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Principle and Policy in Malicious Prosecution

WENDY BONYTHON* AND JOHN FARRAR*

Abstract

Judicial consideration by the Judicial Committee of the Privy Council, and the United Kingdom Supreme Court, of the tort of malicious prosecution – historically confined to criminal prosecution and limited civil proceedings – demonstrates considerable confusion in Common Law systems over the roles of principle and policy in judicial reasoning. As judgements extending malicious prosecution to maliciously motivated civil claims demonstrate, the principles and policies underpinning malicious prosecution and abuse of process, and the relationship between these torts – regarded by judges and jurists as anomalous – remain unclear. Other common law jurisdictions are yet to positively affirm the revised malicious prosecution tort’s applicability to civil proceedings, and the few plaintiffs to plead the expanded tort to date have been unsuccessful.

While the harms arising from maliciously brought civil proceedings understandably excite sympathy, this article contends that expanding malicious prosecution to civil claims via common law reform is a problematic solution resting on unsound jurisprudential foundations, which faces potentially insurmountable evidentiary barriers and necessitates further litigation. We suggest that a better alternative is to encourage greater use of the court’s existing inherent jurisdiction to award compensatory costs and propose introduction of punitive statutory costs powers, available in extreme cases, to deter litigants from initiating civil claims prompted by malice.

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I Introduction

Should the law provide a remedy in tort for those who suffer harm as a result of being sued in maliciously brought civil proceedings? This is the question that both the Judicial Committee of the Privy Council, and the UK Supreme Court, found themselves grappling with in *Crawford Adjusters v Sagikor* ('*Crawford*'),¹ and *Willers v Joyce* ('*Willers*'),² respectively.

In each of *Willers* and *Crawford*, a professional person (C) acting within or on behalf of a corporation angered another person who was empowered to direct that corporation or a related corporate entity (D) to instigate legal proceedings against C. In both cases, the proceedings ended without an adverse finding against C, but at huge reputational, financial, and personal cost to C, which was inadequately – at least in C's view – addressed through costs. In each case, D was arguably motivated by malice, rather than by a reasonable and legitimate belief that C acted wrongfully. In each case, C subsequently sought to bring proceedings against D to provide compensation for financial and reputational losses arising from the initial litigation, in circumstances where costs orders were inadequate from C's perspective.

Historically the weight of precedent has been against C – whom we might characterise as the victim of a subversion of justice – gaining a remedy under tort. Prior to *Crawford*, it was held that the tort of malicious prosecution was only available in cases of criminal prosecution, and a handful of particular civil claims, none of which applied in *Crawford* or *Willers*. In 2013 in *Crawford*, the Judicial Committee of the Privy Council found that the tort of malicious prosecution did extend to civil claims under its jurisdiction, by the slimmest of majorities. Three years later, the UK Supreme Court,³ preferring the Privy Council's decision in *Crawford* over the alternative position taken by the House of Lords in *Gregory v Portsmouth City Council* ('*Gregory*'),⁴ found that malicious prosecution applied to civil proceedings under English law too, again by a narrow margin, and with five of the nine members who heard the Supreme Court appeal in *Willers* also having sat on the earlier Privy Council appeal in *Crawford*.

Evident throughout both *Willers* and *Crawford* is a policy concern that wrongfully sued parties may be inadequately compensated by the costs orders made in their favour when the original wrongful suits are dismissed or stayed. Those orders – traditionally a manifestation of the court's inherent powers to regulate its own processes, combined with statutory provisions on assessment and availability of costs – have been

¹ *Crawford Adjusters v Sagikor General Insurance (Cayman) Ltd (Cayman Islands)* [2014] AC 366.

² *Willers v Joyce* [2018] AC 779.

³ *Ibid.*

⁴ *Gregory v Portsmouth City Council* [2000] 1 AC 419.

codified in many jurisdictions. That costs orders achieve perfect or even approximate justice in all cases is fictive: far from restoring the wronged parties to their original position, even successful parties may instead face crippling debt, in addition to any reputational harms, economic losses, and the toll of defending such suits on their physical and psychological health. Requiring innocent parties to carry the burden of responding to a subversion of justice (i.e., a malicious prosecution in which the other party abuses the power of the law) raises questions about fairness and legitimacy.

That the legal principles of justice and fairness were germane to judicial reasoning in both *Willers* and *Crawford* is, therefore, relatively uncontroversial. Why then were the decisions to firstly expand the scope of malicious prosecution to include civil claims, and secondly to recognise the expanded scope under English law, achieved by such narrow margins, considering a general acceptance of the potential for injustice arising from the circumstances of each case?

Closer consideration of the judgments reveals some surprising tensions in the mechanics of legal reasoning undertaken by judges, including fundamental differences in the prioritisation of principle and policy, and the evaluative weight accorded to each, by individual members of the court in both *Crawford* and *Willers*, which account for the divergent positions adopted. This suggests that judicial approaches to legal reasoning in response to novel or expanding torts remain at least somewhat discretionary. The resulting uncertainty arising from that discretion is perhaps best evidenced by the following two quotations.

While, therefore, policy considerations can, and on occasions must, underlie decisions as to how law should develop, it is necessary to recognise the inherent impossibility of making an infallible prediction about the outcome of a policy choice. Where possible, therefore, such a choice should be aligned with principle. In my view, fundamental principle has a large part to play in the resolution of the debate in this case. And the pre-eminent principle at stake here is that for every injustice there should be remedy at law.⁵

In contrast:

[T]he injustice which he has suffered is not the only factor which can determine whether the law recognises a cause of action in tort. Defining the legal elements of a tort and the legal limitations upon its ambit will commonly involve a large element of policy which may conflict with the simple principle that for every injustice there should be remedy at law.⁶

Ultimately, the majority in both *Crawford* and *Willers* prioritised principle – that for every wrong there should be a remedy – over policy. Yet, it would be wrong to dismiss the reasoning of the minority out of

⁵ *Crawford* (n 1) 405 (Lord Kerr JSC).

⁶ *Ibid* 412 (Lord Sumption JSC).

hand. Their consideration of principle and policy throughout the precedent cases is both detailed and nuanced, as will be discussed below.

The resulting common law reform – affirming availability of malicious prosecution as a cause of action to provide relief to those who have been the target of maliciously-pursued civil proceedings – was achieved by the narrowest of margins, and to date has been at best symbolic: not even the plaintiff in *Willers* successfully established their claim,⁷ reflecting the stringent requirements for establishing malice under the tort. Elsewhere, courts have either declined to follow the Privy Council and UK Supreme Court or remain equivocal.⁸ The question of whether the scope of malicious prosecution *should* be expanded to apply to civil causes of action in other jurisdictions therefore remains worth considering.

This article begins by addressing that question. In particular, it considers the various ways the individual judges in *Willers* and *Crawford* considered issues of principle and policy in circumstances of ambiguous precedent, including how judges rationalised the differing availability of costs orders in civil and criminal matters as part of their reasoning. Having identified a lack of judicial consensus in the mechanics of the reasoning adopted by the various judges, as well as the outcomes of that reasoning, the article then considers whether a similar outcome could be achieved more directly through reform of costs law, thereby avoiding the more controversial and complex pathway of seeking to achieve justice for wronged defendants through reforming the tort itself.

In Part One of this article, we present the elements of the tort and its historical development, up to and including *Willers* and *Crawford*, and

⁷ For a discussion of the evidentiary obstacles the plaintiff in *Willers* faced in establishing malice at trial, and other unintended consequences of recognising the tort, see Rachael Mulheron, 'The Tort of Malicious Prosecution of Civil Proceedings: A Critique and a Proposal' (2022) 42(3) *Legal Studies* 470. The plaintiff's loss at trial in *Willers* triggered further litigation between the parties regarding costs over the malicious prosecution claim. Plaintiffs in the few cases considered in other jurisdictions in the aftermath of *Willers* have been similarly unsuccessful.

⁸ Expansion of the tort subsequent to *Willers* was considered — and rejected — by the Singapore Court of Appeal in *Lee Tat Development Pte Ltd v Management Corp Strata Title Plan No 301* [2018] SGCA 50. Other cases to consider it include *Burgess v Beaven* [2020] NZHC 497, in which it was found to be 'reasonably available under New Zealand law', based on *Robinson v Whangarei Heads Enterprises Ltd* [2015] NZHC 1147 and *Rawlinson v Purnell, Jenkinson & Roscoe* [1999] 1 NZLR 470 (HC). *Giles v Jeffery* [2019] VSC 562 and *Perera v Genworth Financial Mortgage Insurance Pty Ltd* [2019] NSWCA 10 both found it was unsettled whether the tort extended to civil proceedings under Australian law. Additionally, in *Crawford*, Lords Neuberger (at 427-435) and Wilson (at 396) considered the US action for malicious prosecution, as did Lord Steyn in *Gregory* (at 428-430), but concluded that significant differences in the availability of costs orders in the US limited the utility of comparison with other common law jurisdictions. Its potential role in Canada was considered academically in Michael Marin, 'The Uncertain Scope of Malicious Prosecution: Insights from Canada' (2016) 24(2) *Tort Law Review* 80; it was further contrasted with collateral abuse of process in the Australian context in Emerson Hynard and Aiden Lerch, 'The Tort of Collateral Abuse of Process' (2021) 44(2) *UNSWLJ* 714.

the precedential ambiguity identified by the courts in those two cases. Part Two examines how the various Privy Council and Supreme Court justices interpreted the underlying policy arguments and legal principles underpinning the development of the tort to overcome the limits of precedent, and how those approaches explain the divergent conclusions reached on the question of whether or not the existing tort of malicious prosecution should be available in cases of maliciously brought civil proceedings. In Part Three, we reflect on the unpersuasive authority of the decisions as a foundation for expanded recognition of the tort in other common law jurisdictions and suggest that a more effective — and efficient — response to the challenge of maliciously-pursued civil proceedings may be found in the Supreme Court's inherent jurisdiction. In cases of aggravated malice, or circumstances where civil proceedings are abandoned prior to falling under the Supreme Court's inherent jurisdiction, legislation may be an appropriate avenue to impose punitive damages or provide compensation. The article concludes that the divergent approaches to legal reasoning undermine the coherence and legitimacy of the reformed tort, the excessively high evidentiary barriers imposed limit its practical utility, and that its indirectness is an affront to the efficient administration of justice, requiring as it does additional litigation which could be avoided by more effective use of the existing costs provisions available in the primary litigation.

II The Gist and Elements of the Action

Malicious prosecution is a secondary cause of action that has traditionally been available to those whose prosecution in criminal matters has been maliciously or wrongly pursued. On conclusion of the primary (maliciously) brought criminal proceedings, the defendant becomes plaintiff, and brings a secondary cause of action for compensation against the original 'prosecutor' — someone who made a false complaint or otherwise encouraged the institution of criminal proceedings, rather than narrowly restricted to the state prosecution or investigative organs.

