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C Okpaluba

Proof of malice in the law of malicious prosecution: A contextual analysis of Commonwealth decisions

SUMMARY

Generally, malice is a difficult term to define. But, as an element of the law of malicious prosecution, it is likened to spite, ill will or vengeance. In this context, malice represents improper purpose, one alien to the criminal justice system. It emphasises the dominant purpose for the prosecution as to whether it is an improper invocation of the criminal process. Although malice is a separate factor in determining malicious prosecution, it is indeterminate in nature as it tends to overlap with the requirement of reasonable and probable cause. Where the objective sufficiency of the material considered by the prosecutor in deciding to prosecute is satisfied, it is unlikely that malice can be imputed. Whereas from a lack of reasonable and probable cause improper purpose could be inferred. As malice contemplates deliberate intentional act, it is argued that negligence, whatever the degree, will not suffice.

Bewys van kwaadwilligheid in die geval van kwaadwillige vervolging: 'n kontekstuele analise

Kwaadwilligheid is moeilik definieerbaar. As 'n element van die misdryf van kwaadwillige vervolging kan dit vergelyk word met nydigheid, haat en wraak. In hierdie konteks verteenwoordig kwaadwilligheid 'n onbehoorlike doel wat vreemd aan die strafreg is. Dit beklemtoon die hoofrede van die vervolging met betrekking tot die vraag of dit 'n onbehoorlike aanwending van die strafreg is. Alhoewel kwaadwilligheid 'n aparte faktor ten opsigte van kwaadwillige vervolging is, is dit moeilik bepaalbaar aangesien dit oorvleuel met die vereiste "reasonable and probable cause". Waar die inligting waarop die aanklaer sy besluit om te vervolg baseer, voldoende is, is dit onwaarskynlik dat kwaadwilligheid toegeskryf kan word. Terwyl in die geval van die afwesigheid van "reasonable and probable cause" 'n onbehoorlike doel afgelei kan word. Aangesien kwaadwilligheid 'n opsetlike handeling veronderstel, word daar aangevoer dat nalatigheid van enige aard nie voldoende sal wees om die misdryf te bewys nie.

C Okpaluba, Adjunct Professor of Law, Nelson Mandela School of Law, University of Fort Hare.

1. Introduction

Although malice has always played and continues to play a very important role in claims for malicious prosecution,[1] its meaning remains unclear, as in other branches of the law of civil liability.[2] Quite apart from the problem of the definition of malice as a requirement of malicious prosecution, there are other issues relating to its role in this regard which this article investigates further. It is, therefore, appropriate to evaluate individual cases so as to ascertain the manner in which the courts across the Commonwealth have tackled this universal problem of the common law.

Quite recently, in an attempt to refocus malicious prosecution in the light of the modern system of professional prosecution as against the historical private prosecution through which the action developed, the High Court of Australia in *A v New South Wales and Another*[3] extensively revisited the tort with particular emphasis on malice and reasonable and probable cause.[4] In some Canadian decisions, the Supreme Court had reviewed the law of malicious prosecution in the light of the professional prosecutorial services prevalent in modern times.[5] Recently, that same court has made it clear that the lack of reasonable and probable cause may well be evidence of malice.[6] In England, the original home of the tort of malicious prosecution,[7] the courts have been invited to lower the threshold for proving malice which, it was argued, was too high, whereas lowering it will be in compliance with article 5(1)(c) of the European Convention.[8] Whereas the courts in Australia, Canada and England maintain the traditional approach to the requirement of malice (except that, in Canada, that requirement tends to be blurred with probable and reasonable cause),

1 The other elements of malicious prosecution include instigating or continuing prosecution; prosecution having terminated in favour of the plaintiff, and absence of reasonable and probable cause. See, e.g., *Mohamed Amin v Jogendra Kumar Bannerjee* [1947] AC 322 (PC) at 330; *Miazga v Kvello Estate* [2009] 3 SCR 339 (SCC), paragraph 3; *A v New South Wales and Another* (2007) 230 CLR 500 (HCA), paragraph 1; *Minister of Justice and Constitutional Development and Others v Moleko* [2008] 3 All SA 47 (SCA), paragraph 8; *Rudolph and Others v Minister of Safety and Security and Another* 2009 (5) SA 94 (SCA), paragraph 16. See also Bullen & Leake 1868:350-356; Neethling *et al*. 2010:343.

2 Oliver Wendell Holmes Jr. (1894:1) clarified these difficult terms: "If manifest probability of harm is very great, and the harm follows, we say that it is done maliciously or intentionally; if not so great, but considerable, we say that the harm is done negligently; if there is no apparent danger, we call it mischance." See also Fridman 1958:484; Lloyd 2002:161.

3 *A v New South Wales and Another* (2007) 230 CLR 500 (HCA).

4 See Maamary 2008:18.

5 *Nelles v Ontario* (1989) 2 SCR 170 (SCC); *Proulx v Quebec (Attorney General)* (2001) 206 DLR (4th) 1 (SCC).

6 *Miazga v Kvello Estate* [2009] 3 SCR 339 (SCC); *Miazga v Kvello Estate* (2008) 282 DLR (4th) 1 (Sask. CA).

7 See, e.g., Winfield 1921:118-130.

8 *Moulton v Chief Constable of the West Midlands* [2010] EWCA Civ 524 (13 May 2010).

recent debate in South Africa has been dominated by the question as to whether recklessness and negligence play any role, alongside or in place of malice, in the law of malicious prosecution.[9] In this article, therefore, the critical evaluation of the contributions of the South African courts and academics on the element of malice in malicious prosecution follows upon the discussion of developments outlined above.

2. The problem of definition

The complex and slippery nature of malice prompted Professor Fleming to suggest that it be replaced with the term "improper purpose", as in the law of defamation.[10] He contended that malice is wider in its meaning than spite, ill will or a spirit of vengeance, and includes any other improper purpose, such as to gain a private collateral advantage.[11] He wrote:

> At the root of it is the notion that the only proper purpose for the institution of criminal proceedings is to bring an offender to justice and thereby aid in the enforcement of the law, and that a prosecutor who is primarily animated by a different aim steps outside the pale, if the proceedings also happen to be destitute of reasonable cause.[12]

In fact, proof of malice can be discharged by showing that the person prosecuting was actuated either by spite or ill will against the claimant or by direct or improper motives,[13] or that the circumstances were such that the prosecution can only be accounted for by imputing some wrong and indirect motive to the prosecutor.[14] Indeed, Clerk and Lindsell state that:

> The proper motive for a prosecution is, of course, a desire to secure the ends of justice. If a claimant satisfies a jury, either negatively that this was not the true or predominant motive of the defendant or affirmatively that something else was, he proves his case on the point. Mere absence of proper motive is generally evidenced by the

9 *Minister of Justice and Constitutional Development and Others v Moleko* [2008] 3 All SA 47 (SCA); *Relyant Trading (Pty) Ltd v Shongwe and Another* [2007] 1 All SA 375 (SCA).

10 Fleming 1992:620-621.

11 Cf. in *Rambajan Baboolal v Attorney General of Trinidad and Tobago* [2001] TTHC 17, where Slollmeyer J remarked that, although certain comments made by the prosecuting officers at trial might have been unnecessary, uncalled for and totally out of keeping with the high standards expected of police officers acting in the course of their duty, it does not mean that such comments constituted malice for the purposes of the tort of malicious prosecution. Malice is not regarded as being spite or hatred, and can be demonstrated by a party being prompted by improper and indirect motives, the proper motive for a prosecution being the desire to secure the ends of justice. The judge was thus not satisfied that the alleged remarks, or any of them, demonstrate that the motive of the police was none other than the desire to secure the ends of justice.

12 Fleming 1992:620.

13 *Gibbs v Rea* [1998] AC 786 (PC) at 797.

14 Fleming 1992:621.

> absence of reasonable and probable cause. The jury, however, are not bound to infer malice from unreasonableness; and in considering what is unreasonable they are not bound to take the ruling of the judge.[15]

It has been established that the question of malice cannot arise where reasonable and probable cause is not proved.[16] In effect, once a lack of reasonable and probable cause is proved, malice must also be proved in order for an action for malicious prosecution to succeed,[17] that is, assuming that the other elements have been established. There is a line of cases that lead to the conclusion that, in an appropriate case, it may be proper to infer malice from the absence of reasonable and probable cause to commence or continue a prosecution.[18] Again, want of reasonable and probable cause may be evidence of malice where it is such that the jury may come to the conclusion that there was no honest belief in the accusation made.[19] However, it is not conclusive of malice,[20] since the jury must consider the evidence with the other facts of the case. For instance, Owen JA held in *Noye v Robbins*[21] that the absence of reasonable and probable cause and the presence of an honest belief can co-exist. The absence of reasonable and probable cause, while relevant, will not lead inevitably to a conclusion of malice. It is a question of fact to be decided on the evidence and in the light of all the circumstances. The trial judge was thus correct to hold that Robbins believed that there were good grounds to prosecute; that he did not pursue a collateral purpose, and that he was not actuated by malice. Although the concepts of reasonable and probable cause and malice are separate but related, they are both questions of fact. It does not follow, either as a matter of principle or in the circumstances of this case, that a belief, actually and honestly held, is irrelevant to malice where the latter is alleged to exist in the form of improper purpose. According to Owen JA, "impropriety of purpose does not depend upon any conscious wrongdoing in adopting the purpose. But it will always be a question of fact to be determined according to the nature of the illegitimate or oblique purpose and the circumstances of the case generally".[22]

In South Africa, malicious prosecution is an aspect of delictual liability arising from "malicious proceedings" which may occur where a person abuses the process of the court by wrongfully or maliciously setting the law in motion against another. Whether the resulting action is criminal or civil, the person instigating the proceedings will be liable for damages if

