IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S 144 of 2012

BETWEEN: **ROSEANNE BECKETT**
Applicant

AND: **THE STATE OF NEW SOUTH WALES**
Respondent

APPLICANT'S WRITTEN SUBMISSIONS

Filed on behalf of the Applicant by
Turner Freeman
Lawyers
Level 13
39 Martin Place
SYDNEY NSW 2000

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Tel: (02) 8222 3333
Fax: (02) 8222 3349
Ref: Terence Goldberg:126985
Email: tlg@turnerfreeman.com.au

Part I: Internet publication

1. These submissions may be placed on the internet.

Part II: Statement of issues

2. First, whether leave to re-open the correctness of *Davis v Gell* (1924) 35 CLR 275 should be granted.

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3. Secondly, whether *Davis v Gell* (1924) 35 CLR 275 should be overruled.

4. Thirdly, must a plaintiff who brings an action for malicious prosecution affirmatively prove his or her innocence?

5. Fourthly, whether the documentation terminating the criminal proceedings in the present case was a *nolle prosequi* or whether some other characterisation is appropriate.

20 6. Fifthly, whether *Davis v Gell* is binding authority on the mode of termination in the present case.

Part III: *Judiciary Act*: s.78B

7. There are no constitutional issues and no s.78B notices have been served.

Part IV: Case citations

8. Neither of the decisions below is reported. The decision of Davies J is cited as
30 *Beckett v The State of New South Wales [No 1]* [2011] NSWSC 818 and the decision of the Court of Appeal is cited as *Beckett v The State of New South Wales* [2012] NSWCA 114.

Part V: Statement of relevant facts

9. On 24 August 1989 the applicant ("Beckett"[1]) was arrested and charged with various offences. On 27 July 1990, Magistrate Evans ordered Beckett to stand trial in the NSW Supreme Court in relation to a number of matters which subsequently formed 9 counts in an indictment. The following counts in the indictment were presented at her trial:

> *Count 1: [Rock Incident]:*
>
> On 2 May 1988 at Taree maliciously did wound Barry Catt (s.35 *Crimes Act* 1900).
>
> *Count 2: [False Evidence About The Rock Incident]:*
>
> On 3 July 1989 at Taree in the Local Court before Mr G.P. O'Keefe, Magistrate, on an occasion when truth of the same was material, did knowingly and willingly falsely swear in substance, as follows, that is to say, that she, Roseanne Catt, at no time struck Barry Catt with a rock (s.327 *Crimes Act* 1900).
>
> *Count 3: [Swan's Crossing Incident]:*
>
> Between 2 March and 30 March 1989 at Swans Crossing maliciously did wound Barry Catt (s.35 *Crimes Act* 1900).
>
> *Count 4: [Cricket Bat Incident]:*
>
> On 5 May 1989 at Taree did assault Barry Catt thereby occasioning to him actual bodily harm (s.59 *Crimes Act* 1900).
>
> *Count 5: [Drug Incident]:*
>
> Between 1 May and 31 July 1989 at Taree, maliciously did cause to be taken by Barry Catt a noxious thing, namely, lithium, and thereby did endanger the life of Barry Catt (s.39 *Crimes Act* 1900).
>
> *Count 6: [James Morris – RSL Club]:*
>
> On 28 July 1989 at Taree did solicit James Morris to murder Barry Catt (s.26 *Crimes Act* 1900).
>
> *Count 7: [Vernon Taylor – 1 Cornwall Street, Taree]:*
>
> Between 15 July and 16 August 1989 at Taree did solicit Vernon Taylor to murder Barry Catt (s.26 *Crimes Act* 1900).

[1] Formerly known as Roseanne Catt.

Count 9: [Pistol]:

On or about 24 August 1989 at Taree did have in her possession a pistol, namely, a Hopkins and Allen .32 calibre revolver, she then not being the holder of a licence for such pistol (s.25(1) *Firearms and Dangerous Weapons Act* 1973).

10. In addition, count 8 in the indictment presented at trial was as follows:

On or about 24 June 1989 at Taree, did encourage Leslie O'Brien to murder Barry Catt (s.26 *Crimes Act 1900*).

11. The Magistrate did not commit Beckett to stand trial on count 8. Subsequently, however, the DPP presented an *ex officio* indictment in relation to that count, which became count 8 in the indictment.

12. On 11 September 1991 the jury returned verdicts of guilty in relation to counts 1, 2, 3, 4, 6, 7 and 9 and an alternative guilty verdict in relation to count 5. The jury returned a verdict of not guilty in relation to count 8.

13. On 18 October 1991 Beckett was sentenced to a total term of imprisonment of 12 years 3 months with a non-parole period of 10 years 3 months.

