HIGH COURT OF AUSTRALIA

GLEESON CJ
GUMMOW, KIRBY, HAYNE, CALLINAN, HEYDON AND CRENNAN JJ

A APPELLANT

AND

STATE OF NEW SOUTH WALES & ANOR RESPONDENTS

A v State of New South Wales
[2007] HCA 10
21 March 2007
S59/2006

ORDER

1. *Appeal allowed in part;*

2. *Vary paragraph 1 of the orders of the Court of Appeal of the Supreme Court of New South Wales made on 2 September 2005 by adding the words "with costs" after "dismissed";*

3. *Set aside paragraphs 2 to 7 of the orders of the Court of Appeal of the Supreme Court of New South Wales made on 2 September 2005 and, in their place, order that the cross-appeal be dismissed with costs; and*

4. *The respondents to pay the appellant's costs of the appeal to this Court.*

On appeal from the Supreme Court of New South Wales

Representation

D F Jackson QC with A P Stenmark SC and J C Sheller for the appellant (instructed by Greg Walsh & Co)

M G Sexton SC, Solicitor-General for the State of New South Wales with P J Saidi and J C Chapman for the first and second respondents (instructed by Crown Solicitor for New South Wales)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

A v State of New South Wales

Torts – Malicious prosecution – Whether prosecutor acted without reasonable and probable cause – Public rather than private prosecution – Applicant acquitted of offence charged – Prosecutor had no personal knowledge of the facts underlying the charge – Whether prosecutor did not honestly form the view that there was a proper case for prosecution or whether the prosecutor formed that view on an insufficient basis.

Torts – Malicious prosecution – Whether prosecutor acted maliciously – Whether the sole or dominant purpose of the prosecutor was other than the proper invocation of the criminal law.

Words and phrases – "malicious prosecution", "malice", "absence of reasonable and probable cause".

1 GLEESON CJ, GUMMOW, KIRBY, HAYNE, HEYDON AND CRENNAN JJ. This appeal raises issues concerning two of the four elements of the tort of malicious prosecution. For a plaintiff to succeed in an action for damages for malicious prosecution the plaintiff must establish:

(1) that proceedings of the kind to which the tort applies (generally, as in this case, criminal proceedings) were initiated against the plaintiff by the defendant;

(2) that the proceedings terminated in favour of the plaintiff;

(3) that the defendant, in initiating or maintaining the proceedings acted maliciously; and

(4) that the defendant acted without reasonable and probable cause[1].

2 At a jury trial, the third of those issues is for the jury; the fourth is for the judge, although it may be necessary for the judge to obtain the decision of the jury upon a disputed matter of fact relevant to the issue. Many of the decided cases have involved argument as to the circumstances in which it is proper to invite a decision of a jury upon a question relevant to the fourth issue, or as to the form of question appropriate to the circumstances of the case. In this case the action was tried by a judge sitting without a jury. There is no dispute as to the legal nature of the third element: malice is a broader concept than ill-will or spite, and means an improper purpose. In this appeal, there is an issue of fact concerning malice. There are issues of law and fact concerning the absence of reasonable and probable cause.

3 The case arises out of a public, not a private, prosecution brought against the appellant, A. Detective Constable John Floros (the second respondent) is a police officer. He is alleged to have committed the tort. At the time he was a member of the New South Wales Police Service. The first respondent, the State of New South Wales, was sued on the basis that it was vicariously responsible for his wrongdoing. If the second respondent is found liable, the State's vicarious liability is not in dispute. Some of the leading judicial statements concerning the fourth of the above elements and, in particular, the significance of a prosecutor's state of belief, were made at a time when prosecutions were largely in private hands, and in a context where a prosecutor had personal knowledge of the facts

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1 Bullen & Leake, *Precedents of Pleadings*, 3rd ed (1868) at 350-356.

alleged. As Viscount Simonds pointed out in *Glinski v McIver*[2], different factual considerations arise "where in the administration of criminal justice the information is laid by a particular police officer who is in charge of the prosecution and responsible if it is held to be malicious, but it is, as a matter of police organisation, obvious that he must act upon the advice and often upon the instruction of his superior officers and the legal department", and, it may be added, where the prosecutor is acting upon information given to him by a member of the public. In that context, the concept of "belief", as a fact relevant to the question whether a defendant had reasonable and probable cause to institute a prosecution, bears a different aspect.

The prosecution

4 On 9 March 2001, the appellant was arrested, and charged with two offences of homosexual intercourse contrary to s 78H of the *Crimes Act* 1900 (NSW). The first charge alleged homosexual intercourse with the appellant's stepson D (then aged eight) between 8 May and 31 December 1997. The second charge alleged homosexual intercourse with the appellant's stepson C (then aged nine) between 1 and 11 October 2000. The charge sheet in each case identified the second respondent as the informant[3]. The offences alleged were indictable offences. The hearing of committal proceedings commenced at the Children's Court at Campbelltown on 23 August 2001. By that time, the Director of Public Prosecutions had taken over the conduct of the prosecutions. This was done on 6 April 2001, pursuant to ss 9 and 10 of the *Director of Public Prosecutions Act* 1986 (NSW).

5 On 23 August 2001, each of D and C testified that the appellant had engaged in an act of anal intercourse with him. The proceedings were part heard on that day. They continued on 28 August. On 28 August, in the course of cross-examination, C admitted that his evidence in chief was false, and that he had told lies to help his brother. The magistrate, with the concurrence of the representative of the Director of Public Prosecutions, discharged the appellant on

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2 [1962] AC 726 at 744.

3 For a description of procedures of committal and indictment in relation to indictable offences in New South Wales see *R v Butler* (1991) 24 NSWLR 66. See also *Justices Act* 1902 (NSW) (since repealed) ss 21, 22, 22A.

the charge concerning C, stating that he was of the opinion "that a jury would [not] be likely to convict on the evidence"[4].

6 The case was then adjourned to 31 August 2001. On that day D completed his evidence. The magistrate, after hearing argument, concluded "that there [was] no reasonable prospect that [a] jury could convict the [appellant]". The appellant was discharged.

7 The appellant then commenced these proceedings. He sued for malicious prosecution, unlawful arrest, unlawful imprisonment and abuse of process. The action was commenced in the District Court of New South Wales and was heard by Cooper DCJ. The judge held that the evidence did not establish a case of unlawful arrest, unlawful imprisonment or abuse of process. The claim for damages for malicious prosecution was partly successful. Before examining the reasons of Cooper DCJ, it is necessary to refer to the material that was before the second respondent when he charged the appellant. It consisted principally of allegations made by D and C about conduct said to have occurred in private between them and the appellant, and the appellant's response to those allegations.

The complaints

8 The appellant, a civilian employee of the Police Service, married S on 8 May 1997. At the time, S had three children from a previous marriage, including D and C. According to S, D disliked and resented the appellant to the point of hatred. In January 2000, D made a vague complaint to S which could have suggested sexual misconduct by the appellant towards D. Later, D told S that C had been sexually assaulted by the appellant. C confirmed this, but later denied it.

9 The second respondent was a member of a Joint Investigation Team within the Child Protection Enforcement Agency. The team comprised officers of the Department of Community Services and the Police Service. Cooper DCJ was critical of some aspects of the methods of investigation employed by the team where, he said, "fairness gave way to zealotry". In July 2000, the team

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4 As to the decisions to be made by a magistrate on committal proceedings, see *Justices Act* 1902 (NSW) s 41 (since repealed: see now *Criminal Procedure Act* 1986 (NSW) Ch 3, Pt 2, Divs 2 and 3).

received a complaint about the conduct of the appellant towards D and C. There was no evidence as to who made the complaint, or as to its details.

10 On 13 October 2000, District Officer Krkach conducted an interview of D, then aged 11. During that interview, after prolonged questioning, D made an allegation of anal rape. On the same day, District Officer Krkach interviewed C, then aged nine. The second respondent monitored the interview. More than 800 questions were asked. C denied that he had been a victim of any sexual assault. That day the boys were placed in foster care. On 18 October 2000, the second respondent interviewed C again. This time, C alleged that he had been anally raped by the appellant on several occasions, the most recent being on or about 11 October 2000. On 19 October 2000, D was interviewed by the second respondent and Constable Campbell. D asserted a single act of sexual assault about one month after the appellant and S were married. On 30 October 2000, the second respondent and Constable Campbell interviewed S. She said she did not believe the allegations being made by D and C. On 8 February 2001, there was a third interview of C, at which the second respondent was not present. On this occasion at one point, C affirmed that he had been anally raped by the appellant but later asserted an act of oral sex. He said that "some things happened but mostly it didn't happen". He did not clarify what it was that he said did not happen. The interviews with D and C were recorded on videotape.

11 In January 2001, there were proceedings in the Children's Court concerning the care of the children. On about 23 January 2001, the second respondent was informed that the Children's Court had found on the balance of probabilities that D and C had been sexually abused. The evidence in these proceedings does not disclose the nature of the material before the Children's Court, but Cooper DCJ referred in his reasons for judgment to a report of a psychologist appointed by the Department of Community Services, dated 16 December 2000. The judge criticised the report, which he regarded as unfair and as based on inadequate information.

12 The second respondent was given the task of reviewing all the material obtained in the interviews. He was on leave from early December 2000 until about 4 January 2001. Before he went on leave he asked for this case to be re-allocated. When he returned from leave, he found that had not happened. He was given permission to work overtime to read all the material. He had other pressing commitments as well. The second respondent gave evidence that during January 2001 he received a number of phone calls from the Child Protection Enforcement Agency inquiring about the status of the investigations. He was asked why the investigation was taking so long. At the time, his wife was very

ill, and he had a heavy workload. As has been noted, it was on 8 February 2001 that a third interview with C was conducted. At the trial much importance was attached to statements later made by the second respondent to the appellant's solicitor to the effect that he felt he was under pressure to charge the appellant because the appellant was an employee of the Police Service. Evidence of those statements was critical to the decision of Cooper DCJ. The Court of Appeal took a somewhat different view of the evidence.

13 On 9 March 2001, the second respondent interviewed the appellant. The appellant denied the allegations of sexual assault. After the interview, the second respondent charged the appellant. It appears that an arrest was effected without warrant, and that accordingly there was no sworn information, the charges being recorded on charge sheets, in accordance with ss 22 and 22A of the *Justices Act* 1902 (NSW).

Statements by the second respondent to the appellant's solicitor

14 On 6 July 2001, after the prosecution had been taken over by the Director of Public Prosecutions, the second respondent telephoned the appellant's solicitor, Mr Walsh. The second respondent said that he had been away on leave and on his return he had seen a communication from Mr Walsh asking to see the video recordings of the interviews with D and C. Mr Walsh said that he had already seen them. The second respondent then went on to make some comments about the case. He said he had advised the appellant to apply to have the complainants cross-examined at the committal hearing. He said that he felt sorry for the appellant and that he (the second respondent) had been under pressure to charge the appellant because the appellant was employed by the Police Service. He said that he had been advised by people above him to the following effect: "Look, if you had a prime facie case, you've got to leave it up to the court".

15 A second conversation took place on 28 August 2001, at the committal proceedings, during an adjournment after C had admitted he had lied in his evidence in chief. The second respondent referred to the earlier telephone conversation. He repeated that he had felt he was under pressure to charge the appellant because the appellant was an employee of the Police Service, and said that if it had been up to him he would not have charged the appellant. Mr Walsh said that his client had been through an ordeal, and that the evidence of D and C was unreliable. The second respondent said: "I agree but what could I do, they told me in town I should have done this or I should have done that but what could I do?"

16 In commenting on the above evidence, and in particular on the evidence of what was said about a prima facie case, Cooper DCJ said:

> "It needs to be noted that it is not enough that there be a prima facie case in the sense of information which, if accepted, would establish the elements of the criminal charge. In addition the person laying the charge must have the belief based upon reasonable grounds that the allegations are probably true."

17 The soundness in law of that proposition was contested in the Court of Appeal, but what is of immediate importance is the way it was reflected in the judge's findings of fact.

The decision of the primary judge

18 Cooper DCJ dismissed the appellant's action insofar as it related to the charge concerning D, but found in favour of the appellant in relation to the charge concerning C. Because the Director of Public Prosecutions took over the proceedings on 6 April 2001, the judge held that the appellant was entitled to damages to compensate him for the consequences of the laying of the charge involving C on 9 March 2001 and the maintenance of the prosecution up to 16 May 2001, which was regarded as allowing for a reasonable period for the Director to consider his position after taking over the proceedings. The judge assessed compensatory damages at $20,000 and increased this sum to $25,000 by way of aggravated compensatory damages. He awarded exemplary damages in an amount of $5,000. After an amount for pre-judgment interest was added, there was judgment for the appellant, against the first and second respondents, for $31,250.

19 In his reasons, Cooper DCJ dealt first with the issue of malice. Relying principally upon inferences he drew from the statements made by the second respondent to Mr Walsh, he said:

> "For reasons previously given it is beyond doubt that there were a number of pressures both family and professional upon Detective Constable Floros. It is also beyond doubt that [this] investigation was alone among the many he was then conducting in respect of which he was receiving repeated phone calls. Evidence was adduced by Counsel for the State that this investigation was being monitored by officers of the Child Protection Enforcement Agency because it had been reported to them by reason of the plaintiff's employment by the Police Service.

> The plaintiff has comfortably satisfied me on the balance of probabilities that Detective Constable Floros laid both charges against the plaintiff not for the purpose of bringing a wrongdoer to justice, but for the improper purpose of succumbing to the pressure from officers of the Child Protection Enforcement Agency to charge the plaintiff because he worked for the Police Service. Accordingly, the plaintiff has satisfied me that Detective Constable Floros acted maliciously."

20 That finding was reversed by the Court of Appeal. The finding related to both charges. The second respondent denied the conversations, but Cooper DCJ accepted the evidence of Mr Walsh, which was supported by file notes. The statements made by the second respondent to Mr Walsh were treated by the judge as relating to the charges concerning both D and C. That interpretation was not inevitable, but it was open. In the conduct of the trial, there does not appear to have been any suggestion that what was said applied only to the charge concerning C. In dealing with the issue of malice, Cooper DCJ repeated what he had earlier said in his general review of the law concerning malicious prosecution, that is to say, that it is not enough that there be a prima facie case in the sense of information which, if accepted, would establish the elements of the charge, and that the person laying the charge must have the belief, based upon reasonable grounds, that the allegations are probably true.

21 On the issue of reasonable and probable cause, Cooper DCJ found in favour of the second respondent in relation to the charge concerning D, and in favour of the appellant in relation to the charge concerning C. As to the charge concerning D, the judge said:

> "[T]he prosecutor does not have to believe that a court will find the person charged guilty, merely that he believes [sic] that on the probabilities upon reasonable grounds, that the person committed the offence charged.
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> The plaintiff has failed to satisfy the court on the balance of probabilities that Detective Constable Floros did not have reasonable grounds for believing and that he did not in fact believe that the plaintiff had committed the offence upon [D] notwithstanding the countervailing evidence. In short I am satisfied on the balance of probabilities that it was a proper case to bring to court."

22 The reference to "the countervailing evidence" was a reference to matters of circumstantial detail which were argued to be inconsistent with D's

allegations. The proposition that a prosecutor "has to believe", on reasonable grounds, that the allegations are probably true, that is to say, that, on the probabilities, the accused committed the offences charged, was a recurring theme in the learned judge's reasons.

