THE TORT OF COLLATERAL ABUSE OF PROCESS

EMERSON HYNARD* AND AIDEN LERCH**

The tort of collateral abuse of process has an enigmatic place in Australian tort law. Although Australian courts regularly debate and question the elements of this tort, as most recently demonstrated by the decision of the New South Wales Court of Appeal in Burton v Office of the Director of Public Prosecutions (2019) 100 NSWLR 734, its exact formulation has been perpetually in dispute. Courts are given little assistance when they turn to Australian scholarship, as the tort has been the subject of limited academic scrutiny. In pursuit of greater clarity, this article offers a scholarly exploration of the contested tort of collateral abuse of process. The authors propose that it is only by accepting that the tort exists to compensate the wronged individual, punish and deter the tortfeasor, and maintain the integrity of the judicial process, that its precise elements can be properly assessed and coherently formulated.

I INTRODUCTION

Essential to the proper functioning of a principled legal system is a judiciary that can safeguard its own processes. A core mechanism used by courts to guard against judicial proceedings being converted into instruments of injustice or unfairness is the inherent power to stay proceedings.[1] In particular, courts can order proceedings to be stayed (or dismissed) where there is an abuse of process.[2] When

---

* LLB (Hons I, University Medal), BCom (Finance) (UOW); Associate to the Honourable Justice MBJ Lee at the Federal Court of Australia.

** LLB (Hons I, University Medal) (UOW); BCL (Oxon) Candidate (William Asbrey BCL Scholar 2020–21). The authors would like to thank Professor James Goudkamp, Yvonne Apolo, Sophie Whittaker and the anonymous reviewers for their insightful and challenging comments on earlier drafts. We also acknowledge the members of the *University of New South Wales Law Journal* for their excellent editorial work. All errors remain our own.

1 *Walton v Gardiner* (1993) 177 CLR 378, 392–3 (Mason CJ, Deane and Dawson JJ). For a detailed review of this power, see generally Wendy Lacey, 'Inherent Jurisdiction, Judicial Power and Implied Guarantees under Chapter III of the *Constitution*' (2003) 31(1) *Federal Law Review* 57, 65–6.

2 The principles relevant to a stay of proceedings for an abuse of process were most recently espoused by the High Court in *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256, 262–7 [2]–[15] (Gleeson CJ, Gummow, Hayne and Crennan JJ) ('*Batistatos*'). The common law power has also been given statutory recognition in Australia. In particular, courts are given the power to dismiss claims and applications where they are an abuse of process: see, eg, *Federal Court Rules 2011* (Cth) r 16.21(1)(f); *Uniform Civil Procedure Rules 2005* (NSW) r 13.4(c); *Uniform Civil Procedure Rules 1999* (Qld) rr 162(d), 389A; *Uniform Civil Rules 2020* (SA) rr 34.1(1)(b), 143.2; *Supreme Court (General Civil*

that doctrine is invoked, a plaintiff or a defendant who attempts to use a legal process for an improper purpose is stopped so as not to effect an abuse of that process. However, as was noted by the High Court in *Batistatos v Roads and Traffic Authority of New South Wales* ('*Batistatos*'), the term 'abuse of process' is used in a number of contexts.[3] One of which is to denote the curious tort of collateral abuse of process.[4] It is this unfamiliar tort which is the core focus of this article.

The tort of collateral abuse of process imposes liability on a litigant who intentionally misuses a legal process to obtain a collateral object outside the process' lawful scope, and which subsequently causes damage to an opposing litigant. Perhaps the most illuminating example of the tort's commission is found in the seminal 1838 decision of *Grainger v Hill*, where the tort was established as an action on the case.[5] There, the defendants lent Grainger £801 and took security by way of a mortgage over Grainger's ship. However, before the loan was due to be repaid, the defendants became concerned about the sufficiency of their security and resolved to possess the vessel by taking custody of the ship's register. When Grainger (validly) refused to repay the loan, the defendants commenced an action in assumpsit in the King's Bench and a writ of *capias ad respondendum* was subsequently issued. Ordinarily, pursuant to such a writ, an arrested individual was entitled to be released if he or she paid a *monetary sum*. However, when the writ was issued in this case, the sheriff's officers who served it on Grainger were instructed by the defendants to inform him that they had come for his ship's register and that if he did not deliver it, or pay bail, they would take him into custody. Grainger was imprisoned for 12 hours before he handed over the ship's register. In a subsequent action brought by Grainger, the defendants were held to have misused the legal process because they had employed the writ of *capias ad respondendum* to extort property from the claimant to which they had no legal right, instead of using such a writ for its proper purpose, in this case requiring Grainger to repay a monetary sum.[6] On this basis, the Court found that 'the process of law has been abused, to effect an object not within the scope of the process'.[7] It is upon the reasoning in this case, and a later English decision of *Gilding v Eyre*,[8]

Procedure) Rules 2015 (Vic) r 23.01(1)(b); *Rules of the Supreme Court 1971* (WA) ord 20 r 19(1)(d), ord 67 r 5.

3 (2006) 226 CLR 256, 262 [1] (Gleeson CJ, Gummow, Hayne and Crennan JJ).

4 The cause of action is often simply referred to as the tort of 'abuse of process'. However, as Bell P has identified, the tort is more helpfully labelled 'collateral abuse of process': *Burton v Office of the Director of Public Prosecutions* (2019) 100 NSWLR 734, 739 [14] ('*Burton*').

5 (1838) 4 Bing (NC) 212; 132 ER 769 ('*Grainger*').

6 Ibid 773 (Tindal CJ), 773 (Park J), 774 (Vaughan J), 774 (Bosanquet J).

7 Ibid 773 (Tindal CJ).

8 (1861) 10 CBNS 592; 142 ER 584. Although, English courts have since held that these were the only two cases where the tort was successfully made out in England: see *Land Securities Plc v Fladgate Fielder* [2010] Ch 467, 481 [41] (Etherton LJ) ('*Land Securities*'); *Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd* [2014] AC 366, 422 [149] (Lord Sumption JSC) ('*Crawford*'). See also the discussion of the authorities in *Kings Security Systems Ltd v King* [2021] EWHC 325 (Ch) [210]–[229] (Andrew Lenon QC sitting as a deputy judge of the Chancery Division).

that the tort of collateral abuse of process was founded in Australia and a number of other common law jurisdictions.[9]

In Australia, the High Court first considered the tort in the 1909 decision of *Bayne v Blake*.[10] In that case, Griffith CJ and O'Connor J seemingly accepted that the tort existed as a cause of action, despite finding that it was not made out on the evidence.[11] The tort was again recognised as a valid cause of action in the 1911 decision of *Varawa v Howard Smith Co Ltd*, although it was similarly not made out on the facts.[12] The existence of the tort was then reaffirmed by Isaacs J in the 1915 decision of *Dowling v Colonial Mutual Life Assurance Society*, where his Honour considered the tort by way of obiter dicta in the context of assessing whether to set aside an order nisi in bankruptcy.[13] In these early cases, other than identifying that a misuse of a legal process is an actionable wrong, the High Court did not justify the tort's existence, nor articulate its precise formulation.[14]

The High Court considered the tort on one further occasion in the 1992 decision of *Williams v Spautz*, where its application in Australian law was, once again, accepted in obiter dicta.[15] The tort of collateral abuse of process has otherwise only been held to have been committed on four occasions in Australia's history: once in Victoria,[16] Queensland,[17] New South Wales,[18] and the Federal

9 The tort has been upheld in Canada: see *Behn v Moulton Contracting Ltd* [2013] 2 SCR 227; *Metrick v Deeb* (2003) 172 OAC 229. It has also been upheld in many states of the United States of America: see *Cartwright v Wexler, Wexler & Heller, Ltd*, 369 NE 2d 185 (Ill Ct App, 1977); *Robb v Chagrin Lagoons Yacht Club*, 662 NE 2d 9 (Ohio, 1996); *Mozzochi v Beck*, 529 A 2d 171 (Conn, 1987); *Friedman v Dozorc*, 312 NW 2d 585 (Mich, 1981).

10 (1909) 9 CLR 347 ('*Bayne*'). Although note that O'Connor J sitting on the High Court of Australia had once before referred to *Grainger* and stated, '[t]he principles there laid down are not, in my opinion, applicable to the state of facts which the plaintiff puts forward in this case': *Bayne v Baillieu* (1908) 6 CLR 382, 401.

11 *Bayne* (1909) 9 CLR 347, 353–5 (Griffith CJ), 357–8 (O'Connor J).

12 (1911) 13 CLR 35, 69–71 (O'Connor J), 91–92 (Isaacs J) ('*Varawa*').

13 (1915) 20 CLR 509, 521–4.

14 Griffith CJ admitted that the tort's elements were 'a matter of great obscurity': *Bayne* (1909) 9 CLR 347, 353. Additionally, O'Connor J's analysis in *Varawa* incorrectly required that for the tort to be made out, a defendant must commence the process without reasonable and probable cause: *Varawa* (1911) 13 CLR 35, 69–70. This has also been identified by Mendelson: Danuta Mendelson, *The New Law of Torts* (Oxford University Press, 3rd ed, 2014) 192. Finally, it was seemingly presumed by O'Connor and Isaacs JJ in *Varawa* that because the tort was founded in English common law, the tort would have similar application in Australia: *Varawa* (1911) 13 CLR 35, 70 (O'Connor J), 91 (Isaacs J). For further doubts about the tort's elements, see *Bayne* (1909) 9 CLR 347, 356 (Barton J); *Varawa* (1911) 13 CLR 35, 55–6 (Griffith CJ).

15 (1992) 174 CLR 509, 522, 524–5 (Mason CJ, Dawson, Toohey and McHugh JJ), 533–5 (Brennan J), 553 (Gaudron J) ('*Williams*').

16 *National Australia Bank Ltd v McFarlane* [2005] VSC 438 ('*NAB v McFarlane*'). The defendants instituted criminal proceedings against the plaintiff bank to prevent it from enforcing a judgment to sell their land.

17 *QIW Retailers Ltd v Felview Pty Ltd* [1989] 2 Qd R 245 ('*QIW v Felview*'). The defendants applied for a winding up order in respect of the plaintiff company in order to force the directors to negotiate with the defendants over certain demands.

18 *Gulabrai v Hamer-Mathew* [1997] NSWCA 131 ('*Gulabrai v Hamer*'). For a discussion of this case, see Part III(A).

Court of Australia.[19] Despite this, Australian courts regularly debate and question the elements of the tort, primarily in the context of considering whether to strike out pleadings for failing to disclose a reasonable cause of action.[20] Furthermore, courts have held on numerous occasions that a plaintiff has failed to make out the tort's required elements,[21] and have also considered the tort when assessing whether to exercise the court's inherent power to stay proceedings.[22]

Although there is a wealth of judicial consideration on this curious cause of action, academic scrutiny of the tort is not only limited, but virtually non-existent.[23] Indeed, even the handful of tort law textbooks that seek to enunciate this cause of action have been criticised for their 'fleeting' reference to the tort, which demonstrates an 'insufficient appreciation of the fact that, whilst proceedings may be or may amount to an abuse of process and be liable to be stayed or dismissed for that reason, it does not follow from that fact alone that the tort of collateral abuse of process has been committed'.[24] As a result, there is an absence of scholarship that critically analyses the modern formulation of the tort and the underlying reasons for its existence in contemporary Australian law. This is of

19 *Martin v Norton Rose Fulbright Australia [No 11]* [2020] FCA 1641 ('*Martin v NRF*'). Norton Rose Fulbright instituted proceedings in the Federal Court of Australia alleging a want of jurisdiction of the Fair Work Commission in order to prevent its former employee from obtaining a certificate he required to litigate his claims against the firm. Note that it has also been held on one occasion that there was sufficient evidence for the tort to be put to a jury: see *Hanrahan v Ainsworth* (1990) 22 NSWLR 73 ('*Hanrahan 2*').

20 See *Hanrahan v Ainsworth* (1985) 1 NSWLR 370, 373–8 (Hunt J) ('*Hanrahan 1*'); *Grimwade v Victoria* (1997) 90 A Crim R 526, 534–7 (Harper J); *Butler v Simmonds Crowley & Galvin* [2000] 2 Qd R 252, 258–65, [22]–[42] (McMurdo P, Pincus and Thomas JJA) ('*Butler*'); *Bhagat v Global Custodians Ltd* [2000] NSWSC 321, [13]–[67] (Young J) ('*Bhagat*'); *Paradise Grove Pty Ltd v Stubberfield* [2001] QCA 117; *Beach Club Port Douglas Pty Ltd v Page* [2006] 1 Qd R 307, 315 [24] (McPherson JA, Jerrard JA agreeing at 315 [26], Chesterman J agreeing at 317 [32]) ('*Page*'); *Leerdam v Noori* (2009) 255 ALR 553, 559–61 [29]–[45] (Spigelman CJ), 565 [65]–[67] (Allsop P), 579–84 [123]–[139] (MacFarlan JA) ('*Leerdam*'); *Burton* (2019) 100 NSWLR 734, 739–744 [14]–[42] (Bell P), 746–747 [52]–[65] (White JA), 751–2 [95]–[98], 755–6 [124] (McCallum JA).

