

# A town called...

*In the first of two articles, Ian McDonald and Daniel Cook examine the possible expansion of malicious prosecution*



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**'Other torts, such as defamation and malicious falsehood, already protect interests of personality, and if the protection they afford proved to be inadequate, a better solution may be to extend their scope rather than to extend the tort of malicious prosecution beyond its existing boundaries.'**

**O**n 7 March 2016, the Supreme Court heard *Willers v Joyce & anor (as executors of Albert Gubay (deceased))*. At time of writing, its judgment is expected in early June 2016.

This judgment will provide welcome clarity on the scope of the tort of malicious prosecution, in particular whether it offers a remedy to the victim of maliciously brought civil claims or whether its operation is limited to criminal prosecutions (and a small category of other cases, which generally involve the use of the coercive power of the legal process on an *ex parte* basis).

In anticipation of the Supreme Court's decision, this article summarises the current law, as explained in the first instance decision, *Willers v Gubay* [2015], from which the appeal has been brought (following a leapfrog certificate to permit the case to go directly to the Supreme Court) and the potential significance of the Supreme Court's judgment. Our second article will report on the currently pending judgment from the Supreme Court.

### Background facts

The malicious prosecution claim arose following the discontinuance of proceedings brought by a company controlled by Mr Gubay alleging negligence and breach of fiduciary duty in connection with certain acts alleged to have been undertaken by Mr Willers as a director of that company. Mr Willers contended that Mr Gubay knew that the claim was false because he was himself the author of the acts complained of. The claim was discontinued two weeks before the start of a five-week trial and Mr Willers was awarded his costs.

Following the discontinuance of the proceedings against him, Mr Willers brought fresh proceedings against Mr Gubay claiming damages for malicious prosecution. Mr Gubay responded with an application to have the claim struck out on the basis that the tort of malicious prosecution of civil proceedings is unknown to English law.

### What is malicious prosecution?

In outline, the tort of malicious prosecution provides a civil remedy to someone against whom an action is brought without reasonable and proper cause and for malicious reasons.

To establish the tort, the claimant must establish the following:

- the law was 'set in motion' against the claimant;
- the prosecution was determined in the claimant's favour;
- it was brought without reasonable and proper cause;
- it was malicious; and
- the claimant suffered loss or damage as a result.

In *Saville v Roberts* [1698] Holt CJ defined the interests protected by the tort of malicious prosecution in the following terms:

There are three sorts of damages, any one of which is sufficient to support this action. First, damages to fame, if the matter whereof he be accused is scandalous. Secondly, to his person, whereby he is imprisoned. Thirdly, to his property, whereby he is put to charges and expenses.

However, as explained by Lord Steyn in *Gregory v Portsmouth City Council* [2000], the first of the above elements is understood to mean that the tort is limited to the malicious prosecution of criminal proceedings and a limited category of cases of abuse of civil process (for example, the malicious presentation of a winding-up order or bankruptcy petition).

It was argued in *Willers* that the High Court should instead follow the more recent decision in *Crawford Adjusters v Sagicor General Insurance (Cayman) Ltd* [2013], an opinion of the Privy Council hearing an appeal from the Cayman Islands.

### Gregory

The principal issue in *Gregory* was whether the tort was capable of applying to the malicious institution of domestic disciplinary proceedings by a local authority against a councillor, but the House of Lords also considered (*obiter*) whether there is a general tort of maliciously instituted civil proceedings on the basis that it would be unsatisfactory to leave such an important issue unresolved.

Lord Steyn (who delivered the only speech) concluded that the tort of malicious prosecution is not generally available in respect of civil proceedings. He identified the distinctive feature of the tort as being the defendant having abused the coercive power of the state. The paradigm case is the malicious prosecution of criminal proceedings, but the established situations where the tort extends beyond criminal proceedings share that distinctive feature insofar as they involve the abuse of civil legal process. Lord Steyn

acknowledged that the tort extended to the malicious presentation of a winding-up or a bankruptcy petition. The rationale for such extension is that because winding-up and bankruptcy petitions are required to be advertised prior to the hearing, the defendant's reputation can be injured before they can show that the foundation for the petition is false.

The House of Lords was not prepared to extend the scope of the tort to cover disciplinary

prevented the board reaching that conclusion, and was influenced by there being no other tort which he considered capable of addressing the injustice which the claimant had suffered.

Lord Kerr also attached importance to Lord Steyn having been 'tolerably confident' that the injustice suffered by victims of malicious prosecution of civil proceedings could be adequately redressed by other means: he saw the case before the Privy Council as showing the inadequacy of alternative

*Lord Steyn identified the distinctive feature of the tort as being the defendant having abused the coercive power of the state.*

proceedings, concluding that it should remain within its existing boundaries. Lord Steyn noted that other torts, such as defamation and malicious falsehood, already protect interests of personality, and if the protection they afford proved to be inadequate, a better solution may be to extend their scope rather than to extend the tort of malicious prosecution beyond its existing boundaries.