23 As to the charge concerning C, the judge said:

> "I can well appreciate that Detective Constable Floros had great difficulty in determining what he should do in relation to [C's] allegation. And it is in this context that what he called 'pressure' becomes significant. On the balance of probabilities I am satisfied that Detective Constable Floros succumbed to the pressure from senior officers in the Child Protection Enforcement Agency to charge the plaintiff because he was employed by the Police Service.
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> In relation to the charge involving [C] the totality of the evidence satisfies me on the balance of probabilities that Detective Constable Floros did not believe that the plaintiff had committed the offence, or alternatively, that if he did believe it, then such belief was not based upon reasonable grounds."

24 There was argument as to what it was that Cooper DCJ found concerning the second respondent's belief. Literally, the finding is expressed in the alternative. The words "if he did believe it" (that the appellant had committed the offence) could be understood to negate a finding that he did not believe it. If the judge meant that the second respondent did not believe that the appellant had committed the offence and, in addition, that he did not have reasonable grounds for any such belief, then the findings were cumulative, not alternative, and the expression "if he did believe it" was at least a slip. The appellant contends, and the respondents dispute, that Cooper DCJ made a finding that the second respondent did not believe that the appellant had committed the offence against C, and an additional finding that there were no reasonable grounds for believing that the second respondent had committed the offence.

The decision of the Court of Appeal

25 The Court of Appeal dismissed an appeal by the appellant against the trial judge's decision concerning the charge in relation to D, allowed a cross-appeal by the first and second respondents against the decision concerning the charge in relation to C, set aside the judgment of Cooper DCJ and entered judgment in the

action for the respondents[5]. The principal judgment was that of Beazley JA, with whom Mason P and Pearlman AJA agreed.

26 The appeal was by way of re-hearing. No challenge was made to the trial judge's views of the credibility of the witnesses. He had accepted the evidence of Mr Walsh as to his conversations with the second respondent, and that evidence was accepted in the Court of Appeal. The second respondent had given evidence about his state of mind when laying the charges, including evidence that he made an independent assessment of the evidence and that he was not merely responding to pressure to charge the appellant because he was an employee of the Police Service and, inferentially, because it was seen as important that an employee of the Police Service should not be given special or favourable treatment. The general tenor of the second respondent's evidence was that he was told that he had to lay charges if he thought that there was a prima facie case, and he thought there was a prima facie case. That, it was argued, was the only sense in which he was responding to pressure. Beazley JA reviewed all of the evidence, including the material which showed the strengths and weaknesses of the case against the appellant at the time of the laying of the charges.

27 The trial judge's conclusions on the issues of reasonable and probable cause, and malice, in a number of respects reflected his view of the nature of the belief a prosecutor should entertain in order to justify the laying of a charge. (Putting it that way ignores questions of onus of proof, but it sufficiently indicates the point of present relevance.) Beazley JA considered that this was a topic upon which there were conflicting authorities, that the trial judge had followed the wrong line of authority, and that his erroneous views were of pervasive influence in his reasoning.

28 The suggested conflict of authority was found in statements of principle by Jordan CJ, giving the judgment of the Court, in *Mitchell v John Heine & Son Ltd*[6], on the one hand, and by Dixon J in *Sharp v Biggs*[7] and *Commonwealth Life*

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5 *A v State of New South Wales* [2005] NSWCA 292, reported in part at (2005) 63 NSWLR 681.

6 (1938) 38 SR (NSW) 466.

7 (1932) 48 CLR 81.

Assurance Society Ltd v Brain[8], on the other. In brief, Beazley JA considered that, according to Jordan CJ, the question was whether a prosecutor believed that the accused is probably guilty, whereas according to Dixon J it was enough, to defeat a claim of absence of reasonable and probable cause, that a prosecutor believed that the probability of the accused's guilt was such that upon general grounds of justice a charge was warranted.

29 This problem of the nature of the belief that is required (in the sense that absence of such a belief, if proved by a plaintiff, will show absence of reasonable and probable cause), and of the caution that must be exercised in applying judicial statements of principle without regard to their context, was a matter to which Cooper DCJ referred. Early in his judgment, he quoted the well-known passage in the judgment of Jordan CJ in *Mitchell v John Heine* in which it was said, among other things, that the prosecutor must believe that the accused is probably guilty, and that the information on which the prosecutor acts, whether it consisted of things observed by the prosecutor himself, or things told to him by others, must be believed by him to be true[9].

30 Immediately thereafter, however, the trial judge quoted passages from the speeches of Lord Denning and Lord Devlin in *Glinski v McIver*[10]. In the first of those passages, Lord Denning said that the word "guilty" is apt to be misleading and that a prosecutor has only to be satisfied that there is a proper case to lay before the court. In the second of the passages quoted by the trial judge, Lord Devlin cited with approval the statement by Dixon J in *Commonwealth Life Assurance Society v Brain*[11] that what is required is belief that the probability of the accused's guilt is such that upon general grounds of justice a charge against him is warranted.

31 Beazley JA said that Dixon J's statement was correct and ought to be regarded as authoritative. She then went on to analyse the evidence, and make findings of fact, in that light. In one important respect, Beazley JA's evaluation of some evidence differed from that of Cooper DCJ. It concerned the inferences

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8 (1935) 53 CLR 343.

9 *Mitchell v John Heine & Son Ltd* (1938) 38 SR (NSW) 466 at 469.

10 [1962] AC 726 at 758 and 767.

11 (1935) 53 CLR 343.

to be drawn from the evidence of Mr Walsh about his conversations with the second respondent, and, in particular, the nature of the pressure to which the second respondent had said he was subjected. The second respondent was asked on a number of occasions about the progress of his investigation. For reasons that were explained in evidence, it is clear that the investigation proceeded slowly. The second respondent went on leave in December 2000, he wanted the case allocated to someone else, he was burdened by other cases, and his wife was seriously ill. The Children's Court found, on the balance of probabilities, that the children had been abused, and made orders as to their care. This occurred in January 2001, before the second respondent had conducted his third interview with C, and before he had interviewed the appellant. The inquiries about what the second respondent was doing were made against that background. It was in that context that he was told that, if there was a prima facie case, he had to "leave it up to the court". That was the only thing that was said to him that could have been described as a direction. The second respondent said in his evidence: "I charge[d] him on my decision. I assessed the case. It was my investigation". Beazley JA said[12]:

> "[I]t is one thing to find that a person was under pressure to charge if there was a prima facie case. It is another to find that a prosecutor, in laying a charge, had a motive '*other than bringing a wrongdoer to justice*', as must be established to prove malice. Despite the second respondent's sometimes confused thinking as to what was important and what was not, I do not consider that it was established that he did not believe he had a '*prima facie case*', being the phrase used by his superiors, or that his intention in charging the appellant was other than to bring him to justice."

32 The Court of Appeal reversed the trial judge's finding on malice. It also reversed his finding on the issue of reasonable and probable cause in relation to the charge concerning C. The position with respect to C was complicated by the relationship between C's allegations and those of D. After examining the material that was available to the second respondent in relation to C, and having earlier considered the trial judge's finding about the second respondent's belief concerning D (a finding that was favourable to the second respondent), Beazley JA said[13]:

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12 [2005] NSWCA 292 at [188].

13 [2005] NSWCA 292 at [171]-[172].

> "It is also possible that the Crown may have sought to use the charges in respect of D and C as being mutually corroborative, although neither party advanced that argument in this Court and there would have been a real question whether they could be so used ... But even if the cases did not corroborate each other, they were closely linked, and it was a reasonable response to lay charges in both matters. There are other ways to test the matter. Accepting the weaknesses in the case relating to C to which I have referred, but also accepting that there were factors that supported the likelihood that C was being truthful, the question might be asked as to what a prudent prosecutor ought reasonably to have done. One answer might have been to lay the charge [concerning] D and adopt a '*wait and see*' approach to the charge [concerning] C. There are many public policy reasons why that would have been quite inappropriate. Another answer was not to charge in relation to C at all ... that, too, would not have been a reasonable response by the second respondent in this case. Accordingly, I am of the opinion that a reasonable prosecutor exercising '*prudence and judgment*' would have been justified in laying the charge in respect of C.
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> I do not consider that the second respondent's statements that he would not have charged the appellant had it been left to him, or that he was not surprised that the case in relation to C had collapsed, detracts from that finding. Those statements reveal an understanding by the second respondent that the case in relation to C was weak. It is also apparent on the evidence as discussed earlier that at some later stage the second respondent formed the view that the case may not survive the criminal process. The evidence does not establish when the second respondent formed that view. But in any event, such a belief does not, of itself, amount to evidence that there was not reasonable and probable cause or that he did not believe the material upon which he could properly make an assessment was such as to justify the laying of a charge."

33 On the issue of reasonable and probable cause in relation to the charge concerning D, after making her own assessment of the evidence, and applying her own view as to the matter of belief, Beazley JA concluded that the trial judge was correct to hold that absence of reasonable and probable cause had not been established.

Issues for resolution

34 There was no argument in this Court, and it appears, from the absence of any discussion in the reasons of Cooper DCJ or Beazley JA, that there was no

argument in the District Court or the Court of Appeal, about the first two elements of the tort of malicious prosecution. As to the second element, the position was obvious. As to the first, it is of some significance to note why the matter was not in dispute. 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"[14].

35 In *Martin v Watson*[15], a woman made an allegation that her neighbour had indecently exposed himself to her whilst standing on a ladder in his garden. She went to a police station and complained. A detective constable laid an information against the neighbour. At a hearing before the Magistrates' Court, the Crown Prosecution Service offered no evidence, and the charge was dismissed. The House of Lords held that, since the facts relating to the alleged offence were solely within the complainant's knowledge, and that as a practical matter the police officer who laid the information could not have exercised any independent discretion, the complainant could be sued for malicious prosecution, and upheld an award of damages against her. The complainant had "in substance procured the prosecution"[16]. The police officer to whom the complaint was made had no way of testing the truthfulness of the accusation[17]. Lord Keith of Kinkel quoted with approval a statement by McMullin J in the Court of Appeal of New Zealand[18], that a person may be regarded as the prosecutor if he puts the police in possession of information which virtually compels an officer to bring a charge.

36 For present purposes, it is unnecessary to explore the circumstances in which, in an action for malicious prosecution, a complainant, rather than a police officer who lays an information or signs a charge sheet, will be regarded as the prosecutor. The second respondent, in his evidence, acknowledged, and indeed asserted, that it was his decision, and his responsibility, to lay the charges. He

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14 Fleming, *The Law of Torts*, 9th ed (1998) at 676.

15 [1996] AC 74.

16 [1996] AC 74 at 89.

17 [1996] AC 74 at 89.

18 *Commercial Union Assurance Co of NZ Ltd v Lamont* [1989] 3 NZLR 187 at 207-208.

certainly did not act in haste, by laying the charges as soon as he became aware of the allegations. Almost five months elapsed between the making of the complaints and the laying of the charges. A finding of the Children's Court, adverse to the appellant, preceded the charges by about six weeks. No one suggested that the real prosecutors were the children, D and C. Yet although in the present case it was not said that the conduct of the children put the second respondent in a position where he was virtually compelled to lay the charges, so that they, and not he, should be regarded as the true prosecutors, the case illustrates the fact that there are circumstances, of which accusations of sexual offences may sometimes provide an example, where the capacity of a police officer to verify information, and form an opinion about where the truth appears to lie, in a practical sense is very limited.

37 The conduct alleged by D and C was of such a nature that, if it occurred at all, it occurred in private. Uncorroborated allegations of private sexual misconduct are notoriously difficult to test. That is why warnings are given to juries. That difficulty, however, is not only a problem for juries deciding whether to convict; it may also be a problem for a police officer deciding whether to lay a charge. Juries sometimes convict upon the uncorroborated evidence of a complainant. This police officer heard uncorroborated allegations of sexual abuse from two young children. It is accepted on all sides that he had to take the responsibility for deciding whether to lay charges. It is said that his state of belief is relevant to whether he had reasonable and probable cause to prosecute. In such a context, what is the nature of the belief that is in question?

38 For the reasons explained by the House of Lords in *Glinski v McIver*[19], justice requires that the prosecutor, the person who effectively sets criminal proceedings in motion, accept the form of responsibility, or accountability, imposed by the tort of malicious prosecution. Insofar as one element of the tort concerns reasonable and probable cause, the question is not abstract or purely objective. The question is whether the prosecutor had reasonable and probable cause to do what he did; not whether, regardless of the prosecutor's knowledge or belief, there was reasonable and probable cause for a charge to be laid. The question involves both an objective and a subjective aspect.

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19 [1962] AC 726. See, for example, Viscount Radcliffe at 756-757, Lord Devlin at 775.

39 The standard form of pleading alleges that the defendant acted (maliciously and) without reasonable and probable cause. A plaintiff who sets out to prove that allegation may, or may not, endeavour to establish, by direct evidence (including admissions), or inference, something about a defendant's belief. In a jury trial that may raise an issue for the jury. At a trial without a jury, that may raise for the judge's decision a specific question of fact. The nature of the question may depend upon what, in the circumstances of the case, is said to demonstrate that a defendant did not have reasonable and probable cause to prosecute. Those circumstances, in turn, may be affected by the nature of the allegations, and the prosecutor's capacity to form an opinion about their strength and reliability.

40 Similarly, where a plaintiff alleges that a prosecutor acted maliciously, that is, for an improper purpose, not for the purpose of carrying the law into effect[20], the circumstances of the prosecution may determine the nature of the case the plaintiff will seek to make. Absence of reasonable and probable cause may, in a given case, be evidence of malice; but there are two separate issues to be decided.

41 In the case of a public prosecution, initiated by a police officer, or a Director of Public Prosecutions or some other authority, 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 organisational setting in which a decision to prosecute is taken could be of factual importance in deciding the issue of malice.

42 In the present case, which is not unusual, the second respondent's conduct was being overseen by other authorities (that, indeed, is said to be part of the problem), and he must have been aware that, soon after the charges were laid, the proceedings could be taken over by an independent prosecuting authority and, presumably, discontinued if the view were taken that there was not a proper case to go forward. 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 review.

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20 Fleming, *The Law of Torts*, 9th ed, (1998) at 674.

43 At a jury trial, where a question relevant to the issue of reasonable and probable cause is left to a jury, it is usual for that question to precede a question concerning malice, which is always a question for the jury. That is because of a concern that an adverse conclusion about malice could, in effect, swamp the other issues. It is convenient, in this case, first to deal with the issue of reasonable and probable cause and, in that connection, the nature of the belief that is relevant, and then to consider the issue of malice.

Some matters of history

44 In *Abrath v North Eastern Railway Co*[21], Cave J formulated three questions for the jury:

> "1. Did the defendants in prosecuting the plaintiff take reasonable care to inform themselves of the true state of the case; 2. Did they honestly believe the case which they laid before the magistrates; and, 3. Were the defendants actuated by any indirect motive in preferring the charge against the plaintiff[?]"

The jury were directed to consider the first two questions before proceeding to the third. They were directed that it was necessary to consider the third question, about malice, only if one of the first two questions was answered, "no". On appeal, first to the Court of Appeal[22] and then the House of Lords[23], the questions formulated by Cave J were approved and thereafter, those, or questions like them, were seen as sufficiently identifying the issues that would arise in a claim for malicious prosecution. But, as noted earlier, it was well settled that whether the absence of reasonable and probable cause was established was ultimately a question for the judge, not the jury. The task of the jury was to be confined to deciding disputed questions of primary fact, not the ultimate question of whether the facts, as found, established an absence of reasonable and probable cause[24].

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21 (1883) 11 QBD 79 at 79.

22 (1883) 11 QBD 440.

23 (1886) 11 App Cas 247.

24 *Herniman v Smith* [1938] AC 305.

