

MALICIOUS PROSECUTION

1. In order to succeed in an action for malicious prosecution, a Plaintiff must prove:
 - i. That the prosecution was initiated by the defendant;
 - ii. That the prosecution terminated favorably to the plaintiff;
 - iii. That the defendant acted with malice in bringing or maintaining the prosecution; and
 - iv. That the prosecution was brought or maintained without reasonable and probable cause.¹
2. In *A v State of New South Wales*, A was charged with two alleged offences of sexual assault upon his stepsons. He was a civilian employed by the NSW Police Department.
3. There was evidence that the youngest complainant had been influenced by the older complainant, to maintain an allegation against his step-father. Greg Walsh represented A in the criminal proceedings which were heard at the Campbelltown Local Court. The police officer, Detective Floros spoke to Mr Walsh and in doing so in effect stated that "*A would not have been charged if he'd not been an employee of the Police Department...*"
4. In the course of the criminal proceedings, the younger complainant admitted in cross-examination by Mr Walsh, that he had been given access to his older brother's statement by police and FACS officers and there had been discussion about the allegations made by the older brother in the presence of and involving the younger complainant. The prosecutor was also present. The charges were dismissed by the Magistrate.
5. A, instituted proceedings in the District Court seeking damages for malicious prosecution. The action was heard by Cooper DCJ. Mr Walsh had to withdraw from the proceedings as he was a material witness and actually gave evidence in those proceedings. the plaintiff, A, was successful and awarded damages. The State of NSW appealed. The Court of Appeal unanimously upheld the appeal and leave was sought to appeal to the High Court in behalf of A which was granted. In a unanimous judgment, A's appeal was upheld.

Initiation of the prosecution by the defendant

6. In *A v State of New South Wales* at [34]:

¹ See *A v State of New South Wales* (2007) 230 CLR 500 at [1]. Greg Walsh acted for A in this matter

“the identification of the appropriate defendant in a case of malicious prosecution is not always straightforward. ‘to incur liability the defendant must play an active role in the conduct of the proceedings as by instigating or setting them in motion, citing Fleming, The Law of Torts 9th Ed at 676.’”

7. In the course of the judgment, the High Court referred to Martin v Watson [1996] AC 74. In that case, a woman complained that a neighbour indecently exposed herself to her whilst standing on a ladder in his garden. She complained to police and the information was laid against the neighbour by the police. In the Magistrate’s Court the Prosecution offered no evidence and the charge was dismissed. It was held by The House of Lords that as the facts and circumstances of the alleged offence was solely within the complainant’s knowledge and the police officer could not have exercised an independent discretion, the complainant could be sued for malicious prosecution as she had *“in substance procured the prosecution”* and the police officer had no way of testing the truthfulness of the accusation.
8. Dixon J in Commonwealth Life Assurance Society Ltd v Brain (1935) 53 CLR 343 at 379 said:

“It is clear that no responsibility is incurred by one who confines himself to bringing before some proper authority information which he does not disbelieve, even although in the hope that a prosecution will be instituted, if it is actually instituted as the result of an independent discretion on the part of that authority... But, if the discretion is misled by false information, or is otherwise practiced upon in order to procure the laying of the charge, those thus brought about the prosecution are responsible... The rule appears to be that those who counsel and persuade the actual prosecutor to institute proceedings or procure him to do so by dishonestly prejudicing his judgment are vicariously responsible for the proceedings. if the actual prosecutor acts maliciously and without reasonable and probable cause, those who aid and abet him in going so are joint wrongdoers with him.”

9. In State of New South Wales v Abed [2014] NSWCA 419 Gleeson JA (Bathurst CJ and McFarlane JA agreeing) said at [185]:

“claims for malicious prosecution are commonly brought against the prosecutor and sometimes against additional defendants. Nonetheless, it is not a necessary condition for the effective pursuit of an action for malicious prosecution that the actual prosecutor himself or herself was party to the wrongdoing; Johnston v Australia and New Zealand Banking Group Ltd [2006] NSWCA 218 at [39] – [40] (Basten JA; Giles and Santow JJA agreeing). As noted by Basten JA, the authorities for this proposition include Commonwealth Life Assurance Ltd v Brain [1935] HCA 30; 53 CLR 434 at 379 and 381-382 (Dixon J).”