15 *Clerk and Lindsell* 2006: paragraphs 16-37.
16 *Abbott v Refuge Assurance Co Ltd* [1961] 3 All ER 1074; *Randolph Burroughs v Attorney General* HC 4702/1986, HC 241/1987 (T&T HC, 5 April 1990).
17 *Micheal Mungroo v Attorney General and Another* HC 491/1984 (HC T&T, 9 November 1993).
18 *Burley v Bethune* (1814) 5 Taunt 580 at 853; *Heath v Heape* (1856) 26 LJMC 49; *Still v Hastings* (1907) 13 OLR 322 (Div Ct) at 334.
19 Winfield & Jolowicz 2010:935.
20 *Mitchell v Jenkins* (1835) 5 B & Ad 588.
21 [2010] WASCA 83 (4 May 2010), paragraph 218.
22 *Noye v Robbins* [2010] WASCA 83 (4 May 2010), paragraph 208.

s/he acted intentionally, maliciously and without reasonable and probable cause.[23]

In addition to malicious prosecution, "malicious criminal proceedings" includes malicious procurement of a search warrant or malicious arrest or imprisonment. whereas "malicious civil proceedings" arises where a person is maliciously arrested "under civil process, malicious execution, malicious insolvency or liquidation proceedings and any other abuse of the legal process".[24] From this exposition, it is clear that South African law in this regard differs from English law where "malicious prosecution is often an offshoot of a failed criminal prosecution. It is rarely available in civil proceedings".[25] There is, in English law, the tort of abuse of process which occurs 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".[26]

Again, from the South African standpoint, the term "malice" is as confusing, for it is often equated with both improper motive and *animus injuriandi*.[27] For instance, Neethling *et al.* submit that *animus injuriandi*, and not malice, is required for malicious prosecution in South African law.[28] They submit, however, that there are instances in the case law where *animus injuriandi* has been replaced with gross negligence.[29] They submit further that:

> The courts have given various meanings to the requirement of malice. The preponderance of opinion is that malice is a 'regtens ongeoorloofde beweegrede' (legally improper motive) for the prosecution, in other words, any 'indirect or improper motive' not necessarily involving 'spite or ill-will'. It can be deduced from case law that any motive apart from motive to have the plaintiff pay for his alleged crime, denotes malice … However, … if a motive to have the plaintiff convicted is indeed present, the existence of any other motive will not constitute malice.[30]

Generally speaking, motive which "indicates the reason for someone's conduct and must not be confused with intent"[31] is irrelevant in this

23 *LAWSA* McQuoid-Mason 2008:192, paragraph 311.
24 *LAWSA* McQuoid-Mason 2008:192, paragraph 311.
25 Okpaluba 2013a:paragraph 3.6, forthcoming (2013) TSAR (August).
26 *American Restatements: Torts* 2nd ed., section 682. See also *Metall & Rohstoff v Donaldson Luflein & Jenrette Inc* [1990] 1 QB 391 at 469-470. For a recent restatement of this tort and its relation to malicious prosecution, see *Land Securities Ltd v Fladgate Fielder* [2010] 2 All ER 741 (CA). See also Okpaluba 2013b:paragraph 3.
27 Burchell 2004:206.
28 Neethling *et al.* 2010:345.
29 Neethling *et al.* 2010:345.
30 Neethling *et al.* 2005:179-180, paragraph 3.1.2.3.
31 Neethling *et al.* 2010:130. The authors state that intent "is a technical legal term" denoting "willed conduct which the wrongdoer knows is wrongful; motive, on

branch of the law, except in those instances where there is aggravation or mitigation of a sentence or damages award; or in those circumstances where an otherwise lawful act becomes unlawful because of the defendant's improper motive, such as abuse of rights, the defences rebutting unlawfulness in defamation or abuse of legal proceedings. As Brand AJ has held in a recent Constitutional Court judgement concerning the defence of lack of *animus injuriandi* or intent in an action for defamation, "motive does not necessarily correlate with intent. A defendant, who foresaw the possibility that his attempt at humour might be defamatory of the plaintiff, but nonetheless proceeds with the attempt, will have *animus injuriandi* or intent in the form of *dolus eventualis*".[32] The Acting Judge of the Constitutional Court also held that "*animus injuriandi* is the subjective intent to injure or defame. It is the equivalent of *dolus* in criminal law.[33] It does not require that the defendant was motivated by malice or ill will towards the plaintiff. It includes not only *dolus* but *dolus eventualis* as well."[34]

In addition to the discussion later in this article with regard to the interconnectedness of the requirement of reasonable and probable cause and malice in an action for malicious prosecution, and whether recklessness or negligence can be equated to malice for the action to succeed, suffice it to say as this stage that Tebbutt JA captured the approach of South African courts, when he held in *Dlamini v Attorney General*[35] that:

> In a number of South African cases it has been held that malice in the context of malicious prosecution also includes *animus injuriandi* and there has been much judicial pronouncement on whether malice has been replaced by *animus injuriandi* in the third of the requirements that a plaintiff has to prove.[36] The author of the section on malicious prosecution in the *Law of South Africa (LAWSA)* feels this is open to question[37] and submits that malice should still be required to establish wrongfulness. It seems to me that the two concepts, although one is concerned with lawfulness

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the other hand, refers to the reasons why a person acts in a particular way, ie, the object he wishes to achieve, his desire, or the facts behind the formation of his will … Despite the differences between intent and motive, motive is clearly of evidentiary value to prove direct intent – it may serve as evidence that someone acted with direct intent. Moreover, motive may serve as proof of consciousness of wrongfulness. It may be accepted that a bad motive (malice or *mala fides*) usually indicates knowledge of wrongfulness while a good motive (*bona fides*) usually indicates the opposite."

32 *Le Roux & Others v Dey & Another* 2011 (3) SA 274 (CC), paragraph 129.

33 Burchell 2005:461-468.

34 *Le Roux & Others v Dey & Another* 2011 (3) SA 274 (CC), paragraph 131.

35 [2007] SZSC 1 (Swazi SC).

36 See, e.g., *Lederman v Moharai Investments* (Pty) Ltd 1969 (1) SA 190 (A) at 196; *Moaki v Reckitt and Colman* 1968 (3) SA 98 (A) at 103-104; *Prinsloo v Newman* 1975 (1) SA 481 (A) at 492A-C; *Thompson v Minister of Police* 1971 (1) SA 371 (E) at 373-374.

37 *LAWSA* McQuoid-Mason 2008: paragraph 321.

> and other with fault,[38] within the context of an action for malicious prosecution, differ but little from one another. *Animus injuriandi* has been defined as 'consciously wrongful intent'[39] or an intention to injure, i.e. a deliberate intent to harm. In order to succeed in his action a plaintiff would therefore have to establish a desire on the part of the defendant to cause him harm or a conscious or deliberate intention to injure him by setting in motion the legal proceedings against him.[40]

3. The Australian approach

Having held in *A v NSW*[41] that the objective sufficiency of the material considered by the prosecutor in coming to the decision to prosecute in the face of reasonable and probable cause must be assessed in light of all the facts of the case, Gleeson CJ for the majority embarked upon the consideration of what constitutes malice as a separate element of the tort of malicious prosecution. The Chief Justice of Australia then posed the question which often troubles courts in view of the generally recognised "slippery" nature of "malice" as a term in the law of torts:[42]

> When it is said that malice is demonstrated by showing that the prosecutor acted for purposes other than a proper purpose of instituting criminal proceedings, what kind of extraneous purpose suffice to show malice?[43]

Previously, Kitto J had said in *Trobridge v Hardy*[44] that malice represents the "unlawful intent which is present whenever an injurious act is done intentionally and without just cause or excuse". Gleeson CJ then held in *A v NSW* that to constitute malice in the context of this tort, the dominant purpose of the prosecutor must be a purpose other than the proper invocation of the criminal law, that is, "an illegitimate or oblique motive",[45] insofar as that improper purpose must be the sole or dominant purpose actuating the prosecutor.[46] In support of this opinion were some previous common law cases where it was held that to constitute malice, other than spite or ill will, includes the desire to punish the defendant[47] and to stop a civil action brought by the accused against the prosecutor.[48]

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38 *LAWSA* McQuoid-Mason 2008: paragraph 321.
39 *Maisel v Van Naeren* 1960 (4) SA 836 (C).
40 At page 11 of the un-paragraphed transcript of the judgement.
41 *A v New South Wales and Another* (2007) 230 CLR 500 (HCA), paragraph 87.
42 *A v New South Wales and Another* (2007) 230 CLR 500 (HCA), paragraph 89. See also Fleming 1998:685.
43 *A v New South Wales and Another* (2007) 230 CLR 500 (HCA), paragraph 88.
44 (1955) 94 CLR 147 at 152. See also *Shearer v Shields* [1914] AC 808 at 813-815.
45 Quoting *Gibbs v Rea* [1998] AC 786 at 804.
46 *A v New South Wales and Another* (2007) 230 CLR 500 (HCA), paragraph 91. See also *Williams v Spautz* (1992) 174 CLR 509 at 529 per Mason CJ, Dawson, Toohey and McHugh JJ.
47 *Glinski v McIver* [1962] AC 726 (HL).
48 *Springett v London and South-Western Bank* (1885) 1 TLR 611.

Gleeson CJ likened the law of malicious prosecution to the tort of malicious procurement of a search warrant which Lords Goff and Hope held in *Gibbs v Rea*.[49] This is a private law action that can be proved if the search warrant was obtained maliciously and that there was a want of reasonable and probable cause.[50] There are four further points to be made in respect of the tort of malicious prosecution emanating from this case.