45 This division of functions between judge and jury was examined by Thayer[25] and said to be "a peculiar doctrine". In *Johnstone v Sutton*, Lord Mansfield and Lord Loughborough described[26] the question of reasonable and probable cause as "a mixed proposition of law and fact". But Thayer rightly said[27] that "[b]aptizing the question of reasonable and probable cause with this name, as a 'mixed question of law and fact,' common and almost universal as it is, has only added to the confusion." Rather, Thayer preferred to describe[28] the question as "*a mixed question of fact*; 'mixed' in the sense that the two tribunals [of judge and jury] are blended in deciding it, that the issue of fact is divided between them".

46 Yet despite what appears thus to be an unusual division of functions, Lord Chelmsford could say in 1870, in *Lister v Perryman*[29], that:

> "[T]here can be no doubt since the case of *Panton v Williams*[30], in which the question was solemnly decided in the Exchequer Chamber, that what is reasonable and probable cause in an action for malicious prosecution, or for false imprisonment, is to be determined by the Judge ... No definite rule can be laid down for the exercise of the Judge's judgment. Each case must depend upon its own circumstances, and the result is *a conclusion drawn by each Judge for himself, whether the facts found by the jury, in his opinion, constitute a defence to the action*." (emphasis added)

The reason assigned[31] by Thayer for this division of functions was to control the question "lest those who would come forward in aid of public justice should be

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25 Thayer, *A Preliminary Treatise on Evidence at the Common Law*, (1898) at 221.

26 (1786) I TR 510 at 545 [99 ER 1225 at 1243].

27 Thayer, *A Preliminary Treatise on Evidence at the Common Law*, (1898) at 224.

28 Thayer, *A Preliminary Treatise on Evidence at the Common Law*, (1898) at 225.

29 (1870) LR 4 HL 521 at 535.

30 (1841) 2 QB 169 [114 ER 66].

31 Thayer, *A Preliminary Treatise on Evidence at the Common Law*, (1898) at 230.

intimidated or discouraged". And as Fleming pointed out[32], "as early as 1599 it was regarded as unsafe to send the general issue to the 'lay gents'[33], who are too easily swayed by the feeling that, merely because an innocent man has been subjected to prosecution, he deserves recompense".

47 There are many reported decisions about malicious prosecution. Many of them consider whether the plaintiff demonstrated that the prosecution had been instituted or maintained without reasonable and probable cause. Much of what is said in the early cases about the tort must be understood in the light of the fact that the action would inevitably be tried by judge and jury. Many of the early cases focus upon working out the respective functions of judge and jury and, in particular, what questions should be asked of the jury.

48 Moreover, much of what is said in the early cases must also be understood against the background provided by the then very different arrangements for the detection and prosecution of crime. In particular, the early cases must be read with the recognition that organised police forces for the detection of crime, and elaborate administrative and bureaucratic arrangements within the executive arm of government for the prosecution of crime, were not developed until after the framework of the tort was established. The frequency of reference in the decided cases to whether the defendant prosecutor "believed" the plaintiff to be guilty of the crime alleged may be explained, at least in part, by reference to these considerations.

49 It is also important to recognise that the assumption that a prosecutor would have personal knowledge of the facts alleged to found a criminal prosecution may appear to be at odds with modern notions of elaborate arrangements within the executive branch of government for the detection and prosecution of crime. It is, however, an assumption that reflects important and long-established features of criminal procedure. There are two features of that branch of procedure which are of particular importance. First, criminal proceedings can be instituted by any member of the public. During the nineteenth century, there was much debate in England and Wales about who

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32 Fleming, *The Law of Torts*, 9th ed (1998) at 683.

33 *Pain v Rochester and Whitfield* (1599) Cro Eliz 871 [78 ER 1096 at 1097].

should control prosecutions[34]. It is not necessary to trace these controversies. A private individual's ability to institute criminal proceedings remained unaffected although the creation of public prosecuting authorities normally introduced provisions for them to take over, and sometimes to terminate, such proceedings. Secondly, under the procedures established by Sir John Jervis's Act, *The Indictable Offences Act* 1848 (UK)[35], the first step in initiating a prosecution of another, in England and Wales, was, in most cases, either the arrest of the alleged offender, and the bringing of that person before a justice, or the laying of an information before a justice for the issue of a warrant or summons[36]. An action for malicious prosecution (as distinct from an action for trespass to the person committed by wrongfully arresting the person) would therefore arise, much more often than not, out of proceedings that had been commenced by the laying of an information – often an information on oath. The laying of an information presupposed that the informant had at least some personal knowledge of the matters alleged.

50 Australian criminal procedure, both before and after federation, was generally similar. The relevant statutory provisions were closely modelled on Sir John Jervis's Act. In particular, criminal proceedings, more often than not, began with either the arrest of the alleged offender or with the laying of an information before a justice which, if a warrant was sought, was to be "laid in writing, and the matter thereof substantiated by the oath of the informant or of a witness"[37].

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34 Cornish, "Defects in Prosecuting – Professional Views in 1845", in Glazebrook (ed), *Reshaping the Criminal Law*, (1978) at 305; Australia, The Law Reform Commission, *Standing in Public Interest Litigation*, Report No 27 (1985) at 182-183 [343]; *Gouriet v Union of Post Office Workers* [1978] AC 435 at 477 per Lord Wilberforce.

35 11 & 12 Vict c 42.

36 *The Indictable Offences Act* 1848 (UK), ss 8 and 9.

37 *Justices Act* 1902 (NSW), s 22. (The reference is to that Act in the form it took when charges were laid against the appellant. See now, *Criminal Procedure Act* 1986 (NSW) ss 47-50).

Two requirements

51 In *Johnstone v Sutton*[38], Lord Mansfield and Lord Loughborough said "[t]he essential ground of this action is, that a legal prosecution was carried on without a probable cause". But as their Lordships went on to say[39], "[a] man, from a malicious motive, may take up a prosecution for real guilt, or he may, from circumstances which he really believes, proceed upon apparent guilt; and in neither case is he liable to this kind of action[40]". Much of the development of the law concerning malicious prosecution reflects the attempts to balance the provision of a remedy where criminal processes have been wrongly set in train with the need not to deter the proper invocation of those processes. The two requirements of absence of reasonable and probable cause, and malice, represent the particular balance that is struck.

52 At first sight, requiring both malice and absence of reasonable and probable cause may seem an unnecessary elaboration of the requirements necessary to achieve that balance. Both Holmes, in *The Common Law*[41], and Herbert Stephen, in his 1888 monograph, *The Law Relating to Actions for Malicious Prosecution*, challenged whether it was necessary to require that both elements be established. Holmes favoured discarding the requirement of malice. He said[42]:

> "On the one side, malice alone will not make a man liable for instituting a groundless prosecution; on the other, his justification will depend, not on his opinion of the facts, but on that of the court. When his actual moral condition is disregarded to this extent, *it is a little hard to believe that the existence of an improper motive should be material*." (emphasis added)

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38 (1786) 1 TR 510 at 544 [99 ER 1225 at 1243].

39 (1786) 1 TR 510 at 545 [99 ER 1225 at 1243].

40 *Warren v Mathews* (1704) 6 Mod 73 [87 ER 831].

41 Holmes, *The Common Law*, (1882), Lecture IV, "Fraud, Malice, and Intent – The Theory of Torts", 130 at 141-142.

42 Holmes, *The Common Law*, (1882), Lecture IV, "Fraud, Malice, and Intent – The Theory of Torts", 130 at 142.

Likewise, Stephen, in the preface to his work[43], said that he saw "no reason why the necessity for proving malice should be retained". He continued[44] by saying that the necessity for proving malice "is ineffectual, because the jury are at liberty to infer it from the want of reasonable cause". Stephen thought[45] that it should suffice to establish that the "defendant instituted the prosecution against [the plaintiff], either without honestly believing [the plaintiff] to be guilty, or without having a reasonable ground for believing [the plaintiff] to be guilty".

53 No court has embraced these views[46]. They are views that were expressed before the resolution, at the end of the nineteenth and start of the twentieth centuries, of controversies that emerged in England, in disputes between employers and employees, about the significance to be given in a civil action to proof of an intention to injure another. Not until 1897 did the House of Lords decide, in *Allen v Flood*[47], that an act "lawful in itself" is not converted by a malicious or bad motive into an unlawful act so as to make the doer of the act liable to a civil action. In this regard the tort of malicious prosecution was seen as anomalous. Lord Davey said[48] of that tort that:

> "From motives of public policy the law gives protection to persons prosecuting, *even where there is no reasonable or probable cause for the prosecution*. But if the person abuses his privilege for the indulgence of his personal spite he loses the protection, and is liable to an action, *not for the malice* but for the wrong done in subjecting another to the annoyance, expense, and possible loss of reputation of a causeless prosecution." (emphasis added)

54 It is on this basis that the tort has hitherto been understood as requiring proof of two distinct elements, one positive (malice) and the other negative

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43 Stephen, *The Law Relating to Actions for Malicious Prosecution*, (1888) at vi.

44 at vi.

45 at v.

46 cf the remarks of Richards J in *Assheton v Merrett* [1928] SASR 11 at 14.

47 [1898] AC 1.

48 [1898] AC 1 at 172-173.

(absence of reasonable and probable cause). The two requirements meet the two different kinds of case posited in *Johnstone v Sutton* – maliciously taking up a prosecution "for real guilt", and proceeding upon apparent guilt from circumstances which the prosecutor "really believes". That is, the positive requirement of malice, and the negative requirement of absence of reasonable and probable cause, each have a separate role to play in the tort. A conclusion about malice does not render irrelevant the inquiries about what the prosecutor did make, and should have made, of the material available when deciding whether to initiate or maintain the prosecution.

55 For immediate purposes it suffices to describe malice as acting for purposes other than a proper purpose of instituting criminal proceedings. Purposes other than a proper purpose include, but are not limited to, purposes of personal animus of the kind encompassed in ordinary parlance by the word "malice". It also suffices to refer for the moment to what the prosecutor "made" or "should have made" of the available material without pausing to explore what is meant by those expressions. It will be necessary to return to these topics.

56 Even if a prosecutor is shown to have initiated or maintained a prosecution maliciously (for example, because of animus towards the person accused) and the prosecution fails, an action for malicious prosecution should not lie where the material before the prosecutor at the time of initiating or maintaining the charge both persuaded the prosecutor that laying a charge was proper, and would have been objectively assessed as warranting the laying of a charge.

57 There are three features of the present law to which attention should be drawn. First, because questions of malicious prosecution can arise only where the prosecution has ended in the plaintiff's favour, the paradigm case to consider is where the plaintiff has been acquitted of the offence charged. (It is convenient to leave aside what other circumstances suffice to show that the prosecution has ended in the plaintiff's favour, and focus on the paradigm case of acquittal.) That acquittal is not to be controverted[49]. The hypothesis for a subsequent action for malicious prosecution arising from such a case is, therefore, that the plaintiff was not guilty of the offence charged. But that alone does not entitle the plaintiff to a remedy against the prosecutor.

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49 *Rogers v The Queen* (1994) 181 CLR 251 at 273; *Pearce v The Queen* (1998) 194 CLR 610 at 625-626 [53]-[55]; *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at 29 [77].

58 Secondly, the inquiry about reasonable and probable cause has two aspects. That is, to decide whether the prosecutor did not have reasonable and probable cause for commencing or maintaining the prosecution, the material available to the prosecutor must be assessed in two ways. What did the prosecutor make of it? What should the prosecutor have made of it? To ask only whether there was material available to the prosecutor which, assessed objectively, would have warranted commencement or maintenance of the prosecution would deny relief to the person acquitted of a crime prosecuted by a person who not only acted maliciously, but who is shown to have acted without forming the view that the material warranted prosecution of the offences. Conversely, to ask only what the prosecutor made of the material that he or she had available when deciding to commence or maintain the prosecution would favour the incompetent or careless prosecutor over the competent and careful.

59 Thirdly, the action for malicious prosecution has a temporal dimension. To ask whether a prosecution was commenced or maintained without reasonable and probable cause directs attention to the state of affairs when the prosecution was commenced, or when the prosecutor (the defendant in the subsequent civil claim) is alleged to have maintained that prosecution. Moreover, it necessarily directs attention to what material the prosecutor had available for consideration when deciding whether to commence or maintain the prosecution, not whatever material may later have come to light.

Absence of reasonable and probable cause

60 It is important to recognise that, in an action for malicious prosecution, the plaintiff must establish a negative (the *absence* of reasonable and probable cause). The forensic difficulty of proving a negative is well known. At least some of the questions presented in this appeal arise because there is an inevitable tendency to translate the negative question – whether the defendant prosecutor acted *without* reasonable and probable cause – into the different question – what *will* constitute reasonable and probable cause to institute criminal proceedings. The logical relationship between the two forms of question tends to obscure first, the importance of the burden of proof, and secondly, the variety of factual and forensic circumstances in which the questions may arise.

61 Because the absence of reasonable and probable cause is understood as containing both subjective and objective elements, one of the chief forensic difficulties confronting a plaintiff is how to establish what the prosecutor (the defendant in the civil proceeding) had in his or her mind when instituting or maintaining the prosecution. Absent some admission by the defendant, the

plaintiff must make the case by inference and, if the defendant gives evidence, by cross-examination. The shape of the forensic contest in the particular case will inevitably dictate the way in which the plaintiff puts the argument that absence of reasonable and probable cause is established. In particular, what, if anything, the defendant prosecutor says in court, or has said out of court, about why he or she launched the prosecution, will loom very large in the plaintiff's contentions about absence of reasonable and probable cause. It must be recognised that much of what is said in the decided cases about want of reasonable and probable cause is moulded by the nature of the forensic contest in the particular case.

62 Especially in the nineteenth century cases, the focus of the forensic contest was upon what the prosecutor knew or believed when instituting or maintaining a prosecution. It was inevitable that this should be so, if only because much more often than not the prosecutor brought or continued the prosecution on the basis of what was alleged to be personal knowledge of the matters giving rise to the charge. It was, therefore, only comparatively late in the development of the law relating to malicious prosecution that consideration was given to the launching of criminal proceedings because of what had been reported to the prosecutor. In *Lister v Perryman*[50], the House of Lords decided, albeit in the context of an action for wrongful imprisonment, that absence of reasonable and probable cause was not necessarily established by showing that the prosecutor acted[51] "upon the information of a trustworthy informant [but had] not made inquiry of some one else who could have repeated and confirmed what was told him"[52]. But until well into the twentieth century, most cases of malicious prosecution arose in circumstances where the prosecutor was to be supposed to have had personal knowledge of at least the central facts upon which a criminal charge had been based.

Two different tests?

63 Much of the argument in the present matter, in the Court of Appeal, was directed to exploring what were thought to be differences between what

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50 (1870) LR 4 HL 521.

51 (1870) LR 4 HL 521 at 537.

52 See also *Herniman v Smith* [1938] AC 305.

Jordan CJ had said, in *Mitchell v John Heine*[53], about what would constitute reasonable and probable cause for prosecuting another for an offence, and what Dixon J said, in *Sharp v Biggs*[54], about when there would *not* be reasonable and probable cause for prosecuting another. It may be noted, however, that the reasons of the primary judge suggest that no such differences were observed at trial or, if they were, that the arguments of the parties were not focused upon them in the same way as they were in the Court of Appeal.

64 Jordan CJ said[55], in *Mitchell v John Heine*, that there were five conditions to be met if one person was to have reasonable and probable cause for prosecuting another for an offence:

> "(1) The prosecutor must believe that the accused is probably guilty of the offence. (2) This belief must be founded upon information in the possession of the prosecutor pointing to such guilt, not upon mere imagination or surmise. (3) The information, whether it consists of things observed by the prosecutor himself, or things told to him by others, must be believed by him to be true. (4) This belief must be based upon reasonable grounds. (5) The information possessed by the prosecutor and reasonably believed by him to be true, must be such as would justify a man of ordinary prudence and caution in believing that the accused is probably guilty."

