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## Torts - Prima Facie Tort - Liability for Instigation of Police Investigation or Prosecution

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TORTS—PRIMA FACIE TORT—LIABILITY FOR INSTIGATION OF POLICE INVESTIGATION OR PROSECUTION—Plaintiff organized a corporation for the purpose of collecting funds from the public to aid cancer victims. Defendant, well-known columnist engaged in soliciting money for a rival cancer fund, was alleged, inter alia, to have instigated state and federal government investigations and prosecutions that resulted in plaintiff being criminally convicted and subsequently acquitted on a new trial after appeal. As a consequence of these actions, public confidence had been destroyed in plaintiff's cancer fund corporation and it had ceased to function. Plaintiff complained that defendant's actions were done with the intention of harming plaintiff and had resulted in plaintiff's loss of salary as director of the cancer fund corporation, and in plaintiff's loss of his private detective license. On appeal from an appellate division decision ordering the complaint dismissed, *held*, affirmed. Although generally a lawful act for the malicious purpose of harming plaintiff that does harm plaintiff may be actionable,<sup>1</sup> in this type of situation the best interests of the public are advanced by exposure of the truth by official action, and such truth should

<sup>1</sup> Principal case at 163, citing *Al Raschid v. News Syndicate Co.*, 265 N.Y. 1, 191 N.E. 713 (1934), and *Beardsley v. Kilmer*, 236 N.Y. 80, 140 N.E. 203 (1923).

not be shackled by fear of a civil action for damages. *Brandt v. Winchell*, 3 N.Y. (2d) 628, 148 N.E. (2d) 160 (1958).

The courts, in actions complaining of wrongful instigation or use of judicial process, are faced with two opposing policy considerations. On the one hand they recognize an interest in being free from unjustifiable and vexatious legal proceedings.<sup>2</sup> On the other hand the courts realize the importance of a policy of encouraging citizens to report apparent crimes<sup>3</sup> and to have free access to the courts. Consequently actions of the type represented by the principal case are generally discouraged<sup>4</sup> and surrounded by limitations more stringent than in other causes of action.<sup>5</sup>

When bringing suit for damages due to instigation or misuse of judicial process<sup>6</sup> a plaintiff traditionally has had two theories on which to base his action: malicious prosecution and abuse of process. The tort of malicious prosecution is an ancient and well established action<sup>7</sup> designed to recompense an accused person for injury to his reputation, person, and finances due to unwarranted legal proceedings.<sup>8</sup> Limited in England to actions for prior criminal prosecutions, in this country the action is generally extended to cover prior civil proceedings and even administrative proceedings (e.g., revocation of licenses).<sup>9</sup> Although there is not complete agreement on the nature of specific elements of this cause of action, those elements necessary for recovery because of a prior criminal proceeding are generally held<sup>10</sup> to be (1) a prosecution instituted by defendant,<sup>11</sup> (2) a prior termination of the proceedings in favor of the accused (plaintiff in the instant action),<sup>12</sup> (3) a lack of probable cause for the prosecution,<sup>13</sup> and (4) "malice" or collateral private purpose other than the public

<sup>2</sup> *Tutton v. Olsen & Ebann*, 251 Mich. 642, 232 N.W. 399 (1930). See 3 TORTS RESTATEMENT §653, Introduction (1938); PROSSER, TORTS, 2d ed., 645 (1955); *Melvin v. Pence*, (D.C. Cir. 1942) 130 F. (2d) 423.

<sup>3</sup> *Melvin v. Pence*, note 2 supra, at 428.

<sup>4</sup> *Carere v. F. W. Woolworth Co.*, 259 Mass. 238, 156 N.E. 55 (1927).

<sup>5</sup> *Luther v. First Bank of Troy*, 64 Idaho 416, 133 P. (2d) 717 (1943). See also *Melvin v. Pence*, note 2 supra, which reasons that a contrary policy would result, in civil cases at least, in repeated litigation instead of the first suit being an end to the matter.

<sup>6</sup> Assuming here that the process is correct and regular, as opposed to the situation giving rise to an action for false imprisonment. See PROSSER, TORTS, 2d ed., 646 (1955).

<sup>7</sup> The leading case is *Saville v. Roberts*, 1 Ld. Raym. 374, 87 Eng. Rep. 725 (1698).

<sup>8</sup> *Luther v. First Bank of Troy*, note 5 supra. See PROSSER, TORTS, 2d ed., 645 (1955).

<sup>9</sup> *Melvin v. Pence*, note 2 supra, at 426, 427. See also 3 TORTS RESTATEMENT §675 and §680 (1938); PROSSER, TORTS, 2d ed., 662 (1955). Where prior civil process is the subject of the complaint, recovery is generally limited to those cases where special injury can be shown, *Melvin v. Pence*, note 2 supra, at 426.