First, no little difficulty arises if attempts are made to relate what will suffice to prove malice to what will suffice to demonstrate absence of reasonable and probable cause. In particular, attempts to reduce that relationship to an aphorism – like, absence of reasonable cause is evidence of malice,[51] but malice is never evidence of want of reasonable cause[52] – may well mislead. Proof of particular facts may supply evidence of both elements. For example, if the plaintiff demonstrates that a prosecution was launched on obviously insufficient material, the insufficiency of the material may support an inference of malice as well as demonstrate the absence of reasonable and probable cause. No universal rule relating to proof of the separate elements can or should be stated.[53]

Secondly, there is no limit to the kinds of other purposes that may move one person to prosecute another. Malice can be defined only by a negative proposition: a purpose other than a proper purpose. And, as with absence of reasonable and probable cause, to attempt to identify exhaustively when the processes of the criminal law may properly be invoked (beyond the general proposition that they should be invoked with reasonable and probable cause) would direct attention away from what it is that the plaintiff has to prove in order to establish malice in an action for malicious prosecution – a purpose other than a proper purpose.[54]

Thirdly, its proof will often be a matter of inference. But it is proof that is required, not conjecture or suspicion.[55] Finally, the reference to "purposes other than a proper purpose" might be thought to bring into this realm of discourse principles applied in the law of defamation or in judicial review of administrative action. But those parallels could be drawn with the principles applied in those areas without obscuring the distinctive character of the element of malice in this tort. It is an element that focuses upon the

49 *Gibbs v Rea* [1998] AC 786 at 804.
50 *A v New South Wales and Another* (2007) 230 CLR 500 (HCA), paragraph 95.
51 Cf. *Johnstone v Sutton* (1786) 1 TR 510 at 545, where Lords Mansfield and Loughborough stated that "from the want of probable cause, malice may be, and most commonly is, implied", and in *Varawa v Howard Smith Co Ltd* (1911) 13 CLR 35 at 100, where Isaac J said that the "want of reasonable and probable cause is always some, though not conclusive, evidence of malice".
52 Cf. *Johnstone v Sutton* (1786) 1 TR 510 at 545, where Lords Mansfield and Loughborough postulated that "from express malice, the want of probable cause cannot be implied".
53 *A v New South Wales and Another* (2007) 230 CLR 500 (HCA), paragraph 90.
54 *A v New South Wales and Another* (2007) 230 CLR 500 (HCA), paragraph 92.
55 Cf. per Lords Goff and Hope in *Gibbs v Rea* [1998] AC 786 at 804.

dominant purpose of the prosecutor and requires the identification of a purpose other than the proper invocation of the criminal law.[56]

Callinan J held that malice may have different meanings in different branches of the law. In defamation, for instance, knowledge of falsity, or an absence of belief in the truth of the publicised material, may constitute it, as will spite or ill will.[57] Recklessness, too, can amount to malice in defamation and may do so in cases falling short of wilful blindness or the like. However,

> Malice in a case of malicious prosecution may, however, be established if some collateral purpose is shown to have provoked or driven the prosecution. That does not mean that a person bringing a prosecution who dislikes, perhaps even despises, the subject of it should necessarily on that account alone be adjudged to have brought it maliciously. If the charge is one that should have been laid according to the precept of Dixon J, the prosecutor's distaste for, or dislike of, the accused will be an incidental matter only. Clearly enough, some of the questions which should be asked to ascertain whether reasonable and probable cause existed may also arise in relation to malice. The two elements will not always in practice neatly divide into two different topics. Here, however, indirect purpose and therefore malice was established: the purpose of giving effect to pressures from senior officers.[58]

In *Noye v Robbins and Crimmins*,[59] the question was whether or not malice, in the sense of instituting and pursuing the charges against Noye for an improper or collateral motive, has been proved by the plaintiff. Heenan J held that it is sufficient if his motivation was for some improper or collateral motive, such as a reluctant wish to comply with a requirement of his superiors to lay a charge when he, himself, did not consider that a charge was justified. Further, proof by a plaintiff that there was no reasonable cause for instituting a prosecution may, when taken with all the facts, show that the dominant purpose of the prosecutor in initiating the charge was for a purpose other than the proper invocation of the criminal law, because it was an illegitimate or oblique motive.

> That possibility has been completely dispelled in the present case by the evidence which has satisfied me that Inspector Robbins honestly believed that there was a sufficient basis to charge Noye with the offences laid. The fact that, in different circumstances, and with the benefit of advice less influenced by the strong opinions of the Gwilliam team, a reasonable person should have reached a different opinion, does not detract from the integrity of the personal

56 *A v New South Wales and Another* (2007) 230 CLR 500 (HCA), paragraph 93.
57 *Horrocks v Lowe* [1975] AC 135 at 149-150; *Roberts v Bass* (2002) 212 CLR 1, paragraph 77.
58 *A v New South Wales and Another* (2007) 230 CLR 500 (HCA), paragraphs 186-189.
59 *Noye v Robbins* [2007] WASC 98 (30 April 2007), paragraphs 691 and 702.

> motives and animation of Inspector Robbins. All this means that the plaintiff's claims against Inspector Robbins must be dismissed.[60]

In those circumstances, Heenan J held that Inspector Robbins was the prosecutor in relation to the criminal charges laid against Noye and that those charges were later terminated in favour of the plaintiff. However, the plaintiff failed to prove that the Inspector acted maliciously whereas, according to the judge, he acted only for the proper motives of instituting criminal proceedings against a person he believed should be put on trial for the offences charged. Heenan J held further:

> I reach these findings, notwithstanding my conclusion that in initiating the charges for malicious prosecution Inspector Robbins did not, objectively, have reasonable and probable cause to do so, because of the great extent to which the charges depended upon the credibility of Lynette Crimmins who could not be expected to be regarded as a witness of truth. In reaching that conclusion, I am satisfied that Inspector Robbins himself honestly believed that there was a proper basis for laying the charges, and that he reached that belief after taking advice from persons whom he was entitled to respect and rely upon in that regard. Objectively, however, it should have been apparent that in the face of Noye's denials, and his cooperation with the IAU (Internal Affairs Unit) investigation, the case for prosecution could not be made out on the basis of the tenuous credibility of Lynette Crimmins.[61]

Although the court recognised that there can be occasions where the absence of reasonable and probable cause for initiating the prosecution is itself some evidence of malice,[62] this case did not fit into that category. The question is, when taken with all other facts, was it apparent that the dominant purpose of the prosecutor in initiating the charge was for a purpose other than the proper invocation of the criminal law, because it was an illegitimate or oblique motive. That possibility was completely dispelled in the present case by the evidence which satisfied the trial judge that Inspector Robbins honestly believed that there was a sufficient basis to charge Noye with the offences laid. The fact that, in different circumstances, and with the benefit of advice less influenced by the strong opinions of the Gwilliam team, a reasonable person should have reached a different opinion, did not detract from the integrity of the personal motives and animation of Inspector Robbins. The plaintiff's claim of malicious prosecution against the Inspector was therefore dismissed.[63]

At the Western Australian Court of Appeal, Owen JA held that "the starting point is the honestly held belief [on the part of the prosecutor]

60 *Noye v Robbins* [2007] WASC 98 (30 April 2007), paragraph 702.
61 *Noye v Robbins* [2007] WASC 98 (30 April 2007), paragraph 701.
62 *A v New South Wales and Another* (2007) 230 CLR 500 (HCA), paragraphs 40 and 90.
63 *Noye v Robbins* [2007] WASC 98 (30 April 2007), paragraph 702.

that a case for prosecution existed.[64] That the trial judge recognised that malice could be established regardless of ill will and proceeded to identify the elements of Noye's (factual) case on malice. The trial judge made an express finding that Robbins was not actuated by the need to find a scapegoat, although he acknowledged the existence of pressure and "made reference" ("for this reason") on which Noye relied. In the final analysis, the trial judge made the following findings or comments:

- Noye has the onus of establishing malice;
- On the evidence Robbins acted *only* for the proper motive of instituting criminal proceedings against a person *whom he believed* should be put on trial for the offences charged;
- Robbins believed there was a proper basis for laying the charges after taking advice from appropriate sources, and

those conclusions take into account the problems with LC's credibility and, accordingly, the lack of reasonable and probable cause.[65]

In affirming the finding of the trial judge that Robbins believed that there were good grounds to prosecute and that he did not pursue a collateral purpose and thus was not actuated by malice,[66] Owen JA held:

> Whenever the law has to grapple with the subjective/objective dichotomy, problems are bound to arise. This area of the law is no exception, as the Court recognised in *A v The State of New South Wales*[67] and the trial judge saw in this case.[68] It seems to me that the facts of this case illustrate the complexities. Here, the question whether Robbins held an honest belief that a proper case existed for laying the charges was relevant to, but not determinative of, the element of reasonable and probable cause. It was also relevant to, but not determinative of, the issue of malice. To succeed, Noye would have to establish that Robbins' sole or dominant purpose in charging him was an improper one. In the way the facts turned out, the trial judge was left with two alternative explanations: either Robbins was actuated by a desire to find a scapegoat (or similar terminology) or he laid the charges believing that there was a proper basis to do so. It is a little difficult to see how a choice between the two alternatives could have been made without some examination of Robbins' subjective state of mind and the honesty of the belief he professed to hold.[69]

64 *Noye v Robins* [2010] WASCA 83 (4 May 2010), paragraph 209.
65 *Noye v Robbins* [2010] WASCA 83 (4 May 2010), paragraph 209.
66 *Noye v Robbins* [2010] WASCA 83, paragraph 218.
67 *A v New South Wales and Another* (2007) 230 CLR 500 (HCA).
68 *Noye v Robbins* [2007] WASC 98 (30 April 2007), paragraph 684.
69 *Noye v Robbins* [2010] WASCA 83, paragraph 211.