Favourable termination of the prosecution

10. An essential element is that the plaintiff must establish the prosecution against him/herself ended in his favour. A conviction would demonstrate reasonable and probable cause for any prosecution. However, this does not require the Plaintiff to prove an acquittal on merits. In *Beckett v New South Wales* [2013] HCA 17, the Court referred to *Commonwealth Life Assurance Society Ltd v Smith* [1938] 59 CLR 527, requiring the Plaintiff to prove his or her innocence at the trial of the civil action where the prosecution was terminated by the entry of a nolle prosequi by the Attorney General. At [5] and [6] the Court said as follows:

“The second element of the tort is a requirement of the policy. Differing accounts of the rationale for the requirement are found in the early cases. It is said that a person should not be permitted to allege that a pending proceeding is ‘unjust’ and that the possibility of a conflict in judicial decisions should not be allowed. The rationales for the rule evince the concern of the law with the consistency of judicial determinations, a concern that is distinct from proof of actual innocence or guilt, a plaintiff who is wrongfully convicted of an offence cannot maintain an action for malicious prosecution notwithstanding that he or she may possess irrefutable proof of innocence.

The requirement that the prosecution has terminated avoids the possibility of conflict in the decisions of the court trying the criminal charge and the court trying the civil action. Any termination that does not result in conviction is favourable to the plaintiff for the purposes of the civil action. Prosecutions may terminate in the number of ways without verdict, the Magistrate may not commit for trial, the Director may not find a bill of indictment, the Director may direct that no further proceedings be taken after a bill has been found, or the Attorney General may enter a nolle prosequi. The plaintiff has no control over the termination of the proceedings in any of these ways and in those circumstances, it would be unjust to deprive him or her of the ability to recover for the tort. As professor Salmond explained it:

“what the plaintiff requires for his action is not a judicial determination of his innocence, but merely the absence of any judicial determination of his guilt.”²

11. In *Beckett*, the Court observed:

“19. The appellant was arrested by members of the New South Wales Police Force and charged with a number of offences against her husband. She was committed to stand trial in the Supreme Court of New South Wales. A bill of indictment charging the appellant with nine counts was found and she was arraigned upon it. The eight count was preferred ex officio. At the conclusion of the verdicts of guilty on counts 1, 2, 3, 4, 6, 7 and 9, and on the alternative charge to the offence charged in count 5. A verdict of not guilty was returned respecting the offence charged in count 8.

20. In October 1991, the appellant was sentenced to a term of imprisonment of twelve years and three months with a non-parole period of ten years and three months. She

² See *Davis v Gell* (1924) 35 CLR 275

appealed unsuccessfully against her convictions and sentence to the New South Wales Court of Criminal Appeal.

21. In 2001, the appellant petitioned the Governor seeking a review of her convictions. The Attorney General referred the application to the Court of Criminal Appeal. The Court of Criminal Appeal remitted the determination of a number of factual questions to Acting Judge Davidson. Following the delivery of Davidson ADCJ's findings on 17 August 2005, the Court of Criminal Appeal allowed the appeal in relation to counts 1, 2, 5, 6, 7 and 9 and quashed each conviction. The Court entered a verdict of acquittal on count 9. A new trial was ordered on counts 1, 2, 5, 6 and 7. The appellant's appeal against her convictions for the offences charged in counts 3 and 4 was dismissed.

22. On 22 September 2005, the director directed that there be no further proceedings against the appellant on the outstanding charges that were the subject of the Court of Criminal Appeal's order for a new trial. On 26 September 2005, a document communicating the director's determination was forwarded to the Registry of the Court of Criminal Appeal."

12. Therefore, there is no need to distinguish a prosecution terminated by entry of a nolle prosequi by the Attorney General or a direction by the DPP under the statutory power (s.7 Director of Public Prosecutions Act 1986) from other termination of prosecution short of acquittal.³

Malice

13. In A v New South Wales, the High Court at [91] said:

"91. What is clear is that, to constitute malice, the dominant purpose of the prosecutor must be a purpose other than the proper invocation of the criminal law – an "illegitimate or oblique motive". That improper purpose must be the sole or dominant purpose actuating the prosecutor.