The basic elements of the torts pleaded in the two key cases of *Willers* and *Crawford* (malicious prosecution and abuse of process) were relatively uncontroversial in their formulation. The current edition of *Winfield and Jolowicz* identifies the essentials of the tort of malicious prosecution:⁹

1. that the defendant prosecuted the claimant;
2. that the prosecution ended in the claimant's favour;

⁹ James Goudkamp and Donal Nolan, *Winfield and Jolowicz on Tort* (Sweet & Maxwell, 20th ed, 2020) 20-006.

3. that the prosecution lacked reasonable and probable cause;
4. that the defendant acted maliciously; and
5. that the claimant suffered damage as a result.¹⁰

This formulation is not significantly different from the formulations used by others.¹¹

The history of malicious prosecution is long and complex, dating back to at least 1285, when a statute from the time of Edward I's reign provided victims of maliciously prosecuted homicides and felonies with a right to pursue damages from those who conspired to instigate such prosecutions.¹² The 1698 landmark case of *Savile v Roberts* ('*Savile*'),¹³ a claim of action on the case for malicious prosecution for riot, established firstly that conspiracy was not an essential requirement of the tort, and secondly, that the harms capable of supporting the action (a requirement for actions on the case) were harm to reputation, if the crime was a 'scandalous' one; harm to the person, where the claimant was at risk of losing life limb or liberty; and damage to property, which included 'being put to expense'.¹⁴ Notably, not all crimes were considered 'scandalous', which meant that, in the early days, malicious prosecution was not available to criminal prosecutions generally, but only those for which wrongful accusation could have supported a claim in slander.

In *Savile*, Holt CJ observed that, while an action would generally not lie against someone who brought a civil action without cause, the situation may be different if the party who was sued could show special damage arising from a suit that was 'manifestly vexatious'. This has subsequently been interpreted as 'the malice that is the foundation of all actions of this nature, which incites men to make use of law for other purposes than those for which it was ordained'.¹⁵ Parker CJ, in *Jones v Givin* (or *Gwynn*), confirmed that 'an action would lie for the malicious prosecution of civil proceedings if the claimant could "show special matter which shows malice"'.¹⁶

In *Grainger v Hill*,¹⁷ the court drew a distinction between malicious prosecution and what it recognised as abuse of process, although the margins of the distinction remain unclear. In that case, the defendants had loaned money to the plaintiff, using his ship as security. The plaintiff was permitted to continue using the ship, which he was legally permitted to do provided he retained the ship's register. Concerned

¹⁰ Ibid 20-006.

¹¹ See, eg, Stephen Todd et al, *Todd on Torts* (Thomson Reuters, 8th ed, 2019) 1037.

¹² *Crawford* (n 1) 386 (Lord Wilson SCJ), citing Anno 13, Edw I, stat 1, c12.

¹³ (1698) multiple reports including 1 Ld Raym 374; 5 Mod Rep 394; 87 ER 725; 88 ER 1267; 91 ER 1147, cited in *Willers* (n 2) 793, 794; *Crawford* (n 1) 387-9 (Lord Wilson JSC).

¹⁴ *Willers* (n 2) 794 (Lord Toulson JSC).

¹⁵ *Crawford* (n 1) 389 (Lord Wilson JSC), quoting *Savile* (n 13).

¹⁶ *Jones v Givin* (1760) 93 ER 300.

¹⁷ *Grainger v Hill* (1838) 132 ER 769.

about the plaintiff's ability to repay the loan before it fell due, the defendants claimed the plaintiff was in default of the debt and obtained a writ requiring the sheriff to detain the plaintiff. In the alternative to his arrest, the plaintiff was advised that the defendants would be satisfied if he instead handed over the register, which he did, but without which he could no longer sail. He subsequently repaid the loan by the due date, but lost several voyages in the interim, causing him to suffer financial loss. The court awarded the plaintiff a remedy, finding that the plaintiff was not required to prove an absence of reasonable or probable cause in a claim based on improper purpose, as distinct from malicious prosecution.

In *Quartz Hill Consolidated Gold Mining Co v Eyre* ('*Quartz Hill*'),¹⁸ the tort of malicious prosecution was recognised as applicable to a petition to wind up a company. The court however drew a distinction between winding up applications and civil claims more generally, and this judgment appears to be the genesis of the more recent view that the tort of malicious prosecution applied to civil claims on an exceptional, rather than general, basis. The Court accepted in principle that the tort applied to civil claims generally, but reasoned that, by 1883, malicious prosecution of most civil claims would be unable to satisfy the harm requirements set out in *Savile*. This was because imprisonment could not be a consequence of civil suit; costs orders would account for any economic losses incurred in defending the suit; and any harm done to reputation was contemporaneously resolved: 'the evil done by bringing the action is remedied at the same time that the mischief is published, namely, at the trial'.¹⁹ The contemporary relevance of this reasoning — referred to as 'antidote and poison' — was the subject of much discussion in both *Crawford* and *Willers*.

In the aftermath of *Quartz Hill*, therefore, the application of malicious prosecution to civil proceedings was restricted to exceptional types of civil proceedings, rather than available generally. These included proceedings for bankruptcy or winding up; writs for debt issues in respect of debts which had already been satisfied; bench warrants authorising the arrest of non-presenting summoned witnesses; writs of arrest for ships and aircraft; orders securing assets of parties to an arbitral dispute in anticipation of arbitration; and search warrants.

In *Gregory v Portsmouth City Council*, an attempt to broaden the availability of malicious prosecution to include maliciously-brought administrative proceedings was made. Gregory was alleged to have used confidential information that he came by in his capacity as councillor for personal benefit. Amid widespread media coverage, the Council's own disciplinary proceedings found he had committed

¹⁸ (1883) 11 QBD 674.

¹⁹ *Ibid* 684-5 (Brett MR).

misconduct. He successfully challenged the finding under judicial review pathways,²⁰ and subsequently sued the Council for malicious prosecution. The House of Lords upheld the decision to strike out Gregory's claim.²¹ Acknowledging that the tort did not extend to civil claims generally (a proposition with which the Court agreed) Gregory proposed that disciplinary proceedings were quasi-criminal because of their penal outcomes and should therefore be treated the same way as criminal proceedings under the tort. Noting the wide variety of disciplinary proceedings and their varying degrees of penalty, the House of Lords found that recognition of Gregory's claim would result in the court having to determine on a case-by-case basis which disciplinary proceedings were sufficiently criminal as to fall within the scope of the malicious prosecution tort, creating uncertainty.

Acknowledging changes in publicization of civil proceedings since *Quartz Hill*, Lord Steyn in *Gregory* noted that the 'poison and antidote' reasoning which historically justified exclusion of civil proceedings from malicious prosecution may no longer apply, but thought there may be other reasons for not extending the scope of the tort. Accepting that while extending the tort to encompass civil proceedings may be more compelling than extending it to cover disciplinary proceedings, he nonetheless thought that the availability of other torts may render it unnecessary.²²

It is the exceptional basis for inclusion in this list of civil proceedings for which malicious prosecution may be available that lies at the heart of the disputes in *Crawford* and *Willers*. Specifically: what, if any, is the underlying principle for the inclusion of those classes of civil proceedings to which the tort has been found to apply on an exceptional basis? Or, alternatively, does principle require that the tort be available in all types of civil claim, and that the assortment of claim types accepted by the courts to date is a reflection of procedural law, rather than underlying principle?

A *Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd*

Paterson was a chartered surveyor working as Crawford Adjusters in the Cayman Islands when a hurricane caused extensive damage to a property development insured by Sagicor. Sagicor appointed Paterson as loss adjuster. The CEO of Sagicor, who resided in the development, was keen for the restoration work to be undertaken quickly and recommended the builders who were subsequently engaged to undertake the restoration. Notwithstanding delays, which prevented the

²⁰ *Reg v Portsmouth City Council, Ex parte Gregory* [1990] 2 Admin LR 681.

²¹ *Gregory* (n 4).

²² *Ibid* 432.

builders from providing a final estimate for the full extent of the restoration work, the builders commenced the work on an advanced payment basis.

Sagicor subsequently engaged a new vice president, Delessio, who was known to Paterson and who did not like him. Becoming concerned about the inadequacy of documentation supporting the advance payments to the builders, Delessio dismissed the builders and stated an intention to destroy Paterson professionally. He engaged Purbrick — another surveyor — to conduct a review of the work done at the site. Delessio instructed Purbrick not to speak to the builders, Paterson, or any of the subcontractors and suppliers used in the repair work, or to consult the engineers who provided the reports and drawings on which the repairs were based, or their reports. Delessio also instructed Purbrick to exclude any costs associated with cleaning up the site from his report.

Purbrick's report formed the basis of a writ issued by Sagicor and the owners of the development against the builders and Paterson, alleging that the Sagicor had paid \$2.2 million more than they were required to under the policy, based on the fraudulent misrepresentations of Paterson. The writ further alleged that Paterson and the builders had conspired in making the misrepresentations. Delessio subsequently informed a journalist about the allegations against Paterson. On publication, those allegations caused substantial damage to Paterson's reputation and the viability of his business activities. Paterson filed a counterclaim for fees payable to him under his contract with Sagicor. The owners subsequently withdrew their claim against Paterson.

Three months prior to trial the builders disclosed invoices and other documents which accounted for the missing funds. On advice from counsel, Sagicor withdrew its claim. Sagicor was ordered to pay indemnity costs, and Paterson was granted leave to amend his counterclaim to include a claim for damages arising from abuse of process. The builders were likewise granted leave to amend a counterclaim to include claims for both malicious prosecution and abuse of process. At trial, the court treated both Paterson and the builders as having both claimed for abuse of process and malicious prosecution. The builders' counterclaim succeeded on other grounds, and they settled. Paterson's claim was dismissed, and he appealed.

Paterson's claim for abuse of process was dismissed. Although that tort requires the claimant to demonstrate that the claim was brought for a 'collateral' or 'improper' purpose, using a legitimate legal process, it is not necessary to demonstrate that it either lacked probable cause, or that it was terminated in favour of the defendant.²³ The grounds for dismissing Paterson's claim for abuse of process were that Sagicor 'had

²³ *Crawford* (n 1) 392 (Lord Wilson JSC).

not used the facility to sue Mr Paterson to secure an object for which legal action was not designed²⁴; indeed, the facility was used in order to secure exactly the object the legal action was designed to achieve. Further, that Sagicor's dominant motive in making the allegations was improper was insufficient to convert its otherwise legitimate use of the legal process into an abuse. In *Crawford* it was also found that the two torts were distinct.

