Case Note

Determining Where the Truth Lies: Institutional Prosecutors and the Tort of Malicious Prosecution

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Abstract

The High Court's near unanimous decision in *A v New South Wales*[1] constituted an attempt to develop a modern judicial approach to the tort of malicious prosecution. Despite the regular pleading of the tort in civil claims, Australian decisions are characterised by their general neglect in addressing the requisite belief needed by institutional and bureaucratic prosecutors in commencing proceedings. In an era where prosecutions are set in train by large bureaucratic agencies such as the NSW Police Service, rather than private individuals, the utility of a tort whose framework was designed prior to the establishment of these agencies, required fundamental reassessment. Notwithstanding the High Court's ultimately unconvincing attempts to reconcile conflicting authority as they related to the third and fourth elements of the tort, this article suggests that the court's final determinations in *A v New South Wales* provide a subtle, but necessary departure from previous authority.

1. Introduction

In attempting to safeguard the judicial process from misuse by litigants, the tort of malicious prosecution has historically provided those who are the subject of groundless and unjustified proceedings a means of redress against prosecutors. While the impetus for the development of the tort has largely arisen as a result of private litigation, the recent High Court of Australian decision in *A v New South Wales* reflects an attempt by the court to clarify the continuing function and elements of the tort in the context of modern arrangements for the prosecution of crime. As a result of the absence of organised police forces and offices of public prosecution at the time the framework of the tort was first developed, Australian and English decisions are characterised by their general neglect in addressing the requisite belief needed by institutional and bureaucratic prosecutors in commencing proceedings.

For a plaintiff to succeed in an action for malicious prosecution it has consistently been held that the plaintiff must establish:

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1 *A v New South Wales* (2007) 233 ALR 584.

1. that proceedings of the kind to which the tort applies (generally, as in this case, criminal proceedings) were initiated against the plaintiff by the defendant;
2. that the proceedings terminated in favour of the plaintiff;
3. that the defendant, in initiating or maintaining the proceedings acted maliciously; and
4. that the defendant acted without reasonable and probable cause.[2]

While the four elements of the tort of malicious prosecution were merely restated by the High Court, the appeal raised in the case concerned the third and fourth elements. Specifically, the court was asked to determine the correct test to be applied in assessing whether the defendant acted maliciously and in proving that the defendant's conduct was without reasonable and probable cause. Despite confirming that each of these elements serve a different purpose and remain as separate elements which a plaintiff must prove in order to succeed in establishing the tort, the efforts of the majority to reconcile earlier conflicting authority has, perhaps, undermined the near unanimity of the decision in *A v New South Wales*. In particular, the court's conclusion that there is no disharmony between the expressions of the applicable principles as relating to the absence of reasonable and probable cause by Jordan CJ in *Mitchell v John Heine and Son Ltd*[3] and Dixon J in *Sharp v Biggs*[4] may do little to elucidate the level of belief required by prosecutors in bringing a case to trial.

2. Background[5]

A, a New South Wales Police Service employee, was charged in March 2001 with two offences of homosexual intercourse with his eight year old stepson, D, and his nine year old stepson, C. Following initial interviews with C and D in October 2000, where allegations of anal rape were put forward by the boys, both C and D were placed in foster care. The second respondent, Detective Constable Floros, was a member of a Joint Investigation Team within the Child Protection Enforcement Agency who was given the task of interviewing C and D and reviewing all material obtained throughout the investigation. It was during the first interviews in October 2000 where C initially denied that he had been a victim of any sexual assault. Notwithstanding the uncertainty surrounding C's allegations, the hearing of committal proceedings commenced at the Children's Court on 23 August 2001. On that day each of C and D testified that the appellant, A, had engaged in an act of anal intercourse with him. However, in cross-examination C admitted that his evidence in chief was false and that he had told lies to assist his brother. After hearing argument, the magistrate discharged the appellant on the charges concerning both C and D, concluding that on the evidence it would not be likely that a jury would convict the appellant.

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2 Edward Bullen & Stephen Martin Leake, *Precedents of Pleadings in Actions in the Superior Courts of Common Law* (3rd ed, 1868) at 350–356.

