Abuses of the legal process: To tort or not to tort

V S Khanna*

In this paper the author examines the tort of abuse of process, with particular reference to a recent High Court decision, Cunningham *v* Clarke. *The author argues that the analysis in* Cunningham *creates some problems. He concludes that these may be solved by following the example of the Georgia Supreme Court and redefining this tort in New Zealand law.*

I INTRODUCTION

The justification for being subject to a legal system is linked to its ability to prevent and compensate for abuses and injustices. However, the legal system itself is capable of being abused. If a legal system is to be of use to the society that has developed it, it must have a way to protect itself from, and compensate individuals for, abuses of its own processes before it can claim to protect anyone from abuses or injustices in society. Our legal system has developed many ways to protect itself from, and compensate for, the abuse of its processes. One of these is the tort for abuse of process.

In New Zealand this tort appears to have never been used and hence, any movement in it must be viewed carefully as it is still in its developmental stages.[1] The recent High Court decision in *Cunningham* v *Clarke*[2] is such a movement.

This paper will investigate the case of *Cunningham* v *Clarke* and its implications for the use of the tort of abuse of process in New Zealand. As a starting point the torts relating to abuses of the court will be defined and the facts, issues and decisions of *Cunningham* will be detailed. It will then be considered whether the development of a tort to compensate for the misuse of the criminal process can be justified in New Zealand. If it can be, the focus will be on whether the formulation of the tort in *Cunningham* is the best way in which to compensate for the abuse, or whether some changes may be suggested for the future. However, before one considers the implications of the decision in *Cunningham* it may prove useful to define some of the torts designed to prevent and compensate for abuses of the court.

---

* This article is a revised version of a paper written as part of the VUW LLB (Honours) programme.

1 There appear to have been no New Zealand cases before 1990 considering the tort of abuse of process.

2 Unreported, 23 March 1990, High Court Wellington Registry CP 93/88.

II THE NATURE OF THE TORT OF ABUSE OF PROCESS

Abuse of process is both a tort and a reason allowing a court to dismiss a case which is otherwise in order (eg a frivolous claim).[3] It is tempting to equate these with each other. However, one should not. Courts can and should dismiss actions that are flawed or frivolous, but all such cases are not open to damages under the tort for abuse of process. This tort only deals with claims that have an improper purpose, whereas the dismissal deals with claims that are a waste of the court's time regardless of the motive or purpose behind them.[4] The focus in this article will be on the tort for abuse of process and other torts in the area of abuse of legal procedure.

At present, the two torts associated with preventing abuses of the legal procedure are malicious prosecution and abuse of process. To understand what makes abuse of process different from malicious prosecution, one must enquire into the rationale behind these torts.

Malicious prosecution developed as a result of balancing two important interests of society: first, the desire to safeguard individuals from being harassed by unjustifiable litigation, and second, the desire to encourage citizens to aid in law enforcement by protecting them from the prejudice of retributory civil claims which may ensue if the accused wins the case.[5] An attempted balance between these goals has resulted in the requirements for malicious prosecution. To be successful, the plaintiff must show that:

(a) the defendant instituted (ie initiated) criminal proceedings;
(b) without reasonable or probable cause;
(c) which terminated in favour of the plaintiff;
(d) these proceedings were instituted maliciously[6] or for an improper purpose (a purpose which is not one the proceedings are designed to achieve);[7] and
(e) damage resulted which falls under one of the following three heads:[8]
    (i) damage to reputation;
    (ii) damage to person; or
    (iii) damage to property and pecuniary interests.

Clearly, malicious prosecution punishes groundless actions while protecting prospective informants by making them liable only if an unsuccessful criminal action was brought or aided maliciously and without reasonable and probable cause, and

---

3 A M Tettenborn "When Can You Sue Those Who Sue You?" (1986) 45 Camb LJ 200, 201.

4 Above n 3.

5 JG Fleming *The Law of Torts* (7 ed, Law Book Co Ltd, Sydney, 1987) 579. This view was confirmed in *Commercial Union Assurance Co of NZ Ltd* v *Lamont* [1989] 3 NZLR 187, 192.

6 Fleming, above n 5, 579.

7 Fleming, above n 5, 580.

8 Fleming, above n 5, 580. This requirement was accepted in *Marley* v *Mitchell* Unreported, 19 September 1988, Court of Appeal, Wellington, CA 104/85.

resulted in specific types of damages.[9] These factors are claimed to help establish a balance between the two competing interests mentioned above.

However, the gist of the tort for abuse of process is not in the wrongful launching of criminal proceedings, but in the misuse of process for any purpose other than that which it was designed to serve.[10] This involves the concept that the action was merely a means to "force" the defendant to do something which was outside the scope of the legal claim brought to court. It is, therefore, immaterial whether the suit was initiated with reasonable or probable cause, or terminated in favour of the plaintiff. Liability for abuse of process requires that there be at least an improper purpose.[11]

It should be noted that malicious prosecution and abuse of process are both civil claims, in that they result only in civil law remedies like damages. Generally, malicious prosecution is a civil claim for a wrong that occurred in initiating a criminal prosecution. In some jurisdictions, however, malicious prosecution has been extended to cover wrongs that occurred in initiating civil proceedings.[12]

Abuse of process is normally a civil claim for the wrong of misusing the civil process. Nonetheless, in some jurisdictions it has been extended to cover the wrong of misusing the criminal process as well.[13] *Cunningham* essentially decides that in New Zealand the tort for abuse of process should be extended to grant damages for a misuse of the criminal process.[14] Having established why the tort for abuse of process exists and how it differs from other torts, one may now consider the facts and issues which gave rise to the decision in *Cunningham.*

III FACTS OF *CUNNINGHAM* V *CLARKE*

The facts of *Cunningham* are quite complex. Nevertheless, a brief description of the essential facts and issues will provide a useful framework within which to evaluate the decision. The plaintiff, Mr Cunningham, was the Industrial Relations Manager for

---

9 Fleming, above n 5, 579. As most criminal actions are brought by the police, the aid the informant gave the police in the case is often the relevant determining factor. For a fuller discussion of these issues, see *Lamont*, above n 5.

10 Fleming, above n 5, 592.

11 US tort law requires not only improper purpose, but also a misuse of the process somehow manifesting this intent (eg trying to extort money not owed): *Ellis* v *Wellons* 29 SE 2d 884 (1944).

12 In the USA the tort for malicious prosecution of civil proceedings exists: see the American Second Restatement on the Law of Tort § 674; in the UK, however, the existence of this tort is still in doubt: see *Metall und Rohstoff AG* v *Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391 (CA). In New Zealand judicial attitudes are changing from the English to the American view: see *New Zealand Social Credit* v *O'Brien* [1984] 1 NZLR 84.

13 The American Second Restatement on the Law of Tort § 682 defines abuse of process as covering both criminal and civil proceedings; *Metall*, above n 12, defines abuse of process as restricted to civil proceedings. For further discussion, see Part IV C below.

14 Above n 2, 53.

General Motors, and was engaged in wage negotiations with the relevant union near the time of the incident.[15] These negotiations were unfortunately not conclusive and the union decided to use more compelling means. It organised a picket in front of General Motors' office to persuade other workers to join the picket and not to return to work unless there was some movement on the wage negotiations.[16] The picket proceeded quietly for some time until other workers arrived at the workplace. According to independent eye-witnesses some people were apparently trying to drive through the picket and were being encouraged to do so by Mr Cunningham.[17] Mr Cunningham allegedly made comments to the effect that the drivers on their way to work should hit the picketers with their cars.[18] Following these comments, scuffles broke out and police present at the scene made several arrests.