To succeed on the issue of reasonable and probable cause the plaintiff had to establish "that *one or more* of these conditions did *not* exist"[56] (emphasis added). Jordan CJ continued[57]:

> "This he may do by proving, if he can, that the defendant prosecutor did not believe him to be guilty, or that the belief in his guilt was based on insufficient grounds."

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53 (1938) 38 SR (NSW) 466 at 469.

54 (1932) 48 CLR 81 at 106.

55 (1938) 38 SR (NSW) 466 at 469.

56 (1938) 38 SR (NSW) 466 at 469.

57 (1938) 38 SR (NSW) 466 at 469.

Taken in isolation from these concluding propositions, the five conditions stated by Jordan CJ may be contrasted with what Dixon J said[58] in *Sharp v Biggs*:

> "Reasonable and probable cause does *not* exist if the prosecutor does not *at least* believe that the probability of the accused's guilt is such that upon general grounds of justice a charge against him is warranted. Such cause may be absent although this belief exists if the materials of which the prosecutor is aware are not calculated to arouse it in the mind of a man of ordinary prudence and judgment." (emphasis added)

The closing words of this passage suggest the provenance of the language used by the trial judge in relation to the charge concerning C.

In *Commonwealth Life Assurance Society Ltd v Brain*[59], Dixon J repeated what he had earlier said in *Sharp v Biggs* but also said that:

> "[w]hen it is not disputed that the accuser believed in the truth of the charge, or considered its truth so likely that a prosecution ought to take place, and no question arises as to the materials upon which his opinion was founded, it is a question for the Court to decide whether the grounds which actuated him suffice to constitute reasonable and probable cause."

65 The five conditions stated by Jordan CJ focus upon the prosecutor's belief in the guilt of the person charged; the statements of Dixon J in *Sharp v Biggs* speak of the probability of guilt being sufficient "upon general grounds of justice" to warrant a charge. But it is wrong to make too much of these differences in expression. In particular, they should not be read as propounding radically different tests. Especially is that so when it is recognised that the conditions stated by Jordan CJ are conditions to be met if there *is* reasonable and probable cause to prosecute another, and Dixon J spoke in *Sharp v Biggs* of what would suffice to show an *absence* of reasonable and probable cause. As Dixon J explained in *Brain*[60], belief in the truth of the charge, or considering its truth so likely that a prosecution ought to take place, does not conclude the issue of absence of reasonable and probable cause.

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58 (1932) 48 CLR 81 at 106.

59 (1935) 53 CLR 343 at 382.

60 (1935) 53 CLR 343 at 382.

66 The better view is that the five conditions stated by Jordan CJ may provide guidance about the particular kinds of issue that might arise at trial in those cases where the defendant prosecutor may be supposed to have personal knowledge of the facts giving rise to the charge and the plaintiff alleges either, that the prosecutor did not believe the accused to be guilty, or that the prosecutor's belief in the accused's guilt was based on insufficient grounds. The five conditions were not, and could not have been, intended as directly or indirectly providing a list of elements to be established at trial of an action for malicious prosecution. It would be wrong to understand them in that way. As Jordan CJ said, a plaintiff had to establish that one or more of those conditions did *not* exist. And, as will later be explained, the five conditions stated by Jordan CJ should not be understood as completely or exhaustively describing what will constitute reasonable and probable cause.

67 Both *Mitchell v John Heine* and *Sharp v Biggs* were actions against private, not public, prosecutors. In both cases the prosecutor was alleged to have personal knowledge of facts directly relevant to whether the person prosecuted was guilty of the offence charged. In *Mitchell v John Heine*, the plaintiff had been charged with theft of a grinder owned by the defendant company. The plaintiff alleged that one director of the defendant company (Victor Heine) had given him the grinder and that Alfred Heine, the director who had promoted the prosecution on behalf of the company, had been told of the gift by his brother Victor. But as the evidence emerged at trial, when Alfred accused the plaintiff of theft, and the plaintiff responded by alleging that he had been given the grinder, Victor had been sent for, asked whether he had made the gift, and denied it. Only then was the plaintiff charged with theft.

68 At trial of the action in *Mitchell v John Heine*, the judge directed the jury to return a verdict for the defendant on the ground that there was no evidence of the absence of reasonable and probable cause. The appeal to the Full Court of the Supreme Court of New South Wales was, as Jordan CJ said[61], "chiefly argued [on questions concerning] the principles governing the relative functions of judge and jury in an action for malicious prosecution". Particular attention was directed to whether any question should have been put to the jury "as to Alfred Heine's belief, or as to any matter of fact necessary to enable [the trial judge] to form a conclusion as to whether absence of reasonable and probable cause had

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61 (1938) 38 SR (NSW) 466 at 468-469.

been proved"[62]. The Full Court held, following the then recent decision of the House of Lords in *Herniman v Smith*[63], that no such question should have been put. As Jordan CJ, who gave the Full Court's reasons, said[64]:

> "Merely to prove that the defendant had before him information which might or might not have led a reasonable man to form an opinion that the plaintiff was guilty supplies no evidence that the defendant did not believe him to be guilty ... [T]he necessary evidence is not supplied by proof that the defendant was aware of facts which might or might not have satisfied him of the plaintiff's guilt, or that he had before him information, some of which pointed to guilt and some to innocence."

69 To speak of proving "that the defendant did not believe [the plaintiff] to be guilty"[65] makes sense if the defendant prosecutor may be supposed to know where the truth lies. And that was the central allegation made by the plaintiff in *Mitchell v John Heine*. The plaintiff said, in effect: "the prosecutor knew I had been given the item which I was accused of stealing". Likewise, the proposition that *absence* of reasonable and probable cause is demonstrated by proving that the prosecutor "does not *at least* believe that the probability of the accused's guilt is such that upon general grounds of justice a charge against him is warranted"[66] finds ready application in a case, like *Sharp v Biggs*, where the defendant prosecutor had charged the plaintiff with giving perjured evidence about what the plaintiff alleged he had seen the defendant doing. And as the use of the expression "at least" reveals, Dixon J was not proffering a general or all-embracing specification of what would suffice to establish the absence of reasonable and probable cause.

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62 (1938) 38 SR (NSW) 466 at 473.

63 [1938] AC 305.

64 (1938) 38 SR (NSW) 466 at 470.

65 (1938) 38 SR (NSW) 466 at 469.

66 (1932) 48 CLR 81 at 106 (emphasis added).

What is absence of reasonable and probable cause?

70 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). Does proof of the absence of reasonable and probable cause require proof of the absence of a state of persuasion (a "belief") in the mind of the prosecutor? What is the subject-matter of the state of persuasion that is to be considered? Is it a persuasion about the likelihood of a particular outcome of the prosecution (the conviction of the person prosecuted)? Is it a persuasion about what the material considered by the prosecutor reveals ("guilt" or "probable guilt" of the person prosecuted)? Or is it a persuasion about that material's sufficiency to warrant setting the processes of the criminal law in motion? What, if any, weight may be given by the prosecutor to the existence of various checks and balances, like the interposition of committal proceedings and the assignment of particular functions to the Director of Public Prosecutions, that form an integral part of the system of criminal justice?

71 Those questions should be answered as follows. If the plaintiff alleges that the defendant prosecutor did not have the requisite subjective state of mind when instituting or maintaining the prosecution, that is an allegation about the defendant prosecutor's state of persuasion. The subject-matter of the relevant state of persuasion in the mind of the prosecutor is the sufficiency of the material then before the prosecutor to warrant setting the processes of the criminal law in motion. If the facts of the particular case are such that the prosecutor may be supposed to know where the truth lies (as was certainly the case in *Sharp v Biggs*) the relevant state of persuasion will necessarily entail a conclusion (a belief of the prosecutor) about guilt. If, however, the plaintiff alleges that the prosecutor knew or believed some fact that was inconsistent with guilt (as the plaintiff alleged in *Mitchell v John Heine*) the absence of reasonable and probable cause could also be described (in that kind of case) as the absence of a belief in the guilt of the plaintiff.

72 But what of a case like *Martin v Watson*[67] where the prosecutor knows only of the fact that a complaint has been made? What of *Glinski v McIver*[68], a case arising out of the prosecution of the appellant, Mr Glinski, for offences of conspiracy to defraud and obtaining goods by false pretences? The prosecution had been instituted by the respondent, a Detective Sergeant of police. The appellant alleged that the prosecution had been brought to punish him for giving evidence, in another case, which the police believed to be perjured.

73 In a case where a police officer prosecutes a person on the basis of statements by third parties, there are evident difficulties in applying a test of reasonable and probable cause which would be satisfied by demonstrating only that the subjective state of mind of the prosecutor fell short of positive persuasion of guilt. A test of that kind would presuppose the need for a police officer to have some degree of personal commitment to a case. That would, or at least would often, not be consistent with what should desirably be the objective assessment and analysis of material provided by others.

74 The appellant in *Glinski v McIver*[69] argued that a prosecutor did not have reasonable and probable cause for a prosecution without "an overall belief in the guilt of the accused, a *personal* opinion as to the facts and their effect in law and a belief in the facts on which the prosecution is founded." The respondent contended[70] that belief in guilt is not an ingredient in reasonable and probable cause and that the role of the subjective element of belief "is confined to the belief in the existence and reliability of facts known to the prosecution and does not extend to mere abstract belief in guilt in the sense of the prosecutor's personal opinion".

75 As Lord Devlin pointed out[71], "in the reported cases the question put to the jury has almost universally been whether the defendant believed in the plaintiff's

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67 [1996] AC 74.

68 [1962] AC 726.

69 [1962] AC 726 at 729 (emphasis added).

70 [1962] AC 726 at 733.

71 [1962] AC 726 at 769.

guilt or in the truth of the charge". But as Lord Devlin also pointed out[72], "guilt" has the ambiguity identified earlier in these reasons. Does "guilt" refer to the strength of the case revealed by the material then available, or does it refer to some objective state of guilt which, presumably, should find reflection in the ultimate outcome of the prosecution? There is evident difficulty in using the word in this context with the second of these meanings if only because a fundamental hypothesis for the institution of an action for malicious prosecution is that the prosecution failed.

76 The absence of reasonable and probable cause will not in every case be shown by demonstrating that the prosecutor had no positive belief that the accused person was, or was probably, guilty. In particular, references to belief in guilt, or more properly, the absence of belief in guilt, will very likely prove distracting in any case where the prosecutor may not be supposed to know where the truth lies. A case where the prosecutor acts on the statements of others is one example of such a case.

77 There are three critical points. First, it is the negative proposition that must be established: more probably 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 prosecutor made of the material that he or she had available when deciding whether to prosecute or maintain the prosecution? That is, when the plaintiff asserts that the defendant acted without reasonable and probable cause, what exactly is the content of that assertion?

78 As noted earlier in these reasons, the jury questions formulated by Cave J in *Abrath v North Eastern Railway Co*[73] asked whether the prosecutor "honestly believe[d] the case ... laid before the magistrates". But the content of the question – "did the prosecutor *believe* the case which [he or she] laid before the magistrates?" – is not altered if the word "honestly" is added before "believe". The word "honestly" may therefore be thought to have no substantive function to

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72 [1962] AC 726 at 770.

73 (1883) 11 QBD 79.

perform. Nonetheless, the qualitative element of the contention that the defendant prosecutor acted without reasonable and probable cause may often be captured best by the word "honesty". In most cases, honesty, or more accurately, the allegation of lack of honesty, will require consideration of what the prosecutor knew, believed, or concluded, about some aspect of the material. If the prosecutor's knowledge or belief must be considered, honesty will add nothing to the inquiry. But it will not always be necessary or appropriate to look only at what the prosecutor knew or believed. Not least will that be so where the prosecutor's knowledge or belief is confined to knowledge or belief of what *others* have said or done.

79 In *Mitchell v John Heine*, did the prosecutor know, or believe, that the accused person had been given the property which the accused was or was to be charged with stealing? If "yes", the prosecutor would not have acted *honestly* in launching the prosecution. And it would also be right to describe the prosecutor as not *believing* the case. The prosecution would have been instituted without reasonable and probable cause. In *Sharp v Biggs*, did the prosecutor know, or believe, that the evidence which the accused had given about the prosecutor's actions was right? Again, if "yes", the prosecutor did not act *honestly*, the prosecutor did not *believe* the case, and there was no reasonable and probable cause to institute a prosecution for perjury. In both cases the plaintiff would show, in the words of the jury question, that the prosecutor did not "honestly believe" the case that was to be laid before a magistrate. If, however, the answer is "no", it may or may not be apt to describe the prosecutor as *believing* the accused to be guilty. The aptness of the description would turn on the nature of the material at issue.

80 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 processes of the criminal law in motion. (There may also be a real and lively question about the objective sufficiency of the material, but that may be left to one side for the moment.) In deciding the subjective question, the various checks and balances for which the processes of the criminal law provide are important. In particular, if the prosecutor was shown to be of the view that the charge would likely fail at committal, or 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 prosecution, or to have formed

that view on an insufficient basis, the element of absence of reasonable and probable cause is not established.

81 The expression "proper case for prosecution" is not susceptible of exhaustive definition without obscuring the importance of the burden of proving the *absence* of reasonable and probable cause, and the variety of factual and forensic circumstances in which the questions may arise. For the reasons given earlier, it will require examination of the prosecutor's state of persuasion about the material considered by the prosecutor. That should not be done by treating the five conditions stated by Jordan CJ in *Mitchell v John Heine* as a complete and exhaustive catalogue of what will constitute reasonable and probable cause. First, to focus upon what *is* reasonable and probable cause distracts attention from what it is that the plaintiff must establish – the *absence* of reasonable and probable cause. And secondly, because those conditions are framed in terms of belief about probable guilt, they are conditions that, for the reasons already given, do not sufficiently encompass cases where the prosecutor acts upon information provided by others.

The objective aspect of reasonable and probable cause

82 It is convenient to deal at this point with the objective aspect of an allegation of absence of reasonable and probable cause. As Dixon J said in *Brain*[74], if there is no dispute that a prosecutor "believed in the truth of the charge, or considered its truth so likely that a prosecution ought to take place" and no question arises as to the materials upon which the opinion was founded, there remains the question, for the Court to decide, "whether the grounds which actuated [the prosecutor] suffice to constitute reasonable and probable cause."

83 Reference is sometimes made in this context to the statement of Hawkins J in *Hicks v Faulkner*[75] defining reasonable and probable cause:

> "to be, an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the

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74 (1935) 53 CLR 343 at 382.

75 (1878) 8 QBD 167 at 171.

accuser, to the conclusion that the person charged was probably guilty of the crime imputed."

The objective element of the absence of reasonable and probable cause is thus sometimes couched in terms of the "ordinarily prudent and cautious man, placed in the position of the accuser" or explained by reference[76] to "evidence that persons of *reasonably sound judgment* would regard as sufficient for launching a prosecution". Or, as Griffith CJ put it in *Crowley v Glissan*[77], 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".

84 None of these propositions (nor any other equivalent proposition which might be formulated to describe the objective aspect of absence of reasonable and probable cause) readily admits of further definition. It is plain that the appeal is to an objective standard of sufficiency. The references to "reasonable" and "reasonably", to "ordinarily prudent and cautious", make that clear.

85 Because the question in any particular case is ultimately one of fact, little useful guidance is to be had from decisions in other cases about other facts[78]. Rather, the resolution of the question will most often depend upon identifying what it is that the plaintiff asserts to be deficient about the material upon which the defendant acted in instituting or maintaining the prosecution. That is an assertion which may, we do not say must, depend upon evidence demonstrating that further inquiry should have been made.