14. Beckett subsequently filed an appeal against her convictions and sentence with the Court of Criminal Appeal. That Court subsequently dismissed her appeal: see *R v Catt* (1993) 68 A Crim R 189.

15. In early 2001 Beckett petitioned the Governor, pursuant to s.474B of the *Crimes Act* 1900 (NSW), seeking a review of her convictions on the eight counts on which she had been found guilty.

16. On 24 July 2001 the Attorney General referred the matter to the Court of Criminal Appeal pursuant to s.474C(1)(b) of the *Crimes Act* 1900 (NSW).

17. On 7 December 2001 Beckett filed a notice of appeal in the Court of Criminal Appeal. That Court ordered that the factual issues in the appeal be remitted to a judge pursuant to s.12(2) of the *Criminal Appeal Act* 1912 (NSW). That remittal was allocated to Davidson ADCJ who delivered his findings on 27 July 2004.

18. On 17 August 2005 the Court of Criminal Appeal delivered judgment allowing the appeal in part: see *R v Catt* [2005] NSWCCA 279. The Court made the following orders:

(i) Uphold the appeal in relation to counts 1, 2, 5, 6, 7 and 9 and quash each conviction.

(ii) Enter a verdict of acquittal on count 9.

(iii) Order that there be a new trial in relation to counts 1, 2, 5, 6 and 7.

(iv) Dismiss the appeal in relation to counts 3 and 4.

(v) The Appellant's bail is to continue.

(vi) Reserve liberty to apply.

19. On 22 September 2005 the DPP directed that there be no further proceedings against Beckett on all the outstanding charges. That direction is recorded in a signed (and dated) handwritten note appended to a typed submission to the DPP by Keith Wright dated 21 September 2005.

20. On 26 September 2005 a form from the office of the DPP headed "Particulars of no further proceedings submission to the Director" was prepared by one Ms Asplet within the Office of the DPP. The document was forwarded to the Court of Criminal Appeal Registry. The form of the document is set out at [18] of the Court of Appeal's judgment in the present case.

21. On 26 September 2005 Ms Asplet wrote to Beckett on the letter head of the Office of the DPP advising that the DPP had decided to proceed no further with the charges of malicious wounding, perjury, attempt to cause a noxious thing to be taken and two counts of solicit to murder.

22. On 15 August 2008 Beckett instituted proceedings against the State of New South Wales seeking damages for the tort of malicious prosecution.

23. The State of New South Wales filed a notice of motion seeking the determination of two questions:

A. With respect to each of the counts 1, 2, 5, 6 and 7, for which the plaintiff was tried:

i. Accepting that the proceedings terminated in favour of the plaintiff, to the extent that the plaintiff's claim for malicious prosecution is based upon each of these counts, does the plaintiff need to prove her innocence in relation to each count to succeed?

B. With respect to count 9 for which the plaintiff was tried:

i. To the extent that the plaintiff's claim for malicious prosecution is based upon this count, does the plaintiff need to prove her innocence of the charge?

24. The primary judge (Davies J) answered those two separate questions as follows:

A. Yes.

B. No.

25. Beckett appealed to the Court of Appeal in relation to question A. The State cross-appealed to the Court of Appeal in relation to question B.

26. The Court of Appeal dismissed both the appeal and the cross-appeal.

27. On 5 October 2012 Beckett's application for special leave to appeal was referred by Gummow, Hayne and Heydon JJ to a Full Bench.

Part VI: Applicant's argument

28. It is convenient to consider the issues under the following headings.

(i) Issues for determination

29. The first issue for this Court's determination is whether Beckett needs to prove her innocence in relation to counts 1, 2, 5, 6 and 7 in order to succeed with her claim for malicious prosecution. In substance the key question is whether *Davis v Gell* was correctly decided.

30. It will be observed that the form of the question posed by Davies J accepts that the proceedings were terminated in favour of Beckett. And the question does not simply

raise the relevance of her innocence (or otherwise): the question is whether she bears the onus of proof in relation to innocence and whether proof by her of her innocence is an essential element of her cause of action.

31. The second issue is whether *Davis* is binding authority dealing with the particular mode of termination of the criminal proceedings in the present case, namely, a direction by the DPP pursuant to s.7(2)(b) of the *Director of Public Prosecutions Act* 1986 (NSW). Beckett submits that in *Smith* at p.543 this Court held that the ratio of *Davis* was confined to a prosecution halted by a *nolle prosequi* entered by the Attorney-General. Beckett submits that the ratio of *Davis* does not extend to a s.7(2)(b) direction.

(ii) NSWCA reasoning

32. Tobias JA summarised the reasoning of the NSWCA on the first issue neatly when he said that because "this Court is bound by the decision of the High Court in *Davis*, it is necessary for [Ms Beckett] in her action for malicious prosecution to prove her innocence notwithstanding that the entry by the Director of a *nolle prosequi* in respect of those charges terminated the proceedings against her in her favour": [89](d).

