
GARDEN COURT
CHAMBERS

Malicious prosecution, misfeasance in public office and damages after Rees

Fatima Jichi, Garden Court Chambers (Chair)
Stephen Simblet QC, Garden Court Chambers
Una Morris, Garden Court Chambers
Michael Etienne, Garden Court Chambers

GARDEN COURT CHAMBERS

24 June 2021

@gardencourtlaw

Malicious Prosecution and Misfeasance in Public Office & Claims against the Police after Rees

Stephen Simblet QC, Garden Court Chambers

24 June 2021

References / Citations

- Rees and others v Commissioner of Police [2017] EWHC 273 (QB) , Mitting J
- Rees and others v Commissioner of Police [2017] EWCA Civ 1587, McCombe LJ, King LJ, Coulson LJ
- Rees and others v Commissioner of Police [2019] EWHC 2939 (QB), Cheema- Grubb J
- Rees v Commissioner of Police [2021] EWCA Civ 49, Davis LJ, Flaux LJ, Laing LJ
- The last two concern damages for malicious prosecution and misfeasance in public office, the first two concern the substantive claims for malicious prosecution and misfeasance in public office.

The Daniel Morgan Murder

- Murder going back to 1987, where Daniel Morgan attacked with axe on pub car park.
- Daniel Morgan was a partner in Southern Investigations, a private investigators firm with clients including News of World and other News International publications.
- Range of motives being put forward, including business dispute with Jonathan Rees, his business partner, disputes over private life, murky relationships, fall out over money?
- Nobody convicted.
- Initial investigation incompetently done, probably sabotaged by corrupt police.
- Case mired in prominent allegations of serious corruption.
- Case was, and remains, continuing embarrassment to Metropolitan Police.

Series of investigations leading nowhere

- Initial investigation “Operation Morgan” not just botched, but probably corrupt. No photographs of the scene other than of Daniel Morgan’s body.
- Series of police investigations referred to in judgment of Mitting J [2017] EWHC 273, who sets out in chronological order from paragraphs 7-52.
- Included inquest, then Hampshire Police Inquiry: that inquiry which led to charging of Glenn Vian’s wife’s uncle, Paul Goodridge: Goodridge v Chief Constable of Hampshire [1999] 1 WLR 1558, still a useful case on disclosure of reports between police and prosecution - will return to that below, when we look at Court of Appeal.
- Paul Goodridge later successfully settled his malicious prosecution claim.
- “Operation Two Bridges”.
- Still rumour, supposition, ground to halt.

DCS David Cook put in charge

- Operation Abelard I/ Operation Morgan 2, under Detective Chief Superintendent, also on Crimewatch on telly. Merged with/ became Operation Abelard II, which had its roots in the investigations into drug trafficker and associate Garry Vian, James Ward.

- Cook has useful media links, including to Sun reporter, Mike Sullivan. Uses Sullivan to plant a story that the Daniel Morgan murder is being reinvestigated.

- Gary Eaton responds to that. Cook and Dalby meet with Gary Eaton, for limited purpose: see paras 59- 61

- However, Cook feeds him his theory of the case, including, unprompted, “give me the name of the brothers”: see Mitting J, 61.

Eaton's information: an eye- witness

- Gary Eaton supposed to be being debriefed in sterile corridor. Was not: Mitting J 66- 69. Cook regularly phoning and texting Eaton, in breach of sterile corridor arrangements, and such contact resulted in material changes to Eaton account.

- So far as investigation concerned, moved from having series of rumours and supposition to having someone who said he was there. Included accounts given in a series of debrief interviews, and being taken to scene.

- However, his account was wrong and known to be wrong: Mitting J at [89]: "The scene as depicted by Eaton could not have occurred" and [90] "that it was unlikely that he had seen Daniel Morgan's body as described".

- Importantly, [91] "The fact that Eaton's description of the scene in the car park could not have been right was known to the investigating officers, as Beswick acknowledged… In any event it would have been obvious to the experienced team of investigating officers that there was something seriously amiss with Eaton's description"

Cook concealed behaviour

- Mitting J [146]: “Eaton's evidence was important to the case as a whole. It had been contaminated by the actions of Cook which Cook deliberately withheld from the CPS and Treasury Counsel.”

