Malice in wonderland

In the second of two articles, Ian McDonald and Daniel Cook conclude their consideration of malicious prosecution

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'The Supreme Court had to determine whether the tort is available only in respect of the malicious prosecution of criminal proceedings and certain limited types of action, or whether its scope extends to the malicious prosecution of civil proceedings.'

On 20 July 2016, a nine-member panel of the Supreme Court handed down its judgment in *Willers v Joyce* [2016]. The panel decided by a 5:4 majority that a claim for malicious prosecution of civil proceedings is sustainable in English law. The leading judgment was given by Lord Toulson, with whom Lady Hale, Lord Kerr and Lord Wilson agreed. Lord Clarke delivered a concurring judgment, and dissenting judgments were given by Lords Neuberger, Mance, Sumption and Reed.

The case reached the Supreme Court following the granting of a 'leapfrog' certificate by the High Court, under s12 of the Administration of Justice Act 1969. The certificate was granted because the High Court had concluded that it was bound by House of Lords authority which conflicted with the views more recently expressed by the Judicial Committee of the Privy Council – the law needed to be clarified at Supreme Court level.

The Supreme Court had to determine whether the tort is available only in respect of the malicious prosecution of criminal proceedings and certain limited types of action, or whether its scope extends to the malicious prosecution of civil proceedings.

As well as addressing that issue, the Supreme Court also delivered a separate judgment (at 44) on the status of Privy Council decisions in the doctrine of precedent.

Background facts

Mr Willers was sued by Langstone Leisure Ltd for alleged breaches of his duties when he was a director of the company. Mr Willers defended the action and issued a third-party claim for an indemnity against Mr Gubay on the ground that he had acted under Mr Gubay's direction when committing the acts on which the claim against him was based. The claim against Mr Willers was discontinued two weeks before the start of a five-week trial and he was awarded his costs in the usual way.

Mr Willers then brought fresh proceedings against Mr Gubay claiming damages for malicious prosecution. According to Mr Willers, the claim against him had been part of a campaign by Mr Gubay to do him harm. He alleged that Mr Gubay was motivated by malice and had caused the Langstone claim to be brought against him without reasonable cause.

Mr Gubay applied to have the claim struck out on the basis that the tort of malicious prosecution of civil proceedings is unknown to English law.

Conflicting decisions

Prior to this decision, there were two conflicting authorities.

First, the House of Lords case of *Gregory v Portsmouth City Council* [2000] related to whether the tort of malicious prosecution was available in respect of disciplinary proceedings. Lord Steyn, who gave the main speech, also considered the boundaries of the tort generally. He accepted that there was a stronger case for extending the tort to civil proceedings generally than to disciplinary proceedings, but 'for essentially practical reasons' he was not persuaded that its scope ought to be extended.

He took into account the protection given by other related torts such as defamation, malicious falsehood, conspiracy and misfeasance in public office. Instead of extending the scope

of the tort of malicious prosecution, if those other torts did not provide adequate protection, a better solution may be to extend their scope rather than to extend the scope of the tort of malicious prosecution.

Secondly, in *Crawford Adjusters v Sagicor General Insurance (Cayman) Ltd* [2013] a 3:2 majority in the Privy Council took the opposite view, concluding that the tort of malicious prosecution did extend to civil proceedings. Taking into consideration Lord Steyn's reasoning in *Gregory*, Lord Wilson was influenced by there being no other tort which he considered capable of addressing the injustice that the claimant had suffered. The alternative torts left a gap which needed to be filled by the tort of malicious prosecution, rather than by following Lord Steyn's suggested approach in *Gregory* of extending other torts.

In deciding whether it preferred the analysis in *Gregory* or *Crawford Adjusters*, the Supreme Court reviewed the historical authorities to identify whether they supported the existence of a general tort of malicious prosecution. It also looked closely at the policy considerations for and against permitting such claims to be brought.

The authorities

In order to identify the scope of the tort of malicious prosecution, the Supreme Court analysed a number of cases stretching back to the seventeenth century. Their Lordships recognised that such an exercise was not without difficulty.

Lord Toulson cautioned that the early cases are capable of more than one respectable interpretation and noted that it may be that there was never a time when there was a general understanding of the precise boundaries of the tort. His view was that the scope of the tort should not depend on who has the better argument on a controversial question about the scope of the law some centuries ago.

