**Malicious process**

Malicious process is a civil Wong, separate from malicious prosecution, which entails instituting a legal process short of prosecution without reasonable and probable cause and with malice. “The two most Common examples are applications for arrest warrants and search Warrants.**63 64**

In relation to such applications there are four ingredients of the tort that the claimant must establish,**65** namely:

* a successful application for the warrant was made; there was a lack of reasonable and probable cause for making the application.

it was made maliciously; and there was resultant damage.

Proving a lack of reasonable and probable cause and proving malice have been described in detail under the preceding section on malicious prosecution. In relation to proceedings that the claimant has no right to attend, such as applications for warrants, it need not be shown that they terminated in his or her favour**.66 67 68** Damage for these purposes is not as strictly confined as under the tort of malicious prosecution and encompasses all forms of recognised damage."

If the ingredients of a malicious process claim are proved, the claimant will overcome the difficulty that otherwise arises because of the Constables Protection Act 1750 in suing in relation to arrests or searches undertaken in obedience to a warrant **(see paras 6.76-6.78** and **9.15 ).** If the claimant cannot prove a lack of reasonable and probable cause and/or malice, in some circumstances an action in negligence may lie if the warrant was obtained on the basis of inaccurate information.**6\***

1. ***Roy v Prior [1970] 2 All ER 729, HL; Gibbs v Rea [1998] AC 78G, PC.***
2. For other instances of malicious process see ***Clayton and Tomlinson Civil Actions Against the Police (3rd edn, Thomson Sweet & Maxwell, 2004)*** **paras 8-083—8-089.**
3. **Keegan v Chief Constable of Merseyside Police [2003] 1 WLR 2187.**
4. However, if the form of process under challenge involves the attendance of both parties, such as a complaint of breach of the peace, then in the claimant’s favour termination must be shown.
5. See the discussion of permitted heads of tortious damage in relation to misfeasance in a public office and in relation to negligence at **paras 7,45 and 8.85** respectively.
6. **Hough v Chief Constable of the Staffordshire Constabulary [2001] EWCA Civ 39,** though see the discussion of this case at **para 8.66.**

**Misfeasance in a public office**

**Definition**

1. The tort of misfeasance in a public office was originally developed during the eighteenth and nineteenth centuries for the benefit of elec­tors who were wilfully denied the right to vote by a returning officer. It was little used for some considerable time afterwards. More recently the value of this tort has been recognised as a broader remedy for abuse of administrative power. Over the last ten years it has come to be increasingly deployed in claims against the police. The rationale of the tort is that executive or administrative power ‘may be exercised only for the public good’ and not for ulterior or improper purposes.69 70 71 However, the fact that an official acts in excess of his or her powers does not always give rise to a monetary remedy. The elements of the tort of misfeasance in a public office were clarified by the House of Lords in ***Three Rivers DC v Bank of England (No 3 f°*** as follows:
* the conduct must be that of a public officer, exercising power in that capacity.
* the officer must either intend to injure the claimant by his or her acts or knowingly/recklessly act beyond his or her powers.
* and thereby cause damage to the claimant.
* in circumstances where he or she knew the act would probably cause damage of this kind.
1. These elements are considered in more detail in turn below. Miscon­duct in a public office can also amount to a criminal offence.**7'**

**A public officer**

1. A police officer who abuses his position will certainly fulfil the first *element* of the tort. A civilian employed by a police authority is also likely to be a public officer for these purposes, as the comparable offence of misconduct in a public office applies to every person who is appointed to discharge a public duty and is paid to do *so.****72*** *A* decision made by an employee of the Crown Prosecution Service in relation to
2. **Jones v Swansea City Council [1990] 1 WLR 54, 85F.**
3. ***[2003] 2 AC 1, HL.***
4. In ***Att-Gen’s Reference No 3 of2003 (2004)*** ***2 Cr App R 23*** the Court of Appeal con­sidered the ingredients of the criminal offence; they are similar, but not identi­cal to the elements of the tort of misfeasance.
5. ***R v Bowden [1995] 4 AUER 505.***

an actual or prosecution can also ground a claim in misfea­sance (if the other elements of the tort are satisfied)/3

