



Précis Paper

Malicious Prosecution

Peter Neil SC discusses malicious prosecution, in the light of a recent case handed down by the NSW Court of Appeal. When does a police officer or prosecutor act without reasonable and probable cause? How might the tort be applied in the future?

Discussion Includes

- The elements of the tort of malicious prosecution
- What it means for a prosecutor to act maliciously
- What it means for a prosecutor to act without reasonable and probable cause
- The requirements on prosecutors to act properly
- The requirements on police to act properly
- Problems with the litigation process where there are determined litigants and unrepresented litigants

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1. In this edition of BenchTV, Peter Neil SC (Barrister) and Ian Benson (Solicitor) present on the NSW Court of Appeal (Macfarlan & Emmett JJA; Sackville AJA) decision in *Clavel v Savage* [2015] NSWCA 61 which considered the tort of malicious prosecution. Mr Neil SC acted for the successful third respondent (defendant), the State of New South Wales, in the Court of Appeal and in the court below.

Background to *Clavel v Savage* (2015)

2. The appellants, Mr and Mrs Clavel, commenced proceedings against their former neighbours, the Savages, seeking damages for intentional infliction of emotional distress. They also brought suit against the State of New South Wales for malicious prosecution and collateral abuse of process. The Clavels were unsuccessful at first instance before Rothman J (*Clavel v Savage* [2013] NSWSC 775) and appealed to the Court of Appeal (*Clavel v Savage* [2015] NSWCA 61). Insofar as the appeal affected the claim against the neighbours, the appellants and the neighbours reached a compromise. The appeal proceeded only against the State.
3. These proceedings were borne out of series of disputes that arose between the Clavels, the Savages, other members of the Great Mackerel Beach community and the police. One such criminal proceeding brought on the complaint of neighbours, alleged that Mr Clavel had assaulted a young boy, aged 8 or 9, apparently as a result of a belief that the boy had moved his wheelbarrow, causing him inconvenience. In addition, numerous applications for Apprehended Violence Orders (AVOs) were made against Mr Clavel. All of the criminal proceedings that were brought ended in favour of the Clavels.
4. An interesting aspect of the proceedings generally was that Mrs Clavel was alleged to be a secondary victim of the actions of the police and the Savages. Mr Neil SC confesses to not understanding what Mrs Clavel being a 'secondary victim' actually entailed. Nonetheless, it was ultimately irrelevant given all causes of actions pleaded by Mr Clavel were rejected on appeal.
5. The principal ground of appeal related to the primary judge delivering judgments 2 and 3 years after the trial with the appellants alleging that the substantial delay rendered findings of fact unsafe. The Court of Appeal dismissed this claim with a separate ground relating to the primary judge's findings about the credibility of Mr Clavel, as it did not bear any relevance to the claims in malicious prosecution. The following sections will consider the court's reflections on the substantive matter of the action in malicious prosecution.

The Elements of Malicious Prosecution

6. The authority of *A v State of NSW* 2007 HCA 10; 230 CLR 500 was cited in the appellate judgment in *Clavel v Savage* 2015 NSWCA 61 at [48] where the Court of Appeal accepted the elements as set out in [1] of A's case:

A plaintiff must establish:

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

[See also *Beckett v State of New South Wales* [2013] HCA 17; 248 CLR 432 at [4] (French CJ, Hayne, Crennan, Kiefel and Bell JJ)]

7. As malicious prosecution is a civil cause of action, the elements must be proved on the balance of probabilities.

Court of Appeal's Decision - *Clavel v Savage* [2015] NSWCA 61

8. In determining whether the elements were so proven, the Court noted that the previous proceedings were indeed criminal, and terminated in favour of Mr Clavel. Therefore the first two elements were duly satisfied for the Clavels' claim. The remaining third and fourth elements were subject to further argument.
9. Both elements require the identification of the defendant-prosecutor. The 'prosecutor' for the purposes of the tort may either be a police officer, a police prosecutor, or a Crown prosecutor. The prosecutor may be a police officer in circumstances where they cause a charge to be brought, bring the charge themselves, or undertake actions to ensure the charge continues in the system notwithstanding a police prosecutor or some other prosecutor actually presenting the evidence in court. Mr Neil SC notes that where a police officer has more information or knows more about the circumstances of the alleged offences than the police prosecutor then they are likely the 'prosecutor' for the purposes of the tort. In Clavel's case, it was alleged that the various police officers who brought the charges were the relevant 'prosecutors', rather than the police prosecutors.
10. The third element of malice requires proof that the prosecutor institutes or maintains criminal proceedings for any purpose other than the proper prosecution of the criminal law. For

example, if it could be shown that the prosecutor bore animus to a plaintiff or bore some un-prosecutorial interest in wanting to wound or injure the plaintiff, these would not be proper bases for instituting or maintaining proceedings and would therefore be malicious. The Clavels alleged that the police in Mackerel Beach brought criminal charges against them as a tactic to force them to leave the area – motivated by a desire not to investigate the Clavels' own complaints and as a result of the disruption the Clavels had brought to the community.

11. In relation the fourth element of the tort, Sackville AJA referred to *Mitchell v John Heine & Son Ltd* (1938) 38 SR (NSW) 466 at [469], where Jordan CJ said that there were five conditions to be met if a person was to have reasonable and probable cause for prosecuting another for an offence:

- (1) The prosecutor must believe that the accused is probably guilty of the offence.
- (2) This belief must be founded upon information in the possession of the prosecutor pointing to such guilt, not upon mere imagination or surmise.
- (3) The information, whether it consists of things observed by the prosecutor himself, or things told to him by others, must be believed by him to be true.
- (4) This belief must be based upon reasonable grounds.
- (5) The information possessed by the prosecutor and reasonably believed by him to be true, must be such as would justify a man of ordinary prudence and caution in believing that the accused is probably guilty.

