

ST. VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

CIVIL SUIT NO. 281 of 1995

BETWEEN

SYLVANUS LESLIE

Plaintiff

AND

RYAN OLLIVIERRE

Defendant

Appearances:

Mr. Arthur Williams for the Plaintiff

Mr. Graham Bollers and Mr. Birch-Smith for the Defendant.

2001:December 11

DECISION

MASTER CHARMAINE PEMBERTON

- [1] This action was commenced by what was then called a specially endorsed writ of summons filed on 14th July, 1995, in which the Plaintiff claimed special damages in the sum of \$17, 790.80, general damages, such further or other relief and costs. The statement of claim was amended by leave of the court on 4th October, 1999. Particulars of Malice were filed on 8th November, 1999.

- [2] The facts of this matter as gleaned from the pleadings are as follows. The Plaintiff and his infant son traveled to St. Vincent and the Grenadines from Canada during the month of October, 1994. As he was about to board a plane for his departure, he was prevented from leaving as a result of a civil action filed against him by the Defendant. It is instructive to note at this point that the Plaintiff neglected to plead the circumstances surrounding how he was prevented from leaving the island.
- [3] The statement of claim went on to state that the civil action was heard and dismissed in the Kingstown Magistrate's Court. The amended statement of claim states that the proceedings were instituted maliciously by the Defendant and that there was no reasonable and probable cause for the institution of the proceedings. The Plaintiff then pleaded that the action of the defendant deprived him of his liberty and he suffered loss and damage. Particulars of Malice were supplied on Order from the Court.
- [4] The matter came up for Case Management Conference on 19th November, 2001 and during his submissions Counsel for the Plaintiff stated from the Bar table that his client's cause of action was based on false imprisonment and malicious prosecution.
- [5] This prompted the Court to pose the following preliminary issue of **whether based on the pleadings, there is a valid basis for this claim in the torts of malicious prosecution and/or false imprisonment**. Written submissions were presented for the court's consideration.
- [6] The Plaintiff's written submissions did not deal with the substantive principles of malicious prosecution, but stated that under the head of this tort lies an action "properly" known as **"malicious abuse of civil process"**. The Defendant's submissions dealt with the torts of malicious prosecution and false imprisonment as requested and Counsel for the Defendant submitted orally on the cause of action malicious abuse of civil process.
- [7] It is the law that in order to succeed on a claim for malicious prosecution, four elements must be shown and proved. They can be listed shortly as:

1. That the plaintiff was prosecuted by the defendant, that is that criminal process was set in motion against the plaintiff by the defendant;
2. That the prosecution was determined in favour of the plaintiff;
3. That the prosecution was brought without reasonable and probable cause; and
4. That the prosecution was malicious.

[8] It is an accepted fact that the proceedings brought by the defendant against the plaintiff in the Magistrate's Court in Kingstown were civil proceedings. In light of that fact, it is unnecessary at this time to say anything other than a claim in the form as presented by the plaintiff's pleadings does not satisfy the requirements for the tort of malicious prosecution.

[9] The Court was asked to consider whether the pleadings could sustain a claim for malicious abuse of civil process. In support of the contention that the pleadings supported such a claim, Counsel for the Plaintiff provided learning from **Clerk and Lindsell on Torts** 16th ed. and **Halsbury's Laws of England** 3rd ed. Vol. 25. Clerk and Lindsell speaks of a tort "abuse of civil process" whilst Halsbury's refers to "malicious abuse of civil proceedings".. When each is studied, it is found that they amount to the same cause of action.

[10] In Clerk and Linsell at paragraph 19 – 40, the ingredients of the tort are set out as:

- malice and absence of reasonable and probable cause; and
- that the proceedings came to a due legal end

and as distinct from malicious prosecution where what is necessary is the setting of the criminal law in motion, in this particular tort, civil process, **"the remedy is only for some damage to person or property, as where a man is maliciously arrested when about to go abroad and required to give security..."**

[11] In **HALSBURY'S LAWS OF ENGLAND (op. cit.)** as stated above, the tort is styled "malicious abuse of civil proceedings". The learned authors state that the remedy is analogous to an action for malicious prosecution and such an action can lie "if those proceedings are undertaken maliciously and without reasonable and probable cause". At

paragraph 718 the learned authors outline the matters which the Plaintiff must normally prove, and these are:

- malice
- absence of reasonable and probable cause
- that the entire proceedings have been terminated in his favour
- proof of damage so that the "extra costs (were) incurred in resisting such proceedings, beyond the party and party costs allowed by the court, is not such damage as will support an action.

Paragraph 721 goes on to lay down the general rule that "the bringing of an ordinary **civil** action, although it is brought maliciously and without reasonable and probable cause will not support an action by the person sued against the plaintiff for maliciously bringing the first action.