Despite finding that Paterson had established all the elements of the tort of malicious prosecution, Henderson J likewise dismissed that cause of action because 'the present state of the law did not allow the extension of the law to civil proceedings',²⁵ citing Lord Steyn in *Gregory v Portsmouth City Council*.²⁶

On appeal, the court upheld Henderson J's decision.²⁷ Paterson then appealed to the Judicial Committee of the Privy Council,²⁸ which narrowly upheld Paterson's appeal, with Lords Kerr²⁹ and Wilson,³⁰ and Baroness Hale,³¹ in the majority, and Lords Sumption³² and Neuberger³³ dissenting.

B *Willers v Joyce*

Gubay was a multibillionaire who had made his fortune from a range of businesses and companies. For approximately 18 years, Willers worked for Gubay as his 'right hand man', in which role he was privy to all the business dealings of Mr Gubay and the companies owned by the Trust. He was appointed a director of most if not all of them, was a signatory on their bank accounts, and gave instruction to solicitors in connection with litigation with which the companies were involved.³⁴

One of the companies, Langstone Leisure Ltd, became involved in a dispute with Aqua Design and Play Ltd, which it had engaged to construct swimming pools at Langstone's health clubs. Langstone commenced proceedings for breach of contract against Aqua over pool covers Langstone alleged were defective. Instructions to commence proceedings were issued either by, or via, Willers. Aqua entered liquidation, but Langstone continued to pursue one of Aqua's directors for wrongful trading. That claim was subsequently abandoned.

²⁴ *Crawford* (n 1) 384 (Lord Wilson JSC).

²⁵ *Ibid.*

²⁶ *Gregory* (n 4) 432-433 (Steyn LJ).

²⁷ *Crawford* (n 1) 384.

²⁸ *Ibid* 366.

²⁹ *Ibid* 411.

³⁰ *Ibid* 401.

³¹ *Ibid* 404.

³² *Ibid* 426.

³³ *Ibid* 435.

³⁴ *Willers v Joyce* [2017] EWHC 1225 (Ch), [11].

After discovering from auditors that legal costs associated with its pursuit of Aqua and its director exceeded the value of the claims for breach of contract and wrongful trading, Willers was dismissed from Gubay's employment.³⁵ Gubay lodged a claim (subsequently discontinued) seeking to recover £140,000 he alleged Willers had unlawfully taken from his bank account. Willers counterclaimed for £3 million allegedly owed to him by Gubay from his employment. Langstone subsequently claimed that Willers' pursuit of Aqua breached his director's duties causing Langstone to suffer significant losses. Langstone sought £1.9 million in damages. Willers' defence was that Gubay, acting as a shadow director of Langstone, either instigated or knew of and approved all decisions regarding Langstone's pursuit of Aqua and its director.

Langstone subsequently discontinued its claim. Willers was awarded standard costs but was unsuccessful in obtaining indemnity costs against either Langstone or Gubay.³⁶ Willers subsequently brought proceedings against Gubay, principally on the grounds of malicious prosecution.³⁷ Willers argued that Gubay was responsible for causing Langstone to bring the claim against him; that it was determined in his favour; that Gubay lacked reasonable cause in bringing the claim; that Gubay bringing the claim was driven by malice; and that he (Willers) had suffered damage, specifically loss of reputation, loss of earnings, loss of health, and economic loss of the difference between the costs of defending the claim (£3.9 million) and the costs he was awarded on standard basis (£1.7 million) – a shortfall of £2.2 million.³⁸

Gubay sought to have the claim struck out for want of a cause of action. At first instance — based on an agreed statement of facts — the strike out application was granted, with the judge noting she was bound by the House of Lords decision in *Gregory v Portsmouth City Council*, notwithstanding alternative reasoning by the Judicial Committee of the Privy Council in *Crawford*.³⁹ She did, however, facilitate a 'leapfrog' certificate enabling Willers to appeal her decision to the Supreme Court.

The Supreme Court, considering the same agreed set of facts, had two questions to resolve in considering the appeal. Firstly, in the event of conflicting decisions arising from the Judicial Committee of the Privy Council and the House of Lords, can lower courts follow the Privy Council?⁴⁰ Secondly, and most relevantly for this article, do civil

³⁵ The costs were an estimated £900,000, while the maximum sum recoverable under damages for both claims was only £400,000.

³⁶ *Willers* (n 2) 789 [4] (Lord Toulson JSC).

³⁷ *Ibid* [5].

³⁸ *Ibid* 789-90.

³⁹ *Willers v Joyce* [2015] EWHC 1315 (Ch).

⁴⁰ *Willers v Joyce* | [No 2] [2018] AC 843.

proceedings fall within the scope of malicious prosecution under English law?⁴¹

Five of the judges who heard *Crawford* as members of the Judicial Committee of the Privy Council reconvened as members of the UK Supreme Court to decide *Willers* some three years later. Much of the reasoning used by individual judges in *Willers* was, therefore, a reprisal of their earlier views in *Crawford*.

The majority, comprising a joint judgment written by Lord Toulson with Baroness Hale and Lords Kerr and Wilson agreeing,⁴² and Lord Clarke concurring in a separate judgment⁴³ – preferred the majority outcome from *Crawford* that malicious prosecution did apply to civil proceedings generally. The minority — Lords Mance⁴⁴ and Reed,⁴⁵ joining Lords Sumption⁴⁶ and Neuberger⁴⁷ from *Crawford* — would have dismissed the appeal.

The fundamental development achieved in *Crawford* and *Willers* was the expansion of the type of claim being prosecuted (Element 1). For the purposes of a malicious prosecution arising from civil proceedings, *Willers* established that prosecution means the setting of the law in motion by way of an appeal to irrelevant judicial authority, rather than prosecution in its narrower more criminal sense of instigating criminal charges. Ending the prosecution in the claimant's favour (Element 2) can arise by many means such as acquittal, reversal of conviction on appeal, discontinuance by leave of the court, or quashing of an indictment or others. In the context of civil proceedings, discontinuance with the leave of the court will suffice. *Savile v Roberts*,⁴⁸ as noted above, identifies damage (Element 5) for the purposes of malicious prosecution as consisting of damage to a person's fame, to the safety of their person or the security of their property, including expenses incurred in defending against an unjust charge.⁴⁹ At trial, put to proof of the actual, rather than agreed, facts relied on in the

⁴¹ *Willers* (n 2)

⁴² *Ibid* 806.

⁴³ *Ibid* 814.

⁴⁴ *Ibid* 833.

⁴⁵ *Ibid* 841.

⁴⁶ *Ibid* 840.

⁴⁷ *Ibid* 839.

⁴⁸ *Savile* (n 13).

⁴⁹ *Willers* (n 2) 794 (Lord Toulson JSC). Concern regarding improper exploitation of disparities in power involving litigation aimed at 'bleeding' a party into submission has been reflected in notions of governments adopting a 'model litigant' approach in civil litigation and in the emergence of Anti-SLAPP (Strategic Litigation Against Public Purpose) enactments regarding public interest activism. See, eg, Penelope Swales, "'Gunns 20" Reaches a Final Settlement' (2010) 35(1) *Alternative Law Journal* 39; Brian Walters, *Slapping on the Wrists: Defamation, Developers, and Community Activism* (UNSW Press, 2003); Byron Sheldrick, *Blocking Public Participation: The Use of Strategic Litigation to Silence Political Expression* (Wilfrid Laurier University Press, 2014); and Peter Coe, 'An Analysis of Three Distinct Approaches to Using Defamation to Protect Corporate Reputation from Australia, England and Wales, and Canada' (2021) 41(1) *Legal Studies* 111.

strikeout application and subsequent appeal, the plaintiff in *Willers* was unsuccessful in establishing the elements of the expanded tort.

In the context of malicious prosecution for civil proceedings, courts focus on the lack of reasonableness of the original prosecutor's belief that the claimant had engaged in wrongful conduct (Element 3) and also whether malice (such as strong dislike, resentment, or desire for an improper benefit) was the dominant factor driving the prosecutor to make the claims against the claimant (Element 4). These elements presented the plaintiff in *Willers* at trial with insurmountable evidentiary obstacles, ultimately resulting in the failure of his claim. Notwithstanding evidence of Mr Gubay's history of using litigation and his wealth to pursue vendettas against people — even to the extent of instructing his executors in his will to continue to pursue litigation against Willers 'vigorously' — Willers was unable to prove malice, and so the claim for malicious prosecution was dismissed.⁵⁰ The executors of Gubay's estate successfully sought to join Willers' solicitors and counsel as defendants for costs proceedings, in light of Willers' personal impecuniosity. Willers was ordered to pay standard costs to Gubay's executors, estimated at approximately £1.9 million, commencing with an interim payment of £1 million. When Willers defaulted on the interim payment, Gubay's executors sought to obtain costs from Willers' legal advisors, on the basis that they were the true instigators of the malicious prosecution claim in an attempt to recover the unpaid legal fees owed to them by Willers, which were disallowed under the costs order Willers received on discontinuation of the original claim.⁵¹

Willers is hardly alone in this position. Despite several cases now recognising that malicious prosecution claims for civil claims exists, at least in theory, in no case since has a plaintiff successfully demonstrated that it did in fact happen in their case.⁵² Paterson, the plaintiff in *Crawford*, seems to have fared somewhat better: as part of its consideration, the Privy Council recommended he be awarded \$1.335 million Cayman Island dollars, accounting for the economic loss he suffered defending the original claim, along with a further \$0.035 million in general damages for distress, hurt, and humiliation.⁵³

III Principle and Policy, after Uncertain Precedent?

Despite considering the same body of law the majority and the minority assessments of where the weight of precedential support for expansion of the categories of civil proceeding within the scope of malicious

⁵⁰ *Willers v Joyce* [No 2] [2018] EWHC 3424 (Ch).

⁵¹ *Willers v Joyce* [2019] EWHC 2183 (Ch), [5].

⁵² Mulheron (n 7). See, eg, *Robinson v Whangarei Heads Enterprises* [2015] 3 NZLR 734; *Murren v Schaeffer* [2017] NZHC 163.

⁵³ *Crawford* (n 1) 383 [29], 401 [80].

prosecution rested differed markedly throughout the judgements in *Crawford* and *Willers*. The majority judgments in each case viewed the common law as having historically recognised the tort of malicious prosecution arising from civil proceedings generally, implicitly finding that any restriction on the types of civil proceeding from which the tort could arise was random, or at best an outcome of procedural law rather than principle. Expanding recognition to civil proceedings of the type under the circumstances mooted in *Crawford* and *Willers* simply represented the next incremental step in the development of the common law. Furthermore, such recognition of the cause of action was required by legal principle to avoid injustice to the wronged party.

