LIABILITY FOR THE MALICIOUS INSTITUTION
OF CIVIL PROCEEDINGS

Stephen Todd*

Should a person who maliciously institutes civil proceedings without any reasonable and probable cause be held liable in the same way as the malicious prosecutor in criminal proceedings? Early case law in England is equivocal, but a decision of the House of Lords in 2000 specifically rejected it.1 However, two recent decisions have brought about a significant change. In Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd,2 the Privy Council, in a three to two majority decision,3 upheld the action. Then in Willers v Joyce,4 the same question arose for determination by the UK Supreme Court, and this time by a five to four majority, it was again resolved in favour of allowing the action. Let us consider first the background to these two decisions and then look at the reasoning underlying the majority and the minority views.

In English law, there is a long-established category of claim, laid down authoritatively in Quartz Hill Consolidated Gold Mining Co v Eyre,5 where an action does lie, namely civil proceedings which attack the credit of the person sued, like bankruptcy proceedings or a winding up petition against a company. There are a few other special cases,6 but in all other circumstances, the courts in England have in the past denied a remedy even in the case of civil claims making serious allegations of fraud or immorality. One justification for this restrictive view lies not in any matter of high principle but in the theory propounded in Quartz Hill Consolidated Gold Mining Co v Eyre, that the bringing of an ordinary civil action, unlike an action which may wreck credit the moment it becomes known that it has been started, does not naturally or necessarily involve any injury to reputation, person or property. First, it is argued that the defendant suffers no loss of reputation or standing, because his character will be cleared by the successful defence of the charge.7 But this view may be criticised on the grounds that public suspicion may be aroused by the mere bringing of charges, irrespective of their outcome, and that in any event, no similar argument applies where a person successfully defends a criminal charge. Second, it is said that the defendant’s only pecuniary damage will

* Professor of Law, University of Canterbury, New Zealand and Professor of Common law, University of Nottingham, United Kingdom.
1 Gregory v Portsmouth City Council [2000] 1 AC 419.
3 Lord Wilson, Lady Hale and Lord Kerr, Lord Sumption and Lord Neuberger dissenting.
4 [2016] 3 WLR 477.
5 (1883) 11 QBD 674.
7 Quartz Hill Consolidated Gold Mining Co v Eyre (n.5), 689–690.
be the costs of defending the action and he will already have been compensated for this in the first action. This ignores the reality of the matter that the award of costs in a civil action is unlikely to be an adequate compensation for the costs actually incurred. Furthermore, any disparity as regards the costs of defending criminal proceedings has been held recoverable. Other possible relevant considerations are the potential to deter resort to the justice system, to which the reply is that honest litigants would not be deterred, and the need for finality in litigation, which argument could be applied equally in the case of prior criminal proceedings.

These arguments suggest that a distinction between malicious criminal and malicious civil proceedings is not easy to justify. Indeed in *Gregory v Portsmouth City Council*, the House of Lords considered that one traditional explanation — that the poison and the antidote were presented simultaneously — was no longer plausible. But he considered that the extension of the tort to civil proceedings generally had not been shown to be necessary because adequate protection was afforded by other related torts. But this is hardly true as a general proposition, and there was in fact no other available action which could assist Mr Gregory.

This brings us to the decision of the Privy Council in *Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd*, on appeal from a decision of the Cayman Islands Court of Appeal. The plaintiff claimed damages in respect of the defendant having maliciously instituted proceedings against him, alleging that he was guilty of deceit and conspiracy to defraud, and in a majority decision, it was held that an action for malicious prosecution of civil proceedings should lie and that the claim succeeded. Lord Wilson surveyed the early development of the law of malicious prosecution and was satisfied that the tort had indeed applied to civil proceedings. His Lordship noted the disparate situations in rather more recent times where a civil action had been held to lie, and also that decisions in Australia, New Zealand and the United States recognised the tort (as to which see further below). As regards the policy of the matter, he considered that none of the objections stood scrutiny. In particular, insofar as the rationale for the tort of malicious prosecution was the inability of a successful defendant to sue a claimant for defamation in respect of allegations made maliciously in legal proceedings, it applied as much to civil as to criminal proceedings. In that a distinctive feature of the tort was that the defendant had abused the coercive powers of the state, it again applied as much to civil proceedings. There was no principle behind a redefinition of the distinctive feature as being an abuse of the coercive powers of the state only in

