District Court
New South Wales

THE TORT OF MALICIOUS PROSECUTION

Introduction

1 To succeed in an action for damages for the tort of malicious prosecution, a plaintiff must prove four things:

(1) That the prosecution was initiated by the defendant;

(2) That the prosecution terminated favourably to the plaintiff;

(3) That the defendant acted with malice in bringing or maintaining the prosecution; and

(4) That the prosecution was brought or maintained without reasonable and probable cause.

See A v State of New South Wales (2007) 230 CLR 500 at [1]

2 It is the intention of this paper to look at some recent developments in this area of jurisprudence, focussing on each of the four elements set out above.

Initiation of the prosecution by the defendant

3 In *A v State of New South Wales*, the High Court said at [34]:

> "The identification of the appropriate defendant in a case of malicious prosecution is not always straightforward. 'To incur liability the defendant must play an active role in the conduct of the proceedings, as by 'instigating' or setting them in motion, citing Fleming, The Law of Torts 9th Ed at 676.'"

4 The Court also referred to *Martin v Watson* [1996] AC 74. That case concerned a complaint by a woman that her neighbour indecently exposed

himself to her while standing on a ladder in his garden. She went to the police and complained and an information was laid against the neighbour by a Detective Constable. Before the Magistrate, the prosecution offered no evidence and the charge was dismissed. The House of Lords held that because the facts and circumstances of the alleged offence were solely within the complainant's knowledge and the police officer could not have exercised an independent discretion, the complainant could be sued for malicious prosecution as she had "in substance procured the prosecution", and the police officer had no way of testing the truthfulness of the accusation.

5 This reflects the position in Australia as outlined by Dixon J (as he then was) in Commonwealth Life Assurance Society Ltd v Brain (1935) 53 CLR 343 at 379 where his Honour said:

> "It is clear that no responsibility is incurred by one who confines himself to bringing before some proper authority information which he does not disbelieve, even although in the hope that a prosecution will be instituted, if it is actually instituted as the result of an independent discretion on the part of that authority …But, if the discretion is misled by false information, or is otherwise practised upon in order to procure the laying of the charge, those who thus brought about the prosecution are responsible … The rule appears to be that those who counsel and persuade the actual prosecutor to institute proceedings or procure him to do so by dishonestly prejudicing his judgment are vicariously responsible for the proceedings. If the actual prosecutor acts maliciously and without reasonable and probable cause, those who aid and abet him in doing so are joint wrongdoers with him."

6 The real difficulty arises where in complex cases the prosecuting authority is in receipt of evidence from a variety of sources and has to decide in the exercise of its discretion whether it is in possession of sufficient evidence to justify setting the law in motion against the defendant.

7 In Sahade v Bischoff [2015] NSWCA 418, Gleeson JA (with whom Basten JA and Beech-Jones J agreed) said at [119]:

> "119 It has been said that one should never assume that tainted evidence persuaded the police to prosecute. … However, a prosecutor may in practical terms be obliged to act on apparently reliable and damning evidence supplied by police."

At [120] his Honour said:

> "These statements reflect public policy considerations that members of the community should be encouraged to aid the police in their function of investigating and prosecuting the breaches of the criminal law without fear of being harassed by actions of malicious prosecution. This consideration, together with the independent discretion exercised by the prosecutors, led Richardson J to conclude that the circumstances in which third parties are to be regarded as having instigated a prosecution should be 'rare and exceptional' (at 199). It is unnecessary to go so far in the present case. It can be accepted that there is a need for caution even in a 'simple' case in determining what persuaded the police to prosecute."

His Honour was referring to the judgment of Richardson J in *Commercial Union Assurance Co NZ Ltd v Lamont* [1989] 3NZLR 187 at [199].

8 The Court of Appeal has held that a person who is not a prosecutor can be liable for malicious prosecution. In *State of New South Wales v Abed* [2014] NSWCA 419, Gleeson JA (Bathurst CJ and MacFarlan JA agreeing) said at [185]:

> "Claims for malicious prosecution are commonly brought against the prosecutor and sometimes against additional defendants. Nonetheless, it is not a necessary condition for the effective pursuit of an action for malicious prosecution that the actual prosecutor himself or herself was party to the wrongdoing: *Johnston v Australia and New Zealand Banking Group Ltd* [2006] NSWCA 218 at [39] – [40] (Basten JA; Giles and Santow JJA agreeing). As noted by Basten JA, the authorities for this proposition include *Commonwealth Life Assurance Ltd v Brain* [1935] HCA 30; 53 CLR 343 at 379 and 381-382 (Dixon J)."