3 *Mitchell v John Heine and Son Ltd* (1938) 38 SR (NSW) 466 ('*Mitchell v John Heine*').

4 *Sharp v Biggs* (1932) 48 CLR 81 ('*Sharp v Biggs*').

5 For a detailed description of the facts, refer to *A v New South Wales* (2007) 233 ALR 584 at 588–589 (Gleeson CJ, Gummow, Kirby, Heydon & Crennan JJ).

3. Decisional History

Subsequent to the appellant's acquittal, the appellant commenced proceedings for malicious prosecution, unlawful arrest, unlawful imprisonment and abuse of process in the District Court of New South Wales. During the trial Cooper DCJ heard evidence that the second respondent, Detective Floros, had told A's solicitor that he felt sorry for A, but was under pressure to charge A as he was an employee of the Police Service.[6] Evidence was also heard that Detective Floros had a second conversation with A's solicitor during the committal proceedings, repeating that he had felt under pressure to charge A because he was an employee of the Police Service and that if it had been up to him he would not have charged the appellant.[7] Cooper DCJ dismissed all causes of action apart from that of malicious prosecution in relation to the charge concerning C, finding that Detective Floros acted maliciously by charging A for the improper purpose of succumbing to pressure from the Child Protection Enforcement Agency.[8]

A appealed to the New South Wales Court of Appeal (Mason P, Beazley JA and Pearlman AJA) against the dismissal of his claim in respect of the charge involving D, and the rejection of his other claim, of abuse of process. The respondents cross-appealed against the judgment in A's favour in respect of the charge involving C. The central issue in the appeal was the requisite level of belief required by a prosecutor in cases alleging malicious prosecution. The principal judgment of Beazley JA concluded that Cooper DCJ erred in following the test established by Jordan CJ in *Mitchell v John Heine,* preferring to apply the principles stated by Dixon J in *Sharp v Biggs* and *Commonwealth Life Assurance Society Ltd v Brain*.[9] The Court of Appeal reversed the trial judge's finding on malice and on the issue of reasonable and probable cause, holding that despite weaknesses in the case relating to C, a reasonable prosecutor 'exercising "prudence and judgment" would have been justified in laying the charge in respect of C'.[10] On the issue of reasonable and probable cause in relation to the charge concerning D, Beazley JA agreed with the trial judge's finding that the absence of reasonable and probable cause had not been established by A.

In light of the Court of Appeal's recognition of the existence of conflicting authority in relation to the third and fourth elements of the tort of malicious prosecution, the proceedings before the High Court provided an opportunity to reconsider these elements and their significance in respect of modern arrangements for the prosecution of crime.

6 *A v New South Wales* (2007) 233 ALR 584 at 590 (Gleeson CJ, Gummow, Kirby, Hayne, Heydon & Crennan JJ).

7 Id at 591.

8 Ibid.

9 *Commonwealth Life Assurance Society Ltd v Brain* (1935) 53 CLR 343 ('*Brain*').

10 *A v New South Wales* [2005] NSWCA 292 at 171–172 (Beazley JA).

4. Two Distinct Requirements — 'Malice' and 'Absence of Reasonable and Probable Cause'

Prior to their review of the applicable tests in determining both the third and fourth elements of the tort, the High Court unambiguously rejected any historical arguments advocating the removal of the requirement of malice. Such arguments were often premised upon a conviction in the sufficiency of solely proving that the defendant instituted the prosecution against the plaintiff either without honestly believing the plaintiff to be guilty, or without having a reasonable ground for believing the plaintiff to be guilty.[11] However, in the principal judgment of Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ it was contended that no court had embraced these views as they were expressed before the resolution about the significance to be given in a civil action to proof of an intention to injure another.[12]