33. In so holding, the Court of Appeal followed the decision of this Court in *Davis v Gell*. Accordingly, the primary substantive issue for determination in the present appeal is whether *Davis v Gell* should be overruled.

34. On the second issue, the NSWCA held that "what the Director did in the present case when he made his direction in terms of s.7(2)(b) of the *DPP Act* was to enter a *nolle prosequi* to the outstanding charges against [Beckett]" (at [76]) and therefore held that *Davis v Gell* was binding authority that Beckett needed to establish her innocence.

(iii) *Davis v Gell*

35. In this case the prosecution had been halted by the entry of a *nolle prosequi*. The accused then brought civil proceedings against his prosecutor. The Court held:

(i) that the criminal proceedings had terminated in the plaintiff's favour: pp.292, 297;

(ii) that in order to succeed the plaintiff had to affirmatively establish his innocence of the charge.

36. Isaacs ACJ at pp.284-285 cited various statements in the case law that the criminal prosecution had to be "unfounded", "groundless", "causeless" (or similar) and held that the "second essential" of the cause of action was "that the plaintiff in the civil action is innocent": "the prosecution being groundless, there was, *when all the circumstances are known, no real cause* for it" (p.285; emphasis in original). At p.292 Isaacs ACJ repeated his conclusion that "innocence ... remains to be proved in order to maintain the action and cannot be assumed". And, at p.293 he quoted an *obiter dictum* of Bowen LJ (in an *ex tempore* judgment in *Abrath v North Eastern Railway Co* (1883) 11 QBD 440, at 455) that innocence was an element of the action, noting correctly that the "rule was not called for by the circumstances of the case, and is not involved in the decision at the trial; no issue was raised as to innocence, the plaintiff having been acquitted": see also footnote 5 below.

37. The cases referred to by Isaacs ACJ at pp.284-285 and 292-293 are not cases whose *rationes decidendi* determine that a plaintiff must establish innocence to make out an action for malicious prosecution. These cases[2] are either equivocal, mere dicta or deal with reasonable and probable cause. Moreover, there is no reasoning supporting Isaacs ACJ's holding which seems to be based merely on the passages quoted from the cases.

38. Gavan Duffy J referred to no case law and briefly stated his conclusion (p.294) that "in an action for malicious prosecution the plaintiff must prove his innocence".

39. Starke J's reasoning is similar to that of Isaacs ACJ. At pp.295-296 Starke J refers to *dicta* that the plaintiff must be innocent and establish that the charge was "unfounded". At p.297 his Honour held that the innocence of the plaintiff must be established and that "the burden is upon him in the first instance to make out his case".

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[2] *Reed v Taylor* (1812) 4 Taunt 616, at 618 [128 ER 472, at 473]; *Waterer v Freeman* (1617) Hob 266, at 267 [80 ER 412, at 413]; *Johnson v Emerson* (1871) LR 6 Ex 329, at 344, 373; *Ram Coomar Coondoo v Chunder Canto Mookerjee* (1876) 2 App Cas 186, at 201; *Allen v Flood* [1898] AC 1, at 173; *Gaya Prasad v Bhagat Singh* (1908) 30 ILR 525, at 536; *Weston v Beeman* (1857) 27 LJ Ex 57, at 59; *Bank of New South Wales v Piper* [1897] AC 383, at 388, 390; *Abrath v North-Eastern Railway Co* (1883) 11 QBD 440 at 455.

40. However, as with Isaacs ACJ, the reasoning of Starke J on the issue of innocence is dependent upon statements in cases which are equivocal, mere dicta or are otherwise not direct authority that innocence must be proved[3]: see also footnote 5 below. Further, there is otherwise no real reasoning to support the conclusion reached.

(iv) *Commonwealth Life Assurance Society Ltd v Smith*

41. In *CLASL v Smith* (1938) 59 CLR 527 this Court distinguished *Davis v Gell*, confined its reasoning to the situation where the criminal proceedings were halted by a *nolle prosequi* and held that its reasoning "cannot be extended further" (p.543). Rich, Dixon, Evatt and McTiernan JJ made a number of observations which undermine the reasoning in *Davis*.

42. First, at pages 532-533 it is noted that in "the textbooks which treat of the action commonly called malicious prosecution there is not to be found, we believe, any statement to the effect that it is incumbent upon the plaintiff *in any circumstances* to prove his innocence of the charges preferred against him, or any statement to the effect that it is open to a defendant to defeat the action by proof of the plaintiff's actual guilt". At p.541 it is noted that in the textwriters "no trace of such a requirement can be found" and that "[n]one of these writers appears to have supposed that the question of guilt or innocence was ever at issue in an action of malicious prosecution".[4] These statements suggest a strong view on the part of the four justices that innocence is always irrelevant in a malicious prosecution case.