92 Purposes held to be capable of constituting malice (other than spite or ill will) have included to punish the defendant and to stop a civil action brought by the accused against the prosecutor. But because 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 be properly 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 the action for malicious prosecution – a purpose other than a proper purpose."

³ The High Court held that Davis v Gell should not be followed.

14. The essential approach as to the element of malice, is that *"its an element that focuses upon the dominant purpose of the prosecutor and requires the identification of a purpose other than the proper invocation of the criminal law."*

15. The dominant purpose of the prosecutor must be a purpose other than the proper invocation of the criminal law. In *A v New South Wales* at [41] the Court said:

"...where a prosecutor has no personal interest in the matter, and no personal knowledge of the parties or the alleged events, and is performing a public duty, the organizational setting in which a decision to prosecute is taken could be of factual importance in deciding the issue of malice."

16. The Court went on to say at [42]:

"In the case of a private prosecution, it may be easier to prove that a prosecutor was acting for a purpose other than the purpose of carrying the law into effect than in a case of a prosecution instituted in a bureaucratic setting where the prosecutor's decision is subject to layers of scrutiny and to potential view."

17. In *State of New South Wales v Abed* [2014] NSWCA 419, Gleeson JA (Bathurst CJ and McFarlan JA agreeing) said:

*"Examples of an improper purpose includes spite or ill will to punish the defendant and to stop a civil action brought by the accused against the prosecutor. However, the joint judgment in *A v New South Wales* emphasized at [92], it is not [possible to identify exhaustively when the processes of the criminal law may be improperly invoked. What the plaintiff has to prove, in order to establish malice in an action for malicious prosecution is a purpose other than a proper purpose: *A v New South Wales* [92]."*

Prosecution brought or maintained without reasonable and probable cause

18. The plaintiff in an action for malicious prosecution must establish a negative from the absence of reasonable and probable cause. This often can be a difficult requirement. The High Court in *A v New South Wales* acknowledged these difficulties at [60]-[61].

19. It is frequently the case that absence of reasonable and probable cause is to be proved by inference. The Court said:

"77 There are three critical points. First, it is the negative proposition that must be established, more probable than not, the defendant prosecutor acted without reasonable and probable cause. Secondly, that proposition may be established in either or both of two ways: the defendant prosecutor did not 'honestly believe' the case that was instituted or maintained, or the defendant prosecutor had no sufficient basis for such an honest belief. The third point is that the critical question presented by this element of the tort is: what does the plaintiff demonstrate about what the

defendant prosecution made of the material that he or she had available when deciding whether to prosecute or maintain the prosecution? That is, when a plaintiff asserts that the defendant acted without reasonable and probable cause, what exactly is the content of that assertion?"

20. Absence of reasonable and probable cause contains both subjective and objective elements. In *A v New South Wales*, the Court said:

"In cases where the prosecutor acted on material provided by third parties, a relevant question in an action for malicious prosecution will be whether the prosecutor is shown not to have honestly concluded that the material was such as to warrant setting the process of the criminal law in motion... In deciding the subjective question, the various checks and balances for which the processes of the criminal law are important. In particular, if the prosecutor was shown to be of the view that the charge would likely fail at committal, would likely be abandoned by the Director of Public Prosecutions, if or when that officer became involved in the prosecution, absence of reasonable and probable cause would be demonstrated. But unless the prosecutor is shown either not to have honestly formed the view that there was a proper case for the prosecution, or to have formed that view on a sufficient basis, the element of absence of reasonable and probable cause is not established."

21. The Court referred to the objective nature of reasonable and probable cause as referred to:

*"83... The objective element of the absence of reasonable and probable cause is thus sometimes couched in terms of the 'ordinary prudent and cautious man, placed in the position of the accuser', or explained by reference to 'evidence that persons of reasonably sound judgment would regard as sufficient for launching a prosecution'. Or, as Griffiths CJ put it in *Crowley v Lisson* (1905) 2 CLR 744 at 754, the question can be said to be 'whether a reasonable man might draw the inference, from the facts known to him, that the accused person was guilty.'"*

22. The Court at [87] observed *"the objective sufficiency of the material considered by the prosecutor must be assessed "in light of all of the facts of the particular case."*
23. An important feature on a factual basis of this case, is somewhat analogous to that of *Aw & Ors v State of NSW* [2005] NSWSC 543.⁴
24. The decision of *Aw* is based upon a factual matrix which can only be described as bizarre and unbelievable. The judgment extends to 182 pages. The first plaintiff Aw and the second plaintiff LW married in 1972. Aw's mother was JS who lived with the family in a caravan and parked in the backyard of the family home. She was 72 years of age.