<sup>10</sup> See, generally, *Luther v. First Bank of Troy*, note 5 supra; *Tutton v. Olsen & Ebann*, note 2 supra; *Ranke v. State*, 206 Misc. 569, 134 N.Y.S. (2d) 83 (1954); 3 TORTS RESTATEMENT §653 (1938); PROSSER, TORTS, 2d ed., 646 (1955).

<sup>11</sup> See note 10 supra. Concerning the meaning of "instituted" see *Melvin v. Pence*, note 2 supra, at 427.

<sup>12</sup> *Friedman v. Roseth Corp.*, 190 Misc. 742, 74 N.Y.S. (2d) 733 (1947).

<sup>13</sup> *Simpson v. Coastwise Lumber & Supply Co.*, 239 N.Y. 492, 147 N.E. 77 (1925).

purpose of bringing a lawbreaker to trial.<sup>14</sup> In the principal case malicious prosecution would fail even though defendant had malice because there is no lack of probable cause for his instigation of official action<sup>15</sup> and because there has not been a complete termination of the prior process in plaintiff's favor.<sup>16</sup>

The gist of the second traditional tort, abuse of process, is generally said to be the improper use of a regular legal process, civil or criminal,<sup>17</sup> for a purpose other than that for which the process was designed.<sup>18</sup> Abuse of process seems to have developed to redress grievances that malicious prosecution could not reach with its strict limitations<sup>19</sup> and neither a termination of prior proceedings<sup>20</sup> nor a lack of probable cause<sup>21</sup> need usually be shown to maintain this action. However, the elements of this tort are not so well defined as those of malicious prosecution. Exactly what misuse of process will be grounds for recovery is the subject of controversy.<sup>22</sup> The courts frequently say that if the process were used for its proper purpose (i.e., not for collateral coercion of some kind<sup>23</sup> nor to impose discomfort vindictively<sup>24</sup>), then no amount of malice or improper motive will be grounds for an abuse of process action.<sup>25</sup> In the principal

<sup>14</sup> *Tutton v. Olsen & Ebann*, note 2 *supra*, at 645.

<sup>15</sup> Conviction by a jury, even though later reversed, usually is held to be conclusive proof of existence of probable cause. *Carere v. F. W. Woolworth Co.*, note 4 *supra*. See also PROSSER, TORTS, 2d ed., 657 (1955).

<sup>16</sup> Official action, including a consent injunction against plaintiff engaging in the charitable subscription business, still stands. The court in the principal case indicated its reluctance to consider what it called a "collateral attack upon the official acts of public authorities in a litigation to which the authorities are not parties." Principal case at 163.

<sup>17</sup> *Ash v. Cohn*, 119 N.J.L. 54, 194 A. 174 (1937). See 3 TORTS RESTATEMENT §682 (1938).

<sup>18</sup> *Rhoades v. Adelman*, 145 N.Y.S. (2d) 766 (1955); *Tricomi v. Tricomi*, 192 Misc. 763, 81 N.Y.S. (2d) 750 (1948); *Rothbard v. Ringler*, 77 N.Y.S. (2d) 351 (1947).

<sup>19</sup> The leading case is *Grainger v. Hill*, 4 Bing. (N.C.) 212, 132 Eng. Rep. 769 (1838) wherein a cause of action was allowed plaintiff against a defendant who had used a debt warrant to coerce plaintiff to give up a ship registry.

<sup>20</sup> *Grainger v. Hill*, note 19 *supra*. See also 3 TORTS RESTATEMENT §682, comment *a* (1938). Cf. *Friedman v. Roseth Corp.*, note 12 *supra*.

<sup>21</sup> *Grainger v. Hill*, note 19 *supra*. See 32 MINN. L. REV. 805 (1948); 3 TORTS RESTATEMENT §682, comment *a* (1938).

<sup>22</sup> It is said that the process must be used for some purpose other than that which it is designed for. *Lader v. Benkowitz*, 188 Misc. 906, 66 N.Y.S. (2d) 713 (1946); *Serxner v. Elgart*, 196 Misc. 1053, 94 N.Y.S. (2d) 731 (1949). See PROSSER, TORTS, 2d ed., 669 (1955); but other courts have said that there is also an abuse when process is used for its legitimate purpose in a reckless or oppressive way. *Smith v. Weeks*, 60 Wis. 94, 18 N.W. 778 (1884), and see dissenting opinion in *Docter v. Riedel*, 96 Wis. 158, 71 N.W. 119 (1897).

<sup>23</sup> *Grainger v. Hill*, note 19 *supra*.

<sup>24</sup> *Ash v. Cohn*, note 17 *supra*, where a body execution to enforce an appeal bond was used by defendant to hold plaintiff in jail over a weekend although defendant knew plaintiff had property which could be attached.

