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MALICIOUS PROSECUTION: A REVIEW OF SOUTH AFRICAN  
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**REASONABLE AND PROBABLE CAUSE IN THE LAW OF MALICIOUS  
PROSECUTION: A REVIEW OF SOUTH AFRICAN AND COMMONWEALTH  
DECISIONS**

C Okpaluba\*

## 1 Introduction

It is not every prosecution that is concluded in favour of the accused person that necessarily leads to a successful claim for malicious prosecution. So much depends on the absence of a reasonable and probable cause, and the *animus iniuriandi* of the defendant in instigating, initiating or continuing the prosecution. It is widely accepted that reasonable and probable cause means an honest belief founded on reasonable ground(s) that the institution of proceedings is justified.<sup>1</sup> It is about the honest belief of the defendant that the facts available at the time constituted an offence and that a reasonable person could have concluded that the plaintiff was guilty of such an offence. Ultimately, it is for the trial court to decide at the conclusion of the evidence whether or not there is evidence upon which the accused might reasonably be convicted.<sup>2</sup>

In *Hicks v Faulkner*,<sup>3</sup> Hawkins J defined reasonable and probable cause as "an honest belief in the guilt of the accused based upon a full conviction, founded on reasonable grounds, of the existence of a state of circumstances, which assuming them to be true, would reasonably lead to any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was

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<sup>1</sup> *Beckenstrater v Rottcher & Theunissen* 1955 1 SA 129 (A) 136A-B; *Newman v Prinsloo* 1973 1 SA 125 (T) 149H.

<sup>2</sup> *S v Lubaxa* 2001 2 All SA 107 (A) para 10; *S v Suhuping* 1983 2 SA 119 (B) 120H-121I; *S v Khanyapa* 1979 1 SA 824 (A) 838F-G.

<sup>3</sup> *Hicks v Faulkner* 1878 8 QB 167 171, approved and adopted by the House of Lords in *Herriman v Smith* 1938 AC 305 316 per Lord Atkin.

probably guilty of the crime imputed".<sup>4</sup> It was stated that the test contains a subjective as well as an objective element. There must be both actual belief on the part of the prosecutor and the belief must be reasonable in the circumstances.

The necessary deduction, which the courts have for centuries made from that definition, is that there has to be a finding as to the subjective state of mind of the prosecutor as well as an objective consideration of the adequacy of the evidence available to him or her. This is tantamount to a subjectively honest belief founded on objectively reasonable grounds that the institution of proceedings was justified.<sup>5</sup> A combination of both the subjective and objective tests means that the defendant must have subjectively had an honest belief in the guilt of the plaintiff and such belief must also have been objectively reasonable.<sup>6</sup> As explained by Malan AJA in *Relyant Trading*, such a defendant will not be liable if he/she held a genuine belief in the plaintiff's guilt founded on reasonable grounds. In effect, where reasonable and probable cause for the arrest or prosecution exists, the conduct of the defendant instigating it is not wrongful.<sup>7</sup> For Malan AJA, the requirement of reasonable and probable cause "is a sensible one" since "it is of importance to the community that persons who have reasonable and probable cause for a prosecution should not be deterred from setting the criminal law in motion against those whom they believe to have committed offences, even if in so doing they are actuated by indirect and improper motives".<sup>8</sup>

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<sup>4</sup> It was held in *Broad v Ham* 1839 5 Bing NC 722 725 that the reasonable cause required is that which would operate on the mind of a discreet person; it must be probable cause which must operate on the mind of the person making the charge, otherwise there would be no probable cause upon which he/she could operate. There can be no probable cause where the state of facts had no effect on the mind of the party charging the other. See also *Rambajan Baboolal v Attorney General of Trinidad and Tobago* 2001 TTHC 17 (Slollmeyer J).

<sup>5</sup> *Minister of Justice and Constitutional Development v Moleko* 2008 3 All SA 47 (SCA) para 20; *Relyant Trading (Pty) Ltd v Shongwe* 2007 1 All SA 375 (SCA) para 14 (hereafter *Relyant Trading*); *Beckenstrater v Roffcher & Theunissen* 1955 1 SA 129 (A) 136A-B.

<sup>6</sup> *Joubert v Nedbank Ltd* 2011 ZAECPEHC 28 para 11.

<sup>7</sup> Neethling, Potgieter and Visser *Law of Personality* 178.

<sup>8</sup> *Relyant Trading* para 14 citing in support, *Beckenstrater v Roffcher & Theunissen* 1955 1 SA 129 (A) 135D-E. Thus it was held in *Noye v Robbins and Crimmins* 2010 WASCA 83 para 368 that the trial judge was correct to have found that what animated Inspector Robbins at the time he laid charges and throughout the period when they were pending was his "own view" that the "evidence warranted putting Noye on trial for the charges proposed" and that in doing so he acted for the purpose of bringing a wrongdoer to justice.

The requirement of reasonable and probable cause in proving malicious prosecution tends sometimes to be confused with the requirement of reasonable ground to suspect that an offence has been committed in order for a peace officer to arrest any person without a warrant.<sup>9</sup> Further, although reasonable and probable cause and malice are distinct grounds for the action for malicious prosecution, they are often difficult to distinguish one from the other as they tend to overlap. For, it is improbable to find that a prosecutor acted maliciously where there is reasonable and probable cause to prosecute or to find that the defendant who was motivated by malice had reasonable and probable cause to prosecute. The finding that there was reasonable and probable cause to prosecute invariably neutralises the existence of malice in the circumstances as the latter is contingent on the former. In any event, the two requirements appear inseparable in most instances of malicious prosecution.

In order to succeed in an action for malicious prosecution, the plaintiff must prove all four requirements; namely, that the prosecution was instigated by the defendant; it was concluded in favour of the plaintiff; there was no reasonable and probable cause for the prosecution; and that the prosecution was actuated by malice.<sup>10</sup> Although the first two requirements may appear to be straight-forward, they are no less difficult to prove than the last two. The burden of proving that there is reasonable and probable cause for prosecuting a person is as challenging as proving that the prosecutor was motivated by malice. That this is the case in the South African law of malicious prosecution is illustrated by the judgments of the Supreme Court of Appeal in *Relyant Trading; Minister of Justice and Constitutional Development v Moleko*<sup>11</sup> and Kgomo J in *Bayett v Bennett*.<sup>12</sup> Recent Australian and English<sup>13</sup> cases similarly bear witness to this proposition. While the present

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<sup>9</sup> Section 40(1)(b) *Criminal Procedure Act* 51 of 1977.

<sup>10</sup> See eg *Mohamed Amin v Jogendra Kumar Bannerjee* 1947 AC 322 (PC) 330; *Miazga v Kvello Estate* 2009 3 SCR 339 (SCC) para 3; *A v New South Wales* 2007 230 CLR 500 (HCA) para 1; *Minister of Justice and Constitutional Development v Moleko* 2008 3 All SA 47 (SCA) para 8; *Rudolph v Minister of Safety and Security* 2009 5 SA 94 (SCA) para 16; Bullen and Leake *Precedents of Pleadings* 350-356; Clerk, Lindsell and Dugdale *Torts* 972; Neethling, Potgieter and Visser *Law of Delict* 343; Rogers *Winfield and Jolowicz on Tort* 923.

<sup>11</sup> *Minister of Justice and Constitutional Development v Moleko* 2008 3 All SA 47 (SCA).

<sup>12</sup> *Bayett v Bennett* 2012 ZAGPJHC 9 para 167.

<sup>13</sup> For instance, the explanation offered by Richards LJ in *Alford v Chief Constable of Cambridgeshire Police* 2009 EWCA Civ 100 para 48 is in point. Having reached the conclusions

investigation concentrates on reasonable and probable cause in an action for malicious prosecution, in appropriate instances references may occasionally be made to malice. An important adjunct to the subject matter is the concept of the objective sufficiency of the information available to the prosecutor, which brings to the discussion the leading Australian case of *A v New South Wales*,<sup>14</sup> where a ten-point guideline was laid down.

Equally relevant to this discussion are the contributions of the Supreme Court of Canada grappling with the modern concept of malicious prosecution since *Nelles v Ontario*<sup>15</sup> through *Proulx v Quebec (Attorney General)*<sup>16</sup> down to *Miazga v Kvello Estate*<sup>17</sup> - the three Supreme Court judgments around which the modern law of malicious prosecution in Canada could easily be constructed.

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that the police not only had reasonable grounds to suspect that the accused person committed the offence but also that the prosecutor had reasonable and probable cause for prosecuting, the Lord Justice found it unnecessary to deal with the issue of malice. The reasoning behind so concluding was that since the judge held that "[h]ad the claimant proved a lack of reasonable and probable cause for prosecuting, he would have succeeded in establishing malice in the sense of improper motive" (para 153). This is not, "as I read the judgment and as counsel for the Chief Constable agreed, a finding of malice, but an observation that there would have been an improper motive if the appellant had proved a lack of reasonable and probable cause for prosecuting, which he did not. That was because the evidence showed that part of the thinking of those responsible for the prosecution was to make an example of the appellant, as a police officer, and to show the public that the police were treating seriously innocent deaths caused in police road pursuits; a point that can be linked to the disquieting degree of publicity given to the arrest and charging of the appellant. However, that was as far as the point went; and the finding that there was reasonable and proper cause for the prosecution meant that the question of malice or improper cause became irrelevant to liability. It would be wrong in the circumstances to go any further into the issue." The next is *Moulton v Chief Constable of the West Midlands* 2010 EWCA Civ 524 paras 26-27 and 44 where Lady Justice Smith held that the trial judge had been right to hold that there was reasonable and probable cause to commence the prosecution but had made no specific reference to evidence of malice at the time of the charge, as he had not needed to do so. The claim could not succeed in respect of that period if there was reasonable and probable cause to prosecute. But, as a fact, there was not a shred of evidence from which it could be inferred that, at that early stage, the officers were motivated by anything other than a legitimate desire to bring the appellant to justice. The Justice of Appeal held that that there was never a time when the police did not have reasonable and probable cause to bring and continue the prosecution. In that case, it was not necessary to say anything about malice. See also *Howarth v Gwent Constabulary* 2011 EWHC 2836 (QB) paras 130-131.