---

10 *Gregory v Portsmouth City Council* (n.1), 432.
11 *Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd* (n.2).
12 Citing *Bulwer v Smith* (1583) 4 Leon 52, 74 ER 724 and *Gray v Dight* (1677) 2 Show KB 144, 89 ER 848.
Liability for the Malicious Institution of Civil Proceedings 125

criminal proceedings. The law needed to be true to the reason for its very existence. His Lordship thought that denying a remedy to the victim of a wrong doing should always be regarded as exceptional, and any justification needed to be necessary, strict and cogent. In his opinion, the force of all suggested justifications for denying the plaintiff a remedy failed to measure up to these demanding standards.

Lord Sumption, in dissent, thought that the distinction between civil proceedings and criminal proceedings was neither arbitrary nor unsatisfactory. Malicious prosecution was a tool for constraining the arbitrary exercise of the powers of public prosecuting authorities or private persons exercising corresponding functions. A malice-based tort made no sense in the context of private litigation where the plaintiff was not exercising any public function. Nor was there any justification in that context for making a further substantial inroad into the immunity from civil liability for things said and done in the course of legal proceedings. Further, the precise ambit of the tort would be both uncertain and potentially very wide. Logically, it would apply to any factual case advanced in civil proceedings which maliciously and baselessly discredited another party, including a case advanced by a defendant or a third party.14 And, finally, there were real concerns about the practical consequences of any extension of the law in this area, which would offer litigants an occasion for prolonging disputes by way of secondary litigation.

The majority decision posed an issue of judicial precedent for the courts in England and Wales. In Gregory v Portsmouth City Council, as we have seen, the House of Lords rejected any extension of the action for malicious prosecution, but the Privy Council in Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd allowed the action. So which decision should a lower court follow? In Willers v Joyce the trial judge concluded that she was bound to follow the decision of the House of Lords, but issued a “leapfrog” certificate15 to enable the claimant to apply to the Supreme Court for permission to appeal. The Supreme Court granted permission and thereafter issued two decisions, one on the substantive question of law16 and another on the question of precedent.17 Our concern is with the first of these decisions.18

14 Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd (n.2), [78(g)] (Lord Wilson) left this point open. Lord Kerr ([111]–[113]) thought that whatever view one took about recognition of a tort of malicious defence, it was possible to remain sanguine about its likely prevalence.

15 Under the Administration of Justice Act 1969 s 12 (UK).

16 Willers v Joyce (n.4).

17 Willers v Joyce (No 2) [2016] 3 WLR 534.

18 Lord Neuberger delivered a judgment on the second issue with which all of the members of the Supreme Court agreed. His Lordship said that, subject to one qualification, a judge of a court in England and Wales (or in Northern Ireland) should never follow a decision of the Judicial Committee of the Privy Council (JCPC) if it was inconsistent with the decision of a court which was otherwise binding on that judge. However, there would be appeals to the JCPC where a party wished to challenge the correctness of an earlier decision of the House of Lords or Supreme Court or of the Court of Appeal on a point of English law where the JCPC decided that the decision in question was wrong. It would plainly be unfortunate in practical terms if the JCPC could never effectively decide that the lower courts in England and Wales
The claimant was employed by the defendant for over 20 years until he was dismissed in 2009. The claimant was a director of a company (L Ltd) which had brought and abandoned a claim against another company and had then sued the claimant for alleged breaches of duty causing it to incur the costs in pursuing the earlier claim. The claimant defended the action, which was discontinued before trial, and L Ltd was ordered to pay the claimant’s costs. The claimant then sued the defendant for malicious institution of proceedings, alleging that L Ltd was controlled by the defendant, that it had brought the earlier claim on the defendant’s instructions and that L Ltd’s claim against him had been brought without reasonable cause, had been determined in his favour, had been actuated by malice and had caused him to suffer loss. The ingredients of the action, if it existed, not being in dispute, the question for the Court was whether the malicious prosecution of civil proceedings was a tort known to English law.

