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Torts - Malicious Prosecution - The Requirement of Special Injury

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by legal restrictions. What it does mean is that in the absence of conduct so unreasonable as to be almost entirely without any conceivable justification, an irate debtor will find expenditure of funds in satisfaction of his obligation to be a more rewarding investment than prosecution of a law suit against his overzealous creditor.

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TORTS—MALICIOUS PROSECUTION—THE REQUIREMENT OF SPECIAL INJURY.—The action of malicious prosecution is a specific tort, classified by Cooley as a wrong affecting personal security.[1] A cause of action for malicious prosecution is based on breach of that legal duty which every man owes to another to refrain from instituting proceedings when malice is present and he has no probable cause to justify his action. It has been stated that such a prosecution is one that is begun in malice, without probable cause to believe it can succeed, and which finally ends in failure.[2] The action of malicious prosecution has been referred to as one not favored by the law[3] but it is agreed that when the requisite elements exist the action will lie.

The elements of an action for malicious prosecution are: (1) the commencement or continuance of an original criminal or civil judicial proceeding by the present defendant against the present plaintiff; (2) its bona fide termination in favor of the present plaintiff; (3) the absence of probable cause for such proceeding; (4) the presence of malice; and, (5) damage resulting to the present plaintiff.[4] The burden is upon the plaintiff to show the concurrent existance of these requirements.

The question of the quantum of damage the plaintiff must suffer when the action is founded on the malicious prosecution of a civil suit[5] is a perplexing one. One view is that an action will not lie unless there has been an arrest of the person, seizure of property or other special injury which would not necessarily result in all suits prosecuted to recover for like causes of action.[6]

1. Cooley, Torts 381 (4th Ed. 1932).
2. *See* Burt v. Smith, 181 N. Y. 1, 73 N.E. 495, 496 (1905); Kunz v. Johnson, 74 S. D. 577, 57 N.W.2d 116, 119 (1953).
3. *See, e.g.*, Ball v. Rewles, 93 Cal. 222, 28 Pac. 937, 938 (1892); Alexander v. Petty, 108 A.2d 575, 577 (Del. 1954); Davis v. Brady, 218 Ky. 384, 291 S.W. 412 (1927); North Point Construction Co. v. Sagner, 185 Md. 200, 44 A.2d 441, 444 (1945).
4. *See* Turner v. J. Black & Sons, 242 Ala. 127, 5 So.2d 93, 94 (1941); Kunz v. Johnson, *supra* note 2 at 118.
5. The discussion of damage herein is confined to damage arising from the prosecution of a civil suit. The conflict concerning quantum of damage is not present when the suit complained of was a criminal action.
6. *See, e.g.*, Counihan v. Ferrell, 89 Ga. 795, 81 S.E.2d 215 (1954); Schwartz v. Schwartz, 285 Ill. App. 560, 2 N.E.2d 751 (1936), *affirmed*, 366 Ill. 247, 8 N.E.2d

The case of *Aalfs v. Aalfs*,[7] a suit for malicious prosecution, arose out of an action for recission of a contract of sale of an interest in a business. Plaintiff alleged damage consisting of impaired credit, a clouded title, impaired saleability of property, damaged reputation, humiliation and expenses of defense. The court held that these were incidents which would attach to any suit for recission of a contract of sale, and that such elements of damage did not constitute the requisite special injury to maintain the action. Courts adopting this view contend that such damages are but the uncompensated burdens of litigation for which the action of malicious prosecution will not lie.[8] A right of action has been found to exist where a partner was deprived of his property due to the appointment of a receiver over partnership property;[9] where assets were tied up by the malicious institution of bankruptcy proceedings;[10] where a party was arrested and held to bail in civil process;[11] and where there were unfounded proceedings in forcible entry and detainer.[12] Such incidents of damage are thought to constitute special injury.

The opposite view, taken by a seemingly equal number of courts, is that an action will lie for the institution of a civil action maliciously brought without probable cause even though there has been no interference with the person or property of the defendant in the original suit and no special injury is shown.[13] The rationale behind this theory is that one who maliciously sets in motion the formidable machinery of the courts to the oppression and harassment of his neighbor, abuses the process of the law intended for parties who act in good faith. His offense is of the same character as that of one who accompanies such an action with the seizure of the person or the property of the defendant, but of a lesser degree.[14] These courts advance the common law maxim that for every wrong the law furnishes a remedy, and argue

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668 (1937); Smith v. Michigan Buggy Co., 175 Ill. 619, 51 N.E. 569 (1898); Wetmore v. Mellinger, 64 Iowa 741, 18 N.W. 870 (1884); Cabakov v. Thatcher, 27 N. J. Super. 404, 99 A.2d 548 (1953); Johnson v. Walker Smith Co., 47 N.M. 310, 142 P.2d 546 (1943).