As a result of these incidents, charges were laid against the picketers under the Summary Proceedings Act 1957.[19] The union and its affiliates then asked the police to initiate criminal prosecutions against Mr Cunningham and his employers. When the police declined to do so,[20] the union decided to bring a private prosecution against Mr Cunningham for behaving in a disorderly manner that was likely in the circumstances to cause violence against persons to continue, and also to lay charges that he behaved in a disorderly manner in a public place.[21]

The District Court dismissed the charges against the picketers and Mr Cunningham. As a result, Mr Cunningham decided to sue the union and its affiliates for malicious prosecution, defamation and the tort of abuse of process. These three causes of action were pleaded before the High Court in the present case.

To succeed in the malicious prosecution claim the plaintiff had to prove that the defendant:

(a) instituted/initiated criminal proceedings against the plaintiff;
(b) with an improper motive or malice;
(c) without reasonable and probable cause;
(d) that terminated in the plaintiff's favour; and
(e) resulted in damage to the plaintiff.[22]

In the High Court, Gallen J found that the plaintiff's claim for malicious prosecution failed because he had not proved that the defendant acted maliciously and

---

15 Above n 2, 2.
16 Above n 2, 4.
17 Above n 2, 13.
18 Above n 2, 13.
19 Above n 2, 20.
20 The police considered that giving Mr Cunningham a warning was sufficient and were not prepared to go any further than that at that time: above n 2, 24.
21 Above n 2, 28.
22 The damages would have to come under the three heads listed earlier; see text at n 8 above.

without reasonable and probable cause in initiating the criminal prosecution.[23] In other words, elements (b) and (c) were not proved. The plaintiff's action for defamation also failed. This was not because he could not prove that the material was defamatory, but because the High Court found that the defendant's publications were protected by qualified privilege on that occasion.[24]

The main cause of action for the purposes of this article was the decision on the action for the tort of abuse of process. The plaintiff argued that abuse of process could be held to exist, either for the initiation of a criminal prosecution, or for the continuation of a criminal prosecution the main purpose of which was not to achieve the goal for which it was designed (in other words, a prosecution with an improper motive).[25]

Gallen J did not consider it possible to maintain an action for abuse of process in respect of the initiation of a criminal prosecution when there was already a tort that dealt with this, namely malicious prosecution. His Honour reasoned that, because the elements for the tort of abuse of process were not as stringent as those for malicious prosecution, both torts could not be generally available. Gallen J stated[26] that the test for malicious prosecution was so stringent:

> to ensure that people are not unreasonably inhibited from initiating criminal prosecutions, that being a right of citizens and an important right where those normally responsible for initiation are not prepared to act. To allow the wider tort of abuse of process to apply where the stringent requirements of malicious prosecution cannot be satisfied, would be to defeat that concern.

He also found no authorities where the initiation of criminal proceedings was brought within the tort of abuse of process.[27] He therefore concluded that the tort was not available at this point. Gallen J considered the evidence in any event and found that it did not substantiate a finding for abuse of process at the initiation of the prosecution because improper motive could not be shown to be the main reason for initiating the prosecution.[28]

However, the argument that the tort of abuse of process was available in New Zealand for the continuation of criminal proceedings, the main purpose of which was not to achieve the goal for which it was designed, was supported by some American cases.[29] Gallen J, treating the reasoning in these cases as persuasive in New Zealand, held that the tort of abuse of process may lie in respect of a criminal prosecution only if

---

23 Above n 2, 41.
24 Above n 2, 77.
25 Above n 2, 43.
26 Above n 2, 43.
27 No New Zealand, English or US authorities were cited to him to uphold the argument for abuse of process at the initiation of proceedings.
28 Above n 2, 52.
29 The plaintiff relied on dicta in *Ellis* v *Wellons*, above n 11, and *Lader* v *Benkowitz* 66 NYS 2d 713 (1946).

it could be shown that, subsequent to its initiation, the proceedings were perverted or used by the defendant for some improper purpose.[30] His Honour hereby adopted the American definition of abuse of process.[31]

Gallen J held that a distinction should be drawn between the wrongful initiation of criminal proceedings (in other words, malicious prosecution) and subsequent perversion of criminal proceedings (in others words, abuse of process). He held, however, that on the available evidence there had been no subsequent perversion of the criminal proceedings.[32]

This decision raises several questions concerning the tort of abuse of process in New Zealand. One of these is whether the development of a tort to compensate for the misuse or abuse of the criminal process can be justified in New Zealand. If it can be, the next question is whether the formulation of this tort in *Cunningham* offers the best compensation for this misuse of the criminal process, or whether a better formulation may be suggested.

IV THE JUSTIFICATION FOR THE DEVELOPMENT OF THE *CUNNINGHAM* TORT

The justification for developing any tort will always be a much debated issue. Essentially, a consideration of the foundations of tortious liability is required and thus, the grounds which are needed before one can develop a tort. There are three views on this issue. Each will be set out before one is adopted.

Some commentators have argued that tort law is simply a patchwork of distinct causes of action, each protecting different interests and each based on separate principles of liability.[33] Tort law is thus seen as a finite set of independent rules, and the courts are not free to recognise new heads of liability, because the foundations are fixed and cannot be expanded.[34]

Others, however, have argued that torts can be developed to meet any need that courts may perceive to exist. It is argued that the law of torts is based on a single unifying principle that all harms are tortious unless they could be justified.[35] Thus, the

---

30 *Ellis* v *Wellons*, above n 11, 885. The use of the phrase "subsequent to its initiation" will be considered in Part V A 2 below.

31 In *Lader*, above n 29, a case relied on by Gallen J, McNally J had held that "the gist of the action for abuse of process lies in the improper use of process after it has been issued." It should be noted that both *Lader* and *Ellis* v *Wellons*, above n 11, also relied on by Gallen J, concerned alleged abuse of process arising out of a criminal prosecution, as it did in *Cunningham*.

32 Above n 2, 56.

33 J Salmond *The Law of Torts* (6 ed, Sweet & Maxwell, London, 1924) 9, quoted in *Frame* v *Smith* (1987) 42 DLR (4th) 84, 86 in the judgment of Wilson J in the Supreme Court of Canada.

34 Above n 33.

35 This was another point of view which Wilson J recognised in *Frame*; above n 33.

courts are free to develop new torts whenever there is a harm that cannot somehow be justified.[36]

There are yet other commentators who fall between these two extremes. They argue that, while tort law exhibits no comprehensive theory of liability, the existing categories of liability are sufficiently flexible to allow tort law to grow and adapt.[37] Glanville Williams has stated that there are some general rules creating liability and others exempting from it.[38] Between these two rules is a large area of law in which the courts operate as unbiased arbiters. Thus, in a case which has not been provided for, the decision will be for the plaintiff if the court concludes that the case is one in which existing principles of liability may properly be extended.[39]

This approach has much merit because it allows the courts some flexibility, but cannot be said to be fostering "palm tree justice", because it requires the courts to justify the new tort on existing principles. These benefits persuaded Wilson J in *Frame* v *Smith* to accept this view of the foundations of tortious liability as being pragmatic and realistic.[40] Wilson J considered that, on this approach, the development of a tort can be justified only when the plaintiff has shown that existing principles of liability can be properly extended.[41] It is submitted that this is the best basis on which to consider if the decision in *Cunningham* is justified because of its pragmatic appeal and recent judicial support.

