

The Concept of Malicious Prosecution

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ABSTRACT

Malicious prosecution is an abuse of the process of the court by wrongfully setting the law in motion on a criminal charge. In order to succeed the plaintiff must prove that there was a prosecution without any just and reasonable cause, initiated by malice and the case was decided in the plaintiff's favor. It is necessary to prove that damages were incurred by the plaintiff as a result of the prosecution. The burden of proof rests on him. He has to prove the existence of malice. Malice may be proved by previously stained relations, unreasonable and improper conduct like advertising the charge or getting up false evidence. Though mere carelessness is not the per se proof of malice, unreasonable conduct like haste, recklessness or failure to make enquiries would be some evidence. Malicious prosecution is the malicious institution of unsuccessful criminal or bankruptcy or liquidation proceedings against another without reasonable or probable cause. This tort balances competing principles, namely freedom that every person should have in bringing criminals to justice and the need for restraining false accusations against innocent persons.

1. Introduction

"It is no doubt true that everyone has a right to set in motion judicial machinery for protection of his own rights, but such person should not infringe the corresponding rights of others by instituting improper legal proceedings in order to harass them by unjustifiable litigation."¹

Malicious prosecution is a common law tort, which found its origin in the ancient English regime. The most important aspect in a person's life is his life, liberty and reputation. The concept of malicious prosecution safeguards all three of them by effectively protecting the person from unwanted and maliciously instituted proceeding. The origin of this concept, in effect came from the abuse of the judicial process. Professor Winfield has the following to say about the law of malicious prosecution: "It had to make its way between two competing principles, - freedom of action that every man should have in bringing criminals to justice and the necessity for checking lying accusations of innocent people. 1 Ameruddin v Fazalur Rahim Khan (2003 YLR 136)

For some time the judges oscillated between apprehension of scarring off a just accuser and fear of encouraging a malicious one."²

The concept of malicious prosecution plays the distinguishing role between the right of the person to move the law into motion, and the corresponding right of being free from harassment of a malicious legal proceeding. This is achieved by a deterrence which would streamline and would instigate everyone to use their right to move the law into motion after putting in due thought behind it. This deterrence is in the form of malicious prosecution. It is the gate keeper in safeguarding one right from the other. Such an abuse of necessity may, be

injurious, as involving damage to character, or it may, in any particular case bring about damage, to a person or property."³

2. Indian Context on Malicious Prosecution

The idea of malicious prosecution is not essentially alien to Indian law. The tort of malicious prosecution can best be summarized as an institution of proceedings without probable and reasonable cause with malicious intent. This concept has been developed and expanded through judicial precedents over time. The most important aspect for a person alleging malicious prosecutions is to prove want of reasonable and probable cause which is assessed as a question of fact and not a question of law⁴. Reasonable and probable cause has been defined in the case Rishabh Kumar v. K.C. Sharma⁵ Now the question of reasonable and probable cause depends on the facts as known to the defendant who initiated the prosecution; and when the facts upon which the prosecutor acted have been ascertained and when the facts operating on the prosecutor's mind at the time of the prosecution are known, the Court has to determine whether those facts afforded reasonable and probable cause for prosecuting the accused. If those facts did afford reasonable and probable cause, then the prosecution would be justified and it would not as a rule be necessary for an inquiry to be made into the prosecutor's belief. The state of belief of the prosecutor goes to malice, but not as a rule to reasonable and probable Cause."⁵ "The 192nd Law Commission Report says that the main purpose of enacting a law on malicious prosecution is to prevent a person from instituting or continuing vexatious proceedings habitually

³Clerk and Lindsell on Torts, 662, (Ninth Ed.)

⁴ 4 Norm Maamary, Determining Where the Truth Lies: Institutional Prosecutors and the Tort of Malicious Prosecution, University of Sydney, Available at <http://dictionaryofbooks.org/case-noteuniversity-ofpennsylvania-law-review.pdf>

⁵ 5 AIR 1961 M.P. 329

¹ Ameruddin v Fazalur Rahim Khan (2003 YLR 136).

