**Malicious prosecution**

**7.2** It is a tort maliciously and without reasonable and probable cause to initiate criminal proceedings against another person, which terminate in favour of that other and which result in damage to reputation, person, freedom or property.

**7.3** The right to sue for malicious prosecution is intended to protect people from unwarranted accusations being brought against them in the criminal courts. Facing false charges may lead a person to suffer detention in custody, financial damage, loss of standing in his- or her community, anxiety and/or even psychiatric injury. However, the courts also recognise the importance of people, in particular the police, not feeling inhibited in using the legal process to prosecute crime and consider that collateral litigation following the resolution of criminal proceedings should be closely controlled. In framing the ingredients of the common law tort of malicious prosecution, the courts have had to weigh up these competing considerations. As Fleming says:

The tort of malicious prosecution is dominated by the problem of balancing two countervailing interests of high social importance: safeguarding the individual from being harassed by unjustifiable litigation and encouraging citizens to aid in law enforcement.'

**7.4** As we shall see in more detail below, the balance has been struck by the courts requiring claimants to go so far as to prove (among other) **1**

**1** ***Fleming, The Law of Torts (9th edition, I. BC Information Services, 1998). p671.*** See this text for a fuller discussion of the competing public interests’ things} bad faith on the part of those responsible for the prosecution. A prosecution brought for a proper purpose will never be a malicious prosecution, even if based on slender evidence. Thus, although thousands of people are acquitted of the offences of which they were accused every year, only a relatively small proportion of those people will have a viable claim for malicious prosecution. The collective effect of the criteria that the claimant must prove to establish a claim in malicious prosecution has led one commentator to observe that ‘the action for malicious prosecution is held on a tighter rein than any other in the law of torts'" and a number have called for reform in this area.**2 3**

**7.5** To succeed in a claim for malicious prosecution against the police, it must be shown that damage has been suffered because:

* the police prosecuted; and
* the criminal case was concluded in the accused’s favour; and
* reasonable and probable cause were absent in the bringing of the prosecution; and
* the police acted maliciously.

These elements are described in more detail in turn below.

**7.6** Malicious prosecution claims are particularly useful where the claimant alleges that the prosecution case against him was based on evidence concocted by the police. It is much more difficult to establish a malicious prosecution claim where the prosecution evidence was substantially based upon accounts given by independent third parties, even if that evidence was discredited during the criminal proceedings. If a claimant wishes to allege police fabrication of evidence in circumstances where the prosecution was also based on significant incriminating evidence from other sources, a claim of misfeasance in a public office may be a more viable option, if the fabrication can be established, than an action for malicious prosecution**.4**

**7.7** A malicious prosecution claim usually entitles the parties to choose trial by judge and jury, unless any of the prescribed exceptions apply.**5** The six-year limitation period for commencing a claim runs from the date when the criminal proceedings terminated in the claimant's

**2** ***Fleming, The Law of Torts (9th edition, LBC Information Services, 1998).***

**3** ***See e.g. Clayton and Tomlinson, Civd Actions Against the Police (3rd ed, Thomson Sweet & Maxwell. 2004) para 8-006,***

**4** ***See paras 7.50 -7.51 looking at the inter-relationship between the two torts.***

**5 *See Supreme Court Act 1981 s69 and County Court Act 1984 s66, discussed in more detail at paras 12.78-12.90.* favour.**

**6** If the claimant's conviction was quashed on appeal, this may be some considerable time after the misconduct took place.

**7.8** It is uncertain, on the current state of the caselaw, whether a defence to liability can be established by proving on a balance of probabilities that the claimant did in fact commit the offence in question. It is suggested that the better view is that technically this affects quantum rather than liability.**7 8 9 10** However, if the police have strong evidence that he or she did in fact carry out the relevant crime, the claimant’s credibility as a witness may well be too damaged to enable the elements of the tort to be established.

