Volume 60
Issue 3 *Dickinson Law Review - Volume 60, 1955-1956*

3-1-1956

Malicious Prosecution

Frank S. Seiders Jr.

Conclusion

It has been the purpose of this note to assimilate the law on trusts for the perpetual care of cemetery lots in Pennsylvania and point up certain unanswered questions. The chief problem which remains unanswered is, what shall be done with eccentric testators who continue to create trusts of considerable monetary size for the care of their lots. The cases on this point have increased throughout the years, but to date no workable solution has been attempted by the courts or the legislature. It is suggested that this would be a legitimate exercise of the legislative or judicial power and it is hoped that the proper responsible people will take note of this possibility. It has been previously mentioned that the lawmakers have handled the problem of smaller trusts adequately and there appears to be no reason why they should not take it upon themselves to clarify the larger trust situation.

MAXWELL E. DAVISON

MALICIOUS PROSECUTION

The interest protected by the tort of malicious prosecution is freedom from unjustifiable litigation. Originally this tort was limited in its scope so that it could be maintained by the plaintiff only where; first, the defendant had instituted or continued a criminal prosecution against the plaintiff; second, the criminal action had terminated in favor of the accused; third, the defendant in the malicious prosecution action had no probable cause for instituting or continuing the proceeding; and finally, the defendant acted maliciously in bringing the proceeding or had a primary purpose other than that of seeing that an offender be brought to justice.[1] These elements were essential to the maintenance of the action and the absence of any one of them inevitably resulted in a verdict for the defendant.

The inadequacies of not allowing redress by an action of malicious prosecution for suits that could not be termed criminal, but which could lead to the arrest of the accused, the seizure of his property, and even to his incarceration soon asserted themselves. Professor Harper has pointed out that even under the narrow English rule the action may be maintained for insolvency or bankruptcy proceedings, since they result in direct pecuniary loss to plaintiff, as well as for civil proceedings that are accompanied by arrest, attachment or injunction.[2]

The courts in this country have also broadened the scope of malicious prosecution to include proceedings that could perhaps best be termed "quasi-criminal." In the case of *Lueptow v. Schreader*[3] the defendant, a school board member, filed a petition informing the juvenile authorities that, in effect, the plaintiff

---

1 PROSSER, TORTS § 96 (1941 Edition).
2 HARPER, A TREATISE on the LAW of TORTS § 268 (1933 Edition).
3 226 Wis. 437, 277 N. W. 124 (1938).

was a juvenile delinquent. The defendant stated in the petition that the plaintiff had sent threatening letters to his teachers, had defaced the school buildings, had caused a disturbance in the school, and was incorrigible. The court held that the filing of such a petition, if untrue and done maliciously and without probable cause, could be the basis of an action for malicious prosecution. The court stated:

> "Such a petition may result in serious consequences and damages. Its natural tendency is to injure one's social standing and credit and to bring humiliation to the one whose honesty and lawabidingness is so seriously questioned. Where this is done maliciously and without probable cause it is a wrong for which the law should afford a remedy, and an action for malicious prosecution is as well adopted to afford that remedy as any other action known to the law."

The case of *Hardin v. Hight*[4] enlarged the scope of malicious prosecution so as to protect one against whom a search warrant has been issued maliciously and without probable cause. In this case the court pointed out that a search warrant was an instrumentality used to detect crime and recover stolen property. It was indicated that the action would lie even if the warrant did not direct the arrest of the individual in the event that the stolen goods be found in his possession.[5] The court, in support of their holding, quoted the provision of the Constitution guaranteeing the peoples' right to be secure in their persons, houses, papers and effects against unreasonable searches. Of course, this extension of malicious prosecution is not limited exclusively to the fields of juvenile delinquency and search warrants. Many other areas, such as lunacy, bastardy and involuntary bankruptcy proceedings may now form the basis of an action for malicious prosecution.[6]

In some instances an action for malicious prosecution may be based on a purely civil action. This was not the earlier rule as allowance of costs was thought to be sufficient compensation to the successful party.[7] The rules governing the action for malicious prosecution of a civil suit are composed of the same elements that are prerequisite to maintaining an action based on a criminal action.[8]

However, the courts have been exceedingly cautious in permitting a suit for malicious prosecution based on a purely civil action. The tort of malicious prosecution has never been a favorite of the law.[9] This is probably due to the policy of the courts to encourage litigants to resort to them in order to protect

---

4 106 Ark. 190, 153 S. W. 99 (1913).

5 The court said; "certainly the putting in motion of such an agency maliciously and without probable cause is as much calculated to injure the feelings and reputation of the person against whom it is directed as if the further direction for his arrest in case the property sought should be found in his possession were contained therein. This being true, we hold the procuring the issuance of a search warrant maliciously and without probable cause will support an action for damages for malicious prosecution."