4. The *Nelles/Proulx* jurisprudence in Canada

Prior to the judgement of the Supreme Court of Canada in *Nelles v Ontario*,[70] Canadian courts regarded malice, in this instance, to mean some predominant wish or motive other than vindication of the law; some other motive than a desire to bring to justice the person the defendant honestly believes to be guilty. As Locke J put it in *Lamb v Benoit et al.*,[71] malice in this form of action "is not to be considered in the sense of spite or hatred against an individual but of *malus animus* and as denoting that the party is actuated by improper and indirect motives".[72] In delivering his landmark judgement on malicious prosecution in *Nelles,* Lamer J made a number of remarks in relation to the requirement of malice which, for this purpose,

- is the equivalent of "improper purpose" in that its reach is quite expansive;

to succeed in an action of this nature, the plaintiff must prove malice as well as absence of reasonable and probable cause,[73] and

- it could be in the form of a deliberate and improper use of the office of the Attorney General or Crown Attorney, a use inconsistent with the status of "minister of justice".

This burden on the plaintiff is tantamount to a requirement that the Attorney General or Crown Attorney perpetrated a fraud on the process of criminal justice and, in doing so, perverted or abused his office and the process of criminal justice which, in some instances, would amount to criminal conduct.[74]

The majority of the Supreme Court emphasised what is required to satisfy the element of malice in a claim for malicious prosecution held in *Proulx v Quebec (Attorney General)*[75] that a suit for malicious prosecution had to be based on more than recklessness or gross negligence. Rather, it required evidence that reveals a wilful and intentional effort on the Crown's part to abuse or distort its proper role in the criminal justice system. The key to malicious prosecution was malice, but the concept of malice in this context included prosecutorial conduct fuelled by an improper purpose or purpose inconsistent with the status of "minister of justice".[76] The trial judge found an improper motive, and his findings were entitled to deference. The Court of Appeal, therefore, erred in interfering with those

70 *Nelles v Ontario* (1989) 2 SCR 170 (SCC).
71 (1959) 17 DLR (2d) 369 (SCC).
72 *Lamb v Benoit et al.* (1959) 17 DLR (2d) 395 (SCC).
73 See also per Smith DCJ, *Carpenter v MacDonald* (1978) 21 OR (2d) 165 (Ont. DC) affirmed (1979) 27 OR (2d) 730 (Ont. CA) at 184; *Abrath v North Eastern Railway* (1883) 11 QDB 440 (CA).
74 *Nelles v Ontario* (1989) 2 SCR 170 (SCC) at 193-194.
75 *Proulx v Quebec (Attorney General)* (2001) 206 DLR (4th) 1 (SCC) (2001) 206 DLR (4th) 1 (SCC).
76 *Proulx v Quebec (Attorney General)* (2001) 206 DLR (4th) 1 (SCC), paragraphs 35 and 45.

findings.[77] Several factors indicated improper purpose in this case. First, the prosecutor ignored the probable inadmissibility and lack of probative value of the recorded conversation between the plaintiff and the victim's father. Secondly, his address to the jury distorted the plaintiff's words and improperly transformed them into a confession. Thirdly, he allowed the retired police officer to work on the case notwithstanding his status as a defendant in the plaintiff's defamation suit.[78] Fourthly, in 1986, the prosecutor had concluded that there were no reasonable and probable grounds to lay the murder charge. Fifthly, in 1991, he allowed his office to be used in defence of a civil suit which was a perversion of powers and an improper abuse of prosecutorial power. In order to secure a conviction at all costs, he misled the court and harnessed the tainted assistance of the retired police officer.[79] Finally, by so doing, the prosecution acted in a flagrant disregard of the plaintiff's rights fuelled by motives that were entirely improper.[80]

The majority held that the facts of this case were indeed exceptional. *Nelles* established a generous boundary within which prosecutors acting in good faith would have immunity despite bad decisions. The mixed motives of the Prosecutor in the present case carried him across that boundary. Unless *Nelles* was to be read as staking out a remedy that was available only in theory and not in practice, the appellant was entitled to hold the Prosecutor accountable in the civil action brought following the abusive prosecution.[81] In concluding that the acts of the Prosecutor amounted to malice which was established, the majority, like Lamer J in *Nelles*, likened the prosecutorial behaviour as perpetuating a fraud on the criminal justice process.[82] They also agreed with the dissenting opinion of LeBel JA who, in the Court of Appeal, deprecated the conduct of the prosecutor in these words:

> The prosecutor committed one illegal act after another, contrary to the principles of criminal law and the rules of the judicial system. Although he should have known the probable consequences of his acts, he abused his powers as an officer of the court and pursued an unlawful goal. That unlawful goal and thus bad faith may be inferred from the record as a whole. It would appear from both the circumstances prior to the laying of the complaint and from the conduct of the case that the objective was to obtain a conviction despite the rules of law, based on a deep-seated belief as to the accused's guilt that was not justified by an objective review of the case.[83]

77 *Proulx v Quebec (Attorney General)* (2001) 206 DLR (4th) 1 (SCC), paragraph 36.
78 *Proulx v Quebec (Attorney General)* (2001) 206 DLR (4th) 1 (SCC), paragraphs 38-42.
79 *Proulx v Quebec (Attorney General)* (2001) 206 DLR (4th) 1 (SCC), paragraph 44.
80 *Proulx v Quebec (Attorney General)* (2001) 206 DLR (4th) 1 (SCC), paragraph 44.
81 *Proulx v Quebec (Attorney General)* (2001) 206 DLR (4th) 1 (SCC), paragraph 44.
82 *Nelles v Ontario* [1989] 2 SCR 170 (SCC) at 194.
83 *Proulx v Quebec (Attorney General)* [1999] RJQ 398 (Que. CA) at 431.

The lessons garnered from the *Nelles*/*Proulx* jurisprudence were recently summarised by Charron J in *Miazga v Kvello Estate*[84] and encapsulated in three broad propositions. First, it is readily apparent from its constituent elements that the tort of malicious prosecution targets the decision to initiate or continue with a criminal prosecution. When taken by a Crown prosecutor, this decision is one of the "core elements" of the prosecutorial discretion, thus lying "beyond the legitimate reach of the court" under the constitutionally entrenched principle of independence.[85] The principle of Crown independence means that decisions taken by a Crown attorney pursuant to his/her prosecutorial discretion are generally immune from judicial review under principles of public law, subject only to the strict application of the doctrine of abuse of process.[86] Secondly, just as immunity from judicial review is subject to the doctrine of abuse of process in public law, the Attorney General and Crown attorneys do not enjoy absolute immunity from a suit for malicious prosecution in private law. A person accused of a criminal offence enjoys a private right of action when a prosecutor acts maliciously in fraud of his/her prosecutorial duties with the result that the accused suffered damage. However, the civil tort of malicious prosecution is not an after-the-fact judicial review of a Crown's exercise of prosecutorial discretion. Under the strict standard established in *Nelles*, malicious prosecution will only be made out where there is proof that the prosecutor's conduct was fuelled by "an improper purpose or motive, a motive that involves an abuse or perversion of the system of criminal justice for ends it was not designed to serve".[87] In other words, it is only when a Crown prosecutor steps out of his/her role of "minister of justice" that immunity is no longer justified.[88] Thirdly, the high threshold for Crown liability was reiterated in *Proulx*, where the court stressed that malice in the form of improper purpose is the key to proving malicious prosecution. In the context of a case against the Crown prosecutor, malice does not include recklessness, gross negligence or poor judgement. Malice can be said to exist only where the conduct of the prosecutor constitutes "an abuse of prosecutorial power" or the perpetuation of "a fraud on the process of criminal justice".[89] Having regard to the defendant/prosecutor's mixed motives, the court was satisfied that *Proulx* was one of those "highly exceptional" cases in which Crown immunity for prosecutorial misconduct should be lifted, and the defendant found liable for malicious prosecution.[90]

84 [2009] 3 SCR 339 (SCC), (2008) 282 DLR (4th) 1 (Sask. CA).
85 *Krieger v Law Society of Alberta* [2002] 3 SCR 372, paragraphs 32 and 46.
86 *Miazga v Kvello Estate* [2009] 3 SCR 339 (SCC), paragraph 6.
87 *Nelles v Ontario* (1989) 2 SCR 170 (SCC) at 199.
88 *Miazga v Kvello Estate* [2009] 3 SCR 339 (SCC), paragraph 7.
89 *Proulx v Quebec (Attorney General)* [2001] 3 SCR 9 (SCC), paragraphs 44 and 45.
90 *Miazga v Kvello Estate* [2009] 3 SCR 339 (SCC), paragraph 8.

5. The boundaries of reasonable and probable cause and malice

In *Hicks v Faulkner*,[91] 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 probably guilty of the crime imputed.[92]

It was stated that the test contains both a subjective and an objective test. 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 the foregoing 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/her.[93] This tantamounts to a subjectively honest belief founded on objectively reasonable grounds that the institution of proceedings was justified.[94] 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.[95] As explained by Malan AJA in *Relyant Trading*, such a defendant will not be liable if s/he held a genuine belief founded on reasonable grounds in the plaintiff's guilt. In effect, where reasonable and probable cause for the arrest or prosecution exists, the conduct of the defendant instigating it is not wrongful.[96] 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

91 (1878) 8 QBD 167 at 171 approved and adopted by the House of Lords in *Herniman v Smith* [1938] AC 305 at 316 per Lord Atkin.

92 It was held in *Broad v Ham* (1839) 5 Bing NC 722 at 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 or 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).

93 See Okpaluba 2013b:paragraphs 1 and 4.

94 *Minister of Justice and Constitutional Development v Moleko* [2008] 3 All SA 47 (SCA), paragraph 20; *Relyant Trading (Pty) Ltd v Shongwe and Another* [2007] 1 All SA 375 (SCA), paragraph 14; *Beckenstrater v Roffcher & Theunissen* 1955 (1) SA 129 (A) at 136A-B.

95 *Joubert v Nedbank Ltd* [2011] ZAECPEHC 28, paragraph 11.

