



## Précis Paper

### Malicious Prosecution

In this edition of Benchmark Television, John Maconachie Q.C. discusses the tort of Malicious Prosecution with particular reference to the watershed case of *A v State of New South Wales* (2007) 230 CLR 500. The interview details the history of the cause of action, including its justifications at common law; clarifies the elements of the tort as illustrated by the High Court in *A*; and canvasses areas for the development of the law. Mr Maconachie Q.C. acted as Senior Counsel for the first, second and third respondents (State of New South Wales, Floros and Hannigan) in *A's Case* at the NSW Court of Appeal.

#### Discussion Includes

- Malicious prosecution requires that the defendant acted with malice in bringing or maintaining the prosecution
- Further, the initial prosecution must have been brought or maintained without reasonable and probable cause
- This element is established if the initial prosecutor subjectively believed that the prosecution was not warranted OR where there were objectively no reasonable grounds for the prosecution
- The defendant in a malicious prosecution action will generally be the independent prosecution authority rather than the police investigators
- The temporal consideration of the tort requires that malice & absence of reasonable/probable cause existed at the same time in the mind of the prosecutor
- What the defendant (prosecutor) knew at relevant times is an important factual consideration for malice & reasonable/probable cause

# Précis Paper

## Malicious Prosecution

1. In this edition of BenchTV, John Maconachie QC (Barrister) and Catherine McDonald (Arbitrator) discuss the tort of malicious prosecution, with particular reference to the watershed case of *A v State of New South Wales* (2007) 230 CLR 500.
2. The interview details the history of the cause of action, including its justifications at common law, clarifies the elements of the tort as illustrated by the High Court in *A*, and canvasses areas for the development of the law.
3. Mr Maconachie QC acted as Senior Counsel for the first, second and third respondents (New South Wales, Floros, and Hannigan) in *A's Case* before the NSW Court of Appeal.
4. The tort is committed when a person wrongfully and with malice institutes or maintains legal proceedings against another.
5. In attempting to safeguard the judicial process from misuse by litigants, the tort of malicious prosecution has historically provided those who are the subject of groundless and unjustified proceedings a means of redress against prosecutors.

### Elements of Malicious Prosecution

6. The High Court in *Beckett v New South Wales* (2013) 87 ALJR 602 at [4] reformulated the elements set out in *A's case* as follows:

...the plaintiff must prove four things: (1) the prosecution was initiated by the defendant; (2) the prosecution terminated favourably to the plaintiff; (3) the defendant acted with malice in bringing or maintaining the prosecution; and (4) the prosecution was brought or maintained without reasonable and probable cause.

### Who is the Prosecutor?

7. In the past, prosecutions were laid privately, whereas in modern times prosecutions are almost exclusively undertaken by the police and subsequent prosecuting authorities, such as the Director of Public Prosecutions. Generally, a person who provides the police with information, believing it to be true, will be held not to have initiated the proceedings. Rather, the proceedings will be regarded as initiated by and at the discretion of an independent prosecuting authority: *Commonwealth Life Assurance Society Limited v Brain* (1935) 53 CLR 343, at 379 per Dixon J.