Alternatively, the judgments of the minority in each case reasoned that any prior recognition of malicious prosecution arising from civil proceedings occurred on a strictly limited and exceptional basis, typically warranted only when the civil proceedings occurred *ex parte*, denying the target an opportunity to present a defence, or when the civil proceedings related to immediate seizure of the person or property of the target. They concluded that recognition of the cause of action would be contrary to legal principle, and variously thought it would be creating a new tort,⁵⁴ or reviving an extinct one.

The divergent interpretation of precedent by the majorities and minorities cannot be attributed to selection of different cases or judgements either. Generally judges considered the same cases, and even the same passages from judgements, but interpreted them differently. A key example is the different interpretations of Holt CJ's observations about malice in *Savile v Roberts*, cited above.

Lord Wilson, writing the leading judgment for the majority in *Crawford*,⁵⁵ and Lord Toulson, writing the leading judgment for the majority in *Willers*,⁵⁶ both cited Holt CJ's recognition of malicious prosecution being applicable to civil proceedings where the proceedings were frivolous or vexatious. This, they reasoned, supported the proposition that while not available routinely, if civil proceedings were brought for vexatious or frivolous reasons, malicious prosecution could apply.

Lord Sumption, interpreting Holt CJ somewhat differently, highlighted the point made by Holt CJ that costs were recoverable in the civil claims, but not criminal matters, meaning that unlike in civil claims, the only option for recovery for claimants who were maliciously prosecuted for crimes was to bring the action.⁵⁷ He interpreted Holt CJ's inclusion of civil proceedings on a far narrower exceptional basis, based as the tort is on a requirement of malice. He distinguished

⁵⁴ Ibid 420.

⁵⁵ Ibid 386-8.

⁵⁶ *Willers* (n 2) 793.

⁵⁷ *Crawford* (n 1) 419.

between the public purpose of criminal prosecution and private purpose of civil claims, and also noted that Holt CJ's passage on special matter referenced *Daw v Swaine*,⁵⁸ which he cited was evidence that Holt CJ was referring specifically to an action for arrest of goods, an action subsequently subsumed by the abuse of process cause of action, and therefore, presumably, no longer good law.⁵⁹

Lord Wilson considered 'the basis of the action on the case was *damage* caused by D to C, and ... the crucial additional element was malice', while Lord Toulson thought that Holt CJ's reference to 'special matter' could apply to the malice of the defendant's conduct.⁶⁰ Lord Sumption also focused on the exceptional nature of malice in torts. But Lord Sumption tied the requirement of malice to both immunities associated with legal proceedings (which could be waived in the event the witness was motivated by malice) and more broadly to the 'public character of the function performed by the prosecutor'. This, he thought, accounted for the ongoing, but restricted, existence of the tort, including its limitation to criminal prosecution.⁶¹

Lord Toulson in *Willers* also noted that more recently in obiter in *Berry v British Transport Commission*⁶² — a malicious prosecution claim arising from criminal rather than civil proceedings — Diplock J accepted that malicious prosecution could apply to civil or criminal proceedings, provided damage could be proven. That position was repeated by Danckwerts LJ in the subsequent Court of Appeal judgment on the same case.⁶³

Nor were malice and damage the only areas where the same body of precedent led the minority and majority to vastly different conclusions: they similarly diverged over the historical rationale for including or excluding certain types of civil proceedings from the ambit of malicious prosecution, notwithstanding their citation of the same precedential material.

Lord Wilson in his majority judgment referred to the included categories of civil proceedings as a 'rag-bag', including cases where 'the gravity of the wrong ... would not approach its gravity in other cases of malicious prosecutions of civil proceedings, such indeed as in the case before the Board' (ie, *Crawford*).⁶⁴ Baroness Hale was slightly more circumspect, noting that they comprised a rational list of *ex parte* processes which do damage before they can be challenged. But that can be the only principle upon which they were singled out, and today

⁵⁸ *Daw v Swaine* (1685) 1 Sid 424; (1685) 84 ER 342; (1714) 82 ER 1195.

⁵⁹ *Crawford* (n 1) 419.

⁶⁰ *Willers* (n 2) 795 (Toulson LJ).

⁶¹ *Crawford* (n 1) 418 (Lord Sumption JSC).

⁶² [1962] 1 QB 306.

⁶³ *Willers* (n 2) 800-1.

⁶⁴ *Crawford* (n 1) 400.

bringing an ordinary action can also do damage before it can be challenged...'.⁶⁵

Lord Sumption (dissenting), in quoting Clerk & Lindsell's *The Law of Torts* (20th ed (2012), at [16-09]), identified as one of the elements of a malicious prosecution claim that 'the claimant must show first that he was prosecuted by the defendant, that is to say that the law was set in motion against him by the defendant on a criminal charge'.⁶⁶ That statement of the elements of the tort was also used by the court in *Gregory*, and other cases. It is not, however, an exhaustive statement: as Lord Sumption later acknowledged, there are some civil causes of action to which malicious prosecution does apply — what Lord Steyn in *Gregory* referred to as 'special instances of abuse of legal process'.⁶⁷ Indeed, Lord Sumption himself summarises the law as follows:

It is in my opinion entirely clear that on the law as it presently stands there is no action for the malicious prosecution of civil proceedings outside the special case of malicious winding up petitions and a small number of analogous ex parte proceedings.⁶⁸

Lord Neuberger, also dissenting, pointed out that ex parte or interlocutory proceedings may never lead to a final judgment, and as such may not provide an opportunity for a costs application and order to be made.⁶⁹

The ambiguity of the precedent case law reflects the absence of a clear principle uniting it into a coherent body of law. Evident from the discussion summarised above is a lack of clarity about the limits of scope of the tort; what the criteria for recognising its application to some but not all types of civil claims were historically; and whether those justifications remain relevant today.

Several judges — both majority and minority from both *Willers* and *Crawford* — questioned the continuing relevance of the 'poison and antidote' reasoning from *Quartz Hill*,⁷⁰ observing that changes in procedural law mean that pleadings are now widely accessible (and reportable, including by media) well in advance of trial.⁷¹ Likewise, the adequacy of costs orders overshadows much of the majority reasoning. The scale of the difference between the plaintiff's expenses in defending the claim and the costs orders awarded seems to be the harm the majority are most overtly concerned about. They consider it in

⁶⁵ Ibid 403.

⁶⁶ Ibid 414.

⁶⁷ Ibid 414-5.

⁶⁸ Ibid 420.

⁶⁹ Ibid 431.

⁷⁰ Buckley LJ, in *Wiffen v Bailey and Romford Urban District Council* [1915] 1 KB 600, 607, summarising *Quartz Hill*.

⁷¹ See, eg, *Little v Law Institute of Victoria* [Nno 3] [1990] VR 257, 283-6 (Ormiston J), 267 (Kaye and Beach JJ); *Gregory* (n 4) 432-3 (Steyn LJ); *Crawford* (n 1) 392 (Lord Wilson JSC); *Willers* (n 2) 800 (Lord Toulson JSC).

greater detail than other forms of damage that are, perhaps, consequential to the economic loss suffered by the plaintiff.⁷² Little, if any, consideration is given to the broader question of the harms done to the courts, including to their legitimacy, in the event that abusive proceedings are not adequately censured.

And there remain other areas of uncertainty in the aftermath of the decision. What, for example, is the relationship between malice and collateral purpose? Is malice a strict requirement, as seems to be the position adopted, or should something lesser, such as collateral purpose, satisfy the special circumstances of vexatious or frivolous litigation alluded to by Holt CJ in *Savile v Roberts*, and invoked by both minority and majority? Is there, a need to consider the broader contemporary issue of the relationship between abuse of rights, in the sense of modern human or statutory protections, and abuse of process? It is difficult to see how being the target of an abusive process or a malicious prosecution would not infringe the rights of the plaintiff; yet surprisingly, given the UK has a Bill of Rights, this point attracted no judicial discussion.

Nor is there agreement on the future – or even existence – of the torts. Should they, for example, continue as two overlapping but nominally distinct torts, or should they, as Baroness Hale suggested, be merged into a single tort? Is one of them, as suggested by Lord Sumption, already become extinct?

In the absence of clear precedent, therefore, the judges drew on considerations of principle and policy to reach a decision which raises even greater uncertainty. Yet as the judgments again demonstrate, there is no clear consensus about how principle and policy should be used in judicial decision-making to achieve even those imprecise outcomes.

It is clear that different judges in both *Crawford* and *Willers* have very different views on the roles of principle and policy in judicial decision-making, despite over fifty years of intense academic and judicial debate on the subject. That debate gives rise to at least three separate issues, each of which is relevant for the current discussion. They are:

1. What is the taxonomic relationship between rules, principles, and policy?;
2. Are questions of principle and policy justiciable?; and
3. Assuming they are, what relative weighting should be accorded to each in any given situation requiring the exercise of judicial discretion - or, indeed, evaluation?

⁷² See, eg, *Crawford* (n 1) 397-8; *Willers* (n 2) 806 (Lord Toulson JSC).

In this section of the paper we will unpack each of these issues in a little more detail, to provide background for the differences separating the majority and the minority on *Crawford* and *Willers*.

A *Rules, principles, and policies*

In *The Concept of Law*, Hart drew a distinction between ‘primary’ and ‘secondary’ rules, the former of which were effective due to social acceptance of them, the latter of which were effective as a result of the authority or validity they demonstrated. Dworkin, responding to Hart’s model of positivism, argued that Hart’s model failed to account for other factors evident within a system of laws, including standards, principles, and policy. Principle and policy are increasingly referred to by judges in deciding cases but are not rigidly defined concepts. ‘Principle’ is usually thought of as akin to a rule but pitched at a higher level of generality. It is sometimes thought of in axiomatic terms as a starting point for reasoning. It is often of an ethical content.

Policy is a broader-based concept usually referring to socio-economic or political goals.

The distinction between them was used by Ronald Dworkin in his critique of Hart’s *Concept of Law*, which analysed a legal system in terms of a union of primary and secondary rules adopting a broad approach to rules.

Dworkin in his article ‘The Model of Rules’⁷³ in 1977 observed that when lawyers reason or dispute about legal rights and obligations, particularly in those hard cases when our problems with these concepts seem most acute, they make use of standards that do not function as rules, but operate differently as principles, policies, and other sorts of standard.

⁷⁴

He argued that rules differ from principles:

The difference between legal principles and legal rules is a logical distinction. Both sets of standards point to particular decisions about legal obligation in particular circumstances, but they differ in the character of the direction they give. Rules are applicable in an all-or-nothing fashion. If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision.⁷⁵

Principles describe rights whereas policies describe goals. Rights have a threshold weight against community goals. Rights have primacy.

Hart continued their debate in his old age but never fully addressed Dworkin’s criticisms.