- Mitting J [186] “On the facts of this case, I am satisfied that what Maddison J found that what Cook did amounted to the crime of doing an act tending and intended to pervert the course of justice. The principal purpose of the sterile corridor system, even though it was non-statutory was as stated: to ensure the integrity of evidence to be given by an assisting offender. By prompting a potentially unreliable witness to implicate Glenn and Garry Vian in the Morgan murder and then to conceal the fact that he had done so from the CPS and prosecuting counsel, Cook did an act which tended to pervert the course of justice.”

- We would all hope that that amounted to a winning case! But it did not (at that stage)!

Elements of claim for malicious prosecution

- Claimant was prosecuted (or sued: Willers v Joyce [2016] UKSC 43, [2016] 3 WLR 477)
- By the Defendant
- Without reasonable and probable cause
- With malice
- The Proceedings ended in Claimant's favour
- The proceedings caused damage to the Claimant
- (see Lord Keith, Martin v Watson [1996] AC 74)

Mitting J's findings

- Despite those clear findings, Mitting J considered that other evidence against Jonathan Rees, Glenn Vian and Garry Vian (notwithstanding that in Garry Vian's case, much of that came from the James Ward material, where the same prompting had taken place and where there was a serious reason to think that the amount sought in confiscation proceedings was massively reduced as Ward negotiated his co- operation) meant that there was sufficient to charge those three Claimants

- He considered this relevant to reasonable and probable cause, and that this other evidence was not negated by the clear findings in relation to Eaton's evidence.

- This was critical to his findings on absence of reasonable and probable cause, and also the issue of who is the prosecutor.

What is effect of tainted evidence?

- Mitting J concluded that the tainted evidence would still have resulted in prosecution of three of the claimants: see [192] in relation to misfeasance in public office

- In relation to the fourth, note his conclusion at paragraph 196. Rees AT FIRST INSTANCE is thus powerful, High Court authority of not just some strike- out "arguability" issue, but of concluded findings that misconduct in relation to manufacturing or tainting evidence has amounted to misfeasance in public office.

- This leads on to Una Morris' talk on Misfeasance. See also Gillard and Daniels v Chief Constable of South Wales [2015] EWCA Civ 680, esoecially at para 43-45.

- In relation to malicious prosecution, Mitting J held that this simply took the evidence of Eaton out of the mix, and he then considered the other evidence against the Claimants. He concluded that there was sufficient evidence to proceed against three of the four, thus that there was reasonable and probable cause.

Mitting J's approach to tainted evidence overturned

- The three unsuccessful claimants appealed to the Court of Appeal, which allowed their appeals [2018] EWCA Civ 1587

- McCombe LJ [96- 97] "……..I find that it is inconceivable that any properly informed prosecutor, or counsel advising him or her, would have countenanced the preferring of charges on the relevant date based, as these were, on the report of an SIO who had procured a significant plank of the proposed Crown case by committing the crime which the judge held that DCS Cook had committed. Such a prosecutor would, I am convinced, have wanted DCS Cook, and any influence deriving from him, to be cleared from the scene and a fresh untainted assessment made of the remaining evidence before considering again whether a prosecution should be brought. Given the circumstances, the prosecutor would have wanted to be assured that the taint of DCS Cook's conduct had not otherwise affected the investigation. The case would have had to be assessed from an unaffected point of view."

- plus Coulson LJ (next slide)

Taint: inferences to be drawn

- Coulson LJ [113]: “Mitting J…had to assume that Eaton's evidence had never been available (see paragraphs 158 and 191 of the Judgment), that was only half the exercise he was obliged to do. In my view, he had to go on and ask himself whether the criminal proceedings would have been commenced against the appellants in circumstances where, not only was Eaton's evidence unavailable, but where it was also known that his "new and compelling" evidence had only been obtained through the criminal conduct of the Senior Investigating Officer. In other words, it was insufficient for the judge merely to subtract Eaton's evidence from the equation…”

- Coulson [115] “There is one final point that I would wish to make. The key question with which both Mitting J and this court have wrestled was whether or not, absent Eaton and the actions of DCS Cook, there was the necessary RPC. Considerable court and judicial resources have been expended on endeavouring to answer this question: the original trial took 3 weeks, and the appeal a full one and a half days, involving 6 counsel, including 2 QCs. And yet it is likely that the answer to that very question was contained in the contemporaneous documents relating to the original decision to charge, for which the CPS did not waive privilege.”

Malice

- Cook did not give evidence, so was silent about this.

