Cambridge Law Journal, **74(1)**, March 2015, pp. 78–108
doi:10.1017/S0008197314001111

CRIMINAL CONVICTIONS AND THE CIVIL COURTS

MATTHEW DYSON AND JOHN RANDALL*

ABSTRACT. *How should a civil court use a relevant conviction? Some have argued that a civil claim contesting the factual basis of a conviction should be struck out as an abuse of process unless new evidence is presented which "entirely changes the aspect of the case". Such a high evidential requirement is wrong in principle, inconsistent with section 11 of the Civil Evidence Act 1968, and unjust in practice. The law should recognise that there are two distinct types of cases. The first is concerned with truly abusive claims, where the later civil suit is brought for an improper purpose or otherwise similarly abusive; there a high level of new evidence should be required. The second deals with challenges to convictions which are in principle permissible; there, if on the facts they have no real prospect of success, an application for summary judgment by the other party is the solution.*

KEYWORDS: *Collateral attack, conviction, abuse of process, tort, Civil Evidence Act 1968,* Hunter v Chief Constable of West Midlands.

I. INTRODUCTION

Have the courts gone too far in restricting parties from challenging, in later civil litigation, the factual basis of a criminal conviction? At the moment, there is a trend for courts to require a very high level of new evidence, enough to "entirely change the aspect of the case".[1] This paper argues that imposing this requirement for all such cases is wrong in principle, and inconsistent with section 11 of the Civil Evidence Act 1968 (CEA 1968) and the policy reasons formulated by the Law Reform Committee[2] which underlay it. Even requiring such case-changing evidence in theory has caused problems in practice. In one reported case, a sexual assault victim, whose evidence had contributed to the defendant's conviction at a criminal trial, was required to go through the ordeal of giving such evidence all over again if she wished to pursue a claim for civil damages against him.[3] In short, the law is currently producing unjust outcomes for convicted persons, victims, or third parties.

* The authors are grateful to Mark Elliott and Ian Scott for comments on earlier drafts. The usual proviso applies. Addresses for correspondence: Trinity College, Cambridge, CB2 1TQ, UK. Email: mnd21@cam.ac.uk; St Philips Chambers, 55 Temple Row, Birmingham, B2 5LS, UK. Email: jrandall@st-philips.com.

[1] The so-called *Phosphate Sewage* test, see note 120 below.

[2] For the essence of which see text to note 57 below.

[3] *J. v Oyston* [1999] 1 W.L.R. 694.

We argue that the answer to this is for the law to recognise two distinct types of cases with different characteristics and legal frameworks. The first type is concerned with truly abusive claims, where the later civil suit is brought for an improper purpose,[4] or (it is suggested more exceptionally) one whose prosecution can otherwise be impugned as so manifestly unfair to another party, or likely to bring the administration of justice into disrepute, as to render it an abuse.[5] The second deals with a legally permissible, but evidentially unsubstantiated, challenge, namely where a challenge to the conviction is in principle permissible[6] but on the facts has no real prospect of success. This second category should not be dealt with under the doctrine of "abuse of process" as, *ex hypothesi*, it does not concern abuse.

On the one hand, courts must have a jurisdiction to curtail abusive litigation. In true abuse cases, there is clear justification for requiring a very high level of new evidence if the case is to be permitted to proceed to a full trial. On the other hand, there were good reasons behind Parliament's decision, in enacting section 11 CEA 1968, to allow the evidential value of convictions to be challenged without imposing any particular special evidential requirement, beyond rebutting a simple presumption that a convict committed the offence "unless the contrary is proved". Claimants who have attempted to challenge the import of their criminal convictions in a later civil case have, despite their statutorily conferred entitlement to do so, had their claims dismissed as abusive merely because the likelihood of their success did not reach a very high threshold, and this is wrong. Absent the element of abuse, a lower level of new evidence should be enough to allow the claim to proceed to trial. Whether these claims should so proceed can be tested through an application for summary judgment. There, the person contesting the conviction need only show a real (as opposed to fanciful) prospect of success under Civil Procedure Rules (C.P.R.) 24.2; at trial, the standard of evidence will be the balance of probabilities, with the burden of proof resting on the party asserting that the convict did not commit the offence.[7]

Three short examples where this issue, sometimes known as collateral attack, arises may be useful from the outset. First, the paradigm claimant-orientated example is *Hunter v Chief Constable of the West Midlands* in 1981.[8] The House of Lords held that the use of a civil action to initiate a collateral attack on a final decision of a criminal court was an

[4] A term "more helpful" than "collateral purpose": see *Crawford Adjusters v Sagicor* [2013] UKPC 17, [2014] A.C. 366, at [62], per Lord Wilson S.C.J., when discussing the tort of abuse of process. See also *Walpole v Partridge & Wilson* [1994] Q.B. 106, 120.

[5] See *Hunter v Chief Constable* [1982] A.C. 529, 536; *Walpole* [1994] Q.B. 106. Although Lord Diplock was careful to not to limit abuse of process to "fixed categories" (see also text to note 144 below), in practice these three bases for it are those identified in the modern cases in this area.

[6] Through CEA 1968, s. 11.

[7] CEA 1968, s. 11(2)(a); see also *Hunter* [1982] A.C. 529, 544, per Lord Diplock.

[8] Reported in *Hunter* [1982] A.C. 529. In 1991, a further appeal by Mr. Hunter and five others against their convictions for murder was allowed by the Court of Appeal (Criminal Division), on the grounds of new and compelling evidence of police misconduct in the obtaining of confessions, which had constituted the principal evidence against the accused at their trial.

abuse of the process of the civil court, absent fresh evidence which entirely changed the aspect of the case. This was a civil claim by the "Birmingham Six" that their confessions for a notorious bombing had been procured by violence; the confessions had been the key piece of evidence against them.[9] This allegation had been assessed in the criminal trial during an eight-day voir dire hearing,[10] and dismissed. It was also implicitly rejected by the jury in their guilty verdicts.[11] The House of Lords dismissed the civil claim for assault without consideration on its merits. Importantly, the Home Office had already admitted vicarious liability for the assaults (on the premise that they were committed by prison officers, and therefore *after* the confessions), so the six did not need to prosecute the civil claim against the Chief Constable to recover full compensation for their injuries.[12] Thus, the true purpose of that claim was demonstrably not to obtain such compensation, but rather collaterally to challenge the convictions. Subsequent cases have not, however, confined this well-known decision to improper purpose, manifest unfairness, and public disrepute cases.[13]

Second, in *CXX v DXX* (2012),[14] it was the defendant who sought to challenge the conviction. The defendant, a consultant physician, had a brief sexual relationship with the claimant medical secretary. After she became pregnant, and rejected his suggestion of an abortion, he sought to cause her to miscarry by spiking her tea, her coffee, and then her orange juice with abortifascient drugs. He had been tried and convicted in the Crown Court of two counts of attempting to administer a poison with intent to procure a miscarriage[15] and permission to appeal against the convictions had been refused. The claimant brought a tortious claim against him for trespass to the person and harassment, occasioning her psychiatric injury and consequential loss and damage. She relied, inter alia, on the convictions, pursuant to section 11 of the CEA 1968. In addition to disputing the allegations, the defendant alleged that the convictions were wrongful, particularly because of an allegedly significant inconsistency in her evidence at trial. The Master both struck out those passages in the defence as an abuse of process, and entered summary judgment in her favour – a decision against which the defendant sought permission to appeal.[16] Spencer

[9] See *Hunter* [1982] A.C. 529, 537.
[10] Ibid., at p. 538.
[11] Given the trial judge's direction recounted by Lord Diplock at pp. 538–39; see also p. 542.
[12] Ibid., at pp. 536, 539, 541; J.A. Jolowicz, "Lest Decisions Conflict: Once Given Not To Be Reopened" [1989] C.L.J. 196.
[13] See e.g. *Brinks Ltd. v Abu-Saleh (No. 1)* [1995] 1 W.L.R. 1478.
[14] *CXX v DXX* [2012] EWHC 1535 (QB); 162 N.L.J. 806. For a Case Note, see R.J. Kelly, "Civil 'Relitigation' of a Criminal Conviction" [2012] Jo. Crim. L. 369.
[15] An offence contrary to Offences Against the Person Act 1861, s. 58.
[16] Spencer J. heard the application for permission to appeal and the appeal together for reasons of convenience. The defendant had, for good measure, also taken the opportunity to counter-claim for malicious prosecution (a claim doomed to fail, so long as his conviction stood: *Basebé v Matthews* (1867) L.R. 2 C.P. 684).

J. disagreed with the Master on abuse of process, observing that, in the face of section 11, it "cannot be the case that it is automatically an abuse of process to seek to [challenge a conviction,] which the statute permits him to do", but dismissed the appeal against summary judgment on the evidential ground that the defendant had no real prospect of succeeding in his (albeit non-abusive) defence.[17]

Third, contrast those two cases with *McCauley v Vine*.[18] There, the defendant did not appeal her summary conviction for a low-level road traffic offence, driving without due care and attention contrary to section 3 of the Road Traffic Act 1988, most likely in view of the expense and effort involved for a minor offence and limited penalty. However, when a civil claim brought for surprisingly high damages relied on the conviction, the defendant's insurer became more interested in the case. The insurer paid for a report from a consulting engineer and traffic accident investigator, prepared after the magistrates' proceedings, which strongly supported the defendant's case. It was clearly not an abuse per se to contest the civil claim, which section 11 expressly permitted. Therefore, the Court of Appeal rightly set the level of evidence required to defeat a claim for summary judgment below the level of "entirely changing the aspect of the case".

This paper first reviews the various ways in which tort has been used over the years as a means of challenging a conviction. It then consider the normative question of what is objectionable about a civil claim being used in that way as well as the factors that have to be balanced to do so. We then look at how the modern doctrine which has become known as collateral attack has emerged and analyse how, in our view, much of the case law has failed to give proper effect to section 11 of the CEA 1968, and become bedevilled by a failure to distinguish between what should be recognised as two distinct strands of authority. In arriving at our conclusions, we include a brief comparison with parallel issues in public law. We will focus on cases where the subject of the collateral attack is a criminal conviction, although similar questions arise in other, related contexts including collateral attacks on criminal acquittals,[19] hybrid determinations like Anti-Social Behaviour Orders[20] and confiscation orders,[21] civil judgments,[22] and a variety of quasi-judicial determinations.[23]

[17] See at paras. [34]–[35] and [58]–[62].
[18] *McCauley v Vine* [1999] 1 W.L.R. 1977.
[19] See generally J. Stapleton, "Civil Prosecutions Part 1: Double Jeopardy and Abuse of Process" (1999) 7 Torts L.J. 244; and "Civil Prosecutions Part 2: Civil Claims for Killing or Rape" (2000) 8 Torts L.J. 15; N. Zaltzman, "Relitigating the Admissibility of a Confession: Collateral Attack on Acquittal in Subsequent Criminal Proceedings" [1999] Crim.L.R. 886; and M. Hirst, "Contradicting Previous Acquittals" [1991] Crim.L.R. 510.
[20] E.g. *Ali Daar v Chief Constable of Merseyside Police* [2005] EWCA Civ 1774; [2005] Po. L.R. 376.
[21] E.g. *In re Norris* [2001] UKHL 34; [2001] 1 W.L.R. 1388; *Re Y* [2011] EWHC 2427.
[22] *Reichel v Magrath* (1889) 14 App. Cas. 665; and *R. v L.* [2006] EWCA Crim 1902; [2006] 1 W.L.R. 3092.
[23] Such as unfair dismissal by an Employment Tribunal, unlawful killing by a Coroner's Court, and breach of the Prison Rules by an Independent Adjudicator. See recently, J.R. Spencer, "The Ghost of the rule in Hollington v Hewthorn: Exorcist required" [2014] C.L.J. 474.