6 Note, 22 MINN. L. R. 1060 and cases there cited.

7 See note 2, *supra.*

8 Mayflower Industries v. Thor Corp., 15 N. J. Super. 139, 83 A. 2d 246 (1951).

9 Peterson v. Cleaver, 265 Pac. 428 (Oregon 1928), "We are aware of the well recognized rule that actions for malicious prosecution are not favorites of the law."

their rights without being in constant fear of being confronted with a counter suit in the event that they are unsuccessful.[10] Dean Prosser has noted that in all civil suits the plaintiff is always seeking his own ends so he is allowed more latitude than he is in criminal cases which he may instigate.[11] The institutor of a civil action is not required to have the same certainty as to the facts that is required of one who starts a criminal action.[12]

This overwhelming desire on the part of the courts not to discourage the bringing of civil suits was considered in the recent New Jersey case of *Taft v. Ketchum*.[13] In this case the plaintiff was an attorney. The defendant filed a complaint against the attorney with the county ethics and grievance committee. The complaint charged the attorney with improper conduct. The plaintiff-attorney thereupon brought an action for malicious prosecution against the defendant. In holding that the filing of this complaint failed to support the plaintiff's action the court readily recognized that two conflicting policies were involved. In the first place, there would be a great harm done to the attorney if the charges were groundless. On the other hand, public interest demands that those with knowledge of unethical activities of an attorney be free to disclose such conduct to the appropriate authorities. The court concludes that the latter policy is the stronger as, if everyone who filed such a complaint would have the threat of a malicious prosecution action hanging over him, the effect in many instances would be the suppression of legitimate charges—a result that is clearly not in the public interest.[14] While it appears that this case has been decided largely on a policy basis, it should be noted that the majority based their decision to some extent on the case *In re Chernoff*[15] which states that disbarment of an attorney is not to punish but is to maintain the purity of the bar.

As we have just seen, the courts are not overly anxious to permit an action of malicious prosecution to be based on an action of a completely civil nature. Nevertheless, they will allow the action to lie, especially where the plaintiff has suffered some special damage. Special injury is possibly not vital, however, as in a numerical majority of the jurisdictions the action of malicious prosecution will lie even if plaintiff's person or property has not been interfered with and he has sustained no special injury.[16] According to the Restatement of the Law of Torts there seems to be no reason why special damages should be vital to recovery. Section 674 of the Restatement reads as follows:

---

10 Note, 11 GEO. WASH. L. REV. 118.
11 PROSSER, TORTS § 97 (1941 Edition).
12 Smith v. Smith, 296 Ky. 785, 178 S.W.2d 613 (1944).
13 113 A. 2d 671 (N. J. 1955), Noted in 60 DICK. L. REV. 95 (1955).
14 Justice Wachenfeld vigorously dissented to this on the theory that such a cloak of immunity "will only serve to encourage the use of disciplinary proceedings as privileged sanctuaries to carry on personal vendettas and excursions of ill will disassociated from the true facts in a cause."
15 334 Pa. 527, 26 A. 2d 355 (1942).
16 150 A.L.R. 897 and cases there cited. Pennsylvania is listed among those jurisdictions in which special injury must be shown.

"One who initiates or procures the initiation of civil proceedings against another is liable to him for the harm done, thereby if,

(a) The proceedings are initiated (i) without probable cause, and (ii) primarily for a purpose other than that of securing the adjudication of that claim on which the proceedings are based, and

(b) except where they are ex parte, the proceedings have terminated in favor of the person against whom they were brought."

Obviously this section contains nothing which makes it mandatory that the plaintiff suffer some sort of special damage before he can bring his suit for malicious prosecution on a civil action. Despite this, however, some courts have steadfastly maintained, in well reasoned, forceful opinions, that special damages are vital to recovery. Recovery has not infrequently been denied "when there has been no arrest of the person or seizure of the property of the defendant, and no special injury sustained, which would not necessarily result in all suits prosecuted to recover for like causes of action."[17] The case of *Melvin v. Pence*[18] sets forth the proposition that this is "the more general rule" and is necessary to maintain free access to the courts by persons who, even though they have legitimate grievances, may be deterred from bringing suit out of fear of liability in the event their suit fails.

Probably a respectable number of the courts that require a showing of special injury have been influenced by comment (c) to Restatement Section 674. This comment states that it is necessary for the plaintiff to show material harm such as that which results from the interference with the use, enjoyment or vendability of his land, chattels, or intangibles and the necessary expenditures that are required to defend himself. If the plaintiff cannot show this it is quite sufficient, according to the comment, that he show the violation of a legal right which is in itself sufficient to support an action for damages. This would include imprisonment of the person, depriving the plaintiff of possession of his land, chattels, or intangibles, or the harm to his reputation resulting from the defamatory nature of the facts alleged as the basis of the proceeding against him.