Lord Toulson (with whom Lady Hale, Lord Kerr, Lord Wilson and Lord Clarke agreed19) recognised that the early case law was capable of more than one respectable interpretation, and it might be that there never was a time when there was a general understanding precisely where the boundaries of the tort lay. Accordingly, turning to policy, he found it instinctively unjust for a person to suffer injury as a result of the malicious institution of proceedings for which there was no reasonable ground and yet not be entitled to compensation for the injury intentionally caused by the person responsible for it. The question then was whether any possible counterarguments ought to prevail. His Lordship set out a number of contentions to this effect but felt able to reject them all.

First, the suggestion that the tort might deter those with valid civil claims from pursuing them through fear of a vindictive claim against them had been rejected in the case of criminal proceedings20 and had no greater merit here. Second, there was a public interest in avoiding unnecessary satellite litigation, whether in criminal or civil matters, but, again, that had not been a sufficient reason for disallowing claims for the malicious prosecution of criminal proceedings. Further, the action did not amount to a collateral attack on the outcome of the first proceedings (save for a point about a claim for costs, discussed in the next paragraph). Third, there was no duplication of remedies, and Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd and the present case showed that injustices arising from groundless and damaging civil proceedings could not be addressed by way of other

should follow the JCPC decision. The solution was for the registrar of the JCPC to draw the attention of the President of the JCPC to the fact that there might be an invitation to the JCPC to depart from a decision of the House of Lords, Supreme Court or Court of Appeal. The President could then take that fact into account when deciding on the constitution and size of the panel to hear the appeal, and, provided that the point in issue was one of English law, the members could, if they thought it appropriate, not only decide that the decision in question was wrong but also could expressly direct that domestic courts should treat the decision of the JCPC as representing the law of England and Wales.

19 Lord Clarke also delivered a separate judgment.
20 Savil v Roberts (1698) 1 Ld Raym 374, (1703) 5 Mod 405, (1703) 12 Mod 208.
Liability for the Malicious Institution of Civil Proceedings

The action was not inconsistent with witness immunity from civil liability. An action against a defendant for damages for malicious prosecution after giving false evidence was not brought on or in respect of the evidence but in respect of the prosecution. Fourth, there was no inconsistency between the absence of a duty of care owed by a litigant towards the opposing party and imposing a liability for maliciously instituting proceedings with reasonable cause. The distinction between careless and intentional conduct was a familiar feature of parts of the common law. Sixth, the tort should not be confined to persons exercising the coercive power of the state. Malicious prosecution was not a public law tort, and it would be incorrect to see it as having any of the characteristics of a public law remedy.

A further point made by Lord Toulson concerned costs. The notion that a costs order could make good the injury caused by the prosecution of a malicious claim was almost certainly a fiction, and the court should try if possible to avoid fictions, especially where they resulted in substantial injustice. So his Lordship did not regard the claim in the instant case to recover excess costs as an abuse of process.

The four dissentients — Lord Mance, Lord Neuberger, Lord Sumption and Lord Reed — each delivered a judgment. As regards the authorities, their Lordships were satisfied that they did not support the wider action. As regards policy, Lord Neuberger conveniently summarised a substantial number of concerns and came to opposite conclusions from those favoured by Lord Toulson. In particular, his Lordship thought that the new tort would be inconsistent with the general rule that a litigant owes no duty to an opponent in the conduct of civil litigation and also with the rule that even a perjuring witness in court proceedings was absolutely immune from civil liability. Next, the original justification for the tort in the criminal context, that it was a tool for constraining the arbitrary exercise of the powers of public prosecuting authorities or private persons exercising corresponding functions, did not apply in the ordinary civil context.