43. Secondly and importantly, at pages 542-543 the four justices made the following observations:

> "The plaintiff must prove that the prosecution terminated in his favour. He must prove that there was no reasonable and probable cause for the prosecution. *But he need not prove that in truth he was innocent of the charge, and it is not open to the defendant to attempt to prove, as an answer to the action, that in truth he was guilty, notwithstanding the termination of the criminal proceedings in his favour.* In proving

[3] *Jones v Givin* (1714) Gilb 185, at 201-202 [93 ER 300, at 304-305]; *Abrath v North-Eastern Railway Co* (1883) 11 QBD 440, at 455; *Cox v English, Scottish and Australian Bank* [1905] AC 168, at 170-171; *Wheeler v Nesbitt* (1860) 24 Howard 544, at 549; 65 US 544 at 549.

[4] At p.540 there is reference to the 3rd edition (1868) of Bullen and Leake, *Precedents of Pleadings*. At p.350 of this work the following appears: "This cause of action consists in the prosecution by the defendant of legal proceedings, of a civil or criminal nature, against the plaintiff, maliciously and without any reasonable or probable cause; whereby the plaintiff is injured ... or put to expense."

> the existence of reasonable and probable cause, the defendant is confined to information of which he was aware at the time of the prosecution. He cannot justify a prosecution that failed by showing that facts of which he did not know made it reasonable (*Delegal v Highley*; *Turner v Ambler*). In the course of proving facts on which he based the prosecution, the defendant may sometimes succeed in raising a doubt of the plaintiff's innocence. When this happens an absence of reasonable and probable cause is hardly likely to be found. But it would be surprising if a defendant could go into the guilt or innocence of the plaintiff as a separate issue though on the issue of reasonable and probable cause he is not permitted to prove facts which he did not know at the time of the prosecution even when the facts amount to the highest degree of objective cause for the prosecution, namely, proof of the real guilt of the accused." (emphasis added and case references omitted)

44. Although their Honours add a caveat in relation to the case of a *nolle prosequi* (which is "covered by the decision in *Davis v Gell*": p.542) they were "of opinion that the guilt or innocence of the plaintiff is not an issue going to the cause of action in malicious prosecution" (p.543). Nor can the defendant prove innocence as a defence: see the italicised portion quoted in the previous paragraph. And at p.544 their Honours noted that the "policy of the law appears to us to be opposed altogether to reopening in civil proceedings the question of innocence or guilt". Moreover, "the issue of guilt or innocence has no real relevance to damages" (p.545). Thus, it is clear that these four justices regarded guilt or innocence as an irrelevant matter in actions for malicious prosecution (although the precise situation in *Davis* was formally reserved – apparently for later determination).

45. Thirdly, at page 533 the four justices referred to *Davis v Gell* and noted that it was there held that "in *every* action of malicious prosecution the plaintiff must show that the charge was 'unfounded', and that meant that he must show his innocence" (emphasis added). Given that their Honours held in *Smith* that (putting a *nolle prosequi* case to one side) a plaintiff did not ever need to prove innocence, it is clear that the four justices regarded this key aspect of the reasoning in *Davis* as manifestly unsustainable.

46. Fourthly, at pp.536-537 their Honours quote extensively from the unreported decision of the Privy Council in *Balbhaddar Singh v Badri Sah* (JCPC no. 66 of 1924) and adopt Lord Dunedin's observation that the proposition that the plaintiff has to prove that he was innocent of the charge upon which he was tried is "quite erroneous" (p.536). At page 543 their Honours note that *Davis v Gell* applies only to the entry of

a *nolle prosequi* and "cannot be extended further" by reason of the decision of the Privy Council in *Balbhaddar*.

47. It is submitted that the substance of the reasoning in *Smith* cannot stand with the reasoning in *Davis v Gell* (despite the caveat in relation to that case). Once it is accepted (as accepted in the questions in the present case) that a *nolle prosequi* is a favourable termination, there is no basis for distinguishing that situation from every other form of termination of criminal proceedings.

10 **(v) Some other relevant Australian authorities**

48. *Cox v English, Scottish and Australian Bank* [1905] AC 168 is a decision of the Privy Council on appeal from the Supreme Court of Queensland. At page 170 the Board referred to the *ex tempore* dictum by Bowen LJ in *Abrath v North-Eastern Railway Co* (1883) 11 QBD 440, at 455[5] that the elements of the tort included that the plaintiff was "innocent and that his innocence was pronounced by the tribunal before which the accusation was made". However, at page 171 the Board assumed these matters in the plaintiff's favour. Therefore, the issue of innocence as an element was not raised squarely for decision.