21 *Bayne* (1909) 9 CLR 347, 353–5 (Griffith CJ), 357–8 (O'Connor J); *Varawa* (1911) 13 CLR 35, 69–71 (O'Connor J), 91–92 (Isaacs J); *Pollack v Retravision (NSW) Ltd* (Federal Court of Australia, Sackville J, 13 October 1997) 10–12, 34; *Nexus Minerals NL v Flint* (Supreme Court of Western Australia, Malcolm CJ, Kennedy and Franklyn JJ, 8 August 1997) 21–3 (Malcolm CJ); *Emanuele v Hedley* (1998) 179 FCR 290, 302–3 [41]–[45] (Wilcox, Miles and Nicholson JJ); *Malter v Procopets* [1998] VSC 79, [71]–[75] (Smith J); *McWilliam v Penthouse Publications Ltd* (Supreme Court of New South Wales, Maconachie AJ, 17 June 1998) 56–8; *Pola v Commonwealth Bank* (Federal Court of Australia, Sundberg J, 19 December 1997) 9–11; *Noye v Robbins* [2007] WASC 98, [268]–[273] (Heenan J); *Clavel v Savage* [2013] NSWSC 775, [75]–[87] (Rothman J); *Maxwell-Smith v S & E Hall Pty Ltd* (2014) 86 NSWLR 481, 488–97 [32]–[69] (Barrett JA, Beazley P agreeing at 483 [1], McColl JA agreeing at 483 [2]) ('*Maxwell-Smith*'); *Armstrong v McIntosh [No 4]* [2020] WASC 31 [217]–[223] (La Miere J).

22 *Williams* (1992) 174 CLR 509, 522–9 (Mason CJ, Dawson, Toohey and McHugh JJ), 533–7 (Brennan J), 551–2 (Deane J), 552–5 (Gaudron J).

23 Upon a detailed review of the literature, only one Australian *note* on the tort could be found: see Nicholas Mullany, 'The Conduct of Defence and Abuse of Process' (1995) 3(3) *Tort Law Review* 177. Otherwise, the tort is briefly considered in Australian tort law textbooks: see Mendelson (n 14) 188–93; RP Balkin and JLR Davis, *Law of Torts* (LexisNexis Butterworths, 5th ed, 2013) 718–21; Carolyn Sappideen and Prue Vines, *Fleming's The Law of Torts* (Thomson Reuters, 10th ed, 2011) 707–8; Kit Barker et al, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2011) 94–7.

24 *Burton* (2019) 100 NSWLR 734, 740 [22] (Bell P).

concern, particularly given that since the tort's inception, Australian courts have been unable to agree on its precise formulation.

Indeed, the High Court of Australia was divided over the tort's specific elements when it last considered the cause of action in *Williams v Spautz*. In particular, the Court was not in agreement as to whether the tort required proof of an overt act or threat.[25] This led the Queensland Court of Appeal in *Butler v Simmonds*,[26] and the New South Wales Court of Appeal in *Maxwell-Smith v S & E Hall*[27] to decline to follow the majority in *Williams v Spautz* in certain respects.[28] In light of this ambiguity, Bell P in *Burton v Office of the Director of Public Prosecutions* ('*Burton*'), by way of obiter dicta, sought to precisely define the scope of the tort.[29] His Honour held that four elements were required to make out the cause of action: (1) the tortfeasor must have instituted a legal process for an improper purpose; (2) the legal process in question must have been misused in order to obtain some collateral advantage or benefit 'entirely outside' that afforded by the legal process invoked; (3) the process in question must have been deployed in furtherance of the alleged tortfeasor's improper purpose by way of an overt act or threat; and (4) the plaintiff must have suffered special damage. However, despite Bell P's pursuit of clarity, his Honour's formulation did not command the agreement of the Court.[30]

What is common among the authorities, and perhaps unsurprising in light of the limited academic scrutiny of the tort, is that little attention has been devoted to providing arguments in support of the tort's existence. Other than identifying that an abuse of a legal process is an actionable wrong, neither the English or Australian courts have sought to extrapolate *why* liability should be imposed in such circumstances. Nor have the policy reasons underpinning the tort's limited scope been explored. This is problematic. Indeed, as was recognised by Bell P,[31] unless the tort is properly conceptualised and understood, litigants may be free to misuse legal processes or conversely, there may be a proliferation of secondary litigation due to an unnecessary imposition of tortious liability.[32]

Integral to a proper understanding of the tort of collateral abuse of process is a contribution by the scholarship identifying and examining the tort's underlying purposes. Unless formulated with these purposes in mind, any attempt to advance the tort's elements will continue to lead to uncertainty and confusion in judicial reasoning. This article therefore seeks to provide guidance in the development of the tort of collateral abuse of process by exploring its justificatory bases, so that

25 *Williams* (1992) 174 CLR 509, 527–8 (Mason CJ, Dawson, Toohey and McHugh JJ), 539 (Brennan J), 551–2 (Deane J), 552 (Gaudron J). See Part IV(C).

26 *Butler* [2000] 2 Qd R 252, 258, 263–4 [38] (McMurdo P, Pincus and Thomas JJA). See also *Page* [2006] 1 Qd R 307, 311 [14] (McPherson JA).

27 *Maxwell-Smith* (2014) 86 NSWLR 481, 493 [54] (Barrett JA).

28 For further explanation of this, see Part IV(C).

29 *Burton* (2019) 100 NSWLR 734, 744 [42].

30 For example, McCallum JA questioned the requirement of there being a collateral advantage or benefit obtained by the tortfeasor, rather than a collateral disadvantage or burden: ibid 755–6 [124].

31 Ibid 739 [16].

32 Although the risk of further secondary litigation due to the tort's existence is seemingly overstated given that there have only been four successful claims in Australia.

its elements can be properly defined and understood. As a necessary first step, Part II makes a number of preliminary observations in order to position the tort within Australian law. Part III then employs contextual doctrinal research to examine and assess the purposes underlying the tort's existence and the countervailing policy considerations which limit its scope of application. This framework is then deployed in Part IV to critically assess the elements of the tort and any defences which may have application.

II LOCATING THE TORT WITHIN AUSTRALIAN LAW

Given that this article offers a scholarly exploration of the tort of collateral abuse of process, it is necessary to situate the tort within Australia's general law. To this end, this Part will make three preliminary observations that the authors deem integral to a proper understanding of the tort.

First, it must be recognised that the tort of collateral abuse of process is engaged in circumstances where the utility of a stay of proceedings for an abuse of process has passed. A stay acts as a defence by stopping a litigant from misusing, or attempting to misuse, a legal process.[33] For example, in *Batistatos*, the High Court held that the plaintiff was stayed from bringing his 28-year-old claim in negligence as it would otherwise have amounted to an abuse of the legal process.[34] A stay of proceedings, however, is limited in two respects. First, while a stay ordered for an abuse of process will usually be accompanied by an order for indemnity costs, it does not impose liability on the wrongdoer and therefore does not entitle a court to award a remedy to the wronged party.[35] Secondly, a stay is futile when the abuse of a legal process has been effected. This is for the obvious reason that the abusive process has run its course and can no longer be stopped; the damage has been done. It is in these circumstances that the tort of collateral abuse of process operates. When the tort's more demanding elements are made out,[36] tortious liability is imposed and a litigant is entitled to a remedy for the damage that they have suffered due to a legal process being misused against them.[37]

Secondly, the tort of collateral abuse of process must be distinguished from that of malicious prosecution. Although both torts are concerned with a misuse of legal proceedings, they are not identical. The tort of collateral abuse of process can

33 James Goudkamp, *Tort Law Defences* (Hart Publishing, 2013) 131–2, 135.

34 *Batistatos* (2006) 226 CLR 256, 281–2 [69]–[72] (Gleeson CJ, Gummow, Hayne and Crennan JJ).

35 Indeed, this explains why a stay is not exercised to deter or punish a litigant but only to 'protect the integrity of the court's own processes': *Victoria International Container Terminal Ltd v Lunt* [2021] HCA 11, [32] (Kiefel CJ, Gageler, Keane and Gordon JJ). See also at [43] (Edelman J).

36 Although the use of proceedings or a process may amount to an abuse of process such that they are stayed, this does not mean that the tort has been committed. The tort requires specific and more demanding elements to be proven.

37 The tort is the only way in which a litigant can obtain a remedy for having a legal process misused against it. The various *Civil Procedure Acts* and *Civil Procedure Rules* do not provide a remedy in such circumstances.

be committed by the use of any criminal or civil process.[38] By contrast, in Australia the tort of malicious prosecution has only been upheld in the context of a use of malicious criminal proceedings.[39] More importantly, however, is the fact that an essential element of the tort of malicious prosecution is that the prosecutor must have commenced the allegedly malicious proceeding without reasonable and probable cause.[40] In this sense, the prosecutor must be shown to have brought the proceeding without reasonably believing that there was a valid claim against the defendant. In contrast, in an action for collateral abuse of process, the tort may be committed irrespective of whether the litigant who initiated the impugned process does, or does not, have a valid cause of action against the opposing party.[41] Therefore, even if a plaintiff (or prosecutor) reasonably brings proceedings against a defendant with a legitimate legal right to vindicate, if the plaintiff subsequently uses those proceedings improperly to obtain an advantage outside the scope of the legal process, he or she will have committed the tort against the defendant. Thus, the ambit of the tort of collateral abuse of process is greater than that of malicious prosecution.

Thirdly, an analysis of the four successful cases upholding the tort demonstrates that the usual rules governing remedial responses will apply: general compensatory; aggravated and exemplary damages;[42] and an injunction restraining a party from bringing further abusive proceedings,[43] have all been awarded. However, apportionment for contributory negligence has never occurred in a case of collateral abuse of process.[44] In any event, the weight of Australian authority is that contributory negligence does not have application to the intentional consequences of a tort.[45] Given that the tort of collateral abuse of process is only committed where it is proven that the defendant held a *specific* intent to cause a

38 Indeed, in *NAB v McFarlane*, the tort was made out by the misuse of criminal proceedings: [2005] VSC 438, [60]–[62] (Habersberger J).

39 Although, it has been noted that there is nothing in the history of the action that limits the tort to criminal proceedings: Sappideen and Vines (n 23) 695. Furthermore, in England, a claimant was permitted to go to trial on the allegation that the tort was committed by the malicious use of civil proceedings: see *Willers v Joyce* [2018] AC 779.

40 *Hicks v Faulkner* (1878) 8 QBD 167, 171 (Hawkins J); *A v New South Wales* (2007) 230 CLR 500, 502–3 [1], 513–14 [38]–[39] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ) ('*A v NSW*').

41 *Williams* (1992) 174 CLR 509, 522–3 (Mason CJ, Dawson, Toohey and McHugh JJ); *Grainger* (1838) 4 Bing (NC) 212; 132 ER 769, 773 (Tindal CJ), 773 (Park J), 774 (Vaughan J), 774 (Basanquet J). Murphy has also recognised this in the context of the extent to which the tort of collateral abuse of process requires proof of malice: see John Murphy, 'Malice as an Ingredient of Tort Liability' (2019) 78(2) *Cambridge Law Journal* 355, 360.

42 *QIW v Felview* [1989] 2 Qd R 245, 260–3 (Macrossan J); *Hamer-Mathew v Gulabrai [No 2]* (1995) Aust Torts Reports ¶81-334 ('*Hamer-Mathew [No 2]*'). See also *Martin v NRF* [2020] FCA 1641, [408] (Kerr J).

43 *NAB v McFarlane* [2005] VSC 438, [67]–[69] (Habersberger J).

44 The reason that the authors have placed this discussion here (as opposed to the below section on defences) is that the provision for apportionment for contributory negligence is better characterised as a remedial response, not a defence: Goudkamp (n 33) 6–7, 17–18.

45 *Venning v Chin* (1974) 10 SASR 299, 317 (Bray CJ); *New South Wales v Riley* (2003) 57 NSWLR 496, 522 [103]–[104] (Hodgson JA, Sheller JA agreeing at 498–9 [9], 504–5 [31], Nicholas J agreeing at 532 [147]).

collateral object beyond the lawful scope of the legal process instituted,[46] it is the authors' contention that any apportionment for alleged contributory negligence on the part of the plaintiff would be erroneous. A court would otherwise be improperly comparing two incommensurate fault states: the intentional wrongdoing of the defendant and the negligent conduct of the plaintiff.[47]

In light of the above observations, it is clear that the tort of collateral abuse of process is uniquely focused on imposing liability for abusing a legal process and, in doing so, takes a distinct position in Australian tort law. What remains to be seen, and what neither courts nor scholars have articulated, is why tortious liability should be imposed in such circumstances. In pursuit of greater stability and reason, this article will now explore the justificatory bases for the existence of the tort of collateral abuse of process and the policy reasons which limit its scope of application.