96 Neethling *et al.* 2005:178.

> they believe to have committed offences, even if in so doing they are actuated by indirect and improper motives.[97]

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.[98] 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.

For instance, Sharma CJ, speaking on the criterion of "malice" in *Kennedy Cecil v Morris Donna and Attorney General of Trinidad and Tobago*,[99] held that proof of malice means that there must be "malice in fact" whereby a claimant 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. According to *Halsbury's*,[100] it is malice if the defendant had any purpose other than to bring a person to justice.[101] "The Court of Appeal unanimously accepted the finding of the trial judge that, although the police officer was hasty in coming to the decision to prosecute the plaintiff, that in itself was not necessarily indicative of an improper motive. Again, failure to make proper enquiry as to the facts cannot, standing alone be proof of malice." So, too, the officer's failure to sift information which appeared to be suspicious was a non-issue, since there was nothing to show that any information given to the officer at that time was in any way suspicious. Accordingly, the trial judge had sufficient evidence placed before him to find that the respondents had reasonable and probable cause to initiate proceedings against the appellant, there being no proof of improper or indirect motive on the part of the officer who

97 *Relyant Trading (Pty) Ltd v Shongwe and Another* [2007] 1 All SA 375 (SCA), paragraph 14 citing in support, *Beckenstrater v Roffcher & Theunissen* 1955 (1) SA 129 (A) at 135D-E. Thus it was held in *Noye v Robbins & Crimmins* [2010] WASCA 83, paragraph 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."

98 Section 40(1)(b), *Criminal Procedure Act* 51/1977.

99 [2005] TTCA 28.

100 *Robertson and Jastrzebski* 1994: paragraph 470.

101 *Stevens v Midland Counties Rly. Co* (1854) 10 Exch 352.

initiated the prosecution.[102] It is appropriate to take this discussion a step further by focusing on the *Miazga* case from Canada, *Marley v Mitchells*[103] from New Zealand, and *Bayett v Bennett*[104] from South Africa for further illustration.

5.1 *Kvello Estate v Miazga*

In *Miazga*,[105] the prosecution of the plaintiffs for sexually assaulting children was stayed. The trial judge held that the lack of reasonable and probable cause for the prosecution *per se* gave rise to a strong presumption of malice in the circumstances of the case.[106] Although there was merit in the argument for a test requiring some proof of malice in addition to, and independent of lack of reasonable and probable cause, the Court of Appeal held that the test could not be reduced to such a rigid formula.[107] It was the totality of the circumstances that were to be considered. The finding by the trial judge that the Crown prosecutor did not have an honest belief that the respondents had committed the assaults alleged by the children or an honest belief that the respondents were guilty of the offences charged tipped the balance against the prosecutor. However, upon the consideration of the whole of the evidence, the trial judge's finding was reasonable.[108] Indeed, there were no reasonable and probable grounds to recommend the laying of the charges or to proceed with the prosecution.[109] It follows that for a Crown prosecutor to proceed with a prosecution without a belief in the credibility of his complainants and without a belief in the guilt of the accused amounted to the wilful and intentional effort on the Crown's part to abuse or distort its proper role within the criminal justice system. It took this case beyond bad judgement, negligence or recklessness and into the realm of malice. The Crown prosecutor's actions were tainted by lack of belief that they could no longer be considered as possibly matters of bad judgement, negligence or recklessness.[110]

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102 *Kennedy Cecil v Morris Donna and Another* [2005] TTCA 28, paragraphs 31, 34, 35 and 36.

103 [2006] NZAR 181 (CA).

104 [2012] ZAGPJHC 9 (17 February 2012).

105 (2008) 282 DLR (4th) 1 (Sask. CA).

106 It has also been held by the courts in Ontario that continuing a prosecution in the absence of reasonable and probable ground(s) is capable of giving rise to an inference of malice: *O'Neil v Metropolitan Toronto (Municipality) Police Force* [2001] 195 DLR (4th) 59 (CA); *Folland v Ontario* (2003) 225 DLR (4th) 50 (CA); *Miguna v Toronto Police Services Board* (2008) 301 DLR (4th) 540 (CA), paragraphs 59 and 60.

107 *Miazga v Kvello Estate* (2008) 282 DLR (4th) 1 (Sask. CA), paragraph 97.

108 *Miazga v Kvello Estate* (2008) 282 DLR (4th) 1 (Sask. CA), paragraph 135.

109 *Miazga v Kvello Estate* (2008) 282 DLR (4th) 1 (Sask. CA), paragraph 140.

110 *Miazga v Kvello Estate* (2008) 282 DLR (4th) 1 (Sask. CA), paragraphs 141 and 142. Vancise JA, dissenting, held [paragraphs 198 and 245] that the Crown prosecutor should not have been held liable for malicious prosecution. The absence of reasonable and probable cause was in and of itself could be proof of malice. The test for malicious prosecution did not depend on presuming

Further appeal in *Miazga 2* provided the Supreme Court the opportunity of laying down further guidelines on the absence of reasonable and probable cause and the malice requirements in the light of the unique role played by Crown prosecutors in Canada's public prosecution system. This was necessitated by the submission that the *Nelles* test be amended so that malice under the fourth element may be inferred solely from a finding of lack of reasonable and probable grounds under the third element. It was argued that to require independent evidence of malice presents too high a barrier for any wrongly prosecuted person to obtain a remedy against a Crown prosecutor.[111]

The Supreme Court held that "malice" is a question of fact, requiring evidence that the prosecutor was impelled by an "improper purpose".[112] 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/her role as a "minister of justice". The plaintiff must demonstrate on the 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 s/he exceeded the boundaries of the office of the Attorney General.[113] The need to consider the "totality of all the circumstances" does not mean that the court is to embark on a second-guessing of every decision made by the prosecutor during the course of the criminal proceedings. It simply means that a court shall review all the evidence related to the prosecutor's state of mind, including any evidence of lack of belief in the existence of reasonable and probable cause, in deciding whether the prosecution was in fact fuelled by an improper purpose.[114] While the absence of a subjective belief in reasonable and probable cause is relevant to the malice inquiry, it does not equate with malice and does not dispense with the requirement of proof of an improper purpose.[115] By requiring proof of an improper purpose, the malice element ensures that liability will not be imposed in cases where a prosecutor proceeds absent reasonable and probable grounds by reason of incompetence, inexperience, poor judgement, lack of professionalism, laziness, recklessness, honest mistake, negligence or

malice only from the absence of reasonable and probable cause. In order for there to be a finding of malicious prosecution, the trial judge must be able to find an inference of malice from both an absence of reasonable and probable cause and other evidence of malice or improper purpose. The trial judge erred in law in finding that the Crown prosecutor's conduct constituted malice or that he possessed a primary purpose other than that of carrying the law into effect. There was no evidence that revealed a wilful and intentional effort on the Crown prosecutor's part to abuse or distort his proper role within the criminal justice system.

111 *Miazga v Kvello Estate* [2009] 3 SCR 339 (SCC), paragraphs 4 and 52.

112 Source?:paragraph 78. See also per Lamer J in *Nelles v Ontario* (1989) 2 SCR 170 (SCC) at 193-194.

113 *Miazga v Kvello Estate* [2009] 3 SCR 339 (SCC), paragraph 89.

114 *Miazga v Kvello Estate* [2009] 3 SCR 339 (SCC), paragraph 85.

115 *Miazga v Kvello Estate* [2009] 3 SCR 339 (SCC), paragraph 86.

even gross negligence.[116] 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.[117]

The court was unanimous in upholding the Court of Appeal to the effect that there was no evidence to support a finding of malice. The trial judge's "strong indicators of malice … were based on erroneous conclusions, errors in law, or were unsupported by the evidence" or on the record.[118] Moreover, the approach adopted at trial in the review of the Crown attorney's conduct of the prosecution exemplifies the very kind of second-guessing of prosecutorial discretion that should be avoided.[119] The trial judge's basis for concluding that the Crown attorney did not have the requisite subjective belief amounts to a palpable and overriding error which did not qualify for deference. The Crown attorney testified that, while he did not believe some aspects of the allegations, he believed the children, a testimony not rejected by the trial judge albeit faulting the Crown attorney for failing to state that he believed in the respondent's "probable guilt". However, even if he had so testified, his testimony would have been rejected because, in the trial judge's view, the children's allegations could not possibly give rise to a reasonable belief in probable guilt. That conclusion was not supported by available evidence. Several judges at both the trial and appellate levels in the criminal proceedings accepted and relied upon the same allegations by the children in convicting their biological parents. In these circumstances, reliance on the findings of the courts in antecedent proceedings does not amount to improper "bootstrapping",[120] but simply belies the trial judge's assertion that no one could possibly have believed the children.[121]

The court was unanimous in overturning virtually all of the facts relied upon by the trial judge as indicative of malice on the part of the Crown attorney. Accordingly, the Court of Appeal erred in upholding the trial judge's finding that the Crown attorney was liable for malicious prosecution. Nevertheless, the majority of that court relied on the 'totality of all the circumstances' requirement to forego the need for evidence beyond absence of reasonable and probable cause to prove that the

116 *Miazga v Kvello Estate* [2009] 3 SCR 339 (SCC), paragraph 81.
117 *Miazga v Kvello Estate* [2009] 3 SCR 339 (SCC), paragraph 80.
118 *Miazga v Kvello Estate* [2009] 3 SCR 339 (SCC), paragraph 91.
119 *Miazga v Kvello Estate* [2009] 3 SCR 339 (SCC), paragraph 91.
120 Charron J, *Miazga v Kvello Estate* [2009] 3 SCR 339 (SCC):paragraph 97, described "bootstrapping" in malicious prosecution circumstances to occur "when a prosecutor argues that he or she had reasonable and probable grounds to commence or continue a prosecution on the basis of subsequent judicial determinations made at the preliminary inquiry or the trial itself. While a determination of guilt at a criminal proceeding is not determinative of the reasonable and probable question under the third prong of the test for malicious prosecution, it is a relevant factor that may be properly considered in ascertaining the existence or absence of reasonable cause."
121 *Miazga v Kvello Estate* [2009] 3 SCR 339 (SCC), paragraph 96.