86 It is, nonetheless, important to recognise what, standing alone, may not suffice to show a want of objective sufficiency. It is clear that absence of reasonable and probable cause is not demonstrated by showing only that there were further inquiries that *could* have been made before a charge was laid. When a prosecutor acts on information given by others it will very often be the case that some further inquiry *could* be made. *Lister v Perryman*[79], where a charge was

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76 Fleming, *The Law of Torts*, 9th ed (1998) at 681 (emphasis added).

77 (1905) 2 CLR 744 at 754 (emphasis added).

78 *Sungravure Pty Ltd v Meani* (1964) 110 CLR 24 at 37; *Liftronic Pty Ltd v Unver* (2001) 75 ALJR 867 at 885 [90]; 179 ALR 321 at 345; *Joslyn v Berryman* (2003) 214 CLR 552 at 584 [100], 602 [158]; *Herniman v Smith* [1938] AC 305 at 317.

79 (1870) LR 4 HL 521.

preferred on account of what had been reported to the prosecutor, is a good example of such a case. And as Lord Atkin rightly said in *Herniman v Smith*[80]:

> "It is not required of any prosecutor that he must have tested every possible relevant fact before he takes action. His duty is not to ascertain whether there is a defence, but whether there is a reasonable and probable cause for a prosecution."

87 For like reasons it cannot be stated, as a general and inflexible rule, that a prosecutor acts without reasonable and probable cause in prosecuting a crime on the basis of only the uncorroborated statements of the person alleged to be the victim of the accused's conduct. Even if at trial of the offence it would be expected that some form of corroboration warning would be given to the jury, the question of absence of reasonable and probable cause is not to be decided according to such a rule[81]. The objective sufficiency of the material considered by the prosecutor must be assessed in light of all of the facts of the particular case.

Malice

88 There remains for separate consideration the question of what will constitute malice. When it is said that malice is demonstrated by showing that the prosecutor acted for purposes other than a proper purpose of instituting criminal proceedings, what kinds of extraneous purpose suffice to show malice?

89 Fleming rightly said[82] that "'[m]alice' has proved a slippery word in the law of torts". It will be recalled that Lord Davey, in the passage of his speech in *Allen v Flood*[83] set out earlier in these reasons, had spoken of the law giving protection to prosecutors even where there is no reasonable and probable cause for the prosecution, but losing that protection "if the person abuses his privilege

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80 [1938] AC 305 at 319.

81 *Bradshaw v Waterlow & Sons Ltd* [1915] 3 KB 527 at 534.

82 Fleming, *The Law of Torts*, 9th ed (1998) at 685.

83 [1898] AC 1 at 172-173.

for the indulgence of his personal spite". To the same general effect, Fleming said[84], of the use of the word "malice" in relation to this tort that:

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

"Malice" in malicious prosecution is a separate element of the tort. It is to be contrasted with "malice in law" – what Kitto J described[85], citing *Shearer v Shields*[86], as "the unlawful intent which is present whenever an injurious act is done intentionally and without just cause or excuse".

90 No little difficulty arises, however, if attempts are made to relate what will suffice to prove malice to what will suffice to demonstrate absence of reasonable and probable cause. In particular, attempts to reduce that relationship to an aphorism – like, absence of reasonable cause is evidence of malice[87], but malice is never evidence of want of reasonable cause[88] – may very well mislead. Proof of particular facts may supply evidence of both elements. For example, if the plaintiff demonstrates that a prosecution was launched on obviously insufficient material, the insufficiency of the material may support an inference of malice as well as demonstrate the absence of reasonable and probable cause. No universal rule relating proof of the separate elements can or should be stated.

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84 Fleming, *The Law of Torts*, 9th ed (1998) at 685.

85 *Trobridge v Hardy* (1955) 94 CLR 147 at 162.

86 [1914] AC 808 at 813, 814, 815.

87 cf *Johnstone v Sutton* (1786) 1 TR 510 at 545 per Lord Mansfield and Lord Loughborough [99 ER 1225 at 1243]: "From the want of probable cause, malice may be, and most commonly is, implied"; *Varawa v Howard Smith Co Ltd* (1911) 13 CLR 35 at 100 per Isaacs J: "[T]he want of reasonable and probable cause is always some, though not conclusive, evidence of malice."

88 cf *Johnstone v Sutton* (1786) 1 TR 510 at 545 per Lord Mansfield and Lord Loughborough [99 ER 1225 at 1243]: "From the most express malice, the want of probable cause cannot be implied."

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"[89]. That improper purpose must be the sole or dominant purpose actuating the prosecutor[90].

92 Purposes held to be capable of constituting malice (other than spite or ill will) have included to punish the defendant[91] and to stop a civil action brought by the accused against the prosecutor[92]. 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 properly be invoked (beyond the general proposition that they should be invoked with reasonable and probable cause) would direct attention away from what it is that the plaintiff has to prove in order to establish malice in an action for malicious prosecution – a purpose *other than* a proper purpose.

93 Two further observations should be made about the element of malice. First, its proof will often be a matter of inference. But it is proof that is required, not conjecture or suspicion[93]. Secondly, the reference to "purposes other than a proper purpose" might be thought to bring into this realm of discourse principles applied in the law of defamation or in judicial review of administrative action. No doubt some parallels could be drawn with the principles applied in those areas. But drawing those parallels should not be permitted to obscure the distinctive character of the element of malice in this tort. It is 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.

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89 *Gibbs v Rea* [1998] AC 786 at 804.

90 *Trobridge v Hardy* (1955) 94 CLR 147 at 162 per Kitto J; cf *Williams v Spautz* (1992) 174 CLR 509 at 529 per Mason CJ, Dawson, Toohey and McHugh JJ.

91 *Glinski v McIver* [1962] AC 726.

92 *Springett v The London and South-Western Bank* (1885) 1 TLR 611.

93 cf *Gibbs v Rea* [1998] AC 786 at 804 per Lord Goff of Chieveley and Lord Hope of Craighead dissenting as to the result of the appeal in that matter.

94 At a time before the development of what now is known as administrative law, significant questions of public law, and of abuse of power by public officials, were determined as issues in tort actions[94]. What may be understood as echoes of the administrative law principles respecting improper purpose in the exercise of a statutory power may sometimes be heard in the reference in the tort of malicious prosecution to improper purposes of prosecutors.

95 However, this does not warrant any conclusion that a failure to take account of relevant considerations, or a taking account of irrelevant considerations, would necessarily constitute malice for the purposes of this tort. The tort of malicious prosecution is a private law remedy that is not available to all who have been prosecuted unsuccessfully. It is available only upon proof of absence of reasonable and probable cause *and* pursuit by the prosecutor of some illegitimate or oblique motive. Lord Goff of Chieveley and Lord Hope of Craighead said[95], of the related but distinct tort of malicious procurement of a search warrant:

> "The sole function of the tort is to enable the person to recover damages, and in regard to that private law remedy the guiding principle is that it is for the plaintiff to make out his case. It is for him to prove that the search warrant was obtained maliciously and that there was a want of reasonable and probable cause."

A like statement may be made in respect of the tort of malicious prosecution.

Applying the principles in this case

96 The findings made, and the conclusions reached, by the trial judge and by the Court of Appeal have been described earlier in these reasons. It will be recalled that the trial judge held that the appellant made out his claim in respect of the charge concerning C, but failed in his claim concerning D. At trial, the case had been pleaded and presented without differentiating between the two charges preferred against the appellant. That is, the case was conducted at trial

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94 *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 558; *State of New South Wales v Ibbett* (2006) 81 ALJR 427; 231 ALR 485.

95 *Gibbs v Rea* [1998] AC 786 at 804.

on the basis that there was a single prosecution to be considered. Correctly, however, no submission was made in this Court that it was not open to the trial judge to come to different conclusions in respect of the prosecution of each charge. It is well established that where an indictment contains several assignments of perjury or theft, proof that some of them lacked reasonable cause, and were laid maliciously, warrants a verdict for the plaintiff[96]. That rule is not confined to cases where the charge was theft or perjury.

97 Reference was also made earlier to a passage in the reasons of Beazley JA where her Honour discussed the appropriateness of bringing a charge in relation to D but not in relation to C. In the way the trial was conducted, and in particular in the way the evidence of the second respondent emerged, this was not a matter that was investigated. Beazley JA did not explain why laying a charge in relation to D but not in relation to C "would not have been a reasonable response". It was not argued in this Court that the primary judge's ultimate conclusion, which differentiated between the two charges, was not open to him. Nor was it argued that there is any procedural unfairness to either party in approaching the matter on the basis that to uphold that differentiation is at least a possibility.

98 It is convenient to begin consideration of the application of the principles set out earlier in these reasons to the facts of this case by juxtaposing the three critical paragraphs of the reasons of the trial judge. They are, first, the conclusion about malice:

> "The plaintiff has comfortably satisfied me on the balance of probabilities that Detective Constable Floros laid both charges against the plaintiff not for the purpose of bringing a wrongdoer to justice, but for the improper purpose of succumbing to the pressure from officers of the Child Protection Enforcement Agency to charge the plaintiff because he worked for the Police Service. Accordingly, the plaintiff has satisfied me that Detective Constable Floros acted maliciously."

99 Second, there is the conclusion about reasonable and probable cause in respect of the charge concerning D:

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96 *Dent v Standard Life Association* (1904) 4 SR (NSW) 560; *Birchmeier v The Council of the Municipality of Rockdale* (1934) 51 WN (NSW) 201; *Leibo v Buckman Ltd* [1952] 2 All ER 1057.

> "The plaintiff has failed to satisfy the court on the balance of probabilities that Detective Constable Floros did not have reasonable grounds for believing and that he did not in fact believe that the plaintiff had committed the offence upon [D] notwithstanding the countervailing evidence. In short I am satisfied on the balance of probabilities that it was a proper case to bring to court."

This conclusion about reasonable and probable cause in respect of the charge concerning D, if not overturned, is determinative of the appellant's claim in respect of that prosecution.

100 Third, there is the conclusion about reasonable and probable cause in respect of the charge concerning C:

> "In relation to the charge involving [C] the totality of the evidence satisfies me on the balance of probabilities that Detective Constable Floros did not believe that the plaintiff had committed the offence, or alternatively, that if he did believe it, then such belief was not based upon reasonable grounds."

101 This juxtaposition of the critical findings reveals what may be thought to be two difficulties. First, as noted earlier in these reasons, there may appear to be a difficulty presented by the alternative expression of the finding about reasonable and probable cause in respect of the charge concerning C. Secondly, there may be thought to be a tension between the finding about malice, and the finding about reasonable and probable cause in respect of the charge concerning D. That latter tension can be expressed interrogatively as: How can it be said that a prosecution was launched in order to succumb to pressure yet be launched in the belief that the accused was guilty? How can it be said that a prosecution was launched by the prosecutor in order to succumb to pressure upon him in respect of the charge concerning C when the suggested pressure did not, in its terms, differentiate between the offences against C and D?

102 Upon analysis, however, what may appear to be tensions, even inconsistencies, between the critical findings are readily resolved. It is important to recognise that the findings about reasonable and probable cause were primarily focused, as they should have been, upon whether the appellant had established the *absence* of reasonable and probable cause. Although the trial judge went on to say that he was satisfied that the case concerning D "was a proper case to bring to court", the central thrust of his finding about that prosecution was that the appellant had not demonstrated an *absence* of reasonable and probable cause.

The further finding that it *was* "a proper case to bring to court" is best understood as a finding about the objective sufficiency of the material before the second respondent to warrant laying the charge concerning D.

103 In the case concerning C, the expression of findings in the alternative – the second respondent did not believe that the appellant had committed the offence, or alternatively, if he did believe it, that belief was not based upon reasonable grounds – is a finding of the *absence* of reasonable and probable cause. It was sufficient for the trial judge to find, as he did, that either the second respondent did not form the view that the material considered warranted laying a charge in respect of C or, if in fact the second respondent did form that view, that there was no sufficient basis for doing so. It was not necessary to take the further step of choosing between the alternatives.

104 The absence of an adequate objective basis for the formation of the requisite opinion made it unnecessary to decide whether the second respondent had in fact formed the opinion that the material considered warranted laying a charge in respect of C. Further, the finding about malice, that neither charge was laid for the purpose of bringing a wrongdoer to justice, would be inconsistent with a conclusion that the second respondent had formed the subjective opinion that a charge should be laid in respect of C. But there is no inconsistency in the trial judge concluding, as he did, that either the second respondent did not believe there was a case fit for prosecution or, viewed objectively, the material then available did not warrant forming such an opinion. Nor is there any inconsistency in concluding, in relation to the charge concerning D, that although that charge was not laid to bring a wrongdoer to justice, the appellant had failed to establish that the second respondent did not believe that the appellant had committed the offence, or that, if he did believe it, the belief was not based upon reasonable grounds.

105 If the trial judge was right to conclude that absence of reasonable and probable cause was demonstrated in respect of the charge concerning C, the conclusion that neither that charge nor the charge concerning D was brought for the purpose of bringing a wrongdoer to justice, but both were brought to succumb to pressure, required the conclusion that the appellant had proved malicious prosecution in respect to the charge concerning C.

106 Taken out of its context, the reference to succumbing to pressure is apt to mislead. It is necessary to notice several issues that the use of the expression may be thought to present. It may be said that to speak of the prosecutor's purpose as being to succumb to pressure confuses cause and purpose. That is,

succumbing to pressure may more readily be described as a cause of conduct rather than a purpose for conduct. Further, succumbing or yielding to pressure, whether from superiors or some other external source, may, in at least some circumstances, direct attention to such questions as whether the purposes of those exerting pressure are to be attributed to the prosecutor, or whether, in truth, those who exerted pressure are to be identified as the prosecutors of the charges laid. Finally, succumbing to pressure evokes notions of "dictation" or "undue influence"[97] encountered in connection with administrative decision-making. Especially is that so in a hierarchical and disciplined police force, where, as noted earlier, it is to be expected that police officers launching prosecutions should be subject to supervision and control by superiors and should, at least in cases of difficulty, seek advice and direction from superiors. It would be wrong, however, to approach the question of malice by assuming that the principles developed in administrative law under the rubrics of "dictation" or "undue influence" may be applied directly.

107 In this case, the particular finding made by the trial judge about the prosecutor succumbing to pressure is to be understood first and foremost by reference to the finding which immediately preceded it, namely, the finding that the charges preferred against the appellant were laid "not for the purpose of bringing a wrongdoer to justice". Further, the reference to "succumbing to pressure" is also to be understood as the trial judge's summary of the effect of the evidence given about conversations between the second respondent and the appellant's solicitor during the committal hearing. That evidence was evaluated by the primary judge in the context of his assessment of the witnesses, and of the wider investigative process undertaken by the Child Protection Enforcement Agency.

108 The second respondent said that he had been under "pressure" to charge the appellant "because he worked for the Police Service" and that "if it was up to me I wouldn't have charged him". Whether these words were said and, if they were, what was meant by them, were issues to be determined by the trial judge according to the whole of the evidence led at trial. It was open to the trial judge to conclude, as he did, that the words were said, and that they were intended, not as words of solace, but as a true reflection of the second respondent's frame of mind at the time he laid the charges. It was therefore open to the trial judge to conclude, as he did, that the charges were laid not for the purpose of bringing a

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97 *Bread Manufacturers of NSW v Evans* (1981) 180 CLR 404 at 411.

wrongdoer to justice but for some other purpose. That other purpose was described as "succumbing to pressure".