7. 66 N.W.2d 121 (Iowa 1954).
8. Johnson v. Walker Smith Co., *supra* note 6.
9. Luby v. Bennet, 111 Wis. 613, 87 N.W. 804 (1901).
10. Norin v. Scheldt Mfg. Co., 220 Ill. 521, 130 N.E. 791 (1921).
11. Cardival v. Smith, 109 Mass, 158, 12 Am. Rep. 682 (1872).
12. Pope v. Pollock, 46 Ohio St. 367, 21 N.E. 356 (1889).
13. Turner v. J. Black & Sons, 242 Ala. 127, 5 So.2d 93 (1941); Peerson v. Ashcraft Cotton Mills, 201 Ala. 348, 78 So. 204 (1918); Ackerman v. Kaufman, 41 Ariz. 110, 15 P.2d 966 (1932); Easton v. Bank of Stockton 66 Cal. 123, 4 Pac. 1106 (1884); McCormick Machinery Co. v. William, 63 Neb. 391, 88 N.W. 497 (1901); Kolka v. Jones, 6 N. D. 461, 71 N.W. 558 (1897).
14. *See* Lipscomb v. Shofner, 96 Tenn. 112, 33 S.W. 818, 819 (1896).

that to refuse the action in the absence of special damage would be to violate this well recognized principle. If an individual has prostituted judicial process to gratify personal malice, the courts should afford the party wronged redress for the damage sustained by him.[15]

The courts that require special injury reason that there should be no restraint upon the original suitor through fear of liability which may arise from failure in his action. He should not ordinarily be subject to a suit for bringing an action, and be required to defend against the charge of malice and the want of probable cause.[16] Advocates of the special injury criterion maintain that in a civil action the measure of damages of a successful defendant is statutory costs however inadequate they may be.[17] These courts claim support for their position from the fact that by the *Statute of Marlbridge,*[18] the English courts abolished the cause of action for damages for the malicious prosecution of civil suit.

In the leading North Dakota case of *Kolka v. Jones,*[19] the judge had this to say in commenting on the arguments of courts in this country claiming support from the English rule:

> "Ignoring the differences between the phraseology and manifest purpose of the statutes regulating costs in this country, and the letter and obvious spirit of the Statute of Marlbridge, the assertion is not infrequently made that costs afford full indemnity, though the suit be instituted without probable cause, and prosecuted in a spirit of malice. To our minds this argument does not rise to the dignity of sophistry. The claim that the payment of statutory costs will in all cases or even in any case make amends for the damage inflicted by the malicious prosecution of a civil suit is palpably false . . . Subsequent legislation in England shows that the Statute of Marlbridge was enacted, not as a general law regulating costs, but to afford a summary remedy to the successful defendant in place of the existing cause of action to recover his damages on account of

15. *See* Ackerman v. Kaufman, 41 Ariz. 110, 15 P.2d 966, 967 (1932); Closson v. Staples, 42 Vt. 209, 1 Am. Rep. 316 (1869).

16. *See, e.g.,* Smith v. Michigan Buggy Co., 175 Ill. 619, 51 N.W. 569, 571 (1898); Aalfs v. Aalfs, 66 N.W.2d 121, 123 (Iowa 1954).

17. *See* Muldoon v. Rickey, 103 Pa. St. 110 (1883). *Cf.* Smith v. Michigan Buggy Co., note 16 *supra* at 571, "It is urged that the costs which are awarded to the successful defendant in a civil suit, malicious in its character, and brought against him without probable cause, are inadequate compensation for the injury which he suffers. But the question of the amount of costs which are to be allowed the successful party is a question to be determined by the legislature, and not by the courts."

18. *See* Myre v. Hessey, 242 Wis. 638, 9 N.W.2d 106 (1943) at 110: "The only reference to malicious prosecution that we find in the statute is in Par. II of c. VI thereof, pp. 60, Vol. 1, English Stats. at Large, where the English translation given reads as follows: 'And if any chief lords do maliciously implead such feofees, faining his case, namely, where the feoffments were made lawfully and in good faith, then the feofees shall have their damages awarded and their costs which they have sustained by occasion of the foresaid plea, and the plaintiffs shall be grievously punished by americiament.' "

19. 6 N. D. 461, 71 N.W. 558 (1897).