II. The Use of Tort in Challenging a Conviction

The problem of "collateral attack" is not new, but dealing with it as an abuse of process is. To know what role abuse of process should play requires an understanding of the gap it is trying to fill. Historically, there has been a patchwork of rules which have narrowed the possible scope for such a collateral attack. Those rules have contributed to creating modern law's pinch-point, whereby collateral attack is dealt with only as a matter of evidence, without the specificity of whether the case is truly an abuse, or merely a permissible challenge, to be tested by an application for summary judgement.

For much of the common law's history, a collateral attack on a conviction was unlikely because conviction for a serious crime could lead to an inability to play any further role in legal proceedings. The two main mechanisms for this were capital punishment and attainder,[24] which brought with it the loss of any goods with which to fund the claim. Attainder and forfeiture of goods were only formally removed in 1870, although they had been in decline for much of the nineteenth century.[25] In addition, until the second half of the twentieth century, a claimant could not try to claim before these criminal mechanisms took hold: his action would be "merged" in, or suspended by, the felony.[26] However, exceptional situations, such as where benefit of clergy had been obtained and thus capital punishment avoided, or a less serious crime had been committed, did come before the courts even before the twentieth century.

Why would a convicted person seek to use tort law to attack an earlier criminal conviction? First and foremost, it used to be almost all there was. Before the Court of Criminal Appeal began to hear cases in 1908, there were few other ways to challenge a conviction. Even in the second half of the nineteenth century, a writ of error, or an application to the Court of Crown Cases Reserved, were the only other options, and they were poor options indeed.[27] So, other than seeking a royal pardon, a convicted person would bring a civil claim to challenge some key part of the conviction. This was possible because the civil claim was thought to run on separate tracks from the criminal prosecution.[28]

[24] See F. Pollock and F.W. Maitland, *The History of English Law Before the Time of Edward I*, 2nd ed., vol. I (Cambridge 1898), 476–77.

[25] Forfeiture Act 1870, s. 1. Cf. P.P. (1833), XXIX, 393, paper 765, Felon's Property Returns for 1823–1833: £3,200 forfeited, of which the majority was held in trust for the felon or his family. See also e.g. HC Deb. vol. 200 cols. 931–37 (30 March 1870) and J.H. Baker, *An Introduction to English Legal History*, 4th ed. (London 2002), p. 509, suggesting that enforcement had tailed off by the eighteenth century.

[26] M.N. Dyson, "The Timing of Tortious and Criminal Actions for the Same Wrong" [2012] C.L.J. 85.

[27] See generally P. Handler, "The Court for Crown Cases Reserved" (2011) 29 L.H.R. 259.

[28] The prosecution, though long brought by the victim, being in the name of the Crown: Dyson, "The Timing", pp. 105–9.

Tort law remains one of the few possible means of seeking to subvert or discredit a criminal conviction once any criminal appeals have been exhausted.

A. Tort Claims and Tort Immunities

There are at least eight ways in which a civil claim might be used indirectly to challenge a conviction; historically, most have been met with specific immunities to suit, but more recently a trend of liberalisation can be seen:

(1) A suit against the judge: typically impossible in tort due to judicial immunity.[29]

(2) A suit against the prosecutor, as being malicious: again, for present purposes such an action will seldom be useful since it is typically impossible in the face of a conviction which has not been overturned.[30] Furthermore, the tort's stringent requirements[31] err on the side of protecting those who prosecute, although they do not make investigations and prosecutions "sacrosanct".[32]

(3) A suit against counsel, witness, jury (or judge) for words used, originally in libel or deceit: such claims have long been barred by ancient rules of immunity.[33] The immunity includes conspiracy to injure, so one cannot attempt to get around the witness rule by alleging a wrongful conspiracy.[34] In 2000, advocates' immunity from suit by their clients for their conduct of litigation was removed,[35] but they remain entitled to absolute privilege in respect of statements made in court.[36] Related privileges extend defamation protection even further; for example, even a complaint made to the police is now covered by absolute privilege.[37] Witnesses of fact retain an immunity in negligence[38] but, as of 2011, expert witnesses can be liable in negligence.[39] In respect of police or other investigating witnesses, other possible claims include conspiracy to injure and misfeasance in public office. For instance, in *Darker v Chief Constable of the West*

[29] Though see the recent discussion in J. Murphy, "Rethinking Tortious Immunity for Judicial Acts" (2013) 33 L.S. 455, arguing for a reduction in the level of such immunity. See recently *O'Shane v Harbour Radio Pty. Ltd.* [2013] NSWCA 315.

[30] *Basebé* (1867) L.R. 2 C.P. 684.

[31] See e.g. E. Peel and J. Goudkamp (eds.), *Winfield and Jolowicz on Tort*, 19th ed. (London 2010), paras. 20–01 to 20–07.

[32] See e.g. *Darker v Chief Constable of the West Midlands* [2001] 1 A.C. 435, 455–56, per Lord Cooke.

[33] *R v Skinner* (1772) 98 E.R. 529.

[34] *Marrinan v Vibart* [1963] 1 Q.B. 528.

[35] *Arthur J.S. Hall & Co. v Simons* [2002] 1 A.C. 615.

[36] *Medcalf v Mardell* [2002] UKHL 27; [2003] 1 A.C. 120, at [53], per Lord Hobhouse of Woodborough.

[37] *Westcott v Westcott* [2008] EWCA Civ 818, [2009] Q.B. 407.

[38] *Arthur J.S. Hall* [2002] 1 A.C. 615, 740 per Lord Hobhouse.

[39] *Jones v Kaney* [2011] UKSC 13; [2011] 2 A.C. 398, at [68], per Lord Brown of Eaton-under-Heywood S.C.J.: in addition to their contractual duties to the party retaining them, there might be exceptionally egregious behaviour needing a remedy.

Midlands,[40] investigative work before the court proceedings was held not to be covered by the immunity. Such claims are apparently quite common at first instance, but not often successful.[41]

(4) A claim for perjury against a witness: such claims are rare (for an example where one was attempted, see *Hargreaves v Bretherton*[42]), but theoretically possible.

(5) A claim against another wrongdoer, seeking to pass the blame or cost onto them: at common law, no action in contribution was allowed between joint wrongdoers, nor could one bring a further action against a different member of a group of joint wrongdoer.[43] This greatly restricted any such claim. However, since statutory intervention in 1935, it has been possible to claim against another wrongdoer.[44] Historically, claims attempting to pass the cost of a conviction on, even where essentially strict liability, have typically failed.[45] In more modern times, such a claim can get perilously close to being met with a defence of *ex turpi causa non oritur actio*.[46]

(6) There are also some specific statutory rules which expressly prevent relitigation, in order to prevent low-level criminal offences from escalating, civilly or criminally, once dealt with by summary courts. The last surviving of a raft of nineteenth-century bars is section 45 of the Offences Against the Person Act 1861: once tried, whether convicted or not, on a summary charge of assault, a defendant is released from "all further or other proceedings, civil or criminal, for the same cause".[47] Another example is section 329 of the Criminal Justice Act 2003 (CJA 2003), which requires a claimant to obtain leave before bringing a trespass claim arising out of the events which led to the defendant's conviction for an imprisonable offence, and leave is only granted where the defendant's acts were grossly disproportionate. Such claims are thought to denigrate the criminal justice process because they might taint the conviction or dispute key facts underlying

[40] *Darker* [2001] 1 A.C. 435.

[41] See e.g. *Darker* [2001] 1 A.C. 435, 439, 453; *Roy v Prior* [1971] A.C. 470, 477–78.

[42] *Hargreaves v Bretherton* [1959] 1 Q.B. 45. They peaked as a means of controlling witnesses but, by the 1870s, they had died out, as prosecutions and civil suits: W.E. Schneider, "Perjurious Albion: Perjury Prosecutions and the Victorian Trial" in A. Lewis and M. Lobban (eds.), *Law and History: Current Legal Issues 2003*, vol. 6 (Oxford 2004), esp. 344. These had occasionally reached the media, e.g. the case of the Reverend Henry Hatch: *The Times*, May 18, 1860.

[43] See *Merryweather v Nixan* (1799) 8 T.R. 186; and L.F. Everest (ed.), *Everest and Strode's Law of Estoppel*, 3rd ed. (London 1923), 61–62.

[44] Law Reform (Married Women and Tortfeasors) Act 1935, s. 6(1)(c) provided no such protection in respect of joint liability and, indeed, contributions could be sought from other tortfeasors. See now the Civil Liability (Contribution) Act 1978, s. 3.

[45] See e.g. *Colburn v Patmore* (1834) 149 E.R. 999. See also *Burrows v Rhodes and Jameson* [1899] 1 Q.B. 816.

[46] See e.g. *Gray v Thames Trains* [2009] UKHL 33; [2009] 1 A.C. 1339, e.g. at [29]–[55]. See further at note 78 below and the text thereto.

[47] See recently *Wong v Parkside Health NHS Trust and another* [2001] EWCA Civ 1721; [2003] 3 All E.R. 932.

it. The benefit seems mostly to be for police officers, rather than those who defend themselves from crimes.[48] Recently, the Court of Appeal has retrospectively granted leave to bring such a battery action, despite the legislation not expressly permitting that.[49]

(7) A claim against those not involved with the original action but who later make statements suggesting that the defendant did commit the crime of which he was convicted. A defendant in such a claim could not adduce the conviction as evidence in justification since convictions were generally inadmissible in civil proceedings – a position made certain by *Hollington v Hewthorn* in 1943.[50] However, section 13 of the CEA 1968 made previous convictions conclusive in a defamation action, which had the effect of displacing claims intended to serve this underlying aim into other causes of action, particularly those in point (8).