In adopting this approach to determine whether the development of a tort to compensate for the misuse of the criminal process is justified in New Zealand one would have to ask two questions. First, on what grounds have torts in the area of abuse of legal procedure (eg the tort of conspiracy, malicious prosecution, etc) developed? Secondly, are these grounds present in New Zealand to such an extent that a tort to compensate for the misuse of the criminal process is justified? If these grounds exist then clearly the courts are justified in developing the tort.

Thus, the first level of inquiry would be to determine the grounds on which torts in this area of law have developed. This will require an historical analysis of the reasons for the development of the torts in the area of abuse of legal procedure, focusing on the development of these torts in the USA and the UK.[42]

---

36 Above n 33, 87.
37 Above n 33, 87.
38 G Williams "The Foundations of Tortious Liability" (1939) 7 Camb LJ 111, 131.
39 Above n 33, 87.
40 Above n 33, 87.
41 Above n 33, 87.
42 As these two jurisdictions are frequently looked to when considering the development of this area of law in New Zealand.

A *Historical Analysis*

The concept of punishing a person who has abused the legal procedure is not a novel one. Indeed, it has exercised jurists' minds since the beginning of civilisation. For example, ancient jurists in Mesopotamia developed penalties, which were probably quite effective, in order to deter groundless suits.[43] Likewise, in early Anglo-Saxon law there were severe punishments that could be meted out for the prosecution of groundless suits. Plaintiffs could, for example, lose their tongues or all of their possessions for bringing a suit that was unsuccessful. These are early examples of the principle of compensating for abuse of the legal procedure. However, these ancient systems were certainly not perfect, especially as no distinction was drawn between unsuccessful suits which were brought maliciously and those which were brought honestly.[44] One would expect this type of penalty to be a great deterrent to people contemplating initiating a criminal prosecution, whether honestly or maliciously.

Nonetheless, the English system did improve, but rather slowly. By the thirteenth century, severe physical punishments were being replaced with monetary penalties, called amercements.[45] These would vary according to the offence, and could at worst result in guilty parties losing all their possessions. Nonetheless, this was an improvement over the previous system as it allowed some flexibility in determining the penalty, and therefore some distinction to be drawn between punishing malicious and honest unsuccessful suits.[46]

However, like the other penalties in the ancient times, amercements were paid to the court; the injured party therefore remained uncompensated. Certain abuses also went on unpunished under this system.[47] For example, straw-party actions burgeoned,[48] where one person would ask another, usually a pauper, to initiate an action on his or her behalf.[49] The advantage of this was that, under the amercement system, penalties for false claims would be assessed against the party bringing the claim only. Wealthy plaintiffs therefore avoided substantial penalties by hiring paupers to bring their actions. The court could take everything the pauper had, but could not reach the real instigator of the action.[50]

These weaknesses combined to threaten the judicial system's ability to manage the onslaught of claims abusing the legal procedure. The result was the development of

---

43 See M Giles "Tort Law - Abusive Litigation - The Georgia Supreme Court Creates a New Tort to Replace Malicious Use of Process and Malicious Abuse of Process - *Yost* v *Torok* 344 2d SE 414" (1988) 18 Cumberland LR 491, 492, which refers to The Code of Hammurabi §§ 1 and 126.

44 Above n 43, 493.

45 Above n 43, 494.

46 Above n 43, 493.

47 Above n 43, 494.

48 Above n 43, 494.

49 Above n 43, 494.

50 Above n 43, 494.

conspiracy, the first tort in the area of abuse of legal procedure.[51] Compensating for the abuse of the legal procedure thus became a principle of tortious liability with the development of the tort of conspiracy. This tort was developed to help support the internal control system of amercements. A weak internal control system was, therefore, the ground on which the principle of tortious liability of compensating for abuse of legal procedure was extended to develop the tort of conspiracy. However, this tort only met straw-party actions and thus left a significant area of abuse uncompensated. The injured party still did not receive compensation directly unless conspiracy applied.[52]

The response to this was to develop cost statutes that allowed compensation to be paid directly to the injured party.[53] However, these statutes still did not adequately compensate injured parties for their expenses and the damage to their reputations.[54]

Perhaps as a result of this, the English courts developed a tort to deal with groundless litigation brought maliciously and causing damage. The landmark case for this, *Savill* v *Roberts*,[55] was decided in 1698 and introduced the tort of malicious prosecution into English common law.

In this case, Roberts had been indicted for participating in a riot. On his acquittal, Roberts brought an action against Savill claiming that he had maliciously caused his indictment.[56] The court concluded that Savill had caused damage to Roberts' property by maliciously charging him with riot, and that the existing remedies could not compensate Roberts properly.[57] The damage that could be recovered, however, had to fall into one of three categories: damage to reputation, the person, or pecuniary interests.[58] This tort was developed because the older remedy of amercements (now cost statutes) seemed to have become incapable of deterring people from bringing groundless suits or providing proper compensation to the injured party.[59] Here again, the weakening of the effectiveness of internal controls or cost statutes was the main reason behind the extension of the principle of tortious liability to compensate for the abuse of legal procedure, to develop the new tort of malicious prosecution.[60]

---

51 The first recorded case of conspiracy occurred in 1293; above n 43, 494.

52 Above n 43, 495.

53 Above n 43, 495. For examples of these cost statutes, see 8 Eliz, ch 2 (1565) and 4 Jac, ch 3 (1607). It should be noted that costs in criminal cases had to be applied for under the statutes, whereas costs in civil cases were awarded at the discretion of the court.

54 Above n 43, 495.

55 (1698) 12 Mod 208; 88 ER 1267.

56 Above n 55.

57 Above n 55, 1268.

58 Above n 55, 1268.

59 It seems that at the time amercements were not fully compensating for costs or damage to reputation and did not make a very large dent in one's wallet. Thus, they were not very effective; see above n 43, 497.

60 Above n 43, 497.

At this time the United States legal system was coming into existence; its developments can now be compared with those in English law. The early US developments paralleled those in England, in that the United States adopted the common law sanction of costs[61] and the tort of malicious prosecution for essentially the same reasons that the English had.[62] Again, the rationale for so doing was to fill in a gap left by weakening internal controls.

However, in both the English and US jurisdictions a significant area of abuse was not controlled by the sanctions available at that time. This abuse occurred when a process which was legally justified, and therefore not susceptible to malicious prosecution, was misused to achieve some objective for which it was not designed or intended.[63]

B The Rise of the Tort for Abuse of Process

This abuse was first considered in 1838 in the English case of *Grainger* v *Hill*.[64] In *Grainger* the plaintiff had mortgaged his ship to the defendants in exchange for a loan.[65] However, it seems that the defendants became apprehensive about their security and decided to seize the ship's register, without which the plaintiff could not go to sea.[66] The defendants then called on the plaintiff to either pay the debt before it was due, or surrender his register, failing which, they would arrange for him to be arrested. The plaintiff gave up the register and later sued for its return and for damages for profits lost since he could not sail without it.[67] He succeeded in the court of first instance and on appeal. Tindal CJ recognised that the case involved:[68]

> ...an action for abusing the process of the law, by applying it to extort property from the Plaintiff, and not for an action for malicious arrest or malicious prosecution, in order to support which action the termination of the previous proceeding must be proved...