⁷³ Ronald Dworkin, ‘The Model of Rules’ in *Taking Rights Seriously* (Duckworth, 1977) 14-45.

⁷⁴ Ibid 22.

⁷⁵ Ibid 25.

Although Dworkin derived his original terminology from Roscoe Pound, he was excessively dogmatic and at other times elusive.⁷⁶ Nevertheless, his views have found favour with some senior judges, although one has the impression that they have not read much of his work nor committed themselves to his shifting positions. An earlier case that illustrates the differences between senior judges well is *McLoughlin v O'Brien* (*McLoughlin*).⁷⁷ The judgements in *McLoughlin* demonstrate the tension between principle and policy in judicial reasoning and a reluctance to give one priority over the other. Assuming the justiciability of principle and policy, there remains a question of priority between the two. Is Dworkin correct that principles trump policy, or is it looser than that? Is he in fact guilty of circular reasoning and are judges engaged in a more flexible process?

In *McLoughlin*,⁷⁸ the court had to decide whether recovery for psychological harm suffered by a woman whose family was involved in a serious motor vehicle accident, resulting in the death of one of her children, should be permitted, even though the woman was not present at the scene of the accident but attended the hospital immediately after being advised of the accident's occurrence. The Court of Appeal found that the woman's harm was reasonably foreseeable, but while Griffiths LJ found that the duty of care owed by the defendants was restricted to those on the road, or nearby, at the time of the accident, Stephenson LJ found that the defendants did owe the plaintiff a duty of care, although policy considerations would prevent her from being permitted to recover damages.⁷⁹

Lord Wilberforce summarised the issue, and the outcomes at the Court of Appeal, as follows:

Though differing in expression, in the end, in my opinion, the two presentations rest upon a common principle, namely that, at the margin, the boundaries of a man's responsibility for acts of negligence have to be fixed as a matter of policy. Whatever is the correct jurisprudential analysis, it does not make any essential difference whether one says, with Stephenson L.J., that there is a duty but, as a matter of policy, the consequences of breach of it ought to be limited at a certain point, or whether, with Griffiths L.J., one says that the fact that consequences may be foreseeable does not

⁷⁶ See, eg, Maija Aalto-Heinilä, 'Wittgenstein, Dworkin and Rules' (2009) *From the ALWS Archives: A Selection of Papers from the International Wittgenstein Symposia in Kirchberg am Wechsel* <<https://wab.uib.no/ojs/index.php/agora-alws/article/view/2753>>, which resists the idea that rules must be determinate and absolute, as demanded by Dworkin. The same is true of principles. See Lord Goff, 'An Innocent Turns to Crime' [1984] 5(2) *Statute Law Review* 5, 14-15; and Louis E Wolcher, 'Ronald Dworkin's Right Answers Thesis Through the Lens of Wittgenstein', (1997) 29(1) *Rutgers Law Journal* 43.

⁷⁷ *McLoughlin v O'Brien* [1983] 1 AC 410.

⁷⁸ *Ibid.*

⁷⁹ *McLoughlin v O'Brien* [1981] QB 599.

automatically impose a duty of care, does not do so in fact where policy indicates the contrary.⁸⁰

The House of Lords ultimately found in favour of recovery, however, the methodological approaches used by the individual members are far from consistent. In particular, the court diverged over the legitimacy of policy considerations in determining the outcome.

Citing Lord Diplock in *Dorset Yacht Co v Home Office*,⁸¹ and Lord Reid in *British Railways Board v Herrington*,⁸² both of whom found that in the absence of legal principle, the courts must turn to policy in order to establish the limits of liability, Lord Edmund-Davies accepted that

any invocation of public policy calls for the closest scrutiny, and the defendant might well fail to discharge the burden of making it good, as, indeed, happened in *Rondel v Worsley* [1969] 1 AC 191. But that is not to say that success for the defendant would be unthinkable.

He continued:

I hold that public policy issues *are* ‘justiciable’. Their invocation calls for close scrutiny, and the conclusion may be that its nature and existence have not been established with the clarity and cogency required before recognition can be granted to any legal doctrine, and before any litigant can properly be deprived of what would otherwise be his manifest legal rights. Or the conclusion may be that adoption of the public policy relied upon would involve the introduction of new legal principles so fundamental that they are best left to the legislature... In the present case the Court of Appeal did just that, and in my judgment they were right in doing so. But they concluded that public policy required them to dismiss what they clearly regarded as an otherwise irrefragable claim. In so concluding, I respectfully hold that they were wrong, and I would accordingly allow the appeal.’

He also quoted with approval the judgment of Kennedy J in *Dulieu v White*.⁸³

I should be sorry to adopt a rule which would bar all such claims on grounds of policy alone, and in order to prevent the possible success of unrighteous or groundless actions. Such a course involves the denial of redress in meritorious cases, and it necessarily implies a certain amount of distrust which I do not share, in the capacity of legal tribunals to get at the truth in this class of claim.⁸⁴

Lord Russell of Killowen similarly found:

⁸⁰ *McLoughlin* (n 77) 410 [5].

⁸¹ [1970] AC 1004, 1058 D.

⁸² [1972] AC 877, 897 C.

⁸³ [1901] 2 KB 669.

⁸⁴ *Ibid* 681.

I would not shrink from regarding in an appropriate case policy as something which may feature in a judicial decision. But in this case what policy should inhibit a decision in favour of liability to the plaintiff? Negligent driving on the highway is only one form of negligence which may cause wounding or death and thus induce a relevant mental trauma in a person such as the plaintiff. There seems to be no policy requirement that the damage to the plaintiff should be on or adjacent to the highway. In the last analysis any policy consideration seems to be rooted in a fear of floodgates opening—the tacit question ‘What next?’. I am not impressed by that fear—certainly not sufficiently to deprive this plaintiff of just compensation for the reasonably foreseeable damage done to her. I do not consider that such deprivation is justified by trying to answer in advance the question posed ‘What next?’ by a consideration of relationships of plaintiff to the sufferers or deceased, or other circumstances: to attempt in advance solutions, or even guidelines, in hypothetical cases may well, it seems to me, in this field, do more harm than good.⁸⁵

Lord Scarman, in contrast, rejected the legitimacy of policy as a consideration in judicial determination. Considering the law-making functions of court and legislature, and the relationship between principle and policy, he observed:

The appeal raises directly a question as to the balance in our law between the functions of judge and legislature. The common law, which in a constitutional context includes judicially developed equity, covers everything which is not covered by statute. It knows no gaps: there can be no ‘casus omissus’. The function of the court is to decide the case before it, even though the decision may require the extension or adaptation of a principle or in some cases the creation of new law to meet the justice of the case. But, whatever the court decides to do, it starts from a baseline of existing principle and seeks a solution consistent with or analogous to a principle or principles already recognised. The distinguishing feature of the common law is this judicial development and formation of principle. Policy considerations will have to be weighed: but the objective of the judges is the formulation of principle. And, if principle inexorably requires a decision which entails a degree of policy risk, the court's function is to adjudicate according to principle, leaving policy curtailment to the judgement of parliament. Here lies the true role of the two lawmaking institutions in our constitution. By concentrating on principle that judges can keep the common law alive, flexible, and consistent, and keep the legal system clear of policy problems which neither they, nor the forensic process which it is their duty to operate, are equipped to resolve. If principle leads to results which are thought to be socially unacceptable, parliament can legislate to draw a line or map out a new path.⁸⁶

⁸⁵ *McLoughlin* (n 77) 411 (Russell LJ).

⁸⁶ *Ibid* 430 (Scarman LJ).

B *The justiciability of principle and policy*

In a paragraph which Lord Edmund-Davies, rejecting the idea that policy issues were ‘non-justiciable’, confessed himself ‘startled’ by, Lord Scarman concluded:

Why then should not the courts draw the line, as the Court of Appeal manfully tried to do in this case? Simply, because the policy issue as to where to draw the line is not justiciable. The problem is one of social, economic, and financial policy. The considerations relevant to a decision are not such as to be capable of being handled within the limits of the forensic process.⁸⁷

Nor is Lord Scarman alone in his view that questions of policy at least are outside the scope of what is justiciable. There is an extensive academic literature on the appropriateness or otherwise of judges considering policy factors. Academic realists argue that this is something judges have always done: the recent development lies not in its occurrence, but rather in its acknowledgment.⁸⁸ These scholars tend to adopt a more outwardly focused view of negligence law, emphasising its significance as both a means of social welfare, and also a means of general deterrence. In contrast, other judges and scholars who adopt a more internalised view of torts law as a means of primarily or even exclusively doing justice *intra partes*,⁸⁹ find that broader questions of policy have no role to play in judicial decision-making. Further, they note that judges are ill-equipped to consider questions of policy which, in their view, are more appropriately left to the legislature to develop and amend as it sees fit.

⁸⁷ Ibid 431.

⁸⁸ See, eg, Andrew Robertson, ‘Policy-Based Reasoning in Duty of Care Cases’ (2013) 33(1) *Legal Studies* 119; Jane Stapleton, ‘The Golden Thread at the Heart of Tort Law: Protection of the Vulnerable’ (2003) 24(2) *Australian Bar Review* 135; Jane Stapleton, ‘Duty of Care Factors: A Selection from the Judicial Menus’ in Peter Cane and Jane Stapleton (eds), *The Law of Obligations: Essays in Celebration of John Fleming* (Clarendon Press, 1998) 340; Harold Luntz, ‘The Use of Policy in Negligence Cases in the High Court of Australia’ in Michael Bryan (ed), *Private Law in Theory and Practice* (Routledge-Cavendish, 2007) 55; James Plunkett, ‘Principle and Policy in Private Law Reasoning’ (2016) 75(2) *Cambridge Law Review* 366; Kylie Burns, ‘It’s Not Just Policy: the Role of Social Facts in Judicial Reasoning in Negligence Cases’ (2013) 21(2) *Torts Law Journal* 73; Kylie Burns, ‘In This Day and Age’: Social Facts, Common Sense and Cognition in Tort Law Judging in the United Kingdom’ (2018) 45(2) *Journal of Law and Society* 226; Christian Witting, ‘Tort Law, Policy and the High Court of Australia’ (2007) 31(2) *Melbourne University Law Review* 569; Jonathan Morgan, ‘Policy Reasoning in Tort Law: The Courts, the Law Commission and the Critics’ (2009) 125 *Law Quarterly Review* 215.

⁸⁹ See, eg, Ernest Weinrib, *The Idea of Private Law* (Oxford University Press, 2012); Allan Beever, *Rediscovering the Law of Negligence* (Hart, 2007).

