



Précis Paper

Malicious Prosecution

Wrongly convicted person awarded substantial damages.

Discussion Includes

- Rarely does a superior court describe a police officer as "a corrupt bully who intimidated witnesses" using "extraordinary and overbearing methods".
- However, in *Beckett v NSW* that is precisely what occurred when the Court so described Detective Thomas.
- In August 2015, the Supreme Court of NSW published its judgment on a claim for malicious prosecution against the State of New South Wales arising from conduct of Mr Thomas spanning more than 30 years."

Précis Paper

Malicious Prosecution

1. In this edition of BenchTV, Paul Blacket SC (Barrister) and Peter Neil SC (Barrister) present on the NSW Supreme Court's (Harrison J) decision in *Beckett v State of New South Wales* [2015] NSWSC 1017 which considered an action in the tort of malicious prosecution. Mr Blacket SC appeared for the successful plaintiff, Roseanne Beckett.
2. Mr Neil SC recently appeared on BTV to discuss the decision in *Clavel v Savage* [2015] NSWCA 61, where he appeared on behalf of the defendant, State of NSW, in successfully resisting claims of malicious prosecution.

Facts Giving Rise to Malicious Prosecution

3. At [170] of Harrison J's judgment, his Honour indicates that the case arose because a police officer, Peter Thomas, who had been primarily responsible for collecting the evidence which led to Ms Beckett's prosecution, bore considerable animosity towards her. This feeling of ill-will was said to have arisen as a result of charges of arson that Mr Thomas had brought against Ms Beckett which were ultimately no-billed. Mr Thomas' career progression in the police force was said to have been hampered as a result and for this he blamed Ms Beckett.
4. Subsequent to the failed arson charge but prior to the malicious prosecution, Ms Beckett married a friend of Mr Thomas, Barry Catt. The marriage broke down soon after with Ms Beckett having taken out domestic violence orders against Mr Catt. In fact, Mr Catt was admitted to a mental institution as a result of his violent and manic behavior, which was attributed to a serious bi-polar disorder (for which he was prescribed lithium). Moreover, allegations were made by DOCS officials, supported by Ms Beckett, that Mr Catt had sexually abused his children. Mr Catt was subsequently acquitted of all charges. In the course of the prosecution, Mr Thomas provided significant support to defence counsel, with Mr Blacket SC noting it was seen as remarkable for a serving police officer to actively assist the defence of a serious prosecution.
5. Prior to the complete breakdown of the marriage, a 'rock incident' occurred where it was alleged that Mr Catt had punched Ms Beckett, in response Ms Beckett allegedly struck him in the face with a rock. The Taree police did not initiate proceedings against either party given conflicting testimonies. Ms Beckett then commenced a private prosecution of Mr Catt which Mr Blacket SC considers to have been the genesis of many of her eventual problems. At the same time, family law proceedings were ongoing with Ms Beckett successfully injunctioning Mr Catt from entering the family home and granting her control of the smash repairs business in which they were both partners.

6. With both matters ongoing, a friend of Mr Catt made a complaint to ICAC in relation to the conduct of Ms Beckett, alleging she had been untruthful. ICAC referred the matter to police given the complaint was outside their jurisdiction and it was ultimately referred to Detective Thomas. In a subsequent bail application, Allen J suggested that there was probably no more inappropriate a person to investigate than Mr Thomas.
7. Together with a large number of detectives, Mr Thomas raided Ms Beckett's home, arresting and charging her with a number of offences including two counts of solicit to murder Mr Catt and perjury with respect to evidence given in her private prosecution, which remained incomplete. A count alleged she had been administering lithium (the substance he had been taking to combat his bi-polar disorder) to Mr Catt for the purpose of occasioning his death, notwithstanding a psychiatrist regularly monitoring Mr Catt's lithium levels reporting that there was no time at which his lithium levels were unusually high.
8. Tangentially, Mr Blacket SC noted that much was done by the police for the benefit of the news media acquiring shots of Ms Beckett being handcuffed and led into court. Furthermore, Ms Beckett alleged there was a large amount of jewelry and important papers taken from her by Mr Thomas at the time of her arrest that was not returned. Additionally, Ms Beckett's son was also arrested and it was alleged that Mr Thomas and another detective stood over him, in an intimidating manner. Finally, a Mr Golds, who had provided evidence favourable to Ms Beckett with regard to the 'rock incident' was also said to have been the subject of threats from Mr Thomas causing him to recant his testimony, subsequently providing an account consistent with Mr Catts's.
9. Ms Beckett's trial proceeded for 3.5 months and she was convicted of all but 1 count, and was sentenced to 13 years with a non-parole period of 10 years, serving the time whilst continuing to maintain her innocence. At the time of her incarceration in 1991 she was in her late 30's, with a clean criminal record and Mr Blacket SC describes her experience of prison as extremely trying.
10. Following a series of failed appeals, Ms Beckett was released on bail in 2001 with fresh evidence raising doubt in relation to her conviction. Following an inquiry that lasted for what Mr Blacket SC describes as an "unconscionable" period of 12 months, the Court of Criminal Appeal set aside all but two of her convictions with those remaining being relatively minor assaults which could be seen in a domestic context as part of the conflict with Mr Catt. The Court ordered a retrial of those counts for which they had not acquitted Ms Beckett, with the DPP declining to further prosecute those matters.