- Nevertheless, Mitting J declined to infer malice. [176] "….. The fact that he overstepped the mark – even to the point of committing the criminal offence of doing an act tending and intended to pervert the course of justice – does not alter his state of mind which was, I am satisfied, to bring those he believed to be complicit in the murder to justice."

- Court of Appeal unimpressed by that. King LJ [106- 108] "I would endorse, without reservation, the conclusion of McCombe LJ that DCS Cook was a prosecutor who acted maliciously. McCombe LJ observes that any other finding would be a "negation of the rule of law" [91], and Coulson LJ that it would be "contrary to basic principle". I agree that that is undoubtedly the case and, in my view, any other conclusion would, in the eyes of the general public, defy common sense."

  "To say that DCS Cook, a prosecutor guilty of perverting the course of justice by creating false evidence against the appellants, was, on account of his belief in their guilt, not acting maliciously, is rather like saying that Robin Hood was not guilty of theft."

Mouncher v Chief Constable of South Wales

- In that case, police did disclose advices, documents and records in relation to how decisions to prosecute had been taken.
- Although a point had been raised about the legitimacy of this, and the extent to which PII was engaged, since it suited the police, they had chosen to do all of that.
- They even called live oral evidence from the CPS officials themselves, and from all prosecution counsel (one of whom who was by then, a circuit judge!)
- In Rees, there was no material at all disclosed (as Coulson LJ observed)
- A common factor in each case was that the defendant represented by Jeremy Johnson QC (as he then was)
- Remember Goodridge, cited earlier: Police report to CPS was discloseable.

Who is the prosecutor when CPS is misled?

- Mitting J [146]:
- “…… There is a difference between making it "in practical terms virtually impossible for the CPS to exercise independent discretion" and making the exercise of that discretion more difficult, because of the deliberate concealment of an important fact. In my judgment, the latter lies on the wrong side of the line for determining whether or not someone other than the CPS is to be treated as the prosecutor for the purpose of the tort of malicious prosecution. Applying the principles derived from the authorities, Cook's conduct did not make it virtually impossible in practical terms for the CPS, advised by Treasury Counsel, to exercise their independent discretion……”
- Mitting J [147]:
- “For those reasons, I have decided that Cook is not be treated as the prosecutor so that, for that reason, the claimants have failed to prove the first of the elements of the tort.”

Who is the prosecutor?

- Real question is who is a prosecutor. There may be more than one.

- Copeland v Commissioner of Police [2015] 3 All ER 391, at paragraph 25 of the judgment, Moses LJ approved a test as to whether DC Bains was “instrumental in the bringing of the prosecution”, and explained it as being to fix liability on the person who, in substance, is responsible for the bringing of the prosecution. Question asked in that case was “"Has [claimant] proved (i.e. is it more likely than not) that [police officer] deliberately fabricated his account of her hitting him in the face in the statement used for her prosecution in the Magistrates’ Court?"

- Rees, Court of Appeal: see [45- 60] McCombe LJ: [58] “It seems to me that the case falls squarely within what this court said in AH(unt) v AB. DCS Cook deliberately manipulated the CPS into taking a course which they would not otherwise have taken (Sedley LJ). The decision to prosecute was "overborne and perverted" (c.f. Wall LJ) by DCS Cook's presentation of the material to the CPS with the implicit suggestion that its procurement was not tainted in the manner that it was.”

Misfeasance in public office:

What is an ‘act’ of misfeasance and how can the tort be used?

Una Morris, Garden Court Chambers

24 June 2021

Misfeasance in public office

- *Three Rivers District Council and Others v Governor and Company of the Bank of England (No 3)* [2001] UKHL 16, [2003] 2 AC

- Following the collapse of BCCI, a claim by some 6000 depositors of BCCI's UK branch against the Bank of England in misfeasance in public office in relation to either wrongly granting a licence to BCCI or in failing to revoke BCCI's licence on the basis that the Bank knew, believed or suspected that BCCI would probably collapse without being rescued.

- In broad terms, the question before the House of Lords in *Three Rivers (*for our purposes, there were also issues of Community law): What is the correct definition of the tort of misfeasance in public office? Alternatively, what are the 'ingredients' of the tort?