² Prof. Winfield, Torts, Chapter 24, 747, (Sixth Ed.)

and without reasonable ground in the High Courts and subordinate courts

In India, even in the absence of a clear and detailed law from which malicious prosecution emanates, the Courts have divulged some key principles that can be observed consistently throughout the jurisprudential trends.⁶

Is the institution of unsuccessful criminal or bankruptcy or liquidation proceedings against another without reasonable or probable cause? This tort balances competing principles, namely freedom that every person should have in bringing criminals to justice and the need for restraining false accusations against innocent persons.⁷ Liability for malicious prosecution has always had to steer a path between two competing principle on one hand the freedom of action that everyone should have to set the law in motion and to bring criminals to justice and the other hand the necessity to check lying accusation against innocent people. Refer to institution of unsuccessful criminal proceeding maliciously and without reasonable and probable cause. When such prosecution because such damage to the party prosecuted it is a tort for which he can bring an action. The burden which has to be taken by the claimant in a case of malicious prosecution is a heavy one. There is no liability in negligent in respect of neither the conduct of neither a prosecution nor the investigation of a charge made against claimant.⁸ Majority actions for malicious prosecution nowadays are probably brought against the police but the House of lords has reaffirmed that a private person who sets the law in motion may still incur liability.

3. When does Prosecution start?

The Prosecution is not deemed to have commenced before a person is summoned to answer a complaint. In *Khagendra Nath v. Jacob Chandra*⁹ there was mere lodging of complaint alleging that the plaintiff wrongfully took away the bullock cart belonging to the defendant and requested that something should be done. The plaintiff was neither arrested nor prosecuted. It was held that merely bringing the matter before the executive authority did not amount to prosecution and therefore the action for malicious prosecution could not be maintained. There is no commencement of the prosecution when a magistrate issues only a notice and not summons to the accused on receiving a complaint of defamation and subsequently dismissed it after hearing both the parties

How can we establish malicious prosecution?

The tort of malicious prosecution provides redress for those who are prosecuted without cause and with malice. In order for the tort of malicious prosecution to succeed the plaintiff must prove that there was a prosecution without reasonable and just cause, initiated by malice, and the case

⁶Law Commission Of India, 192nd Report On Prevention Of Vexatious Litigation, 2007, Available at https://www.google.co.in/url?sa=tandrcrct=janddq=andesrc=sandsourc=webandcd=1andcad=rjaanduaact=8andved=0ahUKEwj4NvYy7rWAhWBto8KHZBAB5IQFggIMAAandurl=http%3A%2F%2Fwww.missionofindia.nic.in%2Freports%2Freport192.pdfandusg=AFQjCNFvGn_szbs5WGCpCtc7DpPBvbP bFg

⁷ Vivienne Harpword, Principle of Tort, 4th Edition, 2000

⁸ 8 Winfield & Jolowicz, Tort, 18th edition, sweet & Maxwell publishers.

⁹ A.I.R 1977 N.O.C 207

was resolved in the plaintiff's favor. It is necessary to prove that damage was suffered as a result of the prosecution. In an action of malicious prosecution the plaintiff must prove:-

i. That the plaintiff was prosecuted by the defendant

There must have been a prosecution initiated by the defendant. The word „prosecution“ means a proceeding in a court of law charging a person with a crime. To prosecute is to set the law in motion and the law is set in motion only by an appeal to some person clothed. The person to be sued is the person who was „actively instrumental in putting the law in force. There was a conflict on the question whether there is prosecution of a person before process is issued calling upon him to defend him. One view was that a prosecution began only when process was issued and there could be no action when a magistrate dismissed a complaint under section 203 of the code of criminal procedure. The other view was that a prosecution commenced as soon as a charge was made before the court and before process was issued to the accused. The proper test was indicated by the privy council in the *Mohammad Amin v. Jogendra Kumar Bannerjee*¹⁰ .The defendant had filed a complaint before the magistrate charging the plaintiff with cheating. The magistrate thereupon examined the complainant an oath and made an inquiry under s 202 of the code of criminal procedure. Notice of the inquiry had been issued to the plaintiff who attended it with his counsel and incurred costs doing so. The magistrate finally dismissed the complaint under section 203 of the code. In these circumstances the Privy Council held that there was a prosecution .The test is not whether the criminal proceedings have reached a stage at which they may be described as a prosecution, the test is whether such proceedings have reached a stage at which damage to the plaintiff results. A mere presentation of complaint to a magistrate who dismissed it on the ground that is disclosed no offence may not be sufficient. Ground for presuming that damage was a necessary consequence, It will be for the plaintiff to prove that damage actually resulted. In the case of *Martin v. Watson*¹¹ the House of Lords held that it is not necessary that defendant should be the prosecutor in any technical sense. What matters that he should in substance be the person responsible for the prosecution being brought. In this case the defendant made various charges to the police that the claimant had indecently exposed himself to her and this lead to the prosecution of the claimant at which no evidence was offered against him. In another case *Yohana s/o Miyuni v. Isaya s/o Bakobi*¹².