<sup>14</sup> *A v New South Wales* 2007 230 CLR 500 (HCA) (*A v NSW*) para 1.

<sup>15</sup> *Nelles v Ontario* 1989 2 SCR 170 (SCC) (*Nelles*).

<sup>16</sup> *Proulx v Quebec (Attorney General)* 2001 206 DLR (4<sup>th</sup>) 1 (SCC) (*Proulx*).

<sup>17</sup> *Miazga v Kvello Estate* 2009 3 SCR 339 (SCC) (*Miazga 2*), 2008 282 DLR (4<sup>th</sup>) 1 (Sask CA) (*Miazga 1*).

## 2 Distinguishing the test for reasonable ground to suspect

The law of wrongful arrest and malicious prosecution are closely linked, but the principles governing each cause of action diverge at the point when the arrest and detention translate into prosecution. But because the requirement of reasonableness is common to both causes; reasonable ground to suspect<sup>18</sup> or, as it is described in some jurisdictions, "reasonable grounds";<sup>19</sup> "reasonable cause";<sup>20</sup> or "good cause to suspect";<sup>21</sup> on the one hand and reasonable and probable cause to prosecute on the other, there is the tendency to conflate the different tests. However, Lord Devlin laid down the test of reasonable suspicion as:

arising at or near the starting-point of an investigation of which the obtaining of *prima facie* proof is the end.<sup>22</sup> When such proof has been obtained, the police case is complete; it is ready for trial and passes on to its next stage. It is indeed desirable as a general rule that an arrest should not be made until the case is complete. But if arrest before that were forbidden, it could seriously hamper the police. To give power to arrest on reasonable suspicion does not mean that it is always or even ordinarily to be exercised. It means that there is an executive discretion. In the exercise of it many factors have to be considered besides the strength of the case. The possibility of escape, the prevention of further crime and the obstruction of police inquiries are examples of those factors with which all judges who have had to grant or refuse bail are familiar.<sup>23</sup>

Building on the foregoing, Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ spoke in *George v Rockett*<sup>24</sup> of the required state of mind, contrasting suspicion with a belief or a reason to believe, and held that suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: "I suspect but I cannot

<sup>18</sup> Section 40(1)(b) *Criminal Procedure Act* 51 of 1977 of South Africa.

<sup>19</sup> Section 24(6) *Police and Criminal Evidence Act*, 1984 (UK); s 495(1)(a) *Canadian Criminal Code*, 1985. See e.g. *Holgate-Mohammed v Duke* 1984 AC 437 (HL); *Castorina v Chief Constable of Surrey* 1996 LGR 241 (CA); *Al Fayed v Commissioner of the Police of the Metropolis* 2004 EWCA Civ 1579 (CA); *R v Storey* 1990 1 SCR 241 (SCC); *Collins v Brantford Police Services Board* 2001 204 DLR (4<sup>th</sup>) 669 (OntCA); *Hudson v Brantford Police Services Board* 2001 204 DLR (4<sup>th</sup>) 645 (OntCA).

<sup>20</sup> Section 352 *Crimes Act* 1900-24 of Australia. See eg *Ruddock v Taylor* 2005 222 CLR 612 (HCA); *Zaravinos v NSW* 2005 214 ALR 234 (NSWCA).

<sup>21</sup> Section 315 *Crime Act*, 1961 of New Zealand. See eg *Attorney General v Hewitt* 2000 2 NZLR 110 (HC); *Neilsen v Attorney General* 2001 3 NZLR 433 (CA); *Zaoui v Attorney General* 2004 NZCA 228 (CA).

<sup>22</sup> *Hussien v Chong Fook Kam* 1970 AC 942 (HL) 948.

<sup>23</sup> *Hussien v Chong Fook Kam* 1970 AC 942 (HL) 948.

<sup>24</sup> *George v Rockett* 1990 170 CLR 104 (HCA).

prove". The facts which can reasonably ground a suspicion may be quite insufficient reasonably to ground a belief, yet some factual basis for the suspicion must be shown. In their opinion, it is a positive finding of actual apprehension or mistrust. The objective circumstances sufficient to show a reason to believe something need to point more clearly to the subject matter of the belief, but that is not to say that the objective circumstances must establish on the balance of probabilities that the subject matter in fact occurred or exists: the assent of belief is given on more slender evidence than proof. Belief is an inclination of the mind towards assenting to, rather than rejecting, a proposition and the grounds which can reasonably induce that inclination of the mind may, depending on the circumstances, leave something to surmise or conjecture.<sup>25</sup>

The judgment of Malan AJA in *Relyant Trading* is also instructive in this regard. The Acting Justice of Appeal began by casting wrongful arrest in its well-known mode as consisting in the wrongful deprivation of a person's liberty. Again, liability for wrongful arrest is strict, neither fault nor awareness of the wrongfulness of the arrestor's conduct being required.<sup>26</sup> Further, an arrest is malicious where the defendant makes improper use of the legal process to deprive the plaintiff of his liberty.<sup>27</sup> However, in both wrongful and malicious arrest not only a person's liberty but also other aspects of his or her personality may be involved, particularly dignity.<sup>28</sup> It was held in *Newman v Prinsloo*<sup>29</sup> that in wrongful arrest the act of restraining the plaintiff's freedom is that of the defendant or his agent for whose action he is vicariously liable, whereas in malicious arrest the interposition of a judicial act between the act of the defendant and apprehension of the plaintiff makes the restraint on the plaintiff's freedom no longer the act of the defendant but the act of the law.<sup>30</sup> On the other hand, Malan AJA held that malicious prosecution

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<sup>25</sup> *George v Rocket* 1990 170 CLR 104 (HCA) 115-116. See also *O'Hara v Chief Constable of RUC* 1997 AC 286 293C-D.

<sup>26</sup> *Smit v Meyerton Outfitters* 1971 1 SA 137 (T) 139D; *Minister of Justice v Hofmeyr* 1993 3 SA 131 (A) 154E-157C; *Todt v Ipser* 1993 3 SA 577 (A) 586F-587C; *Donono v Minister of Prisons* 1973 4 SA 259 (C) 262B.

<sup>27</sup> *Thompson v Minister of Police* 1971 1 SA 371 (E) 373E-G.

<sup>28</sup> See Burchell, *Personality Rights* 353ff.

<sup>29</sup> *Newman v Prinsloo* 1973 1 SA 125 (T) 127H.

<sup>30</sup> *Relyant Trading* para 4.

consists in the wrongful and intentional assault on the dignity of a person comprehending also his or her good name and privacy.<sup>31</sup> The requirements are that the arrest or prosecution be instigated without reasonable and probable cause and with "malice" or *animo iniuriarum*.<sup>32</sup> Although the expression "malice" is used, it means, in the context of the *actio iniuriarum*, *animus iniuriandi*.<sup>33</sup> Quoting per Wessels JA in *Moaki v Reckitt and Colman (Africa) Ltd*:<sup>34</sup>

Where relief is claimed by this *actio* the plaintiff must allege and prove that the defendant intended to injure (either *dolus directus* or *indirectus*). Save to the extent that it might afford evidence of the defendant's true intention or might possibly be taken into account in fixing the quantum of damages, the motive of the defendant is not of any legal relevance.<sup>35</sup>

Another important distinguishing factor between reasonable suspicion to arrest and the requirement of reasonable and probable cause in the law of malicious prosecution is the factor of proof. In malicious prosecution the burden of proof is on the plaintiff, who must show that all four elements developed by the courts over the years are present. In an action for wrongful arrest, on the other hand, the burden is always on the defendant to justify the arrest and detention<sup>36</sup> and he/she must prove in defence that he/she had reasonable suspicion as grounds to arrest as one of four statutory jurisdictional facts in terms of section 40(1)(b) of the *Criminal Procedure Act* 1977.<sup>37</sup> Restated by the Supreme Court of Appeal in *Minister of Safety and*

<sup>31</sup> *Heyns v Venter* 2004 3 SA 200 (T) 208B.

<sup>32</sup> *Thompson v Minister of Police* 1971 1 SA 371 (E) 373F-H; *Lederman v Moharal Investments (Pty) Ltd* 1969 1 SA 190 (A) 196G-H.

<sup>33</sup> *Heyns v Venter* 2004 3 SA 200 (T) 208E-F; *Moaki v Reckitt and Colman (Africa) Ltd* 1968 3 SA 98 (A) 104A-B; Neethling, Potgieter and Visser *Law of Personality* 124-125.

<sup>34</sup> *Moaki v Reckitt and Colman (Africa) Ltd* 1968 3 SA 98 (A) 104B-C.

<sup>35</sup> *Relyant Trading* para 5. Emphasising the issue of the lawfulness of a prosecution in *National Director of Public Prosecutions v Zuma* 2009 2 SA 277 (SCA) paras 37-38, Harms DP said that "a prosecution is not wrongful merely because it is brought for an improper purpose. It will only be wrongful if, in addition, reasonable and probable grounds for prosecuting were absent ... The motive behind the prosecution is irrelevant because, as Schreiner JA said in connection with arrests, the best motive does not cure an otherwise illegal arrest and the worst motive does not render an otherwise legal arrest illegal (*Tsose v Minister of Justice* 1951 3 SA 10 (A) 17). The same applies to prosecution. This does not, however, mean that the prosecution may use its powers for 'ulterior purposes'. To do so would breach the principle of legality." See also *Highstead Entertainment (Pty) Ltd t/a 'The Club' v Minister of Law and Order* 1994 1 SA 387 (C).