Those cautionary words are reflected in the dissenting judgments. Lord Neuberger pointed out that the old judgments often refer to rules and procedures that are no longer part of our legal system, can be hard to interpret and are not always reliably reported – and do not speak with one voice.

Similarly, Lord Reed cautioned that 'the significance of the historical inquiry should not be exaggerated'. While he recognised that it can often be valuable to examine historic cases in order to see how the modern law has come to be shaped as it is, Lord Reed stated that the Supreme Court must bear in mind that it is deciding the law for the 21st century, and as such the body of law developed by the judiciary ought to be 'well-suited to the conditions of the present day'.

The conclusion reached by Lord Toulson was that the authorities show how the courts had fashioned the tort to do justice in situations where a person has suffered injury as a result of the malicious use of legal process without any reasonable basis. This conclusion was echoed by Lord Clarke, who did not regard Lord Toulson's analysis of the historical cases as conclusive, but was of the opinion that the cases showed the willingness of the court to grant a remedy in novel circumstances, where provable loss had resulted from civil proceedings brought maliciously and without any proper justification.

In contrast, the minority view (particularly the analysis of Lord Mance) was that the old authorities did not establish that the tort of malicious prosecution extended to giving a remedy for the malicious pursuit of civil proceedings.

Policy arguments

Lord Toulson started by summarising the case in favour of permitting claims for the malicious prosecution of civil proceedings, citing Holt CJ's observation in *Saville v Roberts* [1698] that:

> ... if this injury be occasioned by a malicious prosecution, it is reason and justice that he should have an action to repair him the injury.

Lord Toulson thought that 'this appeal to justice is both obvious and compelling', and considered that it would be instinctively unjust for there to be no recourse for a person who suffers injury as a result of the malicious prosecution of civil proceedings – this was the reasoning which had led judges to create the tort of malicious prosecution.

In assessing the policy arguments on the scope of the tort, Lord Toulson addressed a number of counter-arguments identified in the other judgments. Lord Neuberger listed 12 such arguments or concerns and similar points can be found in the other dissenting judgments – the following paragraphs give a flavour of the general policy considerations.

Lord Toulson considered that it would be instinctively unjust for there to be no recourse for a person who suffers injury as a result of the malicious prosecution of civil proceedings.

There was a concern that extending the tort of malicious prosecution carried an unacceptable risk of unmeritorious claims, which would deter those with valid claims and be contrary to the desirability of avoiding satellite litigation.

Lord Toulson noted that there were already many deterrents to litigation, such as uncertainty, time and expense. He was not aware of any evidence that the exposure to indemnity costs faced by a claimant who brings civil proceedings on an improper basis had deterred those with honest claims from pursuing them.

Would the extension of the tort of malicious prosecution to civil proceedings lead to a duplication of remedies, given the potential overlap with other torts? Lord Toulson concluded that *Crawford Adjusters* (at 17) and the present case showed that other torts did not adequately protect litigants from the consequences of maliciously prosecuted civil claims.

Lord Sumption (dissenting) was concerned that the volume of litigation

had already increased exponentially in the last 70 years, and that increasing the opportunities for bringing secondary actions was undesirable. However, while Lord Toulson accepted that there is a public interest in avoiding unnecessary satellite litigation, he did not regard a claim for malicious prosecution as generally constituting a collateral attack on the outcome of the first proceedings. Where the damages claimed are based on damage to reputation, damage to health or loss of earnings, the claim would not involve a collateral attack on the first proceedings. However, insofar as the damages claimed in the malicious prosecution action are costs incurred in defending the first action which the judge in that action had decided not to award, that would be objectionable as a collateral attack on the judge's decision.

There is a difference between imposing a duty of care and imposing liability for proceedings that are maliciously instituted and brought without reasonable or probable cause.

Lord Toulson did not consider that recognising a tort of malicious prosecution of civil proceedings would be inconsistent with there being no duty of care between litigants – there is a difference between imposing a duty of care and imposing liability for proceedings that are maliciously instituted and brought without reasonable or probable cause. The same distinction applies in criminal cases, where the police owe no duty of care toward a suspect, but that does not mean that they are immune from the tort of malicious prosecution. To highlight the distinction between careless and intentional conduct, Lord Toulson turned to Oliver Wendell Holmes Jr's colourful observation that 'even a dog distinguishes between being stumbled over and being kicked' (*The Common Law*, 1909, lecture 1).