### Absence of Reasonable and Probable Cause

8. The question of reasonable and probable cause has both a subjective and an objective element.
9. If the defendant did not subjectively believe the prosecution was warranted - assuming that could be proved on the balance of probabilities - the plaintiff will have established the negative proposition.
10. However, even when the prosecutor believed the prosecution was justified, the plaintiff may yet succeed if it can be shown that, objectively, there were no reasonable grounds for the prosecution.
11. There is an important temporal element in determining whether the defendant commenced or maintained the proceedings without reasonable or probable cause. This will first focus on the matters known at the time the proceedings were instituted, and then subsequently on fresh matters known as the proceedings continue. A prosecutor who learns of facts only after the institution of proceedings which show that the prosecution is baseless may be liable in malicious prosecution for continuing the proceedings: *Hathaway v State of New South Wales* [2009] NSWSC 116 at [118] (overruled on appeal [2010] NSWCA 184, but not on this point); *State of New South Wales v Zreika* [2012] NSWCA 37 at [28]–[32].
12. In *A v State of New South Wales*, the plaintiff had been charged with sexual offences against his two stepsons. The High Court found that the evidence demonstrated that the plaintiff had shown an absence of probable belief in the case of the charge relating to the younger child but had failed to do so in the case of the older boy. In the first situation, the police officer did not form the view that the material he possessed warranted laying the charge; or, alternatively, if he had in fact formed that view, there was no sufficient basis for his doing so. The evidence suggested a strong possibility that the younger boy was “making up” a story to support his older brother in circumstances where there was substantial animosity on the part of the older boy towards the plaintiff.

### Malice

13. The plurality in *A v State of New South Wales* referred to cases of spite and ill-will, and cases where the dominant motive was to punish the alleged offender, in setting out what are sufficient grounds to satisfy the element of malice.
14. Generally, it must be shown that there was a purpose other than a proper purpose. However, strict proof will be required, not conjecture nor mere suspicion.

15. The plaintiff succeeded in *A v State of New South Wales* (on the malice issue) because he was able to show that the proceedings were instituted by the police officer essentially because he had been under extreme pressure from his superiors to do so, not because he wished to bring an offender to justice.

#### Implications

16. Accordingly, the plaintiff's appeal was allowed in relation to the prosecution of offences against the younger child. The plaintiff remained unsuccessful in the claim of malicious prosecution in relation to the older brother.
17. In light of the High Court's reasoning in *A v State of New South Wales*, Mr Maconachie QC states: "a lot of people think that if you are acquitted of a crime, the paradigm case of a favourable outcome, then you should be entitled to compensation. Nothing could be further from the truth." Given the complexity of the elements that a plaintiff is required to satisfy for malicious prosecution and the evidence required to establish the tort, it appears that Mr Maconachie's observation rings true.

#### Note

18. A comprehensive and practical summary of all the relevant legal principles stated in *A v State of New South Wales* is to be found in the judgment of Tobias AJA in *State of New South Wales v Quirk* [2012] NSWCA 216 at [69]–[70].

## **BIOGRAPHY**

### John Maconachie QC

Senior Counsel 1990, admitted to the Bar in 1975

John is a well renowned Appellate practitioner, and has extensive experience in common law, including catastrophic injury claims, malicious prosecution, false arrest, misfeasance in public office, trespass to land and to the person, Insurance law, Professional liability, Public liability, including claims involving governments and statutory authorities. He is an Accredited Mediator pursuant to Australian National Standards.

### Catherine McDonald

Catherine was admitted to practice in 1985 and commenced working with A R Conolly and Company the same year. She was a barrister from 1987 to 1994 when she joined a major national law firm practising in public liability, statutory insurance, professional indemnity and occupational health and safety. She was a partner in a commercial firm from 2000 to 2004 where she managed a high volume insurance litigation practice as well as drafting and advising on insurance clauses in a range of contracts. During that time she was an Arbitrator of the District Court and of the Workers Compensation Commission. She is a trained mediator.

## **BIBLIOGRAPHY**

### Focus Case

*A v State of New South Wales* (2007) 230 CLR 500

### Judgment Link

<http://www.austlii.edu.au/au/cases/cth/HCA/2007/10.html>

### Cases

*Beckett v New South Wales* (2013) 87 ALJR 602

*Leibo v Buckman Ltd and Another* (1952) 2 All ER 1057

*Crawford Adjusters v Sagicor General Insurance (Cayman) Ltd* [2013] UKPC 17

*Savile v Roberts* (1698) 91 ER 1147

### Extrinsic Materials

Fleming on Torts - J Fleming, Law of Torts, 10th edn, Thomson Reuters Australia Limited, Sydney, 2011