(8) A challenge to some procedural or evidential element of the criminal trial which might then discredit the conviction: this might involve many different torts, such as trespass to the person in a claim that a confession was obtained by the violence of police officers, negligence by those involved in an earlier trial, or whether forcing a witness to attend a trial was an abuse of process.[51] Tort law has not yet developed specific immunities to cover this kind of case.

It is important to notice that immunities from suit and the statutory bars do not turn on evidential considerations. They were based on rules of law to prevent vexation and the risk of punishment.

Today, 'collateral attacks' typically fall within (8) challenging procedural or evidential questions from within the criminal trial. A particularly important reason for this focus is the removal of one of the previously available approaches, libel actions (see point (7)).

B. Closing Down the Libel Route

Parliament's removal of the opportunity to challenge an earlier conviction via a claim in defamation ((7) above) greatly contributed to the dominance of collateral attacks focusing on points of evidence in relation to the conviction.[52]

Defamation had been an effective and commonly used tool to challenge a prior criminal conviction. The use of libel to attempt to clear one's name

[48] E.g. J. Spencer, "Legislate in Haste, Repent at Leisure" [2010] C.L.J. 19.
[49] *Adorian v Commissioner of Police of the Metropolis* [2009] EWCA Civ 18; [2009] 1 W.L.R. 1859; in the event, Adorian's claim failed at trial: [2010] EWHC 3861 (QB).
[50] *Hollington v F. Hewthorn & Co.* [1943] KB 587. On the historical development before and after, see M. N. Dyson, "Civil Law Responses to Criminal Judgments in England and Spain" (2012) 3 Journal of European Tort Law 308.
[51] *Roy* [1971] A.C. 470, where the House of Lords refused to strike out such a claim.
[52] See generally Dyson, "Civil Law Responses", esp. pp. 320–22.

goes back a long way, though perhaps resistance to such claims is equally long-standing. For instance, in *Cutler v Dixon* (1585),[53] witness statements made in court were held not to be capable of being defamatory. As Lord Phillips noted in *Jones v Kaney*, this immunity predated many of the most common actions in tort of today.[54] However, the forensic immunity did not apply to others, outside the court case, who made statements about persons convicted of committing crimes. Convictions generally did not estop the convicted person, as against the world, from denying his guilt[55] or from bringing libel actions against those who said that s/he did commit the crime. Libel actions were preferred for two reasons: their focus on reputation, rather than a direct challenging of the criminal decision or the facts upon which it was based; and because they effectively had a reversed burden of proof. Famous examples include one of the Great Train Robbers suing from prison someone who had the temerity to say that he had committed the crime.[56] The libel action would not change the result of the criminal conviction, but would allow the plaintiff to claim that a second jury had vindicated him, however much this over-simplified the actual proceedings.

Section 13 of the CEA 1968 cut off this libel route. The result was that anyone seeking to do what a libel action had previously allowed them to do would need a new cause of action.

The only other step the civil law allowed was to challenge some fact upon which the conviction had been founded. In any such claim, the general admissibility provision, section 11, not the defamation provision, section 13, would be in play. It was an express recommendation of the Law Reform Committee (LRC) that section 11 should not make convictions *conclusive* evidence:

> We have considered whether in subsequent actions a conviction should be conclusive as to the culpability of the convicted person; but we do not think that, apart from certain actions for defamation, it would be right to go so far. Our premise is that the decision of an English criminal court upon an issue which it has a duty to determine is more likely to be right than wrong – not that it is infallible. Error may arise for a number of reasons. The evidence upon which the criminal court's decision was based may have been incomplete – particularly in summary proceedings for minor offences in which professional lawyers are not engaged. Further evidence may have come to light before the subsequent civil proceedings. The defence may

[53] *Cutler v Dixon* (1585) 76 E.R. 886.
[54] *Jones* [2011] UKSC 13; [2011] 2 A.C. 398, at [11].
[55] See e.g. *Petrie v Nuttal* (1856) 156 E.R. 957, 960; *Castrique v Imrie and Tomlinson* (1870) L.R. 4 H.L. 414, 434. Libel was versatile enough that it has even been possible to clear the name of a dead person by use of a libel action, despite the rule of law that dead men have no reputations to protect: J. Dean, Hatred, Ridicule or Contempt (London 1954), 96–117, on W.E. Gladstone and prostitutes, and the libel case brought against his sons, *Wright v Gladstone*.
[56] *Goody v Odhams Press Ltd.* [1967] 1 Q.B. 333. See also e.g. *Hinds v Sparks* [1964] Crim.L.R. 717.

> have been inadequately presented at the criminal trial. Unreasonable inferences of fact may have been drawn by the court, or it may have fallen into error in law, but the smallness of the penalty imposed may have made it not worthwhile to appeal to a higher court. The accused may have pleaded guilty, particularly to a minor offence, not because he had no defence but for reasons of personal convenience – to save time and expense or to avoid disclosing some embarrassing though non-criminous fact which would come to light if the case were defended. We do not suggest that erroneous convictions for these or any other reasons are common, but they may occasionally occur and we do not think that a party to a civil action, who may not be the convicted person himself, should be debarred from proving if he can that a conviction was erroneous. But we have no doubt that the onus should be upon him to prove it. We accordingly recommend that [a conviction is admissible to prove a person committed an offence] unless it is proved that such conviction was erroneous.[57]

Therefore, according to the LRC and the CEA 1968, a party in civil proceedings has a statutory entitlement to attempt to prove that a relevant conviction was erroneous. This approach accords with pragmatism and fairness. In addition, any challenge was not to be loaded in favour of the claimant, as a libel action had been. The LRC said that the phrase "prima facie evidence" was too vague, but recommended only that the burden be on the defendant to prove that the conviction was erroneous.[58] The CEA 1968 made no reference to a standard by which such claims could be judged other than on the merits.[59]

Thus, English law has quite deliberately not adopted the position of many civil law countries that convictions amount to res judicata on later civil actions.[60] This carries with it a downside: complex cases challenging potentially old facts can be begun, with the potential to cause vast expenditure of both cost and time, as well as giving a convicted criminal a chance to air his views once again.

As a consequence, a procedural mechanism to silence such attacks early had to be found, which led to the assertion of a jurisdiction to strike them out as an abuse of process.[61] Its use to this end developed soon after the CEA 1968 came into force: the judgment of the Court of Appeal in

[57] Lord Pearson, *Law Reform Committee Fifteenth Report: The Rule in* Hollington v Hewthorn (1967), paras. [13], [14].

[58] Ibid., at para. [14].

[59] As noted by M. Dean, "Law Reform Committee: Fifteenth Report on the Rule in Hollington v. Hewthorn" (1968) 31 M.L.R. 58, who in fact argued that a later civil court would, without further evidence, have to ignore the conviction in practice.

[60] See e.g. on France, G. Viney, *Introduction à la responsabilité*, 3rd ed. (Paris 2008), 292–315; on Spain, see Dyson, "Civil Law Responses", pp. 329–39.

[61] There are other reasons to have such a mechanism, e.g. as a useful case management tool to allow one test case to go forward. Other claims would be stayed, but the claimants in the stayed actions would technically not be parties to the test case, so could attempt to challenge its findings at a later date. The jurisdiction to stay such collateral attacks as an abuse of process provides a solution: A. Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice*, 3rd ed. (London 2013), para. 25.138.

Hunter came less than 10 years later. The desire to restrict the use of section 11 may have been understandable, but it is founded neither in the statute nor in justice or fairness. If there was new evidence, then absent some way to require the plaintiff to appeal the conviction if possible, the civil action should be allowed to proceed; the LRC and the CEA 1968 were clearly right.

III. Why Prevent "Collateral Attack"?

What is objectionable about a civil claim casting doubt on an earlier conviction? It is right to recognise the instinctive feeling that enabling a losing party to relitigate the very same point in a different court, absent significant new evidence, is objectionable, whatever the exact legal basis for so holding.[62] The difficulty underlying that instinct derives from how the legal system should balance six concerns: competence, the primacy of criminal law, public confidence in the justice system, finality, fallibility, and efficiency.

First, there are certain questions within a legal system best dealt with by the most competent court, and a collateral attack on its decision can sometimes put this in doubt. Whether because of institutional, procedural, or constitutional competence, some issues and outcomes should be dealt with by one area of law. For instance, the sanction of punishment or the mark of acquittal is better allocated by the criminal law. Thus, it could be argued, if a criminal conviction is in error, the best way to correct that is successfully to appeal it. This clearly has merit, but experience suggests that it should be viewed as aspirational rather than mandatory.

Second, there seems to be an instinctive presumption, albeit seldom articulated, that the criminal law has a certain primacy, if not sanctity, within our legal system. Such a presumption is made even in England and Wales, where there is no a priori attempt to structure the common law as a unity, nor even to use the same terminology for the same concepts and ideas across different areas of law.[63] Although this factor clearly plays a role in English law, it is not and should not be unyielding in the face of other important values. A simple manifestation of the same was in the procedural realities which long made a conviction the end of any claimant's dreams of obtaining a remedy.

Third, there is a clear social importance in maintaining public confidence in the justice system, particularly by keeping the criminal justice system clean. For instance, Sir Thomas Bingham M.R. spoke of the "affront to

[62] Lord Diplock in *Hunter* [1982] A.C. 529, at 543, holds that *Hollington v Hewthorn* is not an authority on where an identical question is raised in a civil case after its determination in a criminal one. This is because, he noted, in *Hollington* the issue was *not* identical: the tort of negligence was not the same as the crime of careless driving under Road Traffic Act 1930, s. 12.

[63] See e.g. M.N. Dyson, "Challenging the Orthodoxy of Crime's Precedence over Tort: Suspending a Tort Claim Where a Crime May Exist" in S.G.A. Pitel, J.W. Neyers and E. Chamberlain (eds.), *Challenging Orthodoxy in Tort Law* (Oxford 2013), esp. pp. 125–26.

any coherent system of justice which must necessarily arise if there subsist two final but inconsistent decisions of courts of competent jurisdiction", in the context of a civil case which sought implicitly to subvert an earlier, subsisting conviction.[64] This can extend to preventing the entertainment of potentially degrading *claims*, not just contradictory *judgments*. At the outset of his speech in *Hunter*, Lord Diplock identified one of the purposes to be served by a "salutary" inherent jurisdiction summarily to dismiss such claims as being to prevent them from "bring[ing] the administration of justice into disrepute among right-thinking people".[65] In *Amin*, one of the most recent cases on collateral attack, the claimant was alleging complicity by agencies of the UK government in significant ill treatment in Pakistan preceding removal of a terrorist suspect to the UK,[66] which, it was contended, tainted his trial in England on terrorism charges. The claimant had raised these very allegations at that trial, but they were dismissed. Irwin J. did not shy away from applying *Hunter*, concluding only that "right-thinking people who were confronted with these allegations being advanced once more in a civil court would inevitably perceive them as being deployed to cast doubt on the Claimant's conviction even were the Claimant to disavow such an intention".[67]

Fourth, there should be finality to legal disputes.[68] Generally speaking, it is a sound policy that, once a party has had a full opportunity to contest a cause before a court of competent jurisdiction,[69] the appeal system should be the only legitimate way of seeking to reopen the result.[70] This principle underlies the protection against double prosecution, as well as the prevention of constant resort to the legal system by a disappointed and obsessive accused or litigant.