Lord Toulson did not accept that permitting claims for the malicious prosecution of civil proceedings would be inconsistent with witness immunity from civil liability, nor did he agree that the logical corollary was permitting claims arising from the malicious defence of a claim (noting the distinction between the initiation of proceedings and steps taken later which may involve bad faith, and for which the court can impose sanctions). He also rejected the proposition that the tort should be confined to persons exercising the coercive power of the state.

So, overall the reasons put forward in the dissenting judgments were not enough to persuade the majority that malicious prosecution should not extend to civil proceedings.

Requirements of malicious prosecution

But if such a claim is sustainable in English law, what test must the claimant satisfy? Lord Toulson noted that a claimant would have a 'heavy burden to discharge' to establish a malicious prosecution claim.

Lord Mance noted that the pursuit of an unfounded claim had never been actionable in itself, so the concept of malice is key. He expressed concerns regarding the role played by the concept of malice. To meet these concerns, Lord Toulson referred to a two-limbed test, differentiating between the requirement to show the absence of reasonable and proper cause and the requirement to show malice (but recognising that what he said on these points was *obiter*).

To meet the first requirement, the claimant would need to show that proceedings had been brought against them without reasonable and probable cause. This test involves overcoming a higher hurdle than showing that the claimant in the underlying proceedings did not believe their claim would succeed – it would be necessary to show that the underlying proceedings had been brought where there was no proper case to put before the court.

Secondly, they would need to show that the party who brought those proceedings did so maliciously. Lord Toulson looked first at the general meaning of malice, which had been explained in *Bromage v Prosser* [1825] as follows:

> Malice, in common acceptation, means ill-will against a person, but in its legal sense it means a wrongful act, done intentionally, without just cause or excuse.

Applying that to malicious prosecution, a claim will be malicious if the claimant had deliberately misused the process of the court. The process of the court would be misused where, for example, it can be shown that the underlying claim had been brought in the knowledge that it had no foundation. It may also arise where a claimant is indifferent as to whether the allegation can be supported by evidence, but nevertheless brings the claim 'to secure some extraneous benefit to which he has no colour of a right'. The critical feature is that the proceedings 'were not a bona fide use of the court's process'.

The Supreme Court unanimously decided that a judge should not follow a decision of the Privy Council if it is inconsistent with the decision of a court by which the judge is bound. However, this is subject to an important exception.

Doctrine of precedent

In its second judgment in this case, the Supreme Court considered:

> ... whether the Courts of England and Wales should continue to treat decisions of the Privy Council, made by a board comprising solely of serving Supreme Court Justices who have heard full argument and made their decision on the basis of English law, as having no status as legal precedent in England and Wales.

The Supreme Court unanimously decided that a judge should not follow a decision of the Privy Council if it is inconsistent with the decision of a court by which the judge is bound. However, this is subject to an important exception: in an appeal to the Privy Council that involves an issue of English law on which a previous decision of the Supreme Court, House of Lords or Court of Appeal is challenged, the members of the Privy Council can, if they think appropriate, not only decide that the previous decision was wrong, but also can expressly direct that domestic courts should treat their decision as representing the law of England and Wales.

This approach was considered sensible in view of the fact that the Privy Council normally consists of the same judges as the Supreme Court and its procedures enable it to have advance notice of such an issue and form an appropriate panel (in terms of constitution and size) to hear the appeal.

Conclusion

This is a landmark decision on the availability in English law of the tort of malicious prosecution in relation to civil proceedings. It was however decided on the narrow question of whether such a claim is sustainable in principle, leaving questions regarding causation and the types of loss that can be recovered to be developed later.

While an important question on the scope of the tort of malicious prosecution has now been answered, it remains to be seen how far the tort will develop. It will also be interesting to see whether it might have the 'chilling effect' on civil litigation that Lord Neuberger predicted and whether it might open the floodgates to a rush of claims. Lord Toulson drew attention to the 'heavy burden' of satisfying the test to establish a successful claim and judges in future cases are likely to be careful not to let it become a tactical weapon to deter genuine claims, while giving a remedy to those who suffer loss as a result of unfounded proceedings being brought against them for malicious reasons. ■

Bromage v Prosser
(1825) 4 B&C 247

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 Joyce & anor (in substitution for and in their capacity as executors of Albert Gubay (deceased)
[2016] UKSC 43