Necessary elements Damage

**7.9** Unlike some other types of police misconduct (primarily assault, battery and false imprisonment), it is necessary to show that damage has been suffered by the claimant for the action to succeed. In practice this requirement is sometimes overlooked, but historically only three types of damage fulfilled this criterion in a malicious prosecution claim, namely: loss of reputation, the risk of loss of ‘life, limb or liberty;' and financial loss of reputation is shown if the charge was 'necessarily and naturally' defamatory, that is to say, it was one that lowered the claimant in the estimation of right-thinking members of society generally." Accordingly, an alleged failure to pay a tram fair met this test as it involved an imputation of dishonesty,'0 On the other hand, an allegation of pulling a communication cord on a train without sufficient cause did not convey a sufficiently discreditable reflection on the claimant.**11** It will always depend upon the degree of moral stigma attached to the particular offence. For example, some motoring offences, such as drink driving or driving while disqualified carry with them a strong element of this stigma, whereas other motoring offences, such as driving with a bald tyre or a defective

**6 *Dunlop v HM Customs of Excise (1998) 12 March, CA. Limitation is discussed in more detail at paras 11.69-11.71.***

**7 *See Clerk s [ Lindsell on Torts (18th edn, Sweet &. Maxwell, 2000) para 16-35 and Clayton and Tomlinson Civil Actions Against the Police (3rd edn, Thomson Sweet & Maxwell, 2004) para 8-075.***

**8 *Savik v Roberts (1698) 1 Ld. Raym 374, 3 78.***

**9 *Wijfen v Bailey e£ Romford UDC [1915] 1 KB 600, CA.***

**10 *Rayson v S London Tramways Co [1893] 2 QB 304.***

**11 *Berry v British Transport Commission [1962] 1 QB 306, CA.***

light would be unlikely to qualify. In respect of loss of liberty, it is enough if the offence for which the claimant is prosecuted is one punishable by imprisonment;1^ there need not be actual loss of liberty. Legal costs incurred in defending oneself against a malicious prosecution constitute sufficient damage to qualify as financial loss, even where the court grants an allowance towards those costs.**12 13** It is sufficient for a claimant to prove that one of these three elements resulted from the prosecution. If ‘damage' in this sense is proved and the other elements necessary for liability are established, the claimant can then recover for all the consequences of the prosecution at the stage when compensation is assessed. Thus, distress and anxiety caused by the prosecution will be taken into account when the level of damages is determined (see chapter **14)**. It has not been decided whether the requirement to show ‘damage’ could be satisfied by the claimant having suffered psychiatric injury; arguably this could come within the concept of risk of injury to limb. However, in practice, if psychiatric injury has resulted from the prosecution, it is likely that the charge involved damage to reputation and/or risk of imprisonment and so the criterion would be satisfied in any event.

**Police prosecution**

**7.10** The claimant needs to show both that he or she was prosecuted and that the person who he or she alleges brought the proceedings maliciously should be treated as a ‘prosecutor’.

**7.11** A prosecution consists of ‘setting a judicial officer in motion’.**14** Thus the first of these ingredients will only raise a potential difficulty if an allegation is withdrawn at a very early stage, before the claimant is actually brought before a criminal court at all. However, it has been held that laying an information before a magistrate is sufficient in itself to amount to a prosecution for these purposes. Most criminal proceedings commence with a charge. Clayton and Tomlinson submit that a prosecution will have begun if the claimant has been charged,**15** as this is the point from which damage to the claimant may result. On this basis an action in malicious prosecution would lie even if the charge was then withdrawn before the case ever came before the court.