Favourable termination of the prosecution to the plaintiff

9 The plaintiff has to establish that the prosecution against him ended in his favour. Obviously, conviction of the plaintiff would be sufficient to show that there was reasonable and probable cause for any prosecution. It has been long held that this does not require the plaintiff to establish an acquittal on the merits.

10 There is an exception to the general rule that the plaintiff's guilt or innocence of a criminal charge is not an issue in the action for malicious prosecution. In *Beckett v New South Wales* [2013] HCA 17, the High Court acknowledged that the exception, allowed in *Commonwealth Life Assurance Society Ltd v*

Smith (1938) 59 CLR 527, on the authority of *Davis v Gell* (1924) 35 CLR 275, requires the plaintiff to prove his or her innocence at the trial of the civil action where the prosecution was terminated by the entry of a nolle prosequi by the Attorney General. At [5] and [6], the Court said as follows:

> "5 The second element of the tort is a requirement of the policy. Differing accounts of the rationale for the requirement are found in the early cases. It is said that a person should not be permitted to allege that a pending proceeding is 'unjust', and that the possibility of a conflict in judicial decisions should not be allowed. The rationales for the rule evince the concern of the law with the consistency of judicial determinations, a concern that is distinct from proof of actual innocence or guilt: a plaintiff who is wrongfully convicted of an offence cannot maintain an action for malicious prosecution notwithstanding that he or she may possess irrefutable proof of innocence.
>
> 6 The requirement that the prosecution has terminated avoids the possibility of conflict in the decisions of the court trying the criminal charge and the court trying the civil action. Any termination that does not result in conviction is favourable to the plaintiff for the purposes of the civil action. Prosecutions may terminate in the number of ways without verdict: the Magistrate may not commit for trial; the Director may not find a bill of indictment; the Director may direct that no further proceedings be taken after a bill has been found; or the Attorney General may enter a nolle prosequi. The plaintiff has no control over the termination of the proceedings in any of these ways and in those circumstances it would be unjust to deprive him or her of the ability to recover for the tort. As Professor Salmond explained it:
>
> > 'What the plaintiff requires for his action is not a judicial determination of his innocence, but merely the absence of any judicial determination of his guilt.'"

11 The procedural history in *Beckett* was prolix. It was summarised by the court as follows:

> "19. The appellant was arrested by members of the New South Wales Police Force and charged with a number of offences against her husband. She was committed to stand trial in the Supreme Court of New South Wales. A bill of indictment charging the appellant with nine counts was found and she was arraigned upon it. The eighth count was preferred ex officio. At the conclusion of the appellant's trial on 11 September 1991 the jury returned verdicts of guilty on counts 1, 2, 3, 4, 6, 7 and 9, and on an alternative charge to the offence charged in count 5. A verdict of not guilty was returned respecting the offence charged in count 8.
>
> 20. In October 1991, the appellant was sentenced to a term of imprisonment of twelve years and three months with a non-parole period of ten years and three months. She appealed unsuccessfully against her convictions and sentence to the New South Wales Court of Criminal Appeal.

> 21. In 2001, the appellant petitioned the Governor seeking a review of her convictions. The Attorney-General referred the application to the Court of Criminal Appeal. The Court of Criminal Appeal remitted the determination of a number of factual questions to Acting Judge Davidson. Following the delivery of Davidson ADCJ's findings, on 17 August 2005, the Court of Criminal Appeal allowed the appeal in relation to counts 1, 2, 5, 6, 7 and 9 and quashed each conviction. The Court entered a verdict of acquittal on count 9. A new trial was ordered on counts 1, 2, 5, 6 and 7. The appellant's appeal against her convictions for the offences charged in counts 3 and 4 was dismissed.
>
> 22. On 22 September 2005, the Director directed that there be no further proceedings against the appellant on the outstanding charges that were the subject of the Court of Criminal Appeal's order for a new trial. On 26 September 2005, a document communicating the Director's determination was forwarded to the Registry of the Court of Criminal Appeal."

12 The High Court went on to hold that there was no principal reason to distinguish a prosecution terminated by entry of a nolle prosequi by the Attorney General, or a direction by the DPP under the statutory power (s 7 of the Director of Public Prosecutions Act 1986) from other forms of termination falling short of acquittal. The Court therefore held that its decision in *Davis v Gell* should not be followed.

Malice in bringing or maintaining the prosecution

13 *A v New South Wales* concerned the third and fourth elements of the tort. As to malice, the High Court said at [91]:

> "91 What is clear is that, to constitute malice, the dominant purpose of the prosecutor must be a purpose other than the proper invocation of the criminal law – an "illegitimate or oblique motive". That improper purpose must be the sole or dominant purpose actuating the prosecutor.
>
> 92 Purposes held to be capable of constituting malice (other than spite or ill will) have included to punish the defendant and to stop a civil action brought by the accused against the prosecutor. But because there is no limit to the kinds of other purposes that may move one person to prosecute another, malice can be defined only by a negative proposition: a purpose other than a proper purpose. And as with absence of reasonable and probable cause, to attempt to identify exhaustively when the processes of the criminal law may be properly invoked (beyond the general proposition that they should be invoked with reasonable and probable cause) would direct attention away from what it is that the plaintiff has to prove in order to establish malice in the action for malicious prosecution – a purpose other than a proper purpose."