The plaintiff sued the defendant for spoiling his reputation, maliciously imprisoning him and uprooting his crops. The parties were neighbor and had numerous disputes over the right of each in relation to the hand of the other. In the cause of one dispute the defendant made a report to the police that the plaintiff had threatened him and the plaintiff was arrested and remanded for two days. The criminal proceeding was terminated on the plaintiff's favor.

ii. That the proceeding complained was terminated in favor of the plaintiff

¹⁰(1948)51CWN 723(PC)

¹¹ (1996) A.C 74,

¹² (1969) HCD 25

The plaintiff must prove that the prosecution ended in his favor. He has no right to sue before it is terminated and while it is pending. The termination may be by an acquittal on the merits and a finding of his innocence or by a dismissal of the complaint for technical defects or for non prosecution. If, however he is convicted he has no right to sue and will not be allowed to show that he was innocent and wrongly convicted. His only remedy in that case is to appeal against the conviction. If the appeal results in his favor then he can sue for malicious prosecution. It is unnecessary for the plaintiff to prove his innocence as a separate issue. In the case of *Festo v. Mwakabana*¹³, the appellant having a dispute over ownership of land with his neighbor, harvested maize growing on the land. The respondent preferred a criminal complaint against the former. The appellant was tried and convicted by the trial magistrate but acquitted on appeal. The judge observed that it could not be disputed that so far as plaintiff was concerned the criminal proceedings had been terminated in his favor thereby satisfying. The essential requisite condition for bringing an action for malicious prosecution, On the other hand in the case of *Reynolds v. Kennedy*¹⁴, it was held that no action would lie of the claimant had been convicted even if his conviction was later reversed on appeal. The reasons apparently being that the original conviction showed conclusively that there was foundation for the prosecution; however, this is no longer be regarded as good law.

iii. That the prosecution was instituted against without any just or reasonable cause.

“Reasonable and probable cause was defined in the case of *Hicks v. Faulkner*¹⁵ as “an honest belief in the guilt of the accused based on a full conviction founded upon reasonable grounds, of the existence of a circumstances, which assuming them to be true, would reasonably lead any ordinary prudent man and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed”. In the case of *Satyakam v. Dalluth* the defendant, an illiterate, engaged the plaintiff, as his advocate in a dispute of his landed property. After the decision of this case, there was another dispute of some other property of the defendant and the plaintiff took up the case of the opposite party.

The defendant object to the conduct of the plaintiff and filed to a complaint in the Bar council of India alleging professional misconduct. The Bar council gave the benefit of doubt to the plaintiff and dismissed the complaint. There after the plaintiff filed a suit for malicious prosecution against the defendant. The court observed that because of similarity between the two litigation and also high traditions of the legal professional, the plaintiff should not have accepted the case against the old client. Since there was reasonable cause and no Malice on the part of the defendant, it was not the case of malicious prosecution.

iv. The defendant acted maliciously

For the purpose of malicious prosecution, malice means having any other motive apart from that of bringing an offender

to justice. Thus, is the presence of some other and improper motive that is to say the legal process in question for some other than its legally appointed and appropriate purpose. In the case of *Allen v. Flood* a general rule was propounded that an act lawful in itself does not merely become unlawful because of the bad motives of the actor and some of them lordships in the House of Lords suggested that Malicious prosecution was not really an exception to this rule. The settled rule is that Malice is the gist of the action for malicious prosecution and must be proved by the plaintiff in the first instance. It is for the plaintiff to prove that there was an existence of Malice that is to say the Burden of proof lies upon the plaintiff. Anger and revenge may be proper motives if channeled into the criminal justice system. The lack of objective and reasonable cause is not an evidence of malice but lack of honest belief is an evidence of malice. In *Peter Ng'homongo v. Gerson M.K Mwangi*¹⁶. The court of appeal established malice when it found out that the principal of the college of Mapwapwa was in conflict with Peter (a tutor) stemming from the fact that Peter was a good and a very nice singer.