109 Because the second respondent denied saying the words attributed to him there could be no exploration in evidence of what exactly was meant by his reference to "pressure". It did emerge that the second respondent had been told that he should charge the appellant if there was a prima facie case. The reference to "prima facie case" was ambiguous. It may have meant no more than that there was some evidence which, if taken at its highest and accepted, would establish each element of the charge under consideration; it may have meant that there was sufficient evidence to commit the appellant for trial. No matter what contradictions there were in the accounts given by C and D, those accounts contained descriptions of events which, if accepted, established the crimes charged. In the first and limited sense in which the words "prima facie case" might be understood, those statements revealed such a case. But central to the case of the appellant, in his claim for damages for malicious prosecution, was that, when looked at as a body of evidence, there were so many inconsistencies and uncertainties in those statements, that they did not warrant laying the charges that were laid, and that there would not be sufficient evidence to commit him for trial. There was, however, no exploration at trial of who in the Police Service had spoken of charging the appellant if there was a prima facie case; there was no exploration of what the speaker may have meant by the words; there was no direct exploration of what the second respondent understood the words to mean.

110 It was in this evidentiary setting that the evidence of the conversations between the second respondent and the appellant's solicitor assumed the significance it did at trial. In particular, there being no evidence of what the "pressure" was, or who exerted it, the trial judge had only the evidence of what had been said by the second respondent to the appellant's solicitor, as evidence revealing the second respondent's purpose or purposes for charging the appellant. Once the trial judge accepted that the second respondent had said that, "if it was up to [him]", he would not have charged the appellant, and that he had said he had been under "pressure" to do so, it was well open to the trial judge to conclude that the dominant purpose of the second respondent was not to bring a wrongdoer to justice but to secure at least the absence of criticism by, perhaps even favour of, his superiors in the Police Service. It is in that sense that the trial judge spoke of the second respondent charging the appellant for the purpose of succumbing to pressure.

111 As noted earlier in these reasons, the decision of the Court of Appeal hinged about the conclusion that the trial judge's reasoning had followed an

incorrect line of authority and that this error pervaded his reasoning. For the reasons given earlier, there is no conflict of authority as suggested by the Court of Appeal. The applicable principles have been restated in these reasons but the restatement of those principles does not lead to the conclusion that the trial judge's reasoning miscarried.

112 The findings of fact made by the trial judge were open to him and there was no basis for the Court of Appeal to interfere with them. In particular, the findings made by the trial judge about what was said, and meant, by the second respondent in his conversations with the appellant's solicitor were of critical importance. Those findings depended, in important respects, upon the assessment the trial judge made of the credibility of the evidence given by the second respondent and the appellant's solicitor. There was no basis for setting these findings aside. The statements made to the appellant's solicitor were carefully recorded by him in contemporaneous file notes kept by him and cited by the trial judge in his reasons. As well, the trial judge concluded: "I found the evidence of Detective Constable Floros singularly unimpressive and unreliable. For him to say that he had no memory of such significant conversations [with the solicitor] defies the probabilities. I am satisfied that he remembered what he said. He did not want to deny having said it yet he wanted to cover up not only for his indiscretion but also the indiscretion of those superior officers who told him to lay the charges if there was a prima facie case because the plaintiff was an employee of the Police Service"[98].

113 In relation to the charge concerning D, the Court of Appeal considered for itself whether the appellant had demonstrated absence of reasonable and probable cause, and concluded[99] that he had not. Both the trial judge and the Court of Appeal having applied to the determination of that question principles that are expressed differently from those stated earlier in these reasons, it would not be correct to treat the findings of the trial judge and the Court of Appeal on this aspect of the matter as concurrent findings of fact.

114 No basis was established, however, for setting aside the trial judge's finding about the state of mind of the second respondent in relation to the charge concerning D – that it was not shown that he did not believe the appellant to be

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98 *Fox v Percy* (2003) 214 CLR 118 at 128 [26]-[27].

99 [2005] NSWCA 292 at [161].

guilty of the charge brought in respect of D. Nor was it demonstrated that the trial judge erred in concluding that the appellant had failed to show that the second respondent did not have reasonable grounds for that belief. That being so, it follows that the appellant failed to establish that the second respondent did not honestly form the view that the matter concerning D was a proper case for prosecution, and did not establish that there was not a sufficient basis for the second respondent to form a view that there was a proper case for prosecution. It is on this footing that the orders of the Court of Appeal dismissing the appellant's appeal to that Court should not be disturbed.

115 The respondents' cross-appeal to the Court of Appeal against the judgment, given at trial in favour of the appellant in respect of the charge relating to C, was allowed, the judgment was set aside, and in its place there was judgment for the respondents. Those orders of the Court of Appeal should be set aside. They depended upon not only the conclusions reached about the supposed difference in the decided cases about the applicable principles, but upon the Court of Appeal's conclusion[100] that the trial judge's finding of malice should be set aside and a finding[101] made that malice had not been proved.

116 A critical step in the reasoning of the Court of Appeal about malice was that it was open to the Court to draw its own inference about that issue. That appears to have depended upon the conclusion that it was open to the Court of Appeal to determine for itself what weight and meaning was to be given to what the second respondent had said in the conversations with the appellant's solicitor. It can only be on this basis that the Court of Appeal concluded, as it did, that the second respondent's dominant purpose in charging the appellant was not shown to be other than "to bring [the appellant] to justice"[102]. But the question of malice was not a matter of inference. The trial judge's conclusion was based upon what he found to have been the second respondent's out-of-court admission – the second respondent's statement that "if it was up to me I wouldn't have charged him", coupled with the associated statements about pressure. The Court of Appeal did not set aside the finding about what the second respondent had said. There was no basis upon which it was open to that Court to attribute a meaning

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100 [2005] NSWCA 292 at [192].

101 [2005] NSWCA 292 at [193].

102 [2005] NSWCA 292 at [188].

to the second respondent's statements that differed in any relevant respect from the way in which the trial judge understood them. It was, therefore, not open to the Court of Appeal to substitute its own finding about malice.

Conclusions

117 The four elements for the tort of malicious prosecution, stated at the outset of these reasons, remain. In particular, elements three and four, the elements of malice and absence of reasonable and probable cause, serve different purposes and remain as separate elements which a plaintiff must prove in order to succeed in establishing the tort. There is no disharmony between the expressions of the applicable principles by Jordan CJ in *Mitchell v John Heine*[103] and by Dixon J in *Sharp v Biggs*[104] and *Commonwealth Life Assurance Society Ltd v Brain*[105].

118 Where a prosecutor has no personal knowledge of the facts underlying the charge, but acts on information received, the issue is not whether the plaintiff proves that the state of mind of the prosecutor fell short of a positive persuasion of guilt. As explained earlier in these reasons, it is whether the plaintiff proves that the prosecutor did not honestly form the view that there was a proper case for prosecution, or proves that the prosecutor formed that view on an insufficient basis.

119 In the present case, the Court of Appeal erred in setting aside the trial judge's findings about the state of mind of the second respondent in relation to the charge concerning the complaint by C. Those findings were supported by the evidence. The findings of the trial judge in that respect should be restored and his findings and conclusions in other respects not disturbed.

Orders

120 For these reasons the appeal to this Court should be allowed, in part. Paragraph 1 of the orders of the Court of Appeal made on 2 September 2005 should be varied by adding the words "with costs" after "dismissed". Paragraphs

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103 (1938) 38 SR (NSW) 466 at 469.

104 (1932) 48 CLR 81 at 106.

105 (1935) 53 CLR 343 at 382.

2 to 7 of the orders of the Court of Appeal made on 2 September 2005 should be set aside. In their place there should be an order that the cross-appeal to that Court is dismissed with costs.

121 Although the appellant has not achieved complete success in his appeal to this Court, he has obtained the restoration of the judgment he obtained at trial. That being so, he should have his costs in this Court. There should therefore be a further order that the respondents pay the appellant's costs of the appeal to this Court.

122 CALLINAN J. This appeal raises these questions. How should the test for the tort of malicious prosecution be stated? Did the Court of Appeal misstate the test or, if it did not, was it nonetheless in error in reversing the decision of the trial judge?

The facts

123 The appellant is an employee of the police service of New South Wales. He, S and her three children lived as a family from 1996. The appellant and S married on 8 May 1997. Two of the children are boys, D, born in 1989, and C, in 1991. D disliked the appellant intensely, as his mother said, "to the point of hatred".

124 In January 2000, after seeing his natural father at Christmas in 1999, D made allegations against the appellant in a conversation with his mother, S, who gave evidence of it:

> "D: Well, I can get rid of him.
>
> S: Well, what do you mean? [D] you just can't take things into your –
>
> D: Yes I can. Well, if I told people that he, if I told people he did things to me that he shouldn't have done, he'd be gone then."

125 In about July 2000, D complained to S that C had been sexually abused by the appellant. According to S, C, in the presence of D, said: "Yeah, you want me to tell you about the things that Dad's been doing to me as well, do you?" S said yes. C said: "[D] told me." S replied: "I don't want to know what [D]'s told you to tell me, you tell me." C said in reply:

> "Dad's been doing things to me that he's not supposed to do ... [H]e just does things that are disgusting that he is not supposed to do. You're supposed to do those with women, not children."

126 In consequence, S decided to confront the appellant. The trial judge summarized the evidence of the confrontation:

> "[S] said that she then took the largest knife in the house, confronted [the appellant] with it as he came out of the shower, held that at his throat and said: 'If this is what it's going to take I want the truth'. [The appellant] looked her straight in the eye and said: 'No I haven't done anything at all'. She turned to [C] and said: 'Have you or have you not? Which is the truth?' He replied: 'No, but [D] wanted me to'. She said to [C]: 'Okay. That tells me enough it's all right'."

127 On 27 July 2000, a complaint of sexual abuse against the boys was made to the "Joint Investigation Team", a group of officials chosen from the State

Department of Community Services and the police service. The complainant remains unidentified.

128 On 13 October 2000, a police officer, Constable Campbell, interviewed D. On the same day, the second respondent interviewed C. Some 600 questions were asked of D, and more than 800 questions of C. C denied having been touched improperly by the appellant. The trial judge expressed his disapproval of one of the questions in particular:

> "C: He hasn't touched me in all those bad touches.
>
> Q: He hasn't touched you in all those bad touches. Okay why would somebody tell me that you told your mum that your dad touched you, your dad, [the appellant], touched you and it was a bad touch?"

129 The judge's criticism of this evidence was well founded:

> "To call this question improper would be an understatement. [The questioner] was inviting a nine year old boy to speculate on the motivation of a person whose identity is not known to him. The purpose of such a question can only be to trap him into making a guess which, if inaccurate or improbable, could later be used to discredit him."

130 On the day of the interviews an interim order under s 60 of the *Children (Care and Protection) Act* 1987 (NSW)[106] was made by the Campbelltown

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106 "**60 Removal of children without warrant**

(1) An authorised officer, or a member of the Police Force, may (without any authority other than that conferred by this subsection):

a) enter any premises in which the officer or member suspects that there is a person who is a child, if the officer or member suspects on reasonable grounds that the person is in need of care by virtue of the person's being in immediate danger of abuse, and

b) search the premises for the presence of any such person, and

c) remove any such person from the premises.

…

(4) An authorised officer, or a member of the Police Force, may use all reasonable force for the purposes of entering and searching any premises or place pursuant to this section and for the purpose of removing a person pursuant to this section.

(Footnote continues on next page)

Children's Court. Pursuant to it, D and C were taken away from the appellant and S and placed in foster care.

131 On 18 October 2000, the second respondent interviewed C again. This time he asked the child some 500 questions. On this occasion, C alleged that the appellant had had anal intercourse with him "heaps of times". He said that he had been raped on 10 occasions and as recently as about a week ago.

132 On 19 October 2000, D was interviewed by Constable Campbell and the second respondent. They asked some 400 questions during the interview. D repeated that the appellant had had anal intercourse with him. He alleged that he had been raped about a month after the appellant and S were married.

133 On 30 October 2000, the second respondent and Constable Campbell interviewed S. They told her of the children's claims and asked her whether she believed them. S said:

> "No, not about the sexual abuse, I don't. I believe that there is a problem and I do believe that the boys and [the appellant] have to go through counselling to try and rectify that problem. There has to be a greater understanding and a better form of communication between them, because well, the boys have obviously got their back up, [the appellant] will his, and I mean, that's not solving anything. And I am not a trained counsellor or arbitrator by any means."

> …
>
> (7) A person authorised to exercise powers by a subsection of this section may exercise any or all of the powers, as appropriate in the circumstances.
>
> (8) In this section:
>
> …
>
> ***place*** means any place, whether or not a public place, and whether or not on premises.
>
> …"

This Act was repealed by the *Children and Young Persons Legislation (Repeal and Amendment) Act* 1998 (NSW) s 3. The repeal of s 60 took effect on 18 December 2000.

134 A psychologist appointed by the Department of Community Services expressed this opinion in a report on 16 December 2000:

> "It is clear that the couple cannot entertain the children's claims of sexual abuse could be accurate, which translates into the children remaining at risk if returned to the care of their parents."

135 On 8 February 2001, C was interviewed for a third time. He accepted that he had told "some lies" earlier but maintained his claims of having been raped, and of oral sexual relations.

136 On about 23 January 2001 the second respondent was informed that the Children's Court had found, on the balance of probabilities, that both C and D had been sexually abused. It is relevant to notice however, that the Children's Court follows a much less rigorous procedure than the Criminal Courts, or indeed, even the orthodox civil courts, in making its determinations. That this is so appears from s 93 of the *Children and Young Persons (Care and Protection) Act* 1998 (NSW):

> "**General nature of proceedings**
>
> (1) Proceedings before the Children's Court are not to be conducted in an adversarial manner.
>
> (2) Proceedings before the Children's Court are to be conducted with as little formality and legal technicality and form as the circumstances of the case permit.
>
> (3) The Children's Court is not bound by the rules of evidence unless, in relation to particular proceedings or particular parts of proceedings before it, the Children's Court determines that the rules of evidence, or such of those rules as are specified by the Children's Court, are to apply to those proceedings or parts."

137 The evidence in these proceedings shows that the second respondent was labouring under a heavy workload throughout his investigation of the boys' complaints. Plainly there was insufficient staff to investigate cases of child abuse. The pressures upon the second respondent were compounded by his wife's pregnancy which was complicated by a life endangering illness. At the same time, police officers senior to the second respondent were pressing him to finalise his investigations. The combination of these pressures probably explains why a number of matters to which the trial judge referred in his careful and detailed judgment and which, if investigated, would have cast doubt on the boys' claims, were not pursued.

138 On 9 March 2001, the second respondent interviewed the appellant who denied all of the allegations of sexual impropriety. The second respondent then laid the following charges:

> "CHARGE NO 1. That [the appellant] on the [sic] between the 8th of May 1997 and the [31st] day of [December] 1997, at Wentworth Falls in the state of New South Wales, did have homosexual intercourse with [D] a male person, then under the age of 10 years to wit, of the age of 8 years of age.
>
> CHARGE NO 2. That [the appellant] on the [sic] between the 1st day of October 2000 and the 11th of October 2000, at Narellan Vale in the state of New South Wales, did have homosexual intercourse with [C] a male person, then under the age of 10 years to wit, of the age of 9 years."

139 The evidence established that at the time alleged in the first charge, D's leg was in plaster from the ankle to the upper thigh, following an operation to correct a deformity of his foot.

140 A week later, the second respondent received a request from the Director of Public Prosecutions ("the DPP") to provide two copies of the brief to him. Subsequently, the DPP advised that Ms Jeffries, a solicitor, would be in charge of the matter. The second respondent provided the copies of the brief to the DPP's office at Campbelltown. The charges were first mentioned in Court on 16 May 2001 and adjourned.

141 The DPP formally assumed control of the prosecution pursuant to his powers under s 9 of the *Director of Public Prosecutions Act* 1986 (NSW). Under s 10 of that Act, if the DPP decides to take over a matter, he is obliged, as soon as practicable, to notify the person otherwise responsible for it. The second respondent was so notified on 6 April 2001.