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49. *Crowley v Glissan [No 2]* (1905) 2 CLR 744: at page 754 Griffith CJ adopted the statement of the elements of the tort by the Privy Council in *Cox* (in turn adopting the *ex tempore* dictum of Bowen LJ in *Abrath*). Barton J concurred with Griffith CJ. Importantly, however, as O'Connor J noted (page 762), the only relevant issue was whether the plaintiff had established a want of reasonable and probable cause for the prosecution. Therefore, the observations on the issue of innocence in *Crowley* were clearly *obiter*.

50. *Commonwealth Life Assurance Society Ltd v Brain* (1935) 53 CLR 343 contains
30 statements by Starke J (pages 350-351) and Dixon J (page 379) that the decision of the Privy Council in *Balbhaddar* is inconsistent with the decision in *Davis v Gell*.

[5] In *Smith* at 541 the following observation is made: "As Issacs J explains in *David v Gell* [at 293] Bowen LJ did not mean that innocence must be proved and acquittal also. He meant that a decision in favour of the accused must be proved, which decision thus established innocence".

51. *A v New South Wales* (2007) 230 CLR 500: at [1] the plurality judgment notes that to succeed in an action for malicious prosecution the plaintiff must establish:

> (i) that proceedings of the kind to which the tort applies … were initiated against the plaintiff by the defendant;
>
> (ii) that the proceedings terminated in favour of the plaintiff;
>
> (iii) that the defendant, in initiating and maintaining the proceedings, acted maliciously; and
>
> (iv) that the defendant acted without reasonable and probable cause.

52. It will be observed that these elements do not include an element that the plaintiff was innocent or that the initial prosecution was "groundless" or "unfounded". Moreover, the plurality's formulation (at [70]) of the matters relevant to an absence of reasonable and probable cause makes it clear that "innocence" per se is not part of this inquiry:

> "There are several questions bound up in the proposition that absence of reasonable and probable cause requires an examination of what the prosecution "made" or "should have made" of the *material available to the prosecutor* when he or she decided to prosecute, or to maintain an existing prosecution. As has already been noted, two kinds of inquiry are postulated: one subjective (what the prosecutor made of the *available material*) and the other objective (what the prosecutor should have made of *that material*)." (emphasis added)

53. Thus reasonable and probable cause is based on the "material available" to the prosecutor – not on innocence in "all the circumstances" (*Davis* at p.285).

54. *Little v Law Institute of Victoria* [1990] VR 257: at 262 Kaye and Beach JJ determined that the elements of the tort were as follows:

> (i) that the proceedings complained of were instituted or continued by [the defendant];
>
> (ii) that [the defendant] instituted or continued the proceedings maliciously;
>
> (iii) that [the defendant] acted without reasonable and probable cause; and
>
> (iv) that the proceedings were terminated in [the plaintiff's] favour.

(vi) Other jurisdictions

55. Authorities from other jurisdictions also support the proposition that a plaintiff need not prove innocence.

56. In the United Kingdom, the Privy Council has rejected the notion that the plaintiff must prove innocence: *Balbhaddar Singh*. In *Martin v Watson* [1996] AC 74, at 80B and *Gregory v Portsmouth City Council* [2000] 1 AC 419, at 426G the House of Lords adopted the following statement of principle from *Clerk & Lindsell on Torts* (now found in the 20th edition at [16-09]):

> "In an action for malicious prosecution the claimant must show first that he was prosecuted by the defendant, that is to say, that the law was set in motion against him by the defendant on a criminal charge; secondly, that the prosecution was determined in his favour; thirdly, that it was without reasonable and probable cause; fourthly, that it was malicious. The onus of proving every one of these is on the claimant."

57. Obviously, these elements do not include proof of innocence. And (as noted at [52]-[53] above) absence of reasonable and probable cause does not involve an inquiry as to innocence. Another important decision is *Delegal v Highley* (1837) 3 Bing NC 950 [132 ER 677]. There the defendant in an action for malicious prosecution pleaded facts establishing that the plaintiff was guilty of the crime charged. Tindal CJ held (at 959; 680) that the plea was bad because it did not allege that the defendant had knowledge of those facts.

58. In New Zealand it has been held that "there is no justification for requiring a plaintiff to prove his innocence" in order to maintain a cause of action for malicious prosecution: *Van Heeren v Cooper* [1999] 1 NZLR 731, at 740.35. The NZCA there noted (p.737) that there were five elements usually proved:

> (i) that the defendant prosecuted the plaintiff on a criminal charge;
>
> (ii) that the criminal proceedings terminated in the plaintiff's favour;
>
> (iii) that the defendant had no reasonable and probable cause for bringing the proceedings;
>
> (iv) that the defendant acted maliciously;
>
> (v) that the plaintiff suffered damage as a consequence of the proceedings.