The ingredients of the tort

- Lord Steyn

"(1) The defendant must be a public officer

It is the office in a relatively wide sense on which everything depends. Thus a local authority exercising private-law functions as a landlord is potentially capable of being sued: Jones v Swansea City Council [1990] 1 WLR 54. In the present case it is common ground that the Bank satisfies this requirement." (191B-C)

The ingredients of the tort

- Lord Steyn:

"(2) The second requirement is the exercise of power as a public officer. This ingredient is also not in issue. The conduct of the named senior officials of the Banking Supervision Department of the Bank was in the exercise of public functions. Moreover, it is not disputed that the principles of vicarious liability apply as much to misfeasance in public off ice as to other torts involving malice, knowledge or intention: Racz v Home Office [1994] 2 AC 45." (191C-D)

The ingredients of the tort

- Lord Steyn:

"(3) The third requirement concerns the state of mind of the defendant
The case law reveals two different forms of liability for misfeasance in public office. First there is the case of targeted malice by a public officer, i e conduct specifically intended to injure a person or persons. This type of case involves bad faith in the sense of the exercise of public power for an improper or ulterior motive. The second form is where a public officer acts knowing that he has no power to do the act complained of and that the act will probably injure the plaintiff. It involves bad faith inasmuch as the public officer does not have an honest belief that his act is lawful…" (191D-F)

"…The plaintiff must prove that the public officer acted with a state of mind of reckless indifference to the illegality of his act: Rawlinson v Rice [1997] 2 NZLR 651…" (193C-D)

The ingredients of the tort

- Lord Steyn:

"(4) Duty to the plaintiff

The question is who can sue in respect of an abuse of power by a public officer…It would be unwise to make general statements on a subject which may involve many diverse situations. What can be said is that, of course, any plaintiff must have a sufficient interest to found a legal standing to sue. Subject to this qualification, principle does not require the introduction of proximity as a controlling mechanism in this corner of the law. The state of mind required to establish the tort, as already explained, as well as the special rule of remoteness hereafter discussed, keeps the tort within reasonable bounds. There is no reason why such an action cannot be brought by a particular class of persons, such as depositors at a bank, even if their precise identities were not known to the bank…" (193D-H)

The ingredients of the tort

- Lord Steyn:

"(5) Causation
Causation is an essential element of the plaintiffs cause of action. It is a question of fact. The majority in the Court of Appeal and Auld LJ held that it is unsuitable for summary determination. That is plainly correct…" (194B-C)

Ingredients of the tort

- Lord Steyn:

"(6) Damage and remoteness

The claims by the plaintiffs are in respect of financial losses they suffered. These are, of course, claims for recovery of consequential economic losses. The question is when such losses are recoverable… It is …convenient to consider it under the traditional heading of remoteness…" (194C-D)

"Enough has been said to demonstrate the special nature of the tort, and the strict requirements governing it. This is a legally sound justification for adopting as a starting point that in both forms of the tort the intent required must be directed at the harm complained of, or at least to harm of the type suffered by the plaintiffs. This results in the rule that a plaintiff must establish not only that the defendant acted in the knowledge that the act was beyond his powers but also in the knowledge that his act would probably injure the plaintiff or person of a class of which the plaintiff was a member." (195H-196A)

Ingredients of the tort

- What about damage and remoteness and recklessness?
- Lord Steyn:

"…Recklessness about the consequences of his act, in the sense of not caring whether the consequences happen or not, is therefore sufficient in law. This justifies the conclusion that the test adopted by Clarke J represents a satisfactory balance between the two competing policy considerations, namely enlisting tort law to combat executive and administrative abuse of power and not allowing public officers, who must always act for the public good, to be assailed by unmeritorious actions." (196B-C)

Vicarious liability

- Lord Steyn in *Three* Rivers:

"…it is not disputed that the principles of vicarious liability apply as much to misfeasance in public off ice as to other torts involving malice, knowledge or intention…" (191C-D)

Vicarious liability

- *Mohamud v Morrisons Supermarket Plc* [2016] UKSC 11, 2016 AC 677

- The claimant brought a claim against Morrisons for assault and battery, arising out of a incident in which an employee was said to have refused the claimant's request to print off some documents and then racially abused the claimant and told him to leave. The employee followed the claimant to his car and then physically attacked him.

- The issue for the Supreme Court, in broad terms, was whether Morrisons could be vicariously liable for the employees actions.