Tindal CJ went on to state that the complaint did not require proof of lack of reasonable and probable cause as the claim was based on the abuse of the process of law, and not on malicious prosecution.[69] This is, therefore, the first case in which the tort of abuse of process was recognised at common law at a time when there was no

---

61 *Hakins* v *Gooden* 3 Records of the Court Assistants, Mass Bay Colony 208 (1660).

62 *Potts* v *Imlay* 4 NLJ 377 (1816) is an example of a US decision adopting the *Savill* tort in the USA. However, certain US jurisdictions did not require damages to come under the three heads in *Savill*. This was known as the American rule for malicious prosecution. An example of this would be *Closson* v *Staples* 42 Vt 77, 80 (1869).

63 This is the generally recognised concept behind the tort for abuse of process.

64 (1838) 4 Bing (NC) 212; 132 ER 769.

65 Above n 64.

66 Above n 64.

67 Above n 64. The action was for recovery of a debt in assumpsit and, therefore, not a criminal action.

68 Above n 64, 773.

69 Above n 64, 773.

compensation for the injured party for this abuse through costs. However, after this decision, the tort of abuse of process went into hibernation in England until 1986, when the English Court of Appeal in *Speed Seal Products Ltd* v *Paddington*[70] awakened it in the form prescribed by *Grainger*. In fact, virtually all the major developments in this area of law were confined to US decisions.

United States courts accepted the rule in *Grainger* and developed it further so that it applied to both civil and criminal proceedings.[71] Here too, the rationale for the tort was to meet a gap in compensation left by costs. Thus, there is historical evidence to suggest that a principle of tortious liability to compensate for the abuse of the legal procedure exists. The grounds for extending this principle to develop new torts have historically been a gap in compensation left by internal sanctions or costs.

Extending the principle of tortious liability to compensate for the abuse of legal procedure, to develop a tort for misusing the criminal process is, therefore, justified if one can prove that the internal sanctions or costs in criminal cases in New Zealand are leaving a gap in compensation sufficient to warrant the introduction of such a tort.

C *The Effectiveness of New Zealand's Internal Sanctions in Criminal Cases*

One obviously cannot answer this question without knowing when a set of internal sanctions has become weak enough to justify a tort, or strong enough to deny its justification. Benchmarks are perhaps needed by which to assess internal sanctions in New Zealand.

It is submitted that these benchmarks should be the internal sanctions or costs of the USA and UK. This is because these two jurisdictions have apparently different views on the availability of the tort of abuse of process for criminal actions. If New Zealand's internal sanctions more closely resemble those in the country which has a tort of abuse of process for criminal actions, the development of the tort in New Zealand would be justified.

The United States stance on the issue of the availability of abuse of process for abusive criminal actions is clear.[72] However, English law on this issue is rather scarce. The writer has not been able to find either cases or journal articles which consider this issue in English law.[73]

---

70 [1986] 1 All ER 91.

71 *Prough* v *Entriken* 11 Pa 81 (1849) and *Ellis* v *Wellons*, above n 11, are examples of such cases.

72 See above n 13.

73 In *Speed Seal*, above n 70, the court made reference to the way in which the tort for abuse of process is defined in the USA (ie available for both types of proceedings), but the reference to it was mainly to show that a tort for abuse of process existed, not its scope.

However, certain comments by the courts can be interpreted as implying that the tort for abuse of process is restricted to civil actions only. In *Metall und Rohstoff AG* v *Donaldson Lufkin & Jenrette Inc*[74] the English Court of Appeal commented on the principle in *Grainger*. The court said that:[75]

> Relief in tort under the principle of *Grainger* v *Hill* is not, in our judgment, available against a party who, however dishonestly, presents a false case for the purpose of advancing or sustaining his claim or defence in *civil proceedings*.

This explicit reference to civil proceedings suggests that the tort is viewed as applicable to civil proceedings only, and not criminal ones. Given this and the lack of any commentary by the courts or academic writers it seems safe to assume that in the UK abuse of process is restricted to civil proceedings only.

There is thus an apparent divergence of opinion between the USA and the UK on this issue. Given the preceding discussion of what has caused torts in this area to develop, the most likely explanation for this divergence would seem to be that internal sanctions in criminal prosecutions in the USA are considerably weaker than those in the UK.

A cursory examination of the internal sanctions in both jurisdictions reveals that they are quite different. The internal sanctions in the UK allow for the recovery of all costs, which include lawyers' fees.[76] The internal sanctions in the USA are not so compensatory. In the USA lawyers' fees are not recoverable through internal sanctions.[77] However, in most cases these will be the major costs. As the internal sanctions in the USA leave a considerable amount of costs uncompensated a tort for the abuse of the criminal process is required. By comparison, all costs can be compensated for in the UK; there may, therefore, be no need for a tort for abuse of the criminal process. This would explain the divergence and support the theory that torts in the area of abuse of legal procedure develop to meet a weakening in internal sanctions.

The key issue is, therefore, whether New Zealand's internal sanctions resemble more closely those of the UK or of the USA. As the main area of costs for a defendant will be lawyers' fees and this is the main ground of divergence, it will prove useful to

---

74 See above n 12. In this case the Swiss plaintiffs were trying to obtain leave under RSC Ord 11, r 1(1)(*f*) to serve proceedings out of jurisdiction to claim damages from the US parent company of their insolvent and fraudulent English brokers. To do so, the plaintiffs had to frame their claim in tort. The plaintiffs alleged conspiracy, abuse of process, malicious prosecution of civil proceedings and the tort of inducing breach of contract. Only the last ground was held to be available for the purposes of RSC Ord 11. This case has, however, been appealed to the House of Lords and a decision is awaited.

75 Above n 12, 470D-E (emphasis added).

76 See the Costs in Criminal Cases Act 1952 (UK).

77 These were not apparently recoverable in the USA because of a general mistrust of lawyers; see above n 43, 495.

determine where New Zealand stands in terms of compensating parties, for lawyers' fees in criminal cases.

It should be noted at this point that costs in criminal cases must be specifically applied for under statute, whereas costs in civil cases can be awarded at the court's discretion. The focus will be on costs in criminal cases as we are dealing here with the tort of abuse of the criminal process. In New Zealand costs in criminal cases are governed by the Costs in Criminal Cases Act 1967 and the Costs in Criminal Cases Regulations 1987. These provide for the reimbursement of lawyers' fees where the court deems it necessary to so order. In this respect New Zealand's internal sanctions are stronger than those in most US jurisdictions, where no lawyers' fees are recoverable. This would suggest that internal sanctions in New Zealand have not weakened to the extent that a tort is required to provide adequate compensation.

However, lawyers' fees and other costs are recoverable in New Zealand on the basis of scale party-and-party costs. In other words, the scale of costs is generally preset. For criminal proceedings these limits are set out in the 1987 Regulations: for example, the maximum available under the scale for senior counsel is NZ$236 for half a day. At present, however, senior counsel in most cases are charging approximately NZ$200 per hour.[78] Thus, for half a day the actual cost will be much closer to NZ$800, not NZ$236. If the internal sanctions are providing only 25% recovery of lawyer's fees it is clearly difficult to argue that the sanctions are not leaving a gap in compensation.[79]

This gap in compensation may further be illustrated by *Crown* v *Lawrence*,[80] where Ellis J found that while the "abused" party had incurred expenses of NZ$8,275 for a two day trial, all that he could recover under the regulations was NZ$200 for half of a senior counsel's day and travelling expenses, which were apparently insubstantial.[81] Ellis J ordered costs at the maximum level provided for in the regulations, but nevertheless stated that:[82]

> This award will fall far short of the actual costs that the Applicant must pay and will be far short of what I would have been inclined to award to the Applicant if the matter was simply in my discretion.