**The officer’s act**

In the ***Three River****s* case the House of Lords emphasised that both limbs of the tort require the claimant to prove bad faith on the part of the relevant officer. Accident, mistake or carelessness is insufficient/4 The first way of committing the tort, where the officer intends to injure the claimant by his or her acts, is often referred to as ‘targeted malice’. The essence is the abuse of power for a specific improper or ulterior motive. The second way of committing the tort involves the relevant officer acting in excess of his or her powers. An example of the difference between the two ways that the tort can be committed could arise from an instance where a police officer mis­used information he or she gained from police records by leaking it to the claimant’s employer, thereby leading to the loss of his or her job. Assuming there was no legitimate reason for the disclosure **(see para 10.17 onwards),** the conduct could come within the first limb of the tort if the officer acted out of spite and in the hope that it would lead to a dis­missal, because the claimant had previously complained about that officer. The conduct could fall within the second limb of the tort if the officer had not acted out of spite but, knowing there were force procedures prohibiting such disclosures, he or she had decided to proceed anyway because he or she thought the procedures were too restrictive.

In the ***Three Rivers*** case the House of Lords decided that in order to establish liability under the second limb, the officer must either exceed his or her powers knowingly or be reckless about this occurring, in the subjective sense that the officer actually appreciated the risk that he or she was going beyond his or her powers but proceeded indif­ferent to this risk. A failure to appreciate such a risk, even if it was obvious, would not suffice for misfeasance. In ***Three Rivers Lord Hutton*** said that the ‘act’ in question may be an omission to act, provided it is the product of a deliberate decision not to act as opposed to mere inad­vertence or oversight,73 74 75

1. ***Elguzouli-Daf v Commissioner of Police of the Metropolis [1995] 1 All ER 833. CA.***
2. See Lo similar effect: ***Thomas v Chief Constable of Cleveland Police [2001] EWCA Civ 1552.***
3. See also ***Toumia v Evans* (1999) *Times* 1 April, CA.**
4. Misfeasance is a tort of personal bad faith and ultimately a claimant must establish bad faith on the part of a particular officer; but it is not always necessary to identify the officer(s) at the outset, if it is suffi­ciently dear from the conduct pleaded by the adamant that bad faith on the part of individual officers was involved.**711**

**Damage**

1. To succeed in establishing liability, the claimant must usually show that he or she suffered a recognisable head of damage' in consequence of the public officer's wrongful actions. Unlike the position in relation to the intentional torts of false imprisonment, assault and battery, it is insufficient to rely on the claimant's inconvenience or distress where ‘damage' has to be shown. ‘Damage’ in this context covers financial loss, loss of liberty**76 77** and death or personal injury.**78** The latter induces both physical injury and psychiatric trauma provided a recognised medical condition is established. Loss of reputation will probably suffice as well.**79** However, where the misfeasance involves an interference with the claimant's constitutional rights it is unnecessary to prove damage.**80** Constitutional rights are those which are of such importance that the right in question cannot be abrogated by the state, save by a specific legislative provision.**81 82** Examples of constitutional rights are the right to vote and the right of access to justice.**87** The extent to which abuses of power by police officers could involve infringement of the claimant’s constitutional rights is cur­rently uncertain. The more serious the abuse, the stronger the chance would be of showing such an infringement.
2. ***Chagas Islanders v Att-Gen* [2003] EWHC 2222.**
3. See ***W v Home Office* [1997] 1mm AR 302, CA and the speech of Lord Clyde in *Darker v Chief Constable of the* West *Midlands Police* [2001] AC 435 HL.**
4. ***Akenzua v Secretary of State for the Home Department* [2003] 1 All ER 35.**
5. See ***Clayton and Tomlinson Civil Actions Against the Police (3rd edn, Thomson Sweet & Maxwell, 2004) para 11-024.***
6. ***Wcttkim- v Secretary of State for the Home Department [2004] EWCA Civ 966*** where the claimant's legally privileged correspondence was opened by prison officers in breach of his constitutional right to unimpeded access to his solicitor,
7. ***Rv Lord Chancellor exp Witham* [1998] QB 575.**
8. See the discussion in ***Watkins v Secretary of State for the Home Department [2004] EWCA Civ 966.***

