

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L.1984/M193

BETWEEN	MADELINE MULLINGS	PLAINTIFF
AND	NELLIE SIMMS	FIRST DEFENDANT
AND	ACTING CORPORAL JOSCELYN CHEVERS	SECOND DEFENDANT
AND	THE ATTORNEY GENERAL FOR JAMAICA	THIRD DEFENDANT

Mr. Clark Cousins and Mr. Polomino instructed by Messrs. Rattray, Patterson and Rattray for the Plaintiff.

Mr. Douglas Leys instructed by the Director of State Proceedings for Second and Third Defendants.

Mr. George Soutar, on the records for the First Defendant, not appearing.

HEARD: JANUARY 14, 15, 16 AND MARCH 19, 1991

CORAM: KECKORD, J.

In this action the plaintiff seeks to recover damages against the defendants for malicious prosecution arising out of an incident which took place along a roadway leading from her home at Brae's River in the parish of St. Elizabeth on the 9th of August, 1983.

It was the plaintiff's case that at about 10:00 a.m. on this day as she drove her car down her private road-way leading to the public road she met a motor cyclist with a pillion rider coming in the opposite direction. She passed them and went on her way. She was not aware that, in passing, her car had brushed and injured the pillion rider whom she recognised to be her next door neighbour, Mrs. Simms, the first defendant. Later, that same day the second defendant, Acting Corporal Chevers, then stationed at the Black River Police Station, accompanied by the first defendant's husband and others visited her home. Acting Corporal Chevers told her he had a report of an accident involving her car and the first defendant. Her husband told Acting Corporal Chevers that the road was a private one and the plaintiff said because of a previous incident involving the first defendant's children, she did not mix with the first defendant and her family. In short, there was bad blood between the two families. Her car was examined by Acting Corporal Chevers and no damage was found.

Subsequently, the plaintiff was served summonses by the police charging her with dangerous and careless driving and unlawful wounding. She attended court on the 21st of August, 1983, pleaded not guilty to the charges and a trial date was set for the 7th of September, 1983; She retained an Attorney-at-Law to represent her at the trial and on the date fixed for trial she was dismissed from all the charges without any evidence being offered against her.

The first defendant subsequently sued her in the Black River Resident Magistrate's Court for negligence arising out of this same incident. Her claim failed and judgment was handed down in favour of the plaintiff.

The first defendant did not attend court at the hearing of this action, neither did her Attorney-at-Law, to protect her interest.

The second defendant testified that on the 9th of August, 1983, while at the Black River Police Station, the first defendant made a report to him. He observed an injury to her right foot below the knee.

"There was swelling on the foot and abrasions and appearance of blood coming from the abrasions. I gave her letter to take to the Doctor at the Black River Hospital."

He visited the plaintiff at her home the same day and told her of the report made by the first defendant. The plaintiff showed him her car, he saw no damage to it.

"When Simms made report to me I believed her story to be true."

The following day the first defendant returned to the station and he took a written statement from her. This was admitted in evidence as exhibit 1. On the 17th of August, he took a statement in writing from Clovis Williamson, the driver of the motor cycle, supporting the first defendant's report. This was admitted in evidence as exhibit 2. He believed Williamson was speaking the truth. He drew up information and summonses against the plaintiff for dangerous and careless driving and unlawful wounding. He did not know the parties before the day of the incident.

It was submitted on behalf of the second defendant that in an action for malicious prosecution the plaintiff must allege and prove the absence of reasonable and probable cause and malice. If the court accepts the evidence of the second defendant that based on reasonable grounds he honestly believed the first defendant's report to be true, then it was a proper case for him to put before the court, in which case the second defendant would not have acted without reasonable and probable cause, and the plaintiff's claim as against him would therefore fail.

For the plaintiff, Mr. Cousins submitted that the plaintiff has satisfied the court with the four essential requirements in a case of this nature.

1. That the defendant prosecuted the plaintiff and as a result she suffered damages.
2. That the prosecution terminated in the plaintiff's favour.
3. That there was no reasonable and probable cause for the prosecution.
4. That the defendant acted with malice or in bad faith.

It was his submission that once the plaintiff satisfied the court on a balance of probabilities requirements 3 and 4, the evidential burden shifts to the defendants to justify their conduct in prosecuting the plaintiff.

Mr. Cousins questioned the credibility of the second defendant in the light of the following.

1. He was told by the plaintiff and her husband that they knew nothing of the alleged incident.
2. He was told by the plaintiff and her husband that even if such an incident had taken place, it was not on a public thoroughfare - it was on private property.
3. He was advised that the first defendant had grievance against the plaintiff.
4. He inspected the plaintiff's car and found no evidence of damage.
5. He obtained no medical report to corroborate the injuries allegedly suffered.
6. He took no statement from the plaintiff.
7. He took no steps to consult with anyone or to seek advice as to the status of the road.

In the context of all the facts known to him, he submitted that no responsible police officer acting properly in the execution of his duties would have charged the plaintiff not only for dangerous and careless driving but also for unlawful wounding.

On the question of malice Mr. Cousins submitted that the court may infer malice from the same facts which establish want of reasonable and probable cause. The court may infer malice once the court rejects his assertion that he honestly believed that the plaintiff was probably guilty of the charges and court also find that there was such a want of reasonable and probable cause on the part of the second defendant as to amount to malice. In view of the plaintiff's standing in the community he asked for judgment and an award of substantial damages.