Ellis J clearly recognised that the applicant was by no means compensated by the costs he received. However, his Honour could not make a more generous order as he was restricted by the regulations. This strongly suggests that New Zealand's internal

---

78 This information was obtained after discussions with Mr John Allen, Partner at Rudd Watts & Stone, Wellington.

79 In practice internal sanctions are often viewed as quite ineffective in compensating the "abused" party especially as they do not cover serious emotional distress or damage to reputation. Above n 78.

80 Unreported, 15 July 1988, High Court Wellington Registry T 47/88.

81 Above n 80.

82 Above n 80.

sanctions are inadequate.[83] New Zealand's internal sanctions, in not providing sufficient compensation are, therefore, more akin to the USA's internal sanctions in terms of effectiveness. Given this, one would then consider that a tort for misusing the criminal process is sorely needed in New Zealand.[84]

It is clear that the development of a tort to compensate for the misuse of the criminal process is justified in New Zealand. However, the matter does not end there. One must now inquire whether the formulation of that tort in *Cunningham* was the best way in which to compensate the injured parties while balancing the interests of others. If not, then one must also consider the changes necessary to improve this area of law.

V A CRITICAL ANALYSIS OF *CUNNINGHAM* V *CLARKE*

It is respectfully submitted that the *Cunningham* approach is not the best way in which to compensate for the misuse of the criminal process. The approach in *Cunningham* has certain weaknesses, which may be categorised as terminological difficulties and policy problems. After considering these problems, an attempt will be made to solve them.

A Terminological Difficulties

There are two terminological difficulties relating to *Cunningham.* These are the use of the term "perversion" in defining abuse of process, and the dichotomy between the initiation and continuation of proceedings.

1 Use of the term "perversion"

In *Cunningham* Gallen J referred to abuse of process as being the perversion, after issuance of criminal proceedings, to effect an object not within the scope of those proceedings.[85] Gallen J referred to perversion as connoting positive and deliberate acts, not merely continuation.[86] However, in some of the authorities relied on in *Cunningham* abuse of process was defined as the misuse of process.[87]

---

83 Also note that in *New Zealand Social Credit* v *O'Brien*, above n 12, 88, Cooke J (as he then was) stated that: "In New Zealand scale party-and-party costs, by comparison with taxed party-and-party costs in England, may fall even further short of a litigant's proper and reasonable actual expenditure." Although this dictum relates to civil costs, the general thrust indicates a weakening in costs overall.

84 It should be noted that the courts may award more than scale costs under s 13(3) of the 1967 Act. However, this discretion may only be used if the case involves special difficulty, complexity or a very important issue: see *In Re Gregg* Unreported, 5 May 1989, High Court Hamilton Registry T 22/88. Thus, if the case was a normal one - as *Crown* v *Lawrence*, above n 80, was - the courts may not exceed the scale of the costs in the regulations.

85 Above n 2, 45.

86 Above n 2, 45.

87 Above n 2, 55 and *Ellis* v *Wellons*, above n 11.

It is submitted that perversion and misuse are not necessarily the same thing. One can misuse a process without actually doing anything more than merely continuing it. Perversion, however, must involve more than simply mere continuation. Where a plaintiff, for example, initiates and continues an action for breach of confidence against X simply to damage X's business interests, this amounts to nothing more than mere continuation. However, the English Court of Appeal has held in *Speed Seal*[88] that these facts establish an arguable action for abuse of process.[89]

However, if one is to define abuse of process as a perversion of process, there must be more than this to establish a cause of action. The "abused" party must show not only that the action was continued to damage their interests, but also that there was some other positive act besides the continuation of the action that showed this. This would require the defendant to convey to the plaintiff in more or less explicit terms that the process was being misused, for example, by attempting to extort money. There seems to be no reason why the defendants should for example, have to tell the plaintiffs that they are misusing the system before the court will hold the defendants liable for such misuse. It is thus difficult to understand the use of this term.

Gallen J adopted this term from *Lader* v *Benkowitz*, one of the precedents cited to him.[90] In that case the plaintiff was a guest at the defendant's hotel. The defendant wanted the plaintiff to pay a hotel rental which was allegedly unwarranted.[91] When the plaintiff refused to pay, the defendant caused a warrant to be issued for the plaintiff's arrest on a charge of disorderly conduct and threatened to have it executed unless the plaintiff paid.[92] She paid and then brought an action for abuse of process.

The court stated "that for a claim of abuse of process to show that regularly issued process was perverted to accomplish an improper purpose is enough."[93] This does not necessarily mean that every abuse of process claim must show perversion. It only means that showing perversion will suffice to show abuse of process. In other words perversion is not essential to show a misuse of the process, but if proved will show a misuse.

This interpretation is supported by the court's definiton of abuse of process as when the "defendant uses or attempts to use the process of the court, not to effect its proper function, but to accomplish through it some collateral object."[94] The court here requires only *use*, rather than perversion of the process.

---

88 See above n 70.

89 *Speed Seal*, above n 70, was a case where abuse of process was alleged in regard to a civil action, whereas *Cunningham*, above n 2, was a case where abuse of process was alleged in regard to a criminal action. However, there seems to be no reason why the ratio of *Speed Seal* cannot be applied to a criminal case.

90 Above n 29.

91 Above n 29, 714.

92 Above n 29, 714.

93 Above n 29, 714.

94 Above n 29, 715.

The term "perversion" is not suggested in English authority or in recent US decisions, where only the misuse of process is required.[95] For these reasons, it is submitted that the term perversion should not form part of the definition of a tort to compensate for the misuse of criminal proceedings.

2 The distinction between initiating and continuing proceedings

Another terminological problem is the distinction drawn in *Cunningham* between initiating and continuing proceedings. Gallen J defines abuse of process as relating to the continuation of, rather than the initiation of criminal proceedings. It is submitted that this distinction is unhelpful and can lead to arbitrary results.

To consider why this distinction is unhelpful and confusing it may be useful to list the general steps in a criminal prosecution of a summary offence so that one can see where initiation might end and continuation might begin:[96]

(i) Complaint laid with the police;[97]
(ii) information prepared;
(iii) information sworn before the court (ie charges laid or information laid);
(iv) summons served on the parties to inform them when to come to court;[98]
(v) the accused pleads (ie guilty, not guilty, remand without plea);
(vi) if the plea is not guilty, the matter goes to a pre-trial conference;[99]
(vii) defended hearing (or trial); and
(viii) decision and resultant action (eg guilty or not guilty and then sentencing, discharge, etc).

The point where initiation ends and continuation begins will occur somewhere in this list. However, Gallen J did not identify what he meant when he used the terms initiation and continuation. Thus, one is uncertain where to draw the line and uncertainty is the last thing this area of law needs.[100]

---

95 For English authority refer to *Speed Seal*, above n 70 and *Metall*, above n 12. American authority includes *Yost* v *Torok* 344 SE 2d 715 (1986) and *Augusta Tennis Club, Inc* v *Leger* 367 SE 2d 263 (1988).

