

## THE HIGH COURT

[2013 No. 9452 P]

BETWEEN

RICHARD HANRAHAN

PLAINTIFF

- AND -

THE COMMISSIONER OF AN GARDA SÍOCHÁNA, IRELAND AND THE ATTORNEY  
GENERAL

DEFENDANTS

**JUDGMENT of Mr Justice Max Barrett delivered on 31st March, 2020.**

1. Mr Hanrahan has brought a claim against the defendants alleging various wrongs, including the tort of malicious prosecution. This judgment is concerned solely with the last-mentioned claim. It arises from a protest that took place at Bellagelilly South in County Mayo on 2 August 2011. Mr Hanrahan was pushed during the protest by Garda Browne. Taking some umbrage at this, Mr Hanrahan resolved to take down Garda Browne's shoulder epaulette number in order that he might make subsequent complaint. Because Garda Browne was moving away from him, Mr Hanrahan reached for the garda's shoulder and somehow managed to rip an epaulette from the jacket. As a result, Mr Hanrahan was subsequently charged with criminal damage to the garda's jacket. The court understands that the normal procedure, given that the jacket was to become evidence in a criminal trial, would have been to place it in an evidence bag, with the chain of custody thereafter being documented comprehensively. Counsel for the defendants indicated to the court in his submissions that the failure to do this (and failure there was) meant that the outcome of the eventual prosecution was always in jeopardy.
2. Mr Hanrahan was convicted in the District Court. The conviction was quashed on appeal when it became clear that there could be no certainty that the right jacket was tendered in evidence. In his testimony before the High Court in the within proceedings, Garda Browne was notably honest: he could not explain how he came to tender the wrong jacket; he seemed embarrassed by this fact; and it seems almost certain that the error derives from the initial failure to place the jacket in an evidence bag. Garda Browne made clear in his evidence that he bears no personal ill-will towards Mr Hanrahan; he was simply doing his duty as he saw it.
3. The law on the tort of malicious prosecution is comprehensively and helpfully addressed in McMahon and Binchy, *The Law of Torts* (4th ed., Bloomsbury Professional, 2013), at pp. 1391-97, elements of which are quoted hereafter and certain observations made by the court:

**"MALICIOUS PROSECUTION**

*[36.02] In attempting to protect individuals against being wrongfully exposed to criminal proceedings, whilst at the same time encouraging persons to bring criminals to justice, the law has faced some difficulties. If, the moment a person was acquitted, he or she could turn around and bring an action against those who prosecuted him or her, '[t]here would indeed, be an end of the criminal justice of the country...'*  
*[Kelly v. The Midland Great Western Railway of Ireland Co. (1872) IR 7 CL 8, at*

*p.16]. The courts have tried to strike a balance between these competing interests in the action for malicious prosecution”.*

Court Note: There are a number of interests which are afforded protection by the tort of malicious prosecution, viz. reputation, bodily freedom and financial interest, all of which receive direct protection under other aspects of the law of torts, e.g. defamation and false imprisonment. Thus, malicious prosecution affords/qualifies privilege to engage in conduct that might otherwise expose one to liability in defamation and/or false imprisonment. So, malicious prosecution is concerned with excess/abuse of privilege. In the within proceedings, the evidence does not point to there being, on the balance of probabilities, any such excess or abuse. In passing, the court notes that the above-quoted observation in *Kelly* seems very much an observation of a time when individual rights and freedoms were not perhaps afforded the same exalted prominence that they now properly enjoy: if an acquitted person considers herself or himself to have been maliciously prosecuted, s/he has every right to bring an action for malicious prosecution and the ultimate effect of the bringing of such actions, if and when successful, should be an overall strengthening of the rule of law, notably in the curbing of any (if any) State excesses/abuses presenting in this regard, as opposed to, e.g., “*an end of the criminal justice of the country*”.

#### **“Ingredients of the Tort**

*[36.03] The tort consists of the institution of unsuccessful criminal proceedings by the defendant, maliciously and without reasonable and probable cause, as a result of which the plaintiff has suffered damage.*

#### **(a) Institution of proceedings**

*[36.04] The defendant must have instituted the proceedings, that is to say, he or she must have been ‘actively instrumental in putting the law in force’...*

Court Note: This limb is clearly satisfied in the within proceedings.

#### **(b) Proceedings must not have been successful**

*[36.05] What the plaintiff requires in his or her action is not a judicial determination of the plaintiff’s innocence but merely the absence of any judicial determination of his or her guilt...*

Court Note: This limb is clearly satisfied in the within proceedings. The initial conviction was quashed on appeal.

#### **(c) Lack of reasonable and probable cause**

*[36.06] The plaintiff must establish that the proceedings were instituted without reasonable and probable cause – that the defendant lacked a reasonable cause for initiating the prosecution. Moreover, he or she must prove this to the satisfaction of the judge rather than the jury...*

Court Note: The lack of reasonable and probable cause offers evidence on which one could find malice to present; the presence of malice need not yield the

inference that there is a lack of reasonable and probable cause, e.g., a garda could from malicious motive take up a prosecution for real guilt and yet the objective "reasonable and probable cause" (as defined in *Dullaghan v. Hillen* [1957] Ir Jur 10, at p. 17, subject to the caveat expressed by McCarthy J. in *McIntyre v. Lewis* [1991] 1 IR 121, at p. 136) could nonetheless present. Whenever it is found that there is reasonable and probable cause, that of itself constitutes a complete defence to the tort of malicious prosecution, regardless of the defendant's motive for instituting the proceedings, even if the defendant was actuated by malice. In the within proceedings, the evidence before the court does not point to a lack of reasonable and probable cause: it points in the contrary direction, *i.e.* to an institution of proceedings *with* reasonable and probable cause. That this is so (and it is so) has the result that the tort of malicious prosecution cannot present.

**(d) Malice**

[36.14] *As well as proving absence of reasonable and probable cause the plaintiff must prove malice on the part of the defendant. The courts have evinced some difficulty in defining malice with any degree of precision, which suggests that there are inherent difficulties in investigating the motives of a prosecutor. His or her motives may be mixed, a desire to bring the offender to justice mingling with anger and the thirst for revenge.*

[36.15] *In the Circuit Court decision in Dullaghan v. Hillen [[1957] Ir Jur 10, at p. 16] Judge Fawsitt stated:*

*'The word "maliciously" implies the doing of that which a person has no legal right to do and the doing of it in order to secure some object by means which are improper. An evil motive is required to complete an actionable wrong'*

[36.16] *The issue of malice is one for the jury subject to two provisos: the court must decide whether any particular motive is a proper or improper purpose for the proceeding in question, and it determines whether there is reasonable evidence of malice to go to the jury.*

Court Note: There is no evidence of malice before the court, none at all. All that presents is a prosecution that was not run as well as it could have been, but without any evidence of "evil motive".

**(e) Damage**

[36.17] *The plaintiff must prove some damage in order to succeed in the action.*

Court Note: It is difficult to see how a plaintiff who otherwise establishes the various elements of malicious prosecution could fail to establish that actionable damage presented: if all the other ingredients of the tort present, it seems almost inevitable that actionable damage will have occurred, albeit that it remains the case that the plaintiff must prove that damage to succeed. Here, Mr Hanrahan, had he succeeded in establishing the other elements of the tort to present (and he did not so succeed), would not have failed on this limb.

4. It follows from the foregoing that Mr Hanrahan's action for malicious prosecution must fail.