142 After charging the appellant, members of the Child Protection Enforcement Agency ("CPEA") spoke to the second respondent from time to time. In evidence in chief at the committal proceedings, the second respondent suggested a reason for the Agency's particular interest:

> "I don't know for sure, but I think that because such a long period of time had taken for it to be finalised."

143 On 6 July 2001 the second respondent telephoned the appellant's solicitor who made a diary note of the ensuing conversation. He recorded that the second respondent said that "he had been under a lot of pressure to charge the [appellant]"; that "he was sorry that he charged [the appellant]"; that the alleged sexual assault in the first charge could have occurred in spite of the plaster [on D's leg]; and that the second respondent's superiors had said words to this effect:

"Look, if you had a prima facie case, you've got to leave it up to the court." The diary note records these other statements by the second respondent:

> "I feel really sorry for [the appellant]. Will you make sure you tell him that I feel sorry for him and that he has been put through this. You know I got a lot of pressure from management to charge him because of the position that he's in you know with the Police Department. ...
>
> [T]hat's right I was under a lot of pressure to charge him. ...
>
> He handled himself pretty well in the record of interview but he did make admissions that it just made it possible that it could have occurred you know so far as what the boy was saying. *I know it's probably impossible but there it is*." (emphasis added)

The committal proceedings

144 The committal hearing began at the Children's Court at Campbelltown on 23 August 2001. Both C and D gave evidence[107] on that day that the appellant had raped them. The hearing was resumed on 28 August 2001. On this occasion C admitted that he had lied in his earlier testimony. The Magistrate intervened to clarify that C was genuinely denying what he had earlier said, asking him very specific questions about the earlier evidence:

> "A. No.
>
> Q. Never did at all?
>
> A. No.
>
> Q. So what you told the other day was lies?
>
> A. Yes.
>
> Q. And you're saying to me that you told lies to help your brother?
>
> A. Yes."

145 Following that evidence, and with the concurrence of the DPP's representative, the Magistrate dismissed the charge against the appellant based on C's complaint. The other charge was adjourned until 31 August 2001.

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107 The appellant had successfully submitted that the children should be made available for examination personally because "special reasons" existed under s 48E of the *Justices Act* 1902 (NSW).

146 The committal resumed on 31 August 2001. The Magistrate, after hearing further evidence and submissions decided that "there [was] no reasonable prospect that [a] jury could convict the [appellant] of the indictable offence charged" and discharged him. The appellant was awarded costs.

147 On 28 August 2001, after C had withdrawn his allegations and admitted that he had lied, the appellant's solicitor and the second respondent had a discussion at the Court House. According to the appellant's solicitor, the second respondent said: "Like I told you on the telephone call, I was under a lot of pressure to charge your client because he worked for the Police Service". The appellant's solicitor's diary note also recorded these statements by the second respondent:

> "I feel very sorry for [the appellant] and gee they put a lot of pressure on me, you don't know the pressure I was under to charge him because he works for the Police Service. ...
>
> [W]hat could I do, they told me in town I should have done this or I should have done that but what could I do?"

The civil proceedings at first instance

148 The appellant instituted proceedings in the District Court of New South Wales against the first and second respondents for damages for malicious prosecution, false imprisonment, false arrest and abuse of process. The appellant pleaded that the respondents' conduct was malicious in that they:

> "**PARTICULARS**
>
> (a) failed to conduct a proper and thorough investigation of the facts relating to the charges which they intended to proffer against the [appellant];
>
> (b) failed to conduct the aforesaid investigation in accordance with proper Police practice and procedure;
>
> (c) did not terminate the Prosecution when it became apparent that the evidence was unreliable and/or insufficient to prove any offence beyond a reasonable doubt;
>
> (d) did not comply with the *Police Service Act* 1996, as amended, and proper Police practice and procedure in that the Police officers failed to:
>
> (i) treat the [appellant] in a fair and impartial manner;

(ii) ensure that after arresting the [appellant], there was a proper assessment of the material relevant to conducting an interview;

[(e)] interviewed the children [D] and [C] in a manner which contaminated the said investigations;

[(f)] failed to competently and properly investigate prior to the arrest of the [appellant], the circumstances in which the allegations had been made;

[(g)] failed to properly investigate the time frame of the allegations made by the child [D] when the circumstances indicated that should have been done;

[(h)] failed to properly investigate the allegation made by the child [C] that on the afternoon of 11 October 2000 the [appellant's] wife may in fact have been home and further that the said child attended at a local Shopping Centre with his sibling ... during the proceedings when he alleged that he had been the subject of sexual abuse/assault by the [appellant];

[(i)] charged the [appellant] as the result of pressure brought to bear as a result of the fact that the [appellant] was an employee of the NSW Police Service;

[(j)] charged the [appellant] with knowledge there was no proper basis upon which to charge the [appellant];

22. In amplification of this allegation, the [appellant] will rely on the fact that the [appellant] was arrested and the Prosecution was instituted and continued in the absence of credible information pointing to the [appellant's] guilt, or alternatively upon information which was clearly insufficient.

23. The [appellant] further alleges that the Prosecution was malicious in that it was instituted, maintained and continued without reason, or probable cause:

PARTICULARS

(i) One or more of the Police officers knew or ought to have known that there was no case for the [appellant] to meet;

(ii) One or more or both of the Police officers failed to conduct a proper and fair investigation of the alleged charges;

(iii) The imprisonment of the [appellant] was unlawful and otherwise false and was not justified in all the circumstances;

(iv) The maintenance and continuation of the prosecution against the [appellant] was maintained and continued;

(v) The [appellant] was charged by virtue of him being an unsworn officer of the NSW Police Service;

(vi) The maintenance and continuation of the prosecution against the [appellant] was maintained to justify the unlawful and improper conduct of the Police officers in charging the [appellant] in the first place without proper evidence."

149 The action was tried by Cooper DCJ without a jury. In addition to hearing oral evidence of which there was a great deal, reading the brief for the committal proceedings and other exhibits, his Honour had the advantage of watching the children's interviews, which had been recorded on video tape.

150 In considering the element of reasonable and probable cause his Honour clearly appears to have adopted the approach and much of the language of Jordan CJ delivering the judgment of the Full Court of New South Wales in *Mitchell v John Heine & Son Ltd*[108]:

> "In order that one person may have reasonable and probable cause for prosecuting another for an offence, it is necessary that the following conditions should exist: (1) The prosecutor must believe that the accused is probably guilty of the offence. (2) This belief must be founded upon information in the possession of the prosecutor pointing to such guilt, not upon mere imagination or surmise. (3) The information, whether it consists of things observed by the prosecutor himself, or things told to him by others, must be believed by him to be true. (4) This belief must be based upon reasonable grounds. (5) The information possessed by the prosecutor and reasonably believed by him to be true must be such as would justify a man of ordinary prudence and caution in believing that the accused is probably guilty.
>
> In order that the plaintiff may succeed on the issue of reasonable and probable cause, it is essential that he should establish that one or more of these conditions did not exist. This he may do by proving, if he can, that the defendant prosecutor did not believe him to be guilty, or that the belief in his guilt was based on insufficient grounds.

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108 (1938) 38 SR (NSW) 466 at 469-471.

> To establish the first of these matters, it is essential that evidence should be given of some fact or facts which, either inherently or coupled with other matters proved in evidence, would enable the inference that the defendant did not believe in the plaintiff's guilt. If such evidence is given, the question must be left to the jury, whether it has been proved to their satisfaction that the defendant did not believe in the plaintiff's guilt. But unless such evidence is given it is not proper to put a question to the jury as to the defendant's belief ... Merely to prove that the defendant had before him information which might or might not have led a reasonable man to form an opinion that the plaintiff was guilty supplies no evidence that the defendant did not believe him to be guilty. If this ground is relied on, the plaintiff must give some evidence from which an inference may be drawn as to what the defendant's belief actually was. It is not sufficient to give evidence from which a guess may be made as to what it was. Nor is it sufficient merely to supply evidence of reasons for non-belief; and if such evidence is relied on there must also be evidence that these reasons were in fact operative ...
>
> If he contends that the defendant did not believe some of the information which he had, he must supply evidence supporting an inference as to what the defendant's belief actually was with respect to the accuracy of the information in question, not a guess as to what it was. …
>
> If the plaintiff does place before the Court evidence of the nature of the whole of the information which the defendant had, it is for the judge and not the jury to determine whether it was reasonable for the defendant to believe in the accuracy of the information ... and also to determine whether it was reasonable for him to act on it, ie, whether it was sufficient to justify a man of ordinary prudence and caution in believing that the plaintiff was probably guilty." (footnotes omitted)

151 With respect to the second respondent's evidence that he was unable to remember the conversations recorded in the diary notes of the appellant's solicitor, his Honour said:

> "I found the evidence of [the second respondent] singularly unimpressive and unreliable. For him to say that he had no memory of such significant conversations defies the probabilities. I am satisfied that he remembered what he said. He did not want to deny having said it yet he wanted to cover up not only for his indiscretion but also the indiscretion of those superior officers who told him to lay the charges if there was a *prima facie* case because the [appellant] was an employee of the Police Service."

152 The trial judge made a finding on purpose in these terms:

> "The [appellant] has comfortably satisfied me on the balance of probabilities that [the second respondent] laid both charges against the [appellant] not for the purpose of bringing a wrongdoer to justice, but for the improper purpose of succumbing to the pressure from officers of the [CPEA] to charge the [appellant] because he worked for the Police Service. Accordingly, the [appellant] has satisfied me that [the second respondent] acted maliciously."

153 His Honour continued:

> "This, however, is not sufficient to entitle the [appellant] to judgment against the [respondents]. He must go further and satisfy the court on the balance of probabilities that [the second respondent] did not in fact believe upon reasonable and probable grounds that the [appellant] was probably guilty in relation to each respective charge."

154 His Honour appropriately gave separate consideration to each charge. He accepted that the one based on D's allegations was not laid without such a belief:

> "As is pointed out earlier, the prosecutor does not have to believe that a court will find the person charged guilty, merely that he believes that on the probabilities upon reasonable grounds, that the person committed the offence charged.
>
> The [appellant] has failed to satisfy the court on the balance of probabilities that [the second respondent] did not have reasonable grounds for believing and that he did not in fact believe that the [appellant] had committed the offence upon [D] notwithstanding the countervailing evidence. In short I am satisfied on the balance of probabilities that it was a proper case to bring to court."

155 But his Honour held that the charge based upon C's allegations was laid without the requisite belief. He said of it, that "the totality of the evidence satisfies me on the balance of probabilities that [the second respondent] did not believe that the [appellant] had committed the offence, or alternatively, that if he did believe it, then such belief was not based upon reasonable grounds". In stating his conclusion in this way, I do not take his Honour to be expressing himself provisionally or uncertainly. All that he was doing was saying that even if the second respondent did, which the trial judge rejected, believe that the appellant had committed the offence, there were no reasonable grounds for such a belief: a not uncommon way for trial judges to make findings on sequential issues.

156 The prosecution was, as the trial judge held, very distressing for the appellant. In assessing the damages, his Honour confined the respondents' liability to the period beginning with the laying of the charges and concluding at

a reasonable time after 6 April 2001, the date upon which responsibility for the prosecution rested with the DPP.

157 Judgment was accordingly given against the respondents for $31,250.00, inclusive of aggravated and exemplary damages. They were ordered to pay 90 per cent of the appellant's costs. No issue as to the first respondent's vicarious liability for the acts of the second respondent, as a police officer, pursuant to s 6 of the *Law Reform (Vicarious Liability) Act* 1983 (NSW), was raised at the trial or on appeal.

The Court of Appeal

158 The appellant appealed to the New South Wales Court of Appeal[109] (Mason P, Beazley JA and Pearlman AJA) against the dismissal of his claim in respect of the charge involving D, and the rejection of his other claim, of abuse of process. The respondents cross-appealed against the judgment in the appellant's favour in respect of the charge involving C. The Court of Appeal unanimously dismissed the appellant's appeal, and upheld the respondents' cross-appeal.

159 Beazley JA, with whom the President and Pearlman AJA agreed, was of the opinion that the trial judge erred in preferring the test for malicious prosecution propounded by Jordan CJ in *Mitchell v John Heine & Son Ltd* to that of Dixon J in this Court in *Sharp v Biggs*[110] and *Commonwealth Life Assurance Society Ltd v Brain*[111]. In *Sharp*, Dixon J had said[112]:

> "Reasonable and probable cause does not exist if the prosecutor does not at least believe that the probability of the accused's guilt is such that upon general grounds of justice a charge against him is warranted. Such cause may be absent although this belief exists if the materials of which the prosecutor is aware are not calculated to arouse it in the mind of a man of ordinary prudence and judgment."

In *Commonwealth Life Assurance Society Ltd v Brain*, his Honour substantially reaffirmed that opinion[113]:

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109 *A v State of New South Wales* (2005) 63 NSWLR 681 (partial report); [2005] NSWCA 292.

110 (1932) 48 CLR 81.

111 (1935) 53 CLR 343.

112 (1932) 48 CLR 81 at 106.

113 (1935) 53 CLR 343 at 382-383.

"Upon the issue of the absence of reasonable and probable cause the jury were asked one question only, namely, whether the appellant company genuinely and honestly believed that the prosecution was justified. In the circumstances of this case, I think that it was desirable, if not necessary, to put the question to the jury and that the answer given to it, unless set aside, makes it impossible for the Court to decide that there was not an absence of reasonable and probable cause for the prosecution of the respondent Brain.

When it is not disputed that the accuser believed in the truth of the charge, or considered its truth so likely that a prosecution ought to take place, and no question arises as to the materials upon which his opinion was founded, it is a question for the Court to decide whether the grounds which actuated him suffice to constitute reasonable and probable cause. In such a case, unless there be some additional element of an exceptional kind, there is no further fact needed to enable the Court to judge whether the prosecutor was warranted in proceeding. I repeat what I said in *Sharp v Biggs*: 'The ultimate inference, whether or not the facts of the case amount to a want of reasonable and probable cause, is for the Court, but it is for the jury to determine what are the facts of the case. … The question submitted to the jury was aptly framed to obtain their opinion as to the existence of the requisite belief. If that belief had been found to exist, the question would have remained whether the materials were enough to arouse it in a man of reasonable prudence and judgment, and this latter question it would have been for the Court to decide." (footnotes omitted; original emphasis)

160 In her reasons in this case, Beazley JA said[114]:

"Dixon J's formulation focuses upon the question whether the material available to the prosecutor is such as to at least lead to 'a belief that the probability of the accused's guilt is such that upon general grounds of justice *a charge against him is warranted*'. The prosecutor does not have to believe in the guilt of the accused. This statement has to be read subject to the qualification mentioned by Lord Denning, that in a case where the prosecution is based upon the prosecutor's own evidence, an absence of honest belief in the case being advanced would be evidence of absence of reasonable and probable cause. That qualification does not apply in this case as the second respondent was not prosecuting on his own account but rather was doing so in the course of his duties as a police officer.

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114 (2005) 63 NSWLR 681 at 696-697 [108]-[110]; NSWCA 292 at [108]-[110].