96 This information was provided by Senior Sergeant Hamill, Police Prosecutions, Wellington Police.

97 The police may have arrested the accused without a complaint, or a person may have called the police while the offence was taking place. The police may have arrived and arrested the alleged offender at the scene. These can also be step (i); above n 96.

98 If the accused has been arrested, he or she is required to sign a police bond stating that he or she will appear within seven days of the arrest; above n 96.

99 If guilty, the matter can be moved to step (viii) quite quickly. If remanded then after some time the accused will have to make some plea (either guilty or not guilty); above n 96.

100 In the USA this area of law is considered quite confusing, see *Yost* v *Torok*, above n 95.

One could argue that the meaning to be attributed to initiation is that which the courts have given to the term when used in defining the initiation/institution of criminal proceedings for the tort of malicious prosecution. However, this matter is not quite so simple, as the definition of initiation varies from jurisdiction to jurisdiction.

In the USA initiation may best be defined by reference to an illustration. Let us say that X, maliciously and without probable cause, informs a police officer that Y has committed an offence. The police officer makes a valid arrest and then releases Y before any further steps are taken because it is discovered Y is innocent. X is liable to Y for malicious prosecution.[101] On this interpretation, initiation means making a complaint or, at least giving information resulting in an arrest.[102] Given that *Cunningham* relied on American authority it would seem that this test should be used.

However, in New Zealand it is often considered that laying an information, or procuring the laying of the information, is the initiation of the proceedings, rather than merely arranging an arrest.[103] Thus, it seems the tests used in the USA and New Zealand are different. To add confusion to the matter, the decision as to whether a person procured the initiation will depend on the circumstances of the case.[104]

The English courts tend to favour the New Zealand approach, but they have recently started asking whether the proceedings have moved to a stage when they are prejudicial to the reputation of the accused to determine if the initiation requirement is met.[105] This test may produce a different result in each case and create more confusion. Thus, the point of initiation can vary. Without explicit direction from the courts in New Zealand as to which interpretation is to be used in relation to abuse of process, the parties are left in a state of uncertainty.

Even if the courts did set down a rule which established where initiation ends and continuation begins, it would nonetheless lead to arbitrary results. An example may help to illustrate this point. Let us say that initiation ends at point A and continuation begins at that point. If the defendants try to extort money from the plaintiff throughout the proceedings and the plaintiff gives in before the initiation ends (ie before point A) then no abuse of process is possible as the misuse occurred at the initiation stage.[106] If, however, the plaintiff is clever, he or she will wait until the first second of the continuation of the proceedings has occurred before giving in. In so doing, the plaintiff will be able to sue for abuse of process. Thus, even though the wrong that occurred is

---

101 The American Second Restatement on the Law of Torts § 654.

102 In New Zealand arrest can often occur before the information is laid or sometimes near the serving of the summons: see above n 97.

103 See *Lamont*, above n 5, 199.

104 *Lamont*, above n 5, 199. There was also some suggestion in this case that the test for initiation may depend on whether it was a private or police prosecution.

105 Fleming, above n 5, 582.

106 This example presumes that an action for malicious prosecution is not available on the facts.

really identical, the results are different because of this arbitrary and artificial distinction between initiation and continuation.

Gallen J presumably used this logic because he referred to US authorities, such as *Lader*, which define abuse of process as the misuse of the legal process "after issuance". On this analysis, the abusive issuance/initiation of proceedings does not fall within the tort for abuse of process. However, it is submitted that the words "after issuance" may actually mean "regardless of the propriety of the issuance".[107] The reason for this is that the tort of abuse of the legal process must by definition cover all actions and abuses in the legal process (ie the initiation and continuation of it), not simply abuses in the *continuation* of the legal process.[108] Therefore, any use of the process with an improper motive that occurs in the legal process should come within the ambit of the tort. This interpretation of "issuance" avoids the arbitrary results and has been adopted in more recent US decisions.[109] Having considered these terminological problems one may turn to the policy problems.

B Policy Problems Associated with Cunningham

Two policy problems can arguably arise from *Cunningham*. These relate to the policy concerns that have restricted the application of malicious prosecution.

1 Another reason for the initiation and continuation dichotomy

From *Cunningham* one can glean that another very significant reason why Gallen J wished to draw a distinction between initiation and continuation was to avoid having the torts of malicious prosecution and abuse of process available at the same time. A very likely reason for this was perhaps a fear that abuse of process would be available in circumstances where malicious prosecution was not. Gallen J considered that abuse of process was not as strict a tort as malicious prosecution and that it would be easier to make a successful claim for abuse of process than for malicious prosecution.[110] The result, arguably, would be that prospective informants would be inhibited from coming forward and aiding law enforcement because of a greater likelihood of liability in a civil action. This would be too great a cost to bear for allowing abuse of process at the initiation stage, but not at continuation since apparently malicious prosecution could be restricted to the initiation stage only.

On the face of it, this argument would justify on policy grounds the distinction, albeit arbitrary, between continuation and initiation. However, it is submitted that it does not bear closer scrutiny. Abuse of process will not succeed in every case where

---

107 Support for this interpretation is found in *Ellis* v *Wellons*, above n 11, 885, where the tort is defined as the malicious perversion of a regularly issued process.

108 This view is supported by the American Second Restatement on the Law of Torts § 682 and by recent US decisions such as *Yost* v *Torok*, above n 95, discussed in Part VI below.

109 See *Yost*, above n 95, and *Leger*, above n 95.

110 Above n 26.

malicious prosecution fails. For example, if X shows that a criminal action was initiated by Y with malice or an improper purpose, but Y won the case and had reasonable grounds to bring it, an action for malicious prosecution will fail. On these facts, however, an abuse of process action will also fail. This is because not only an improper motive, but also resultant *misuse* must be shown for abuse of process. Thus, Y must be proven to have gained or attempted to gain some collateral advantage.[111] This element of collateral advantage is not required in malicious prosecution. To this extent, abuse of process provides an extra safeguard against scaring away informants.

Another safeguard may be found in the definition of misuse. If the informant maliciously gives false information, a prima facie action for perjury or malicious prosecution may exist.[112] However, these facts do not necessarily lead to a finding for abuse of process. In *Metall* the English Court of Appeal held that providing false evidence to win a case was not abuse of process.[113] Actions designed to help win a case are uses of the process for a purpose for which it was designed, which is to resolve a claim. In other words trying to win a case does not constitute an abuse of process, but using the case to accomplish some collateral object does.

Abuse of process claims are unlikely to succeed in every case where malicious prosecution fails and they are, therefore, unlikely to deter informants. In this sense the policy argument against allowing malicious prosecution and abuse of process to operate concurrently is unconvincing and hence, the initiation and continuation distinction remains untenable. This, however, does not mean that allowing abuse of process to cover abuses in criminal actions, either at the initiation or continuation of them, cannot scare away informants.

2 The presence of two torts in criminal proceedings

One peculiar policy problem with the position after *Cunningham* is that now both the torts of malicious prosecution and abuse of process are available in criminal proceedings. It is submitted that if a person maliciously institutes groundless criminal proceedings they will most likely be liable for not only malicious prosecution, but also abuse of process. Malicious prosecution requires (a) the initiation of (b) groundless criminal proceedings (c) without reasonable and probable cause and with (d) malice or an *improper motive* (e) resulting in damage. Abuse of process requires (a) an *improper motive* and (b) a misuse of the process.[114] Thus, when a person has proved malicious prosecution, he or she would have proved at least element (a) of abuse of process.[115]

---

111 See *Lader*, above n 29.

112 *Lamont*, above n 5, 199.