<sup>25</sup> *Meisels v. J.C.A. Trading Corp.*, 189 Misc. 46, 69 N.Y.S. (2d) 720 (1947); *Hauser v. Bartow*, 273 N.Y. 370, 7 N.E. (2d) 268 (1937). See *King v. Henderson*, [1898] A. C. 720; and 7 BROOK. L. REV. 123 (1937).

case there is indication that legal process was used to accomplish only the purpose for which it was designed (i.e., to protect the public by preventing allegedly improper soliciting of funds in this case) and consequently an abuse of process action would not lie.

Since in the principal case the plaintiff cannot come within one of the accepted categories of tort liability, his only hope for recovery was the prima facie tort theory, that intentional infliction of temporal damages is a cause of action which requires justification by the defendant if he is to escape liability.<sup>26</sup> This theory changes the older common law idea that bad motives cannot make a lawful act unlawful,<sup>27</sup> and is opposed to the view that only that action is a tort which falls within one of the particularly defined classes or categories of tort.<sup>28</sup> In England in the late nineteenth century<sup>29</sup> and in this country in the early twentieth century<sup>30</sup> the principle of motives being the essence of unlawfulness was recognized, and in a leading case before the United States Supreme Court<sup>31</sup> Justice Holmes stated this view as the prima facie tort doctrine. The New York courts are committed to this unified theory of intentional tort law;<sup>32</sup> consequently plaintiff in the principal case argued that the otherwise lawful act of setting official agencies in motion to investigate or prosecute should not be different from any other act which becomes unlawful when done solely with bad motives of harming plaintiff.<sup>33</sup> But in cases involving instigation and use of legal process and official action it appears that New York courts, at least, will consider important policy arguments connected with the specific torts of malicious prosecution and abuse of process, namely, the need to encourage exposure of "those guilty of offenses against the public."<sup>34</sup> The New York court applied these policy considerations to

<sup>26</sup> Principal case at 162.

<sup>27</sup> See Judge Cooley's statement quoted in PROSSER, TORTS, 2d ed., 21 (1955).

<sup>28</sup> A view attributed to Sir John Salmond. See PROSSER, TORTS, 2d ed., 3 (1955).

<sup>29</sup> *Mogul Steamship Co. v. McGregor, Gow & Co.*, 23 Q.B. 598 (1889); *Temperton v. Russell*, [1893] 1 Q.B. 715; *Quinn v. Leatham*, [1901] A.C. 495. See also *Lumley v. Gye*, 2 El. & Bl. 216, 118 Eng. Rep. 749 (1853); and cf. *Allen v. Flood*, [1898] A. C. 1. It is generally considered, however, that England does not today subscribe to the prima facie tort doctrine. See Forkosch, "An Analysis of the 'Prima Facie Tort' Cause of Action," 42 CORN. L. Q. 465 at 473 (1957); Hale, "Prima Facie Torts, Combination, and Non-feasance," 46 COL. L. REV. 196 at 197 (1946).

<sup>30</sup> *Plant v. Woods*, 176 Mass. 492, 57 N.E. 1011 (1900); *Moran v. Dunphy*, 177 Mass. 485, 59 N.E. 125 (1900); *Aikens v. Wisconsin*, 195 U.S. 194 (1904).

<sup>31</sup> *Aikens v. Wisconsin*, note 30 supra. The first use of the term "prima facie" in connection with the extension of tort concept was probably by Wightman, J., in *Lumley v. Gye*, note 29 supra.

<sup>32</sup> Principal case at 163; *Rager v. McCloskey*, 305 N.Y. 75, 111 N.E. (2d) 214 (1953); *Advance Music Corp. v. American Tobacco Co.*, 296 N.Y. 79, 70 N.E. (2d) 401 (1946); *Opera on Tour v. Weber*, 285 N.Y. 348, 34 N.E. (2d) 349 (1941); *Beardsley v. Kilmer*, supra note 1. Other states accepting the prima facie tort view include Massachusetts, Illinois, Iowa, Minnesota, New Jersey, and North Carolina. See Forkosch, "An Analysis of the 'Prima Facie Tort' Cause of Action," 42 CORN. L. Q. 465 at 479, 480 (1957).

<sup>33</sup> Principal case at 163.

<sup>34</sup> Principal case at 164.

deny plaintiff a cause of action in the principal case.<sup>35</sup> The prima facie tort theory generally calls upon the courts to weigh matters of policy more than traditional tort concepts might.<sup>36</sup> In so doing, the principal case illustrates how the flexible and still developing theory of prima facie tort may be limited on its frontiers by many of the same arguments that prevented recovery under the categorical or "pigeon-hole" view of tort liability.

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<sup>35</sup>In *Friedman v. Roseth Corp.*, note 12 supra, the Supreme Court for New York County refused to extend the prima facie tort theory to establish a cause of action for instituting actions on contract where the contract actions had not terminated, using basically the same reasoning it used to reject malicious prosecution and abuse of process counts.

<sup>36</sup>Forkosch, "An Analysis of the 'Prima Facie Tort' Cause of Action," 42 *CORN. L. Q.* 465 at 467 (1957).