There is no serious dispute on the facts of this case. There is also no dispute on the law applicable. The only question left for the court to determine is - Did the second defendant honestly believe the report given to him by the first defendant and her witness? If the answer is in the affirmative, then was this belief based on reasonable grounds?

The plaintiff has challenged the second defendant that his belief in the first defendant's report was not based on reasonable grounds. But he had information from the first defendant that the incident was along the Parish Council road although this was contradicted by the plaintiff. He was aware that there was bad blood between the parties. Although no damage was seen on the car, from the report it was most unlikely that there would be any damage whatsoever. As far as the injury to the first defendant is concerned, although no medical report was received, the second defendant stated that he had looked at the first defendant's foot and observed a recent injury. This was corroborated by the motor cyclist himself. There has also been a complaint that the second defendant took no statement from the plaintiff.

What is the duty of a police man to whom a report of this nature is made?

In Herniman vs. Smith (1936) A/C 305 Lord Atkin said at page 319:

"It was further said that he should have asked for a further explanation from Herniman. No doubt, circumstances may exist in which it is right before charging a man with misconduct to ask him for an explanation. But certainly, there can be no general rule laid down, and where a man is satisfied, or has apparently sufficient evidence, that in fact he has

been cheated, there is no obligation to call on the cheat and ask for an explanation which may only have the effect of causing material evidence to disappear or be manufactured. It is not required of any prosecutor that he must have tested every possible relevant fact before he takes action. His duty is not to ascertain whether there is a defence, but whether there is reasonable and probable cause for a prosecution."

What then is a reasonable and probable cause?

See Hicks v. Faulkner (1981-5) A.S.R. Reprint p. 187, where Hawkins J, ~~at~~ page 191, said:

"I should define reasonable and probable cause to be an honest belief in the guilt of the accused, based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed."

The second defendant testified that he did not know either the plaintiff or the first defendant before the date of this incident. It would be reasonable therefore to assume that there was no reason for him to take sides. In Hicks v. Faulkner (Supra) Hawkins J. continued at page 192.

"If the informant were known by the accuser to be a person whose veracity, memory, power of observation and accuracy no confidence could be placed, no jury, I should think, would hesitate to find that a belief based solely upon information from such an informant was unreasonable."

In Glenski v. McIver (1962) A/C at page 761 Lord Denning said of cases where the prosecutor is not personally involved but makes the charge on information given to him by others --

"The issue again appears simple. If the information was believed by him to be trustworthy, there was good cause for the prosecution. If it was known to him to be untrustworthy and not fit to be believed, there was no cause for it."

The plaintiff must also prove malice. Wooding C.J. in Irish v. Barry (1965) 3 WLR said at page 179 --

"It is undoubtedly true that the self same circumstances showing that an arrest was without reasonable and probable cause may be sufficient to establish malice on the part of the prosecutor. But such cases, must I think, be rare in the case of a police prosecutor acting in the ordinary course of his normal duty."

From the testimony of the plaintiff in the instant case I have found no evidence on which I could reasonably find that the second defendant was actuated by malice, that is, any sinister or indirect or improper motive in instituting this prosecution.

On the totality of the evidence, the plaintiff has also failed to prove to me on a balance of probabilities that the second defendant prosecuted her without reasonable and probable cause.

For these reasons the claim as against the second and third defendants is dismissed with costs against the plaintiff to be agreed or taxed.

The first defendant having entered an appearance and filed a defence and counterclaim, failed to appear at the trial to defend the action and to prosecute her claim.

Notwithstanding her absence, in order to succeed against her, the plaintiff must fulfil all the conditions necessary in an action of this nature.

I am satisfied that the proceedings were instigated by the first defendant. It could well be argued however that all she did was to report an accident to the police as is required by Section 39 of the Road Traffic Act.

From the bad blood between the plaintiff and the first defendant, I am satisfied that the first defendant acted maliciously, that is out of ill will; that the proceedings were terminated in favour of the plaintiff, and that she suffered damages.

What of the all important issue that the first defendant acted without reasonable and probable cause? The plaintiff in her evidence said,

"As I drove down my driveway I met a motor cycle rider with a pillion rider coming in opposite direction, coming towards me. I recognised the rider to be Clovis Williamson, and the pillion to be Mrs. Simms. I passed them and went on my business. I was not aware in passing if my car brushed any part of the motor cycle or Mrs. Simms."

She admitted in cross-examination that the road was very narrow, that the car took up most of the road - not too difficult for car and motor cycle to pass - but some difficulty.

The evidence of Acting Corporal Chevers was to the effect that the first defendant having made report to him of a motor vehicle accident he observed that the first defendant had slight injury to her foot from which blood was coming.

Against this back-ground could there have been a reasonable belief held in good faith by the first defendant in the existence of sufficient facts as would justify a report to the police?

The burden of proving absence of reasonable and probable cause, a notoriously difficult task of proving a negative, lies on the plaintiff. After a long and careful consideration of the facts, I am not satisfied on a balance of probabilities, that the plaintiff has got over this hurdle.

Accordingly, the action against the first defendant also fails. On the claim there will therefore be judgment for the first defendant with costs limited to the filing of her defence against the plaintiff. The counterclaim is dismissed for want of prosecution.