Crown attorney was, in fact, actuated by an improper purpose. They, therefore, erred by concluding that the Crown attorney's lack of subjective belief in the existence of grounds was sufficient to ground a finding of malice without identifying any improper purpose. Neither the plaintiffs nor the courts below have pointed to any improper purpose that impelled the Crown attorney to prosecute the respondents.[122]

5.2 The *Mitchells'* case against municipal councillors

In *Mitchells*, a husband and wife were prosecuted by a municipal council for having constructed a building, namely steps and a landing to their house, without a permit. The council proceeded with the prosecution despite calls for it to seek legal advice first. Subsequently, however, the council took legal advice and withdrew the prosecutions. In their action for malicious prosecution, the Mitchells alleged malice by the councillors who had voted for prosecution. A jury found that the councillors honestly believed that the Mitchells had committed an offence but were motivated by malice in instituting the prosecution. The judge then held that the councillors' honest belief was not based on reasonable grounds and gave judgement for the Mitchells. On appeal, the councillors contended that there were reasonable grounds for their belief and that there was no malice against Mrs Mitchell as the resolution was only to prosecute Mr Mitchell; and, in any event, there was no injury to Mrs Mitchell, because accounts for the Mitchell's defence costs for the prosecution were addressed to and paid by Mr Mitchell.

Hardie Boys J for the Court of Appeal of New Zealand held that a prosecution was malicious if instituted without reasonable or probable cause. That is, without an objectively honest belief in a proper case to place before the court, based on a full conviction on reasonable grounds of the existence of a state of circumstances which, if true, would reasonably lead any ordinary, prudent and cautious person to conclude that the person charged was probably guilty of the crime. Honesty of belief was a jury question, but whether an honest belief was based on reasonable and probable cause was for the judge.[123] A reasonable person would take reasonable steps to ascertain the true state of the case; consider the matter on admissible evidence only; and in all but the plainest cases, lay the facts fully and fairly before counsel of standing and experience for advice that prosecution was justified.[124]

These steps were not essential, but failure to take any step was evidence from which a judge could infer absence of reasonable and probable cause. In some cases, a local authority might act on the advice of council officers experienced in bylaws, in the same way as a citizen might act on the advice

122 *Miazga v Kvello Estate* [2009] 3 SCR 339 (SCC:paragraphs 92, 100 and 101.
123 *Marley v Mitchells* [2006] NZAR 181 (CA), paragraph 8.
124 *Marley v Mitchells* [2006] NZAR 181 (CA), paragraph 20; *Abbott v Refuge Assurance Co Ltd* [1962] 1 QB 432 at 454.

of a police officer.[125] However, in this case, there was no such advice, because the engineer's report did not support the inspector's view. This fact ought to have caused councillors "to act even more circumspectly".[126] The judge was, therefore, entitled to find no reasonable grounds for the prosecution.[127] It was also held that the jury was entitled to find malice against both plaintiffs, because there was evidence that they were both targets of the malice of the councillors which, in this case, was made up of spite, ill will and any other improper and wrongful motive than that of bringing a suspected criminal to justice.[128]

5.3 *Bayett v Bennett*

In *Bayett & Others v Bennett & Another*,[129] Kgomo J held that that the defendants (Bennett and Wales) deliberately made it very easy for the police to arrest, and the State to prosecute, the plaintiff. They provided the police with all the statements they needed without the need for them to do any in-depth independent investigation. The defendants did this "by drafting the statements in such a way that they purportedly contained decisive facts leading to obvious conclusions", based on "untruths, distortions and designed omissions".[130] Thus, they were persons who did more than place information of commission of a crime before the prosecutor. They played such an active role in the prosecution that they were, *par excellence*, the instigators of the prosecution against the plaintiff. The trial judge held that, when viewed cumulatively, all these deliberate misrepresentations of the truth and flagrant omissions in the defendant's statements would justify a finding that they were designed to instigate and secure an arrest and prosecution with the ulterior purpose to put pressure on Bayett to pay to them R7.1 million demanded on 13 December 2005.[131]

In these circumstances, it was held that the defendants chose to depose to affidavits for purposes of the criminal complaint by not only making

125 *Marley v Mitchells* [2006] NZAR 181 (CA), paragraph 21.
126 *Marley v Mitchells* [2006] NZAR 181 (CA), paragraph 22.
127 In *Caie v Attorney General* [2006] NZAR 379 (CA), the appellant having succeeded at the trial on an action for false imprisonment, appealed on the court's finding that there was no tort of malicious prosecution committed against the appellant in this case. The Court of Appeal saw no grounds, let alone compelling grounds, for reversing the trial judge's factual finding that the police had reasonable and probable cause for bringing the proceedings, that disposes of any challenge to the malicious prosecution cause of action. It was essential that he proved this element in order to proceed with this cause of action. He failed to do so and failed to convince the court that his case was exceptional. The Court of Appeal had no reason to interfere with the finding of the trial court.
128 *Marley v Mitchells* [2006] NZAR 181 (CA), paragraph 29, citing per Lord Devlin in *Glinski v McIver* [1962] AC 726 at 766.
129 2012 ZAGPJHC 9 (17 February 2012), paragraph 140.
130 *Bayett & Others v Bennett & Another,* paragraph 152.
131 *Bayett & Others v Bennett & Another,* paragraph 165.

false and distorted allegations, but also 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 an ulterior purpose in instituting those proceedings.[132] It was held further that the deliberate omissions and false statements by the defendants justify "the probable inference that they acted with malice".[133] They knew that if they put "correct facts and all the facts" in their statements to the police, there might not have been any prosecution, hence the "twisting of facts, the telling of untruths and the deliberate omission of crucial facts".[134] Realising at some point in the prosecution that the allegations lacked merit, the prosecutor withdrew the matter. "Such a prosecution came as no surprise", according to Kgomo J, "as it [was] an objective fact that there were no merits in the prosecution."[135] Accordingly, the judge concluded that "the malice and the motive for the malice" were "patent".[136]

6. Is the threshold for proving malice too high?

The question is: whether the threshold for proving malice in malicious prosecution is very high, and perhaps, untenable. The Canadian Supreme Court justifies the high threshold of proof inherent in the malice requirement on the ground of the highly discretionary and quasi-judicial role of public prosecutors. McLachlin CJC compared the law of negligent police investigation[137] which does not involve the same quasi-judicial decisions as to guilt or innocence or the evaluation of evidence according to legal standards. Rather, it contemplates the lower "negligence" standard.[138] It was on the application of this lower negligence threshold in the discharge of their investigative duties that the Supreme Court of Canada unanimously absolved the police of liability in *Hill v Hamilton-Wentworth Regional Police Services Board*.[139]

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132 *Bayett & Others v Bennett & Another,* paragraphs 168-169 and 173.

133 *Bayett & Others v Bennett & Another*, paragraph 176.

134 *Bayett & Others v Bennett & Another*, paragraph 198. See also *Baker v Christiane* 1920 WLD 14; *Heynes v Venter* 2004 (3) SA 200 (T).

135 *Bayett & Others v Bennett & Another*, paragraph 193.

136 *Bayett & Others v Bennett & Another*, paragraph 199.

137 See *Hill v Hamilton-Wentworth Regional Police Services Board* [2007] 3 SCR 129 (SCC), where McLachlin CJC enunciated the law of negligent police investigation in Canada, thus rejecting the public interest immunity of English law whereby the police is immune from liability when they are engaged in criminal investigation. See *Hill v Chief Constable of West Yorkshire* [1989] 1 AC 53 (HL); *Brooks v Commissioner of Police for the Metropolis and Others* [2005] 1 WLR 1495 (HL); *Smith v Chief Constable of Sussex Police* [2008] 3 WLR 593 (HL); *Mitchell v Glasgow City Council* [2009] 2 WLR 481 (HL). See, generally, Okpaluba & Osode 2010:paragraphs 9.1-10.3.1.5.

138 *Vancouver (City) v Ward* [2010] 2 SCR 28 (SCC), paragraph 43.

139 *Hill v Hamilton-Wentworth Regional Police Services Board, supra.* Cf. *Minister of Safety and Security v Mohofe* [2007] 4 All SA 697 (SCA). See also *Petersen v Minister of Safety and Security* [2007] 2 All SA 177 (C); *Cele v Minister of Safety*

There are two contrasting Canadian cases for illustration. First, there is the judgement of Klebuc J in *Klein v Seiferling*,[140] where it was held that the manner in which the officers conducted their investigation constituted more than mere negligence or poor judgement. It was so reckless and devoid of reason and respect for the rights and security of the plaintiffs and the administration of justice that it was directly and inferentially malicious. For instance,

> they withheld vital information from Connelly regarding Weist's limitations which they knew might have a bearing on his advice and the manner in which the Attorney General would deal with the plaintiffs. They deliberately ignored the quantity and quality of the evidence gleaned while they were in Vancouver and exploited Weist without respect or concern for his known difficulties. These factors … establish malice of the character contemplated in *Nelles*.[141]

Then, there is the judgement of Ground J who, having regard to *Nelles*/*Proulx* authorities, held in *Wiche v Ontario*,[142] that there was absolutely no evidence that Marin, an SIU investigator, was motivated by anything other than a desire to make an honest determination based on the evidence before him as he was required to do under the provisions of section 113(7) of the *Police Services Act* 1990 (Ontario).[143] The bald allegations that this investigator, in making his decision, was bowing to pressure from the media or from interest groups in the community or that he was attempting to make a name for himself as a newly appointed Director of Special Investigation Unit (SIU) were not such evidence. It was not shown that the SIU investigation was "hastily made and careless in the extreme" or that Marin proceeded with reckless disregard of evidence which would have led him to conclude that there were no reasonable grounds for laying the information.[144] In other words, an action for malicious prosecution may only succeed on the basis of inferring malice where the laying of charges can only be accounted for by imputing some wrong or improper motive or where the prosecution proceeded with reckless indifference as to the truth or to the reliability of evidence or with reckless indifference to the guilt or innocence of the accused. This was not such a case. According to Ground J, "[e]ven if there were some oversights and deficiencies on the part of the SIU investigators in carrying out the investigation, it does not appear to me that this comes anywhere close to the imputation of a wrong or improper motive or to the reckless indifference required to be established to infer malice in an action for malicious prosecution."[145] There is also the more curious English case discussed in the next paragraph.