<sup>36</sup> *Zealand v Minister of Justice and Constitutional Development* 2008 4 SA 458 (CC) paras 24, 25.

<sup>37</sup> Section 40(1)(b) *Criminal Procedure Act* 51 of 1977.



*Security v Sekhoto*,<sup>38</sup> the four jurisdictional facts which the defendant must plead are that: (a) the arrestor must be a peace officer; (b) that he or she entertained a suspicion; (c) that the suspicion was that the arrestee had committed a Schedule 1 offence,<sup>39</sup> and (d) that the suspicion was based on reasonable grounds. It was further clarified in *Sekhoto* that once these jurisdictional facts are met, it was not necessary to add a gloss to the section by requiring the arresting officer to consider the Bill of Rights before arresting the suspect.<sup>40</sup> There was nothing in section 40(1)(b) that could lead to the conclusion that its words contain a hidden fifth jurisdictional fact. If it be recalled that the purpose of an arrest is to enable the arrestor to bring the suspect to justice, it follows that the discretion to arrest without a warrant does not impose upon the officer the burden of digging into the Bill of Rights to satisfy himself/herself that no aspect of it has been violated before exercising that discretion. Once the suspect has been brought to court, the authority to detain inherent in the exercise of the power to arrest expires and the authority to detain the suspect shifts to the court.<sup>41</sup>

The test for determining the existence of a reasonable suspicion is an objective one, that is, the grounds of suspicion must be those which would induce a reasonable person to have the suspicion.<sup>42</sup> It is, therefore, not whether a police officer believes that he has reason to suspect, "but whether on an objective approach, he in fact has reasonable grounds for his suspicion".<sup>43</sup> That is, "[a] reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable

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<sup>38</sup> *Minister of Safety and Security v Sekhoto* 2011 1 SACR 315 (SCA) (hereafter *Sekhoto*) para 6.

<sup>39</sup> *S v Shininda* 1986 1 SA 573 (T).

<sup>40</sup> See eg per Bertelsmann J *Louw v Minister of Safety and Security* 2006 2 SACR 178 (T) 186a-c, 187e. See also *Gellman v Minister of Safety and Security* 2008 1 SACR 446 (W); *Le Roux v Minister of Safety and Security* 2009 4 SA 491 (KZP); *Ramphal v Minister of Safety and Security* 2009 1 SACR 211 (E); *Mvu v Minister of Safety and Security* 2009 6 SA 82 (GSJ). Contra *Charles v Minister of Safety and Security* 2007 2 SACR 137 (W).

<sup>41</sup> *Sekhoto* para 42.

<sup>42</sup> *R v van Heerden* 1958 3 SA 150 (T) 152E. As Jones J put it in *Rosseou v Boshoff* 1945 CPD 145 147: "... when one comes to consider whether he had reasonable grounds one must bear in mind that in exercising those powers he must act as an ordinary honest man would act, and not merely act on wild suspicions, but on suspicions which have a reasonable basis".

<sup>43</sup> *Duncan v Minister of Law and Order* 1986 2 SA 805 (A) 814D-E; *Minister of Law and Order v Hurley* 1986 3 SA 568 (A) 579F-G; *Minister of Law and Order v Pavlicevic* 1989 3 SA 679 (A) 684G.

and probable grounds for the arrest".<sup>44</sup> What is required is that the police officer must take account of all the information available to him/her at the time and base the decision to arrest on such information.<sup>45</sup> What constitutes reasonable grounds for suspicion had to be judged against what was known or reasonably capable of being known at the relevant time.<sup>46</sup> A belief or suspicion was capable of being reasonable even though founded on a mistake of law. The officer in question need not be convinced that the information in his/her possession was sufficient to commit for trial or convict, or to establish a *prima facie* case<sup>47</sup> for conviction, before making the arrest.<sup>48</sup>

As Jones J held in *Mabona v Minister of Law and Order*,<sup>49</sup> the person claiming malicious arrest or malicious prosecution must not only allege but must go further to prove that the defendant acted maliciously and without probable cause.<sup>50</sup> Thus, in *Rudolph v Minister of Safety and Security*<sup>51</sup> the court had to resolve the tension between the reasonable justifiability of the arrest and detention in this case and the subjective feeling of the police officer faced with the decision whether or not to

<sup>44</sup> *R v Storrey* 1990 1 SCR 241 (SCC) 250-251. The phrase "reasonable and probable cause for a prosecution" according to Robertson and Jastrzebski *Halsbury's Laws of England* para 472 is "an honest belief in the guilt of the accused based on a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of an accuser, to the conclusion that the person charged was probably guilty of the crime imputed." See further *Abbott v Refuge Assurance Co Ltd* 1961 3 All ER 1074; *Riches v DPP* 1973 2 All ER 935; *Fink et al v Sharwangunk Conservancy Inc* 790 NYS 2d (10 February 2005); *Chatfield v Comerford* 1866 4 F & F 1008; *Lister v Perryman* 1870 LR 4 HL 521; *Baptiste v Seepersad and Attorney General of Trinidad and Tobago* HC 367 of 2001 (unreported); *Kennedy Cecil v Morris Donna and Attorney General of Trinidad and Tobago* 2005 TTCA 28 (T&T CA).

<sup>45</sup> *Chartier v Quebec (Attorney General)* 1979 2 SCR 474 (SCC); *R v Golub* 1997 34 OR (3d) 743 (ONCA) 749.

<sup>46</sup> Per Gleeson CJ, Gummow, Hayne and Heydon JJ, *Ruddock v Taylor* 2005 222 CLR 612 (HCA) 626 para 40.

<sup>47</sup> *Attorney General v Hewitt* 2000 2 NZLR 110 (HC); *Police v Anderson* 1972 NZLR 233; *Duffy v Attorney General* 1985 CRNZ 599; *Hussien v Chong Fook Kam* 1970 AC 942 947-948; *Caie v Attorney General* 2005 NZAR 703 (HC) para 85; *Niao v Attorney General* High Court, Rotorua CP 22/96, 11 June 1998.

<sup>48</sup> *PHE v Ottawa-Carleton (Region) Police Service* 2003 OJ No 3512 (SCJ) para 54.

<sup>49</sup> *Mabona v Minister of Law and Order* 1988 2 SA 654 (SE) 658E. See also *Gellman v Minister of Safety and Security* 2008 1 SACR 446 (W) para 72; *Le Roux v Minister of Safety and Security* 2009 4 SA 491 (KZP) 498 para 24; *Visagie v Minister of Safety and Security* 2009 ZAECHC 2 paras 20-23; *Dallison v Caffrey* 1964 3 WLR 385 (CA) 398; *Holgate-Mohammed v Duke* 1984 AC 437 445(HL).

<sup>50</sup> A classical illustration of unlawful detention is *Russel v Minister of Safety and Security* 2008 ZAECHC 161 para 11.

<sup>51</sup> *Rudolph v Minister of Safety and Security* 2007 3 All SA 271 (T).

arrest and detain. Given the jurisprudence embedded in the case law, the question which the court had to address was whether the reasons put forward for the arrest and detention of the plaintiff satisfied the requirement of a discernible objective standard, which is what distinguishes a lawful arrest and detention from an arbitrary and unconstitutional one.<sup>52</sup> The Supreme Court of Appeal found that the trial judge was in error to have concluded that the arresting officer was justified in effecting the arrest without warrant, since no Schedule I offence was committed in the circumstances of the case. And since no offence of sedition had been committed, it could hardly be said that the arresting officer reasonably suspected the first appellant of committing sedition.<sup>53</sup> It was further held that by knowing that no offence of illegal gathering had been committed and nonetheless proceeding to charge the appellants, the officer acted wrongly. By continuing so to act, reckless as to the possible consequences of that conduct, the officer acted *animo injuriandi*.<sup>54</sup>

There was no way the arrest in *Le Roux* could have satisfied the reasonableness test since Madondo J found that the arresting officer's reason for the arrest and detention of the appellant was to demonstrate to her black colleagues that she was not motivated by racial prejudice in favour of the appellant. It was held that her action was not in the interest of justice as the arrest was not to secure the appellant's attendance before the court or for the protection of the public. There was therefore no reason to support the decision to arrest, nor was there any rational connection between the detention of the appellant and the purpose the arresting officer ought to have set out to achieve. The detention of the appellant was accordingly unlawful. It was an unreasonable interference with his liberty and fundamental dignity.<sup>55</sup>

In Canada, the courts adopt both the definition of reasonable and probable cause as well as the test postulated in *Hicks v Faulkner*<sup>56</sup> by Hawkins J to determine if a

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<sup>52</sup> See also *R v Wilson* 1990 1 SCR 1291; *R v Storrey* 1990 53 CCC (3d) 316 324.

<sup>53</sup> *Rudolph v Minister of Safety and Security* 2009 5 SA 94 (SCA) paras 14, 25.

<sup>54</sup> *Rudolph v Minister of Safety and Security* 2009 5 SA 94 (SCA) para 20.

<sup>55</sup> *Le Roux v Minister of Safety and Security* 2009 4 SA 491 (KZP) para 41. See also *A v Secretary of State for the Home Department* 2003 1 All ER 816 (CA) 817.