The court's rejection of these arguments highlights the important role that each element plays in successfully bringing an action for malicious prosecution. Thus, while those who have favoured discarding the requirement of malice have relied only on the reasonableness of setting a prosecution in train, the High Court has affirmed that the action requires proof of two distinct elements, one positive (malice) and the other negative (an absence of reasonable and probable cause). In this regard, malice is described by the court as 'acting for purposes other than a proper purpose of instituting criminal proceedings', and as a result a conclusion about the prosecutor's purpose or motive would not render irrelevant the court's inquiries about what the prosecutor did make, or should have made, of the material available when deciding whether to initiate or maintain the prosecution.[13]

As a matter of illustration the court explained:

> Even if a prosecutor is shown to have initiated or maintained a prosecution maliciously (for example, because of animus towards the person accused) and the prosecution fails, an action for malicious prosecution should not lie where the material before the prosecutor at the time of initiating or maintaining the charge both persuaded the prosecutor that laying a charge was proper, and would have been objectively assessed as warranting the laying of a charge.[14]

Critically, references to the material in the possession of the prosecutor at the time the prosecution was commenced or maintained, necessarily imports a temporal dimension into a court's consideration of the prosecutor's actual state of belief. In coming to a conclusion regarding the absence of reasonable and probable cause, attention must, according to the court, only be directed to what material was available when the prosecution was instigated or maintained, not to material that may have arisen or come to light after the decision had been made. This temporal

11 *A v New South Wales* (2007) 233 ALR 584 at 601 (Gleeson CJ, Gummow, Kirby, Heydon & Crennan JJ).

12 Ibid.

13 Ibid.

14 Id at 601–602.

limitation upon a plaintiff's actions prohibits the use of extraneous materials that may unfairly distort the actual state of affairs as they existed at the time of the prosecutor's decision — a state of affairs fundamental to the proof of both the third and fourth elements of the tort.

5. Proceedings Before the New South Wales Court of Appeal

Although the decision of Beazley JA of the New South Wales Court of Appeal was ultimately set aside by the High Court, her Honour's judgment, with Mason P and Pearlman AJA concurring, provides a detailed and valuable analysis of the line of conflicting authorities as they relate to both the requirement of malice and that of the absence of reasonable and probable cause. It is, however, in the Court of Appeal's conclusions as to the correct principles regarding the absence of reasonable and probable cause where the greatest divergence with the High Court's decision emerges. Drawing heavily on the extra-judicial writings of Ipp JA,[15] the decision of Beazley JA runs counter to the final determination of the High Court that there is no disharmony between the test enunciated by Jordan CJ and that propounded by Dixon J.

While the trial judge determined A's claim for malicious prosecution on the basis of the principles stated by Jordan CJ in *Mitchell v John Heine*, Beazley JA ultimately preferred the test of Dixon J first stated in *Sharp v Biggs* and later repeated in *Brain.* In *Mitchell v John Heine* Jordan CJ stated:

> In order that one person may have reasonable and probable cause for prosecuting another for an offence, it is necessary that the following conditions should exist: (1) The prosecutor must believe that the accused is probably guilty of the offence. (2) This belief must be founded upon information in the possession of the prosecutor pointing to such guilt, not upon mere imagination or surmise. (3) The information, whether it consists of things observed by the prosecutor himself, or things told to him by others, must be believed by him to be true. (4) This belief must be based on reasonable grounds. (5) The information possessed by the prosecutor and reasonably believed by him to be true, must be such as would justify a man of ordinary prudence and caution in believing that the accused is probably guilty.[16]

Requiring that a prosecutor believe in the guilt of the accused prior to bringing a charge, Beazley JA viewed this formulation as posing the test for prosecutors too highly and in doing so giving rise to a number of problems.[17] Instead, the judgment of Dixon J in *Sharp v Biggs*, decided six years earlier by the High Court, was preferred by the Court of Appeal due to its strong judicial endorsement. In that case Dixon J decided that 'reasonable and probable cause *does not exist* if the prosecutor does not believe that the probability of the accused's guilt is such that

15 See David Ipp, 'Must a Prosecutor Believe that the Accused is Guilty? Or, was Sir Frederick Jordan Being Recalcitrant?' (2005) 79 *Australian Law Journal* 233.

16 *Mitchell v John Heine & Son Ltd* (1938) 38 SR (NSW) 466 at 469 (Jordan CJ).