Fifth, the merit of finality, however, has its limits, not least because human fallibility is not suspended at the precincts of a court building, criminal or civil. As Professor Brainerd Currie has put it, "judicial findings must not be confused with absolute truth".[71] A fortiori decisions, unsupported by articulated reasoning, of 12 members of the public making up a jury should certainly not be. Section 11 of the CEA 1968 expressly allows for the possibility of the prima facie correctness of a criminal conviction being displaced where "the contrary is proved". Similarly, these limitations have been recognised in the context of wrongful acquittals for serious crimes, which

[64] *Smith v Linskills* [1996] 1 W.L.R. 763 (CA), 773.
[65] *Hunter* [1982] A.C. 529, 536; see also 542.
[66] *Amin v Director General of the Security Service (MI5)* [2013] EWHC 1579 (QB).
[67] Ibid., at para. [72]; see also paras. [69]–[70].
[68] Masterfully dealt with in *Smith* [1996] 1 W.L.R. 763 (CA).
[69] *Hunter* [1982] A.C. 529, 541. Cf. *Hamilton v Al-Fayed* [1999] 1 W.L.R. 1569, 1581–82, per Lord Woolf M.R.
[70] *Walpole* [1994] Q.B. 106, 118, per Ralph Gibson L.J.
[71] "Mutuality of Collateral Estoppel: Limits of the Bernard Doctrine" (1957) 9 Stan.L.Rev. 281, 315, cited by G.D. Watson, in "Issue Estoppel, Abuse of Process and Prospective Litigation: The Death of Mutuality" in I.R. Scott (ed.), *International Perspectives on Civil Justice* (London 1990), 188, fn. 32.

themselves can undermine public confidence in the justice system, and a statutory exception to the double jeopardy principle has been enacted by Part X of the CJA 2003. Even if public confidence cannot stand a single instance of doubt injected from the civil law, that does not mean that errors should go unremedied.

Finally, legal systems should be efficient. They should use only such resources as are necessary to achieve justice. It is understandable that an economic reason such as this has not often been expressly stated in decisions, but it appears to underlie some of the analysis. One aspect of efficiency which has reached the surface is whether acquittals should also affect later civil actions, whether shielded by abuse of process as well or by admitting acquittals as evidence. However, it is generally thought that the prosecution's failure to prove beyond reasonable doubt that the defendant is guilty proves nothing of interest to a later civil court.[72] As mentioned above, the LRC actually recommended that, in defamation actions, proof that the plaintiff was acquitted should be conclusive evidence of innocence.[73] However, while such a move would be more efficient, and tie in with greater similarity between modern civil and criminal procedure, it runs counter to judicial inclination and would come with some risks.[74] Indeed, given the apparently increasing numbers of tortious claims brought by victims of crime against acquitted defendants, it might well prove controversial with the general public.

A doctrine of collateral attack, operating within the broader concept of abuse of the court's process, affords the legal system a means of balancing and giving due weight to these six concerns. Since criminal law and civil law have different approaches to prior determinations of fact, any attempt to cross from crime to tort requires a method to approximate their impact. Such a doctrine allows a discretionary, nuanced, and to some extent inexplicit adjustment of competing values and facts. As Ralph Gibson L.J. put it in *Walpole v Partridge & Wilson*, the:

> ... collateral attack based upon sufficient fresh evidence, if it succeeds demonstrates nothing more than that two different courts, acting according to law, may properly reach different conclusions upon the same or a similar issue when the evidence before the two courts is markedly different.[75]

[72] See e.g. Lord Gardiner L.C. in the debates leading to the Civil Evidence Act 1968: HL Deb. vol. 288 col. 1347 (8 February 1968). In the context of civil claims by complainants following an acquittal at a criminal trial, different evidence may well be admitted, in addition to the different standard of proof. Criminal judges have, and regularly exercise, extensive discretionary powers to exclude otherwise admissible evidence (under e.g. the Police and Criminal Evidence Act 1984 and CJA 2003). Although there is now a general judicial power to exclude otherwise admissible evidence in civil proceedings (under C.P.R. 32.1), in practice it is rarely exercised.

[73] *LRC Fifteenth Report*, paras. [26]–[33].

[74] See e.g. Lord Diplock in *Hunter* [1982] A.C. 529, 542–43; and *Raja v Van Hoogstraten* [2005] EWHC 2890 (Ch), at [43]–[46], per Lightman J.

[75] *Walpole* [1994] Q.B. 106, 117.

By comparison, if the law had developed to use issue estoppel discussed below, from a conviction to a civil claim, that would imply that the issues are indeed the same: the factual matrix can be lifted from one and transferred to another. Instead, espousing a doctrine of collateral attack suggests a desire to be able to cushion the interaction between criminal convictions and civil claims.

The concerns being played out in collateral attack, and abuse of process more broadly, also play a role in the wider relationship between tort and criminal law. English law tends to attempt a new balance in each setting, without a general theory linking tort and crime. An example is that, in the last few decades, it has become increasingly possible for civil claims to precede convictions,[76] but it has not been realised that this makes our many rules which operate under the assumption that a conviction will come first seem backward. One can also see a general trend to move away from complete bars to later civil claims, noted above. A similar issue can be seen in the defence of illegality, or *ex turpi causa non oritur actio*. Originally of uncertain application when it was first used to bar a tortious claim in English law in *Ashton v Turner* (1980),[77] perhaps covering any conduct related to illegality, it has moved to being a defence which will only operate to defeat a claim sufficiently bound up with the commission of a criminal offence.[78] Collateral attack is, in a sense, a more concrete form of *ex turpi causa*: instead of merely barring pursuit of a claim while alleging one's own criminal act, this doctrine addresses pursuit of a claim in the face of a conviction for a related offence. Collateral attack also appears in other junctions between tort and crime. For instance, the determination, as late as 2008, of what the test for self-defence is in tort law, only reached the House of Lords in the face of attempts permanently to stay the proceedings as an abuse of process. In *Ashley v Chief Constable of Sussex Police*, a police officer killed an unarmed suspect because of a mistaken belief in a threat.[79] That mistaken belief was enough to exclude criminal liability, but in tort any mistakes had to be reasonable, which would need to be determined on the facts. However, a further point was that the Chief Constable admitted liability in negligence in the operation, so any litigation of the trespass point would not affect compensating the victim. The claimant, the deceased victim's father, was seeking to prove the events in court and vindicate his son's rights. The refusal to strike out the claim in *Ashley* may be contrasted with *Hunter*, where the Home Office had

[76] See Dyson, "The Timing", pp. 99–103.
[77] *Ashton v Turner* [1981] Q.B. 137.
[78] See now *Gray* [2009] UKHL 33; [2009] 1 A.C. 1339, at [93], per Lord Brown, at [29]–[55], per Lord Hoffmann and at [75]–[87], per Lord Rodger, esp. at [82]; and M.N. Dyson (ed.), *Unravelling Tort and Crime* (Cambridge 2014), esp. chs. 7, 8, 11.
[79] See *Ashley v Chief Constable of Sussex Police (Sherwood Intervening)* [2008] UKHL 25; [2008] 1 A.C. 962.

admitted liability for the actions of prison officers, so compensation was already assured. In *Ashley*, counsel for the Chief Constable argued that proceeding with a second head of claim, once liability had been admitted for one, was an abuse of process, citing *Hunter*.[80] That argument was rejected, but it demonstrates how wide abuse of process could be, and how much it might be used to cover over difficult issues in the relationship between tort and crime.

IV. Emergence of the Modern Doctrine of Collateral Attack

The House of Lords did not invent the discretion to strike out a claim as an abuse of process from scratch in *Hunter*. The discretion was founded on the rule of civil procedure allowing vexatious or frivolous litigation to be blocked. From 1962, this discretion existed under both an inherent jurisdiction and R.S.C. Ord. 18, r. 19(1) covering claims without "reasonable cause of action" or which were "scandalous, frivolous or vexatious" or "otherwise an abuse of the process of the court".[81] It was built on cases in the nineteenth century where multiple civil actions were brought over time, and the Courts took on a discretionary power to stop them early. The cases in support of this repeat civil power were the ones used by the House of Lords in *Hunter*,[82] although the new power extended the rule to antecedent criminal findings.[83] Thus, a clear link with the idea of vexation originated the *Hunter* line of cases but, as will be shown below, the alignment of the CEA 1968 cases with an existing test for vexation brought a number of problems.

It is also interesting that, in *Hunter*, the House preferred a doctrine of collateral attack equating to an abuse of process, instead of the civil law's issue estoppel. There, a party is precluded by estoppel *per rem judicatam* from putting forward an assertion which was essential to his cause of action or defence in an earlier civil case between the same parties or their privies and found to be incorrect, absent fraud in the obtaining of such judgment.

How should this defence be interpreted? On the one hand, it could be argued that successful collateral attack defences, founded on the vexatiousness test, should be rare, since at least two characteristics are needed before

[80] Ibid., at p. 965; see also p. 966. For the rejection of these arguments, see paras. [64]–[66], per Lord Rodger, and cf. paras. [77]–[83].

[81] On the untidiness of this arrangement and its history, see J.A. Jolowicz, "Abuse of the Process of the Court: Handle with Care" (1990) 43 C.L.P. 77. For the more recent development of these types of powers, see I.R. Scott, "Inherent Jurisdiction to Prevent Initiation of Civil Proceedings" (1999) 18 C.J.Q. 197; and J. Sorabji, "Protection from Litigants who Abuse Court Process" (2005) 24 C.J.Q. 31, discussing (at p. 31) the growth of collateral attacks on e.g. the judge and counsel, though focusing on civil claims.

[82] *Reichel* (1889) 14 App.Cas. 665, with only a terse few lines from the House of Lords; and the barely more detailed *Stephenson v Garnett* [1898] 1 Q.B. 677. Both concerned civil actions repeating factual allegations defeated in earlier civil actions.