**12 *Wijfcn v Bailey ef Romford UDC [1915] 1 KB 600, CA.***

**13 *Berry v British Transport Commission [1962] 1 QB 306, CA.***

**14 *Sewell y National Telephone Co [1907] I KB 557, CA.***

**15 *Clayton and Tomlinson Civil Actions Against the Police, para 8-024.***

**7.12** The prosecutor who is sued must be a person who was 'actively instrumental’ in putting the law in motion. There has been no recent appellate case law which has considered the meaning of this phrase. It seems relatively clear that for the purposes of this tort, a prosecution may have a number of different ‘prosecutors. Under Prosecution of Offenders Act 1985 s3(2) the Crown Prosecution Service (CPS) takes responsibility for the conduct of the prosecution following charge or summons by the police. Thus, the CPS could be a prosecutor for the purposes of a malicious prosecution action (in the relatively unlikely event that there was evidence that the CPS had acted in bad faith). In addition, police officers who provide material evidence in support of the prosecution would also appear to be 'actively instrumental’ in the charge being brought or summons being issued. In the majority of malicious prosecution claims where it is alleged that officers fabricated evidence against the claimant, it is accepted by the defendant that those officers were prosecutors for the purposes of the tort.**16 17** Less ' commonly, defendants argue that the only police officer who should be regarded as the prosecutor for these purposes is the officer who determined there was sufficient evidence to charge (usually the custody sergeant on duty at the time; although more senior officers will be involved if the offences are serious). It is suggested that this line of argument does not accord with the ‘actively instrumental' test which is broad enough to include any officer whose account formed a significant part of the prosecution case. Furthermore, such a narrow view of who is the prosecutor does not accord with the division of labour in modern policing and would severely emasculate the tort, as in many instances the officer determining whether there is sufficient evidence to charge would be unaware of any concoction in the officers’ accounts.

**7.13** Where the evidence that forms the prosecution case comes from civilian witnesses it may be more difficult to argue that the police were prosecutors for the purposes of the tort and/or that there was any lack of belief in the case or malice on their part. (Unless it is contended that officers had improperly induced such witnesses to provide evidence against the accused in circumstances where the officers knew such accounts were likely to be unreliable.) In limited situations it is possible to establish that a member of the public who made a false complaint to the police is him or herself a prosecutor and so potentially

**16 *Danby V Beardsley (1880) 43 LT 603.***

**17 *In castes before the Court of Appeal this approach has not been questioned, e.g., Isaac v Chief Constable of the West Midlands Police [2001] EWCA Civ 1405.***

liable in a malicious prosecution claim instead of the police. The House of Lords considered this issue in Martin v Watson.™ They decided that a civilian reporting an alleged offence to the police could be a prosecutor if he or she falsely and maliciously gave information to the police, making clear that he or she is prepared to be a witness for the prosecution and where the facts of the offence are such that they are exclusively within the complainant's own knowledge, making it virtually impossible for the police to make an independent judgment on whether or not to proceed with the prosecution. The test was satisfied on the facts of Martin v Watson where the defendant had made a deliberately false complaint to the police that the claimant had exposed himself to her and there were no other witnesses to the incident. In contrast, the test was not satisfied in ***Mahon v Rahn (No2)***‘-where the Serious Fraud Office had considered information supplied by the defendants and also had obtained information from other sources before forming an independent judgment on whether to prosecute.

**7.14** A defendant may be liable not only for initiating, but also for adopting or continuing proceedings if he or she is actively instrumental in this process and, having acquired positive knowledge indicating the accused’s innocence, nonetheless perseveres.**18 19 20** Thus, for example, if police officers came to learn of information that indicated the person charged was in fact innocent, but they deliberately suppressed the material, rather than passing it on to the CPS, liability might result.

**The criminal case must end in favour of the person suing**

**7.15** The criminal prosecution must have ended in favour of the person suing for malicious prosecution.**21**” This can be achieved by a verdict of acquittal, by the conviction being quashed on appeal,**22** by an acquittal on a technicality, such as an error in the indictment,**23** or by the discontinuance of proceedings.**24**

**18** ***[1996] AC 74, HL.***

**19** ***[2000] 1 WLR 2150, CA.***

**20** ***See Tims v John Lewis Co Ltd [1951] 2 KB 459, CA (reversed on another point by the House of Lords: John Lewis $ Co Ltd v Tims [1952] AC 676).***