**The officer's state of mind in relation to the damage**

The House of Lords' decision in the *Three Rivers* case established that it was sufficient if the relevant officer was aware of the probability of damage being caused by his or her actions; it was unnecessary to show that he or she regarded this as a certainty. The same case also decided it was sufficient if the officer was reckless as to the probability of damage resulting from his or her actions (provided the recklessness was of the subjective type where the officer actually foresaw the risk, as discussed in **para 7.43 above).** An issue remained as to the extent to which the relevant officer was required to appreciate the risk of damage to the particular victim. This was specifically considered by the Court of Appeal in **Akenzua v Secretary of State for the Home Departments** The claim was brought by relatives of a woman murdered by a vio­lent criminal who had entered the United Kingdom illegally but (it was alleged) had been permitted to remain in breach of usual proce­dures and in deliberate disregard of the risks he posed, because of his role as a paid police informant. The defendants sought to strike out the claim on the basis that even if the relevant officers were aware of the murderer's violent tendencies, they were not aware that he posed a threat to the particular woman he killed. The Court of Appeal rejected the suggestion that misfeasance in a public office involved a proxim­ity requirement similar to that applied in the tort of negligence (see the discussion of negligence claims at **para 8.51).** For liability in misfea­sance to be established it was sufficient if the relevant officer con­templated harm to one or more victims who were unknown unless or until the expected harm eventuated.

**Chief officer’s liability**

M7 It is sometimes suggested on behalf of defendants that the act of alleged misfeasance is, by its nature, beyond anything contemplated by the officer’s position and as such outside the scope of the chief officer’s liability for the actions of officers of the force. However, the usual principles of vicarious liability apply (see para 11.107 onwards). Accordingly, the chief officer of the relevant force will generally be held legally responsible for acts committed in the officer’s capacity as a constable, albeit that he or she has exceeded the powers of that office.83 84

1. **Watkins v Secretary of State for the. Home Department [2004] EWCA Civ 966.**
2. ***See Marsh v Chief Constable of Lancashire Constabulary [2003] EWCA Civ 284 and Weir i> Chief Constable of Merseyside Police [2003] ICR 708,***

**Misfeasance in police cases**

Many instances of police misconduct will fall within the more established torts, such as false imprisonment in relation to a wrongful arrest. In those instances, a claim in misfeasance is usually superfluous. However, the tort of misfeasance may be of considerable assistance to claimants in circumstances where misconduct does not relate to arrest, detention or assault. Criminal prosecutions are dealt with sep­arately below. Recent examples of the breadth of misfeasance claims in civil actions against the police include.

1. an officer’s misuse of information obtained via the police national computer concerning the claimant’s convictions: ***Elliot v Chief Constable of Wiltshire?'***
2. an officer’s deliberate failure to investigate a complaint of crime and forging of related documentation; ***Kuddus v Chief Constable of Leicestershire Constabulary?6***
3. wrongful identification of the claimants as distributors of stolen imported vehicles, publicised by officers to customers of the business: ***Cruickshank Ltd v Chief Constable of Kent Constabulary,7***
4. misuse of a known violent criminal as a paid police informant: ***Akenzua v Secretary of State for the Home Department***

Additionally, in *Thomas* v *Secretary of State for the Home Department'?\** the court accepted that the tort would be made out if prison officers deliberately abused their powers by racially discriminating against and abusing inmates or encouraging other prisoners to so abuse them (albeit this was not established on the evidence in that case). How­ever, despite the wide scope of circumstances that could lead to a suc­cessful claim, it is important to bear in mind, as mentioned above, that claims in misfeasance require bad faith to be established and that carelessness, however gross, will never suffice. The Court of Appeal has recently warned against the routine inclusion of allegations of mis- **85 86 87 88 89**

**7.48**

**7.49**

1. ***(1996) Times 5 December, ChD***. The court accepted on a strike-out application that the claim was arguable.
2. ***[2001] 3 All ER 193.*** Liability was conceded and the case was contested on the issue of damages.
3. ***[2002] EWCA Civ 1840.*** The court accepted on a strike-out application that the claim was arguable.
4. ***[2002] EWCA Civ 1840.***
5. ***(2000) 31 July, QBD,*** unreported.

feasance in police actions where there is no clear evidence to support a contention of dishonest abuse of power.'