59. This statement by the NZCA of the elements of the tort was applied in *Caine v Attorney General* [2006] NZAR 379.

60. In Canada in *Miazga v Kvello Estate* [2009] 3 SCR 339 at [3] it was held that the elements of malicious prosecution to be established by the plaintiff are that:

(i) the prosecution was initiated by the defendant;

(ii) the prosecution terminated in favour of the plaintiff;

(iii) it was undertaken without reasonable and probable cause; and

(iv) it was motivated by malice or a primary purpose other than that of carrying the law into effect.

61. Again, these elements do not include proof of innocence or that the prosecution was groundless.

62. In Hong Kong, in *Eugene Jae Hoon Oh v Richdale* [2005] 2 HKLRD 28 at [12] Ma CJHC quoted with approval the four elements from *Clerk & Lindsell* which were adopted by the House of Lords in *Martin v Watson* [1996] AC 74 and in *Gregory v Portsmouth City Council* [2000] 1 AC 419. At [33] Cheung JA also applied the elements adopted in *Martin v Watson*.

63. In Sri Lanka, Fernando AJA (Moseley J agreeing) noted in *Ramen Chettiar v Punchiappuhamy* (1937) 3 40 NLR 118, at 119 that the Court had "not been referred to any decision in England or here which sets out that the plaintiff's action must fail if he cannot prove at the trial of the action for malicious prosecution that he was innocent in fact, in addition to proving that the proceedings terminated in his favour." At page 120 it was held that the plaintiff did not need to establish his innocence or the falsity of the charge, other than by proving that the proceedings had been terminated. The decision in *Ramen* was approved in *Ghouse v Samsudeen* (1944) 45 NLR 417.

64. In Scotland in *Mills v Kelvin & James White, Ltd* [1913] SC 521 it was held (at p.527) that in that jurisdiction "the pursuer is entitled to have his innocence presumed".

65. In Singapore, the Court in *Zainal bin Kuning v Chan Sin Mian Michael* [1996] 2 SLR(R) 858 held that the elements from *Clerk & Lindsell* applied in *Martin v Watson* [1996] 1 AC 74 should also be adopted in Singapore.

66. In Jamaica the elements of the tort have been similarly defined (i.e. without a requirement that the plaintiff establish innocence): *Fullerton v Attorney General* [2011] 3 JJC 2501 at [53]; *Bennett v Grant* [2011] 5 JJC 1601 at p 12; *Brown v Heaven* [2011] 6 JJC 0201 at [25]; *Bent v Attorney General* [2006] 12 JJC 1901.

67. In South Africa the elements of the tort were identified (without a requirement of innocence) in *Van Alphen v Minister of Safety* [2011] ZAKZDHC 25 at [108]:

(i) the servants of the defendant set the law in motion – i.e. instigated or instituted the proceedings;

(ii) the defendants acted without reasonable and probable cause;

(iii) the defendants acted with malice (or *animo iniurandi*); and

(iv) the prosecution has failed.

68. In India: see the unreported decision of the Privy Council in *Balbhaddar Singh*.

69. In the US the position is summarised in *American Jurisprudence* (2nd) volume 52 at §137 as follows:

> "The plaintiff in an action for malicious prosecution is not required to prove his or her innocence to support the action, and is not required to go further than to prove the defendant's malice and want of probable cause in bringing the prior action."

(vii) Principles: leave to re-open and overruling

70. The principles relevant to leave to re-open have been discussed recently in *Wurridjal v Commonwealth* (2009) 237 CLR 309. Earlier discussions appear (*inter alia*) in *Queensland v Commonwealth* (1977) 139 CLR 585; *John v FCT* (1999) 166 CLR 417; *Attorney General (NSW) v Perpetual Trustee* (1952) 85 CLR 237.

71. Beckett seeks the Court's leave to re-open the correctness of *Davis v Gell*. It is submitted that relevant factors in that regard (and factors relevant to determining whether *Davis* should be overruled) include the following:

(a) whether the proposition for which the earlier decision is authority has become part of a stream of jurisprudence and been accepted in subsequent decisions: *Wurridjal* at [64]: *Davis* was not accepted as correct in *Smith* and has not been followed by other courts, even on the precise point for which it is authority (see *Mann v Jacombe* [1961] NSWR 273: FC);

(b) whether the error in the prior decision has been made manifest by later cases which have not directly overruled it: *Wurridjal* at [68]; *Queensland v Commonwealth* at 630: *Smith* identifies the error in *Davis* although it does not directly overrule it;