[83] In fact, Jolowicz argues that only the inherent jurisdiction, not the rule-based one, could be used where the action is unobjectionable on its face: "Abuse", pp. 82–89 and fn. 29.

the use of the discretion is likely. First, the implications for the reputation of the criminal justice system would have to be sufficiently grave. In *Hunter*, the criminal prosecution and the infamous bombing which claimed the lives of many, predominantly young people that led to it were of national importance, and had taken a great deal of time and money. Second, it would have to be thought that no injustice was being caused. In *Hunter*, it could be argued that, if the process itself had been fair, and no substantial new evidence was put forward, the matter was over.[84] So much can be inferred from Lord Diplock's focus on fairness and public policy.[85] Nonetheless, it was at one time thought that any collateral attack would be an abuse of process. Thus, in *Somasundaram v Melchior & Co.*, a conviction based on a guilty plea made on professional advice could not be challenged, even where the plaintiff/convict genuinely felt wronged.[86] This led Jolowicz to argue that "it is plainly the Court of Appeal's intention that no challenge, even by a sidewind, should be levied against a judicial decision save by way of appeal".[87]

Nevertheless, as the doctrine was unfolded over time, not every collateral attack was barred. In *Secretary of State for Trade and Industry v Bairstow*, Sir Andrew Morritt V.-C. and the Court of Appeal allowed an appeal against the striking-out of a defence which was a collateral attack on an unfair dismissal finding.[88]

Collateral Attack and Claims against Lawyers

Actions against lawyers for their conduct of a previous case, where impugning the outcome of that case is generally a necessary element in the causation of loss, soon proved to be an important testing ground for the doctrine of collateral attack. In *Rondel v Worsley*, a barrister was held not to owe a duty of care to the party whom he was representing in court on a "dock brief".[89] For present purposes, it is enough to highlight the feeling that allowing the action would have risked abuse, especially as a way of challenging some part of the earlier conviction. Thus, the immunity was endorsed. None of the proceedings referred to a power to dismiss such a collateral attack as an abuse of process, despite frequent references to that being the effect of the attempted cause of action.[90] Between *Rondel*

[84] Of course, as it turned out in that case, the various courts could not have been more wrong: see note 8 above.
[85] *Hunter* [1982] A.C. 529, 536.
[86] *Somasunaram v M. Julius Melchoir & Co.* [1988] 1 W.L.R. 1394, esp. 1042–43.
[87] Jolowicz, "Lest Decisions Conflict", p. 198.
[88] *The Secretary of State for Trade and Industry v Bairstow* [2004] Ch. 1, esp. at [38].
[89] See R.F. Roxburgh, on the background "*Rondel v. Worsley*: The Historical Background" (1968) 84 L.Q.R. 178; and on the case itself "*Rondel v. Worsley*: Immunity of the Bar" (1968) 84 L.Q.R. 513, esp. 518–27. See also, on the ethical discussion generated, D.L. Carey Miller, "The Advocate's Duty to Justice: Where Does It Belong?" (1981) 97 L.Q.R. 127.
[90] See *Rondel v Worsley* [1966] 2 W.L.R. 300 (QBD.); [1967] 1 Q.B. 443 (CA) and [1969] 1 A.C. 191 (HL). Lord Salmon's throwaway remark that the learned judge at first instance in *Rondel* could have

and 2000, when the immunity was removed, a number of cases tinkered with its scope.[91] One key case was *Saif Ali v Sydney Mitchell & Co.*, an action for the negligent drafting of a statement of claim by a barrister. The claim was not struck out, but the immunity in respect of work performed in, or intimately connected with, court was maintained. There, Lord Diplock opined that the pre-CEA 1968 libel action and a negligence action against a lawyer were "similar abuse[s] of the system".[92] In 2000, advocates' immunity was removed in *Arthur J.S. Hall v Simons*. In the Court of Appeal, Lord Bingham of Cornhill C.J. had held that "the need for such immunity was eroded" by *Hunter*.[93] The House of Lords stressed that there was no longer need for the immunity to prevent abuse after the power to dismiss an action established in *Hunter*. Then, Lord Steyn held, in removing the immunity:

> That leaves collateral challenges to civil decisions. The principles of res judicata, issue estoppel and abuse of process as understood in private law should be adequate to cope with this risk. It would not ordinarily be necessary to rely on the Hunter principle in the civil context but I would accept that the policy underlying it should still stand guard against unforeseen gaps. In my judgment a barrister's immunity is not needed to deal with collateral attacks on criminal and civil decisions.[94]

Presciently, Lord Hoffmann opined that, if the immunity were removed, there would be more cases to test the boundaries of the *Hunter* doctrine.[95]

V. Collateral Attack, Tortious Claims, and Defences

If the law is to respect section 11 and its underlying policy reasons, it must separate out true cases of abuse of process from claims which depend on rebutting the statutory presumption which flows from a subsisting conviction, but are so unlikely to succeed that summary judgment can properly be given against them without the need for a full trial on the merits. There are early signs of some judicial recognition of this.

A. Evidential Significance of a Subsisting Prior Conviction

Section 11 of the CEA 1968 renders a subsisting prior conviction admissible in civil proceedings as rebuttable evidence that the convicted person (whether or not a party to them) committed the offence. A party relying

dismissed it as an abuse of process (*Saif Ali v Sydney Mitchell & Co.* [1980] A.C. 198, 228, apparently picking up the argument of counsel for the appellants, 201) appears to be ahistorical, but might suggest what he thought commonly happened on the ground.

[91] See e.g. *Arthur J.S. Hall* [2002] 1 A.C. 615, at [29]–[30] of the CA report.

[92] [1980] A.C. 198, 223.

[93] Ibid., at para. [16] of the CA report.

[94] Ibid., at p. 680. See also pp. 684–85, per Lord Browne-Wilkinson, and pp. 699–705, per Lord Hoffmann. Cf. pp. 722–24, per Lord Hope, and pp. 742–43, per Lord Hobhouse.

[95] Ibid., at p. 705.

on the conviction may supplement it, if s/he thinks it desirable, by adducing as hearsay evidence the evidence given by the prosecution witnesses in the criminal trial or, if preferred, can call them again. Soon after the Act came into force, Lord Denning M.R. held that, in applying section 11, weight could be given to the conviction in itself, subject to the circumstances of the particular case:

> Take a plea of guilty. Sometimes a defendant pleads guilty in error: or in a minor offence he may plead guilty to save time and expense, or to avoid some embarrassing fact coming out. Afterwards, in the civil action, he can, I think, explain how he came to plead guilty.
>
> Take next a case in the magistrates' court when a man is convicted and bound over or fined a trifling sum, but had a good ground of appeal, and did not exercise it because it was not worthwhile. Can he not explain this in a civil court? I think he can. He can offer any explanation in his effort to show that the conviction was erroneous: and it is for the judge at the civil trial to say how far he has succeeded.
>
> In my opinion, therefore, the weight to be given to a previous conviction is essentially for the judge at the civil trial. Just as he has to evaluate the oral evidence of a witness, so he should evaluate the probative force of a conviction ….
>
> I regard the conviction of Stupple in these circumstances, after a four and a half week trial, by a jury who were unanimous, as entitled to great weight in this civil action.[96]

Following this early guidance, and despite the bare fact of a conviction being a form, albeit a relatively unusual form, of hearsay evidence, a conviction is often treated as carrying considerable weight, at least absent compelling fresh evidence.[97]

What a judge is to make of a conviction may also depend on its context. In *Hunter*, Lord Diplock opined that section 11, though not expressly limited to criminal convictions of *defendants* to civil actions, must in practice inevitably be so: hence, he concluded, he was "not dealing with the use of civil actions by plaintiffs to initiate collateral attacks upon final decisions against them which may have been made by a criminal court of competent jurisdiction".[98] Nevertheless, he went on to observe *obiter* that the:

> … wide variety of circumstances in which section 11 may be applicable includes some in which justice would require that no fetters should be imposed upon the means by which a defendant may rebut the statutory presumption that a person committed the offence of which he has been convicted by a court of competent jurisdiction.

[96] *Stupple v Royal Insurance Co. Ltd.* [1971] 1 Q.B. 50, 72–74. Buckley L.J. took a different view, at 75 et seq. Lord Denning's view has been preferred by H.M. Malek (ed.) in *Phipson on Evidence*, 17th ed. (London 2009), paras. 43–88; by Moore-Bick J. in *Phoenix Marine Inc. v China Ocean Shipping Co.* [1999] 1 Lloyd's Rep. 682, at [143]; and by Spencer J. in *CXX* [2012] EWHC 1535 (QB), at [39].

[97] For examples of a robust judicial approach being taken, see *Brinks* [1995] 1 W.L.R. 1478; and *Smith* [1996] 1 W.L.R. 763 (CA).

[98] *Hunter* [1982] A.C. 529, 544.

> In particular I respectfully find myself unable to agree with Lord Denning M.R. that the only way in which a defendant can do so is by showing that the conviction was obtained by fraud or collusion, or by adducing fresh evidence (which he could not have obtained by reasonable diligence before) which is conclusive of his innocence. The burden of proof of "the contrary" that lies upon a defendant under section 11 is the ordinary burden in a civil action: proof on a balance of probabilities; although in the face of a conviction after a full hearing this is likely to be an uphill task.[99]

Thus, while fraud clearly could negate a conviction's value and, by implication, cast great doubt on its correctness, there were other grounds for doing so as well. In general, it would be up to the party convicted to show, on the balance of probabilities, that, notwithstanding his conviction, he did not commit the offence.

This founding statement has been interpreted in diametrically opposite ways. First, there are cases where Lord Diplock's "uphill task" is, in practical terms, rendered an impossibility. The defendants (two of the 57) in *Brinks Ltd. v Abu-Saleh (No. 1)*[100] had been convicted of conspiracies dishonestly to handle stolen gold bullion and fraudulently to evade VAT on taxable supplies of gold; and of 10 counts of handling stolen goods, respectively. The claimant, the immediate victim of the notorious Brink's-Mat robbery of over £27 million worth of gold, sought summary judgment against them for damages to be assessed and substantial interim payments. Both their defences pleaded the same case as they had unsuccessfully advanced at their (criminal) trial. Having cited section 11 of the CEA 1968, Jacob J. said:

> For the defendants to succeed they need more than simply a retrial in the civil action on essentially the same evidence as was called at the criminal trial. A hope that the civil judge will take a different view from a jury who found the case proved beyond a reasonable doubt does not justify a civil trial relitigating the same issues as were tried criminally. A trial on such a basis would be an abuse of process. The defendants have already had one full opportunity of contesting those issues. Moreover they have had such an opportunity when the legal presumptions and rules of evidence were as high as they could be in their favour.
>
> To relitigate the matter now they need to show at least that new evidence not called at the criminal trial will be called at the civil trial. Such evidence must not only be new but must "entirely change the aspect of the case." That this is so is apparent from *Hunter* . . ., where convicted criminals were not permitted to relitigate matters determined against them in criminal proceedings.[101]

[99] Ibid.
[100] *Brinks* [1995] 1 W.L.R. 1478.
[101] Ibid., at p. 1482.