17 *A v State of New South Wales* [2005] NSWCA 292 at 109 (Beazley JA).

upon general grounds of justice a charge against him is warranted.'[18] [Emphasis added.] This test, unlike that of Jordan CJ's, does not impute a need for a positive belief in the guilt of the accused. Rather, the test places a lower threshold on prosecutors in setting proceedings in train, thus possibly avoiding unwarranted timorousness or excessive zealousness on the part of a prosecutor in deciding whether to lay a charge.[19] Notably, Dixon J reaffirmed his formulation of the relevant test in *Brain*,[20] repeating his statement of the principles in *Sharp v Biggs.* It has been observed that the resolution of the issues by Evatt, Starke and McTiernan JJ in *Brain* indicated their Honours' acceptance of Dixon J's formulation.[21] Dixon J's failure, however, to acknowledge explicitly that his formulation of the test in determining a prosecutor's absence of reasonable and probable cause was a departure from what had long been accepted as authority — that the prosecutor was required to believe in the guilt of the accused — have, perhaps, plagued the decisions of the court that have followed these judgments, including the High Court's analysis in *A v New South Wales.*

Where the judgment of Beazley JA clearly distinguishes the underlying requirements of the two tests proffered by Jordan CJ and Dixon J, upon a close reflection of the approach adopted by jurists on this question since both decisions, it appears that a view has commonly emerged that a belief in the charge and belief in the guilt of the accused are interchangeable[22] — a view that Ipp JA has suggested is surely incorrect.[23]

6. Proceedings Before the High Court

A. Absence of Reasonable and Probable Cause — Resolving Conflicting Authorities

The concept of reasonable and probable cause, the most onerous of the elements for a plaintiff to establish, essentially requires the court to consider two questions; one subjective (what the prosecutor actually believed) and the other objective (the reasonableness of that belief). While much was made of the differences between the applicable tests stated by Jordan CJ and Dixon J in the Court of Appeal judgment, the High Court majority did not favour a similar construction of the tests, suggesting a complementary approach to the formulations. In particular, the majority were of the view that it would be wrong to make too much of the differences in expression, further suggesting that the formulations should not be read as propounding 'radically different tests'.[24] Rather, according to the majority, the better view is that the:

18 *Sharp v Biggs* (1932) 48 CLR 81 at 106 (Dixon J).
19 *A v State of New South Wales* [2005] NSWCA 292 at 109 (Beazley JA).
20 *Commonwealth Life Assurance Society Ltd v Brain* (1935) 53 CLR 343.
21 *A v State of New South Wales* [2005] NSWCA 292 at 74 (Beazley JA).
22 Id at 85 (Beazley JA).
23 Ipp, above n15 at 237.
24 *A v New South Wales* (2007) 233 ALR 584 at 604 (Gleeson CJ, Gummow, Kirby, Heydon & Crennan JJ).

> … five conditions stated by Jordan CJ may provide guidance about the particular kinds of issue that might arise at trial in those cases where the defendant prosecutor may be supposed to have personal knowledge of the facts giving rise to the charge and the plaintiff alleges either, that the prosecutor did not believe the accused to be guilty, or that the prosecutor's belief in the accused's guilt was based on insufficient grounds. The five conditions were not, and could not have been, intended as directly or indirectly providing a list of elements to be established at trial of an action for malicious prosecution.[25]

Such a conclusion renders the differences identified by the Court of Appeal, and their ultimate preference for Dixon J's formulation, largely unnecessary. The differences in expression are caused, according to the majority of the High Court, by the fact that the conditions stated by Jordan CJ are conditions to be met if there *is* reasonable and probable cause to prosecute another whereas Dixon J 'spoke in *Sharp v Biggs* of what would suffice to show an *absence* of reasonable and probable cause'.[26] The High Court's finding on this issue appears to suffer from a superficial reading of both tests, attributing the clear differences in language to the mere proof of a positive or a negative requirement. It is arguable that the patent differences between the tests stem not from this fact but from the level of belief expected of a prosecutor. While Jordan CJ's test requires a belief in the probable guilt of an accused, a more difficult state of affairs to satisfy, the test elaborated by Dixon J merely requires that the prosecutor is satisfied that there is a proper case to lay before the court — a case fit to be tried.[27]