III EXPLORING THE IMPOSITION OF TORTIOUS LIABILITY

The theoretical and philosophical examination of 'tort law' has long been the subject of judicial and scholarly discourse.[48] It is not the authors' intention to enter this arena. However, to position the following analysis, a few arguably uncontroversial comments must be made. Tort law is essentially a body of principles which determine if and when liability will be imposed for certain conduct. These principles protect varying interests and are, more or less, pragmatic solutions developed by courts and legislatures to respond to the exigencies of particular times and social contexts.[49] It follows that each tort has its own individual foundations, developed principles and defences which reflect the unique reasons for its existence. The problem that this poses for 'tort law' is that it cannot be holistically explained by reference to one overarching abstract goal, such as compensation, punishment or deterrence.[50]

---

46 Mendelson describes the tort as one which is an 'indirect intentional tort': Mendelson (n 14) 7. Brennan J also reasoned that the tort will only be made out where 'the only substantial *intention* of a plaintiff is to obtain an advantage or other benefit, to impose a burden …': *Williams* (1992) 174 CLR 509, 537 (emphasis added). It is, however, important to acknowledge here that because collateral abuse of process requires a specific intent to cause a harmful consequence, it is distinguishable from the trespass torts which only require a basic intent to do an act (eg, to enter land).

47 See Joanna Kyriakakis et al, *Contemporary Australian Tort Law* (Cambridge University Press, 2020) 344; Balkin and Davis (n 23) 142–3.

48 Indeed, as was stated by Witting, 'a satisfactory definition of a tort remains somewhat elusive': Christian Witting, *Street on Torts* (Oxford University Press, 14th ed, 2015) 3.

49 Barker et al (n 23) 20.

50 For a critique of these 'goals' and how they mutually limit one another, see Robert Stevens, *Torts and Rights* (Oxford University Press, 2007) 320–3; Ernest Weinrib, *The Idea of Private Law* (Harvard University Press, 1995) 40–2; Richard Wright, 'Right, Justice and Tort Law' in David Owen (ed), *Philosophical Foundations of Tort Law* (Oxford University Press, 1995) 159, 159. In light of these observations, scholars have attempted to posit unifying theories of tort law. However, even these overarching theories have been criticised: see, eg, James Goudkamp and John Murphy, 'The Failure of Universal Theories of Tort Law' (2015) 21(2) *Legal Theory* 47.

Where these goals have greater relevance, however, is in an analysis of the underlying purposes of a *particular* tort. This is because inherent in every tortious action is an underlying reason(s) for the imposition of liability; courts cannot simply hold that conduct is wrongful without justification.[51] It is the authors' contention that a tort's purposes can therefore be usefully examined through the lens of general goals. In seeking to explore the reasons for imposing tortious liability for a misuse of the legal process, this Part will draw upon and critically assess the traditional private law goals of compensation, punishment and deterrence. Further, to bolster the analysis and contribute to the growing body of scholarship concerning the intersection between public and private law, this Part will also assess whether the tort serves a 'public law' function.

A Purposes of the Tort: Compensation, Punishment and Deterrence

Compensation of the plaintiff is often said to be a primary justification for the existence of tortious liability.[52] Mendelson goes so far as to opine that '[c]ompensation is the raison d'etre of the law of torts'.[53] However, an assertion that compensation is *the* goal of tort law is deeply controversial.[54] Indeed, if this were the case, tort law would simply compensate all plaintiffs for any loss suffered, irrespective of the relevant fault of the defendant.[55] The more justifiable thesis is that tort law aims to award compensation to a plaintiff in circumstances where the tortfeasor *should* be held responsible for the harm caused.[56] A function of tort law is therefore 'to determine when such harm is worthy of compensation'.[57]

Upon a review of the seminal decision of *Grainger v Hill*, it can be determined that the tort of collateral abuse of process was designed to impose liability after the legal process had been misused, and where a stay of proceedings was therefore no longer appropriate.[58] This reflects the judiciary's motivation to provide plaintiffs with a remedy where they have suffered harm due a defendant's misuse of the legal

51 Tony Honoré, 'The Morality of Tort Law: Questions and Answers' in David Owen (ed), *Philosophical Foundations of Tort Law* (Oxford University Press, 1995) 73, 78; Sappideen and Vines (n 23) 8.

52 Mendelson (n 14) 4, 35–6; Balkin and Davis (n 23) 7–8; Sappideen and Vines (n 23) 3–5, 8; Glanville Williams and BA Hepple, *Foundations of the Law of Tort* (Butterworths, 1976) 26; Cecil A Wright, 'Introduction to the Law of Torts' (1944) 8(3) *Cambridge Law Journal* 238, 240.

53 Mendelson (n 14) 35.

54 Nicholas McBride, 'Rights and the Basis of Tort Law' in Donal Nolan and Andrew Robertson (eds), *Rights and Private Law* (Hart Publishing, 2014) 331, 333–4; Gregory Keating, 'Is the Role of Tort to Repair Wrongful Losses?' in Donal Nolan and Andrew Robertson (eds), *Rights and Private Law* (Hart Publishing, 2014) 367, 369. Indeed, some scholars take issue even with the suggestion that compensation is *a* goal of tort law: see Stevens (n 50) 320–1, 323; Weinrib (n 50) 40–2; Richard Abel, 'A Critique of Torts' (1994) (2) *Tort Law Review* 99, 102; Jules Coleman, *Risks and Wrongs* (Cambridge University Press, 1992) 209. Cf Izhak Englard, 'The Idea of Complementarity as a Philosophical Basis for Pluralism in Tort Law' in David Owen (ed), *Philosophical Foundations of Tort Law* (Oxford University Press, 1995) 183, 187, 193–5.

55 Sappideen and Vines (n 23) 5; Goudkamp (n 33) 179.

56 Wright (n 50) 159; Sappideen and Vines (n 23) 8; Balkin and Davis (n 23) 8. Stapleton posits that it is useful to 'investigate the reasons why tort should refuse a remedy to a plaintiff who has been injured by the defendant' and details how tort law might be constrained: Jane Stapleton, 'In Restraint of Tort?' in Peter Birks (ed), *The Frontiers of Liability* (Oxford University Press, 1994) vol 2, 83, 83.

57 Balkin and Davis (n 23) 8.

58 Clarke JA similarly recognised this in *Hanrahan 2* (1990) 22 NSWLR 73, 108.

process. Given that the tort was established as an action on the case, there can be no doubt that it serves a compensatory purpose.[59]

Interestingly, any identification of the purposes of the tort of collateral abuse of process beyond the achievement of compensation has not yet been explored. Unlike criminal law which is primarily focused on the actions of the defendant, tort law's paradigm is the conflict between two individuals (or groups of individuals).[60] The tort of collateral abuse of process, however, sits in an intriguing position. On the one hand, it involves a quarrel between two individuals; on the other, it involves an abuse of the very system established to quell disputes. As was identified by the court in *Grainger v Hill*, the tort of collateral abuse of process is 'an action for abusing the process of law'.[61] Indeed, it is arguable that the early judicial commentary identifies that the tort, along with its purpose to compensate, serves as a method for punishing the defendant for a wrong committed against the judicial process itself.

The concept of punishment as an underlying goal of tort law is not new. Historically, the functions of tort remedies were primarily admonitory and an award against the tortfeasor served as a punishment.[62] In fact, Salmond and Parker believed that the object of tort liability was penal, not compensatory.[63] Today, there are at least two lines of reasoning which support the continued relevance of punishment in tort law. First, the availability of remedies beyond those of compensatory damages, such as exemplary damages,[64] clearly demonstrate that an underlying action in tort may invoke a level of moral opprobrium sufficient to justify punitive sanction. Secondly, at a more foundational level, is the idea that there can be no tortious liability without a judgment that the defendant was responsible in some relevant sense. As aptly put by Cane, 'the fact that punitive remedies play only a minor role in tort law should not divert our attention from the fact that being held liable in tort is [in itself] a *sanction*'.[65] On this basis, even ordinary damages can be seen as serving a dual purpose; 'they are not only compensation to the plaintiff for what he has undergone, but a punishment to the defendant for what he has done'.[66]

---

59 Indeed, as was stated by Park J after referring to the tort of malicious prosecution:

> [B]ut this is a case primæ impressionis, in which the Defendants are charged with having abused the process of the law, in order to obtain property to which they had no colour of title; and, if an action on the case be the remedy applicable to a new species of injury, the declaration and proof must be according to the particular circumstances.

Grainger (1838) 4 Bing (NC) 212; 132 ER 769, 773.

60 Sappideen and Vines (n 23) 3.

61 *Grainger* (1838) 4 Bing (NC) 212; 132 ER 769, 774 (Vaughan J).

62 Williams and Hepple (n 52) 25; Peter Cane, 'Retribution, Proportionality and Moral Luck in Tort Law' in Peter Cane and Jane Stapleton (eds), *The Law of Obligations: Essays in Celebration of John Fleming* (Clarendon Press, 1998) 141, 141–2 ('Retribution'); Peter Cane, *The Anatomy of Tort Law* (Hart Publishing, 1997) 119 ('*Anatomy*'); Sappideen and Vines (n 23) 10.

63 John Salmond and John Parker, *Salmond on Jurisprudence* (9th ed, Sweet & Maxwell, 1937) 538.

64 Cane, *Anatomy* (n 62) 119; Barker (n 23) 698–700; Balkin and Davis (n 23) 6; *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, 158 (Owen J).

65 Cane, 'Retribution' (n 62) 141 (emphasis added). The idea that liability in tort is a sanction is further supported in: Cane, *Anatomy* (n 62) 13, 119; Honoré (n 51) 73, 88–90; Goudkamp (n 33) 139, 179–80.

66 Williams and Hepple (n 52) 25.

It is the authors' contention that the tort of collateral abuse of process, which has its foundation in vindicating a misuse of the legal process, clearly carries a penal purpose. As was observed by Lord Denning MR in *Goldsmith v Sperrings*:

> In a civilised society, legal process is the machinery for keeping order and doing justice. It can be used properly or it can be abused. It is used properly when it is invoked for the vindication of men's rights or the enforcement of just claims. It is abused when it is diverted from its true course so as to serve extortion or oppression; or to exert pressure so as to achieve an improper end. When it is so abused, it is a tort, a wrong known to the law. The judges can and will intervene to stop it. They will stay the legal process, if they can, before any harm is done. If they cannot stop it in time, and harm is done, they will give damages against the wrongdoer.[67]

This thesis finds significant support in the plurality judgment in *Gulabrai v Hamer-Mathew*. In that case, it was found that the defendant abused his right to defend the action brought against him.[68] This was because the defendant put a line of baseless accusations to the plaintiff art dealer suggesting that he was fraudulent to gather media attention, all for the dominant purpose of putting pressure on the plaintiff to settle a different dispute with the defendant's brother.[69] After the primary judge found that the tort was made out, the Master awarded the plaintiff both compensatory and exemplary damages in equal amounts of $50,000.[70] This award was upheld by the Court of Appeal, as, in the words of Meagher JA, the tortious actions of the defendant were of a 'sufficiently reprehensible kind'.[71] In doing so, the Court echoed the sentiment of Lord Denning in *Goldsmith v Sperrings* and demonstrated that punishing the wrongdoer for an abuse of the legal process is equally as paramount as compensating the plaintiff. Indeed, such an award reflects the Court's disdain of the defendant's intentional and deliberate decision to use his right to conduct a defence in an entirely improper manner in order to gain a collateral advantage.

The purpose of punishment, in this sense, is to protect and safeguard the sanctity of the judicial process. It is uncontroversial that the ability of the legal process to justly resolve disputes, discern fact, and provide relief, grounds public confidence in an independent and impartial judiciary.[72] When abuse of the legal process is tolerated and justice is not seen to be done, courts risk losing such public confidence. This consideration has been recognised in the context of staying proceedings to prevent an abuse of process. As stated by Lord Diplock in *Hunter v Chief Constable of the West Midlands Police*, the power to stay proceedings is:

> [An] inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to

67 [1977] 1 WLR 478, 489 ('*Goldsmith*').

68 *Gulabrai v Hamer* [1997] NSWCA 131, 3 (Meagher JA, Beazley and Stein JJA agreeing at 4). See also the decision of the primary judge: *Hamer-Mathew v Gulabrai* (1994) 35 NSWLR 92, 94 (Brownie J) ('*Hamer-Mathew*').

69 *Hamer-Mathew* (1994) 35 NSWLR 92, 93–4 (Brownie J).

70 *Hamer-Mathew [No 2]* (1995) Aust Torts Reports ¶81-334.

71 *Gulabrai v Hamer* [1997] NSWCA 131, 4.

72 *Herron v McGregor* (1986) 6 NSWLR 246, 267 (McHugh JA); *Jago v District Court (NSW)* (1989) 168 CLR 23, 30 (Mason CJ); *Walton v Gardiner* (1993) 177 CLR 378, 396 (Mason CJ, Deane and Dawson JJ); *Williams* (1992) 174 CLR 509, 520 (Mason CJ, Dawson, Toohey and McHugh JJ); *Batistatos* (2006) 226 CLR 256, 267 [14] (Gleeson CJ, Gummow, Hayne and Crennan JJ).

> litigation before it, or would otherwise *bring the administration of justice into disrepute among right-thinking people*.[73]

Although Australian courts have been hesitant to use the principles applicable to a stay of proceedings to inform the tort of collateral abuse of process,[74] it is the authors' contention that maintaining public confidence in the legal process also underpins the imposition of tortious liability. This is because, when the tort has been committed, a court will have made a factual finding that the defendant has misused the legal process. The defendant's wrongdoing can therefore be said to be greater than when a stay is granted, where only an attempt to abuse the legal process has been manifested. By invoking liability and imposing a sanction on the defendant, courts are able to vindicate such abuse with the aim of maintaining public confidence in the judicial process. Whether, by punishing the wrongdoer for misusing the processes of the court, the tort serves a *public* function, is a contention which will be addressed more fully below.