**21** ***Parker v Langley (1713) 10 Mod 145 and 209.***

**22** ***Hemiman v Smith [1938] AC 305, HL; Berry v British Transport Commission [1961] 3 All ER 65, CA.***

**23** ***Jones v Gwynn (1712) 10 Mod 148, 214; Wicks v Fenthum (1791) 4 Term Rep 247.***

***24 Watkins v Lee (1839) 5 M &. W 270.***

A claim can still succeed even if there was a conviction for a less serious offence than the one for which a person is charged.**35** Where a trial concludes in a person being acquitted of some offences but convicted of others, there may be claims for malicious prosecution in relation to those offences on which there has been an acquittal.**26** If offences are ordered to 'lie on the file' after the defendant has pleaded guilty to other offences, it is likely that this will be treated as an ‘adjournment’ of the proceedings rather than a termination, favourable or otherwise. If proceedings have been stayed because they have been held to be an abuse of process (for instance, because of the length of time it has taken to bring the prosecution), then the ‘stay’ would probably be regarded as a termination in favour of the claimant, given that those reasons usually advanced for the imposition of this requirement in the tort of malicious prosecution, would not be applicable in the circumstances. The most commonly stated reasons for the rule requiring a favourable termination of the prosecution are that the rule exists to prevent individuals challenging the correctness of a subsisting judgment by a criminal court in collateral civil proceedings and that it exists to preclude civil actions where the criminal proceedings have shown that there was sufficient evidence to support a prosecution.

Special problems arise if someone is bound over to keep the peace and to be of good behaviour. If he or she is bound over after the hearing of a ‘complaint ‘the case does not end in his or her favour and he or she cannot sue. M More commonly, however, bind-overs are agreed to by the defence before the case is heard, in exchange for the prosecution offering no evidence on the charge before the court. In Hourihane v Metropolitan Police Commissioner0 the police applied to strike out a claim for malicious prosecution where the claimant had agreed to a bind-over, the CPS had offered no evidence, and the charges (of disorderly behaviour) were duly dismissed. The Court of Appeal

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Boalerv Holder (1887) 51 JP 277.

Reed v Taylor (1812) 4 Taunt 616; Leibov Buckman Ltd [1952] 2 All ER 1057, CA, provided 'damage’ in the sense discussed above results from the offences that terminated in the claimant’s favour.

See, e.g., ***Fleming the law of Torts (9th edn, LBC Information Services, 1998) p678. Under Magistrates’ Courts Act 1980 si 15.***

***Everett v Ribbands [1952] 1 All F, R 823, CA***; see also ***Bynoe v Bank of England [1900-03] All ER Rep 65.*** If the complaint is rejected and thus the opportunity to sue arises, strictly speaking the action lies in malicious process, as discussed below.

***(1994) Times 11 December, CA***.

held that it was impossible to draw any inference that proceedings had terminated adversely to a defendant from the mere statement that he or she was bound over to keep the peace. The court said there might be many reasons why a defendant would prefer to agree to be bound over rather than run the risk of conviction. As the issue in the civil proceedings was whether the charges were brought maliciously and without reasonable and probable cause, the existence of a record showing that, following dismissal of the charges, the claimant was bound over, could not be a good ground for striking out the claim. However, in practice it is likely that the credibility of the claim for malicious prosecution would be adversely affected unless the claimant can convincingly explain why he or she accepted a bind-over in the circumstances.

|h If there is a subsisting conviction, a claim for malicious prosecution cannot succeed, even if there is no further right of appeal and even if it can be proved that the conviction was obtained by fraud.”

The prosecution must lack reasonable and probable cause. Reasonable and probable cause has been defined as:

* an honest belief in the guilt of the accused based upon a full conviction, founded on reasonable grounds, of the existence of a state of circumstances which, assuming them to be true, would reasonably lead any ordinary prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed. This definition has been approved and followed in subsequent cases. In ***Glinski v Mclver” the House of Lords*** held that a claimant has to prove one of two things in order to establish that there was a lack of reasonable and probable cause, namely:
* the prosecutor did not believe in the guilt of the claimant; or a person of ordinary prudence and caution would not conclude in the light of the facts honestly believed at the time that the claimant was probably guilty of the relevant offence. **31**

**31 *Basebe v Matthews (1867) LR 2 CP 684.*** Although where a dishonest abuse of authority can be shown a claim might arise in misfeasance, as discussed at **para 7.50.**

**12** ***Hicks v Faulkner (1878) 8 QBD 167, 171.***

**13** ***[1962] AC 726.***

**7.21** The first element involves a subjective evaluation of the state of the prosecutor's mind at the time of the prosecution. The second element entails an objective assessment of whether there was a sufficient basis for the prosecution on the information known at the time. Thus, there must be actual belief and reasonable belief in the probable guilt of a person for there to be reasonable and probable cause to prosecute. The two elements will be considered in turn.