<sup>56</sup> *Hicks v Faulkner* 1878 8 QBD 167 171.

prosecutor met that criterion.<sup>57</sup> However, unlike the South African courts, the Canadian courts go further to treat that same test as applicable to the requirement of reasonable grounds to arrest a suspect in the first instance. In *R v Storrey*<sup>58</sup> Cory J, referring to "reasonable and probable grounds" in section 450(1) of the *Canadian Criminal Code*,<sup>59</sup> held that the Code required that an arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. Those grounds must, in addition, be justifiable from an objective point of view. In other words, a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds for the arrest. However, the police need not demonstrate anything more than reasonable and probable grounds. It is important to note that Cory J emphasised that the police would not be required to establish a *prima facie* case for conviction before making the arrest.<sup>60</sup>

### 3 Distinguishing the tort of abuse of process

Apart from false imprisonment or malicious prosecution there is, under the English common law, a tort of abuse of process. This is distinct from the "shameful misuse of coercive power",<sup>61</sup> or "a gross abuse of power"<sup>62</sup> encountered in the unlawful conduct of police officers in arrests and detention cases bordering on the tort of misfeasance in public office. But like malicious prosecution, the abuse of process concerns misuse and abuse of the criminal process. Both of them deal with the deliberate and malicious use of the officer's position for ends that are improper and inconsistent with the public duty entrusted upon the officer.<sup>63</sup>

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<sup>57</sup> Per Lamer J in *Nelles v Ontario* 1989 2 SCR 170 (SCC) 192.

<sup>58</sup> *R v Storrey* 1990 53 CCC (3d) 316 (SCC) 324.

<sup>59</sup> See now s 495(1) *Canadian Criminal Code*, 1985 referring to "reasonable grounds".

<sup>60</sup> See also per Osborne JA, *R v Hall* 1995 22 OR (3d) 289 (Ont CA); per Ground J, *Wiche v Ontario* 2001 CanLII 28413 (ON SC) paras 33, 34

<sup>61</sup> *Attorney General of Trinidad and Tobago v Ramanoop* 2005 2 WLR 1324 (PC).

<sup>62</sup> *Mahadeo Sookhai v Attorney General of Trinidad and Tobago* 2007 TTHC 47 para 45.

<sup>63</sup> Per Charron J dissenting in *Hill v Hamilton-Wentworth Regional Police Services Board* 2007 3 SCR 129 para 182.

In its modern form, the tort of abuse of process would lie where it is shown that the defendant had set proceedings in motion with the object of achieving a purpose which was not within the scope of the process. Although the action is related to malicious prosecution, it is distinct from it. The action does not, like malicious prosecution, depend on the proceedings being completed, concluded or withdrawn before it can be instituted.<sup>64</sup> It is an action initiated where "one who uses a legal process, whether criminal or civil against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process".<sup>65</sup>

Quite recently the English Court of Appeal restated the tort of abuse of process and extensively reviewed its relationship with the law of malicious prosecution. In *Land Securities Ltd v Fladgate Fielder*,<sup>66</sup> the plaintiffs claimed damages against the defendants for the tort of abuse of process arising out of an application for judicial review made by the defendants of a decision by the Westminster City Council granting the plaintiffs planning permission. They alleged that the defendants were liable for substantial damages for the tort for threatening and bringing the judicial review proceedings, which was not to obtain relief against the planning authority by quashing the permission, but in order to put pressure on the claimants to assist the defendants to relocate their offices. The question before the Court of Appeal was whether or not the plaintiffs' case was sufficiently arguable to be allowed to proceed to trial.

The Court of Appeal held that there was no basis for extending the tort of abuse of process to the defendants' proceedings for judicial review. In so holding, the court took the opportunity to formulate a six-point proposition of the law based on existing precedents.<sup>67</sup> First, there was no general tort of malicious prosecution of civil cases

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<sup>64</sup> *Grainger v Hill* 1882-1883 11 QBD 440; *Gilding v Eyre* 1861 142 ER 584; *Goldsmith v Sperrings Ltd* 1977 2 All ER 566; *Speed Seal Products Ltd v Paddington* 1986 1 All ER 91.

<sup>65</sup> American Law Institute *Torts* s 682. See also *Metall and Rohstoff v Donaldson Luflein and Jenrette Inc* 1990 1 QB 391 469-470.

<sup>66</sup> *Land Securities Ltd v Fladgate Fielder* 2010 2 All ER 741 (CA) (*Land Securities*).

<sup>67</sup> *Land Securities* para 67 per Etherton LJ.

except in three well-established heads of damage<sup>68</sup> within the principles enunciated by Holt CJ in *Savill v Roberts*<sup>69</sup> as amplified by Brett MR in *Quartz Hill Consolidated Mining Co v Eyre*<sup>70</sup> and applied by the House of Lords in *Gregory v Portsmouth City Council*.<sup>71</sup> Secondly, essential ingredients for a claim of malicious prosecution were the absence of reasonable or probable cause and that the proceedings had ended in favour of the person maliciously prosecuted. Thirdly, the only cases in which the tort of abuse of process had been successfully invoked concerned a blatant misuse of a particular process, namely arrest and execution, within the existing proceedings. Fourthly, in cases of abuse of process, it was irrelevant whether or not there was reasonable or probable cause for the proceedings or in whose favour they ended, or whether they had ended at all. Fifthly, statements in English authorities describing a broader application of the test of abuse of process were all *obiter*.<sup>72</sup> Sixthly, as to the broader statements of principle, there was no clearly accepted approach for identifying what was sufficiently collateral to establish the tort of abuse of process.<sup>73</sup>

The court refrained from defining precisely the limits of the tort of abuse of process. In any event, even if the tort could be committed outside circumstances of compulsion by arrest, imprisonment or other forms of duress, there were no heads of damage that had to exist for the invocation of the tort of malicious prosecution. As Etherton LJ explained:

A different conclusion would not only go beyond the factual context of *Grainger's* case and *Gilding's* case, but would be inconsistent with the refusal of the House of Lords in *Gregory's* case to extend the tort of malicious prosecution to all civil proceedings.<sup>74</sup>

Further, it made no sense severely to limit the cause of action of malicious prosecution, an essential ingredient of which was that the proceedings had been

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<sup>68</sup> Namely, where the defendant's action amounts to a deprivation of the plaintiff's liberty, making a person incur expense, and where a person's fair fame and credit are injured.

<sup>69</sup> *Savill v Roberts* 1698 12 Mod Rep 208, 88 ER 1267.

<sup>70</sup> *Quartz Hill Consolidated Mining Co v Eyre* 1881-1885 All ER Rep Ext 1474 (CA) 1476.

<sup>71</sup> *Gregory v Portsmouth City Council* 2000 1 All ER 560 (HL).

<sup>72</sup> See eg *Re A Debtor* 1955 2 All ER 65.

<sup>73</sup> *Land Securities* para 67.

<sup>74</sup> *Land Securities* para 68.

brought without reasonable or probable cause, to three heads of damage, but to extend to all cases of economic loss a tort of abuse of process, which could apply even where the alleged abuser had a good cause of action. This is because the "dangers of parallel litigation and - echoing the concerns of Slade LJ in *Metall and Rohstoff* case<sup>75</sup> -

... deterring the pursuit of honest claims are obvious. The wider description of the tort of abuse of process in cases prior to *Gregory's* case must be re-appraised in the light of the decision of the House of Lords in that case and the policy considerations underlying it.<sup>76</sup>

#### 4 Objective sufficiency of the information available to the prosecutor

Although the requirement of reasonable and probable cause is, like the other elements of the tort of malicious prosecution, a question of fact to be determined by the jury, that is not often the case, for it is invariably reserved for the judge to decide. At common law, once the facts in the case have been determined by the special verdict of the jury so required, the decision if, on those facts as found, the defendant had acted without reasonable and probable cause remains a decision solely for the judge.<sup>77</sup>

The element of reasonable and probable cause is not established by the plaintiff who seeks only to prove that he was innocent. In *Abrath v The North Eastern Railway Company*,<sup>78</sup> Brett MR held that in order to show that there was an absence of reasonable and probable cause for instituting the prosecution for conspiracy, there was no doubt that the plaintiff was bound to give some evidence of the circumstances under which the prosecution was instituted. It is therefore not sufficient for the plaintiff to show that he was innocent of conspiracy and that there was no substantial ground for charging him with conspiracy. It followed, therefore, that-

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<sup>75</sup> *Metall and Rohstoff v Donaldson Luflein and Jenrette Inc* 989 3 All ER 14 (CA).

<sup>76</sup> *Land Securities* para 68.

<sup>77</sup> *Glinski v McIver* 1962 AC 726 (HL) 778-780 per Lord Devlin.

<sup>78</sup> *Abrath v The North Eastern Railway Company* 1882-1883 11 QBD 440 (*Abrath*).

... if the plaintiff merely proved that, and gave no evidence of the circumstances under which the prosecution was instituted, it seems that the plaintiff would fail; and a judge could not be asked, without some evidence of the circumstances under which the prosecution was instituted, to say that there was an absence of reasonable and probable cause.<sup>79</sup>

The Master of the Rolls concluded that the evidence which must determine the question of whether or not there was reasonable and probable cause must consist of the existing facts or the circumstances under which the prosecution was instituted. Bowen LJ agreed. According to him, when mere innocence wears that aspect, it is because the fact of innocence involves other circumstances which show that there was want of reasonable and probable cause. The Lord Justice cited as an instance where the prosecutor must know whether the story which he is telling against the man whom he is prosecuting is false or true. In such a situation, if the accused is innocent, it follows that the prosecutor must be telling a falsehood, and there must be a want of reasonable and probable cause. On the other hand-

if the circumstances proved are such as that the prosecutor must know whether the accused is guilty or innocent, if he exercises reasonable care, it is only an identical proposition to infer that if the accused is innocent there must have been want of reasonable and probable cause. Except in cases of that kind, it never is true that mere innocence is proof of want of probable cause. It must be innocence accompanied by such circumstances as raise the presumption that there was a want of reasonable and probable cause.<sup>80</sup>

The next point is that whether or not there is a reasonable and probable cause depends upon the materials which were in possession of the prosecutor at the time the prosecution was instituted and, further, upon whether or not those materials were carefully collected and objectively assessed. Addressing these issues in *Abrath*<sup>81</sup> Bowen LJ said:

Now there might be two views of the materials which were in the possession of the prosecution. It may be said that the materials were evidently untrustworthy or that they were obviously trustworthy, according as the one view or the other is taken of the facts. The burden of showing carefulness in the inquiry would be shifted according to the view of the facts adopted. If the materials were admittedly

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<sup>79</sup> *Abrath* 449.