14 The Court went on to state that proof of malice will often be a matter of inference and further, that the element of malice in this tort had a distinctive character, namely, "it is an element that focusses upon the dominant purpose of the prosecutor and requires the identification of a purpose other than the proper invocation of the criminal law" at [93].

15 In the *State of New South Wales v Landini* [2010] NSWCA 157, Macfarlan JA, (Tobias JA and Sackville AJA agreeing), set out the authorities dealing with maintenance of a prosecution at [52] – [59], which included the High Court's joint judgment in *A v New South Wales* in the passage set out in [3] above, namely, "to incur liability the defendant must play an active role in the conduct of the proceedings …".

16 In *Sahade v Bischoff*, supra, Gleeson JA referred to *Landini* and said at [121]:

> "The common feature in the authorities is the requirement that the defendant take some positive conduct to maintain the prosecution, such as giving evidence in support of the prosecution, which is known to be false."

17 As set out above, to constitute malice, the dominant purpose of the prosecutor must be a purpose other than the proper invocation of the criminal law. In *A v New South Wales*, it is important to bear in mind the High Court's statement in that case at [41] in respect of public prosecutions initiated by police officers and subsequently taken over by the DPP. The Court said:

> " … where a prosecutor has no personal interest in the matter, and no personal knowledge of the parties or the alleged events, and is performing a public duty, the organisational setting in which a decision to prosecute is taken could be of factual importance in deciding the issue of malice."

The Court went on to say at [42]:

> "In the case of a private prosecution, it may be easier to prove that a prosecutor was acting for a purpose other than the purpose of carrying the law into effect than in a case of a prosecution instituted in a bureaucratic setting where the prosecutor's decision is subject to layers of scrutiny and to potential review."

18 Those passages were referred to by Gleeson JA (Bathurst CJ and Macfarlan JA agreeing) in *State of New South Wales v Abed*, supra. His Honour went on to say:

> "136 Examples of an improper person includes spite or ill will, to punish the defendant, and to stop a civil action brought by the accused against the prosecutor. However, as the joint judgment in *A v New South Wales* emphasised at [92], it is not possible to identify exhaustively when the processes of the criminal law may be improperly invoked. What the plaintiff has to prove, in order to establish malice in an action for malicious prosecution is a purpose other than a proper purpose: *A v New South Wales* [92].

Prosecution brought or maintained without reasonable and probable cause

19 In an action for malicious prosecution the plaintiff must establish a negative, namely, the absence of reasonable and probable cause. In *A v New South Wales*, the High Court acknowledged the forensic difficulty in proving the negative (see [60]). The Court also recognised (at [61]) the forensic difficulty confronting a plaintiff in establishing what the prosecutor had in his or her mind when instituting or maintaining the prosecution. Usually the plaintiff must make out his case by inference.

20 The Court went on to say:

> "77 There are three critical points. First, it is the negative proposition that must be established: more probably than not, the defendant prosecutor acted without reasonable and probable cause. Secondly, that proposition may be established in either or both of two ways: the defendant prosecutor did not 'honestly believe' the case that was instituted or maintained, or the defendant prosecutor had no sufficient basis for such an honest belief. The third point is that the critical question presented by this element of the tort is: what does the plaintiff demonstrate about what the defendant prosecution made of the material that he or she had available when deciding whether to prosecute or maintain the prosecution? That is, when a plaintiff asserts that the defendant acted without reasonable and probable cause, what exactly is the content of that assertion?"

21 This element of the tort, namely, the absence of reasonable and probable cause, contains both subjective and objective elements. The Court dealt with the subjective element as follows:

> "80 In cases where the prosecutor acted on material provided by third parties, a relevant question in an action for malicious prosecution will be whether the prosecutor is shown not to have honestly concluded that the material was such as to warrant setting the processes of the criminal law in motion. … In deciding the subjective question, the various checks and balances for which the processes of the criminal law are important. In particular, if the prosecutor was shown to be of the view that the charge would likely fail at committal, would likely be abandoned by the Director of Public Prosecutions, if or when that officer became involved in the prosecution, absence of reasonable and probable cause would be demonstrated. But unless the prosecutor is shown either not to have honestly formed the view that there was a proper case for the prosecution, or to have formed that view on an insufficient basis, the element of absence of reasonable and probable cause is not established."