**Belief in the claimant’s guilt**

**7.22** In a trial by judge and jury, this is an issue to be evaluated by the jury, provided there is some evidence to support the claimant's contention that police officers lacked an honest belief in his or her guilt.**14** If the criminal prosecution is based on the accounts of officers as eyewitnesses to the alleged crime involving the claimant (for example where he or she is charged with assaulting an officer or obstructing the officer in the execution of his or her duty), the legal position is relatively straightforward. If the claimant gives a conflicting account of events and contends that the officers fabricated their statements in support of the criminal prosecution, the jury simply has to determine which party is giving the truthful version. If the jury finds that the officers produced a concocted account of events, it must follow that they lacked an honest belief in the claimant's guilt. The strength of the claimant’s case in such circumstances is likely to depend upon factors such as the credibility of his or her own account, whether he or she has witnesses to the events in question, whether there are discrepancies between the officers' accounts and/or inconsistencies with contemporaneous documentation and/or inconsistencies with other known facts such as injuries.

**7.23** The position is more complicated if the evidence in support of the prosecution comes from a number of sources, including non-police sources, and the relevant police officers did not witness the alleged offence. If the central evidence against the claimant comes from civilian witnesses or from expert forensic analysis, in many circumstances it will be difficult to establish that officers did not honestly believe in the prosecution. However, it is important to bear in mind that it is insufficient for officers to believe in the claimant’s guilt in a general sense; they must believe in the charge brought and in the case that is **34**

**34 *Herniman v Smith [1938] AC 305, Hi; Dallis, on v Cajfery [1965] QB 348.*** For further detail see the discussion of the respective roles of judge and jury at ***paras 13.31-13.34 and 13.39-13.40.***

Put forward against the claimant must the claimant.” Thus, to take an example, police may b believe that X is a drugs supplier on the basis of circumstances concerning his lifestyle and associates, but if they plant drugs at X's address and then prosecute on the basis of .discovery of those drugs, they would not honestly believe in their case. Situations in which police officers dishonestly create evidence to support the prosecution of someone who they believe has committed crime is sometimes referred to as ‘noble cause corruption’. Whether there is any nobility in such actions is debatable. In any event, it is submitted that such conduct may amount to a lack of honest belief in the case put forward and thus a lack of reasonable and probable cause, for the purposes of the claim in malicious prosecution (provided, of course, the claimant can prove the officers’ alleged misconduct). Nonetheless, the current state of the caselaw does not make clear what proportion of the prosecution evidence must be discredited by the claimant as dishonest concoction in order to show that officers lacked an honest belief in their case. Thus, if in the previous example, police officers genuinely found drugs at X’s address but fabricated incriminating admissions purportedly from X to bolster the prosecution, would the subjective element of lack of reasonable and probable cause have been established? It is submitted that the answer should be in the affirmative, as officers could not have believed a central element of their case. Equally, the same conclusion should apply if officers were shown to have obtained significant witness accounts by intimidation or inducements and then, knowing the circumstances in which they had been obtained rendered them suspect, dishonestly suppressed those circumstances and put forward the same as reliable evidence.16 Whether the claimant can show a lack of honest belief by proving that part of the evidence was obtained by officers dishonestly or improperly, is likely to depend upon the significance of that evidence to the overall prosecution case.