C *Weighting of principle and policy in evaluative judicial 'discretion'*

Assuming that issues of principle and policy are justiciable, there remains a question of how they should be used in practice by judges confronted with 'hard' cases. Although judges are often described as exercising a discretion, based on the way they describe their reasoning in judgments it is more accurate to state they are undertaking an evaluation. In evaluation, each of a set of competing factors is accorded a weight, reflecting the judge's assessment of the factors relative significance. Where the variability between judicial outcomes resulting from consideration of the same issues arises is in the criteria used by the judge to determine the appropriate weight to assign to each factor. Development of those criteria are the source of judicial discretion, rather than the overall outcome.

Some of the reasons relied on by the courts in *Crawford* and *Willers* illustrate this process clearly, demonstrating how consideration of a common set of factors, appealing to both individual interests and the interests of the community, can result in individual judges reaching diametrically opposed views on a particular set of facts. While this evaluative reasoning process might not matter if those interests coincide, in a judicial undertaking requiring evaluation of multiple conflicting reasons grounded in both principle and policy, such as the present, internal incoherence with each reason further adds to the noise and lack of certainty and predictability underpinning the final determination. This in turn has implications for the legitimacy of the courts, and the certainty of outcome, a fundamental component of the Rule of Law.

It is perhaps enlightening that even in the earliest days of considering the tort of malicious prosecution, the courts showed grave concerns about the policy implications of its recognition. Holt CJ in *Savile v Roberts* stated, 'though this action will lie, yet it ought not to be favoured, but managed with great caution'.⁹⁰ Similarly, Parker CJ in *Jones v Givin*, acknowledging the potential chilling effect of the tort on honest plaintiffs, stated:

The difficulty, which stood most in the way of these actions, was the fear of discouraging prosecutions, and the regard to what was done in a legal course to bring offenders to punishment... [But] requiring satisfaction from those who proceed out of mere malice and wickedness without any reasonable ground, will be no discouragement at all to him who honestly proceeds on reasonable grounds.⁹¹

The need to strike a balance between the principle of doing justice to those who were maliciously prosecuted, and the policy requirement that

⁹⁰ Quoted in *Crawford* (n 1) 389, [48].

⁹¹ (1713) Gilb Cas 185, 209-10 ; 93 ER 300, quoted in *Crawford* (n 1) 389-90, [55].

the tort not be permitted to discourage those with a legitimate cause of action from appealing to the courts - a right itself in accordance with principle - was evident from both the words of the judges, and the limited appearance of the tort before the courts. Indeed, the high thresholds set for the plaintiff in order to bring a claim in the tort (particularly the need to demonstrate both malice and lack of reasonable and probable cause) operated to filter out many putative claims including, we might suspect, some legitimate ones.

As Lord Kerr noted:

Establishing the various rudiments of the tort of malicious prosecution is no easy task. Two particular elements constitute significant challenge by way of proof. It has to be shown that there was no reasonable or probable cause for the launch of the proceedings. This requires the proof of a negative proposition, normally among the most difficult of evidential requirements. Secondly, malice must be established. ... There is no reason that proof of malice in the civil context should be any less stringent. Together these requirements present a formidable hurdle for anyone contemplating the launch of a claim for malicious prosecution.⁹²

In addition to the concerns about the ‘chilling effect’ of, firstly, recognition of malicious prosecution, and, more recently, expansion as per *Willers* and *Crawford*, the majority and minority in these cases identified and considered many other principle and policy considerations arguing both in favour of, and against, recognition of malicious prosecution across an expanded range of civil actions.

These variously include:

1. The chilling or deterrent effect of the spectre of being sued for malicious prosecution in dissuading claimants to bring claims in the first place;⁹³
2. The need for finality in litigation, rather than permitting ‘lack of success in one action (to) generate another’;⁹⁴
3. An assumption that further litigation is the only way to ‘cure’ the injustice experienced by the claimant;⁹⁵
4. The legitimacy of expanding the action if few - if any - plaintiffs will succeed in bringing a claim;⁹⁶
5. A ‘floodgates’ argument which, in contrast to the above, presumes that plaintiffs will flock to the court in droves for

⁹² *Crawford* (n 1) 408 (Lord Kerr JSC).

⁹³ *Crawford* (n 1) 396 (Lord Wilson JSC), 402 (Baroness Hale JSC), 413 (Lord Sumption JSC); *Willers* (n 2) 802 (Toulson LJ).

⁹⁴ *Crawford* (n 1) 396 (Wilson JSC), 432 (Neuberger JSC), 402 (Baroness Hale), 405 (Lord Kerr JSC), 413-4, 422 (Lord Sumption JSC); *Willers* (n 2) 803 (Toulson LJ)

⁹⁵ *Crawford* (n 1) [2014] 396 (Lord Wilson JSC), 432 (Lord Neuberger PSC).

⁹⁶ *Ibid* 396 (Lord Wilson JSC).

the express purpose of suing under the newly expanded cause of action;⁹⁷

6. A perspective that the existing law provides a ‘principled’ foundation for the tort, which would be disturbed unnecessarily and undesirably by recognising the expanded scope of the tort, creating uncertainty;⁹⁸
7. The reasoning behind restricting availability of the tort outlined in *Quartz Hill* and subsequent cases no longer remains valid, if indeed it ever was;⁹⁹
8. That recognition of the tort is inconsistent with immunities for legal proceedings;¹⁰⁰
9. That recognition of the tort is inconsistent with the accepted legal position that parties in litigation do not owe each other duties of care;¹⁰¹
10. That the tort requires a public function component, or restricted to those exercising the coercive power of the state;¹⁰²
11. That recognition of the expanded tort necessarily demands recognition of a corresponding tort of malicious defence;¹⁰³
12. That other torts are capable of responding to injustice arising from malicious prosecution of civil claims;¹⁰⁴
13. That malice does not render an otherwise lawful act tortious;¹⁰⁵ and
14. That the verdict and costs orders are designed to prevent injustice, and recognition of the tort would permit double recovery.¹⁰⁶

As Baroness Hale pointed out, at least some of the policy reasons presented were not supported by empirical evidence: ‘We do not know how real the claims of a chilling effect can be; we do know how real the injustice of being the victim of malicious proceedings can be’.¹⁰⁷ In a similar theme, Lord Kerr noted:

⁹⁷ *Crawford* (n 1) 396 (Lord Wilson JSC); *Willers* (n 2) 802 (Lord Toulson JSC).

⁹⁸ *Crawford* (n 2) 420 (Lord Sumption JSC), 434 (Lord Neuberger PSC); *Willers* (n 2) 804-6 (Lord Toulson JSC).

⁹⁹ See *Gregory* (n 4) 427-8 (Steyn LJ).

¹⁰⁰ *Crawford* (n 1), 405 (Lord Kerr JSC), 420 (Lord Sumption JSC); *Willers* (n 2), 804 (Lord Toulson JSC).

¹⁰¹ *Crawford* (n 1) 412 (Lord Sumption JSC); *Willers* (n 2) 804 (Lord Toulson JSC).

¹⁰² *Crawford* (n 1) 407 (Lord Kerr JSC), 420-1 (Lord Sumption JSC); *Willers* (n 2) 804 (Lord Toulson JSC).

¹⁰³ *Crawford* (n 1) 406, 408-9 (Lord Kerr JSC); *Willers* (n 2) 804 (Lord Toulson JSC).

¹⁰⁴ See *Gregory* (n 4) 432 (Lord Steyn); *Crawford*, (n 1) 410 (Lord Kerr JSC).

¹⁰⁵ *Crawford* (n 1) 420 (Lord Sumption JSC).

¹⁰⁶ *Crawford* (n 1) 410 (Lord Kerr JSC); see also *Gregory* (n 4) 432 (Steyn LJ); *Willers* (n 2) 803 (Lord Toulson JSC).

¹⁰⁷ *Crawford* (n 1) 403 (Baroness Hale JSC).

As a general observation, however, it is right to recognise that conclusions on matters of policy in the legal context are not usually the product of empirical research. Customarily, they are formed instinctually and constitute, at most, informed guesswork about the impact that the selection of a particular policy course will have. While, therefore, policy considerations can, and on occasions must, underlie decisions as to how law should develop, it is necessary to recognise the inherent impossibility of making an infallible prediction about the outcome of a policy choice. Where possible, therefore, such a choice should be aligned with principle. In my view, fundamental principle has a large part to play in the resolution of the debate in this case. And the pre-eminent principle at stake here is that for every injustice there should be remedy at law.¹⁰⁸

In doing so, he neatly summed up the approach to principle and policy adopted by the majorities throughout *Willers* and *Crawford*: principle (specifically that injustice should not be left without a remedy) trumped all other policy considerations.

Lord Toulson, leading the majority in *Willers*, quoted Holt CJ in *Savile v Roberts*:

if this injury be occasioned by a malicious prosecution, it is reason and justice that he should have an action to repair him the injury.¹⁰⁹

He continued:

This appeal to justice is both obvious and compelling. It seems instinctively unjust for a person to suffer injury as a result of the malicious prosecution of legal proceedings for which there is no reasonable ground, and yet not be entitled to compensation for the injury intentionally caused by the person responsible for instigating it. It was that consideration which led the judges to create the tort of malicious prosecution, as can be seen in the case law.¹¹⁰

The minority view, that principle does not outweigh policy, is also evident from Lord Mance's dissenting judgment in *Willers*. Echoing Lord Sumption's approach in *Crawford*, quoted above, he stated:

That the Supreme Court must also engage closely with legal policy is I think clear. Viewed in isolation, the assumed facts of this case make it attractive to think that the appellant should have a legal remedy. But the wider implications require close consideration. We must beware of the risk that hard cases make bad law, and we are entitled to ask why, until the Privy Council's majority decision in *Crawford v Sagikor*, there has been an apparent dearth of authority in this jurisdiction for a claim such as the appellant wishes to pursue.¹¹¹

¹⁰⁸ Ibid 405.

¹⁰⁹ *Willers* (n 2) 802.

¹¹⁰ Ibid 803.

¹¹¹ Ibid 814 (Mance LJ).

The reasoning in both *Crawford* and *Willers* illustrates the importance of understanding the principle – policy conundrum in judicial decision-making. Recognition of the expanded scope of the tort — by a margin of a single judge in each instance — is explained by the difference in judicial understanding of the role and legitimacy of policy in judicial decision-making, and its distinction from principle. More broadly, the debate reflects the question of the appropriate separation of judicial and legislative powers worthy of further academic and judicial consideration.

However, as Lord Goff cautioned in a lecture in 1984:

We have to be very careful indeed to avoid too precise a formulation of principles. Legal principles are perhaps best regarded as basking sharks, lying just beneath the surface of the water, perceptible, indeed recognisable, but undefined. Definition may not only lead to error or injustice, as new fact-situations, unperceived by the author, come to light. Definition may also preclude an adjustment, a re-drawing of the boundaries, a shifting of the marking-buoys.¹¹²

IV The (Uncompensated) Costs of Doing Law...