113 It may be worth noting that *Metall*, above n 12, was a case where abuse of process was alleged with regard to a civil action and the focus here is on abuse of process in criminal actions. However, there appears to be no reason why the reasoning in *Metall* cannot be applied to the situation here.

114 Fleming, above n 5, 592.

115 Even if abuse of process is interpreted (as it was in *Cunningham*) as applying only to the continuation of proceedings, in most cases a finding for malicious prosecution

Also, it is highly unlikely that a person who is guilty of malicious prosecution would not at least have attempted to use the process to accomplish his or her improper motive and hence, element (b) of abuse of process would probably be proven too.[116] When one is liable for malicious prosecution, one is therefore probably going to be liable for abuse of process as well on the *Cunningham* approach.

Thus, even though the torts are theoretically different, proving one of them virtually ensures proof of the other. The presence of two causes of action may work to inhibit prospective informants from coming forward as they can now be liable for two torts and in most cases liability for one will result in liability for the other.

Arguably, the damages awarded will not increase by too much if abuse of process and malicious prosecution are proven, as only one award of damages is granted. However, to gain compensation under malicious prosecution damage in one of the three categories in *Savill* v *Roberts* has generally been required: ie, damage to reputation, injury to the person or damage to pecuniary interests, although exemplary damages may also be awarded.[117] However, for abuse of process all that needs to be shown is special damage, which need not fall within the categories in *Savill*.[118] A party who wins a malicious prosecution claim and thus, an abuse of process claim after *Cunningham* can receive *Savill* damages, exemplary damages and non-*Savill* special damages. Before *Cunningham*, the claimant could receive only *Savill* damages and exemplary damages. Thus, after *Cunningham* there is an increase in the types of damages that can be awarded to the successful claimant.

In this sense an informant may be scared off because he or she may be liable to a greater extent than before. This is likely to cause informants to become unreasonably inhibited from coming forward. Thus, a policy problem clearly arises from *Cunningham* and this makes it necessary to consider some ways in which to avoid this problem if we wish to keep this tort.

VI SUGGESTIONS TO IMPROVE THE TORT OF ABUSE OF LEGAL PROCEDURE

It is submitted that the terminological and policy problems in *Cunningham* can be reduced by reformulating the torts in this area of law. A recent US decision, *Yost* v *Torok*,[119] suggests a more uniform approach to the area of abuse of legal procedure.

---

will lead to a finding for abuse of process as well. This is because a finding for malicious prosecution implies a finding of improper motive at the initiation. The motive is unlikely to then change at the continuation stage, however defined.

116 Attempts to use the legal process also constitute abuse of process: see *Lader*, above n 29.

117 See SMD Todd (ed) *The Law of Torts in New Zealand* (Law Book Co Ltd, Sydney, 1991) 778 and *Marley* v *Mitchell*, above n 8.

118 It is uncertain if exemplary damages can be awarded here. However, so far only special damages have been granted: see Todd, above n 117, 782.

119 Above n 95, followed in *Leger*, above n 95.

In *Yost* the Georgia Supreme Court made some significant changes to the torts of malicious prosecution in civil proceedings and abuse of process.[120] The facts of the case were that the Toroks sued Yost for personal injuries which they alleged arose out of an automobile collision.[121] Yost responded by contending that there never was any collision and filed a counterclaim for abuse of process which he later dropped.[122] The Toroks then brought an independent action for libel, slander and abuse of process alleging that Yost had filed the counterclaim to induce them to abandon their action against him.[123] Their action was dismissed at first instance and they appealed. The Toroks' application for a certiorari that their complaint disclosed a claim of abuse of process reached the Supreme Court of Georgia.

The judges found that this area of tort law was confusing, first, because of the nomenclature used to define the torts, something quite specific to the US terminology, and secondly, because the substantive difference between the two torts is slight, in that abuse of process could be viewed as a somewhat watered down malicious prosecution.[124] As a result of this the court decided to redefine the torts of malicious prosecution in civil proceedings and abuse of process into one tort of abusive litigation.[125] This new tort was defined as occurring when:[126]

> Any party who shall assert a claim or defense, or other position with respect to which there exists such a complete absence of any justiciable issue of law or fact that it reasonably could not be believed that a court would accept the asserted claim, defense or other position; or any party who shall bring or defend an action, or any part thereof, that lacks substantial justification, or is interposed for delay or harassment; or any party who unnecessarily expands the proceedings by improper conduct, including, but not limited to, abuses of discovery procedures, shall be liable in tort to an opposing party....

The term "lacks substantial justification" was defined as "conduct which is substantially frivolous, substantially groundless, or substantially vexatious."[127] The two main constructs of this new tort are the merging together of the torts relating to abuse of legal procedure and the extension of liability to frivolous claims and unnecessary delay and harassment, without restricting the court's power to dismiss these

---

120 Of course, we are considering malicious prosecution and abuse of the criminal process but in the USA the distinction between the two groups of torts, in terms of definition, is very slight (save that one is for criminal, the other for civil proceedings) and thus, *Yost*, above n 95, certainly has strong analogical relevance.

121 Above n 95.

122 Above n 95.

123 Above n 95.

124 Above n 95, 415.

125 The judgment in this case was delivered by Weltner J. Judgment was unanimously given in favour of the Toroks.

126 Above n 95, 417. There is apparently no reason why this reasoning should not be applied to the case of malicious prosecution and abuse of process in criminal proceedings.

127 Above n 95, 417.

actions.[128] The same terms need not be applied to New Zealand, but the general concepts underlying the new tort may prove very advantageous for New Zealand in both criminal and civil proceedings. The new tort of abusive litigation can be incorporated in New Zealand law in the following form.

THE TORT FOR ABUSIVE LITIGATION IN NEW ZEALAND

Any party who brings or defends a criminal or civil claim, or any part thereof with respect to which:

1 Reasonable or probable cause does not exist and the case is brought or defended with malice or an improper motive and fails;[129]

OR

2 The purpose is to achieve an object not within the scope of that process or claim and there is some misuse of the process to achieve that object;[130]

OR

3 The predominant purpose is unnecessarily to expand or delay proceedings;

OR

4 The claim is substantially frivolous or vexatious, and is brought or defended knowing that it is substantially frivolous or vexatious or with the motive to waste the court's time or harass the opposing party;[131]

Shall be liable in tort to an opposing party who suffers damage thereby.[132]

This new tort follows the two main constructs of the *Yost* tort. The merging of the torts and extension of liability to cover frivolous claims has many advantages. It is submitted that by merging the two torts the fear the informants may feel of being

---

128 Above n 95, 418.

129 The added requirement for malice was put in to avoid imputing malice. This element should be explicitly proven, so that the present form of malicious prosecution is retained.

130 The addition of improper purpose in limb 2 is to prevent arbitrary definitions of the term "harassment" and to provide the safeguard that there must be a misuse of the process explicitly proven before a claim will lie. This misuse can be an attempt to misuse the process as occurred in *Lader*, above n 29.

131 It could be argued that limbs 3 and 4 are simply extensions of limb 2 if the definition of misuse or purpose is expanded. However, for the sake of clarity these limbs have been set out separately.