While this is only a comment to the pertinent section of the Restatement it evidently has had a great influence on the courts. In the case of *Davis v. Boyle Brothers*[19] the defendant started an action alleging that the plaintiff was indebted to them. Doubtless there was a confusion of names. Plaintiff informed defendant's employee of this who promised that the suit would be dismissed. Relying on this plaintiff did not appear to defend whereupon judgment was taken against her. When plaintiff had this default judgment removed defendant continued the case and went to trial on the merits. Being unable to prove his case the defendant took a voluntary non-suit. Plaintiff then sued for malicious prosecution but defendant obtained a summary judgment. In holding that the plaintiff was at least entitled to a new trial the appellate court quoted Comment (c)

---

17 Quoted from Peckham v. Union Finance Co., 48 F. 2d 1016 (D. C. App. 1931).
18 130 F. 2d 423 (U. S. App. D. C. 1942).
19 73 A. 2d 517 (D. C. App. 1950).

of Restatement, Section 674, verbatim in order to show that special damages were necessary for plaintiff to recover. In *Smith v. Smith*[20] the court was faced with a situation in which plaintiff was suing the defendant who had earlier sued him (the plaintiff) for slander. Even though the court held that defendant had probable cause to bring his action for slander and therefore malicious prosecution would not lie it was pointed out that the better rule, despite a considerable split of authority, seems to require that the plaintiff show special damages. The court, in this case, cites Restatement Section 674. These cases illustrate the impact of the comment on the courts.

In addition to this split of authority as to whether or not special damages are necessary the authorities do not seem in accord that a series of civil suits brought maliciously and without probable cause will remove the requirement of showing special damages. In *Baber v. Fitzgerald*[21] the court recited that some courts which require special damages are of the opinion that a series of groundless suits changes the rule and constitutes good cause for bringing malicious prosecution; in others it has been held that the bringing of several suits does not change the general rule which requires plaintiff to establish special damages. Perhaps the case of *Soffos v. Eaton*[22] best illustrates the modern trend. In that case the defendant brought four separate actions against the plaintiff, his tenant, maliciously and without probable cause. In the lower court the majority seemed to be of the opinion that the plaintiff could not recover because of a failure to show special damages.[23] In reversing this decision Associate Judge Edgerton said:

> "We see no good reason why the law should tolerate repeated abuse of its processes. To allow redress for such abuse will not seriously hamper the honest assertion of supposed rights. No one is likely to be deterred from litigating an honest claim by fear that some future jury may erroneously decide that he has brought two suits maliciously and without probable cause."

The court continued by pointing out that a balance must be sought between social interests in preventing unconscionable suits and permitting honest assertion of supposed rights. This opinion, therefore, appears to dispense with the necessity of showing special damages where the plaintiff is the victim of several groundless suits brought maliciously and without probable cause.

---

20 See note 12, *supra.*

21 311 Ky. 382, 224 S. W. 2d 135 (1949).

22 152 F. 2d 683 (D. C. 1945).

23 The dissenting judge said, "I agree that the courts should be open and accessible to the public and that no man should be deterred from asserting an honest claim by fear of having to answer a retaliatory damage suit if his action should happen to fail. But there must be some check upon the spirit of malice which, it is here charged, induced the filing of suits against the defendant (plaintiff here) in the face of consistently adverse court decisions. 'The right to litigate is not the right to become a nuisance.' It is certainly not the right repeatedly to abuse the processes of the courts, twist them out of their intended purpose, and make them instruments of oppression." 39 A. 2d 865 (D. C. 1944) contains the opinion of the lower court.

It is also noteworthy that malicious prosecution may now be brought on an action that is instituted before a body other than a judicial tribunal. In the previously mentioned *Toft* case the original action was brought before a grievance committee. In response to the defendant's argument that malicious prosecution would not lie as the committee was not a judicial tribunal, the court said:

> "We cannot agree with this general statement of the law, because we incline on principle toward the weight of authority in this country, which supports the view that under certain circumstances a malicious prosecution may be predicated upon the institution of other than a judicial action, at least where such proceedings are adjudicatory in nature and may adversely affect legally protected interests."

This principle was also stated in the case of *National Surety Co. v. Page*,[24] where the defendant had instigated a proceeding before the State Corporation Commission of Virginia to have the plaintiff's license as an insurance agent revoked. The court in holding that this could form the basis of an action of malicious prosecution pointed out that such a proceeding would have an injurious effect upon one's reputation and business and that, like a criminal action, it should not be used to accomplish an individual's ends but rather to benefit the public. The case of *Melvin v. Pence*[25] reached the same result when the defendant instituted an administrative proceeding which was aimed at procuring the revocation of the plaintiff's private detective license. The court pointed out that the principles of malicious prosecution are applicable to administrative processes, as judicial and administrative processes are closely related.

Conclusion

Originally malicious prosecution would lie only after criminal proceedings had been instituted. The courts, recognizing the inadequacy of this, extended this tort to include such actions as involuntary bankruptcy, juvenile delinquency proceedings, the issuance of search warrants, lunacy proceedings and several others that have herein been referred to as "quasi-criminal". The scope of malicious prosecution has now been enlarged even further to include completely civil actions and administrative processes. While there is a split of authority the better rule seems to be that in the latter instances the plaintiff must be prepared to show special damages. There is also a split of authority as to whether or not the bringing of a series of groundless civil actions will dispense with the necessity of showing special damages. The better view appears to be that it will. The general policy behind the entire concept is to find a balance between giving an aggrieved party redress and at the same time not discouraging those with legitimate claims from asserting them out of fear of a retaliatory action if they are unsuccessful.

FRANK S. SEIDERS, JR.

---

[24] 58 F. 2d 145 (4th Cir. 1932).
[25] See note 18, *supra*.