More fundamental, however, to these proceedings and the general relevance of the tort of malicious prosecution in modern prosecutorial arrangements, is that in *A v New South Wales*, the circumstances concerned a prosecutor setting proceedings in motion based on the complaint of an unidentified individual. It is certainly the case that most prosecutions brought to charge today often consist of a prosecutor not possessing personal knowledge of the facts. As such it would be highly impractical to impose a belief in the guilt of an accused on the part of a prosecutor as a minimum requirement prior to bringing a charge. If, as the majority contends, both tests are readily applicable to situations where the prosecutor knows where the truth lies,[28] as in private prosecutions, the question proffered by the factual matrix of *A* is, what level of belief is required by a prosecutor acting on material and information provided by others? In fact, how can a court assess the subjective state of belief of a prosecutor who himself or herself may be uncertain as to where the truth lies?

25 Id at 604–605.

26 Id at 604.

27 Ipp, above n15 at 236.

28 *A v New South Wales* (2007) 233 ALR 584 at 605 (Gleeson CJ, Gummow, Kirby, Heydon & Crennan JJ).

B. Institutional Prosecutors — Determining Where the Truth Lies

The evident difficulties in applying a subjective test in assessing the reasonableness of a prosecutor's belief are compounded where a police officer, such as Detective Floros, relies on the statements of third parties. In contrast, it is clear that answering the subjective question of what the prosecutor actually believes in cases where the prosecutor is supposed to know where the truth lies, as in private prosecutions, the same difficulties do not arise. In the case of a private prosecution, such as that in *Sharp v Biggs*, where the defendant prosecutor had charged the plaintiff with giving perjured evidence, the High Court's statements on the subjective question are more closely aligned with the test as enunciated by Jordan CJ in *Mitchell v John Heine.* The majority said:

> If the facts of the particular case are such that the prosecutor may be supposed to know where the truth lies (as was certainly the case in *Sharp v Biggs*) the relevant state of persuasion will necessarily entail a conclusion (a belief of the prosecutor) about guilt. If, however, the plaintiff alleges that the prosecutor knew or believed in some fact that was inconsistent with guilt (as the plaintiff alleged in *Mitchell v John Heine*) the absence of reasonable and probable cause could also be described (in that kind of case) as the absence of a belief in the guilt of the plaintiff.[29]

To consider merely what the prosecutor knew or believed at the time the prosecution was instigated or maintained, is not appropriate where the knowledge of a prosecutor is confined to the knowledge or belief of what others have said or done.[30] In these cases, the statements of the majority indicate that the issue is not whether the plaintiff proves that the state of mind of the prosecutor fell short of a positive persuasion of guilt, it is whether the plaintiff proves that the prosecutor *did not honestly form the view that there was a proper case for prosecution, or proves that the prosecutor formed the view on an insufficient basis*.[31] Thus, determining what is a proper case for prosecution will require examination of the prosecutor's state of persuasion about the material considered by them. This formulation of the subjective question ensures that the role of institutional prosecutors is neither distorted nor hindered by imposing on prosecutors too high a threshold to bring cases to trial.

The significance of the High Court's conclusions regarding prosecutions commenced on the information provided by third parties is of particular note considering the nature of present prosecutorial arrangements. The failure of previous cases to deal specifically with such circumstances, in particular those cases relied on by the parties as authority in *A v New South Wales*, may have unduly limited the effectiveness of the tort in addressing potential abuses of the judicial process.

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29 Id at 606.
30 Id at 608.
31 Ibid.