<sup>80</sup> *Abrath* 462.

<sup>81</sup> *Abrath* 459.



untrustworthy, that would be a strong reason for throwing on the defendants the burden of showing that they, nevertheless, had been misled, after all their care, into relying upon worthless materials. If the materials were obviously trustworthy, they would be enough *prima facie* to justify those who trusted to them.<sup>82</sup>

Quite recently, the High Court of Australia held in *A v NSW* that the enquiry about reasonable and probable cause has two aspects. The first is to decide whether the prosecutor did not have reasonable and probable cause for commencing or maintaining the prosecution. The second is that the material available to the prosecutor must be assessed,<sup>83</sup> again, in two ways: (a) what did the prosecutor make of it? (b) What should the prosecutor have made of it? According to the court, to ask only whether there was material available to the prosecutor which, assessed objectively, would have warranted commencement or maintenance of the prosecution would deny relief to the person acquitted of a crime prosecuted by a person who not only acted maliciously but who is also shown to have acted without forming the view that the material warranted prosecution of the offences. Contrariwise, to ask only what the prosecutor made of the material that he or she had available when deciding to commence or maintain the prosecution would favour the incompetent or careless prosecutor over the competent and careful.<sup>84</sup>

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<sup>82</sup> It was held in *A v NSW* para 56 that the absence of reasonable and probable cause is to be determined on the material the prosecution had available when deciding whether to commence or maintain the prosecution, not whatever material may subsequently come to light. Further, "even if a prosecutor was shown to have initiated or maintained a prosecution maliciously (for example, because of *animus* towards the person accused) and the prosecution fails, an action for malicious prosecution should not lie where the material before the prosecutor at the time of initiating or maintaining the charge both persuaded the prosecutor that laying a charge was proper, and would have been objectively assessed as warranting the laying of a charge." See also *Zreika v State of New South Wales* 2011 NSWDC 67 para 134 (*Zreika*).

<sup>83</sup> As Keon J held in *Maharaj v Government of RSA* 2012 ZAKZDHC 6 paras 7-8, "the crucial issue is what information and evidence was available to the State when the decision to prosecute was taken and whether that, and any inferences to be drawn therefrom, were sufficient to at least *prima facie* point to the commission of an offence by the plaintiff. Accordingly, the impressions as to the credibility of the evidence and whether the allegations the various state witnesses deposed to may ultimately be proved are not relevant to the present trial".

<sup>84</sup> *A v NSW* para 58. In *Zreika* para 236, Judge Walmsley postulated that available material is to be identified as to whether it might be regarded as "inculpatory or exculpatory".

## 5 The Australian ten-point guideline

The majority of the High Court of Australia in *A v New South Wales*<sup>85</sup> emphasised<sup>86</sup> the elements of malice<sup>87</sup> and absence of reasonable and probable cause<sup>88</sup> and held that they were separate elements which a plaintiff must prove in order to succeed in establishing the tort of malicious prosecution. For that purpose, there was no disharmony between the expressions of the applicable principles by Jordan CJ in *Mitchell v John Heine and Son Ltd*<sup>89</sup> and Dixon J in *Sharp v Biggs*<sup>90</sup> and *Commonwealth Life Assurance Society Ltd v Brain*.<sup>91</sup> The court then held that, where a prosecutor has no personal knowledge of the facts underlying the charge but acted on information received, the issue was not if the plaintiff had proved that the state of mind of the prosecutor fell short of a positive persuasion of guilt. Instead, the issue was if the plaintiff had proved that the prosecutor did not honestly form the

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<sup>85</sup> *A v NSW* para 1.

<sup>86</sup> *A v NSW* para 117.

<sup>87</sup> *A v NSW* paras 88-89.

<sup>88</sup> *A v NSW* paras 60-87.

<sup>89</sup> *Mitchell v John Heine and Son Ltd* 1938 38 SR (NSW) 466 469. The Chief Justice laid down five conditions which must be met in order for an officer to have reasonable and probable cause for prosecuting a person for an offence. To succeed on the issue of reasonable and probable cause the plaintiff had to establish that one or more of these conditions did not exist. They are: (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.

<sup>90</sup> *Sharp v Biggs* 1932 48 CLR 81 (HCA) 106. Dixon J held that: "Reasonable and probable cause does not exist if the prosecutor does not at least believe that the probability of the accused's guilt is such that upon general grounds of justice a charge against him is warranted. Such cause may be absent although this belief exists if the materials of which the prosecutor is aware are not calculated to arouse it in the mind of a man of ordinary prudence and judgment." Callinan J dissented (*A v NSW* para 165) on the ground that there was no reason why the court should depart, in relation to the first of the four elements necessary to establish the tort of malicious prosecution, from the test stated by Dixon J in *Sharp v Biggs* 1932 48 CLR 81 (HCA). The Court of Appeal was therefore right to prefer that test.

<sup>91</sup> *Commonwealth Life Assurance Society Ltd v Brain* 1935 53 CLR 343 (HCA) 382. Repeating what he said in *Sharp*, Dixon J observed that: "when it is not disputed that the accuser believed in the truth of the charge, or considered its truth so likely that a prosecution ought to take place, and no question arises as to the materials upon which his opinion was founded, it is a question for the court to decide whether the grounds which actuated him suffice to constitute reasonable and probable cause".

view that there was a proper case for prosecution, or had proved that the prosecutor formed that view on an insufficient basis.<sup>92</sup>

It was held in *A v NSW* that in evaluating the material that was available to the prosecutor arising from the investigations, the objective sufficiency of the material must be considered by the prosecutor and assessed in the light of all the facts of the particular case. With regard to the "objective standard of sufficiency", the majority observed:

because the question in any particular case is ultimately one of fact, little useful guidance is to be had from decisions in other cases about other facts. Rather, the resolution of the question will most often depend upon identifying what it is that the plaintiff asserts to be deficient about material upon which the defendant acted in instituting or maintaining the prosecution. That is the assertion which may, we do not say must, depend upon evidence demonstrating that further inquiry should have been made.<sup>93</sup>

The majority, pondering over the earlier question it had posed as to whether or not the grounds which actuated the prosecutor sufficed to constitute reasonable and probable cause, held:

for like reasons it cannot be stated, as a general and inflexible rule, that a prosecutor acts without reasonable and probable cause in prosecuting the crime on the basis of only the uncorroborated statements of the person alleged to be the victim of the accused's conduct. Even if at trial of the offence it would be expected that some form of corroboration warning be given to the jury, the question of absence of reasonable and probable cause is not to be decided according to such a rule.<sup>94</sup> The objective sufficiency of the material considered by the prosecutor must be assessed in the light of all of the facts of the particular case.<sup>95</sup>

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<sup>92</sup> *A v NSW* para 118. See also: *Glinski v McIver* 1962 AC 726; *Gibbs v Rea* 1998 AC 786; *Trobridge v Hardy* 1955 94 CLR 147.

<sup>93</sup> *A v NSW* paras 84, 85, 87.

<sup>94</sup> *Bradshaw v Waterlow and Sons Ltd* 1915 3 KB 527 534.

<sup>95</sup> See also *Landini v State of New South Wales* 2008 NSWSC 1280 paras 39-41 where it was held that the plaintiff's onus was to establish that the facts and circumstances established in evidence concerning each prosecution instituted in 1980 and in 1982 were inconsistent with the existence of reasonable and probable cause. Hall J thus held that a prosecutor, in making an assessment of the purposes of making a sound judgment as to whether or not to charge the individual with a criminal offence, is entitled to have regard to all information held. This includes both information which constitutes admissible evidence in a criminal trial and other information which, though not admissible as evidence, may nonetheless have value in evaluating or assessing the reliability of evidence that is admissible.

A ten-point guideline surrounding principally the element of reasonable and probable cause was laid down by the majority in this case. The first of these propositions is that justice requires that the prosecutor, the person who effectively sets the criminal proceedings in motion, must accept the form of responsibility or accountability imposed by the tort of malicious prosecution.<sup>96</sup> Secondly, insofar as one element of the tort of malicious prosecution concerns reasonable and probable cause, the question is not abstract or purely objective. The question is whether the prosecutor had reasonable cause to do what he did; not whether, regardless of the prosecutor's knowledge or belief, there was reasonable and probable cause for a charge to be laid. The question involves both an objective and a subjective aspect<sup>97</sup> notwithstanding that it is often productive of difficulties in practice, because it essentially requires the plaintiff to establish a negative, rather than for the defendant to prove the existence of reasonable and probable cause.<sup>98</sup> Thirdly, in the case of a public prosecution initiated by a police officer or a Director of Public Prosecutions or some other authority, where a prosecutor has no personal interest in the matter, 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.<sup>99</sup>

The fourth of the guidelines enunciated by the majority pertains to the five conditions laid down by Jordan CJ in *Mitchell v John Heine and Son Ltd*.<sup>100</sup> It was stated that those five conditions may provide guidance about the particular kinds of issue that might arise at trial in those cases where the defendant prosecutor may be supposed to have personal knowledge of the facts giving rise to the charge and the plaintiff alleges either that the prosecutor did not believe the accused was guilty, or that the prosecutor's belief in the guilt of the accused was based on insufficient grounds. The five conditions were not, and could not have been, intended as directly

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<sup>96</sup> *Glinski v McIver* 1962 AC 726.