**7.24** A further aspect to consider is how a claimant raises sufficient evidence of bad faith for the case to be left to the jury on this issue, in circumstances where he or she cannot deny the officers account from first-hand knowledge. Mere suspicion that officers concocted evidence or bullied witnesses will not suffice, but a process of inference may be relied upon where there are (for example) substantial inconsistencies **35 36**

**35** ***See the speeches of Viscount Simmonds, Lord RaddifFe, Lord Denning and Lord Devlin in Glinski v Mclver [1962] AC 726.***

**36** A potential claim in misfeasance could also arise in these circumstances if the officers' conduct amounted to a dishonest abuse of their authority.

with contemporaneous records or inexplicable changes in accounts given.**37 38 39 40** A very good example of this enquiry in to the officer's state of mind is the decision of the Court of Appeal in Paul v Chief Constable of Humberside Police™ The court decided that the trial judge had erred in withdrawing claims in false imprisonment and malicious prosecution from the jury, as there was sufficient material on the particular facts to enable inferences to be drawn that the officers were not acting in good faith, in that they had arrested and charged the claimant to deflect attention from their own potential culpability in relation to the death of Christopher Alder in police custody, rather than out of a considered assessment of the evidence. Less commonly, there may be direct evidence available, for example from witnesses themselves that they were threatened or intimidated by officers into falsely incriminating the claimant, or evidence from what officers themselves said at the time, for example telling a claimant 'we know you didn’t do it, but we’re going to nick you anyway'. However, it is impermissible to rely simply on the objectively weak nature of the prosecution case and contend from this that officers could not have honestly believed in the claimant's guilt/' However, it is arguable that the weakness of the case is one circumstance that should be considered, along with all others, when assessing whether inferences as to a lack of honest belief can be drawn.

It is well established that a lack of honest belief in the case cannot be inferred simply from proof that officers had an ulterior motive for the prosecution.**41** Thus, if officers prosecute Y because she brought a previous complaint against one of their colleagues, but the case was supported by sufficient, genuine evidence indicating that Y was probably guilty, she would not have a viable claim in malicious prosecution. Similarly, if there is evidence that a white man and a black man are both guilty of a crime, but out of racism the police prosecute only the black man, a claim in malicious prosecution would not be made out.**42** This is not to say that the same facts cannot be used to support both a finding of malice and a finding of lack of reasonable and probable cause,

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**37** ***See the speech of Lord Denning in Glinski v Mclver [1962] AC 726.***

**38** ***[2004] EWCA Civ 308.***

**39** ***Glinski v Melver [1962] AC 726. See, e.g., the speech of Lord Raddiffe.***

**40** ***See Clayton and Tomlinson Civil Actions Against the Police {3rd edn, Thomson Sweet & Maxwell, 2004) para 8-042.***

**41** ***Glinski v Mclver [1962] AC 726; Matin v Commissioner of Police of the Metropolis [2002] EWCA Civ 907.***

**42** Although an action under the **Race Relations Act 1976** {as amended) may arise, **see chapter 10.**

if those facts point towards officers lacking honest belief in the evidence put forward, for instance where evidence is fabricated. In the relatively unusual event that the defendant fails to offer any explanation for the basis of the prosecution in circumstances that appear to call for one, the omission can be treated as evidence of a lack of reasonable and probable cause.41 Sometimes a defendant will seek to defend a contention of lack of honest belief on the basis that the prosecution was approved by the CPS and/or counsel and so, it is said, officers were simply following advice. However, this will not avail the defendant if officers withheld information or the decision was based on evidence that the officers knew to be concocted or otherwise substantially flawed.**43 44**

**Objective lack of evidence supporting the prosecution**

**| j\ ,** Even if the prosecutor honestly believed in the case put forward against

the claimant, there will be a lack of reasonable and probable cause for the proceedings if the evidence was too weak to properly support a case. If the judge is sitting with a jury, the jury first decides any disputed facts that bear on this issue, for example, as to what information was known to the prosecutor at the time or as to the level and nature of inquiries that were actually made and then the judge rules upon the objective question of whether there was sufficient evidence to support the prosecution **(see also para 13.31).**

ni It has been suggested that there are a number of steps that an ordinarily prudent and cautious prosecutor would undertake; specifically, he or she would:

* take reasonable steps to ascertain the true state of the case.
* consider the matter on the basis of admissible evidence only; and in all but plain cases, obtain legal advice as to whether a prosecution is justified and act upon that advice.**45**

**28** Thus it is possible that a lack of reasonable and probable cause can be established from a failure to follow obvious lines of inquiry, if doing so would have negated a viable case against the claimant.46 However, it is a question of degree. A prosecutor is not required to test every possible relevant fact before taking action: ‘His duty is not to ascertain whether there is a defence but whether there is a reasonable and probable cause for the prosecution'.47 48 49 If the prosecutor was mistaken about a matter of fact which, if true, would have given sufficient basis for the prosecution, the issue is whether the mistake was a reasonable one to make.'**1®** The significance of taking legal advice has been considered under the discussion of the subjective element above. The fact that the claimant may have been convicted at trial is not treated as decisive of this issue against him or her, if the conviction is later overturned on appeal.41' If the Court of Appeal when overturning a conviction expresses a view about the lack of evidence in support of the prosecution, it is unclear to what extent the claimant can rely upon this opinion in a subsequent civil action.**50**

**43** ***Gibbs v Rea [1998] AC 786, PC.***

**44** ***See Glmski v Mclver [1962] AC 726; Abbott v Refuge Assurance Co [1962] 1 QB 432.***

**45** ***See Abbott v Refuge Assurance Co [1962] 1 QB 432.***

**46** ***tor a recent example in a malicious process case see Keegan v Chief Constable of Merseyside Police [2003] 1 WLR 2187.***

**7.29** If a claimant establishes a lack of reasonable and probable cause by the objective route, rather than by showing that officers did not honestly believe in the case put forward, it may well be difficult to show the further necessary ingredient of malice, unless there is dear evidence of an improper purpose, as discussed below.

**The police acted maliciously**

**7.30** In order to prove that the police acted maliciously, it must be shown that their motive, or their main motive, was something other than the desire to bring the claimant to justice.**51 52** In circumstances where the claimant establishes that officers could not have believed he was guilty because they had concocted the account of his alleged criminality (usually in an attempt to mask their own misconduct), there will be no difficulty in establishing malice. For example, in Thompson v Commissioner of Police for the Metropolis” police falsely alleged that the claimant had bitten an officer's finger and assaulted others in order to cover up their own brutality towards her as she was manhandled into a cell at the police station.**53** Additionally, malice possible relevant fact before taking action: ‘His duty is not to ascertain whether there is a defence but whether there is a reasonable and probable cause for the prosecution'.**47** If the prosecutor was mistaken about a matter of fact which, if true, would have given sufficient basis for the prosecution, the issue is whether the mistake was a reasonable one to make.**'1®** The significance of taking legal advice has been considered under the discussion of the subjective element above. The fact that the claimant may have been convicted at trial is not treated as decisive of this issue against him or her, if the conviction is later overturned on appeal.**41'** If the Court of Appeal when overturning a conviction expresses a view about the lack of evidence in support of the prosecution, it is unclear to what extent the claimant can rely upon this opinion in a subsequent civil action.**50**

**47** ***Herniman v Smith [1938] AC 305, HL, per Lord Atkin at 319.***

**48** ***Hicks v Faulkner (1878) 8 QBD 167,***

**49** See, e.g., ***Hemiman v Smith [1938] AC 305, HL.***

**50** Although no question of issue estoppel arises as the two parties are not the same, one would expect considerable weight to be attached to the Court of Appeal’s view.

**51** ***Stevens v Midland Counties Railway (1854) 10 Exch 352.***

**52** ***[1997] 2 All ER 762.***

**53** ***Commissioner of Police of the Metropolis v Gerald (1998) 10 June, CA, unreported, is another similar example.***

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**Additionally, malice**

**47** ***Herniman v Smith [1938] AC 305, HL, per Lord Atkin at 319.***

**48** ***Hicks v Faulkner (1878) 8 QBD 167,***

**49** See, e.g., ***Hemiman v Smith [1938] AC 305, HL.***

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**52** ***[1997] 2 All ER 762.***

**53** ***Commissioner of Police of the Metropolis v Gerald (1998) 10 june, CA,*** unreported, is another similar example.

