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MAGCO LEGAL LESSONS #19

LEGAL TOPIC: MALICIOUS PROSECUTION

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According to the author of *Commonwealth Caribbean Tort*, the tort of malicious prosecution is committed where the defendant maliciously and without reasonable and probable cause initiates against the plaintiff a criminal prosecution which terminates in the plaintiff's favour, and which results in damage to the plaintiff's reputation, person or property. The essence of malice requires the claimant to prove that the defendant deliberately misused the process of the court: *Willers v Joyce [2016] UKSC 43*. The most obvious case is where the claimant can prove that the defendant brought the proceedings in the knowledge that they were without foundation or basis and still pursued them through the Courts.

The tort of malicious prosecution seeks to hold a balance between two opposing interests of social policy, namely:

(i) the interest in safeguarding persons from being harassed by unjustifiable litigation; and

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(ii) the interest in encouraging citizens to assist in law enforcement by bringing offenders to justice.

The ingredients of the tort of malicious prosecution are set out in ***Clerk & Lindsell on Tort (20th Ed. Pg 1070, para 16:09)*** as follows:

“In an action for malicious prosecution the claimant must show first that he was prosecuted by the defendant, that is to say that the law was set in motion against him on a criminal charge; secondly, that the prosecution was determined in his favour; thirdly, that it was without reasonable and probable cause; fourthly, that it was malicious. The onus of proving every one of these is on the claimant. Evidence of malice of whatever degree cannot be invoked to dispense with or diminish the need to establish separately each of the first three elements of the tort.”

The aforementioned principles were applied in the local case ***of Darryl Bishop v The Attorney General of Trinidad And Tobago CV2015-03348***, the Court propounded that it is settled law that in a claim for malicious prosecution, the Claimant must prove:

- (i) that the law was set in motion on a charge for a criminal offence by the Defendant;
- (ii) that he was acquitted of the charge or that the proceedings were otherwise determined in his favour;
- (iii) that in instituting and continuing the prosecution the defendant did so without reasonable and probable cause;
- (iv) that the defendant was actuated by malice and

(v) as a consequence the claimant suffered damage.

These principles were also applied in the Court of Appeal *Manzano v The Attorney General of Trinidad and Tobago Civil Appeal No.151 of 2011*.

Reasonable and probable cause

In the case of *Mustapha Ghanny v Police Constable Dev Ramadhin No. 16969 and Attorney General Of Trinidad And Tobago CV 2015-01921*, Justice Rajkumar examined what was reasonable and probable cause. The learned Judge referred to the case of *Hicks v Faulkner (2 [1881] AER 1987 at 191* paragraph b, c) Hawkins J stated:

“I should define reasonable and probable cause to be an honest belief in the guilt of the accused, based upon 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 ordinary prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed...”

Hawkins J stated : *“The question of reasonable and probable cause depends in all cases not upon the actual existence, but upon the reasonable bona fide belief in the existence of such a state of things as would amount to a justification of the course pursued in making the accusation complained of...No matter whether the belief arises out of the recollection and memory of the accuser, out of information furnished to him by another...The distinction between facts necessary to establish actual guilt and those required to establish a reasonable*

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bona fide belief in guilt should never be lost sight of considering such case as I am now discussing. Many facts admissible to prove the latter would be wholly inadmissible to prove the former.”

Whether there is reasonable and probable cause is a question to be determined by the Court upon an assessment of the evidence. The burden of proving it lies on the plaintiff. **Halsbury’s Laws Vol.45(2)** states:

“Reasonable and probable cause for a prosecution has been said to be 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.”

Halsbury’s Laws further explained that the presence of reasonable and probable cause for a prosecution does not depend upon the actual existence, but upon a reasonable belief held in good faith in the existence of such facts as would justify a prosecution.

It is important to note that a prosecutor is not required to test every possible relevant fact before he/she takes action. A prosecutor need only ascertain whether there is reasonable and probable cause for a prosecution.

Malice

The Courts have continued to explore the issue of malice throughout the years. In the case of ***Alistaire Manzano v The Attorney General of***

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Trinidad and Tobago C.V. 2010-2754, the Honourable Justice Rahim stated that for malice to be proved, there must be what is known as ‘malice in fact’. **Halsbury’s Laws** states:

“A Claimant in claim for damages for malicious prosecution or other abuse of legal proceedings has to prove malice in fact indicating that the defendant was actuated either by spite or ill-will against the Claimant or by indirect or improper motives. If the defendant had any purpose other than that of bringing a person to justice, that is malice.”