The Tort of Malicious Prosecution & the High Court Judgment

11. At [123] of his judgment, Harrison J noted:

For a plaintiff to succeed in an action for damages for malicious prosecution the plaintiff must establish:

- 1) that proceedings of the kind to which the tort applies (generally, as in this case, criminal proceedings) were initiated against a plaintiff by a defendant;
- 2) that the proceedings terminated in favour of that plaintiff;
- 3) that the defendant, in initiating or maintaining the proceedings acted maliciously; and
- 4) that the defendant acted without reasonable and probable cause

12. It was only when the prosecution declined to proceed with a new trial against Ms Beckett that it could be said that "the proceedings terminated in favour of that plaintiff" and the tort could be said to have crystallised. However, this point was the subject of preliminary dispute by the defendant, State of New South Wales. A previous High Court decision, *Davies v Gell* (1924) 35 CLR 275, suggested that a plaintiff whose proceedings were terminated by a form of nolle prosequi would have to prove their innocence before they could succeed in an action for malicious prosecution. Ms Beckett's original hearing was adjourned for the High Court to consider this question in *Beckett v New South Wales* [2013] HCA 17; 248 CLR 432 where *Davies* was overturned, such that Ms Beckett was not required to prove her innocence for the case to proceed.

13. In delivering their judgment, the High Court emphasized that in order to prove a cause of action in malicious prosecution, the focus must be on what materials were before the prosecutor at the time of the charge up until the time of the indictment with any subsequent fresh evidence not before the 'prosecutor' being inadmissible. Their Honours further noted the need to maintain a sharp distinction between proof of the elements of malice on the one hand, and the absence of reasonable and probable cause, on the other.

Harrison J's Decision

14. Harrison J held that malicious prosecution was made out in relation to count 2 (a count of perjury) and count 6 (a count of soliciting a third party to murder her ex-husband) with Ms Beckett awarded \$2,310,350 in damages.

15. At [576], his Honour noted:

First, I am satisfied that Detective Thomas, at the time of instituting or maintaining the perjury charge, either did not believe in Ms Beckett's guilt or did not have reasonable grounds for so believing. Secondly, I am also satisfied that at the time of instituting or maintaining the solicit James Morris charge, Detective Thomas either did not believe in Ms Beckett's guilt or if he did he did not have reasonable grounds for so believing.

16. Harrison J was also mindful to address the High Court's caution against conflating proof of malice and the absence of reasonable and probable cause at [648-g], observing:

A significant amount of the material referred to in submissions on malice went to motive. Proof of a malicious motive is not automatically proof of malice. I am however satisfied that the evidence establishes that Detective Thomas harboured an intense dislike for Ms Beckett and that the fallout from the delicatessen fire was the cause of it.