> the malicious prosecution of a civil action against him . . . The act of the British parliment which was held to have taken away the existing cause of action for damages for the malicious prosecution of a civil suit was an act which in terms was limited to cases of that kind; and when it is remembered that it gave the defendant not merely costs, but also his damages, it is obvious that the statute was framed to give the successful defendant his remedy in the very case in which he was maliciously prosecuted, instead of compelling him to seek redress in an independent action. The Statute of Marlbridge was limited to civil actions maliciously prosecuted, and gave the defendant the damages he had suffered because of such perversion of the forms and remedies of the law, whereas the statutes regulating costs on this side of the water are not restricted to actions in which the motive promoting the litigation was unjustifiable, but are intended to apply to all cases, to the end that some indemnity to the other suitor may be afforded in every case, independently of the state of mind of the person bringing the suit, on the question whether he had reasonable ground for believing that the action could be maintained; leaving the remedy for a perversion of legal machinery to the common law maxim that for every wrong the law will give legal redress."[20]

Another argument advanced in favor of the requirement of special damage is that the application of the reasoning behind the privilege extending to defamatory matter contained in pleadings leads to the conclusion that the instituting of civil proceedings should be similarly privileged unless special injury results.[21] The dissenting opinion in the very case in which this argument was advanced, countered with these persuasive words: ". . . [B]ecause one is privileged to libel another in an action brought to secure adjudication of a claim he should not be privileged to maliciously injure another when the entire action is maliciously brought for a purpose other than securing adjudication of the stated claim."[22]

A more common contention of courts requiring special injury is that to permit the action would be to promote litigation and encourage successive suits, thus clogging the channels of litigation.[23] The theory is that a successful defendant would be tempted to bring another suit to recover for the damages resulting from his prosecution of the first suit which he had won.[24] Thus it is said if A sues B and loses, he might be subjected to a return suit based

20. *Id.* at 463, 71 N.W. at 560. See also Ackerman v. Kaufman, 41 Ariz. 110, 15 P.2d 966 (1932).
21. *See* Aalfs v. Aalfs, 66 N.W.2d 121, 123 (Iowa 1954).
22. *Id.* at 128.
23. *See, e.g.*, Wetmore v. Mellinger, 64 Iowa 741, 18 N.W. 870, 871 (1884); Abbot v. Thorne, 34 Wash. 692, 76 Pac. 302, 303 (1904); Myhre v. Hessey, 242 Wis. 638, 9 N.W.2d 106, 110 (1943).
24. *See* Smith v. Michigan Buggy Co., 175 Ill. 619, 51 N.E. 569, 571 (1898).

on alleged malice in bringing the first action. But if B should fail in his suit for malicious prosecution, A might then bring his own action in turn, alleging malice and want of probable cause in B's suit, thus producing an endless chain of actions.[25]

The proponents of the contrary view point out that the fears of a multiplicity of suits have not been realized in those jurisdictions allowing the action in the absence of special injury.[26] Such fears have little foundation, as the party who has sustained the burden of one action will be unlikely to assume so quickly the expense of a second suit unless he is reasonable assured of success.[27]

The courts adopting the requirement of special injury to maintain an action for malicious prosecution based on a civil suit construe the bringing of two or more successive suits on the same alleged cause of action to be special injury for which the action will lie.[28] Courts construing successive suits to be special injury for which the action will lie point out that the right to litigate is not the right to become a nuisance.[29] Again it would seem that the offense is of the same character but only lesser in degree. In some jurisdictions the courts partially subvert the requirement of special injury by liberally construing that requirement.[30] For example, it has been held that the prosecution of an appeal as part of the maliciously insituted action gave rise to special injury.[31]

The two widely divergent views on the requirement of special injury point out the need of striking some sort of balance between the prevention of unconscionable suits and permitting honest assertion of supposed rights.

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25. *See* Aalfs v. Aalfs, *supra* note 21 at 124.
26. *See* Kolka v. Jones, 6 N. D. 461, 71 N.W. 558, 561 (1897).
27. *Ibid.*
28. *See* Soffos v. Eaton, 152 F.2d 682 (D.C. Cir. 1945); Shedd v. Patterson, 302 Ill. 355, 134 N.E. 705 (1922).
29. *See* Melvin v. Pence, 130 F.2d 423, 426 (D.C. Cir. 1942).
30. *See* Peterson v. Peregoy & Co., 180 Iowa 325, 163 N.W. 224, 226 (1917); Holt v. Boyle Bros. Inc., 217 F.2d 16 (D.C. Cir. 1954).
31. *See* Soffos v. Eaton, *supra* note 28.