21 Citing Roy v Prior (n.6), 477–478.
22 Citing Gibbs v Rea (n.6), 804 (Lord Goff and Lord Hope).
23 Such an action was recognised in Aranson v Schroeder 671 A 2d 1023 (NH 1995).
24 See especially Willers v Joyce (n.4), [95]–[129] (Lord Mance).
25 Ibid., [156]–[173].
this was limited to cases where the court was invited by the potential defendant to exercise *ex parte* or interlocutory powers, which resulted in the claimant losing his liberty or property without the prior opportunity properly to defend himself. That was no basis for extending it to civil proceedings generally. Further, the precise ambit of the tort would be both uncertain and very wide, potentially extending to a malicious defence and malicious applications or allegations in proceedings which would otherwise not be malicious. Other concerns included the risks of satellite litigation and unanticipated knock-on effects, problems related to defendants wishing to invoke a right to privilege in relation to any document in connection with the allegedly malicious proceedings, a possible chilling effect on the bringing or defending of civil proceedings and real problems involved both in identifying what constituted malice and in deciding what types of loss and damage should be recoverable in connection with claims based on the proposed tort. So his Lordship would have held that a tort such as that argued for by the appellants should not be recognised in the courts of England and Wales.

Let us consider how the decisions in *Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd* and *Willers v Joyce* compare to relevant decisions elsewhere. By far the most extensive consideration of the issue is found in decisions of the courts of the United States. A leading academic text starts its discussion with the statement that “Wrongful institution of a civil action is actionable under rules similar to those for malicious prosecution of a criminal proceeding”.26 However, the position is more nuanced than is apparent from that bald statement, as is made clear by the explanation of the rule and the exceptions and limitations that apply to it that are found in the following paragraphs of the text. In *Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd*, Lord Neuberger, in his dissenting judgment, undertook a close analysis of the US experience and noted significant differences between the position in the United States and England.27 His Lordship recognised (as had Lord Steyn in *Gregory v Portsmouth City Council*)28 that in England, as a general rule, the loser paid the winner’s costs and that this was a deterrent to groundless actions. By contrast, in the United States, there was no such general power, and this absence had played a part in the extension of the tort of malicious prosecution to all civil proceedings. Further, the American rule required that the previous proceedings should have caused “special injury”, being something more than the expense, distress and reputational loss that was ordinarily suffered as a result of wrongful litigation.29 In his Lordship’s opinion, the various established exceptions to the rule that the tort of malicious prosecution did not extend to civil proceedings — the action for

27 *Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd* (n.2), [165]–[190].
28 *Gregory v Portsmouth City Council* (n.1), 428–430.
29 Dobbs, Hayden and Bublick (n.13) section 593.
maliciously presenting a winding up petition,\textsuperscript{30} procuring a search warrant without reasonable cause\textsuperscript{31} or a bench warrant of arrest,\textsuperscript{32} maliciously setting in train a process of execution against property\textsuperscript{33} and maliciously procuring the arrest of a ship\textsuperscript{34} — were satisfactorily explained and justified by this requirement. They all involved \textit{ex parte} or interlocutory orders improperly procured by the person initiating the proceedings, in circumstances where in the nature of things there would never be a final order. So any loss would be “special injury,” which was not a part of the normal detriment caused by litigation.

After reviewing the cases, Lord Neuberger had no doubt that there was support both for maintaining the English rule in \textit{Gregory v Portsmouth City Council} (as it then was) and also for adopting the American rule in the US jurisprudence. However, he considered that there were four specific reasons why the US experience supported Lord Sumption’s dissenting view.\textsuperscript{35} First, even in a jurisdiction where successful defendants rarely could expect to recover their costs, there seemed to be as strong judicial support for the English rule as for the American rule. Second, it was clear that departing from the English rule would have the disadvantage of potentially confusing the law, causing unnecessary uncertainty. Third, and more marginally, the US jurisprudence, with its “special injury” requirement in the English rule, justified on a principled basis what would otherwise appear to be anomalous exceptions to the principle that a claim in malicious prosecution could not be based on civil proceedings. Fourth, the US jurisprudence provided a reminder that wrongful civil litigation should not be viewed in isolation. The courts had procedural mechanisms at their disposal to preserve and strengthen the civil litigation process and to target proceedings brought wrongfully or mistakenly.