12. Mr Neil SC usefully synthesises this list, suggesting that there are subjective and objective sub-elements necessary to establish the absence of reasonable and probable cause.

13. The objective element of the absence of reasonable and probable cause has been 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": *State of New South Wales v Quirk* [2012] NSWCA 216 Tobias AJA (Beazley and Hoeben JJA agreeing) at [70]. Mr Neil SC notes that Crown prosecutors and police prosecutors are generally accepted to be experienced in their task and perhaps even legally qualified – if on the objective material on the brief it should have been apparent that there was a gap in the evidence which means that the charge cannot be proved, that would establish an absence of reasonable and probable cause. It should be noted that without more it is not malicious.

14. On the subjective element, Tobias AJA in *Quirk* at [70] further noted that:

- (i) if the plaintiff alleges that the defendant prosecutor did not have the requisite subjective state of mind when instituting or maintaining a prosecution, that is an allegation about the prosecutor's state of persuasion. The subject matter of the

relevant state of persuasion in the mind of prosecutor is the sufficiency of the material then before the prosecutor to warrant setting the process of the criminal law in motion. If the facts of the particular case are such that the prosecutor may be supposed to know where the truth lies, the relevant state of persuasion will necessarily entail a conclusion (a belief of the prosecutor) about guilt.

15. Importantly, where there are competing versions of events, a prosecutor does not have to resolve in their mind which version of the contested facts a magistrate or a judge or a jury may accept – that is purely a function of the court. One looks to the position the prosecutor was in at the time of the events and not with the benefit of hindsight. It is not required that the police officer subjectively believed in guilt – a police officer simply has to believe both subjectively and objectively that there is evidence to show a crime was committed. It is not difficult to imagine the importance of this principle in sexual assault cases where the evidence is often limited to word against word.
16. Importantly, the third and fourth elements are to be kept distinct. That said, malice being established may bear upon whether there was reasonable and proper cause. However, even if malice is established, if there is found to have been reasonable and probable cause for the prosecution then the claim in malicious prosecution must fail.
17. In every alleged malicious prosecution, there was no evidence beyond hypotheticals that there was not reasonable and probable cause in instituting or maintaining the proceedings. What the plaintiff has to prove for that element is a negative i.e. prove the absence. Mr Neil SC considered that this was a practically insurmountable task in this case as the police engaged in nothing out of the ordinary. As aforementioned, it was alleged the police were in agreement with the Savages to harass the Clavels by endlessly lodging criminal proceedings against them to drive them out. However, this was factually difficult to establish because the Savages left Mackerel Beach more than two years before the Clavels did. Furthermore, a number of the events that were significant in the Clavels' causes of action occurred after the Savages had left, so the suggestion that they were at those times in league with the police was unsustainable. Although the police testimonies did exhibit some inconsistencies, this was unsurprising given the events had occurred 12 years prior. The police had taken very detailed contemporaneous notes and there was no evidence of an axe to grind or biases – one of the police officers had even given a glowing reference to the Clavels' son who is a serving police officer.
18. Mr Neil SC further notes that the fourth element is not a test of whether the police should have done something differently but whether the material adduced had the capacity to prove the absence of a proper basis for the prosecution.

19. Primarily for failing to establish the fourth element, the Court of Appeal rejected all claims of malicious prosecution against the State.

Asides

20. On the issue of costs, during the proceedings in the Supreme Court there were settlement negotiations that were unsuccessful. The State had served a Calderbank offer of \$600,000 inclusive of costs and Rothman J considered at [52] that the Calderbank offer was "more than reasonable in the circumstances" and was open for a reasonable period. Since the offer, if accepted, would have achieved a more favourable result for the appellants than they achieved in the contested litigation, his Honour ordered that the State should have its subsequent costs on an indemnity basis. Mr Neil SC notes that it might be reasonable to assume the Clavel's would have considered that there would be so little left after costs that they were going to 'go for broke' in rejecting the offer.
21. A concern noted in the court below and in the judgments on appeal of Emmett JA and Sackville AJA was the substantial duration of the proceedings – with 13 years having elapsed since the most recent of the relevant prosecutions. Sackville AJA noted at [12] that:

It is, however, difficult to understand how proceedings arising out of neighbourhood disputes, even with the overlay of claims of malicious prosecution, can justify such a lengthy trial. It is even more difficult to understand how a trial of this length could have taken place consistently with the parties' obligation to assist the court to further the overriding purpose stated in s 56(1) of the *Civil Procedure Act 2005* (NSW), namely "to facilitate the just, quick and cheap resolution of the real issues in dispute".
22. What should be taken from the proceedings is perhaps best put by Rothman J at [5], that "some controversies should never be litigated, regardless of the rights and wrongs of the particular parties".

BIOGRAPHY

Peter Neil SC

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Peter Neil SC was called to the NSW Bar in 1977 and appointed Senior Counsel in 1996. Recently his practise 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.

Ian Benson

Ian Benson is Special Counsel at AR Conolly and Company and holds a First Class Honours degree in law.

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http://benchmarkinc.com.au/newslettercms/webversion/benchmark_27-03-2015_weekly_insurance_law_review.html

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Cases

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Legislation

Civil Procedure Act 2005 (NSW)