⁴ Greg Walsh appeared for Aw, Lw and Js in the committal proceedings and also the care proceedings and in respect of the Supreme Court proceedings conducted by Justice Bell.

25. In April 1994, the eldest child SW was aged 18. She was living her boyfriend, Michael. The other children, JW aged 15, a daughter EW aged 13, and another daughter JLW aged 11.
26. In November 1993, SW and Michael sought counselling from Douglas Keir, a counsellor employed at Chatswood, because of problems in their sexual relationship. Douglas Keir was an American and had fairly recently come to Australia after practicing in California for a lengthy period of time. He was an adherent of recovered memory techniques.
27. SW undertook a large number of sessions with Douglas Keir. She came to disclose, after leading conversations and techniques by Keir, that her father had attempted to rape her a matter of days earlier. Keir then contacted the Department of Community Services (DOCS).
28. On 30 March 1994, SW provided a statement to Detective Sergeant Cruickshank (The Cruickshank Statement). In this statement she disclosed alleged sexual abuse from the age of 5. The investigation was a sign to Detective Sergeant MOD at De Why Detected Office. He interviewed SW on 17 April 1994. In that interview there were allegations made against SW's mother. As a result, AW and LW were arrested and charged with sexual offences against SW on that day. DOCS then took the younger children JW, EW and JLW into care. Each of the children denied their parents had sexually abused them. However, over time, allegations of sexual impropriety against one or both of their parents were made. It was alleged that the children were in need of care.
29. In late April and early May 1994, MOD took a lengthy statement from SW.⁵ she now alleged that her mother had been an active participant in the sexual abuse.
30. EW then made allegations against the grandmother JS.
31. On 23 June 1994, AW and LW were charged with a large number of offences of sexual assault.
32. On 18 August 1994, care proceedings were commenced before Mr Rooney, Children's Court Magistrate. The hearing lasted 109 sitting days. On 2 November 1995, Mr Rooney delivered his judgment. The learned Magistrate made findings that the allegations made by the children were essentially and substantially untrue. The children had not been called to give evidence. The Magistrate said clearly "*I find it quite impossible to accept the allegations are true. In any event, the three children subject to these proceedings have in the case of one child partly withdrawn the allegations and the other two completely withdrawn them with respect to the parental involvement.*"

⁵ See Judgement [14]

33. On 18 March 1996, the committal hearing of the charges against the three Plaintiffs commenced before Mr Price Magistrate. I appeared on behalf of the parents and the grandmother. The matter was dealt by way of a special fixture and on 21 June 1996, His Honour discharged LW and JS in respect of all charges. AW was discharged in respect of all charges except for one. The total number of charges against all three were in excess of 130.
34. The following factors applies to the investigation by Cruikshank and MOD:
- That SW when she initially attended upon Douglas Keir, made no allegations of sexual assault involving either AW, LW or JS;
 - That SW and her boyfriend Michael had problems in their sexual relationship which Kier interpreted as arising from trauma probably originating from sexual abuse.
 - That Keir, who was an adherent of recovered memory techniques, over approximately 62 or more sessions, led SW to a belief that she had been sexually abused by her father and that such abuse was of a most bizarre nature.
 - SW's recovered memories that her parents were part of a witches coven and that she was sexually assaulted in the family home on literally hundreds of occasions by her mother, father and grandmother.
 - That during some of the alleged acts of sexual assault, people in black capes were present and that she had been abused in the context of satanic ritual abuse.
 - That her younger siblings had been involved and indeed, EW had undergone an abortion performed on the kitchen table at the family home.
 - That her father had forced her to particulate in sexual acts by threatening her in relation to family pets, including Felix the cat and Ruggets, such animals being killed by having their throats cut by AW.
 - That such pets were buried adjacent to the garage at the rear of the house.
 - That SW had disclosed to MOD these allegations and where such animals had been buried.
 - That blood had been extracted from SW's breast or breasts and had been used in the course of sexual assaults upon her by her parents and grandmother.