It will be noted that this reasoning elides two situations: a defendant having no real prospect of defending the pleaded claim, and the mere advancing of a defence which challenges the correctness of a criminal conviction constituting an abuse the process of the court, absent fresh evidence which entirely changes the aspect of the case.[102] It is suggested that *Abu-Saleh* may be regarded as a case where the right result was reached, but for (at least primarily) flawed reasons (equating a challenge to the correctness of a criminal conviction to an abuse of process). The essential difficulty with the reasoning of Jacob J. in *Abu-Saleh*,[103] as Potter L.J. pointed out in *McCauley v Vine*,[104] is that, in a case where there is no finding of an ulterior motive on the part of the convicted litigant, there is no justification for requiring that party to produce evidence meeting the high standard required to avoid an abuse of process set in *Hunter*. He should not have to "entirely change the aspect of the case" in order to avoid being subjected to summary judgment against him, given that section 11 expressly entitles such a party to rebut the accuracy of his conviction.

The second interpretation of *Hunter* was much more generous to a convicted defendant. In *J. v Oyston*, Smedley J. approached a case somewhat similar to *Brinks* rather differently.[105] The defendant had been convicted of indecent assault and rape of the claimant. She then sued him for damages for trespass to the person, pleading reliance on the convictions pursuant to section 11. The defendant admitted the convictions but alleged that they were wrongful, and sought to adduce evidence undermining the claimant's credibility similar to that upon which he had relied in support of an unsuccessful appeal against conviction. J applied to strike out this defence on the grounds that to relitigate the issue as to the defendant's guilt was an abuse of process, citing *Hunter*, and that the defence disclosed no reasonable defence and was vexatious. The judge declined to apply *Hunter* on the basis that there was:

> . . . a distinction between the position of a plaintiff who sought to relitigate an issue which had earlier been determined against him and a defendant who was seeking to relitigate an issue earlier determined against him,

He added that whilst:

> . . . it may be unwise to say that there can never be an abuse where the subsequent civil proceedings are brought against and not by the subject of the criminal proceedings, none the less, on the present facts I have no doubt that to use the doctrine of abuse of process so as to

[102] See also pp. 1483, 1484.
[103] Ibid., at p. 1482.
[104] *McCauley* [1999] 1 W.L.R. 1977, 1983–84; correctly distinguishing the dictum of Sir Thomas Bingham M.R. in *Smith* [1996] 1 W.L.R. 763 (CA), 771, which applied the *Hunter* test for fresh evidence in that case.
[105] *J* v *Oyston* [1999] 1 W.L.R. 694.

> prevent the defendant from having reheard, with such new evidence as he seeks to adduce, the issue of his guilt would be to cause manifest unfairness.[106]

Smedley J. had earlier cited, with apparent approval, an extract from the submissions of the defendant's counsel, who, having accepted that showing that the defendant's convictions were wrongful would be an "uphill task", nevertheless asserted that section 11 of the CEA 1968:

> . . . is a statutory licence to a defendant in a civil action to relitigate his conviction. The conviction is admissible as evidence against the defendant. It also has the effect of reversing the burden of proof in favour of a plaintiff. However, it is not conclusive.[107]

It follows that the test on a summary judgment application in such a case should be the normal one, now being whether the evidence suffices to demonstrate a real (as opposed to fanciful) prospect of success.[108]

In *Oyston*, Smedley J. rightly identified the significance of the provisions of section 11(2)(a) for a case where a convicted defendant is sued by his victim. *Oyston* may be regarded as a case where the wrong result was reached, but after a judgment containing (at least primarily) unobjectionable reasoning.[109] In stark contrast to *Abu-Saleh*, the claimant rape victim's application to strike out Oyston's defence was dismissed, leaving her to take her claim to a full trial. In fairness to the judge, no application for summary judgment was before him,[110] but surely such an application could and should have been invited in the judgment.[111] As it is, the case must be explained as turning on the rather narrow, procedural point that there can be cases where an application to strike out may fail even though an application for summary judgment may well have succeeded.

In *CXX v DXX*, briefly discussed in the Introduction, the Judge was faced with the apparently conflicting first instance authorities of *Abu-Saleh* and *Oyston*. With regard to abuse of process, Spencer J. took the view that:

> . . . the starting point must be that section 11(2) of [the CEA 1968] undoubtedly gives a defendant the right to challenge a conviction by showing on the evidence, if he can, that the conviction was wrong. It cannot be the case that it is automatically an abuse of process to seek to do that which the statute permits him to do. As ever, it all depends on the circumstances.[112]

[106] Ibid., at p. 700, citing a dictum of Woolf L.J. (as he then was) in *Nawrot v Chief Constable of Hampshire* [1992], *The Independent*, 7 January.
[107] Ibid., at pp. 698–99.
[108] C.P.R. 24.2. See further at text to notes 146–152 below.
[109] Save only the point made in the text to note 111 below.
[110] A factor described as "important" by Spencer J. in *CXX* [2012] EWHC 1535 (QB), at [27].
[111] Which was given a few months before the Court's power to award summary judgment of its own motion was introduced with the new Civil Procedure Rules in April 1999 (C.P.R. 3.3 and 3APD.1.2).
[112] *CXX* [2012] EWHC 1535 (QB), at [34], per Spencer J.

He declined to infer on the facts that the defendant had any ulterior motive[113] in seeking to challenge his convictions in the course of his defence to the civil claim brought against him. He therefore made it clear that, had the result depended on the Master's finding in favour of the claimant's abuse argument and consequent order striking out the defence, he would have granted permission to appeal.[114]

However, the claimant had a second string to her bow, in the form of an application for summary judgment. Spencer J. noted that the Master had made some evaluation of the "new" material relied on by the defendant and had attached little or no significance to it; he reviewed it himself, and found no reason to overturn the Master's view.[115] Applying Lord Hobhouse's well-known exposition of the summary judgment test under C.P.R. Part 24 in *Three Rivers D.C. v Bank of England (No. 3)*,[116] he found that the Master had been correct to conclude that the defendant's case had an absence of reality, and therefore to enter summary judgment against him; he therefore dismissed the application for permission to appeal.[117]

In rejecting the striking-out/abuse of process approach, but upholding the award of summary judgment, Spencer J. charted a careful procedural course which faithfully reflects the correct underlying legal analysis of such cases.[118]

B. Two Strands of Authority Emerging

Hunter was a true abuse of process case, where the plaintiff (1) was clearly pursuing his tortious damages claim for an ulterior or improper motive, namely undermining his convictions for murder, as he amply demonstrated by deliberately turning his face away from a ready opportunity to recover damages for his injuries from a solvent party,[119] and (2) at the time of that case did not have fresh evidence which got anywhere near passing the "entirely changing the aspect of the case" test.[120]

By contrast, in other cases, one party (more usually but not necessarily the defendant) has a relevant, subsisting criminal conviction the accuracy of which s/he wishes to challenge in the proceedings, but no such ulterior motive. Typically, s/he has some new evidence, but probably insufficiently

[113] On the facts, this would have been to "vex the claimant and put her through the mill again" (see para. [35]). At the time, he was seeking to impugn his convictions by a different and permissible method, namely an application to the Criminal Cases Review Commission (see ibid., at paras. [4], [29]).
[114] See ibid., at paras. [35], [60], [62]–[65]. No abuse argument based on manifest unfairness or public disrepute appears to have been advanced by the claimant.
[115] Ibid., at paras. [43]–[44].
[116] *Three Rivers D.C. v Bank of England (No. 3)* [2001] UKHL 16; [2003] 2 A.C. 1, at [158].
[117] See paras. [40]–[58].
[118] Drawing on the concurring judgment of Potter L.J. in *McCauley* [1999] 1 W.L.R. 1977 (CA), 1983–85.
[119] *Hunter* [1982] A.C. 529, 536, 539, 541.
[120] Ibid., at pp. 537, 541, 545 (applying a dictum of Earl Cairns L.C. in *Phosphate Sewage Co. Ltd. v Molleson* (1879) 4 App. Cas. 801, 814).

fundamental to pass the stringent *Phosphate Sewage* test.[121] Given the terms of section 11 of the CEA 1968, such a case cannot, without more, properly be labelled an abuse. Accordingly, an application to strike out should in principle fail (as in *Oyston*), and the case will have to be determined on its merits. That may not, however, require a trial. If, at the interlocutory stage, s/he cannot demonstrate a real (as opposed to fanciful) prospect of success, s/he will be vulnerable to an award of summary judgment. In making that evaluation, just as in determining such a case at trial, judges are entitled to take account of the presumption created by section 11 of the fact of the conviction as evidence in its own right, and of whether in the particular factual circumstances such evidence should be regarded as weighty. Such cases are now best exemplified by *CXX v DXX* (convicted defendant had no real prospect of success, therefore summary judgment justified)[122] and *McCauley v Vine* (convicted defendant had raised serious questions to be tried, therefore summary judgment not justified, and a trial required).[123]

By separating out the strands of abuse and section 11 challenges, the courts would continue the historical development away from blanket immunity from collateral attack, allowing non-abusive litigation to continue where an appropriate amount of new evidence has been shown, and give proper effect to the legislature's enactment of section 11 of the CEA 1968.

C. First Strand: True Abuse of Process Cases

The most important point to appreciate is that not every civil case where a party has a relevant and subsisting criminal conviction, the correctness of which s/he wishes to challenge, involves an abuse of the court's process, and not every such case should be stifled without a full hearing on the merits. *Walpole v Partridge & Wilson* was a claim against lawyers who had advised on appeal, for not taking an available legal point by way of an appeal by case stated to the Divisional Court. This necessarily implied that an error of law had been made by the Crown Court, but on a point which it had not considered. The mere fact that incidental to this civil claim was an assertion that the plaintiff had been wrongly convicted of a criminal offence was not of its own sufficient to render the proceedings an abuse:

> The question whether it is so clearly an abuse of process that the court must, or may, strike out the proceedings before trial must be answered having regard to the evidence before the court on the application to strike out. There are, in short, and at least, exceptions to the principle.[124]

[121] For which, see note 120 above and the text thereto.
[122] *CXX* [2012] EWHC 1535 (QB), esp. at [40]–[58]. *Abu-Saleh*, text to notes 100–103 above, is another such case, provided one ignores those passages in the judgment where Jacob J. suggests that the proposed defences in question amounted to abuses of the court's process.
[123] *McCauley* [1999] 1 W.L.R. 1977, esp. 1983, per Sir Patrick Russell.
[124] *Walpole* [1994] Q.B. 106 (CA), at 115–116, per Ralph Gibson L.J. For an example where the convicted party was the defendant, see *CXX* [2012] EWHC 1535 (QB), esp. text to notes 112–118 above.