### Crawford Adjusters

However, in *Crawford Adjusters* the Privy Council held by a majority of three to two that there is a tort of malicious prosecution of civil proceedings.

Lord Wilson did not consider that Lord Steyn's analysis in *Gregory*

torts and why that gap needed to be filled by the tort of malicious prosecution.

Lord Sumption (with whom Lord Neuberger agreed) disagreed with that analysis. In his opinion, it was clear that there was no general tort of malicious prosecution of civil proceedings. He noted that 'there are dicta and dicta' and while the House of Lords' refusal to expand the scope of the tort in *Gregory* was *obiter*, the question of whether there was a general tort of malicious prosecution in civil proceedings had been fully argued both in the Court of Appeal and in the House of Lords, and the answer given at both levels was as carefully considered as any *ratio decidendi*.

Lord Sumption did not consider that

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anything had changed since *Gregory* to undermine the authority of Lord Steyn's statement of the law.

Furthermore, Lord Sumption concluded that in *Crawford Adjusters*, on the judge's findings of fact, the only tort of which the appellants could avail would not be an extension of any existing tort but rather would have to be an entirely new tort of:

*The costs of 'clearing its name' by defending the claim through to trial could put the viability of a defendant's business at risk.*

... maliciously making damaging allegations of fact in the course of advancing a genuine but unfounded claim in civil proceedings...

and remarked that:

... the law has never been prepared to countenance such a tort in the past and should not be prepared to do so now.

### The decision in *Willers*

It was argued on behalf of Mr Willers that *Crawford Adjusters* could (and should) be followed in preference to *Gregory* on two grounds. First, it was argued that it was a 'foregone conclusion' that this is the approach that would be taken by the Supreme Court. Secondly, *Crawford Adjusters* was characterised as a decision interpreting *Gregory* and therefore was not inconsistent with it.

The deputy judge considered in what circumstances it would be permissible to follow the Privy Council in favour of the House of Lords (or now the Supreme Court). She concluded that *Crawford Adjusters* was a departure from (rather than an interpretation of) Lord Steyn's statement of the law in *Gregory* and directed herself that she could only follow it if she was satisfied that:

- the circumstances of the case were quite exceptional; and
- it was a foregone conclusion that this is what the Supreme Court would do.

This threshold was not met. Among other reasons, the strong dissenting opinion of Lord Sumption (supported by Lord Neuberger) meant that it could not be said that the result of any appeal to the Supreme Court would be a foregone conclusion and the deputy judge was of the view that the circumstances were not sufficiently exceptional to warrant a departure from the

House of Lords' decision in *Gregory*.

The deputy judge therefore concluded that, on the basis of English law as it is currently understood, the claim had to be struck out as disclosing no cause of action.

### Conclusion

It is now for the Supreme Court to determine the scope of the tort of malicious prosecution.

It remains to be seen whether it will be persuaded that it should be extended to meet the criticism made by Lady Hale in *Crawford Adjusters* that the existing boundaries are 'either unclear or make little sense in today's world' or whether, on the other hand, it sees greater force in Lord Sumption's concern that if the tort extends to civil proceedings of a private nature it would be both uncertain and potentially very wide.

When Lord Steyn examined the scope of the tort in *Gregory*, he explained the limited scope of the tort in the following terms:

The traditional explanation for not extending the tort to civil proceedings generally is that in a civil case there is no damage: the fair name of the defendant is protected at trial and judgment of the court.

However, he recognised that this was no longer plausible in modern times when allegations made in litigation are widely disseminated in

the media. The rapid development of social media over the years since *Gregory* has heightened the risk that a defendant will suffer reputational harm which will not be erased by a finding in its favour at trial. For example, unfounded allegations regarding a pharmaceutical manufacturer could cause lasting damage to its brand and to consumers' confidence in its products, particularly if those allegations linger on the internet long after the disposal of the original proceedings.

Even if the defendant suffers no lasting damage to its reputation as a result of the unfounded allegations made against it, the costs of 'clearing its name' by defending the claim through to trial could put the viability of its business at risk. Although the successful defendant can generally expect costs to be awarded in its favour, a costs award (even on the indemnity basis) cannot be expected fully to compensate the defendant, particularly allowing for wasted management time and the general strain on its business of diverting resources to defending proceedings.

On the other hand, if the Supreme Court decides that the tort of malicious prosecution should not extend to civil claims, its judgment may provide some useful guidance on the extent to which other torts already adequately protect the interests identified by Holt CJ.

Either way, the case provides a welcome opportunity for the Supreme Court to examine the remedies available to businesses and individuals that have suffered damage as a result of a civil action against them that has no real foundation and was brought for malicious reasons. Clarity in this area will bring renewed focus to the risk faced by any litigant which brings civil proceedings with the objective of inflicting damage on a competitor rather than for the genuine pursuit of a civil remedy. ■

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

*Gregory v Portsmouth City Council* [2000] UKHL 3

*Saville v Roberts* (1698) 12 Mod Rep 208

*Willers v Gubay* [2015] EWHC 1315 (Ch)