<sup>97</sup> *A v NSW* para 38.

<sup>98</sup> Per Heenan J in *Noye v Robbins and Crimmins* 2007 WASC 98 para 251 (*Noye*).

<sup>99</sup> *A v NSW* para 41.

<sup>100</sup> *Mitchell v John Heine and Son Ltd* 1938 38 SR (NSW) 466 469.

or indirectly providing a list of elements to be established at trial of an action for malicious prosecution. It would be wrong to understand them in that way.<sup>101</sup>

In the fifth of the principles laid down, it was stated that if the plaintiff alleges that the defendant prosecutor did not have the requisite subjective state of mind when instituting or maintaining the prosecution, that is an allegation about the defendant prosecutor's state of persuasion. The subject matter of the relevant state of persuasion in the mind of the prosecution 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 a 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.<sup>102</sup> If, however, the plaintiff alleges that the prosecutor knew or believed some fact that was inconsistent with guilt, the

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<sup>101</sup> *A v NSW* para 66.

<sup>102</sup> Two subsequent judgments from New South Wales address the issue of the quality of the information available to the prosecutor at the time of the decision to prosecute. First, in *Thomas v State of New South Wales* 2008 NSWCA 316 para 105, Gyles AJA with the concurrence of the other members of the Court of Appeal held: "The material to be considered cannot be limited to that which is admissible in evidence. A reasonable basis for a decision by an investigating police officer to lay a charge is not to be equated with a magistrate's decision as to committal for trial or a trial judge's ruling on whether there is a case to go to the jury. The hypothetical reasonable prosecutor is not a judge or barrister specialising in criminal law. Neither is it necessary that the prosecutor be assured that all necessary witnesses will attend the hearing and give evidence in accordance with the information provided by them. The prosecutor may not be a public official. The decision to charge will often be taken promptly, if not immediately, in all kinds of circumstances. Investigations can be expected to continue where necessary, at least up to preparation of the brief of evidence for committal. That is not to suggest that these topics are not properly to be considered under this head. A practical assessment is required. Situations vary so much that it is not helpful to endeavour to lay down strict ground rules." See also *Lister v Perryman* 1870 LR 4 HL 521 538, 540 and 542 per Lords Westbury and Colonsay respectively; *Hicks v Faulkner* 1878 8 QBD 167 173-174, *Birchmeier v Council of Municipality of Rockdale* 1934 51 WN (NSW) 201 202-203, *Mitchell v John Heine and Son Ltd* 1938 38 SR (NSW) 466 469-471. Again, in *Landini v State of New South Wales* 2008 NSWSC 1280 paras 41 and 42, Hall J held that in making an assessment for the purpose of making a sound judgment as to whether to charge an individual with a criminal offence, a prosecutor is entitled to have regard to all information held. "This includes both information which constitutes admissible evidence in a criminal trial and other information which, though not admissible as evidence, may nonetheless have value in evaluating or assessing the reliability of evidence that is admissible." His Honour continued: "It is a commonplace fact that 'police intelligence' and circumstantial evidence are, in combination, utilised in the investigation stage to further investigations and may be examined in the pre-prosecution stage in the decision-making process leading to the laying of criminal charges."

absence of reasonable and probable cause could also be described in that kind of case as the absence of a belief in the guilt of the plaintiff.<sup>103</sup>

In terms of the sixth of the leading beacons of the tort, the court identified three critical points:

- a) It is the negative proposition that must be established: more probably than not the defendant prosecutor acted without reasonable and probable cause.
- b) 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.
- c) The critical question presented by this element of the tort is: what does the plaintiff demonstrate about what the defendant prosecutor made of the material that he or she had available when deciding whether to prosecute or maintain the prosecution? In effect, when the plaintiff asserts that the defendant acted without reasonable and probable cause, what exactly is the content of that assertion?<sup>104</sup>

The seventh point is stated thus: unless the prosecutor is shown either not to have honestly formed the view that there was a proper case for prosecution or to have formed that view on an insufficient basis, the element of the absence of reasonable and probable cause is not established.<sup>105</sup> With regard to the eighth of the principles, the majority noted that the expression "proper cause for prosecution" is not susceptible of exhaustive definition without obscuring the importance of the burden of proving the absence of reasonable and probable cause, and the variety of factual and forensic circumstances in which the questions may arise. It will require examination of the prosecutor's state of persuasion about the material considered by the prosecutor. That should not be done by treating the five conditions stated by

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<sup>103</sup> *A v NSW* para 71.

<sup>104</sup> *A v NSW* para 77.

<sup>105</sup> *A v NSW* para 80.

Jordan CJ in *Mitchell v John Heine and Son Ltd*<sup>106</sup> as a complete and exhaustive catalogue of what will constitute reasonable and probable cause. To begin with, to focus upon what is reasonable and probable cause distracts attention from what the plaintiff must establish - the absence of reasonable and probable cause. Again, because those conditions are framed in terms of a belief about probable guilt, they are conditions that do not sufficiently encompass cases where the prosecutor acts upon information provided by others.<sup>107</sup>

In their ninth guideline, the majority addressed the issue of the objective element of reasonable and probable cause, which it said is 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 the question can be said to be "whether a reasonable man might draw the inference, from the facts known to him, that the accused was guilty".<sup>108</sup> Finally, the court stated 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.<sup>109</sup>

Lastly, the majority held that there was no basis upon which the Court of Appeal could interfere with the findings of facts made by the trial judge in this case. In particular, the findings made by the trial judge about what was said and meant by the second respondent in his conversations with the appellant's solicitor were of critical importance. Those findings depended in important respects upon the assessment the trial judge made of the credibility of the evidence given by the second respondent and the appellant's solicitor. There was no basis therefore for setting the findings aside.<sup>110</sup> Furthermore, the trial judge's conclusion was based upon what he found to have been the second respondent's out-of-court admission – the second respondent's statement that "if it was up to me I wouldn't have charged

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<sup>106</sup> *Mitchell v John Heine and Son Ltd* 1938 38 SR (NSW) 466 469.

<sup>107</sup> *A v NSW* para 81.

<sup>108</sup> *A v NSW* para 83. Cf *Crowley v Glissan* 1905 2 CLR 744 (HCA).

<sup>109</sup> *A v NSW* para 91.

<sup>110</sup> *A v NSW* para 112.

him", coupled with the associated statements about pressure. There was no basis upon which it was open to the Court of Appeal to attribute a meaning to the second respondent's statements that differed in any relevant respect from the way in which the trial judge understood them. It was therefore not open to the Court of Appeal to substitute its own finding about malice.<sup>111</sup>

### **5.1 *Noye v Robbins and Crimmins***

In *Noye*<sup>112</sup> the Supreme Court of Western Australia was confronted with the case of a plaintiff who contended that the prosecution and the disciplinary charges instituted against him by a certain Inspector Robbins were brought maliciously and without any reasonable or probable cause. They were resolved, as far as they were capable of being resolved, in his favour without conviction; and the charges had caused him loss and damage in respect of which the action was maintainable. The plaintiff relied on additional causes of action of misfeasance in public office and injurious falsehood in his claims against Inspector Robbins. In his related action against Lynette Crimmins he alleged malicious prosecution and injurious falsehood. In substance, it was alleged that it was the malice and false accusations on the part of Crimmins which more or less caused the Inspector to lay the charges in the first instance.<sup>113</sup>

On the question of whether or not the grounds which actuated the prosecutor to initiate proceedings sufficed to constitute reasonable and probable cause, it was held that, notwithstanding the complexity of the situation which had arisen and the conflicting views which existed at the time, Inspector Robbins did believe that the evidence disclosed a case against the plaintiff. This meant that he should be charged and put on trial. In effect, Inspector Robbins honestly formed the view that there was a proper case for prosecution.<sup>114</sup> This was not a case where the crucial facts were or ever could have been within the personal knowledge of the prosecutor. Inspector Robbins had to rely on the information which he had obtained or which

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<sup>111</sup> *A v NSW* para 116.

<sup>112</sup> *Noye* para 43.

<sup>113</sup> *Noye* para 187.

<sup>114</sup> *Noye* para 681; *Sharp v Biggs* 1935 53 CLR 343 (HCA); *Commonwealth Life Assurance Society Ltd v Brain* 1935 53 CLR 343 (HCA); *A v NSW* paras 51-81.



was put before him. He could not rely on it by simply taking it at face value without having regard to factors which affected its cogency – obviously the tenuous credibility of Lynette Crimmins who was the only person who said that Noye had been promised or given money; but what he was required to do was to decide if, in his own view and on an objective basis, the evidence warranted putting the plaintiff on trial for the charges proposed and, in doing so, to act honestly for the purposes of bringing a wrongdoer to justice. It was obvious that the inspector had personally reached this decision after careful and anxious thought and with the guidance of superiors and advisors. It was his honest opinion that charges should be laid as they were.<sup>115</sup> However, on the question of whether or not there were on an objective basis reasonable grounds for laying the charges,<sup>116</sup> the trial judge held that, since the evidence upon which the charges were to be laid depended on the unreliable evidence of Lynette Crimmins, there was not a reasonable or probable basis upon which to lay the charges, notwithstanding that Inspector Robbins and some others believed that there was.<sup>117</sup>

## **5.2 Continuing or maintaining the prosecution**

In *Landini v State of New South Wales*<sup>118</sup> Hall J held that the element of reasonable and probable cause in the tort of malicious prosecution is not a purely objective one:

It is not a concept regardless of the knowledge or belief of the prosecutor that there was reasonable and probable cause for a charge to be laid but also involves the issue as to whether the prosecutor had reasonable and probable cause to do what he did.<sup>119</sup>

Although two police officers took active steps to maintain the prosecution of the plaintiff in relation to heroin allegedly found in his possession some three years previously, it turned out that these same officers were responsible for planting the said drug in the plaintiff's vehicle. In the circumstances where evidence had been

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<sup>115</sup> *Noye* para 682.