132 Again for the sake of clarity and simplicity it will be assumed that damages in limb 1 are restricted to those for malicious prosecution at present, but damages under limbs 2-4 will be the damages normally allowable for an abuse of process claim.

susceptible to increased damages is reduced. A person can be liable for only one wrong, the degrees of which may vary. Thus, a person liable under the malicious prosecution branch for damages cannot also be liable under the abuse of process branch; hence, no question of increased damages arises.[133] With this development the prospective informant is now protected and less likely to be inhibited from coming forward than on the *Cunningham* approach.

Another advantage is that the new tort of abusive litigation incorporates into it frivolous and vexatious claims and unnecessary delays in the process.[134] This is useful, given that the longer a trial takes the more expensive and emotionally frustrating it can become. Also, the more frivolous the case is the more time is wasted and the more the court looks like an academic exuberance incapable of coping with real-life problems.[135] The consequences of unnecessary delays or frivolous claims seem to merit compensation as much as, for example, using the process to extort money from a party. In this sense this is a very positive step forward in trying to control potential abuses of the legal process.

This extension of tort liability to cover unnecessary delays or frivolous claims can be justified in New Zealand only if it can be shown that internal sanctions have weakened to the extent that this tort is now needed.[136] Thus, if it can be shown that at present New Zealand's internal sanctions are similar to those of Georgia, this new tort can be developed.[137]

Just before *Yost* was decided, the Georgia State Legislature passed a statute which allowed for the recovery of some lawyer's fees in cases of abusive litigation.[138] Thus, Georgia has now moved closer to New Zealand and yet the new tort was developed there.

---

133 The plaintiff who succeeds under limb 1 can receive only *Savill* damages and exemplary damages, but not non-*Savill* special damages. However, the plaintiff who succeeds under limbs 2-4 can receive only special damages (*Savill* and non-*Savill*), but apparently not exemplary damages. This is because the tort is defined to allow only one limb to be successful although all may be alleged. This solves the problem discussed in Part V B 2 above.

134 The provision for compensation for delays, etc is not meant in any way to restrict the court's right to dismiss fatally flawed cases.

135 For an interesting discussion of frivolous cases see *TIME Magazine*, Auckland, New Zealand, 12 August 1991, 38. The situation does not appear to be so bad in New Zealand but there is always scope for such claims.

136 This follows from the discussion in Part IV above.

137 As was concluded above, New Zealand's internal sanctions are slightly stronger than those of most US jurisdictions, as New Zealand's allowed recovery of lawyer's fees and most US jurisdictions did not: see text at n 83-84 above. If this position had not changed in Georgia, there would have been no grounds for arguing that the new tort should be developed.

138 Ga Code Ann § 9-15-14 (Supp 1987).

Thus, as the internal sanctions are very similar in New Zealand and Georgia the development of this new element of tort liability can be justified.[139]

The *Yost* tort also adds some speed to the judicial process in that it requires the abusive litigation claim to be heard as a compulsory counterclaim as soon as the first action is decided. This will save time in that the parties will not have to set another time at some future date to argue the abusive litigation claim and all the preliminary stages can thus be speeded up.[140]

This approach certainly solves most of the problems associated with the *Cunningham* decision and adds certain benefits as well.[141] It is therefore submitted that if the New Zealand courts were, following the positive moves in *Cunningham,* to merge the torts of malicious prosecution and abuse of process in a manner similar to *Yost* and form a tort as suggested above, the area of abuse of legal procedure and process is likely to be greatly benefited.

VII CONCLUSION

The tort of abuse of process in New Zealand has been expanded by *Cunningham.* It is now possible for wronged plaintiffs to sue for abuses of the criminal process and be properly compensated. This is a very useful decision because it gives the New Zealand legal system another weapon in its arsenal to control abusive litigation. The development of a tort to compensate for the misuse of the criminal process is justified as the grounds on which torts in this area of law have developed have been met in New Zealand. Hence, *Cunningham* is a commendable development.

However, given some of the terminological and policy problems associated with this decision one must examine ways in which to refine the decision to avoid these problems. The approach of the Georgia Supreme Court in *Yost* offers a novel way in

---

139 Of course, this new part of the tort is susceptible to policy arguments in that by allowing a tort for frivolous claims the courts are discouraging honest claimants. However, this can be corrected by requiring that, before a frivolous claim can be compensated for, it must be shown that the claimants' primary purpose was to waste the court's time or harass the opposing party. This has been included in limb 4 of the new tort for New Zealand.

140 Some commentators have regarded this aspect of the decision as problematic. This is because the claim is filed during the trial of the first action, when the client may be emotional and decide to counterclaim as a "knee-jerk" reaction; more claims may be entertained than are necessary. However, with adequate legal counsel the client should be in a more balanced position to make this decision and this problem can thereby be avoided. Some of these problems are discussed at length by A P Dupre "Abusive Litigation" (1986) 21 Georgia LR 429. However, the majority of these problems are procedural and concerns US legal rules which have no equivalent in New Zealand law.

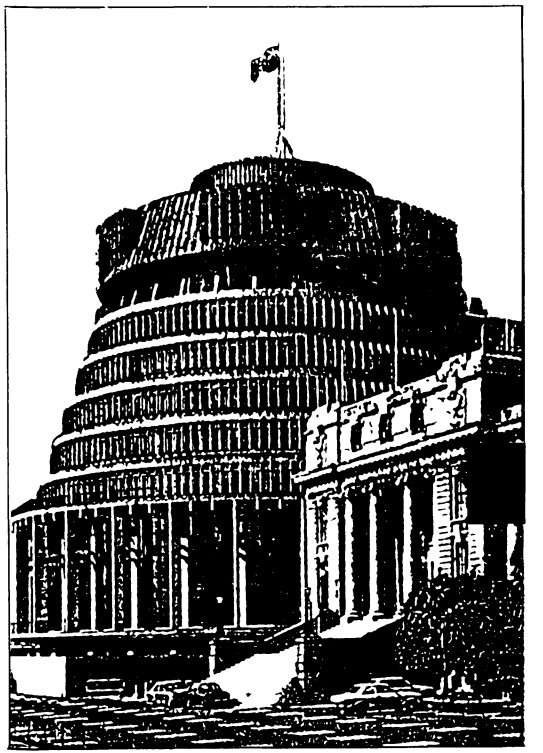
141 Other benefits of this new tort are that there is no arbitrary distinction between the initiation and continuation of proceedings - abuse of process extends to both - and the term "perversion" is also not used. These changes should improve this area of law.

which to solve these problems whilst simultaneously developing a tort which will discourage abusive litigation. If the New Zealand courts were to follow the *Yost* approach, many benefits would be likely to accrue.

These recent decisions provide a foundation for building up a defence mechanism for the legal system to prevent and compensate for abuses of its procedures and processes. This is very important for society's faith in our legal system. After all, it is difficult to have faith in a system which claims to protect society from, and compensate for abuse when that same system is almost impotent when it comes to protecting itself from abuse and compensating those who suffer damage because of it.

NEW ZEALAND'S CONSTITUTION IN CRISIS
Reforming Our Political System

GEOFFREY PALMER



'I feel we've come to the end of an era. We have a political system now which is on its last legs.'

Palmer proposes:

- M.M.P.
- Removal of cabinet from Parliament
- Registration and regulation of political parties
- Division of the office of Prime Minister
- Entrenchment of the Constitution Act
- Entrenchment of the Bill of Rights

and much more.

'All this is pretty close to revolution . . . But I've been driven to it, because from a constitutional point of view this is a primitive country.'

$34.95

McIndoe ▪ Publishers ▪ P.O. Box 694 ▪ Dunedin