However, despite the bifurcated approach to the subjective question proffered by the High Court, the objective element of the test of absence of reasonable and probable cause (the reasonableness of the prosecutor's belief) was not approached in a similar manner. The test, applicable to those possessing both personal and third party knowledge of an accused's guilt, is only asked when the subjective question is answered in the positive. It has been observed that the objective element involves an assessment of the sufficiency of the material before the prosecutor. In light of this the majority contended that:

> The objective element of the absence of reasonable and probable cause is sometimes couched in terms of the "ordinarily prudent and cautious man, placed in the position of the accuser" or explained by reference to "evidence that persons of reasonably sound judgment would regard as sufficient for launching a prosecution …. None of these propositions (nor any other equivalent proposition which might be formulated to describe the objective aspect of reasonable and probable cause) readily admits further definition. *It is plain that the appeal is to an objective standard of sufficiency.*[32] [emphasis added.]

The resolution of the question of sufficiency will most often depend upon identifying what it is that the plaintiff asserts to be deficient about the material upon which the defendant acted in instituting or maintaining the prosecution. In this regard, the court held that the objective element is not proven by showing only that there were further enquiries that could have been made before a charge was laid.[33] Rather, in a further concession to modern prosecutorial arrangements the High Court was of the view that very often, where a prosecutor acts on the information of others, some further inquiry could have been made. As a matter of guidance the court explained that a prosecutor is not required to have tested every possible relevant fact before he or she takes action. Nor is the objective element proven where prosecution is undertaken, as was done in *A v New South Wales*, on the basis of only uncorroborated statements of the person alleged to be the victim of the accused's conduct.[34] The question in any particular case, the court held, is ultimately one of fact.

C. Malice

Proof that the prosecutor acted without reasonable and probable cause will not suffice to establish the tort of malicious prosecution. In addition to that element, a plaintiff has historically been required to show that the defendant brought the prosecution maliciously. At trial, Cooper DCJ found that the second respondent, Detective Floros, acted maliciously by charging A for the improper purpose of succumbing to pressure from the Child Protection Enforcement Agency. While the concept has often proven slippery for jurists, adopting a number of guises in different areas of the law, malice for the purposes of the tort of malicious

32 Id at 609.
33 Id at 610.
34 Ibid.

prosecution concentrates upon the motives of an accuser in laying a charge against an accused.[35] In *Trobridge v Hardy*[36] Fullagar J described malice in the context of malicious prosecution as involving personal spleen or ill-will or some motive other than that of bringing a wrong doer to justice.[37]

The Court of Appeal's preference for the definition stated by Denning LJ in *Glinski v McIver*[38] represents an attempt to relate what will suffice to prove malice to what will suffice to demonstrate an absence of reasonable and probable cause. The High Court was of the view that such attempts are unnecessary and may in fact be misleading. In *Glinski* Denning LJ noted that the presence of malice is usually apparent where it can be shown that a prosecutor lacked an honest belief in the justification of commencing proceedings, because in such circumstances it typically follows that some extraneous and improper purpose actuated the prosecution of an accused.[39] Although it may be inferred that a prosecution launched on obviously insufficient material was actuated by malice, the High Court refused to postulate a universal rule relating proof of the separate elements.[40]

In *A v New South Wales*, the primary judgment of the court indicated that because there is no limit to the kinds of improper purposes that may actuate a prosecutor to bring an action, malice can only be defined by a negative proposition:

> What is clear is that, to constitute malice, the dominant purpose of the prosecutor must be a purpose *other* than the proper invocation of the criminal law — an "illegitimate or oblique motive". That improper purpose must be the sole or dominant purpose actuating the prosecutor.[41]

Callinan J, in a separate judgment, elaborated little on the matter of malice. Reasoning on a similar basis to the rest of the court, Callinan J was of the view that malice is established where some collateral purpose is shown to have provoked or driven the prosecution.[42] Importantly, his Honour recognied that even if the person bringing the prosecution despised the plaintiff, the action will not be found to have been brought maliciously where the circumstances are such that a charge should have been laid.

35 *A v State of New South Wales* [2005] NSWCA 292 at 175 (Beazley JA).
36 *Trobridge v Hardy* (1955) 94 CLR 147.
37 Id at 155 (Fullagar J).
38 *Glinski v McIver* [1962] AC 726 ('*Glinski*').
39 *A v State of New South Wales* [2005] NSWCA 292 at 178 (Beazley JA).
40 *A v New South Wales* (2007) 233 ALR 584 at 611 (Gleeson CJ, Gummow, Kirby, Heydon & Crennan JJ).
41 Ibid.
42 Id at 632 (Callinan J).