22 The Court defined the objective aspect of reasonable and probable cause is as follows:

> "83 … The objective element of the absence of reasonable and probable cause is thus sometimes couched in terms of the 'ordinarily prudent and cautious man, placed in the position of the accuser', or explained by reference to 'evidence that persons of reasonably sound judgment would regard as sufficient for launching a prosecution'. Or, as Griffiths CJ put it in Crowley v Lisson (1905) 2 CLR 744 at 754, the question can be said to be 'whether a reasonable man might draw the inference, from the facts known to him, that the accused person was guilty."

23 Thus, the objective standard is one of sufficiency of the available material on which the prosecutor instigated or maintained the proceedings. This question is ultimately one of fact, and "the resolution of the question will most often depend upon identifying what it is that the plaintiff asserts to be deficient about the material upon which the defendant acted in instituting or maintaining the prosecution". (See [85]).

24 What is not required is that a prosecutor must test or make further enquiry in relation to all information given by others before instituting or maintaining the proceedings. Rather, "the objective sufficiency of the material considered by the prosecutor must be assessed "in light of all of the facts of the particular case". (See [87]).

Damages

25 In addition to the four elements of the tort discussed above, the plaintiff must prove damage (see *Landini* at [20] per Macfarlan JA). Compensatory damages are assessed at large, however, aggravated and exemplary damages are also available depending on the circumstances. The relevant principles are conveniently summarised in *Zreika v New South Wales* [2012] NSWCA 37, per Sackville AJA (with whom Macfarlan and Whealy JJA agreed) as follows:

> "60 A plaintiff who succeeds in an action for malicious prosecution will not necessarily receive either aggravated or exemplary damages. Aggravated damages are given by way of compensation for injury to the plaintiff which, although frequently intangible, results from the circumstances and manner of the defendant's wrongdoing, while exemplary damages are award to punish and deter the wrongdoer: *Uren v John Fairfax & Sons Pty Ltd* [1966] HCA 40; 117 CLR 118, at 129-130, per Taylor J, cited with approval in *New South Wales v Ibbett* [2006] HCA 57; 229 CLR 638, at 646-647 [31], [33]. Aggravated damages are assessed from the point of view of the plaintiff, but an award of exemplary damages is based on the conduct of the defendant: *NSW v Ibbett*, at [34]; *Gray v Motor Accidents Commission* [1998] HCA 70; 196 CLR 1, at 7[15], per Gleeson CJ, McHugh, Gummow and Hayne JJ. However, the same set of circumstances may justify an award of either aggravated or exemplary damages, or both: *NSW v Ibbett*, at 647 [33] [34].
>
> 61 Exemplary damages may be awarded against the State in respect of the conduct of police officers for whose torts the State is responsible: *NSW v Ibbett*; *NSW v Landini*, at [114]. The assessment of exemplary damages in a case of conscious and contumelious disregard of the plaintiff's rights by the police:
>
> > "should indicate … that the conduct of the [police] was reprehensible, [and] mark the court's disapproval of it. The amount should also be such as to bring home to those officials of the State who are responsible for the overseeing of the police force that police officers must be trained and disciplined so that abuses … do not happen."
> >
> > *Ibbett*, at 653 [51], citing *Adams v Kennedy* [2000] NSWCA 152; (2000) 49 NSWLR 78, at 87, per Priestley JA.
>
> 63 In a frequently cited passage, Brennan J in *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Aust) Pty Ltd* [1985] HCA 12; 155 CLR 448, at 471, observed that the considerations that enter into the assessment of compensatory damages are quite different from those that govern the assessment of exemplary damages and that there is no necessary proportionality between the assessment of the two categories. Nonetheless, in *NSW v Ibbett*, at 647 [34], the plurality endorsed the proposition that it is necessary to determine both heads of compensatory damages before deciding whether or not a further award is necessary to serve the objectives of punishment, deterrence or

> condemnation. Their Honours also said (at [35]) that where the same circumstances increase the hurt to the plaintiff and also make it desirable for the Court to mark its disapprobation of the conduct, a single sum may be awarded. Such an award would represent both heads of damage and ensure that no element is compensated more than once."

Conclusion

26 The principles governing actions for damages for the tort of malicious prosecution have developed over the centuries. It is an ancient remedy, which has evolved with the development in our modern society of independent prosecuting authorities which co-exist with the law's recognition of the right to private prosecutions. The application of the principles extracted from the authorities is often a difficult exercise for trial judges because the factual matrices are complex and prolix. Hopefully this paper will assist in crystallising the tests to be applied in establishing whether each of the elements of the tort are made out.

Judge Phillip Mahony SC

Chambers, Sydney

4 March 2016

****