- That in respect of EW, she alleged that she had written a letter to Dolly magazine seeking advice about her fears that she was pregnant and that the magazine had published a reply to her letter.⁶
- That there were allegations made by EW that her father had sexually assaulted her cousin SS during a family holiday at Murrurundi, being allegations completely reputed by SS.

A smoking gun

35. There are generally two approaches to proving absence of reasonable and probable cause in the context of a malicious prosecution case. Some lawyers use the term 'direct route' and 'indirect route'. Whatever the label, the smoking gun approach is obviously one that is often sought on behalf of plaintiffs.
36. In this case, AW, LW and JS were basically impoverished with little financial resources. AW was a Vietnam war veteran living on a pension. LW worked running a canteen at a local school and after contact by MOD after two decades of service, her employment was terminated. JS was very ill and in receipt of an aged pension.
37. In the context of SW, not only were allegations fanciful, but they were utterly bizarre and unbelievable. She alleged that her father, by way of a threat to rape her, had cut the throat of the pet cat Felix. She alleged that blood went all over her and that the cat's remains were buried next to the garage.
38. Greg Walsh was able to ascertain that Felix the cat had not been killed but, on an occasion, had been sunning itself on the tyre of the family car. On a Saturday morning, AW had gotten in the car with LW and the children to go shopping. They heard the cat crying and unfortunately had been accidentally run over. They took the cat to the local vet and it was operated upon and its life was saved. It then lived its remaining life very contentedly at the home.
39. In cross-examination of SW (is just one illustration), she was cross-examined about this very incident. She maintained her story. However, three years after the purported death of Felix, a photograph of her 16th birthday was produced to her and she was holding Felix the cat who was well alive and seemed quite content. She was devastated in the witness box and initially refused to answer any further questions. She was directed to answer the question. She eventually came up with the ridiculous answer that that this was another cat called 'Felix number 2'.

⁶ See judgement [129].

40. At no time did Police conduct any excavation of the area next to the garage, which according to the Crown case, it would have revealed multiple skeletons of animals, including Felix and various other pets including rabbits.
41. In cross-examination, MOD simply could give no explanation as to why he did not do this.
42. The allegations involving the extraction of blood from the human breast was sourced by myself to a book and subsequent Hollywood film called 'The Flowers in the Attic'. The boy in that story, who was imprisoned in the house extracted blood from his sister's breast. There is no blood in a woman's breast and expert evidence was given to establish this fact. The point that is made in this regard, is that this was an issue that MOD did not investigate but was subject to further investigation which demonstrated the totally unreliable evidence sought to be relied upon to found the arrest and charging of the plaintiff.
43. According to SW and her younger sister EW, who gave thirteen police witness statements, on multiple occasions over many years, human blood played a significant part in the sexual assaults allegedly carried out by the Plaintiff. One of the bizarre allegations was that LW would 'milk' SW and EW when they had their periods and then smear the material over them during the course of such an assault. The description by LW and SW was such that it was analogous to a cow being milked. Expert evidence demonstrated that the amount of menstrual material dissipated by a female is very small indeed, so far as volume is concerned.
44. MOD was asked in cross-examination whether he had the subject house forensically examined. To put it bluntly, it would have been 'a Welsh of blood.' Even the best endeavors of the occupants of the house to clean it could not have removed all the presence of DNA material. MOD could not give any satisfactory explanation for failing to have even the most basic forensic examination conducted at the house.
45. EW in the context of the allegation of the abortion, maintained her allegation. In cross-examination of her, Mr Walsh had the benefit of obtaining her medical records which revealed a very important note that she was examined by the family GP upon her first menses. This was at the age of 13 or 14. In cross-examination of EW, she was asked how it was that she underwent an abortion in circumstances which occurred approximately 2 years before her first menses. She could give no explanation for this.
46. MOD was also cross-examined about that issue and he asserted that he was not aware of the note in the doctor's records.
47. SW in cross-examination was taken to the book 'The Flowers in the Attic'. She had no idea that the defence had any theory that she had been reading the book and had been causing underlying passages (in red) to be read by her younger sister EW. Each of

those underlined passages led to a further allegation against the Plaintiff. They contained a most bizarre allegation. MOD and other Police willfully ignored the reality of SW was tragically a very disturbed young woman who had recovered memories of purported sexual assaults at the age of 18 after attending upon a biased therapist.