Furthermore, it is arguable that the deployment of the tort and the award of damages serves a deterrent function. Traditionally, an award against a tortfeasor was seen as 'an adjunct to the criminal law designed to induce antisocial and inconsiderate persons to conform to the standards of reasonable conduct prescribed by law'.[75] Today, however, the relevance of deterrence in tort law is much more limited.[76] The reason for this is twofold. First, it is arguable that the principal concern of modern tort law is with casualties arising from accidents, that is, of *unintended* harm, which is particularly difficult to deter against.[77] Secondly, the universal availability and use of third-party insurance, which provides for the allocation of risk and distribution of loss, means that an insurance company, rather than an individual, bears the brunt of an award of damages.[78] Indeed, it has been

---

73 [1982] AC 529, 536 (emphasis added). Affirmed and applied in *Batistatos* (2006) 226 CLR 256, 264 [6] (Gleeson CJ, Gummow, Hayne and Crennan JJ). Notions of justice and injustice must reflect contemporary values if the courts and the administration of justice are to continue to enjoy the confidence of the public: *Ridgeway v The Queen* (1995) 184 CLR 19, 75 (Gaudron J) ('*Ridgeway*').

74 As Spigelman CJ stated:

> It is necessary to distinguish the tort from the broader based concept of 'abuse of process' which arises in the context of stay applications or assertions of miscarriage of justice: see most recently *PNJ v R* (2009) 252 ALR 612; (2009) 83 ALJR 384; [2009] HCA 6 at [3]. Although cases on the tort may inform the broader concept (see *Williams v Spautz* (1992) 174 CLR 509 at 522–3; 107 ALR 635 at 643), the reverse does not necessarily work.

Leerdam (2009) 255 ALR 553, 559 [31].

75 Sappideen and Vines (n 23) 10; Steven Shavell, *Economic Analysis of Accident Law* (Harvard University Press, 1987) ch 2. It has been identified that in tort law generally, the award of damages is 'a particularly emphatic way of expressing disapproval of and discouraging (or "deterring") certain types of conduct.': Cane, *Anatomy* (n 62) 119. It has also been said that even an award of compensatory damages achieves this: Williams and Hepple (n 52) 25.

76 As Harlow has observed, '[d]eterrent theories of tort law are today hard to come by': Carol Harlow, 'A Punitive Role for Tort Law' in Linda Pearson, Carol Harlow and Michael Taggart (eds), *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Hart Publishing, 2008) 249.

77 For detailed arguments on this, see generally Gary Schwartz, 'Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?' (1994) 42(2) *UCLA Law Review* 377; Sappideen and Vines (n 23) 4, 10.

78 James Fleming, 'Accident Liability Reconsidered: The Impact of Liability Insurance' (1948) 57(4) Y*ale Law Journal* 549, 557–8; EK Braybrooke, 'The Impact of Liability Insurance upon the Conceptual Basis of Loss Allocation' (1968) 3(1) *University of Tasmania Law Review* 53, 67; Peter Cane, 'Justice and

said that a defendant is, in effect, 'only a nominal party to the litigation, a mere "conduit through whom [the] process of distribution starts to flow"'.[79]

However, these considerations are of little relevance in the context of the tort of collateral abuse of process. This is because the act of misusing the legal process is *intentional*,[80] meaning that the defendant averts to, and considers, using the legal process to obtain a collateral advantage before carrying it into effect. Such action is also, for obvious reasons, highly unlikely to be insured against, meaning adverse judgment is to be paid out of the defendant's own pocket, 'making the deterrent lash both real and inescapable'.[81] Additionally, by making a finding that the defendant has misused the legal process, the court acts as a forum in which the defendant is held out as engaging in morally reprehensible conduct. Thus, the imposition of tortious liability also serves a deterrent purpose.[82]

B A Public Law Function?

There is a growing body of scholarship concerning the intersection between public and private law, and more specifically the ongoing and important debate as to whether some torts serve public law functions.[83] That debate is brought into sharp focus in relation to the tort of collateral abuse of process, particularly given the above finding that a core purpose of the tort is to provide the judiciary with a mechanism to punish and deter abuses of its processes.

Before considering any potential public function of the tort of collateral abuse of process, it is necessary to clarify what is intended by the use of the terms 'public law' and 'private law'.[84] The authors adopt the helpful distinction drawn by Cane, who identifies two dimensions to the foregoing dichotomy: an institutional and a

Justifications for Tort Liability' (1982) 2(1) *Oxford Journal of Legal Studies* 30, 46–7; Sappideen and Vines (n 23) 12; Balkin and Davis (n 23) 7–8. Note, however, that the High Court has held that the existence of insurance is no bar to exemplary damages being awarded: see *Lamb v Cotogno* (1987) 164 CLR 1, 9–10 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ); *Gray v Motor Accident Commission* (1998) 196 CLR 1, 12–13 [32]–[37] (Gleeson CJ, McHugh, Gummow and Hayne JJ), 25–7 [80]–[83] (Kirby J).

79 Sappideen and Vines (n 23) 12.

80 See above n 46.

81 Sappideen and Vines (n 23) 10.

82 See *Victoria International Container Terminal Ltd v Lunt* [2021] HCA 11, [43] (Edelman J).

83 See, eg, Jason Varuhas, 'Exemplary Damages: "Public Law" Functions, Mens Rea and Quantum' (2011) 70(2) *Cambridge Law Journal* 284; Mark Aronson, 'Misfeasance in Public Office: Some Unfinished Business' (2016) 132 (July) *Law Quarterly Review* 427; Donal Nolan, 'A Public Law Tort: Understanding Misfeasance in Public Office' in Kit Barker et al (eds), *Private Law and Power* (Hart Publishing, 2017) 177 ('Understanding'); Ellen Rock and Greg Weeks, 'Monetary Awards for Public Law Wrongs: Australia's Resistant Legal Landscape' (2018) 41(4) *University of New South Wales Law Journal* 1159; Donal Nolan, 'Tort and Public Law: Overlapping Categories?' (2019) 135 (April) *Law Quarterly Review* 272 ('Overlapping'); Ellen Rock, 'Misfeasance in Public Office: A Tort in Tension' (2019) 43(1) *Melbourne University Law Review* 337 ('Tension'); Ellen Rock, 'Resolving Conflicts at the Interface of Public and Private Law' (2020) 94(5) *Australian Law Journal* 381. We thank the anonymous reviewers for directing us to this body of literature.

84 This article proceeds on the basis that there is a recognisable distinction between public law and private law. For a comprehensive justification of a dichotomy between the two, see Nolan 'Overlapping' (n 83) 274.

functional.[85] The former is employed to distinguish between public agencies and officials on the one hand, and private citizens on the other. The latter denotes a distinction between public functions and private activities. Conceptualised in this way, 'in rough terms' public law 'is concerned with public institutions and their relations with private citizens, and with the performance of public functions', while private law 'is concerned with private activities and relations between private citizens'.[86] Prima facie, it is plausible to assert that the tort of collateral abuse of process sits at the intersection of these two conceptions. Exactly how it does so, however, is a matter that requires deeper analysis. This section will therefore explore any public law function of the tort of collateral abuse of process and, more importantly, what such classification means to understanding its operation.

1 A Foundation for Analysis: Misfeasance in Public Office

It is necessary to commence any discussion on the intersection between public law and the imposition of tortious liability with what has characteristically been described as the 'only truly public law tort': misfeasance in public office.[87] The reason for this is that by conceptualising a tort undisputed to serve public law functions, a point of departure is constructed against which the tort of collateral abuse of process can be assessed.

The tort of misfeasance in public office is perhaps most succinctly encapsulated by the remarks of Iacobucci J in *Odhavji v Woodhouse* as being committed where a public officer intentionally injures a member of the public 'through deliberate and unlawful conduct in the exercise of public functions'.[88] Using Cane's two dimensional analysis, scholars have conceptualised this cause of action as a public law tort for two reasons. First, from an institutional perspective, the tort is focused on the actions of public agencies and officials: only public officers can commit the tort.[89] Secondly, from a functional perspective, the tort regulates conduct amounting to the purported performance of the peculiarly public functions of a public office: a malicious act by a public officer solely in his

---

85 Peter Cane, *Administrative Law* (Oxford University Press, 5th ed, 2011) 4 ('*Administrative Law*'). Nolan similarly adopts this distinction: ibid 279–80.

86 Cane, *Administrative Law* (n 85) 4.

87 Aronson, 'Misfeasance in Public Office: Some Unfinished Business' (n 83) 428. See also Mark Aronson, 'Misfeasance in Public Office: A Very Peculiar Tort' (2011) 35(1) *Melbourne University Law Review* 1, 49; Nolan, 'Overlapping' (n 83) 280; Robert Sadler, 'Liability for Misfeasance in Public Office' (1992) 14(2) *Sydney Law Review* 137, 138; Mads Andenas and Duncan Fairgrieve, 'Misfeasance in Public Office, Governmental Liability and European Influences' (2002) 51(4) *The International and Comparative Law Quarterly* 757, 761; Carol Harlow, *State Liability: Tort Law and Beyond* (Oxford University Press, 2004) 130; Cane, *Administrative Law* (n 85) 218; *Pyrenees Shire Council v Day* (1998) 192 CLR 330, 376 (Gummow J).

88 [2003] 3 SCR 263, 286 [30]. See also *Sanders v Snell* (1998) 196 CLR 329, 344–5 [37]–[38] (Gleeson CJ, Gaudron, Kirby and Hayne JJ) ('*Sanders*'); *Nyoni v Shire of Kellerberin* (2017) 248 FCR 311, 328 [80]–[81] (North and Rares JJ) ('*Nyoni*').

89 Aronson, 'Misfeasance in Public Office: Some Unfinished Business' (n 83) 428, 436–7; Nolan, 'Understanding' (n 83) 182; Nolan, 'Overlapping' (n 83) 280; Rock, 'Tension' (n 83) 346.

or her capacity as a *private* individual would fall outside the scope of the tort.[90] Therefore, the basis for classifying the tort within public law is its exclusive concern with imposing liability for abuses of public power by an individual acting in their capacity as a public officer.

It is this classification that has enabled the tort's public law functions to be properly understood. It is widely accepted by courts and the academy that misfeasance in public office protects the community interest by ensuring 'that in a legal system based on the rule of law executive or administrative power "may be exercised only for the public good" and not for ulterior and improper purposes'.[91] The tort achieves this by empowering members of the public to privately 'prosecute' official misconduct,[92] ensuring not only that public officers are held accountable,[93] but also deterring future official misconduct in order to improve standards of public administration.[94] Moreover, the award of exemplary damages in misfeasance cases enables courts to 'express a sense of public outrage at the misuse of the powers that were granted to the official to exercise in the public interest'.[95] The award of exemplary damages therefore bolsters the tort's public law functions, and, as helpfully observed by Rock, contributes 'to the higher theoretical goal of supporting the legitimacy of government'.[96]

2 A Closer Relative: Malicious Prosecution

While the tort of misfeasance in public office has been labelled the 'common law's only truly public law tort',[97] it is not the only tort argued to serve a public law function. The next logical point of consideration is the tort of malicious prosecution. As explained in Part II, the tort of malicious prosecution is committed where a public prosecutor, without reasonable and probable cause, maliciously prosecutes a plaintiff on a criminal charge determined in the plaintiff's favour, and which caused damage as a result.[98] Given that the tort imposes liability for malice in the context of an abuse of a prosecutor's official power to bring prosecutions on behalf of the public at large, its public law focus is self-evident. Indeed, Lord Sumption in *Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd* ('*Crawford*') stated that the tort serves as 'a tool for constraining the arbitrary exercise of the powers of public prosecuting authorities or private persons exercising corresponding functions'.[99]

---

90 Aronson, 'Misfeasance in Public Office: Some Unfinished Business' (n 81) 428, 441; Nolan, 'Understanding' (n 83) 182–3; Nolan, 'Overlapping' (n 83) 280–1.

91 *Three Rivers District Council v Bank of England [No 3]* [2003] 2 AC 1, 190 (Steyn LJ) (citations omitted). See also *Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146, 153–4 [11] (Gummow, Hayne, Heydon and Crennan JJ).

92 See Nolan, 'Understanding' (n 83) 187.

93 Rock, 'Tension' (n 83) 367–8.

94 Erika Chamberlain, *Misfeasance in a Public Office* (Thomson Reuters, 2016) 66–9.

95 Ibid 67.

96 Rock, 'Tension' (n 83) 361.

97 Aronson, 'Misfeasance in Public Office: A Very Peculiar Tort' (n 87) 2.

98 *A v NSW* (2007) 230 CLR 500, 502–3 [1] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ) (although the majority explicitly left open whether the tort could be committed by the malicious institution of civil proceedings).

99 [2014] AC 366, 420–1 [145] (Lord Sumption JSC).