In Australia, there are few decisions on the question. However, in Victoria, in \textit{Little v Law Institute of Victoria},\textsuperscript{36} Kaye and Beach JJ observed that it did not follow that at the present time proceedings, tainted with malice and brought without reasonable and probable cause, might not affect adversely the reputation of a defendant or respondent to those proceedings. They concluded that the remedy of malicious abuse of civil proceedings should no longer be confined to a bankruptcy petition and an application to wind up a company where the damage claimed was to the plaintiff’s reputation.

In New Zealand, there has been a degree of support for the action, although no final decision in favour. In \textit{New Zealand Social Credit Political League Inc v

\begin{itemize}
\item \textsuperscript{30} \textit{Quartz Hill Consolidated Gold Mining Co v Eyre} (n.5).
\item \textsuperscript{31} \textit{Gibbs v Rea} (n.6).
\item \textsuperscript{32} \textit{Roy v Prior} (n.6).
\item \textsuperscript{33} \textit{Clissold v Cratchley} (n.6).
\item \textsuperscript{34} \textit{The Walter D Wallet} (n.6).
\item \textsuperscript{35} \textit{Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd} (n.2), [191]–[196].
\item \textsuperscript{36} [1990] VR 257.
\end{itemize}
O’Brien, Cooke J favoured recognising an action in respect of maliciously instituted civil proceedings, although the question did not need to be decided in that case. Again, in Rawlinson v Purnell, Jenkinson & Roscoe, Hammond J accepted that New Zealand law might recognise the tort, although he considered that the question could only be finally resolved by a higher court. Its elements, by analogy to malicious prosecution, were that the defendant had advanced a civil cause against the plaintiff, the cause had been resolved in the plaintiff’s favour, the defendant had no reasonable and probable cause for bringing the proceedings, the defendant acted maliciously in instituting or continuing the proceedings and damage of a kind for which the law would allow recompense had been caused.

However, his Honour held that the instant claim had to fail, because the jury had decided that the defendant had acted incompetently but not maliciously. Further, and most recently, in Robinson v Whangarei Heads Enterprises Ltd, Heath J held, in the light of Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd, that a claim for malicious prosecution of civil proceedings should be permitted to proceed, and at the trial itself, Gilbert J held that the claim should be indeed recognised as alleging a tort. However, it failed on the facts as the plaintiff could not prove that the defendant had acted with malice.

It is apparent from this brief overview that relevant authorities point in different directions and are susceptible to differing interpretation. But ultimately the determination of the question at stake in Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd and Willers v Joyce depends on an assessment of the strength of the competing requirements of policy. The background to the question in the early cases provides no conclusive answer, and in any event, the decision needs to meet the demands of good policy today. The choice is finely balanced, as the split of opinion in both Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd and Willers v Joyce well indicates.

However, some of the objections of the dissentients — the deterrence of good actions, the risk of satellite litigation and the impact on witness immunity — seemingly could be levelled at the established action for the malicious prosecution of criminal proceedings, and others — excessive uncertainty, unanticipated knock-on effects — may prove to be largely unfounded or at least manageable. The difficulty is that the impact of the identified dangers must to some extent be speculative, and the majority view that justice demanded a remedy for the claimant certainly carries resonance. So the majority view, by a narrow margin, deserves to carry the day.