Approach of Bell J as to these issues

48. Justice Bell made findings, that for instance in respect of LW and SW, that they were both maliciously prosecuted. To illustrate the point that I am seeking to make, at [701] Her Honour said:

“although the account given by SW in her third statement was not likely to be admissible in support of prosecution based on EW’s allegations, none the less I accept that the fact that she, too, alleged that her grandmother was involved in acts of sexual abuse was a matter that was open to a prudent investigator to take into account in deciding whether to prosecute JS on the allegations made by EW and SW. however, SW’s account in the third statement seems to me to have been so unsatisfactory in light of the matters to which I have already referred that objectively a person of ordinary prudence and judgment would not have concluded that a prosecution of JS upon her allegations was warranted. I am of the same opinion with respect to a prosecution upon the allegations made by EW.”

49. At [702] Her Honour made a finding that she did not accept that MOD believed that upon general grounds of justice that the prosecution of JS on those eight charges was warranted. There was absence and reasonable and probable cause of the prosecution of JS on the charges referred against her on 15 September.
50. Another issue that arose, was that MOD arranged for Detective Holloway to arrest JS and to be named as the informant in respect of those charges.
51. Her Honour was troubled by MOD’s motive in charging JS with the eight offences on 15 September [705]. She was satisfied that it was a motive other than a belief in the probability of her guilt. Her Honour said this *“the selective briefing afforded to Detective Holloway seems to me itself the evidence of malice in the sense that MOD had some improper or collateral purpose for instituting the prosecution. I am satisfied that JS has made good her cause of action for malicious prosecution in relation to the prosecution of each of the eight offences with which she was charged on 15 September.”*

Subsequent events

52. In order to conclude the narrative of LW & Ors v State of NSW, there was an extraordinary development in the case. Greg Walsh went to see EW at her home for the purposes of interviewing her as a prospective witness in the civil case against the State

of NSW. She had married and when speaking to her, she showed Mr Walsh a framed photo of the wedding. He observed MOD and SW in the photograph and both having similar silver bracelets on their wrists. He asked EW how could it be that MOD and SW were at her wedding. EW then related an extraordinary account to Greg Walsh. She said that SW had from a time before the care proceedings, let alone the committal proceedings, had been involved in a sexual relationship with MOD. At that residence, MOD would often stay overnight in a bedroom with SW. This fact was well known the carer, being the solicitor. She also disclosed to Mr Walsh that during the care proceedings, MOD would stay with SW in a motel in proximity to the Children's Court.

53. EW also disclosed that MOD subsequently lived with SW for a period of 3 years in a unit where EW from time to time would visit.
54. At the time of the arrest of AW, LW and JS, MOD was 50 years of age and SW was approximately 19. According to EW, other Police knew about this relationship.
55. This issue was then the subject of particularization and reliance by the Plaintiffs in the action before Justice Bell. MOD was called to give evidence but had a psychiatric breakdown allegedly in the witness box and could not continue with his evidence. He had prior to being excused by the Trial Judge, admitted the extent and nature of his sexual relationship with SW.
56. The extraordinary facts in *AW* to illustrate the approach of Justice Bell who ultimately went onto serve in the High Court of Australia for over a decade. It is clear that Police are under an obligation to properly investigate allegations of criminality against citizens before they arrest. In this case, investigating Police had a sufficient period of time to properly investigate these allegations against the Plaintiff and indeed such investigations were to say the least, relatively simply to undertake. The fact that the Police were not prepared to do this, demonstrative of real or actual bias in the investigation. In other words, because an allegation of sexual assault is made by a child, Police would charge the suspect 'no matter what'. Police who had the responsibility of properly investigating the allegations, were not prepared to investigate same because so far as they were concerned 'it didn't matter'.
57. In *A v New South Wales*, the malice was the conversation with Greg Walsh to the effect that his client A, was only charged because he was a civilian employed with the NSW Police as a 000 worker.