17. In seeking to prove the absence of reasonable and probable cause, Mr Blacket SC argued that such was the artificiality of the charges, the absence was said to be implicit by their very nature. It was not necessary to show that Mr Thomas did not have a subjective belief of Ms Beckett's guilt as there was not a sufficient amount of evidence before the prosecutor which if believed would be capable of mounting a prosecution. Nevertheless, the difficulty of proving the negative, absence, was clear in the result that Ms Beckett did not succeed in relation to 4 other counts of alleged malicious prosecution as she could not satisfy this element. In fact, Mr Blacket SC was successful in relation to the perjury count only because the magistrate in the private prosecution did not ever agree with Ms Beckett being charged with perjury, which was necessary for there to have been a reasonable/probable cause to prosecute.
18. The trial proceeded for 37 days. It would have been substantially longer had the Crown not agreed with the plaintiff as to what was before the prosecutor at the relevant times. Even so, evidentiary issues abounded with a number of potential witnesses having passed away; of particular significance was the death of Mr Thomas 4 weeks into the trial. Further, many statements collected by police as a result of an internal inquiry into the handling of the Beckett prosecution were inadmissible because they were granted immunity without the consent of the deponent under s 170 of the *Police Act 1990* (NSW).
19. At the time of the interview there were several outstanding issues for resolution. In particular, the question of when interest would commence on the award of damages remained to be determined. Given Harrison J delivered judgment on the 25th anniversary of Ms Beckett's

arrest it was possible that a very large sum of interest had accrued. Ultimately, Ms Beckett was awarded \$4 million plus legal costs payable by the State in *Beckett v State of New South Wales* [2015] NSWSC 1500, calculated with interest accruing from 2005, when all relevant charges against her were terminated in her favour. In addition, there was a separate issue regarding whether the 6 counts of alleged malicious prosecution were attributable to one cause of action. Ultimately, the State has already signaled its intention to appeal from the decision of Harrison J so we will have to wait and see what the Court of Appeal decides on these issues.

Implications:

20. In light of the State's likely appeal, this extremely long-running dispute highlights many of the difficulties for plaintiffs in seeking compensation by establishing malicious prosecution. Mr Blacket SC highlights that running such actions are extremely costly (particularly against the resources of the State) and they require considerable commitment from lawyers who must read countless documents and contend with the evidentiary issues highlighted above. In addition, the presenters note that State appeals are very likely because it seems that judges do not run these sorts of cases every day and previous authorities provide limited guidance on issues such as damages and interest.
21. Ultimately, Ms Beckett was able to claim some damages for being wrongly incarcerated and that seems to be the just outcome. However, it took over 25 years for the saga to conclude and it must be asked whether any amount of money can ever replace the over 10 years of lost time she was forced to endure in prison.

BIOGRAPHY

Paul Blacket SC

Barrister, Maurice Byers Chambers, Sydney

Paul Blacket SC was called to the NSW Bar in 1978 and appointed Senior Counsel in 1999. He specialises in civil and administrative work (particularly involving the medical and legal professions), appeals and all forms of inquiries including judicial, coronial and administrative. He has been a member of the Supreme Court Mediation Panel and served as a District Court Arbitrator. He is currently a Contributions Assessor under the *Dust Diseases Tribunal Act* and was formerly a Judicial Member of the Legal Services Division of the Administrative Decisions Tribunal.

Peter Neil SC

Barrister, 16 Wardell Chambers, Sydney

Peter Neil SC was called to the NSW Bar in 1977 and appointed Senior Counsel in 1996. Recently his practice has been in the criminal, common law and commercial jurisdictions but he has long experience in all kinds of litigious matters and alternative dispute resolution. He has acted for ICAC and PIC and also for clients before ICAC. He has also acted as an assistant ICAC Commissioner.

BIBLIOGRAPHY

Focus Case

Beckett v State of New South Wales [2015] NSWSC 1017

Benchmark Link

https://benchmarkinc.com.au/benchmark/html/benchmark_28-08-2015_weekly_insurance_law_review.html

Judgment Link

<https://www.caselaw.nsw.gov.au/decision/55b56a7ee4b06e6e9f0f8279>

Cases

Beckett v New South Wales [2013] HCA 17

Beckett v State of New South Wales [2015] NSWSC 1500

Clavel v Savage [2015] NSWCA 61

Davies v Gell (1924) 35 CLR 275

Legislation

Police Act 1990 (NSW)