Vicarious liability

- Lord Toulson JSC in *Mohamud:*

"44 In the simplest terms, the court has to consider two matters. The first question is what functions or "fields of activities" have been entrusted by the employer to the employee, or, in everyday language, what was the nature of his job. As has been emphasised in several cases, this question must be addressed broadly…

45 Secondly, the court must decide whether there was sufficient connection between the position in which he was employed and his wrongful conduct to make it right for the employer to be held liable under the principle of social justice which goes back to Holt CJ. To try to measure the closeness of connection, as it were, on a scale of 1 to 10, would be a forlorn exercise and, what is more, it would miss the point. The cases in which the necessary connection has been found for Holt CJ's principle to be applied are cases in which the employee used or misused the position entrusted to him in a way which injured the third party…" ([44]-[45])

Vicarious liability

- Lord Toulson:

"47…It was a gross abuse of his position, but it was in connection with the business in which he was employed to serve customers. His employers entrusted him with that position and it is just that as between them and the claimant, they should be held responsible for their employee's abuse of it.

48 Mr Khan's motive is irrelevant. It looks obvious that he was motivated by personal racism rather than a desire to benefit his employer's business, but that is neither here nor there." ([47-48])

When can the tort be used?

- It may be used as a sole cause of action but often used in the alternative to another cause of action (particularly where there may be difficulties in proving bad faith) for example:

  - Breaches of Community Law (*Three Rivers*)
  - Malicious prosecution
  - False imprisonment
  - Assault and battery
  - Data protection claims
  - Misuse of private information
  - Breach of confidence
  - Negligence
  - HRA 1998

  Also note that it is useful to have an alternative cause of action to misfeasance in public office, where possible, in which the burden of proof is on the defendant e.g. false imprisonment.

When can the tort be used?

- An obvious way in which the tort of misfeasance in public office can be used is as an alternative to malicious prosecution.
- *Daniels v Chief Constable of South Wales Police* [2015] EWCA Civ 680:
  - What is the scope of the immunity in relation to evidence given in civil or criminal proceedings?
  - Lloyd Jones LJ:

> "*42…the immunity applies essentially to statements made by witnesses in the course of giving evidence and to certain limited but necessary extensions of that principle. The fact that an activity may be intimately associated with the judicial phase of the criminal process, as distinct from the administrative or investigatory function, does not, in itself, necessarily give rise to immunity…*" ([42])

When can the tort be used?

- *Rees v Commissioner of Police of the Metropolis* [2017] EWHC 273 (QB) at [195].

A claimant succeeded in misfeasance in public office, where his claim in malicious prosecution had failed.

When can the tort be used?

- *TPKN v Ministry of Defence* [2019] EWHC 1488 (QB)

- The claimant, a former naval officer, pleaded claims in assault and battery and misfeasance in public office in connection with her case that she was raped by a soldier on base in Gibraltar during her service, after an evening of socialising.

- The defendant obtained summary judgment in relation to the issue of vicarious liability and strike out in relation to the claimant's misfeasance in public office claim.

When can the tort be used?

- In *TPKN* in striking out the misfeasance in public office claim, the Master had relied on the definition in Halsbury's, Volume 69, cited as:

"The tort of misfeasance in public office may be committed by a local authority either directly or vicariously through its offences or members. The tort involves the unlawful exercise of power as a public officer where either (1) the conduct is intended to injure another or (2) action is taken knowing or being reckless that there was no power to do so and that the action will probably injure the claimant. It is a question of fact as to whether a sufficient connection can be established between the conduct complained of, the public office held and the power exercised."

- The Master concluded that the alleged actions of rape and sexual assault could not be described as the improper execution of powers by a member of the armed forces.

When can the tort be used?

- Sweeney J in *TPKN*:

"51…whilst the quotation from Halsbury's was, in itself, accurate it did not encompass the full scope of the tort, and (had she been given the opportunity) the Claimant would have been able to point to aspects of the Three Rivers judgment which support her case that the tort is not confined to acts that constitute an improper exercise of power, but includes illegal acts that are beyond the scope of any power." ([51])

- The claimant succeeded in her appeal and the decision to grant the defendant summary judgement on the vicarious liability issue and strike out of the misfeasance in public office claim was overturned on the basis that her case was arguable.

Conclusions

- Misfeasance in public office is a useful tort.
- It can be used creatively, to address a broad range of acts.
- Can be used as a standalone cause of action, but often used in conjunction with one or more others.
- There may be difficulties in establishing one or more elements of the tort.
- It is essential to properly assess the viability of such a claim prior to pleading it.
- Where there appear to be good prospects of success, it is essential to properly plead misfeasance in public office, taking into account principles of vicarious liability where against an employer or similar.

Thank you

020 7993 7600 | info@gclaw.co.uk | @gardencourtlaw