37 [1984] 1 NZLR 84 (CA).
38 [1999] 1 NZLR 479 (HC).
39 See also Official Assignee v Menzies (No 4) HC Auckland CIV-2009-404-3391 (4 May 2011), [41]; Deliu v Hong [2013] NZHC 735, [76]–[88].
41 Robinson v Whangarei Heads Enterprises Ltd [2015] 3 NZLR 734, [49].
BOOK REVIEW

Ruwantissa Abeyratne*


The first edition of Michel Milde’s book, *International Air Law and ICAO* was published in 2008, followed by its second edition in 2012, and, following its regular pattern of four-year intervals, the third edition was released in 2016. I was pleased to receive a copy of the third edition with a request from the publisher for a review. Milde served in various capacities at the Legal Bureau of the International Civil Aviation Organization (ICAO), retiring, after 25 years of service, as the Bureau’s director and is arguably foremost among others in his institutional knowledge of ICAO as it then was. His erudition is clearly reflected in the meticulous manner in which he expounds principles of air law as related to the Organisation. The book therefore is unquestionably substantial, particularly in the chapters relating to historical perspectives, the Convention on International Civil Aviation (Chicago Convention) and ICAO. I have seen no better discussion elsewhere on general principles — both of public and private international air law as they relate to the workings and functions of ICAO.

It is concerning, however, that Milde has addressed only aviation security and the legal regime applicable to air transport economics in all three editions of the book, neglecting to discuss aviation safety and environmental protection — two areas to which international air law unquestionably applies. Another neglected area, on which ICAO has had several deliberations with relevant organisations of the United Nations and ICAO member states, is the possible role of the Chicago Convention and its application/extension to sub-orbital flights, space tourism and the combination of air and outer space travel on which books and journal articles have already been written.

Since Milde discusses at some length such subjects as code sharing, computer reservation systems and trade in services, which do not have any relation to codification of air law, one would have expected, at least between the second and third editions (between 2012 and 2016) — a lapse of four years — a discussion on certain aspects of air navigation law and safety such as Annex 19 on Safety Management, which is completely ignored. While some reference is made in the book to Annex 2 Rules of the Air (on which Milde questionably ascribes to the ICAO Council “legislative” capacity), other important annexes are not given

* Former Senior Legal Officer of ICAO and President/CEO of Global Aviation Consultancies Inc and Senior Associate of Aviation Strategies International, Montreal, Canada.

[(2017) 4:1 JICL 131–132]
attention, presumably on the ground that Annex 2 alone is a “codification” of air law. The absence of mention of market-based measures to address engine emissions, which was the most contentious issue between 2013 and 2016, particularly on the implementation of such a measure — as to whether it would be contained in an annex as a standard — is another disappointment.

Milde starts his foreword to the third edition by saying that books have their fate and goes on to say that “there was a practical need for a new edition that would embody additional experience from extensive international discussions and also update the text with new developments in an effort to codify international air law”. However, the paucity of additional information in the third edition that would have enlightened the reader on “extensive international discussions” and developments that occurred between the publication of the second and the third edition of the book is evident from the fact that the text (excluding the Appendices) of the second edition runs to 314 pages, while the third edition has text up to page 322, adding just 8 pages to the latter. The rest is verbatim text reproduced from the second edition. Just to give an example, in the chapter on aviation security, on the Protocol to the Tokyo Convention of 1963, there are just two pages and a paragraph that address an entire diplomatic conference and the contentious debates that followed. The text of the protocol that was adopted is not discussed. Another lapse is the absence of any discussion on the ICAO aviation safety and security audits as well as such important plans as the Global Aviation Safety Plan and the Global Air Navigation Plan, all of which directly stem from the Chicago Convention and bring to bear legal nuances and implications. These are critical issues in the 21st century.

The above notwithstanding, the book, to the extent that it discusses issues, is substantial. Milde is an erudite scholar, and he has demonstrated well this outstanding quality. However, he is “an ageing octogenarian” as he describes himself and has been in retirement from ICAO for the past 25 years. Therefore, it is unfair to expect of him an update. The book is well worth having in a legal library, but as to whether one should buy the third edition when one already has a copy of the second edition is another matter altogether.