<sup>116</sup> *Noye* paras 683-690.

<sup>117</sup> *Noye* para 690. This finding was upheld by the Court of Appeal in *Noye v Robbins* 2010 WASCA 83 paras 67-70, 189.

<sup>118</sup> *Landini v State of New South Wales* 2008 NSWSC 1280. See also *A v NSW* para 61.

<sup>119</sup> *Landini v State of New South Wales* 2008 NSWSC 1280 para 35.

fabricated, it became obvious that the officers had maintained the prosecution maliciously and without reasonable and probable cause. The case of the appellant therefore revolved around the argument that refraining from taking any steps or mere abstinence from doing anything was insufficient to support a claim for malicious prosecution. It was submitted on appeal that there was no evidence of the two officers-

having actively prevented the giving of evidence by persons who [were] qualified so to do, having suppressed evidence or otherwise having done something. At its highest there was a failure to do something. That is insufficient to attract liability, if only because it denies the application of the rule which requires a coalescence of malice [and] absence of reasonable and probable cause, with an identifiable event or act in prosecuting the plaintiff.<sup>120</sup>

After referring to the authorities on continuing prosecution in malicious prosecution cases,<sup>121</sup> MacFarlan JA held that the conduct of the officer in question satisfied the requirement that, to be liable for malicious prosecution, a defendant "must play an active role in the conduct of the proceedings".<sup>122</sup> The conduct must be such that at least the party gave evidence in support of the prosecution. What happened in this case was equivalent to such a conduct. Here, a document prepared by the officer for the purpose of evidence was, in his presence, tendered to the District Court as evidence. In these circumstances, anyone involved in the proceedings would have witnessed his preparedness, if need be, to mount the witness box to vouch to the contents of the document. For MacFarlan JA:

His presence, without demur to the tender of the document, thus implicitly confirmed its veracity. It also involved (but went beyond) a suppression of the evidence that Mr Knox could have given as to the true circumstances of the arrest of the respondent.<sup>123</sup>

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<sup>120</sup> *State of New South Wales v Landini* 2010 NSWCA 157 para 51 (*Landini*) relying on *Daniels v Telfer* 1933 34 SR (NSW) 99; *Coleman v Buckingham's Ltd* 1963 63 SR (NSW) 171.

<sup>121</sup> See also *Fitzjohn v Mackinder* 1861 Eng R 293; *Martin v Watson* 1996 AC 74 89; *Commercial Union Assurance Co of New Zealand Ltd v Lamont* 1989 3 NZLR 187 207-208.

<sup>122</sup> *A v NSW* para 34.

<sup>123</sup> *Landini* para 69.

In so doing, Mr Knox took active steps to maintain the prosecution of the respondent. This was sufficient to establish the liability of the appellant, which was vicariously liable for a relevant tort committed by the officer.<sup>124</sup>

In the more recent case of *Zreika v State of New South of Wales*<sup>125</sup> it was argued that there were occasions when the police should have stopped the prosecution. In effect, assuming that there was time when they had reasonable and probable cause, that time was finite: as police obtained more and more exculpatory evidence, indicating that they had the wrong person in their custody, they should at each stage have discontinued the proceedings. This argument is supported by the current definition of maintaining prosecution proffered by Simpson J in *Hathaway v State of New South of Wales*<sup>126</sup> and uninterrupted by the Court of Appeal, which overturned the trial judgment on factual grounds.<sup>127</sup> His Honour held that:

Maintaining proceedings is a continuing process. It is conceivable that a prosecutor may act for proper reason (i.e. non-maliciously) or with reasonable and probable cause (or the plaintiff may be unable to prove malice, or the absence of reasonable or probable cause) at the time of institution of proceedings, but, at a later point in the proceedings, and while the proceedings are being maintained, the existence of malice or the absence of reasonable and probable cause may be shown. At any time at which the sole or dominant purpose of maintaining the proceedings becomes an improper (malicious) one, or the prosecutor becomes aware that reasonable and probable cause for the proceedings does not exist, or no longer exists, the proceedings ought to be terminated, or the prosecution is malicious.<sup>128</sup>

Judge Walmsley was persuaded that, on a balance of probabilities, the defendant lacked reasonable and probable cause to continue with the prosecution from the first bail hearing onward. As to the objective aspect of the test laid down in *A v State of New South of Wales*<sup>129</sup> there were the following factors:

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<sup>124</sup> *Landini* para 70.

<sup>125</sup> *Zreika v State of New South Wales* 2011 NSWDC 67 (*Zreika*).

<sup>126</sup> *Hathaway v State of New South Wales* 2009 NSWSC 116.

<sup>127</sup> Although this judgment was reversed on factual grounds in the Court of Appeal - *State of New South Wales v Hathaway* 2010 NSWCA 188 - Simpson J's statement of the law was not interfered with.

<sup>128</sup> *State of New South Wales v Hathaway* 2010 NSWCA 188 para 118.

<sup>129</sup> *A v NSW* para 77.

- a) the extreme dissimilarity between the plaintiff and the description from information witnesses gave police about the man Michael, who was allegedly involved in the shooting;
- b) the lack of any eye-witness identifying the plaintiff as the offender; and
- c) the lack of any evidence of any connecting factor between the plaintiff and anyone associated with the shooting.<sup>130</sup>

In conclusion, the trial judge held that the police lacked reasonable and probable cause from 26 July 2006 onward, when the plaintiff's girlfriend swore in the Local Court on a bail application that he had been with her at the relevant time. The court further found that the police, in particular, Detective Constable Ryder, had no sufficient basis for any honest belief in the case she instituted and then maintained. She knew from 31 July after the witnesses failed to identify the plaintiff as the perpetrator of the offence in a photo array which included the photograph of the plaintiff, that the case lacked reasonable and probable cause.<sup>131</sup> Thus, the prosecutor knew from 31 July 2006 that she had erred in arresting the plaintiff, and that she lacked reasonable and probable cause for the prosecution, but she maintained the case thereafter with that knowledge, hoping she would find enough evidence against him. Indeed, no reasonable person would have believed in the plaintiff's guilt beyond 31 July 2006.<sup>132</sup>

## 6 The approach of the Canadian Supreme Court

In *Nelles*,<sup>133</sup> the Supreme Court of Canada held that the tort of malicious prosecution requires not only proof of an absence of reasonable and probable cause for commencing the proceedings but also proof of an improper purpose or motive. Such a motive must involve an abuse or perversion of the system of criminal justice for ends it was not designed to serve and as such incorporates an abuse of the office of the Attorney General and his agents the Crown Attorneys. In *Proulx*, the plaintiff's

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<sup>130</sup> *Zreika* para 241 read along paras 68, 140.

<sup>131</sup> *Zreika* para 247.

<sup>132</sup> *Zreika* para 293.

<sup>133</sup> *Nelles* 192-193.

former girlfriend was murdered in 1982. A coroner's inquest brought to light some circumstantial evidence casting suspicion on the plaintiff, but his presence at the scene of the murder was not established. In 1983 the police surreptitiously recorded a conversation concerning the murder between the plaintiff and the victim's father. The plaintiff speculated about the murderer's conduct and motivations, but explicitly denied having committed it. In 1986 the prosecutor concluded that there was insufficient evidence to charge the plaintiff or anyone else. In 1991 a radio station broadcast allegations linking the plaintiff to the murder. The plaintiff brought an action in defamation against the radio station, a journalist, and a retired police officer. A witness who saw the plaintiff's photograph's in a newspaper article approached the radio station and stated that he recognised the plaintiff's eyes as those of a man he had encountered on the night of the murder. The retired officer showed the witness a photograph of the plaintiff with his eyes covered. The witness affirmed that they were the eyes of the man he had seen: however, when the witness was shown the full photograph, he stated that the plaintiff was not the man he had seen.

The Crown prosecutor then met with the witness and the retired officer. The prosecutor showed the witness eight photographs of the plaintiff and the witness identified one of them as the man he had seen. The prosecutor consulted his superiors and colleagues before charging the plaintiff with first degree murder. At the trial, the witness was not asked to identify the plaintiff. In his closing address to the jury the prosecutor invited the jury to substitute "I" for "he" in the plaintiff's recorded speculations about the murderer's motivation. The plaintiff was found guilty. The Quebec Court of Appeal overturned the conviction on the ground that the verdict was unreasonable, and entered an acquittal. The Court of Appeal held that the identification procedure was seriously flawed, and that the recording of the conversation between the plaintiff and the victim's father was inadmissible under section 24(2) of the Canadian Charter of Rights and Freedoms. The plaintiff then brought an action for malicious prosecution against the Attorney General of Quebec. The trial judge found that there were no reasonable and probable grounds for laying charges against the plaintiff; that the prosecutor had acted on an improper motive,

and the Attorney General was therefore liable. The Attorney General's appeal was allowed by the Court of Appeal.