> Dixon J's formulation bears the mark of good sense given the task a prosecutor must undertake when deciding whether to lay a charge. In my opinion, Jordan CJ's formulation poses the test too highly and in doing so gives rise to a number of potential problems. In particular, it could lead either to unwarranted timorousness or excessive zealousness on the part of a prosecutor in deciding whether to lay a charge. Either would be an unwelcome development in the criminal justice system. Modern prosecutorial practice also reflects this approach[115]…
>
> The test as formulated by Dixon J itself provides the necessary restraint upon the exercise of this very serious power given to police officers and other prosecutors and, for that matter, to any private individual who seeks to bring a prosecution in relation to the commission of a criminal offence. The test carries with it a standard, that is of reasonable and probable cause, which is well understood by the common law. This is important for a number of reasons, not the least of which is that the same test applies regardless of whether the charge relates to an offence that involves little or great factual complexity. Dixon J's formulation also provides adequate parameters around the decision making process. First, it requires that a prosecutor must be seised of sufficient information to warrant the laying of the charge. Secondly, it protects a prosecutor from action for malicious prosecution (insofar as the want of reasonable and probable cause element of the tort is concerned) should it transpire that over the course of proceedings potentially exculpatory evidence emerges, an accused raises a successful defence, witnesses fail to 'come up to proof', or the credibility of evidence is successfully attacked. Such a point was made by Lord Denning in *Glinski v McIver*[116] where his Lordship alluded to the impossibility of a prosecutor being fully cognisant, at the time the charge is laid, of whether 'witnesses are telling the truth' or 'what defences the accused may set up'."

161 Beazley JA was of the opinion that notwithstanding the exertion of pressure upon the second respondent by his superiors, there was insufficient evidence to support a finding that it was in response to that pressure, rather than in the exercise of his own judgment, that on general grounds of justice the charges were warranted, that he decided to lay them[117]:

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115 See Ipp, "Must a Prosecutor believe that the accused is guilty? Or, was Sir Frederick Jordan being recalcitrant?" (2005) 79 *Australian Law Journal* 233 at 239-240.

116 [1962] AC 726 at 758.

117 [2005] NSWCA 292 at [188].

> "[I]t is one thing to find that a person was under pressure to charge if there was a prima [facie] case. It is another to find that a prosecutor, in laying a charge, had a motive '*other than bringing a wrongdoer to justice*', as must be established to prove malice. Despite the second respondent's sometimes confused thinking as to what was important and what was not, I do not consider that it was established that he did not believe he had a '*prima facie case*', being the phrase used by his superiors, or that his intention in charging the appellant was other than to bring him to justice. '*Bringing a person to justice*' does not mean that the person must be convicted. It means to bring a person before the processes of the law. That may be done where there is reasonable and probable cause to lay the charge. Indeed, the trial judge appears to have held that he did believe that, but did not believe the appellant was guilty. The two matters are both logically and juridically distinct and the latter is not a necessary aspect of malice." (original emphasis)

162 After referring to shortcomings in the evidence, of absence of reasonable and probable cause with respect to the charge of sexual abuse of D, her Honour reached this conclusion[118]:

> "The bi-fold test applied by his Honour is a more onerous test than is required. As the trial judge was not satisfied on the more onerous test, it is not likely that a court would be satisfied on the correct test. But in any event, a review of the whole of the evidence has led me to conclude that the appellant has not established that there was not reasonable and probable cause to lay the charge in respect of D."

163 Regarding the charge made in reliance upon C's complaints her Honour said this[119]:

> "It is apparent that the second respondent devoted a great deal of time to an examination of the material. It is also apparent that he felt pressured by his superiors to lay the charges in the context in which I have discussed. However, given that his Honour accepted that what the second respondent was in fact told by his superiors was that if there was a '*prima facie*' case he had to '*leave it up to the court*', the fact that he did feel pressured to lay charges against the appellant is not evidence supporting a want of reasonable or probable cause. When the evidence relating to the charge in respect of C is viewed as a whole, I do not consider that it can be said that there was not reasonable and probable cause to lay the charge. The appellant told the second respondent that C was a '*sincere child*' and

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118 [2005] NSWCA 292 at [161].

119 [2005] NSWCA 292 at [170].

> that a child of that age would be likely to be embarrassed about being interviewed about such matters. Likewise, it is apparent from S's Record of Interview that she considered C to be less likely than D to fabricate such a matter. She also considered that there was less motivation for him to do so as unlike D, C generally had a good relationship with the appellant. When those factors are added to the fact that there was reasonable and probable cause to lay the charge in relation to D, I am of the opinion that a prosecutor, exercising proper caution, would be justified in laying the charge against C." (original emphasis)

The appeal to this Court

164 The only elements of the four elements necessary to establish the tort of malicious prosecution in issue here, are absence of reasonable and probable cause, and malice.

The correct test

165 There is no reason why this Court should depart, in relation to the first of these elements, from the test stated by Dixon J in *Sharp*[120]. The Court of Appeal was right in my opinion to prefer and apply that test. It is as to the application of it to the facts of the case that I part company with the Court of Appeal. Before I explain why I do that, I will state my reasons why the formulation of Dixon J is preferable and should be taken to continue to state the relevant law.

166 First, as Beazley JA said[121], after reviewing the authorities both Australian and English, the test propounded by Dixon J has strong judicial endorsement in both the reasoning and decisions of subsequent cases, and the texts and extra-curial writings of judges.

167 Secondly, his Honour's statement is capable of flexible but practical application to the varying circumstances in which the laying of charges has to be conducted. The words "at least" used by Dixon J stipulate a minimum requirement, but not one which is excessively difficult to satisfy. The requirement is not an unqualified belief of a prosecutor, but rather a belief in a probability of guilt taking account of general grounds of justice, warranting, which I take to mean making it appropriate, that a prosecution be brought.

168 The test is flexible and practical because it directs attention to general grounds of justice. It is unnecessary to attempt to define them comprehensively.

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120 (1932) 48 CLR 81.

121 [2005] NSWCA 292 at [107].

169 The question whether general grounds of justice make it appropriate that a prosecution be brought prompts these further relevant questions. Has there been a sufficient investigation of the case? Has the admissible evidence against the person been fully analysed? Are any material inconsistencies in the available evidence reasonably explicable or understandable? Has the accused co-operated in the investigation? Has he made any admissions of guilt or otherwise compromised himself? Has consideration been given to evidence, if any, that would tend to show that the case against the accused could not be proved beyond reasonable doubt? Has consideration been given to the taking of such professional or other advice as might usefully bear upon the case? Has the mind of the person responsible for the prosecution prudently and cautiously been brought to bear upon these considerations, separately and in combination?

170 It is only if, and after, the prosecutor has asked questions of these kinds, and is able to answer them honestly in the affirmative, that he will be able to ask himself the further question whether there is a *prima facie* case properly, that is on general grounds of justice, to be brought against the accused. I have deliberately inserted the word "properly" in this question for several reasons: in order to give effect to the qualification in the formulation of Dixon J in *Sharp* which makes it clear that in some situations the mere existence of an apparent *prima facie* case may not be enough to found the requisite honest and reasonable belief; in acknowledgment of his Honour's insistence upon the exercise, in deciding whether to proceed, by the prosecution of both prudence and judgment; to reinforce the distinction between the Executive and Judiciary, the former of which always has a discretion whether to charge, and the latter which does not, and which, on the current authority of this Court may not, in a criminal trial with a jury, withdraw even a weak or tenuous case[122] from the latter.

171 The third reason why his Honour's statement of principle should continue to apply is that it accommodates well, indeed I think best, the different functions of the judge and jury in a case in which the latter participates, because it enables the judge to isolate such questions of fact as may need to be asked of them, and so enables him or her to decide the ultimate question of law; of the existence of reasonable and probable cause.

172 The fourth reason for my preference for the test proposed by Dixon J is that his formulation of it, referring as he does to each of belief, probability of guilt, prudence and judgment, gives real effect to the two essential and ultimate requirements, honesty and probability.

173 The fifth reason to prefer Dixon J in *Sharp* is that his Honour's test accommodates well the involvement, in fact generally the control, exercised in

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122 *Doney v The Queen* (1990) 171 CLR 207.

modern times by Directors of Public Prosecution holding independent statutory offices, of the prosecution of serious offences. A Director could not possibly personally be fully acquainted with every case. But somebody in the DPP's office must be and must apply his or her mind to the strength of it, just as at other stages, and in other cases, a particular police officer, rather than an anonymous police service, must do so. The test propounded by Dixon J is more finely nuanced than the others suggested, and its flexibility and practicality equip it well for its application to contemporary statutory offices, departments and circumstances.

174 The sixth reason why there should be no departure from what Dixon J propounded is that the suggested alternatives to it suffer from an unnecessary and inconvenient degree of over-elaboration.

The application of the test

175 As this Court has recently held[123], having regard, in particular, to the generally unqualified jurisdictions conferred upon intermediate courts of appeal by statute, and upon this Court as the final court of appeal under the Constitution, findings of fact by trial judges are open on appeal to review and cautious reversal. In this case however, the Court of Appeal erred in preferring its own view of the facts to the trial judge's.

176 The Court of Appeal referred to the second respondent's evidence that he was influenced by the fact that "an independent organisation [the Children's Court] had established that abuse had occurred, based on the information the children had offered"[124]. The Court of Appeal said that although the second respondent did not say that the finding of the Children's Court relieved him of the obligation to investigate the complaints himself, that he understood that he was so obliged was "implicit" in his evidence[125]. That was, in my view, to read too much into what was left unstated by his evidence.

177 The standard of proof and the manner of proceedings in that Court are, as I have pointed out, very different from those of the Criminal Courts. The fact that the children were no longer in any perceived danger removed any necessity for particular haste in conducting the investigation. The trial judge was alive to these matters. His criticism of the psychologist's report, which was apparently part of the material prompting the seeking of the order made by the Children's

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123 See *Fox v Percy* (2003) 214 CLR 118 at 156-157 [27], 165-166 [148].

124 [2005] NSWCA 292 at [114].

125 [2005] NSWCA 292 at [115].

Court, bears this out. To contend, as the respondents did, that the sexual abuse had been "established" by that Court was to overstate the position.

178 The Court of Appeal thought that the trial judge erred in not giving weight to the second respondent's reliance upon a statement made by the appellant's wife: that she wished the children's father would kill the appellant "[to get] both of them out of [her] life"[126] and that she had threatened the appellant with a knife. But the trial judge neither overlooked these matters nor failed to weigh them with the other evidence, a relevant part of it being that after the confrontation with the knife, the appellant's wife accepted the appellant's denial of any impropriety.

179 The Court of Appeal accepted that the investigation did reveal some inconsistencies and implausibilities in the children's evidence[127], and that the second respondent was influenced by irrelevant and "coincidental" matters[128]. One of the last was the child D's recall of an occasion of an alleged assault. The trial judge did not overlook this. He was of the view that the second respondent should have either doubted it, or at least explored it further, because at the time D was recovering from an operation that had left his leg in plaster and necessitated the use by him of a walking frame.

180 As to some of the factual matters to which the Court of Appeal referred, its view was that although the trial judge was justified in finding that the second respondent's reasoning was illogical, his investigation insufficient, and his analysis of the evidence flawed, it was, in effect, to be unduly critical of him to regard these matters as important or even influential as the trial judge had the benefit of, and presumably was relying too much on, hindsight.

181 The Court of Appeal accepted that the second respondent's reliance upon inadmissible evidence that medical examinations of C and D although not revealing abnormalities of any kind did not "preclude an assault as described", was ill-founded, but that because the law in that regard had only been settled about 10 months before the charges were laid, it was understandable that the second respondent would not have known of it.

182 The Court of Appeal then turned to the critical conversations between the appellant's solicitor and the second respondent, pointing out that the former agreed in cross-examination that the second respondent had said during one of the conversations, "… that people above him advised him, 'look if you had a

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126 [2005] NSWCA 292 at [118].

127 [2005] NSWCA 292 at [128].

128 [2005] NSWCA 292 at [132].

prima facie case, you've got to leave it up to the court.'"[129] According to the Court of Appeal "a quite different picture [of departmental pressure] emerges" when this piece of evidence is taken into account[130]. That, with respect, is simply not so. The second respondent volunteered and reiterated that he acted under departmental pressure. He well knew that there was abroad an over-zealousness on the part of his superiors because the appellant was an employee of the police service. The evidence in this regard leaves me, as it did the trial judge, with the overwhelming impression that the second respondent's superiors were imposing pressure upon him to lay charges, and that it was by this pressure that he was moved.

183 It follows from what I have said that despite the large jurisdiction conferred upon the Court of Appeal to review facts, as well as the application of the law to them by a trial judge, it was not justified in dismissing as irrelevant, insufficient or erroneous the trial judge's findings of fact as it did.

184 The trial judge here enjoyed several very real advantages over the Court of Appeal. He had the opportunity of watching video tapes of the boys' interviews. He saw and heard the second respondent, and the appellant, and evaluated their evidence in the light of the other oral evidence and the voluminous material that he read. Assuming that, in a case of this kind, differences on the part of a Court of Appeal, as to the weight to be accorded to some only of the matters found and held by a trial judge to be of importance to his decision, may produce a different result on appeal, the Court of Appeal was not justified in here differing as it did, for the reasons that I have given.

185 The case, it may be accepted, could not have been an easy or simple one for the second respondent. His difficulties were compounded by his personal distractions and the unduly heavy workload that he had been assigned. Society abhors child abuse. This abhorrence imposes a further burden upon an investigator. These matters were all known, or should have been known, to the second respondent's superiors. They, as well as the second respondent, would have understood that the laying of a charge of child abuse against anyone, let alone a child's step-parent, is a very grave matter, likely to leave a stigma upon the parent even if the charge fails. All of this called for caution and prudence on the part of the respondents. The second respondent should have asked himself the questions to which the test propounded by Dixon J gives rise. Had he done so he would have been unable, on the findings, fairly and carefully made, of the trial judge, to say that there was reasonable and probable cause to charge the appellant with respect to the allegations made by D. It is of no consequence

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129 [2005] NSWCA 292 at [149].

130 [2005] NSWCA 292 at [150].

therefore that the trial judge sought to apply the law as stated by Jordan CJ in *Mitchell v John Heine & Son Ltd* [131] rather than as stated by Dixon J.

186 It is necessary to say only a little about the other matter that was argued. Malice may have different meanings in different branches of the law. For example, in defamation, knowledge of falsity, or an absence of belief in the truth of the publicised material, may constitute it, as will spite or ill will[132]. Recklessness too can amount to malice in defamation[133] and, in my opinion, may do so in cases falling short of wilful blindness or the like.

187 Malice in a case of malicious prosecution may, however, be established if some collateral purpose is shown to have provoked or driven the prosecution. That does not mean that a person bringing a prosecution who dislikes, perhaps even despises, the subject of it should necessarily on that account alone be adjudged to have brought it maliciously. If the charge is one that should have been laid according to the precept of Dixon J, the prosecutor's distaste for, or dislike of, the accused will be an incidental matter only.

188 Clearly enough, some of the questions which should be asked to ascertain whether reasonable and probable cause existed, may also arise in relation to malice. The two elements will not always in practice neatly divide into two different topics.

189 Here however, indirect purpose and therefore malice was established: the purpose of giving effect to pressures from senior officers.

190 All of the elements of the tort were made out on the evidence accepted by the trial judge in respect of the charge based on C's complaint. The appeal to the Court of Appeal in that matter should have been dismissed.

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131 (1938) 38 SR (NSW) 466 at 469-471.

132 *Horrocks v Lowe* [1975] AC 135 at 149-150; see also *Roberts v Bass* (2002) 212 CLR 1 at 32 [77].

133 *Horrocks v Lowe* [1975] AC 135 at 152; see also *Roberts v Bass* (2002) 212 CLR 1 at 21 [44] per Gleeson CJ, 34-35 [84]-[86] per Gaudron, McHugh and Gummow JJ, 79 [230] per Hayne J, 103 [288] per Callinan J.

191 For the reasons given in the joint judgment I would however dismiss the appellant's appeal in respect of the charge brought in reliance upon D's evidence.

192 I would join in the orders proposed in the joint judgment.