D. The High Court's Determinations

Critical to the defendant prosecutor's decision to lay charges against A were comments made by superiors that if he had a prima facie case he should 'leave it up to the court'.[43] As such, over the period of the investigation the defendant's superiors in the NSW Police Service had made it clear to him that his possession of evidence capable of establishing each element of the offences laid against A were sufficient to bring the case to trial. However, at trial, Cooper DCJ noted that it is not enough that there be a *prima facie* case. Rather, the person laying the charge must have the belief based upon reasonable grounds that the allegations against the accused are probably true.[44] His comments to A's solicitor that if it was up to him he would not have charged A provided the trial judge with the necessary evidence to find that Detective Floros did not believe that A committed the offence against C, or if he did believe it, then such belief was not based upon reasonable grounds.[45]

Despite the Court of Appeal's decision to set aside the trial judge's finding on both malice and the absence of reasonable and probable cause in relation to the charge concerning C, the High Court was of the view that Beazley JA's judgment was based on the mistaken conclusion that the trial judge's reasoning had followed an incorrect line of authority. As a consequence, it was held that her Honour's conclusions were erroneous.[46] Indicating that the trial judge's findings were contingent upon an assessment of the credibility of both the second respondent and A's solicitor, the High Court concluded that the trial judge's determinations were open to him and there was no basis for the Court of Appeal to interfere with them.[47] In addition, the Court of Appeal's inference that the second respondent's comments to A's solicitor were words of solace rather than a true reflection of the second respondent's frame of mind, were made, in the court's view, without a proper basis.[48] The question of malice was not, according to the principal judgment of the High Court, a matter of inference. It was premised upon the trial judge's acceptance of the truth of Detective Floros' out-of-court admissions.

Consequently, it was unanimously held that neither the charge relating to D, nor the charge concerning C, was brought for the purpose of bringing a wrongdoer to justice, but the charges were the result of succumbing to pressure to charge A due to his status as a member of the Police Service. However, as an absence of reasonable and probable cause was demonstrated only in respect of C, A had proved malicious prosecution only in respect of the charge concerning C. As such, A's appeal against the trial judge's findings as they related to the allegations made by D, was dismissed.

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43 *A v New South Wales* (2007) 233 ALR 584 at 590 (Gleeson CJ, Gummow, Kirby, Heydon & Crennan JJ).

44 Id at 591.

45 Id at 613.

46 Id at 616.

47 Ibid.

48 Id at 617.

7. Was the High Court Correct?

While the High Court's determinations as to the facts of the case are of themselves unremarkable, the court's conclusions regarding the harmony of the applicable expressions of the law as they relate to the absence of reasonable and probable cause require greater scrutiny. In particular, the extra-judicial statements of Ipp JA place great doubt upon the majority's approach to the tests expounded by Jordan CJ and Dixon J. Where the High Court found that the tests should not be understood as being radically different, both the views of Beazley JA and Ipp JA provide a contrasting, and perhaps, more convincing approach. In his Honour's article, much of which was repeated in the Court of Appeal judgment of Beazley JA, he said:

> There is a major difference between a belief that the "accused is probably guilty of the offence" (being the formulation of Jordan CJ as expressed in *Mitchell*) and a belief that "the probability of accused's guilt is such that upon general grounds of justice a charge against him is warranted" (being the formulation of Dixon J in *Sharp*). According to Jordan CJ, the prosecutor must believe that the accused is probably guilty, but not according to Dixon J.[49]

A similar distinction between both tests was identified by the House of Lords in *Glinski*[50] where Denning LJ noted that the determination of guilt or innocence is for the tribunal of fact and not the prosecutor. Thus, while Jordan CJ's test requires a positive belief in the guilt of the accused, Denning LJ has held that the opposing test merely requires that there is a proper case to lay before the court.[51] The prosecutor, according to Denning LJ, 'cannot judge whether the witnesses are telling the truth [and] he cannot know what defences the accused may set up'.[52] Ultimately, it is with regard to the level of belief required of prosecutors that the major differences emerge. While Jordan CJ's principles establish a higher threshold of belief, they cannot be understood as invoking similar requirements to that proposed by Dixon J. The differences, in the opinion of Ipp JA, are patent and potentially crucial.