A majority of the Supreme Court of Canada allowed the plaintiff's appeal and restored the trial judgment. Having reiterated the *Nelles* tests and holding that the first and second of them were met in this case, the majority zeroed in on the third and fourth elements. In their joint judgment, Lacobucci J and Binnie J (McLachlin CJC and Major J concurring), held that the prosecutor had to have sufficient evidence to believe that guilt could be proved beyond a reasonable doubt in order to have reasonable and probable cause to initiate criminal proceedings. The identification procedure in the present case was extremely flawed and unusual,<sup>134</sup> and the deficiencies in the identification must have been obvious to the prosecutor from the outset. The prosecutor ought to have known that the recording of the conversation between the plaintiff and the victim's father was inadmissible,<sup>135</sup> and that even if the tapes were admissible, they had no probative value.<sup>136</sup> The charges brought against the plaintiff were based on fragments of tenuous, unreliable and likely inadmissible evidence; they were grounded in mere suspicion and hypotheses and could not prove his guilt beyond a reasonable doubt. The proceedings were accordingly not based on reasonable and probable grounds.<sup>137</sup>

According to the Supreme Court in *Miazga 2*, it is well established that the reasonable and probable cause inquiry comprises both a subjective and an objective component, so that for such grounds to exist there must be actual belief on the part of the prosecutor and that belief must be reasonable in the circumstances. However, principles established in suits between private parties cannot simply be transposed to cases involving Crown defendants without necessary modification. While the accuser's personal belief in the probable guilt of the accused may be an appropriate standard in a private suit, it is not a suitable definition of the subjective element of reasonable and probable cause in an action for malicious prosecution against Crown

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<sup>134</sup> *Proulx* para 12.

<sup>135</sup> *Proulx* para 28 relying on *R v Duarte* 1990 65 DLR (4<sup>th</sup>) 240 (SCC).

<sup>136</sup> *Proulx* para 29.

<sup>137</sup> *Proulx* para 34.

counsel. The reasonable and probable cause inquiry is not concerned with a prosecutor's personal views as to the guilt of the accused, but with his or her professional assessment of the legal strength of the case.<sup>138</sup>

Given the burden of proof in a criminal trial, belief in "probable" guilt means that the prosecutor believes, based on the existing state of affairs that proof beyond a reasonable doubt could be made out in a court of law. The public interest is engaged in a public prosecution and the Crown attorney is duty-bound to act solely in the public interest in making the decision whether to initiate or continue a prosecution. This decision may not entirely accord with the individual prosecutor's personal views about a case, but Crown counsel must take care not to substitute his or her own views for that of the judge or jury. Furthermore, where the action is taken against a Crown attorney, the inquiry into the prosecutor's subjective state of belief does not properly belong at the third stage of the test. In the context of a public prosecution, the third element necessarily turns on an objective assessment of the existence of sufficient cause.<sup>139</sup> If the court concludes, on the basis of the circumstances known to the prosecutor at the relevant time, that reasonable and probable cause existed to commence or continue a criminal prosecution from an objective standpoint, the criminal process was properly employed, and the inquiry need go no further. If a judge determines that no objective grounds for the prosecution existed at the relevant time, the court must proceed to the next inquiry, into the fourth element of the test for malicious prosecution.<sup>140</sup>

On the question of malice, the Supreme Court held that "malice" is a question of fact, requiring evidence that the prosecutor was impelled by an "improper purpose".<sup>141</sup> Accordingly, the malice element of the test will be made out when a court is satisfied on a balance of probabilities that the defendant Crown prosecutor commenced or continued the impugned prosecution with a purpose inconsistent with his or her role as a "minister of justice". The plaintiff had to demonstrate on the

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<sup>138</sup> *Miazga 2* paras 58, 59, 63.

<sup>139</sup> *Miazga 2* para 73.

<sup>140</sup> *Miazga 2* paras 76, 77.

<sup>141</sup> *Miazga 2* para 78. See also per Lamer J in *Nelles* 193-194.

totality of the evidence that the prosecutor deliberately intended to subvert or abuse the office of the Attorney General or the process of criminal justice so that he or she exceeded the boundaries of the office of the Attorney General.<sup>142</sup> The need to consider the "totality of all the circumstances" simply meant that a court should review all the evidence related to the prosecutor's state of mind, including any evidence of a lack of belief in the existence of reasonable and probable cause, in deciding whether the prosecution was in fact fuelled by an improper purpose.<sup>143</sup> While the absence of a subjective belief in reasonable and probable cause was relevant to the malice inquiry, it did not equate with malice and did not dispense with the requirement of proof of an improper purpose.<sup>144</sup> By requiring proof of an improper purpose, the malice element ensured that liability would not be imposed in cases where a prosecutor proceeded absent reasonable and probable grounds by reason of incompetence, inexperience, poor judgment, lack of professionalism, laziness, recklessness, honest mistake, negligence or even gross negligence.<sup>145</sup> Malice required the plaintiff to prove that the prosecutor wilfully perverted or abused the office of the Attorney General or the process of criminal justice. The third and fourth elements of the tort must not be conflated.<sup>146</sup>

## 7 Prosecution instigated with reasonable and probable cause

The facts of *Relyant Trading (Pty) Ltd v Shongwe*<sup>147</sup> were somewhat bizarre. The plaintiff had been apprehended as the con man who under a credit agreement had taken a computer and subsequently absconded. The debtor had given false names and identity. The plaintiff was accosted by a salesman of the computer dealer and when he came forward with his identity, he was arrested and detained by the police. He was charged and appeared in court but the charges were later withdrawn. It was a case of mistaken identity. The plaintiff was successful at the trial and was awarded damages for wrongful arrest and malicious prosecution but the Supreme Court of

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<sup>142</sup> *Miazga 2* para 89.

<sup>143</sup> *Miazga 2* para 85.

<sup>144</sup> *Miazga 2* para 86.

<sup>145</sup> *Miazga 2* para 81.

<sup>146</sup> *Miazga 2* para 80.

<sup>147</sup> *Relyant Trading (Pty) Ltd v Shongwe* 2007 1 All SA 375 (SCA) (*Relyant Trading*).



Appeal overturned that award. It was held that to succeed in an action based on wrongful arrest the plaintiff must show that the defendant himself, or someone acting as his agent or employee deprived him of his liberty.<sup>148</sup> Generally, where the defendant merely furnishes a police officer with information on the strength of which the latter decides to arrest the plaintiff, the defendant does not become the one who performed the arrest.<sup>149</sup> Accordingly, the claim for wrongful arrest of the computer dealer must fail, since the arrest was made by the police and not the dealer or its employees.<sup>150</sup>

Liability for malicious prosecution depended not only on an "instigation" - a term of "some complexity" - of the prosecution, but also on the absence of reasonable and probable cause and the presence of *animus iniuriandi*. This must involve an investigation into the state of mind of the dealer's employees and, in particular, the employee who purportedly identified the plaintiff. The liability or otherwise of the defendant would depend on whether or not he had information that led him to believe on objective grounds that the plaintiff was guilty. Here there was the need that persons who had reasonable and probable cause for a prosecution should not be deterred from setting the criminal process in motion against those who they believed had committed offences, even if in so doing they were actuated by indirect and improper motives.<sup>151</sup> The court came to the conclusion that the employee who identified the plaintiff honestly believed that the plaintiff was the person who defrauded her employers. Any reasonable person in her position acting on the information available would have concluded that the plaintiff was probably the person who committed the offence in question. The plaintiff therefore failed to show that the dealer acted without reasonable and probable cause.<sup>152</sup>

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<sup>148</sup> *Smit v Meyerton Outfitters* 1971 1 SA 137 (T) 140D-E.

<sup>149</sup> *Relyant Trading* para 6; *Birch v Johannesburg City Council* 1949 1 SA 231 (T) 238-239.

<sup>150</sup> *Relyant Trading* para 8.

<sup>151</sup> *Relyant Trading* para 14; *Beckenstrater v Rottcher and Theunissen* 1955 1 SA 129 (A) 135D-E.

<sup>152</sup> *Relyant Trading* para 15. Cf in *Bayett v Bennett* 2012 ZAGPJHC 9 paras 168-169, 173 where it was held that the defendants chose to depose to affidavits for purposes of the criminal complaint not only by making false and distorted allegations but also by omitting to disclose full material facts to the police. They knew that they had no reasonable or probable cause to believe, based on reasonable grounds, that the institution of criminal proceedings was justified, but had an ulterior purpose in instituting those proceedings.

## 8 Conclusion

An attempt has been made in this article to identify the boundaries of reasonable and probable cause in malicious prosecution, and reasonable grounds to suspect in the case of unlawful arrest and detention and the tort of abuse of process. The point was made that the requirement of reasonable and probable cause plays such a central role in an action for malicious prosecution that the success of such an action depends largely on there being a lack of reasonable and probable cause for the prosecution among the other three requirements. The presence or absence of reasonable and probable cause more or less dictates whether or not there is any basis for the prosecution and leads the way to the inquiry as to whether there was malice or improper purpose on the part of the prosecutor. Again, whether or not the defendant lacked reasonable and probable cause to instigate, initiate or continue the prosecution depends ultimately on the facts and information carefully collected and objectively assessed, on which the prosecutor based his/her belief that the plaintiff was guilty; it is not the probability that those facts would secure a conviction. Yet the prosecutor is faced with the difficulty in that his/her conduct in this regard is subject to both the subjective and objective tests. In evaluating the material that is available to him/her arising from the investigations, the objective sufficiency of the material must be considered by the prosecutor and assessed in the light of all the facts of the particular case. In effect, his/her belief must be honestly held and founded on reasonable grounds, such that would lead a reasonable person in his/her position to hold a similar belief. It essentially requires the plaintiff to establish a negative, rather than for the defendant to prove the existence of reasonable and probable cause.

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