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and Security [2007] 3 All SA 365 (D); *Minister of Safety and Security and Others v Craig and Others* [2010] 1 All SA 126 (SCA).

140 [1999] 10 WWR 554 (Sask. QB) at 574.

141 [1999] 10 WWR 554 (Sask. QB)

142 2001 CanLII 28413 (ON SC).

143 *Wiche v Ontario* 2001 CanLII 28413 (ON SC):paragraph 37.

144 *Wiche v Ontario* 2001 CanLII 28413 (ON SC):paragraph 42.

145 *Wiche v Ontario* 2001 CanLII 28413 (ON SC):paragraph 43.

6.1 Alleged non-compliance with article 5(1)(c) of the European Convention

It was urged on the Court of Appeal in England in *Moulton v Chief Constable of the West Midlands*[146] that it should lower the threshold requirement for proof of malice in malicious prosecution cases in order to comply with article 5(1)(c) of the European Convention on Human Rights (ECHR). Both the High Court and the Court of Appeal had found that the police had acted at all times material to this case on reasonable and probable ground and would, therefore, not consider malice. It was contended that the burden of proving malice which lies on a claimant is unduly onerous in the English jurisdiction and that the law of malicious prosecution is out-of-date and inadequate remedy. It provides no redress for victims of investigatory or prosecutorial maladministration.[147] The Supreme Court of Canada judgement in *Hill v Hamilton-Wentworth Regional Police Services Board* was cited in support of this argument. The effect of this judgement is that the action for malicious prosecution has been superseded by the tort of negligent police investigation, proof of which imposes a lesser burden on claimant. Rejecting that argument, Smith LJ held:

> Despite the attractive way in which Miss Booth advanced her submissions, I cannot see how article 5 can help her. Miss Booth cannot contend that the appellant's article 5 right had been infringed. He had been arrested and deprived of his liberty for the purpose of bringing him before a competent legal authority on suspicion of having committed an offence and in accordance with a procedure prescribed by law. Reasonable suspicion is a low threshold; in this jurisdiction it is the threshold which justifies arrest. A higher threshold is required before the commencement of a prosecution by preferring a charge. It seems to me that the wording of article 5 imposes a rather lower requirement on the authority which deprives the individual of his liberty than do the present requirements of the tort of malicious prosecution. Put another way, I do not think that the words of article 5 suggest that there is any need for the burden on the claimant to prove malice to be reduced.[148]

Rather, the Lady Justice accepted the submission that where there is a lack of honest belief in the truth of the allegation and the adequacy of the evidence available to prove it, the courts should be willing to infer the necessary degree of malice. If the court holds that there was no honest belief in the validity of the prosecution, the court may well be ready to infer that the prosecutor has proceeded from some motive other than a legitimate desire to bring the accused to justice. In such circumstances, it may not greatly matter where the burden of proof lies. But, in the present

146 [2010] EWCA Civ 524 (13 May 2010).

147 *Moulton v Chief Constable of the West Midlands* [2010] EWCA Civ 524 (13 May 2010), paragraph 49.

148 *Moulton v Chief Constable of the West Midlands* [2010] EWCA Civ 524 (13 May 2010), paragraph 51.

case, counsel expressly acknowledged that the officers did subjectively believe in the validity of the allegations; her complaint was that this was irrational and any objective consideration would have produced a different decision. "It is axiomatic", held Smith LJ:

> ... that it will be more difficult to prove malice in a case in which there was an honest but irrational belief in the validity of the allegation. That was what Miss Booth hoped she would be able to do. Because she failed to prove that the prosecution was not objectively justified, proof of malice is academic in this case. But even if Miss Booth had persuaded me that, as from say, 29 November 2000, continuance of the prosecution could not be objectively justified, I would still not be prepared to hold that continuance of it suggested malice. To my mind, continuance, if inappropriate, suggested only a lack of direction and careful thought. It did not suggest a desire to achieve a conviction regardless of justice or the merits.[149]

6.2 Recklessness and negligence

6.2.1 The Canadian approach

As Charron J reminded us in *Miazga 2,*[150] the label "malicious" implies an intentional tort of which the malice requirement is the key to striking the balance it was designed to maintain between the public interest in the administration of criminal justice with the need to compensate individuals who have been wrongly prosecuted. In other words, a person accused of a criminal offence enjoys this private cause of action where a prosecutor has acted "maliciously in fraud of his or her prosecutorial duties with the result that the accused suffers damage".[151] By the authorities of *Nelles/ Proulx* and *Miazga 2,* the Supreme Court of Canada has established that, in an action for malicious prosecution, the plaintiff must prove that the prosecutor failed to fulfil his/her proper role on account of malice not by reason of incompetence, inexperience, poor judgment, lack of professionalism, laziness, recklessness, honest mistake, negligence or even gross negligence.[152] To succeed in an action for malicious prosecution, the conduct of the prosecutor must be more than recklessness or gross negligence.[153]

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149 *Moulton v Chief Constable of the West Midlands* [2010] EWCA Civ 524 (13 May 2010), paragraph 52.

150 *Miazga v Kvello Estate* [2009] 3 SCR 339 (SCC), paragraph 56.

151 Per Charron J, paragraph 7.

152 *Nelles v Ontario* (1989) 2 SCR 170 (SCC) at 199; *Proulx v Quebec (Attorney General)* (2001) 206 DLR (4th) 1 (SCC), paragraph 35; *Miazga v Kvello Estate* [2009] 3 SCR 339 (SCC), paragraphs 80-81.

153 *Proulx v Quebec (Attorney General)* (2001) 206 DLR (4th) 1 (SCC) at 31, applied in *Grenier v Canada* 2004 FC 132 (CanLII), paragraph 101.

Between *Nelles/Proulx* and *Miazga 2*, the Ontario Court of Appeal held in *O'Neil v Metro Toronto Police Force*[154] that improper purpose need not be linked to a motive to do harm to the plaintiff and that it was unnecessary that any reason for the improper purpose be found, but that improper purpose could be inferred if the defendant continued with the prosecution with reckless indifference to the truth. The plaintiff in this case was arrested by the defendant police officers and prosecuted for robbery based upon a complaint laid by a third party. Notwithstanding that the plaintiff protested his innocence and requested them to pursue certain investigations that would prove this, they failed to do so. The plaintiff was acquitted of the charges. Borins JA (Sharpe JA concurring) held that the trial judge ought not to have excluded the evidence that was relevant to the issues of reasonable and probable cause and malice which led to the erroneous dismissal of the claim for malicious prosecution. The core meaning of malice in the tort of malicious prosecution was the use of the criminal justice system for an improper purpose. In an appropriate case, it was proper to infer malice from the absence of reasonable and probable cause to continue the prosecution.[155] Evidence that a prosecution was continued when there was evidence that the available information was unreliable translates into a deliberate or reckless act from which improper purpose could be inferred. Thus, the failure of the police officer to make adequate inquiries before continuing the prosecution could constitute malice.[156]

6.2.2 The South African experience

The facts of *Moleko* differ significantly from those of *Relyant Trading* involving a private person instigating but the police prosecuting. Yet, the Supreme Court of Appeal arrived at similar conclusions in both cases in relation to equating recklessness and negligence to malice for malicious prosecution. In *Moleko*, a magistrate was prosecuted for defeating or obstructing the course of justice consequent upon his granting bail in respect of Schedule 6 of CPA offences. He was acquitted of the charge. In considering his action for malicious prosecution, Van Heerden JA for a unanimous court held that the defendant in an action for malicious prosecution must not only have been aware of what s/he was doing in instituting or initiating the prosecution, but must at least have foreseen the possibility that s/he was

154 (2001) 195 DLR (4th) 59 (Ont. CA).

155 For instance, it was held in *Ferri v Root* (2007) 279 DLR (4th) 643 (Ont. CA), paragraphs 87 and 94, where a prosecutor decides to secure a conviction at all costs and conducts the case with tunnel-vision. Thus, proceeding with a prosecution in a case where there is no reasonable and probable cause may not of itself constitute malice, but it is certainly evidence from which an inference of malice can be drawn in an appropriate case. Proceeding without reasonable and probable cause is contrary to the law and demands a credible explanation, failing which the inference of malice can be drawn.