As is seen from the above sections, the decision in *Crawford* and *Willers* to recognise malicious prosecution as applicable to an expanded range of civil actions is not a convincing one from either a precedent or a principle and policy perspective. Analysis of neither precedent, nor principle and policy, points to a clear outcome, deviation from which could be identified as an error of law. Rather, the differences in outcome between the majority and the minority reasoning appear to rest on entirely marginal differences in perspective, including on different evaluative weightings accorded to various considerations by different individual judges. It is, at its heart, a matter of individual judicial judgment and discretion operating to fill a void in the practical reasoning toolkit available to judges presented with ‘hard cases’.

In this case the outcome is not necessarily wrong. We would, however, argue that it is unpersuasive. In this section of the article, we suggest that perhaps the reason for this outcome is that the vehicle for remedy chosen (malicious prosecution) is in fact the wrong means of achieving a remedy for the primary harm in these cases, assuming a remedy is in fact required.

On reading the judgments, it becomes apparent that the primary harm the majority sought to address was the uncompensated legal costs incurred by the plaintiff in defending the initial civil claim. Given that, it is unsurprising that the majority accepted that economic loss for unrecovered costs should be recognised as a head of damage under the expanded tort, while the minority reasoned that they should not.

¹¹² Lord Goff, ‘An Innocent Turns to Crime’ [1984] 5(2) *Statute Law Review* 5, 14-15.

Despite the claims ultimately being resolved in their favour, costs orders received by the wronged defendants fell far short of the sums expended by them. The wrong, therefore, is at least in part attributable to the reluctance (or inability) of the courts to award costs that would adhere to the compensatory principle of *restitutio in integrum*.

Lord Toulson in *Willers* stated:

Newey J's decision to award costs to Mr Willers on a standard basis is readily understandable. The action had been discontinued and the judge would not have been able to determine whether Mr Willers should recover indemnity costs without conducting what would have amounted to a trial of the present action. On the other hand, the notion that the costs order made has necessarily made good the injury caused by Mr Gubay's prosecution of the claim is almost certainly a fiction, and the court should try if possible to avoid fictions, especially where they result in substantial injustice. A trial of Mr Willers' claim will of course take up further court time, but that is not a good reason for him to have to accept a loss which he puts at over £2m in legal expenses. Expenditure of court time is sometimes the public price of justice.¹¹³

Lord Sumption in *Crawford* also noted:

Claims in respect of the initiation or conduct of litigation give rise to particular difficulty. The court has an inherent jurisdiction and extensive procedural powers to control its proceedings. The ordinary assumption is that these are apt to prevent abuse and injustice. In a case where their exercise is inappropriate or incapable of achieving that purpose, that is because the claimant is entitled to prosecute his proceedings and the only appropriate intervention by the court is to resolve them on their merits. In dealing with the risk that its process may be abused, the law has always been extremely reluctant to go beyond the exercise of the court's procedural powers in a way that may fetter or deter access to justice or the right of parties to prosecute legally intelligible claims as they see fit.¹¹⁴

He noted with approval the views of the High Court in *Jain v Trent Strategic Health Authority*:

Where the preparation for, or the commencement or conduct of, judicial proceedings before a court, or of quasi-judicial proceedings before a tribunal such as a registered homes tribunal, has the potential to cause damage to a party to the proceedings, whether personal damage such as psychiatric injury or economic damage as in the present case, a remedy for the damage cannot be obtained via the imposition on the opposing party of a common law duty of care. The protection of parties to litigation from damage caused to them by the litigation or by orders made in the course of the litigation must depend upon the control of the litigation by the court or

¹¹³ *Willers* (n 2), 806.

¹¹⁴ *Crawford* (n 1) 412.

tribunal in charge of it and the rules and procedures under which the litigation is conducted.¹¹⁵

Both the majority and the minority acknowledge that the claimant in malicious prosecution claims has experienced hardship. The critical differences in their views lay in firstly, whether such losses should be compensated at law; secondly, whether malicious prosecution is the right way to provide that compensation; and thirdly, whether those losses would be recoverable under any expanded malicious prosecution tort.

As demonstrated by the procedural history of *Willers* in the aftermath of the Supreme Court decision, recognition of the expanded scope of the tort did nothing to put coin back in the pocket of the unfortunate Willers or his legal representatives. Rather than relying on prolonged retaliatory litigation with questionable prospects of success as a means of addressing the injustice identified by the majority, a more direct and effective approach for law reformers, judicial and otherwise, might be to agitate for reform of the rules of procedure, particularly those regarding costs.

It is long established that courts, particularly superior courts, enjoy inherent jurisdiction to govern their own procedures. Writing in 1970, Master Jacob described the jurisdiction as ‘so amorphous and ubiquitous and so pervasive in its operation that it seems to defy the challenge to determine its quality and to establish its limits’.¹¹⁶ He subsequently unpacked some of the properties and characteristics of the jurisdiction. Significantly, he noted that the inherent jurisdiction of the court can coexist alongside any jurisdiction conferred by statute, ‘even in respective matters which are regulated by statute or by rule of court, so long as it can do so without contravening any statutory provision.’¹¹⁷ The coexistence of inherent and statutory power is axiomatic in Australian courts and expressly recognised in statute.

Jacob characterised the features of inherent jurisdiction as follows:

1. inherent jurisdiction is part of procedural law — both criminal and civil — rather than substantive law;
2. it is exercised summarily, rather than by trial;
3. it can be applied not just to parties engaged in litigation, in respect to matters under consideration in litigation, but more broadly, to anyone, or any matter, which comes to the attention of the court;
4. inherent jurisdiction is different from judicial discretion; and

¹¹⁵ [2009] AC 853, 868 [35].

¹¹⁶ I H Jacob, ‘The Inherent Jurisdiction of the Court (1970) 23(1) *Current Legal Problems* 23, 52.

¹¹⁷ *Ibid* 24.

5. inherent jurisdiction applies to any case regardless of the existence of rules of court specifically governing cases of that type. Rules of court supplement, rather than replace, the inherent jurisdiction.

Two of the most common examples of the inherent jurisdiction are contempt of court and the power to regulate the practice of and prevent abuse of process. Contempt of court includes ‘contempt in the face or the presence of the court, disobedience to the process of the court, and irregularities and misfeasance of its officers.’¹¹⁸ Such powers appear to date back to the time of the abolition of the Star Chamber in 1641. With respect to its self-regulation powers, Lord Blackburn famously stated:

But from early times (I rather think, though I have not looked at it enough to say, from the earliest times) the court had inherently in its power the right to see that its process was not abused by proceeding without reasonable grounds, so as to be vexatious and harassing – the court had a right to protect itself against such an abuse, ... it was done by the court informing its conscience upon affidavits, and by a summary order to stay the action which was brought under such circumstances as to be an abuse of the process of the court; and in a proper case they did stay the action’.¹¹⁹

Regarding the existential nature of the inherent jurisdiction, Jacob notes:

the essential character of a superior court of law necessarily involves that it should be invested with the power to maintain its authority and to prevent its process being obstructed and abused. Such a power is intrinsic in a superior court; it is its very lifeblood, its very essence, its immanent attribute. Without such a power, the court would have form but would lack substance. The jurisdiction which is inherent in a superior court of law is that which enables it to fulfil itself as a court of law.¹²⁰

In so saying, he echoes the views of Lord Morris of Borth-y-Gest:

There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A court must enjoy such powers in order to enforce its rules of practise and to suppress any abuse is of its process and to defeat any attempted thwarting of its process.¹²¹

In *Williams v Spautz*, the High Court of Australia stated:

there are two fundamental policy considerations which must be taken into account in dealing with abuse of process in the context of criminal proceedings. ... The first is that the public interest in the administration of justice requires that the court protect its ability to function as a court of law

¹¹⁸ Ibid 26.

¹¹⁹ *Metropolitan Bank v Pooley* (1885) 10 App Cas 210, 220-1.

¹²⁰ IH Jacob, ‘The Inherent Jurisdiction of the Court’ (1970) 23(1) *Current Legal Problems* 23, 27.

¹²¹ *Connelly v DPP* [1964] AC 1254, 1301.

by ensuring that its processes are used fairly by State and citizen alike. The second is that, unless the court protects its ability so to function in that way, its failure will lead to an erosion of public confidence by reason of concern that the court's processes may lend themselves to oppression and injustice.¹²²

Yet the courts will exercise those powers only sparingly:

To my mind it is evident that our judicial system would never permit a plaintiff to be 'driven from the judgement seat' in this way without any court having considered his right to be heard, except in cases where the cause of action was obviously bad and almost incontestably bad.¹²³

Since 1875 the various courts have developed their powers to summarily dismiss actions that constitute abuse of the court's processes: actions which are vexatious or frivolous, brought in bad faith, or designed to harass or oppress the other party. The court is empowered to terminate such proceedings summarily, or to stay or dismiss an action or strike out a defence. These powers enable the court to prevent its processes from being weaponised in the hands of parties to oppress or harass each other.¹²⁴

Mason, writing on the inherent jurisdiction of the court, identified the formulation of rules of court and practice directions as one of the critical functions of the inherent jurisdiction, designed to ensure convenience and fairness in legal proceedings. He observed that

Now that most courts have statutory powers to make rules these inherent powers are seldom called on. However, issue of practice directions is an instance of a court's inherent jurisdiction to order its own business. These powers extend to the imposition of sanctions involving the payment of costs upon failure to adhere to the procedures laid down.¹²⁵

Mason also noted that historically courts have had the power under the inherent jurisdiction to stay civil proceedings until such time as the plaintiff provides security for costs. Notwithstanding legislation and rules of court addressing this issue, in Mason's view this inherent jurisdiction is not restricted merely by virtue of existence of statutory coverage.

Since the time of Jacob and Mason's writing, there has been a tendency for the inherent powers to be supplemented or codified by legislation and court procedure rules. Writing in 1997, Dockray concluded that inherent jurisdiction should be treated as 'a rational collection of related common law powers, each of which has a separate

¹²² (1992) 174 CLR 509, 520 (Mason CJ, Dawson, Toohey, and McHugh JJ).

¹²³ *Dyson v Attorney General* [1911] 1 KB 410, 419, (Fletcher-Moulton LJ).

¹²⁴ IH Jacob, 'The Inherent Jurisdiction of the Court' (1970) 23(1) *Current Legal Problems* 23, 41.