However, Lord Sumption was in the minority in *Crawford*; the majority holding that the tort of malicious prosecution can be committed in the context of *civil* proceedings and therefore is not solely concerned with the actions of public officers.[100] It was this finding which led a majority in *Crawford* to resist a public law analysis of the tort.[101] Specifically, the Board identified that because the tort extends to private citizens maliciously instituting civil proceedings, its essence is concerned principally with the 'illegitimate use by an individual of coercive legal powers to cause harm to another'.[102] Nolan has since argued that this observation weakens the case for classifying malicious prosecution as a public law tort, as its focus is on an abuse of process, as opposed to abuse of power, which in his view, 'seems more redolent of private law patterns of thought'.[103]

3 At the Intersection: Collateral Abuse of Process

On Nolan's analysis, as the tort of collateral abuse of process is concerned solely with the misuse of legal processes rather than abuses of power, this would suggest that it does not have a public law function. Indeed, the tort of collateral abuse of process does not focus exclusively on the actions of public officials: it can be committed by both public and private actors. Hence, from an institutional perspective, the tort is not concerned with public law. Surely, however, the analysis does not stop there; it would otherwise neglect the second limb of Cane's thesis, namely the *functional* dimension.

Equally significant is the fact that the tort of collateral abuse of process is focused on maintaining the integrity of the judicial process. The judiciary, as an arm of government, provides citizens with legal processes to resolve disputes and is entrusted with maintaining those processes so that they accord with the rule of law and are used for their intended and legitimate purposes. When the tort of collateral abuse of process operates, it gives courts the opportunity to place limits on the way in which litigants, whether public or private, can invoke the coercive power of the judicial process. Moreover, the tort provides the judiciary with a mechanism to punish and deter an abuse of its processes, such that the integrity of the judicial process can be vindicated. Not only does the imposition of liability hold the wrongdoer accountable, but the existence of the tort also makes all litigants careful to observe that they are using legal processes properly and for their legitimate purposes. It necessarily follows that, from a functional perspective, the tort of collateral abuse of process is concerned with a public function: the court's maintenance of the integrity of its own processes to ensure its legitimacy as an arm of government. As was remarked by Owen J in *McKechnie v Campbell*:

> A court will not sit idly by and allow its processes to be abused by litigation that is not brought for a purpose which falls within the range of purposes for which the processes exist. It is a doctrine that has its roots in public policy considerations. *The*

100 Ibid 400–1 [78] (Lord Wilson JSC), 407 [104] (Lord Kerr JSC, Baroness Hale JSC agreeing at 404 [90]).

101 See also *Willers v Joyce* [2018] AC 779, 804 [50] (Lord Toulson JSC for Baroness Hale DPSC, Lord Kerr and Lord Wilson JJSC).

102 *Crawford* [2014] AC 366, 407 [104] (Lord Kerr JSC).

103 Nolan, 'Overlapping' (n 83) 287.

> *proper functioning of the justice system and the administration of its processes is very much a matter of public interest.*[104]

Thus, it is the authors' contention that the tort of collateral abuse of process sits squarely at the intersection between public and private law. On the one hand, it is distinct from misfeasance in public office and cannot be classified as a 'public law tort' as it is not solely concerned with imposing liability for abuses of public power by an individual acting in their capacity as a public officer. On the other hand, the most plausible rationale for the tort is that it operates (at least in part) to maintain the integrity of the judicial process, an object which is undoubtedly concerned with the function of the judicial arm of government. What therefore unifies the torts of misfeasance in public office and collateral abuse of process (and by extension, malicious prosecution) is their overarching goal to reinforce public confidence in the legitimacy of government.

The tort of collateral abuse of process is accordingly best classified as a private law action with a multitude of functions, one of which, quite unusually, concerns public law. Two important consequences arise from this classification. First, recognising that the tort of collateral abuse of process exists to maintain the integrity of the judicial process will necessarily inform the tort's elements and any applicable defences that may apply to limit its scope. This is specifically addressed in Part IV below. Secondly, like misfeasance in public office, the tort's public law function further justifies the award of exemplary damages. As outlined above, once the tort is made out, exemplary damages are often awarded to punish the defendant for the wrong committed against the process itself. Exemplary damages for a collateral abuse of process therefore provide the judiciary with an avenue to express a sense of public outrage in its processes being wrongfully misused.[105]

In summary, it is the authors' view that running alongside the tort's more traditional private law purposes is a public law function to maintain the integrity of the judicial process.

C Policy Considerations that Limit the Scope of the Tort

In addition to identifying the underlying purposes of the tort of collateral abuse of process, attention must be given to the policy considerations which limit its scope.[106] This section will critically analyse these considerations, which can be broadly categorised as follows: (i) the restriction on the vindication of legal rights; (ii) the finality of litigation; and (iii) the overlap of existing procedural mechanisms.

1 Restriction on the Vindication of Legal Rights

It has been reasoned that the tort of collateral abuse of process gives rise to a risk that individuals may be discouraged from properly vindicating their legal

104 (1996) 17 WAR 62, 74 (emphasis added). See also *Martin v NRF* [2020] FCA 1641, [396] (Kerr J).

105 This contributes to the 'higher theoretical goal of supporting the legitimacy of government': Rock, 'Tension' (n 83) 361.

106 Importantly, it must not be forgotten that tort law defences also play a key role in limiting tortious liability and therefore reduce the scope of this tort. This issue is addressed in Part IV(E).

rights.[107] This consideration spawns from the fact that, unlike the tort of malicious prosecution, the tort of collateral abuse of process can be successfully made out even if an individual has a valid legal claim that can be pursued against another.[108] Indeed, as was stated by Moore-Bick LJ in *Land Securities v Fladgate Fielder*, and cited by Bell P in *Burton*:

> [T]here are strong policy reasons for limiting to a necessary minimum the range of circumstances in which the prosecution of well-founded civil proceedings will give rise to a cause of action. In general, people should be free to take action to vindicate their rights without facing the threat of collateral proceedings.[109]

Lady Hale further described this concern in *Crawford*, noting that a policy reason cited against the imposition of tortious liability is that 'people should not be deterred from instigating criminal charges or bringing lawsuits by the fear of being sued if they fail'.[110] The Court of Appeal of the Republic of Singapore recently echoed this sentiment in *Lee Tat Development Pte Ltd v Management Corporation Strata Title Plan No 301* when tasked with determining the existence of the tort of collateral abuse of process in Singaporean law.[111] After canvassing in-depth the development of the tort throughout the common law world, Leong JA, delivering the judgment of the Court, held that recognising the tort of collateral abuse of process could have a 'chilling effect on regular litigation'.[112] Although the Court recognised that this effect is somewhat mitigated by the difficulty of establishing the tort, in its view 'litigants may be deterred by the *threat or possibility* of being sued for the abuse of process'.[113]

When a litigant assesses whether to use the legal process to vindicate a legal right, he or she must bear the risk that their action may fail. Prima facie, the possibility of being sued in tort law after such a failure may amplify the risk borne by the litigant. However, the major difficulty with this conclusion is that the secondary risk of being sued in tort law is highly unlikely to be in the mind of an individual assessing whether to use a legal process. It is quite fanciful to imagine that a legal representative would advise a litigant with a proper legal claim against bringing an action out of the fear that if the claim fails, they may later be the subject of an adverse action for abusing the process of the court. Indeed, the risk of failure and the adverse award of costs is the real risk confronting the litigant; any risk of

---

107 *Goldsmith* [1977] 1 WLR 478, 489, 503 (Bridge LJ); *Spautz v Gibbs* (1990) 21 NSWLR 230, 287 (Meagher JA); *Land Securities* [2010] Ch 467, 499 [100] (Moore-Bick LJ); *Crawford* [2014] AC 366, 426 [157] (Lord Sumption JSC).

108 As explained in Part I.

109 *Land Securities* [2010] Ch 467, 499 [100]; *Burton* (2019) 100 NSWLR 734, 740 [20]. See also *Spautz v Gibbs* (1990) 21 NSWLR 230 where Meagher JA noted at 287:

> [I]t is hardly congenial to contemplate the Court having imperfect powers to deal with litigants whose sole occupation seems to be the manufacture of law suits. However, the only alternative is to embrace a theory that the Court may deprive a litigant of his right to press a cause of action, however legitimate, if he initiates it with unworthy or malevolent motives – a theory which is both socially dangerous and repugnant to legal principle.

110 [2014] AC 366, 402 [82].

111 [2018] SGCA 50 ('*Lee Tat*').

112 Ibid 79–80 [156].

113 Ibid (emphasis in original). Lord Sumption also recognised this when he stated: 'The vice of secondary litigation is in the attempt': *Crawford* [2014] AC 366, 422 [148].

being sued for collateral abuse of process, when the litigant has a valid legal claim, therefore pales into insignificance. Lord Kerr captured the reality of the risk that confronts litigants, when he reasoned:

> Those contemplating legal proceedings should not be deterred by the prospect of subsequent litigation challenging the propriety of their having invoked the jurisdiction of the court. But it is surely too glib to say that this will be the inevitable consequence of rendering liable those who have pursued baseless claims for improper motives. A litigant … must confront the likelihood of an award of costs in the event of his failure. In the case of a claimant with a genuine and reasonable belief in the rightness of his cause, will that habitual deterrent be enhanced by the possibility that his opponent will embark on further proceedings against him? … True it may be … that litigation sharpens men's conviction of their own rightness and their suspicion of their opponents' motives. But those who launch proceedings rarely do so without regard to the possibility of failure.[114]

The proposition put is a sound one: it is shallow to assert that attaching tortious liability to those who misuse the legal process will simultaneously prevent genuine litigants from bringing valid claims. This conclusion, however, is prefaced on the assumption that tortious liability will only be imposed where there is an identifiable abuse of the legal process. Where the argument of a 'chilling effect' becomes more convincing is when it is suggested that the elements of the tort are relaxed, such that mere 'bad' motive could be actionable.[115] The impact of imposing tortious liability on the vindication of legal rights is therefore a consideration which should be recognised as confining the scope of the tort.

2 Finality of Litigation

Another policy consideration said to impact the scope of the tort of collateral abuse of process is the principle of finality in litigation.[116] There are concerns that if the tort does not have identifiable and precise limits, it would offer vexatious defendants the opportunity to prolong disputes by way of secondary litigation. Some have reasoned that the importance of finality outweighs the imposition of secondary tortious liability in its entirety.[117] Adopting this view, however, would lead to the absurd conclusion that litigants are free to misuse the legal process without consequence. Courts must therefore balance these competing interests and limit the scope of the tort to ensure that it is sensitive to the principle of finality.

3 The Courts' Inherent Power to Stay Proceedings

The court has an inherent power to stay proceedings where they amount to an abuse of process.[118] As a result, and as was reiterated in Part II, it is generally accepted that the tort should not be identical to that of a stay, as its application, in

---

114 *Crawford* [2014] AC 366, 406 [100] (Lord Kerr JSC).

115 For example, if the tort were to impose liability on a party simply for holding an improper purpose, this could be said to create a real risk that those considering vindicating their valid legal rights may not do so.

116 *Crawford* [2014] AC 366, 402 [82] (Baroness Hale JSC).

117 Ibid 422 [148] (Lord Sumption JSC); *Lee Tat* [2018] SGCA 50, 77–8 [151]–[155] (Leong JA for the Court).

118 See above n 2.

attaching liability, serves a different purpose.[119] Some have gone so far as to say that the tort should not exist because a stay is sufficient to deal with an abuse of the legal process.[120] However, these arguments fail to recognise that the inherent power of the court cannot be invoked retrospectively, after the legal process has been abused. This is, as outlined above, a primary justification for the tort's existence. Thus, the courts' inherent power to stay proceedings merely limits *when* the tort is to apply.

D Summary

The above analysis demonstrates that the tort of collateral abuse of process serves a multitude of purposes which justify its continued existence in contemporary Australian tort law. Not only does the tort seek to compensate the wronged individual, it also provides the judiciary with the ability to punish an abuse of its processes and deter the misuse of them. It is in this sense that the tort is fundamentally unique: it regulates both an interference with the *person* and an interference with the *process*. However, to ensure that the tort does not impede the proper functioning of the legal system generally, the imposition of liability must be tempered. Individuals must not be discouraged from vindicating their valid legal rights, the finality of litigation must be respected and the inherent power of the court to stay proceedings must be realised.

Ultimately, these purposes and policy considerations impact the tort's scope of application and must be considered when properly formulating its elements, the examination of which will form the remainder of this article.

IV A SEARCH FOR CLARITY: EXAMINING THE ELEMENTS OF THE TORT

In the New South Wales Court of Appeal decision of *Burton*, the Court considered, inter alia, whether the appellant had correctly pleaded the tort of collateral abuse of process when he alleged that the respondent, the Office of the Director of Public Prosecutions, had instituted criminal proceedings to vex him. It was in this context that Bell P reviewed the Australian and English authorities and set out the four elements which are said to establish the tort of collateral abuse of process. In light of the limited academic scrutiny devoted to the tort, it is yet to be questioned whether these elements align with the tort's underlying purposes and to what extent they are sensitive to the policy considerations that limit its scope. Nor has there been any consideration of whether any tort law defences should have application.

---

119 *Williams* (1992) 174 CLR 509, 552 (Gaudron J); *Leerdam* (2009) 255 ALR 553, 559 [31] (Spigelman CJ); *Burton* (2019) 100 NSWLR 734, 740 [22] (Bell P).

120 *Lee Tat* [2018] SGCA 50, 80–2 [157]–[161] (Leong JA for the Court). See also *Land Securities* [2010] Ch 467, 501 [109] (Mummery LJ).