The High Court's perpetuation of the clearly mistaken view of the interchangeability of both tests was not followed in the judgment of Callinan J. Preferring the test stipulated by Dixon J in *Sharp v Biggs*, his Honour adopted similar reasoning to that of Beazley JA in her Court of Appeal judgment. Describing Dixon J's test as capable of flexible but practical application, Callinan J suggested that such a test, unlike that proffered by Jordan CJ, was not excessively difficult to satisfy.[53] His Honour's explicit acceptance of the distinct threshold requirements of each test, while departing from the approach of the majority, is in

49 Ipp, above n15 at 234.
50 *Glinski v McIver* [1962] AC 726.
51 Id at 758 (Denning LJ).
52 Ibid.
53 *A v New South Wales* (2007) 233 ALR 584 at 629 (Callinan J).

holding with the decision of the House of Lords in *Glinski* and with the persuasive views of Ipp JA.

Ipp JA's extra-judicial examination of the guidelines of the various Offices of the Directors of Public Prosecutions in Australia further reveals that in no circumstances are prosecutors expected to believe in the guilt of the person to be prosecuted.[54] The critical question is whether the evidence is sufficient to justify the institution or continuation of a prosecution. A common law requirement based on guilt would unnecessarily raise the threshold for institutional prosecutors — a requirement plainly embodied by the principles of Jordan CJ.

It is, thus, highly unfortunate that the majority's superficial reading of two patently distinct lines of authority may undermine the near unanimity of the court's judgment in *A v New South Wales.* Despite this, while the central issue of the appeal focused on these conflicting authorities, it is apparent that the High Court's resolution of the issues may have more correctly shifted the focus towards matters of greater relevance, namely the reality of modern prosecutorial arrangements. The court's statement that neither test readily accommodates the role of modern prosecutorial practices, both being decided in cases brought about by private litigants, was a significant reason for the court's willingness to depart from previous authority. By adopting a bifurcated approach to the subjective element in respect of the absence of reasonable and probable cause, the principles expounded by the court in *A v New South Wales* constitute an attempt to provide those setting proceedings in train based on the information of third parties greater guidance as to their requisite level of belief. However, any real clarification of the level of belief required of a prosecutor in these circumstances necessitated a rejection of either one, or both, of the cited tests — a clarification which the High Court's clouded reasoning did not achieve.

8. Conclusion

The decision in *A v New South Wales* was the first time that the tort of malicious prosecution had come before the High Court of Australia in over seventy years. Despite common perceptions regarding the antiquity of the tort, claims for malicious prosecution are brought relatively frequently against both the NSW Police Service and the Office of Director of Public Prosecutions. Considering the regular pleading of the tort in such claims, the conspicuous absence of a modern authority on the requisite level of belief demanded of a prosecutor to institute and maintain legal proceedings, unduly limited the tort's modern applicability. The decision in *A v New South Wales* heralded the first attempt by the High Court of Australia to bring the tort of malicious prosecution in line with current prosecutorial arrangements. In an era where prosecutions are commenced by large bureaucratic agencies rather than private individuals, the utility of a tort whose framework was designed prior to the establishment of these agencies, required

54 Ipp, above n15 at 239.

fundamental reassessment. The High Court's judgment in *A v New South Wales* was significant because of its recognition that in modern criminal prosecutions, first-hand knowledge of the guilt or otherwise of the accused, rarely occurs.

However, the efficacy of the court's judgment may ultimately be undermined by the majority's failure to acknowledge the patent differences in the tests expounded by Jordan CJ in *Mitchell v John Heine* and Dixon J in *Sharp v Biggs*. At a practical level, it may prove difficult for a prosecutor to reconcile what appear to be two distinct standards of belief with the High Court's unconvincing reasoning that the requirements of each are consistent with the other.