In **Glinski v McIver [1962] AC 726**, where malicious prosecution was alleged, Lord Devlin noted, as a matter of agreement, that malice covered “any motive other than a desire to bring a criminal to justice”. In the local case **Kadir Mohammed v The Attorney General of Trinidad and Tobago CV2013-04647** the Honourable Justice Kokoram considered the principle espoused by Lord Devlin and stated that in the present case, the said principle could be reformulated as “any motive other than a desire to prosecute the Claimant”.

In the local case of **Sandra Juman v The Attorney General Civil Appeal No. 22 of 2009**, Justice of Appeal Mendoca when analysing the issue of malice stated that malice is proven by showing that the police officer was “*motivated by spite, ill-will or indirect or improper motives.*” Malice may be inferred from an absence of reasonable and probable cause but it is this may not be so in every case. Justice of Appeal Mendoca referred to another case and explained that even if there is want of reasonable and probable cause, a judge might nevertheless think that the police officer acted honestly and without ill-will, or without any other motive or desire than to do what he bona fide believed to be right in the interests of justice: **Hicks**

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(supra). The critical feature which has to be proved is that the proceedings instituted by the defendant were not a bona fide use of the court's process.

According to Justice of Appeal Mendonça in *Manzano (supra)*, the proper motive for a prosecution is a desire to secure the ends of justice. As such, a defendant would be deemed to have acted maliciously if he/she initiated the prosecution through spite or ill-will or for any other motive other than to secure the ends of justice. It follows therefore that even if a claimant cannot affirmatively establish spite or ill-will or some other improper motive, he may still succeed in establishing malice if he can show an absence of proper motive.

It is important to note that where a plaintiff failed to discharge the onus of proving that the prosecution was undertaken without reasonable and probable cause, it had become unnecessary to consider the question of malice: *Randolph Burroughs v. AG, HCA 4702/86 and 2418/87*.

Malicious Prosecution - Damages

In *Thadeus Clement v the Attorney General of Trinidad and Tobago Civ. App. 95 of 2010* the Honourable Jamadar JA stated that apart from pecuniary loss, the Courts will consider the following heads of damages for the tort of malicious prosecution, namely:

- (i) Injury to reputation, to character, standing and fame.
- (ii) Injury to feelings for indignity disgrace and humiliation caused and suffered
- (iii) Deprivation of liberty by reason of arrest, detention and/or imprisonment.

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The Court may also award a Claimant exemplary damages in instances where the police have behaved in an oppressive, arbitrary or unconstitutional manner and where the Court having regard to the award for compensation (inclusive of aggravated damages) is of the view that it is not sufficient to mark the Court's disapproval of the actions of the agents of the State, in these circumstances, the Police.

In the case of **KAYODE ALLEYNE -V- Police Officer Carlon Denoon #16038, (a.k.a. "DJ Simple C"), Police Officer Leon Tobias #17258 and the Attorney General**, the High Court recently awarded \$125,000.00 to the Claimant for Malicious Prosecution by the two Police Officers. In her Judgment the Honourable Justice Jacqueline Wilson stated that found that the decision by Police Officer Carlon Denoon, #16038 to lay the charge of unlawful and Malicious wounding against Kayode Alleyne, was overborne by a desire to assist PC Leon Tobias #17258 in justifying the use of his Firearm when he shot Alleyne in a crowd and it was an improper manipulation of the Legal process when they went on to later charge Alleyne for maliciously wounding PC Tobias with a cutlass. Justice Wilson made reference to the Magistrate's comments which were uttered when she dismissed the Malicious Wounding charge against Alleyne. In dismissing the charge of Malicious Wounding the Magistrate commented that there appeared to be an excitement by PC Tobias in trying to account for why he discharged his gun, because he had to account for why he discharged his gun, "he was just accounting for why he did it". There was no evidence of him being wounded by Alleyne and no evidence of a cutlass was ever produced and so the matter was dismissed and Alleyne then sued in the High Court for Malicious Prosecution. In the High Court Judgment, Justice Wilson made the very strong statement that Police Officer Carlon Denoon #16038 did not have an honest belief in the Malicious Wounding charge which he laid against Alleyne. Justice Wilson held that the charge against Alleyne was groundless, and that Police Officer Carlon Denoon #16038 knew it to be so and that in laying the charge against Alleyne, he was motivated by Malice. Thus the claim for Malicious Prosecution succeeded.

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Notwithstanding this, one still has to be careful and make sure that your case is properly founded and strongly grounded before you bring it to Court as just last week Justice Seepersad had to upbraid Attorneys who brought a case for Malicious Prosecution in circumstances where the Court clearly felt that there was no legal or justiciable basis for so doing.

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