A Element One: The Institution of a Legal Process for an Improper Purpose

The first requirement is that the alleged tortfeasor must have instituted a legal process for an improper purpose. This element can be said to contain three sub-elements that have all been considered by Australian courts.

First, the alleged tortfeasor must be the party who actually used the process, and not its legal representatives. Therefore, in *Leerdam v Noori*, it was held that a solicitor acting on behalf of the Minister for Immigration and Multicultural and Indigenous Affairs could not be sued for committing the tort of collateral abuse of process.[121]

Secondly, only a legal *process* must be instituted, rather than legal proceedings. The tort can therefore be committed by the use of any legal process, irrespective of whether a person institutes proceedings, issues a defence, asks for discovery, or issues a subpoena.[122] Balkin and Davis have doubted whether improperly defending proceedings should be actionable, arguing that 'litigants might be deterred from pursuing honest claims or defences and honest witnesses might be deterred from giving evidence' due to being sued for collateral abuse of process.[123] The issue with this conclusion is that plaintiffs similarly face the risk of being deterred from pursuing honest claims. If the tort can be limited in its scope to mitigate against this risk for plaintiffs, it seems unreasonable to suggest that the risk cannot be mitigated for defendants. Moreover, the High Court has held that the power to stay proceedings on the ground that they are an abuse of process 'extends to all those categories of cases in which the processes and procedures of the court … may be converted into instruments of injustice or unfairness'.[124] It would therefore be anomalous for courts to have the power to stay any process that seeks to be abusive, but be prevented from imposing tortious liability where that process, if not the institution of substantive proceedings, in fact achieves such abuse.

Thirdly, the defendant must have an improper purpose. This sub-element is the most contentious as it poses two issues: (i) what makes a purpose 'improper'?; and (ii) will a litigant have committed the tort if they have both an improper and legitimate purpose?

From the outset, the label 'improper purpose' is misleading because it fails to identify the precise subjective intention required of the defendant. In *Clavel v Savage*, Rothman J defined an improper purpose as one 'other than that of carrying the law into effect as the proceedings might otherwise be intended'.[125] In this sense, there is no distinction between whether a defendant intends to obtain an advantage for him or herself, or cause some sort of detriment or disadvantage on the plaintiff, so long as it is collateral and outside the lawful scope of the process. Accordingly,

121 (2009) 255 ALR 553, 560–1 [38]–[45] (Spigelman CJ), 565 [65] (Allsop P), 581 [126] (Macfarlan JA).

122 *Hamer-Mathew* (1994) 35 NSWLR 92, 94 (Brownie J); *Gulabrai v Hamer* [1997] NSWCA 131, 2 (Meagher JA, Beazley and Stein JJA agreeing at 4); *Leerdam* (2009) 255 ALR 553, 560 [36] (Spigelman CJ). Cf Barker et al (n 23) 96–7.

123 Balkin and Davis (n 23) 720.

124 *Walton v Gardiner* (1993) 177 CLR 378, 392–3 (Mason CJ, Deane and Dawson JJ).

125 *Clavel v Savage* [2013] NSWSC 775, [85] (Rothman J).

when courts refer to an 'improper purpose' to found the tort of collateral abuse of process, they mean that it must be proven that the defendant had a *specific* intent to cause an advantage or disadvantage beyond the lawful scope of the legal process instituted.[126] The tort therefore requires proof of a subjective intention to cause a harmful consequence, and can be distinguished from the trespass torts.[127] Examples of such improper purposes include an intention to use a legal process to: affect negotiations to take control of a company;[128] put pressure on an opposing party to settle a different dispute;[129] prevent a bank taking possession of property;[130] interfere with, embarrass and hinder a police officer from carrying out his duties to investigate corruption in the poker machine industry;[131] induce a university to secure the defendant's reinstatement;[132] delay or defer the time for payment of an obligation;[133] vex a criminal defendant;[134] and prevent a former employee from obtaining a certificate from the Fair Work Commission which he required to litigate his claims in the Federal Court of Australia.[135]

Importantly, however, a purpose will not be improper where it is simply to affect a result or consequence that may naturally and reasonably flow from the legitimate application of the process.[136] This was illustrated by the majority in *Williams v Spautz*, where they provided a useful example of an alderman ('A1') who prosecutes another alderman ('A2'), a political opponent of A1, for failure to disclose a relevant pecuniary interest when voting to approve a contract. A1 intends to secure A2's conviction with a desire to see that A2 is disqualified from office as an alderman, pursuant to local government legislation regulating the holding of such offices. In reasoning that A1 did not have an improper purpose, the majority explained:

> The ultimate purpose of bringing about disqualification is not within the scope of the criminal process instituted by the prosecutor. But the immediate purpose of the prosecutor is within that scope. And the existence of the ultimate purpose cannot constitute an abuse of process when that purpose is to bring about a result for which the law provides in the event that the proceedings terminate in the prosecutor's favour.[137]

This reasoning is better understood in light of the initial examples of improper purposes. If a litigant commences proceedings in order to put pressure on an opposing party to settle an entirely different dispute, such a result is not within the legitimate scope of the process because ordinarily a successful claim will only lead

---

126 See above n 46.

127 As the trespass torts only require proof of basic intent to be actionable (eg, to enter land).

128 *QIW v Felview* [1989] 2 Qd R 245, 258–9 (Macrossan J).

129 *Hamer-Mathew* (1994) 35 NSWLR 92, 94 (Brownie J).

130 *NAB v McFarlane* [2005] VSC 438, [61] (Habersberger J).

131 *Hanrahan 2* (1990) 22 NSWLR 73, 96–7 (Kirby P), 99 (Mahoney JA), 122 (Clarke JA).

132 *Williams* (1992) 174 CLR 509, 516 (Mason CJ, Dawson, Toohey and McHugh JJ).

133 *White Industries (Qld) Pty Ltd v Flower & Hart (a firm)* (1998) 156 ALR 169, 239–40 (Goldberg J) ('*White v Flower*').

134 *Burton* (2019) 100 NSWLR 734, 736 [2] (Bell P), 746 [52] (White JA), 751–2 [95]–[98] (McCallum JA).

135 *Martin v NRF* [2020] FCA 1641, [376]–[403] (Kerr J).

136 *Williams* (1992) 174 CLR 509, 526 (Mason CJ, Dawson, Toohey and McHugh JJ), 532–3 (Brennan J); *Maxwell-Smith* (2014) 86 NSWLR 481, 490 [39] (Barrett JA, Beazley P and McColl JA agreeing at 483 [1]–[2]); *Crawford* [2014] AC 366, 393 [63] (Lord Wilson JSC), 422 [149] (Lord Sumption JSC).

137 *Williams* (1992) 174 CLR 509, 526 (Mason CJ, Dawson, Toohey and McHugh JJ).

to a remedy that enforces the specific rights in dispute between the parties. Even if the wrongdoer is successful in his or her claim, it will have no influence on determining the rights and liabilities of an entirely different dispute. In contrast, in the example above, if A1 were to prosecute A2 without being motivated to disqualify A2 from office, a successful prosecution would still have led to A2 being disqualified pursuant to the local government legislation. It can therefore be said that this outcome naturally and reasonably flows from a valid exercise of the legal process, and therefore a purpose to achieve it cannot be improper.[138]

The assessment of an improper purpose is complicated further when a litigant has both an improper and a legitimate purpose. Other than identifying that an improper purpose must be the predominant one,[139] Australian courts have not adequately justified *why* a predominant purpose will suffice.[140] Lord Wilson in *Crawford*, after referring to the judgment of Bridge LJ in *Goldsmith v Sperrings*, significantly doubted whether a legitimate purpose simply nullifies a predominant improper one:

> Then, however, [Bridge LJ] proceeded to notice what he described as 'a difficult area', namely whether a claimant was guilty of abuse if behind his action lay two purposes – one legitimate and one improper … There Bridge LJ was not, at any rate expressly, considering a case where the improper purpose is predominant and the legitimate purpose is subsidiary. But his observations seem to have been influential in leading Teare J to conclude in *JSC BTA Bank v Ablyazov (No 6)* [2011] 1 WLR 2996 that any legitimate purpose negatived abuse even if an improper purpose was predominant. With respect to Teare J, his conclusion fails in my view to allow for the ease with which a claimant with a predominantly improper purpose can point to a legitimate purpose, however slight. In any event it runs clearly counter to the weight of modern legal opinion …[141]

An example that encapsulates the situation posited by Lord Wilson is a scenario in which X validly sues B for breach of contract in order to claim $50,000 owed for services performed by X. However, X is aware that B is in a precarious financial position and is motivated to profit from B's misfortune by using the proceedings to force B to enter into an identical contract for an exorbitant $60,000. To further this purpose, X threatens B that unless B enters into the further contract and pays an upfront deposit of $10,000, X will intentionally draw out the length of

---

138 Whilst, prima facie, it could be argued that all outcomes could be framed as a natural and reasonable consequence of the proceedings, in reality this is not the case. Take another example: preventing the investigation of corruption in the poker machine industry is not a natural and reasonable consequence of defamation proceedings: see *Hanrahan 2* (1990) 22 NSWLR 73, 96–7 (Kirby P), 99 (Mahoney JA), 122 (Clarke JA).

139 *Williams* (1992) 174 CLR 509, 529 (Mason CJ, Dawson, Toohey and McHugh JJ), 537 (Brennan J); *Burton* (2019) 100 NSWLR 734, 743 [34] (Bell P); *QIW v Felview* [1989] 2 Qd R 245, 258 (Macrossan J); *Hanrahan 2* (1990) 22 NSWLR 73, 96–7 (Kirby P), 98–9 (Mahoney JA), 120 (Clarke JA); *Spautz v Gibbs* (1990) 21 NSWLR 230, 278 (Priestley JA); *Gulabrai v Hamer* [1997] NSWCA 131, 3 (Meagher JA); *White v Flower* (1998) 156 ALR 169, 239–40 (Goldberg J); *Butler* [2000] 2 Qd R 252, 263–4 [38] (McMurdo P, Pincus and Thomas JJA).

140 O'Connor J was originally of the opinion that only a sole improper purpose should found the tort: *Varawa* (1911) 13 CLR 35, 71. Interestingly, however, neither the majority of the Court nor another judge in *Williams* referred to O'Connor J's reasoning and it was simply stated by the majority that the purpose must be a predominant one: (1992) 174 CLR 509, 529 (Mason CJ, Dawson, Toohey and McHugh JJ), 537 (Brennan J).

141 *Crawford* [2014] AC 366, 393–4 [64]–[65] (Lord Wilson JSC) (citations omitted).

the proceedings by refusing to come to an agreement in relation to discovery in order to increase B's legal costs. B, already concerned about the cost of the litigation, enters into the agreement for X's services and pays the deposit. Judgment is ultimately entered in favour of X, and B having paid the award, cannot afford to pay for X's additional services and loses their $10,000 deposit.

Although X has sued for the enforcement of a valid legal right, they have also intentionally abused the legal process by using it to affect their predominant improper purpose and force B to enter into a further contract. B's $10,000 loss was not a natural and reasonable consequence of the valid use of the process; rather, X used the process to affect their desired purpose to force B to enter into the contract and pay the deposit. In these circumstances, X has intentionally misused the legal process to their gain. If X was simply able to point to their legitimate purpose of desiring justified compensation to negate the fact that they had an ulterior purpose, the entire objective of the tort to protect against an interference with the legal process would be undermined. Indeed, such a conclusion would ignore the fact that, whilst X clearly has a legal right to vindicate, they have also misused the legal process.[142]

In contrast, by recognising that a predominant improper purpose will suffice to make out the tort, these competing interests can be balanced. X's legitimate purpose to vindicate their right for a breach of contract would still be effected; the imposition of tortious liability would not deny X of this right and their entitlement to the original award of $50,000. However, by holding X liable for committing the tort and awarding damages against them, the judiciary is able to simultaneously punish X's blatant interference with the legal process *and* compensate B for the economic harm suffered, such that the integrity of the judicial process is vindicated.

The above example demonstrates that by having regard to the tort's public law function and its underlying purposes of punishment and compensation, the diluted requirement that a tortfeasor has a predominant (rather than sole) improper purpose, is justified.

B Element Two: Misuse of the Legal Process to Obtain a Collateral Advantage (or Disadvantage?)

This element requires that the legal process must have been misused in order to obtain a collateral advantage 'entirely outside' that afforded by the legal process invoked. It is the crux of the tort, as it raises the moral culpability of the defendant beyond that of merely having an improper purpose. As has been reiterated by courts on numerous occasions,[143] simply instituting proceedings with an improper purpose (ie, an intention to cause a collateral object) is not enough to found tortious

---

142 Furthermore, it would present to litigants that if they have valid legal rights, they are free to abuse the legal process as they wish to the detriment of their opponents.

143 *Hanrahan 2* (1990) 22 NSWLR 73, 122 (Clarke JA); *Williams* (1992) 174 CLR 509, 526 (Mason CJ, Dawson, Toohey and McHugh JJ), 552 (Deane J), 552–3 (Gaudron J); *Butler* [2000] 2 Qd R 252, 260 [27] (McMurdo P, Pincus and Thomas JJA); *Maxwell-Smith* (2014) 86 NSWLR 481, 493 [52] (Barrett JA, Beazley P agreeing at 483 [1], McColl JA agreeing at 483 [2]); *Burton* (2019) 100 NSWLR 734, 741 [25] (Bell P).

liability.[144] By requiring that a plaintiff prove that a defendant used a legal process to *actually obtain* a collateral advantage,[145] the tort's scope of application is significantly reduced. It can therefore be said that this element militates against the risk that the tort may dissuade litigants from validly using legal processes to vindicate their legal rights.