[12] This issue begged for an in depth analysis of the plaintiff's pleadings to see if the conditions were ripe for considering whether there was a cause of action disclosed on the pleadings. Before embarking on this course however, the court invited submissions from Counsel for the defendant. Counsel referred the court to a later edition of the text **Clerk and Lindsell on Torts** 17th ed. in which the authors treated the subject more guardedly. There, the case **METALL UND ROHSTOFF v DONALDSON LUFKIN AND JENRETTE INC. [1990] 1 Q. B. 391** was cited as authority for the proposition that the status of this tort was at best "unclear".

[13] Further, Counsel for the defendant pointed the court to **GREGORY v PORTSMOUTH CITY COUNCIL [1997] EWCA Civ. 2645 (5/11/97)**. This case dealt in depth with the tort of malicious abuse of civil proceedings. The appellant was the subject of disciplinary proceedings brought against him by his employer, the defendant. He alleged that those proceedings, which were determined in his favour, were brought maliciously and without reasonable and probable cause. As a result, he suffered a grave loss of reputation as well

as distress, special damage of £21,500.00, comprising costs and expenses incurred in defending himself against the allegations.

- [14] In those circumstances, the issue which was posed for the court's determination was similar to the one posed by this court, that is, do the facts as pleaded in this case give rise to a course of action in malicious abuse of civil proceedings. At paragraph 53, Lord Justice Simon Brown quoted the following passage from Supreme Court of Victoria in **LITTLE v LAW INSTITUTE OF VICTORIA [1990] VR 257**:

It is settled law that no action will lie for malicious abuse of civil proceedings unless the plaintiff has suffered damage of a form within the three heads of damage which were laid down by Holt C.J. in Savile v Roberts ...Brett M.R. in the [Quartz Hill case] in connection with the Saville v Roberts rule said ...although civil proceedings are taken falsely and maliciously without reasonable or probable cause, nevertheless no action will lie in respect of them, unless they produce some damage of which the law will take notice...

The learned Judge, at paragraph 54 sets out the three forms of damage which would found an action, and they are:

- The damage to a man's fame, as if the matter whereof he is accused be scandalous;
- Where a man is put in danger to lose his life, limb or liberty;
- Damage to a man's property as where he is forced to expend his money in necessary charges to acquit himself of the crime of which he is accused

It may be instructive to quote the following dicta from Bowen LJ at pages 689-690, which encapsulates the issue:

In no action, at all events in none of the ordinary kind, not even in

those based upon fraud where there are scandalous allegations in the pleadings, is damage to a man's fair fame the necessary and natural consequence of bringing the action. Incidentally matters connected with the action, such as the publication of the proceedings in the action, may do a man an injury; **but the bringing of the action is of itself no injury to him. When the action is tried in public, his fair fame will be cleared, if it deserves to be cleared: if the action is not tried, his fair fame cannot be assailed in any way by the bringing of the action.** Apply the second head of damage, namely those injuries which are done to the person: **the bringing of no action under our present law and under the ordinary rules of procedure will involve as a necessary and natural consequence damage to the person.**

The third sort of damage, the existence of which will support such an action as this, is damage to a man's property.

The same observation applies to this third head of damage.

The bringing of an ordinary action does not as a natural or necessary consequence involve any injury to a man's property, for this reason, that the only costs which the Law recognizes, and for which it will compensate him, are the costs properly incurred in the action itself.

(Emphasis mine.)

The court went on to state that in a justified case, the categories may be extended, and did extend the tort to cover the case at hand.

- [15] The question for consideration therefore is this such a case which can justify the extension of the category? The court found as a matter of fact inter alia, that the Tribunal which heard the disciplinary proceedings in **GREGORY'S case** had no power to hear the allegations against the plaintiff. Therefore, the Council by placing the matter before the Tribunal had deprived the plaintiff of an opportunity for a fair hearing. In this case, can the

plaintiff rely on any factor such as this to support the cause of action as advanced by Counsel? I think that this must be answered in the negative. The Magistrate's Court had full competence to hear the case brought by the defendant against the plaintiff. In any event, that factual situation is not disclosed on the pleadings and the court takes the view that parties are bound by their pleadings.

[16] Counsel for the Defendant reminded the court of the dicta in the **METALL** case that subsequent proceedings cannot be used to recover costs not awarded in previous proceedings. Thus the amounts claimed as special damage cannot satisfy the conditions of the tort of malicious abuse of civil process. I wish to associate myself with that view.

[17] The court therefore finds that the Writ of Summons and subsequent pleadings do not disclose a cause of action against the defendant either under malicious prosecution or malicious abuse of civil process.

[18] Pursuant to Part 26 of **THE CIVIL PROCEDURE RULES, 2000** the court orders and directs as follows:

- The action filed on 14th July, 1995 be and is hereby dismissed as disclosing no cause of action against the defendant;
- Costs to be paid by the plaintiff to the defendant to be agreed or in the alternative to be determined in accordance with Part 65 Appendix C (2) of the **CIVIL PROCEDURE RULES 2000**.

The Court gratefully acknowledges the assistance of Counsel.


Charmaine Pemberton
Master.