It must be acknowledged immediately that "abuse of process" is a very wide idea. Separate tests overlap: improper or ulterior purpose, the quality of the evidence available, manifest unfairness to another party, and bringing the administration of justice into public disrepute.

The first and most important element to a true case of abuse within the *Hunter* principle is whether the party in question is seeking to use the court's process for an improper purpose. Mr. Hunter brought a case ostensibly seeking damages for personal injuries. Yet the circumstances demonstrated that he was only interested in using them for an entirely different purpose; the importance of this is apparent from Lord Diplock's speech.[125] This ties in with the ingredients of the tort of abusing the court's process, which the Privy Council has recently confirmed in *Crawford Adjusters v Sagicor General Insurance (Cayman) Ltd.* include (in contradistinction to the tort of malicious prosecution) "the need to establish a purpose not within the scope of the [legal process which the alleged abuser initiated] (i.e. a 'collateral' or, more helpfully, an 'improper' purpose)."[126] For the purposes of tortious liability for abuse of process, the key question is whether the improper purpose was the defendant's predominant motive, for otherwise a defendant could escape liability by pointing to some proper purpose which he concurrently had, however slight.[127] This requirement of a mental element may on occasion give rise to evidential challenges but, in at least some cases, such as *Hunter* itself, the relevant improper purpose will be obvious enough.[128] "Improper" certainly leaves the courts a great deal of discretion – discretion that should be exercised carefully.

Though the presence of an ulterior purpose is central to whether a case is truly an abuse of the court's process, it is not sufficient in isolation. In particular, it cannot be kept entirely separate from the availability of fresh evidence of sufficient quality. In other words, part of the force behind the abuse of process discretion comes from how strong the challenge is, not just its purpose. Citing again from Ralph Gibson L.J. in *Walpole v Partridge & Wilson*:

> I am unable to attach any decisive importance to the point about dominant purpose …. In *Hunter's case* … the collateral attack upon the final decision of Bridge J. on the *voir dire* was an abuse of the process because based upon no sufficient fresh evidence. The fact that the purpose of the plaintiffs was to provide themselves with an argument upon which to attack the true validity of their convictions supported

[125] See notes 12 and 119 above and the text thereto. See also G.D. Watson, "Issue Estoppel", p. 192: "the party seeking to relitigate has an 'ulterior motive' in the sense that it is not his or her genuine purpose to obtain the relief sought in the second action, but some collateral purpose."

[126] *Aliter* a purpose "otherwise than [that] for which the [proceedings] are designed". *Crawford Adjusters* [2013] UKPC 17; [2014] A.C. 366, at [56], [62]–[63], per Lord Wilson S.C.J., citing *Grainger v Hill* (1838) 132 E.R. 769.

[127] Ibid., paras. [64]–[65].

[128] See notes 12 and 119 above.

> the conclusion that those proceedings amounted to an abuse [of] process; but it seems clear to me that, if their purpose had been the apparently more acceptable aim of recovering damages for the injuries which they claimed were inflicted by the police, the proceedings would unquestionably have remained an abuse of process because it constituted a collateral attack upon a final decision which was manifestly unfair to the defendants and because it was such as to bring the administration of justice into disrepute.[129]

The test of whether it is "manifestly unfair" to litigate again appears to be similarly open-textured to "abuse of process" itself, and the two combine to form a very flexible tool. In effect, courts have to balance the impropriety of the motive and the unfairness of the action against the strength of the evidence against the conviction. While sequentially the finding that a claim is abusive determines the level of evidence necessary to proceed, courts clearly assess them together.

The passage just cited was subsequently approved by the Court of Appeal, including Sir Thomas Bingham M.R., in *Smith v Linskills*.[130] There, the plaintiff had been convicted of aggravated burglary, refused permission to appeal, and had served his seven-year sentence. He then sued his solicitors for negligent preparation of his defence in the Crown Court which, he alleged, had led to his conviction. The Court of Appeal held that an ulterior motive on his part (potentially, on the facts, undermining his conviction) was not a necessary ingredient for abuse of process and that, if his true motive was to recover damages, that did not save the claim from being struck out for abuse. It considered that the rule with which it was concerned "rests on public policy. The basis of that public policy … is the undesirable effect of relitigating issues such as this. We cannot see how those undesirable effects are mitigated by the motive of the intending plaintiff to recover damages rather than simply to establish the unsoundness of the earlier decision".[131]

In *Smith v Linskills*, the Court clearly attached importance to an examination of the fresh evidence on which the plaintiff proposed to rely.[132] Notwithstanding the distinguished constitution of the Court, we would respectfully question whether, as it held, the commencement of civil proceedings for a proper purpose (the recovery of damages) for a recognised cause of action (professional negligence) on which there has been no prior judicial determination can properly be stigmatised as an abuse of the court's process. The apparent suggestion that any claim that a subsisting conviction was wrongful made in a civil suit is *ex hypothesi* an abuse of process sits

[129] *Walpole* [1994] Q.B. 106, 120; see also 116. The latter two points appear to be drawn from the first paragraph of Lord Diplock's speech in *Hunter* (at p. 536).
[130] *Smith* [1996] 1 W.L.R. 763, 770–71.
[131] Ibid., at p. 771.
[132] Both by the judge below and the Court of Appeal itself: ibid., at p. 772.

uneasily alongside the terms of section 11 of the CEA 1968. A sounder analysis of such a case, likely to result in effectively the same disposal, would be to treat it as falling within the second strand of cases considered below, and for the Court to adopt a robust approach in being willing to award summary judgment[133] to the defendant if satisfied that the claimant has no real prospect of proving causation.[134] Under section 11, it was to be presumed that Smith did commit the crime, the fresh evidence he put forward to rebut that presumption was unimpressive, and, in addition, as a practical matter, the actual outcome of a real case is always going to be a powerful indicator of the most likely outcome of a similar hypothetical case, albeit conducted somewhat differently.[135] This is particularly so where the earlier case has been a criminal trial, where (as Jacob J. pointed out in *Abu-Saleh v Brinks*, above) the convict will have had a "full opportunity of contesting [the] issues . . . when the legal presumptions and rules of evidence were as high as they could be in their favour".[136] Summary judgment should not, therefore, prove difficult to obtain for a defendant facing a similar claim, if the court strikes a proper balance between the six factors considered under "Why Prevent 'Collateral Attack'?", above.

Irwin J.'s recent decision in *Amin* is in part vulnerable to a similar critique. Counsel for the defendants conceded that there was no "direct or unambiguous evidence to show that Amin sought to bring this claim as a means of attack on his criminal conviction",[137] but cited *Smith v Linskills* in support of the proposition that an improper motive was not a necessary element to establishing an abuse of process.[138] Key to Irwin J.'s decision was a finding that, in the event of Amin succeeding in his civil action, there would have been nothing to prevent him from publicising the result and claiming that his conviction was tainted by mistreatment abroad, with which British agencies were complicit, and that this would have brought the (English) system of criminal justice into disrepute.[139] This conclusion brought Amin's case within one of the heads of abuse of process identified by Lord Diplock in *Hunter*. However, that does leave the decidedly awkward question of whether high-profile cases likely to attract widespread publicity are to be approached differently upon an abuse of process argument being raised, merely because their high profile presents a greater danger to the reputation of the criminal justice system. That would leave litigants in cases attracting little if any publicity free to exercise the right statutorily conferred under section 11 to attempt to undermine their

[133] Now, but not in 1996, available to defendants as well as claimants under C.P.R. 24.3(2).
[134] To prove which, the claimant would have to satisfy the court, on the balance of probabilities, that he would, if properly defended, have been acquitted.
[135] See *Arthur J.S. Hall* [2002] 1 A.C. 615, 705, per Lord Hoffmann.
[136] *Brinks* [1995] 1 W.L.R. 1478, 1482.
[137] No other improper motive having been suggested.
[138] *Amin* [2013] EWHC 1579 (QB), at [43].
[139] Ibid., at paras. [65]–[70]. See also notes 66–67 above and the text thereto.

subsisting conviction. The case of *Amin* could have been resolved more satisfactorily and in accordance with principle either on the basis of an inference that Amin's true purpose in bringing the claim *was* to undermine his conviction[140] or by an award of summary judgment to the defendants (if necessary, of the Court's own motion[141]) on the grounds that Amin's claim had no real prospect of success. Such an award was particularly suitable given Irwin J.'s finding that Amin had no evidence which was "fresh, or fresh to any significant extent" after his failure to substantiate his allegations in the criminal courts, either at first instance or on appeal.[142]

The "rebuttability" provision of section 11(2)(a) of the CEA 1968 is, we suggest, seldom if ever going to prove central to the question of whether or not a convicted litigant's case is truly an abuse of process. Rather, a claim which is an abuse of process will usually be one where the claimant is seeking to use the proceedings for an improper purpose, and the quality of the fresh evidence s/he is in a position to adduce is not such as entirely to change the aspect of the case (neither of which section 11 addresses).[143] In any case, where a claimant does not have sufficient evidence to rebut the presumption in section 11(2)(a), s/he will certainly not have enough to "entirely change the whole aspect of the case". Instead, the claim (though vulnerable to an application for summary judgment by the defendant, as to which see the "Second Strand", below) will still not be an abuse unless the claimant also has an improper purpose for bringing it (or, more rarely, its prosecution would be manifestly unfair to another party or likely to bring the administration of justice into disrepute).

Ultimately, of course, the limits of abuse of process remain undefined. As Stuart-Smith L.J. put it in *Ashmore v British Coal*, "it is dangerous to try and define fully the circumstances which can be regarded as an abuse of the process, though these would undoubtedly include a sham or dishonest attempt to relitigate a matter. Each case must depend upon all the relevant circumstances".[144] This leaves significant flexibility for courts faced with applications to strike out cases said to amount to an abuse of process. However, that flexibility must retain a purpose: that truly *abusive* litigation be prevented and, by statutory definition, attempting to disprove the evidential value of a conviction is not, without more, abusive.