¹²⁵ Keith Mason, 'The Inherent Jurisdiction of the Court' (1983) 57(8) *Australian Law Journal* 449, 449.

history, aims and boundaries, but all of which must take second place to statutes and to mandatory procedural rules.¹²⁶

Sime, writing more recently, went one step further. He argued that while existing applications of the inherent jurisdiction should be retained, it is no longer acceptable for the English higher court, and equivalent courts in other jurisdictions, to generate new procedural law by resorting to the inherent jurisdiction.¹²⁷

While the inherent powers of the court provide authority for how costs orders will be applied by the courts, the availability of costs in the common law courts has historically been derived from statute.¹²⁸ According to Goodhart writing in 1929, '(t)he first statute which gave the plaintiff his costs, and the one on which the whole law on the subject was based until 1875, was the *Statute of Gloucester* (1275). Quoting Lord Coke, he stated

Here is expresse mention made but of the costs of his writ, but it extendeth to all the legall cost of the suit, but not to the costs and expences of his travell and losse of time, and therefore costages commeth of the verb conster, and that again of the verb constare, for these costages must constare to the court to be legall costs and expences.¹²⁹

In essence, the statute permitted recovery of legal costs associated with the writ, but not expenses associated with loss of time, or travel, incurred in pursuing or defending the writ.

Successful defendants became entitled to costs progressively. A 1487 statute provided that if a writ was discontinued, or the plaintiff non-suited, the defendant could recover costs.¹³⁰ Defendant cost recovery culminated in 1606 when a statute permitted a successful defendant to recover costs in all originating proceedings in which costs would have been available to a successful plaintiff.¹³¹ The *Supreme Court of Judicature Acts 1873 and 1875* modified the rule that 'costs follow the event' by granting judges discretion to award costs where the jurisdiction to do so existed,¹³² enabling the court to withhold costs from a victorious litigant under certain circumstances.¹³³

¹²⁶ MS Dockray, 'The Inherent Jurisdiction to Regulate Civil Proceedings' (1997) 113(1) *Law Quarterly Review* 120, 125.

¹²⁷ Stuart Sime, 'Inherent Jurisdiction and the Limits of Civil Procedure' in Andrew Higgins and Rabeea Assy (eds), *Principles, Procedure, and Justice: Essays in Honour of Adrian Zuckerman* (Oxford University Press, 2020).

¹²⁸ *Garnett v Bradley* (1878) 3 App Cas 944, 953–4 (Hatherley LJ). In contrast, the availability of costs in equity has always been based on the court's inherent jurisdiction. See *Jones v Coxeter* (1742) 26 ER 642, 642 (Hardwicke LJ).

¹²⁹ Arthur Goodhart, 'Costs' (1929) 38(7) *Yale Law Journal* 849, 852.

¹³⁰ *Costs in Error Act 1487*, 3 Hen VII, c 10.

¹³¹ *Costs Act 1606*, 4 Jac I, c 3.

¹³² *Re Mills' Estate* (1886) 34 Ch D 24, 33 (Cotton LJ), 42–3 (Fry LJ).

¹³³ Goodhart (n 129).

The availability of costs, therefore, is a product of statute rather than of the court's inherent powers.¹³⁴ Despite modern day rules of court providing models for assessment of costs on an indemnity (party-solicitor) basis, court rules provide limited express guidance to the courts in determining how costs should be assessed or imposed in the context of malicious or abusive proceedings: the 'rule' that 'costs follow the event', on an 'ordinary' (party-party) basis, is difficult to displace.¹³⁵ In the case of malicious civil prosecution, the 'event' may in fact never occur: the defendant may be put to considerable expense defending a claim that is never finalised by the court, or is abandoned by the plaintiff. Even when the defendant is successful in arguing that the plaintiff's conduct in bringing the claim meets the high threshold of malice or procedural abuse to warrant costs on an indemnity basis, the sums awarded fall short of full reparation.¹³⁶

There is therefore a clear disconnect between the existence of the courts' inherent powers to stay claims that are vexatious, frivolous, or even malicious,¹³⁷ for its own protection, and the compensatory relief available by way of costs to those defendants who are arguably put to even greater expense, distress, and inconvenience, in defending those claims, under the existing and historical court procedure rules and practices.

It is axiomatic that for regulation to be effective, it needs to be backed up by enforcement. The courts, via their inherent jurisdiction, regulate their own practices and procedures, including the conduct of those who seek to use their processes. Such regulation is an existential

¹³⁴ Jurisdiction to award costs is conferred on courts through the various acts and rules governing court practice and procedure. See, eg, High Court: *Judiciary Act 1903* (Cth) s 26 and *High Court Rules 2004* r 50.01; Federal Court: *Federal Court of Australia Act 1976* (Cth) s 43(1) and *Federal Court Rules* (2011) pt 40; Australian Capital Territory: *Court Procedures Rules 2006* (ACT) r 1701(1); New South Wales: *Civil Procedure Act 2005* (NSW) s 98 and *Uniform Civil Procedure Rules* (UCPR) (NSW) 2005 pt 42; Northern Territory: *Supreme Court Rules* (NT) r63.03(1); Queensland: *Civil Proceedings Act 2011* (Qld) s 15 and *Uniform Civil Procedure Rules* Qld 1999 r 681(1); South Australia: *Supreme Court Act 1935* (SA) s 40(1) and *Uniform Civil Rules 2020* ch 16; Tasmania: *Supreme Court Civil Procedure Act 1932* (Tas) s 12(2) and *Supreme Court Rules 2000* (Tas) r 57(1); Victoria: *Supreme Court Act 1986* (Vic) ss 24(1), 65C; *Civil Procedure Act 2010* (Vic) and *Supreme Court (General Civil Procedure) Rules 2015* r 63.02; Western Australia: *Supreme Court Act 1935* (WA) s 37(1) and *Rules of the Supreme Court 1971* WA Order 66 r 1(1).

¹³⁵ Gino Dal Pont, *Law of Costs* (LexisNexis Butterworths, 5th ed, 2021) 607 [16.40-44]. The Federal Court Rules (2011) provide a good example: r 40.01 establishes a default position that, absent further description, costs are party-party; r 40.03 establishes that in the absence of a specific costs order, costs follow the event; and r 40.06 permits a party to seek an order relating to costs 'improperly, unreasonably, or negligently incurred', but makes no express comparable provision for costs that prima facie were not unreasonable, improper, or negligent, but rather were incurred in pursuing a or defending a claim that was improper, unreasonable or — more pertinently — malicious or abusive of process. So too UCPR 2005 r 42.1 (NSW) and r 681 UCPR 2005 Qld: General Rule that costs follow the event; and r 702 UCPR Qld identifying standard (party-party) as the default basis, unless ordered otherwise (under r 703).

¹³⁶ Gino Dal Pont, *Law of Costs* (LexisNexis Butterworths, 5th ed, 2021) 177 [7.7].

¹³⁷ These powers are also available under the Rules of Court in some jurisdictions: See, eg, UCPR (NSW) r 13.4; UCPR (Qld) r 389A; and Federal Court Rules 2011, r 26.01.

necessity. But without meaningful enforcement powers – including powers to award costs based on *restitutio in integrum* – and a willingness to exercise them, the court will remain susceptible to concerns that, rather than providing justice, its own processes serve to inflict further injustice on parties who have already been wronged. If the function of the inherent powers is, as Mason states,¹³⁸ ensuring fairness in legal proceedings, then injustices arising from cost shortfalls must be addressed.

A further point for consideration is this: should the courts, if they are serious about protecting the integrity of their own processes, seek to go beyond merely compensating the plaintiff for losses they have incurred, and instead award punitive damages against defendants found liable for malicious prosecution? Although punitive damages are awarded infrequently, they may nonetheless send a powerful deterrence message to anyone thinking of abusing court processes. A counter-argument may of course be that a highly motivated and sufficiently well-resourced defendant is unlikely to be swayed from their course of action by the threat of punitive damages, particularly if they don't see their motives as being malicious or improper. Nonetheless, from a public legitimacy perspective, punitive damages may convey that the court takes a dim view of abusive proceedings, and is aware of the injustice to legitimate litigants whose day in court may be delayed as a result of improper proceedings tying up court resources.

Awarding of punitive damages is not beyond the powers of the court: even when the assessment of costs is expressly covered by legislation, courts have considerable powers to lobby the legislature for change. Where the rules are instead promulgated by the court itself, the courts can amend their own rules. For if the challenges of malice and lack of reasonable cause are, as is claimed by the minority, problematic, it is difficult to see how they would become more so in the context of assessing costs than they are in the context of judging malicious prosecution claims. Further, the statutory nature of court rules and proceedings means that provisions dealing with costs orders are not determined summarily, as per proceedings for contempt under the inherent jurisdiction, but instead are subject to appeal, providing the superior courts with an opportunity for oversight of their application.

V Conclusion

At its heart, a critical weakness in the law surrounding the claims in both *Crawford* and *Willers* is lack of an appropriate means of recompensating people who have incurred expenses defending maliciously brought civil claims. Expanding the tort of malicious

¹³⁸ Keith Mason, 'The Inherent Jurisdiction of the Court' (1983) 57(8) *Australian Law Journal* 449.

prosecution principally to remedy this defect in the law of costs has resulted in an unpersuasive and seemingly unworkable outcome, marred by ambiguous support in both precedent and policy, and division between senior judges about the priority given to principle. Such decisions do little to promote confidence in the coherence of the law, or the Rule of Law.

Expansion of the tort has, to date, resulted in little meaningful change for wrongly sued plaintiffs. Claims under the expanded tort are few and have generally been unsuccessful, undermined by evidentiary difficulties in establishing malice, including those presented by parties' exercise of legal privilege. The index plaintiff in *Willers*, rather than being restored to the position he would have occupied had it not been for the initial suit, failed to prove his claim, and became embroiled in further expensive costs litigation. From his perspective it is difficult to reconcile this outcome with the principle of providing a remedy for an injustice claimed by the majority.

Indeed, a sceptic might claim that this was the inevitable outcome of broadening recognition: broadening the type of claims recognised, without shifting the evidentiary burden imposed on plaintiffs (acknowledged as being insurmountable), or at least seeking to restrict privilege, could be described as offering false hope to the parties. In *Crawford* this outcome was avoided because the Judicial Committee resolved the claim, as well as the issue of recognition, contemporaneously: the potential for the outcome that befell *Willers* in the aftermath of the Supreme Court's reasoning seems to have escaped the majority's consideration.

This article suggests that expansion of the tort was, ultimately, the wrong decision. From a principled perspective, expansion of the tort potentially results in further expense and costs being heaped on the shoulders of any hapless claimant as they pursue illusory relief through additional litigation — hardly a triumph against injustice. The policy and precedential grounds for expanding the tort are ambiguous at best; and a better outcome might have been achieved by refusing to expand recognition, and instead considering reform to the rules governing the assessment of costs, either through changes to judicial policy or, more directly and transparently, through legislative reform.