**7 .32** Although lack of reasonable and probable cause can never be inferred from malice (see above), a lack of reasonable and probable cause can provide evidence of malice.**55 56** However, the extent to which this is possible depends upon the particular circumstances. If it has been shown that officers did not honestly believe in the charges brought, this will afford strong evidence of malice, for the reasons already discussed. However, establishing a lack of reasonable and probable cause by showing that, objectively viewed, there was an insufficient basis for the prosecution, does not generally provide evidence of malice as this state of affairs is not inconsistent with the prosecutor acting for the proper motive of seeking justice; he or she may simply have been careless,**57 58 59 60** This is well illustrated by the decision in Thacker v Crown Prosecution Service,515 where an allegedly weak prosecution was ultimately discontinued. The Court of Appeal said that even if it could be shown that on the objective test there was a lack of reasonable and probable cause for the prosecution and that representatives of the CPS were remiss in not appreciating this earlier, there was no evidence that they acted in bad faith.**5'1** In the malicious process case of Keegan v Chief Constable of Merseyside Police**60** the claimant sought to overcome this difficulty in relation to officers who sought a search warrant on the basis of slender evidence, by arguing from analogy with caselaw concerning the tort of misfeasance in a public office, that ‘malice' now bore an expanded meaning and included circumstances where officers acted with reckless indifference to the legality of their conduct **(see para 7.34)**. The Court of Appeal rejected this argument, reaffirming that malice required proof of an improper purpose. They held there was no evidence of malice on the facts as officers had obtained and executed the search warrant because they were genuinely seeking to recover stolen monies, a perfectly proper purpose (despite the lack of reasonable and probable cause for the warrant).

**54** ***See Clerke (Lindsell on Torts (18th edn, Sweet & Maxwell, 2000) para 16-37 and the authorities cited therein.***

**55** ***Brown v Hawkes [1891] 2 QB 718, 722,***

**56** ***See Haddrickv Heslop (1848) 12 QB 267; Brown v Hawkes [1891] 2 QB 718, 722 and Tempest v Snowdon [1952] 1 All ER 1.***

**57** ***Meeting v Grahame White Aviation (1919) 122 LT 44; Gibbs v Rea [1998] AC 786, PC.***

**58** ***(1997) Times 29 December, CA***.

**59** In such circumstances an action in negligence would also be problematic, because of the difficulty of showing the existence of a duty of care, **as discussed at para 8.56).**

**60** ***[2003] 1 WLR 2187.***

**7.33** Whether there is some evidence of malice so that a jury could properly conclude that this element of the tort was proved, is a matter for the judge to decide. Whether or not, on that evidence, the prosecutor’s motive was indeed malicious is a question of fact for the jury to decide.**61 62**

**European Convention on Human Rights**

**7.34** Convention rights do not appear to expand the circumstances in which a claimant can succeed in an action for malicious prosecution. ECHR article 5(5) provides that everyone who has been detained in contravention of article 5 shall have an enforceable right to compensation. However, a period of detention is regarded as lawful for these purposes if carried out pursuant to a court order, made within the court’s jurisdiction, even if that order was subsequently quashed on appeal.6' Accordingly, where a conviction is quashed on appeal after the appellant has spent time in custody, any available remedies will normally arise in relation to an action for malicious prosecution or misfeasance in a public office, rather than under the Convention. The possibility of claiming compensation from the Home Office in such circumstances is looked at separately **(in chapter 7).**

**61** ***Hicks v Faulkner (1878) 8 QBD 167; Broum v Hawkc.s [1891] 2 QB 718; Daltison v Caffrey [1965] QB 348.*** The respective roles of judge and jury are considered in more detail **at paras 13.31-13,34 and 13.39-13.40.**

**62** ***Benhamv UK (1996) 22 F.HRR 293.***