A debate that has ensued in the Australian courts when assessing this element is whether it exclusively requires a collateral *advantage* be obtained by the wrongdoer, rather than a disadvantage or detriment effected on the opposing party. The discussion was initially sparked by Clarke JA, who was in dissent in *Hanrahan v Ainsworth* for this very reason. In his Honour's view, although it could be inferred from the evidence that the respondent commenced the proceeding to impede the investigation of corruption, the tort of collateral abuse of process could not be put to the jury because there was no evidence led to show how the respondent had sought to use the proceedings to gain a wrongful advantage.[146]

In *Williams v Spautz*, although the majority did not acknowledge the reasoning of Clarke JA, they similarly held that only proof of a collateral *advantage* will establish the tort. The majority stated:

> It is otherwise when the purpose of bringing the proceedings is not to prosecute them to a conclusion but to use them as a means of obtaining some *advantage* for which they are not designed or some *collateral advantage* beyond what the law offers.[147]

In contrast, Brennan J was of the view that using a legal process to create a burden on the opposing party would also suffice to make out the tort. His Honour held:

> For these reasons, I would hold that an abuse of process occurs when the only substantial intention of a plaintiff is to obtain an advantage or other benefit, to *impose a burden* or to create a situation that is not reasonably related to a verdict that might be returned or an order that might be made in the proceeding.[148]

Neither the majority, nor Brennan J, explained the reasons for the distinction in their conclusions. Deane and Gaudron JJ did not comment on the issue.

The Queensland Court of Appeal in *Butler v Simmonds*[149] applied the reasoning of the High Court majority. Similarly, the New South Wales Court of Appeal in *Leerdam v Noori* acknowledged in obiter dicta that a collateral advantage, rather

---

144 Importantly, however, the improper purpose is inherently linked with the collateral object obtained. At this stage of the analysis, in recognising that there is an improper purpose, the court will have simultaneously established that the achievement of that purpose will be the *collateral* advantage obtained or disadvantage imposed. This is for the very reason that a purpose will not be improper where it is a natural and reasonable consequence of the litigation. For example, in *White v Flower*, the improper purpose was to use the process to delay the payment of a debt, in which the corresponding collateral advantage would have been the delay.

145 It is the attainment of a collateral advantage (or disadvantage) which can be said to transform a 'use' of a legal process into a 'misuse'. In this sense, it is the use of the legal process to attain the collateral advantage (or disadvantage) that the process can be said to have been 'misused'.

146 *Hanrahan 2* (1990) 22 NSWLR 73, 123 (Clarke JA).

147 *Williams* (1992) 174 CLR 509, 526–7 (Mason CJ, Dawson, Toohey and McHugh JJ) (emphasis added) (citations omitted).

148 Ibid 537 (Brennan J) (emphasis added).

149 [2000] 2 Qd R 252, 260 [27], 264 [39] (McMurdo P, Pincus and Thomas JJA).

than a disadvantage, is required.[150] The debate ultimately resurfaced in *Burton*. Bell P, drawing on the reasoning of Clarke JA[151] and the authoritative statements of the majority in *Williams v Spautz*,[152] held that the tort will only be made out where the party alleging the commission of the tort can 'identify the advantage that was being sought to be achieved by the moving party in the impugned proceedings'.[153] However, McCallum JA disagreed, stating that:

> In particular, with great respect to the President, I am not confident that the seeking of a collateral advantage is an element of the tort. The authorities considered by his Honour arguably support the proposition that the existence of an improper purpose together with misuse of the proceedings in furtherance of that purpose would suffice, whether or not the purpose was to obtain an advantage. I see no reason in principle why a collateral purpose of imposing a detriment, such as vexation, would not equally fall within the principles discussed, particularly where the relevant process is a criminal proceeding and the alleged tortfeasor is a prosecuting authority.[154]

The conflicting statements of Bell P and McCallum JA therefore leave this element of the tort in a state of ambiguity. However, by looking to the underlying purposes of the tort and the policy considerations which limit its scope, there are significant difficulties in holding that the tort can only be made out where a collateral advantage is obtained.

First, the basis for such a requirement lacks sufficient justification. The statements of various courts holding that a collateral advantage must be proven are seemingly premised on the rationale that because *Grainger v Hill* was founded on a collateral *benefit* being obtained, courts are bound to limit the tort's scope to the achievement of a like benefit.[155] Indeed, there is no further rationale given for the restriction other than for the sake of following precedent. The limitation drawn by the requirement is in no way linked to the suggestion that it is militating against the risk that the tort may prevent litigants from validly using the legal process, nor does it promote the principle of finality in litigation or distinguish the tort from the court's inherent power to stay proceedings.[156] Further, the requirement makes no logical sense given that the first element of the tort (ie, an improper purpose) can be made out by proof of an intention to use a legal process to cause an advantage *or* disadvantage. Thus, from the outset, the requirement of an advantage lacks persuasive justification.

---

150 (2009) 255 ALR 553, 581–2 [128] (Macfarlan JA, Spigelman CJ agreeing at 554 [1], Allsop P agreeing at 561 [46]).

151 *Burton* (2019) 100 NSWLR 734, 743 [35]. However, Bell P did not identify that Clarke JA was in dissent on this point.

152 Ibid 744 [39], citing *Williams* (1992) 174 CLR 509, 526 (Mason CJ, Dawson, Toohey and McHugh JJ).

153 *Burton* (2019) 100 NSWLR 734, 744 [40].

154 Ibid 755–6 [124].

155 In particular, see ibid 743 [36] (Bell P), citing *Grainger* (1838) 4 Bing (NC) 212; 132 ER 769; *Hanrahan 2* (1990) 22 NSWLR 73, 118 (Clarke JA).

156 Indeed, courts have an inherent power to stay proceedings where they are an abuse of process due to being vexatious or oppressive: *Ridgeway* (1995) 184 CLR 19, 74–5 (Gaudron J); *Batistatos* (2006) 226 CLR 256, 266–7, [14] (Gleeson CJ, Gummow, Hayne and Crennan JJ). It would be an anomaly if it were held that a stay could be granted for attempting to affect a disadvantage, but the tort would not be made out when such a disadvantage is in fact achieved.

Secondly, central to this requirement is the ability of the courts to make a distinction between what is a collateral benefit, and what is a detriment. The complication with such an inquiry is that, particularly in criminal proceedings, if the legal process is wrongfully used to effect a collateral outcome, such an outcome could be framed as both an advantage and a disadvantage. Take the example used by McCallum JA above. If a prosecutor wrongfully uses a legal process to vex a criminal defendant, a disadvantage is clearly inflicted on that defendant. However, some may equally argue it provides the prosecutor with an advantage in the proceedings, as such vexation could place undue pressure on the defendant such that he or she may find it more difficult to make out a defence. This analysis demonstrates the circularity in the distinction drawn and exemplifies the artificial constraint that the requirement of a collateral advantage imposes on the tort's scope.

Thirdly, by recognising that only a collateral advantage will suffice, it is arguable that Australian courts would be holding out to litigants that they are free to misuse legal processes, so long as the collateral object they obtain can be framed as a disadvantage, rather than an advantage. The effect of this irrational divide would be that individuals who have a legal process misused against them would be left uncompensated simply because the wrongdoer caused them a detriment, rather than obtained an advantage. Furthermore, by not having the power to invoke liability on litigants in such circumstances, courts would be unable to vindicate an abuse of the legal process by awarding damages. This would hold out to the public that abuses of the legal process are tolerated – a consequence that would seriously risk undermining public confidence in the judicial arm of government and the tort's underlying public law function.

In light of the foregoing deficiencies, the concerns raised by McCallum JA are entirely justified and her Honour's remarks draw significant support when the underlying purposes of the tort of collateral abuse of process are considered. It follows that the tort should be made out irrespective of whether the wrongdoer obtains a collateral advantage or effects a collateral *disadvantage* by a misuse of the legal process.

C Element Three: An Overt Act or Threat

When considering the elements of the tort of collateral abuse of process, courts have frequently emphasised that, '[t]he institution of [a] proceeding with an ulterior motive is not enough – proof of the misuse, or attempted misuse, of the process is necessary'.[157] Some Australian courts have reasoned that the 'use' of the process therefore requires, as an element of the tort, the plaintiff to prove that the defendant committed an overt act or threat in furtherance of the alleged tortfeasor's improper purpose.

157 *Hanrahan 2* (1990) 22 NSWLR 73, 122 (Clarke JA). See also *Williams* (1992) 174 CLR 509, 526 (Mason CJ, Dawson, Toohey and McHugh JJ), 552 (Deane J), 552–3 (Gaudron J); *Butler* [2000] 2 Qd R 252, 260 [27] (McMurdo P, Pincus and Thomas JJA); *Maxwell-Smith* (2014) 86 NSWLR 481, 493 [52] (Barrett JA); *Burton* (2019) 100 NSWLR 734, 741 [25] (Bell P).

This element was first propounded by Priestley JA in *Spautz v Gibbs*.[158] On appeal in *Williams v Spautz*, both Deane and Gaudron JJ approved Priestley JA's remarks and held that in order to establish tortious liability, the plaintiff must prove an act which amounts to a misuse of the legal process, distinct from the mere institution of the process itself.[159] However, the majority, with whom Brennan J expressed concurrence,[160] held that the authorities in England and Australia 'did not insist on the need for an improper act as an essential ingredient in the concept of abuse of process'.[161] Their Honours went on to note that while the authorities do speak of a 'use' of the process, an improper act may afford evidence of this use. They further observed that the commencement of a legal process would satisfy as such an act:

> The statements that there must be a use of the proceedings are equivocal because the commencement of the proceedings may be described as a 'use' of them, even if no attempt be made thereafter to take advantage of them for such a purpose as would constitute an abuse of process. Especially is this so when the party commencing the proceedings has previously threatened that, unless the other party complies with some improper demand the first party has made, such as payment of an alleged debt, criminal proceedings will be commenced and prosecuted to a conviction. In such a case, the very commencement of the proceedings amounts to use of them for an improper purpose.[162]

The difference in opinion between the majority and Deane and Gaudron JJ has led to interesting analyses in state appellate courts. The Queensland Court of Appeal expressly declined to follow the majority in *Williams v Spautz* and instead applied the reasoning of Deane and Gaudron JJ.[163] The New South Wales Court of Appeal approved the approach adopted by the Queensland Court of Appeal and was also of the view that an overt act is an element of the tort.[164] However, in *Burton*, Bell P clarified the position and held that the correct view is that while an overt act is required, 'the commencement of proceedings *may* be an act sufficient to give rise to the tort of collateral abuse of process where there has been some previous improper demand to obtain an advantage not afforded by the legal process initiated'.[165] This led Bell P to conclude in his formulation of the elements that an 'overt act or *threat*' is required to establish the tort.[166]

In light of the diverse judicial analyses, it can be said that it is uncertain whether the identification of an extraneous and collateral overt act or threat is an essential element of the tort of collateral abuse of process in Australia. It is the authors' contention that the original concerns which were said to justify proof of an overt act are overstated. In Deane J's reasons, his Honour made the point that

---

158 (1990) 21 NSWLR 230, 278 (Priestley JA). See also *Williams* (1992) 174 CLR 509, 527 (Mason CJ, Dawson, Toohey and McHugh JJ).

159 *Williams* (1992) 174 CLR 509, 551–2 (Deane J), 552–3 (Gaudron J).

160 Ibid 539 (Brennan J).

161 Ibid 527 (Mason CJ, Dawson, Toohey and McHugh JJ).

162 Ibid 528 (Mason CJ, Dawson, Toohey and McHugh JJ).

163 *Butler* [2000] 2 Qd R 252, 263–4 [38] (McMurdo P, Pincus and Thomas JJA); *Page* [2006] 1 Qd R 307, 311 [14] (McPherson JA).

164 *Maxwell-Smith* (2014) 86 NSWLR 481, 493 [54] (Barrett JA, Beazley P agreeing at 483 [1], McColl JA agreeing at 483 [2]).

165 *Burton* (2019) 100 NSWLR 734, 742 [32] (emphasis in original).