156 *O'Neil v Metro Toronto Police Force* (2001) 195 DLR (4th) 59 (Ont CA), paragraphs 47, 48 and 49.

acting wrongfully, but nevertheless continued to act, reckless as to the consequences of his/her conduct (*dolus eventualis*).[157] Negligence on the part of the defendant, even gross negligence, will not suffice.[158]

The court adopted the definition of *animus injuriandi* offered by Neethling *et al.*[159] which is intention to injure but also includes consciousness of wrongfulness.[160] That means that the defendant directed his will to prosecuting the plaintiff in the awareness that reasonable grounds for the prosecution were absent – awareness that his conduct was wrongful. It follows from this that the defendant will go free where reasonable grounds for the prosecution were lacking, if the defendant honestly believed that the plaintiff was guilty. In such a case, the second element of *dolus*, namely consciousness or knowledge of wrongfulness, and therefore *animus injuriandi*, will be lacking. The defendant's mistake, therefore, excludes the existence of *animus injuriandi*.[161] Van Heerden JA held that the plaintiff had proved *animus injuriandi* on the part of the Director of Public Publications who clearly intended to prosecute the plaintiff and was fully aware of the fact that, by doing so, the plaintiff would in all probability be injured and his dignity, his good name and privacy in all probability negatively affected. In spite of her knowledge of these facts, the Director of Public Publications took the decision to prosecute without making any of the enquiries which she of essence was obliged to make, thus acting in a manner that showed her recklessness as to the possible consequences of her conduct.[162] That means that the defendant directed her will to prosecuting the plaintiff.

In *Relyant Trading,* Malan AJA held that the suggestion that the effect of the decision in *National Media Ltd and Others v Bogoshi*[163] introduced negligence on the part of the defendant as a sufficient basis for a claim for malicious prosecution was misconceived. Although Neethling and Potgieter concede that Malan AJA correctly assessed *Bogoshi*, they however contend that he should have gone further in his judgement in the light of the opinion of the trial judge in *Heyns v Venter*[164] that gross

157 *Minister of Justice and Constitutional Development and Others v Moleko* [2008] 3 All SA 47 (SCA), paragraph 64; *Heyns v Venter* 2004 (3) SA 200 (T), paragraphs 13-14.

158 See also *Relyant Trading (Pty) Ltd v Shongwe and Another* [2007] 1 All SA 375 (SCA), paragraph 5; *Hash v Minister of Safety & Security* [2011] ZAECPEHC 34 (2 August 2011), paragraphs 78-80 and 85.

159 Neethling 2005:181.

160 See further discussion by Neethling & Potgieter 2010:865 at 924.

161 *Minister of Justice and Constitutional Development and Others v Moleko* [2008] 3 All SA 47 (SCA), paragraph 63.

162 *Minister of Justice and Constitutional Development and Others v Moleko* [2008] 3 All SA 47 (SCA), paragraph 65.

163 1998 (4) SA 1196 (SCA).

164 *Heyns v Venter* 2004 (3) SA 200 (T), paragraph 14. It was held, *inter alia*, that the dignity of a person could be unreasonably impaired if defendants were permitted to raise a defence of absence of knowledge of unlawfulness in cases of malicious prosecution. In view of the constitutional protection of human dignity, the ambit of the delict of malicious prosecution had to be extended: if it was clear that a defendant had as a result of gross negligence thought that an

negligence was enough to support a claim for malicious prosecution. They believe that, if negligence were incorporated as a criterion for malicious prosecution, that would "strengthen the fundamental rights protected by the action for malicious prosecution and in this way promote the spirit, purport and objects of the Bill of Rights".[165]

It would appear that, insofar as the common law of malicious prosecution is concerned, cause of action contemplates deliberate or intentional wrongdoing and, if so, the common law may need to be developed and reformulated if it were to be extended to negligent conduct in prosecuting a suspect. At this point in time, it would appear that a prosecution that falls short of malice or recklessness, but that is negligent in its attribute can be brought within the negligence cause of action. There can be no doubt that the prosecutor owes a suspect a legal duty to conduct the investigation or prosecution with due care, that is, within the standard of a reasonable prosecutor or police officer.[166] This is the necessary intendment of the contemporary law of negligence embedded in the jurisprudence of *Carmichele (1)*[167] and those cases based on it.[168] An action in negligence in the circumstances will be more suitable to accommodate a person whose liberty and dignity have been impaired by negligent prosecution. In any event, it is commonplace to see actions for wrongful arrests, malicious prosecution joined with negligence as alternative cause of action. It is in order to protect a suspect's rights to liberty and fair process enshrined in the Canadian *Charter of Rights and Freedoms* that propelled the Supreme Court, following at the heels of the South African police liability jurisprudence, to enunciate the tort of negligent police investigation and prosecution in *Hill v Hamilton-Wentworth Police Services Board.*[169]

The appellants' claim for damages for malicious prosecution in *Rudolph and Others v Minister of Safety and Security and Another*[170] was based on the allegations that members of the South African Police Services had brought false charges against them, having had neither evidence nor

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act constituted a crime and had instigated a charge, he should not be allowed to raise as a defence that he was unaware that it was not a crime. To ensure that this development did not go too far, gross negligence had to be required.

165 Neethling & Potgieter 2007:767 at 829.

166 See, e.g., *Bishi v Minister of Safety and Security* [2008] ZAECHC 64 (ECD) (20 May 2008).

167 *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC).

168 See, e.g., *Minister of Safety and Security and Another v De Lima* 2005 (5) SA 575 (SCA); *Minister of Safety and Security v Rudman* 2005 (2) SA 680 (SCA); *Carmichele v Minister of Safety and Security and Another* (2) 2004 (2) SA 133 (SCA); *Minister of Safety and Security and Another v Hamilton* 2004 (2) SA 216 (SCA); *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as Amicus Curiae* 2003 (1) SA 389 (SCA); *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA).

169 (2008) 285 DLR (4th) 620 (SCC), discussed in Okpaluba & Osode 2010:paragraph 10.3.

170 2009 (5) SA 94 (SCA).

reason to believe that the appellants had committed any offence, and had acted with "malice", and the fact that the charges had subsequently been withdrawn. The respondents denied that the members of the South African Police Services acted with malice inasmuch as the arresting officer had sought legal advice before arresting the first appellant on 18 July 2003. Since there was no argument as to the instigation of proceedings, or the absence of probable or reasonable cause, or of the same being withdrawn, the judgement of the Supreme Court of Appeal centred on the element of what the plaintiff termed "malice", but which the court thought laid under the *actio injuriarum*, since what must be proved in this regard was *animus injuriandi*.[171] As Mthiyane and Van Heerden JJA explained:

> The respondent's argument … is misconceived. The 'malice' must be that of the person responsible for initiating the prosecution against the appellant. In this case the appellants were formally charged – with contravening the Gatherings Act – on Saturday 19 July 2003 by members of the SAPS at the Pretoria Moot Police Station. It would appear that this is the stage at which the proceedings were initiated. Although Captain Bekker's police statement was made only on 18 August 2003, it is safe to assume that the member of SAPS who charged the appellants did so on the basis of the information furnished to him or her by the arresting officer, viz that there were only eight persons (four adults and four children) gathered at the scene of the supposed 'illegal gathering'. By no stretch of the imagination could this 'demonstration' be regarded as a 'gathering' within the meaning of the Gathering Act.[172]

It was thus held that there could be no question that the person who charged the appellants was aware of the fact that, by doing so, the appellants would, in all probability, be "injured" and their dignity[173] negatively affected.[174] Knowing the facts surrounding the arrest of the first appellant, the police officer concerned must, at the very least, have foreseen the possibility that no offence of illegal gathering had been committed and that, in charging the appellants, s/he was acting wrongfully. The officer nevertheless continued to act, reckless as to the possible consequences of his/her conduct. By so doing, the officer acted *animus injuriandi*. Accordingly, the appellants had proved the requirements of malicious prosecution.[175]

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171 *Rudolph and Others v Minister of Safety and Security and Another,* paragraph 18; affirming the approach of the court since *Moaki v Reckitt and Colman (Africa) Ltd and Another* 1968 (3) SA 98 (A) at 103G-104E; *Prinsloo and Another v Newman* 1975 (1) SA 481 (A) at 492A-B down to *Minister of Justice and Constitutional Development and Others v Moleko* [2008] 3 All SA 47 (SCA), paragraph 64.

172 *Rudolph and Others v Minister of Safety and Security and Another,* paragraph 19.

173 See *Relyant Trading (Pty) Ltd v Shongwe and Another* [2007] 1 All SA 375 (SCA), paragraph 5.

174 *Minister of Justice and Constitutional Development and Others v Moleko* [2008] 3 All SA 47 (SCA), paragraph 65.

175 *Rudolph and Others v Minister of Safety and Security and Another,* paragraph 20.

7. Conclusion

It is well established that, where a reasonable and probable cause is not proved, the question of malice arises. In effect, once a lack of reasonable and probable cause is proved, malice is most likely to exist and both must be proved in order for an action for malicious prosecution to succeed. Malice is a question of fact, requiring evidence that the prosecutor was impelled by an improper purpose, ill will or spite. Thus, the malice element of the test for malicious prosecution will be made out when a court is satisfied on a balance of probabilities that the prosecutor commenced or continued the impugned prosecution with a purpose inconsistent with his/her role as an officer of justice. While the absence of a subjective belief in reasonable and probable cause is relevant to the malice inquiry, it does not equate with malice and does not dispense with the requirement of proof of an improper purpose.

Malice is clearly a key element in an action for malicious prosecution. In this context, it includes prosecutorial conduct that is fuelled by an improper purpose. At common law, it is designed to incorporate deliberate or intentional wrong. Although recklessness suffices in some jurisdictions, in others, malicious prosecution must be based on more than recklessness or gross negligence. In any event, negligence, gross or otherwise, is not treated as sufficient to ground an action for malicious prosecution in all jurisdictions. In view of the high threshold for proving malice, it has been suggested that negligence be equated to malice in the South African context. If this argument were to be taken seriously, then there would be the need to develop the common law by the courts. Such responsibility lies with courts in England and Australia where the tort of negligent police investigation is yet to take root. Insofar as South Africa and Canada are concerned, the law of negligent police investigation, which covers conduct falling short of malice or recklessness on the part of the police and the prosecutor, is already in existence. In these two jurisdictions, the prosecutor owes a suspect a legal duty/duty of care to conduct criminal investigation and prosecution with uttermost care. It, therefore, follows that the call to develop the common law in this regard becomes purely academic.

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