**Misfeasance and malicious prosecution**

A vital question in relation to the tort of misfeasance is its inter-rela­tionship with the tort of malicious prosecution in circumstances where a claimant wishes to sue in respect of a failed prosecution brought against him or her. A successful claim in malicious prosecution requires proof that the criminal proceedings against the claimant lacked reasonable and probable cause (see para 7.19 onwards). But a prosecution supported by sufficient evidence to amount to reasonable and probable cause may nonetheless be tainted by false evidence. A rel­atively common allegation made by claimants is that officers have dis­honestly 'improved' the state of the prosecution case against them, by, for example, falsely claiming that admissions were made. In instances where there was a substantial amount of other evidence implicating the claimant, a malicious prosecution action is unlikely to succeed **(see para 7.23).** The House of Lords considered the viabil­ity' of a claim in misfeasance in such circumstances in **Darker v Chief Constable of West Midlands Police?'** where the defendant sought to strike out a claim in misfeasance concerning allegations that officers fabricated evidence and misused informants. The defendant relied upon the principle of witness immunity (that is, that a person cannot be subjected to a civil claim in relation to evidence he or she gives in court proceedings). Malicious prosecution, unlike misfeasance, is an expressly recognised exception to this principle. Previously, in ***Silcott v Commissioner of Police of the Metropolis?****1* the Court of Appeal had struck out a misfeasance claim brought by Winston Silcott concerning admissions allegedly fabricated by police officers in support of his prosecution for the murder of PC Blakelock. The Court of Appeal said that the principle of witness immunity extended to the preparation of evidence for trial, including the creation of false evidence to be used at trial, so the claim in misfeasance could not proceed (although in that instance the evidence which was said to have been fabricated was sufficiently fundamental to the prosecution case for the civil action to proceed as a malicious prosecution claim). In *Darker* the House of 90 91 92

1. ***Masters v Chief Constable of Sussex [2002] EWCA Civ 1482.***
2. ***[2002] EWCA Civ 1482.***
3. ***(1996) 8 Admin LR 633.***

Lords rejected the Court of Appeal's approach. They held that witness immunity did not extend to the deliberate fabrication of evidence by police officers. They drew a distinction between officers' conduct that was part of the investigation process, which fell outside the immu­nity, and action undertaken in an officer’s capacity as a witness, which came within the immunity. As the House of Lords observed, the offi­cers never intended their dishonest creation of evidence to form part of the account they gave as witnesses at the criminal trial; on the con­trary, they intended to conceal it. Thus, in consequence of the *Darker* decision, officers’ fabrication of admissions, planting of false evidence and dishonest manipulation of potential witnesses would all fall out­side the immunity. In contrast, a complaint that did not concern ear­lier investigative action, but was simply to the effect that the officer gave a false account of his dealings with the claimant in his evidence at the criminal trial, would be caught by the witness immunity so as to preclude an action in misfeasance.

**7.51** If the claimant's case in misfeasance avoids the application of the

witness immunity principle, the question remains as to whether as a matter of policy the courts should permit the civil claim despite; there having been reasonable and probable cause for the prosecution. In ***Darker both Lords Cooke and Hutton*** said in terms that this should not bar a claim in misfeasance. Lord Hope appears to have been of a similar view. The other two speeches did not consider this issue. Thus the balance of current authority suggests that a misfeasance claim can proceed in such circumstances.93 However, practitioners should note that, unlike in malicious prosecution claims, where time runs from the date when the criminal proceedings terminated in the claimant’s favour, the normal six-year limitation period runs from the date of misconduct relied upon **(see paras 11.69-11.71)**. Further, if the misfeasance action succeeds, outstanding questions remain as to the level of compensatory damages (as opposed to exemplary dam­ages) that would be considered appropriate for a claimant having to face tainted prosecution evidence in circumstances where a prosecution was in any event justified.

1. Contrary to earlier observations made in ***McDonagh v Commissioner of Police of the Metropolis (1989) Times 28 December, QBD.***

**Negligence and related actions**