166 Ibid 744 [42] (emphasis added).

an extraneous act is essential to found the tort because it would demonstrate that the defendant did more than simply institute proceedings with an improper purpose.[167] This is similarly reflected in *Fleming's The Law of Torts*, where the authors state that:

> In addition to the improper purpose, there must be some overt act or threat distinct from the proceedings themselves, in furtherance of that purpose … Were it otherwise, any legal process could be challenged on account of its hidden agenda.[168]

The Canadian courts have also held that an overt act or threat is an essential element of the tort.[169] Their justification for such a requirement was similarly predicated upon the concern, originally expressed by Professor Irvine, that the tort would otherwise attach liability where only bad motive accompanies the process complained of.[170]

However, as we have noted above, the second element of the tort requires that a collateral advantage or disadvantage is in fact *achieved* by misusing the legal process. This will require proof of the necessary standard by the plaintiff.[171] It is highly unlikely that a court would be satisfied that a collateral advantage or disadvantage, or even the first element of an improper purpose, will have been made out without some form of persuasive evidence.[172] This observation was made by Lords Wilson and Sumption JJSC in *Crawford*.[173] After stating that the reasons of the High Court requiring an overt act were 'not entirely clear', Lord Wilson explained:

> If the rationale behind the suggested need for proof of an overt act or threat is no more than that, in its absence, the defendant in an application for a stay, or indeed a claimant in an action based on the tort, might fail to establish that the other party's purpose had been improper, it would readily be understandable. But, insofar as in some quarters the overt act or threat has taken root not just as having likely evidential importance but as being a substantive requirement, whether for the

---

167 *Williams* (1992) 174 CLR 509, 552. These concerns were similarly mirrored by Clarke JA when he stated that without proof such an act, a defendant 'would be penalised in damages for bringing a good case simply because he hoped, or intended, that by bringing the action he might harass the defendant': *Hanrahan 2* (1990) 22 NSWLR 73, 120 (Clarke JA).

168 Sappideen and Vines (n 23) 708 (citations omitted).

169 *Office and Professional Employees International Union v Office and Professional Employees International Union, Local 15* [2006] 34 CPC (6th) 234 (Supreme Court of British Columbia); Paul Perell, 'Tort Claims for Abuse of Process' (2007) 33(1) *The Advocates' Quarterly* 193, 205.

170 John Irvine, 'The Resurrection of Tortious Abuse of Process' (1989) 47 *Canadian Cases on the Law of Torts* 217.

171 See *Briginshaw v Briginshaw* (1938) 60 CLR 336; *Evidence Act 1995* (Cth) s 140; *Evidence Act 1995* (NSW) s 140; *Evidence Act 2001* (Tas) s 140; *Evidence Act 2008* (Vic) s 140. There are no statutory equivalents in the *Evidence Act 1977* (Qld); *Evidence Act 1929* (SA); *Evidence Act 1906* (WA).

172 This was reiterated by the majority in *Williams* where their Honours referred to the onus of proof being a 'heavy' one: (1992) 174 CLR 509, 529 (Mason CJ, Dawson, Toohey and McHugh JJ). See also *Goldsmith* [1977] 1 WLR 478, 490 (Scarman LJ). Indeed, as Sir Owen Dixon emphasised in a number of cases, when the law requires proof of any fact, the tribunal of fact 'must feel an *actual persuasion* of its occurrence or existence before it can be found': *Briginshaw v Briginshaw* (1938) 60 CLR 336, 361 (emphasis added); a party bearing the onus will not succeed unless the whole of the evidence establishes a 'reasonable satisfaction' on the preponderance of probabilities such as to sustain the relevant issue: *Axon v Axon* (1937) 59 CLR 395, 403; and the 'facts proved must form a reasonable basis for a definite conclusion affirmatively drawn of the truth of which the tribunal of fact may reasonably be satisfied': *Jones v Dunkel* (1959) 101 CLR 298, 305.

173 [2014] AC 366, 394 [66] (Lord Wilson JSC), 425 [155] (Lord Sumption JSC).

> defendant's application or for the claimant's tort, I struggle to understand the reason for it.[174]

His Lordship's reasoning exemplifies the influence of the standard and burden of proof, such that the necessity of an overt act or threat as an element of the tort becomes superfluous.[175]

D Element Four: Special Damage

The final element of the tort of collateral abuse of process requires the plaintiff to prove that he or she suffered special damage as a result of the misuse of the legal process. This requirement can be said to spawn from the tort originally being recognised as an action on the case in *Grainger v Hill*. To prove special damage, a plaintiff must demonstrate monetary loss actually suffered and expenditure actually incurred up to the date of trial; in other words, damage capable of precise monetary quantification.[176]

The requirement for special damage to make out the tort of collateral abuse of process was first recognised by the High Court in *Bayne v Blake*.[177] Although not addressed by the Court in *William v Spautz*,[178] it was held by the New South Wales Court of Appeal in *Burton* that, on the current state of authority, special damage must be proven.[179] Once special damage has been proven, the court is then open to award general compensatory damages as well as exemplary damages (and presumably aggravated damages).[180] For example, the Master in *Hamer-Mathew v Gulabrai [No 2]*, on finding that the plaintiff had suffered special damage in the amount of $1,613 for the cost of repairing the frame and mounting of a Picasso lithograph, also awarded general damages for loss of reputation and hurt to feelings in the amount of $50,000 and exemplary damages in the same amount.[181] This can be distinguished from the decision in *Bhagat v Global Custodians*, where it was held that mental worry, anxiety and ill-health did not constitute special damage for the purposes of the tort as such loss is not readily quantifiable.[182] It can therefore be said that an award of general and exemplary damages is parasitic upon special damage being proven.

Whether the precondition of special damage should be retained as an essential element of the tort is questionable. The primary difficulty with this requirement is that where loss is occasioned due to a misuse of the legal process, it is not always quantifiable. Indeed, in *Burton*, White JA suggested that the tort may be made out

---

174 Ibid 394 [66] (Lord Wilson JSC).

175 Barker et al similarly make the suggestion that without an overt act, proof of some sort will still be required: Barker et al (n 23) 96.

176 *Paff v Speed* (1961) 105 CLR 549, 558 (Fullagar J).

177 See also *Hanrahan 1* (1985) 1 NSWLR 370, 375 (Hunt J).

178 Only the majority very briefly mentioned the requirement of damage when discussing whether an overt act is an element of the tort: *Williams* (1992) 174 CLR 509, 528 (Mason CJ, Dawson, Toohey and McHugh JJ).

179 (2019) 100 NSWLR 734, 744 [41] (Bell P). See also *Maxwell-Smith* (2014) 86 NSWLR 481, 484–485 [13], 488 [32] (Barrett JA, Beazley P agreeing at 483 [1], McColl JA agreeing at 483 [2]).

180 *Gulabrai v Hamer* [1997] NSWCA 131, 4 (Meagher JA, Beazley and Stein JJA agreeing at 4).

181 (1995) Aust Torts Reports ¶81-334. The Court of Appeal upheld this decision: ibid 4.

182 [2000] NSWSC 321, [42]–[48] (Young J).

where a prosecutor '[lays] charges higher than those warranted by the evidence to seek to put pressure on an accused to plead to a lesser charge'.[183] In this example, despite there likely being an abuse of the legal process, there is unlikely to be any quantifiable monetary loss suffered by the accused, meaning the tort would not be made out. The same could be said for instances where the defendant uses legal proceedings to gain a collateral advantage which does not have a direct monetary impact on the plaintiff.[184]

The limiting nature of the special damage requirement is further evident when compared with the tort of malicious prosecution. Whilst proof of special damage was historically an element of the tort of malicious prosecution, three categories of 'actual damage' are now sufficient to establish the tort.[185] These include: damage to the plaintiff's fame; damage to the plaintiff's person; or damage to the plaintiff's property.[186] Thus, a plaintiff will be able to make out this tort if, for example, he or she has suffered general damage to his or her reputation as a result of being prosecuted for a crime, rather than having to prove identifiable monetary loss. Given that the torts of collateral abuse of process and malicious prosecution in effect 'sprang from the same tree',[187] there is no reason why the tort of collateral abuse of process should not dilute its strict requirement of special damage and instead be actionable upon certain identified categories of loss.

This conclusion is further justified when looking to the private law purposes and public law function of the tort enunciated in Part III. In the above example given by White JA, there is a clear misuse of the legal process which is unlikely to be vindicated where the plaintiff is required to prove specific monetary loss. Thus, it can be said that on its current formulation, the purpose of the tort to compensate in effect serves as a precondition to realising its other purposes to vindicate and deter abuses of the legal process. It is our contention that an effective realisation of *all* of these purposes, particularly its important public law function, would be better achieved if the tort of collateral abuse of process did away with the stringent requirement of special damage and was instead actionable on actual damage. It remains to be seen whether the categories of actual damage should be identical to those in malicious prosecution or novel to the tort of collateral abuse of process.

E Defences

It is yet to be considered by courts whether the tort of collateral abuse of process should have its own unique defences. Given that the tort requires proof of an intention by the defendant to misuse a legal process in order to affect a collateral advantage (or, on our analysis, a collateral disadvantage), it is arguable that any

183 *Burton* (2019) 100 NSWLR 734, 747 [60].

184 For example, where a defendant institutes a proceeding in order to be put in a better negotiating position in an entirely different dispute: see *QIW v Felview* [1989] 2 Qd R 245, 258–9 (Macrossan J).

185 *Davis v Gell* (1924) 35 CLR 275, 285 (Isaacs ACJ).

186 As propounded in *Savile v Roberts* (1698) 1 Ld Raym 374; 91 ER 1147, 1149–50 (Holt CJ).

187 *Crawford* [2014] AC 366, 392–3 [62] (Lord Wilson JSC).

relevant common law defences applicable to intentional torts could apply.[188] Interestingly, however, on examination of these defences it seems unlikely that they could be successfully relied upon to justify or excuse a defendant's conduct in the context of a proven collateral abuse of process.

Self-defence and necessity clearly have no application; it is fanciful to suggest that a defendant would be required to misuse a legal process to defend him or herself, or to protect the person or property of another.

While it is theoretically possible that the defence of consent may apply, any plausible argument as to its application falls away when one considers the underlying purposes of the tort. Even though the parties to a proceeding could reach an agreement that one party should wrongfully obtain a collateral advantage by misusing a legal process against the other, this consensual agreement should not justify (or excuse) the defendant's conduct. Courts would otherwise be seen as permitting litigants to conspire to undermine the integrity of its processes; a prospect which is plainly contrary to the tort's public law function. This is the case regardless of whether *both* parties to a legal process benefit from its misuse.[189]

Finally, as to the defence of mistake, there is no doubt that there will be instances in which defendants mistakenly believe that the collateral advantage or disadvantage they effected was within the lawful scope of the legal process which they were using to vindicate their legal right. For example, in *Grainger v Hill* it may well have been that the defendants incorrectly believed that they were entitled to use the writ of *capias ad respondendum* to obtain Grainger's title to his ship, rather than a monetary sum. Importantly, however, irrespective of the reasonableness of defendant's mistaken belief, the defendant would still have had a specific intention to cause a collateral advantage or disadvantage (irrespective of whether they knew it was outside the lawful scope of the process). Therefore, the defendant's mistake does not deny the fault element of the tort.

If a mistake of this kind was held to be a valid defence, it would act as an excuse for the defendant's tortious conduct.[190] There are two reasons why such a mistake, however reasonable, should not excuse a collateral abuse of process. First, as already indicated above, the mistake does not in any way reduce the moral culpability of the defendant and therefore the imposition of liability is still justified. Secondly, if defendants could simply point to their mistaken belief to exculpate them of liability, this would encourage litigants to be less informed about legal processes in order to obtain collateral advantages or cause disadvantages without consequence. This is a result which would undermine the tort's public law function.

---

188 Although, it is important to acknowledge here that because the tort of collateral abuse of process requires a specific intent to cause a harmful consequence, it is distinguishable from the trespass torts which only require a basic intent to do an act (eg, to enter land).

189 It is arguable that in these factual situations the common law crime of contempt may have been committed; however, no court has yet held that a collateral abuse of process constitutes the crime of contempt. On contempt, see *Witham v Holloway* (1995) 183 CLR 525, 538–9 (McHugh J).

190 The mistake cannot act as a justification because using a court's process to vindicate a valid legal right does not justify the attainment of a collateral advantage or the imposition of a collateral disadvantage beyond the scope of that legal process. This conclusion accords with the predominant, rather than sole, improper purpose requirement as explored in Part IV(A).

It is the authors' view that on current legal authority, the usual defences applicable to intentional torts should not have application to justify or excuse a collateral abuse of process. It remains to be seen whether a defence unique to the tort itself should be developed.

V CONCLUSION

This article was motivated by the judicial uncertainty and a lack of academic scrutiny surrounding the tort of collateral abuse of process. It was also prompted by a concern that the justificatory bases of the tort have never been properly articulated or explored. In pursuit of this aim, this article has sought to conceptualise the purposes underpinning the imposition of tortious liability for a misuse of the legal process. In doing so, this article has revealed that when the tort of collateral abuse of process operates, it serves a multitude of functions. Indeed, there can be no doubt that the tort exists to compensate the plaintiff and to punish and deter the tortfeasor for misusing the legal process. Equally as important, however, is the tort's concern with the judiciary's ability to safeguard the integrity of its own processes and ensure its legitimacy as an arm of government. Thus, running alongside the tort's more traditional private law purposes is a peculiarly public law function.

In light of the findings in this article, it is clear that the 'overt act or threat' and 'special damage' elements of the tort must be questioned. The strict requirement that an 'advantage' be obtained by the defendant is also problematic. Nevertheless, irrespective of the approach adopted, it is the authors' contention that any formulation of the tort must be founded upon the purposes that underpin its existence. Indeed, a formulation of the tort that effectively balances these purposes will provide courts with an enhanced ability to guard against judicial proceedings being converted into instruments of injustice or unfairness. Although it is ultimately for the judiciary to revisit the tort of collateral abuse of process, it is now hoped that the courts will be armed with the relevant scholarship to chart an informed approach forward.