(c) whether the prior decision goes with a definite stream of authority and does not conflict with established principle: *Wurridjal* at [68]; *Attorney General v Perpetual Trustee* at 244; *Queensland v Commonwealth* at 630: *Davis* is contrary to the current stream of authority and conflicts with the principles stated in subsequent and prior cases;

(d) whether the prior decision can be confined as an authority to the precise question which it decided or whether its consequences would extend beyond that question: *Wurridjal* at [68]: *Smith* has confined *Davis* to the situation of a *nolle prosequi*; however, *Davis* has been treated by the NSWCA as having ramifications beyond its precise facts because its ratio has been extended to a s.7(2)(b) direction (which is wider than the entry of a *nolle prosequi*);

(e) whether the prior decision is isolated and forms no part of a stream of authority: *Wurridjal* at [68]: *Davis* is isolated from the current stream of authority and has been isolated since March 1926 (when *Balbhaddar* was decided);

(f) whether the earlier decision rests upon a principle carefully worked out in a significant succession of cases: *Wurridjal* at [69]; *John* at 438: *Davis* is not a case which rests upon a principle worked out on a significant succession of cases; indeed in *Smith* the reasoning in *Davis* is said to be without support in the cases and texts;

(g) whether the earlier decision has achieved a useful result or caused inconvenience: *Wurridjal* at [69]; *John* at 438: there is manifest inconvenience

for the lower courts in determining whether to follow *Smith* or *Davis* in the case of a *nolle prosequi*;

(h) whether the earlier decision has been independently acted upon in a way which militates against reconsideration: *Wurridjal* at [69]; *John* at 438: it cannot be asserted that *Davis* has been independently acted upon in a way which militates against reconsideration;

(i) whether the earlier decision has proved to be incompatible with the ongoing development of jurisprudence: *Wurridjal* at [71]: *Davis* is incompatible with *Smith* and with later cases and with decisions in many other jurisdictions; it also lacks support among textwriters;

(j) whether the earlier decision has been weakened by subsequent decisions or in the light of experience: *Wurridjal* at [71]: here *Smith* clearly weakens the earlier decision, as do other subsequent cases noted above;

(k) whether subsequent events have rendered the earlier decision an anomaly: *Wurridjal* at [189]: the decision in *Davis* looks increasingly anomalous in the light of subsequent decisions in all jurisdictions;

(l) whether the earlier decision features fundamental defects of reasoning or errors in basic principle: *Wurridjal* at [182] and [189]: for reasons advanced above (particularly in *Smith*) and below (see [74]-[75]) it is submitted that there are fundamental defects in the reasoning in *Davis* and also errors in basic principle;

(m) whether the reasoning in the earlier decision is at odds with significant authority: *Wurridjal* at [188]: here the decision is at odds with *Smith* and with other decisions noted above;

(n) whether the prior decision was reached only after a very full examination of the question: *Attorney General (NSW) v Perpetual Trustee* at 244: *Smith* demonstrates that a full examination reveals the absence of support for the decision in *Davis* in the cases and among textwriters;

(o) whether the prior decision was recent: *Attorney General (NSW) v Perpetual Trustee* at 244: the decision in *Davis* is not recent and is inconsistent with many more recent authorities;

(p) whether any compelling consideration or important authority was overlooked: *Attorney General (NSW) v Perpetual Trustee* at 244: for reasons advanced in these submissions, there are compelling reasons of principle why the decision is incorrect and as noted in *Smith*, the ratio of *Davis* is contrary to the case law and the views expressed in various texts;

(q) whether the decision is manifestly wrong and whether its maintenance is injurious to the public interest: *Queensland v Commonwealth* at 621-624, 626, 628: it is submitted that (for the reasons given in these submissions) *Davis* is manifestly wrong; it is in the public interest that it be overruled.

72. For these reasons it is submitted that this Court should grant leave to re-open the correctness of *Davis* and should overrule it.

(viii) Submission on applicability of *Davis v Gell*

73. It is submitted that the NSWCA should have applied *Smith* and held that Beckett did not need to establish her innocence. In *Smith* it was held that *Davis* dealt only with the entry of a *nolle prosequi* and "cannot be extended further" (p.543). Contrary to the finding of the NSWCA, the Director's direction in the present case was not an entry of a *nolle prosequi*: the Director's direction was a direction under s.7(2)(b) that no further proceedings be taken against Beckett. The "substance of the power contemplated [by s.7(2)(b)]... is wider than a *nolle prosequi* because it constitutes a direction that no further proceedings be taken against a person who has been committed for trial or sentence" (*R v GKA* (1998) 99 A Crim R 491, at 494 per Cole JA, Gleeson CJ and Barr J concurring). Conversely, a "*nolle prosequi* does no more than bring the trial to an end" and the "accused may again be indicted or fresh process may be awarded in the same indictment and the prisoner again put on his trial" (*Smith* at 534): the effect of a *nolle prosequi* is merely to "put the defendant 'without day'" (*Davis* at 287). Accordingly, the NSWCA was bound by *Smith* not to *extend* the ratio of *Davis* further so as to cover the direction given in the present case.