Abu-Saleh v Brinks, *Smith v Linskills*, and *Amin* offer three examples of where the courts have felt a strong instinct that the claims should not be allowed to proceed to trial, but do not, we suggest, offer any coherent theoretical basis for that result which can satisfactorily be reconciled with the

[140] Which was contended for (see ibid., at para. [43], final sentence), and would hardly have been unreasonable on the facts (see inter alia notes 66–67 above and the text thereto).
[141] As to which see note 111 above.
[142] See *Amin* [2013] EWHC 1579 (QB), at [19]–[26], [36], [60].
[143] See text to notes 125–128 above; see also note 5 above and the text thereto.
[144] See *Ashmore* [1990] 2 Q.B. 338 (CA), 352; see also note 5 above.

terms of section 11 of the CEA 1968 and Parliament's quite deliberate adoption of a rebuttable presumption rather than a conclusive one.[145] For that, we must turn to the second strand of cases.

D. Second Strand: Section 11(2)(a) of the CEA 1968 and the Summary Judgment Cases

Hunter is cited too broadly: it is better thought of as not relevant to cases where a party relies on section 11 of the CEA 1968 *without* having any of the hallmarks of abusive litigation. Whether a claim which seeks to cast doubt on a subsisting conviction merits going to a full trial or ought to be stifled at the interlocutory stage, absent any of the factors which have been recognised as capable of rendering such a claim a true abuse of process, is a question which should be resolved by this second strand of cases. Here, section 11(2)(a) is an important starting point, as Spencer J. rightly held in *CXX v DXX*, because it makes clear the convicted party's entitlement to seek to prove the incorrectness of the conviction.[146] That statutory entitlement was, following the intention of the LRC, not qualified by any statutory requirement to show a "game-changing" level of new evidence, such as that required by the *Phosphate Sewage* test.[147] It follows that an application to strike out the convicted litigant's case (that his conviction was wrongful, and all that flows from that) under C.P.R. 3.4 or the inherent jurisdiction should ordinarily fail. However, an application for summary judgment under C.P.R. Part 24 (no realistic prospect of success on the particular facts) may yet succeed, as was demonstrated in *CXX v DXX* itself.

As Potter L.J. held in *McCauley v Vine*, the *Phosphate Sewage* test of whether it "entirely changes the whole aspect of the case" is of no application where the case is not (otherwise) an abuse of the court's process.[148] In so holding, he distinguished (or arguably declined to follow) a dictum of Sir Thomas Bingham M.R. in *Smith v Linskills* suggesting to the contrary,[149] and disapproved that part of the judgment of Jacob J. in *Brinks Ltd. v Abu-Saleh (No. 1)*[150] in which he applied the *Phosphate Sewage* standard to the fresh evidence there proffered (whilst approving Jacob J.'s decision to grant summary judgment on the facts). In non-abuse cases, the test to be applied to the convicted party's evidence adduced to rebut the section 11 presumption is the normal one, namely on an application for summary judgment that of establishing a real (as opposed to

[145] See text to notes 57–60 above.
[146] Text to note 112 above.
[147] See note 120 above.
[148] *McCauley* [1999] 1 W.L.R. 1977, 1983–84.
[149] *Smith* [1996] 1 W.L.R. 763, 771.
[150] See text to notes 101–102 above.

fanciful) prospect of success[151] and at trial that of satisfying the (civil) court on the balance of probabilities.[152]

VI. A Lesson from Public Law

Finally, a useful lesson can be learnt from public law. Lord Diplock again deployed "collateral" reasoning in public law exactly a year after *Hunter*, in *O'Reilly v Mackman*,[153] the first case on procedural exclusivity in public law. Prior to this, claims against administrative decisions needed to be framed in tort.[154] In *O'Reilly v Mackman*, Lord Diplock tacitly built on *Hunter*'s abuse of process,[155] holding that, since an effective jurisdiction for judicial review existed by then, using any other mechanism to bring a public law challenge would be an abuse of process. However, a collateral invalidity issue *could* be raised in a claim for the infringement of a right of the claimant arising under private law.[156] This would not be the case where the claim had, as its purpose, to attack the validity of the administrative measure (or the power allegedly underlying the measure). This focus on the purpose of the claim is similar to *Hunter*. Its similarity was made all the clearer since one of Lord Diplock's key reasons for preferring judicial review under Order 53 was that it made sure the court could exercise a summary review against groundlessness, unmeritoriousness, and harassment, namely to dismiss the application for abuse of process.[157]

However, modern public law has become more permissive than Lord Diplock's position in the early 1980s,[158] just as has happened in civil law. Thus, the leading case today, *Boddington*,[159] allows *collateral challenge*, as opposed *collateral attack*, of an administrative measure, unless the specific statutory context prevents it.[160] The position is simpler now that C.P.R. Parts 1 (general principles) and 24 (summary judgment)

[151] C.P.R. 24.2.
[152] See *Hunter* [1982] A.C. 529, 544, per Lord Diplock.
[153] *O'Reilly v Mackman* [1983] 2 A.C. 237.
[154] C. Emery, "Collateral Attack: Attacking *Ultra Vires* Action Indirectly in Courts and Tribunals" (1993) 56 M.L.R. 643.
[155] Lord Diplock did not refer to *Hunter*, but Lord Denning M.R., in the Court of Appeal, had referred to *Hunter* at p. 254, as had Ackner L.J. at pp. 260–61, and counsel for the appellants at p. 268.
[156] *O'Reilly* [1983] 2 A.C. 237, 272, 285. See also *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee* [1992] 1 A.C. 624.
[157] *O'Reilly* [1983] 2 A.C. 237, 285.
[158] A position that was criticised at the time: See e.g. C.F. Forsyth, "Beyond *O'Reilly* v. *Mackman*: The Foundations and Nature of Procedural Exclusivity" [1985] C.L.J. 415, esp. 422: "novel and cavalier use of abuse of process." See now D. Feldman, "Error of Law and the Effects of Flawed Administrative Decisions and Rules" [2014] C.L.J. 275 for a view on whether all flawed administrative decisions are void.
[159] *Boddington v British Transport Police* [1999] 2 A.C. 143. *Boddington* built on earlier movements away from a strict collateral attack position, e.g. *Chief Adjudication Officer v Foster* [1993] A.C. 754, 766–67, citing particularly the efficiency benefits.
[160] See e.g. *Boddington* [1999] 2 A.C. 143, 160–62, per Lord Irvine L.C.; *D.P.P. v T.* [2006] EWHC 728 (Admin); [2007] 1 W.L.R. 209. The difference in title is not consistent across the cases, but may be suggestive of an attitudinal shift.

apply to judicial review just as they do to civil claims casting doubt upon convictions.[161] Thus, the defendant can obtain summary judgment in, say, a contractual claim which is abusive of underlying public law regulation, where the claim shows "no real prospect of success". The C.P.R. also allows a claim to be transferred *into* judicial review, rather than merely out of it as under the former R.S.C. Order 53.[162] However, in all these cases, it is the underlying measure, or the power to make it, that is being challenged. In the *Hunter*-style case, it is a *judicial decision* that is being challenged, and thereby perhaps a subsisting conviction. It is an interesting difference that, in practice, earlier judicial review decisions do not appear to be collaterally attacked, whilst earlier convictions are.

Public law's development runs parallel to that in civil law. The role of relevant statutes is now more important than issues of competence or certainty. It also highlights the importance of protecting an individual's rights – a factor not often raised in criminal/civil cases.[163] Finally, the story is a salutary reminder that courts sometimes err when attempting to corral litigants in the face of advantages to proceeding by other means.

VII. Conclusion: Disentangling Collateral Attack and the CEA 1968

Civil suits have long been used as a means of seeking to subvert or discredit criminal convictions. Many such suits have been met with blanket immunities, protective principles, and presumptions, but the law has more recently shifted its position on how and when this should be done. Of particular importance was the admission of convictions as evidence of the facts upon which they must have been founded under sections 11 and 13 of the CEA 1968. The result is that collateral attacks are now typically either negligence actions against counsel or expert witnesses, or attempts to challenge procedural or evidential components of the earlier conviction. Some 30 years ago, English law responded to this in *Hunter* with a jurisdiction to dismiss collateral attacks as abuses of process.

The *Hunter* doctrine is, in itself, unobjectionable, but it is of narrower ambit than some appear to have assumed and has been too readily applied in cases where no true abuse has been involved. Usually, two fundamental elements must be present to establish the abuse properly caught by it: an improper or ulterior purpose on the part of the convicted litigant (commonly to cast doubt on his or her conviction), and the absence of fresh evidence which entirely changes the aspect of the case from that at the criminal

[161] In addition, claims may now proceed in a civil court where they respect public-law safeguards like time limits: *Clark v University of Lincolnshire and Humberside* [2000] 1 W.L.R. 1988, at [16]–[18], [30]–[39].
[162] C.P.R. 54(20) and Practice Direction 54A, at para. 14.2.
[163] See e.g. *Wandsworth LBC v Winder (No 1)* [1985] A.C. 461, 509–10.

trial. Exceptionally, abuse may also be established on the basis of manifest unfairness to another party to the litigation,[164] or of the administration of justice being brought into public disrepute if the litigant in question is allowed to "run" his challenge to the validity of his/her conviction at trial.

However, not every claim challenging or implicitly undermining a relevant and subsisting criminal conviction involves an abuse of the court's process. The common assumption that they do is erroneous, and has led to a conflation of abuse of process with statutorily authorised attempts subsequently to show, in a civil court, that the convicted person did not commit the crime of which s/he was convicted. *CXX v DXX* should be recognised as making a good start, and the reasoning of Jacob J. in *Abu-Saleh* was rightly disapproved by Potter L.J. in *McCauley v Vine*.

The power to strike out a claim without consideration of its merits should only be used where there is real abuse. The reasoning of the Court of Appeal in *Smith v Linskills* should not be followed. When deciding whether to dismiss a claim as an abuse of process under the *Hunter* doctrine, the high, *Phosphate Sewage* standard for new evidence properly applies: nothing less than new evidence "entirely changing the whole aspect of the case" should suffice to save an otherwise abusive claim.

There are, however, claims seeking to cast doubt on subsisting convictions which are *not* abusive, notably where a party is merely seeking to use the right to do so conferred by section 11 of the CEA 1968 itself. These should not be dismissed as abuses of process, but should proceed to be considered on their merits. Unmeritorious claims can still be disposed of, but fairly: in particular, in response to an application for summary judgment, the convicted party should have the opportunity to establish, on the available evidence, a real (as opposed to fanciful) prospect of successfully showing that, despite the conviction, sufficient facts upon which it must have been founded did not in truth occur.

The recognition of these two separate lines of authority as such would reconcile the development of the common law in this field with the provisions of the CEA 1968, better align the modern relationship of tort law and criminal law, and promote just outcomes in individual cases. In particular, in any given case, it would prevent legitimate civil claims and defences from being struck out as abuses of process, whilst still leaving open a principled means of stopping early claims and defences with no real prospect of success: the application for summary judgment.

[164] Most likely a defendant, being forced into relitigating by having been served with proceedings.