v. That the plaintiff suffered some damage

It has to be proved that the plaintiff has suffered damages as a result of the prosecution complaint of. Even though the proceedings terminated in the favour of the plaintiff, he may suffer damage as a result of the prosecution. The damages may not necessarily be pecuniary

a).Proof of monetary loss

If they are special damages the law requires strict proof. Otherwise if they are general there is no real standard measure or yard stick available .

b).Loss of personal security

One could suffer damage which is in form of security for his life or property. As it was stated in the case of *J. Kawana v. B. Mayandi*¹⁷

where the appellant alleged in the meeting that the respondent was responsible for arson which had been committed in the village, Humble Justice observed that the respondent's liberty was endangered and also lost in prison for about a month

c).Threat for loss of job

For someone in employment in a particular profession, which demand adherence to a certain norms or ethics it is serious when a false allegation is made against him or her. This was stated in the case of *Hosea Lalata v. Gibson Zumba Mwasote*¹⁸, the court observed that the plaintiff being a person who was administering justice (magistrate) an allegation of corruption against him was too damaging to his profession

d).Loss of personal liberty

This entails situation where by a person is imprisoned for a certain period of time. In *Hosea's* case the judge found out the respondent was assailed for about 8 months as a result of appellant wrongful acts. Therefore, he was entitled for compensation

¹³ (1983) TLR 154

¹⁴ [1784 1] wils. 232

¹⁵ (1878)8 QBD 167

¹⁶ civil no. 1 of 1994 HC(Dodoma)

¹⁷ (1985) TLR 125

¹⁸ (1980) TLR 154

e).Damage to property

It is possible that when one is busy in criminal sessions, someone's basic activities will have to be shelved. This way leads to damage of property. In the case of J. Kawana v. B.Mayandi¹⁹ because of the respondents incarceration his crops in his shamba where exposed to waste and where infact destroyed. So this amount to damage to property

4. Recent cases

Vishweshwar Shankarrao Deshmukh and Anr v. Narayan VithobaPatil²⁰.The plaintiff was the sarpanch of the village Shirputi in the year 1980 and the defendant no. 1 was in the service as a Gram sewak under the Zila Parishad, and the defendant no.2 was a teacher in a school run by the Zila Parishad. The plaintiff contended that he made several reports against the defendants for their misconduct. The report was made against defendant no.1 for his misbehavior, defalcation and forgery of accounts and also against defendant no.2 for his absence from duties and other irregularities. It is contended that both the defendants then hatched a conspiracy to involve the Plaintiff in a criminal conspiracy and such that the defendant no.1 had lodged an F.I.R. with the police that was assaulted by the plaintiff while he was discharging his duties. On the basis of the F.I.R and investigation done by the Police, criminal proceedings were launched against the plaintiff...

The plaintiff was acquitted of the charges against him. It is contended that on the basis of the F.I.R. lodged by the defendant no.1, plaintiff was arrested but the police and the criminal proceeding against him was with malicious intention on the part of the defendants. The prosecution was launched without any reasonable cause and due to the false prosecution, there was a loss to his prestige and reputation and his status was lowered down in the society being a serpent and a politician. The court held that the plaintiff was maliciously prosecuted by the defendants without any reasonable and probable cause, and therefore they are liable to pay damages worth Rs 12,500.00 to the plaintiff.

5. Conclusion

Malicious prosecution is an abuse of the process of the court by wrongfully setting the law in motion on a criminal charge. In order to succeed the plaintiff must prove that there was a prosecution without any just and reasonable cause, initiated by malice and the case was decided in the plaintiff's favor. It is necessary to prove that damages were incurred by the plaintiff as a result of the prosecution. The burden of proof rests on him. He has to prove the existence of malice. Malice may be proved by previously stained relations, unreasonable and improper conduct like advertising the charge or getting up false evidence. Though mere carelessness is not the per se proof of malice, unreasonable conduct like haste, recklessness or failure to make enquiries would be some evidence. Malicious prosecution is the malicious institution of unsuccessful criminal or bankruptcy or liquidation proceedings against another without reasonable or probable cause. This tort balances competing principles, namely freedom that every person should have in bringing criminals to justice and the need for restraining false accusations against innocent

persons. Malicious prosecution is an abuse of the process of the court by wrongfully setting the law in motion on a criminal charge. It is an effort to disturb the proper functioning of the judicial machinery.

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¹⁹(1985) TLR 125

²⁰ 2005(2) BomCR491