(x) Submission on overruling of *Davis v Gell*

74. It is submitted that *Davis* is flawed in its reasoning and should be overruled because in principle "it is neither incumbent on the plaintiff to establish innocence, nor may the defendant set out to prove that the accused was in fact guilty of the crime charged": *Fleming's Law of Torts* (10th ed) at p.699. Special leave should be granted in order to overrule *Davis*.[6]

75. *Davis* is a decision which was originally based on equivocal statements, mere dicta and passages that are not direct authority that a plaintiff must prove innocence. Subsequent decisions in various jurisdictions (particularly *Smith*) demonstrate that the elements of the tort do not include any requirement that the plaintiff establish innocence. Nor is *Davis* supported by the textwriters. No relevant point of distinction can be made between a *nolle prosequi* and other modes of termination of criminal proceedings. Nor does *Davis* sit easily with the presumption of innocence. Nor can the requirement of absence of reasonable and probable cause be used to draw in an inquiry into innocence per se: it is clear that this issue is judged on the facts available to the prosecutor at the time of prosecution (not on the basis of facts as subsequently discovered). Further, *Davis* is inconsistent with the public policy that a decision of an Attorney-General (or DPP) should not be "tried over again upon the merits" (*Smith* at 552): cf *Smith* at 544. *Davis* was wrongly decided in 1924 and subsequent decisions have increased its isolation as an authority.

76. It is submitted that the law is correctly stated in *Halsbury's Laws of Australia* volume 26 (Tort) at [415-1740]:

> "The cause of action in malicious prosecution does not depend upon the plaintiff proving actual innocence, only that the previous prosecution was terminated in the plaintiff's favour. It is not open to the defendant to attempt to establish the guilt of the plaintiff as a defence[7] although a defendant may seek to prove the facts upon which the prosecution was based in order to prove that the previous proceedings were initiated with reasonable and probable cause."

[6] On the issue of special leave these written submissions wholly supersede the written submissions filed by the applicant in respect of the special leave application heard on 5 October 2012.
[7] Citing *Smith* at p.542 as authority.

Part VII: Applicable statutes

77. Section 7 of the *Director of Public Prosecutions Act* 1986 (NSW).

Part VIII: Orders sought

78. Beckett seeks the following orders:

(1) Grant special leave to appeal.

(2) Appeal allowed with costs.

(3) Set aside the answer to question A given by Davies J and in lieu thereof answer question A "No".

(4) Set aside order (b) made by the Court of Appeal on 2 May 2012 and in lieu thereof order that the appeal to that Court be allowed with costs and the cross-appeal dismissed with costs.

(5) Order that the costs of the separate determination by Davies J be paid by the respondent.

Part IX: Time estimate

79. On the material currently available, it is estimated that Beckett's argument will take approximately 2 hours.

G. O'L. Reynolds
Counsel for the Applicant
Tel: (02) 9232 5016
Fax: (02) 9233 3902
E: guyreynolds@sixthfloor.com.au

S. Nixon
Counsel for the Applicant
Tel: (02) 9221 0272
Fax: (02) 9233 3902
E: snixon@sixthfloor.com.au

G.R. Rubagotti
Counsel for the Applicant
Tel: (02) 9235 1008
Fax: (02) 9235 2342
E: rubagotti@selbornechambers.com.au

Dated: 26 October 2012

DIRECTOR OF PUBLIC PROSECUTIONS ACT 1986 (NSW)*

7 Principal functions

(1) The principal functions and responsibilities of the Director are:

(a) to institute and conduct, on behalf of the Crown, prosecutions (whether on indictment or summarily) for indictable offences in the Supreme Court and the District Court,

(b) to institute and conduct, on behalf of the Crown, appeals in any court in respect of any such prosecution, and

(c) to conduct, on behalf of the Crown as respondent, any appeal in any court in respect of any such prosecution.

(2) The Director has the same functions as the Attorney General in relation to:

(a) finding a bill of indictment, or determining that no bill of indictment be found, in respect of an indictable offence, in circumstances where the person concerned has been committed for trial,

(b) directing that no further proceedings be taken against a person who has been committed for trial or sentence, and

(c) finding a bill of indictment in respect of an indictable offence, in circumstances where the person concerned has not been committed for trial.

* The provision is reproduced as at 22 September 2005, being the date the direction was given by the Director of Public Prosecutions that there be no further proceedings against the Applicant on all outstanding charges.