SUPREME COURT OF QUEENSLAND

CITATION:	*Seabrook v Asher* [2006] QCA 238
PARTIES:	**MARK LEONARD SEABROOK** (plaintiff/appellant) **v** **ALLIANZ AUSTRALIA INSURANCE LIMITED** (first defendant) **CLUB MARINE LTD** ACN 007 588 347 (second defendant) **TROY ERIN LUCK** (third defendant) **BRIAN ERNEST ASHER** (fourth defendant/respondent)
FILE NO/S:	Appeal No 10732 of 2005 SC No 9379 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	23 June 2006
DELIVERED AT:	Brisbane
HEARING DATE:	1 June 2006
JUDGES:	de Jersey CJ, Holmes JA and Helman J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs against the appellant**
CATCHWORDS:	TORTS – MALICIOUS PROCEDURE AND FALSE IMPRISONMENT – MALICIOUS CRIMINAL AND CIVIL PROCEEDINGS – ESSENTIALS OF CAUSE OF ACTION GENERALLY – INSTITUTION OR CONTINUANCE OF PROCEEDINGS BY DEFENDANT – DEFENDANT PROSECUTOR OR INSTIGATOR OF PROSECUTION – where charges of arson and false pretence against plaintiff were dismissed at committal proceedings – where plaintiff subsequently brought action for malicious prosecution against the four defendants for their influence on investigating police officer's discretion to charge – where fourth defendant obtained summary judgment against the plaintiff – whether appeal against summary judgment should be allowed *Uniform Civil Procedure Rules* 1999 (Qld), r 293

Commercial Union Assurance Co of NZ Ltd v Lamont [1989] 3 NZLR 187, applied
Commonwealth Life Assurance Society v Brain (1935) 53 CLR 343, applied
Davis v Gell (1924) 35 CLR 275, applied
Mahon v Rahn (No. 2) [2000] 1 WLR 2150, considered
Martin v Watson [1996] 1 AC 74, considered

COUNSEL: P J Favell for the appellant
R A Perry SC for the respondent

SOLICITORS: Hemming & Hart Lawyers for the appellant
Thynne & Macartney for the respondent

[1] **de JERSEY CJ:** I have had the advantage of reading the reasons for judgment of Holmes JA. I agree with the orders proposed by Her Honour, and with her reasons.

[2] **HOLMES JA:** The fourth defendant, now the respondent to this appeal, was successful in obtaining summary judgment against the plaintiff under r 293 of the *Uniform Civil Procedure Rules* 1999 (Qld). The action was one for malicious prosecution; the plaintiff had been charged with arson and attempted false pretence in respect of fire damage to a boat he owned and his ensuing insurance claim. Those charges were dismissed at committal. The first, second and third defendants were respectively the boat's insurer, its agent and an employee of the agent. The fourth defendant was a loss adjuster appointed by the first and second defendants to investigate the fire. It was alleged that all four defendants had maliciously counselled and persuaded or procured the investigating police officer, Constable Lawrence, to bring the charges or had misled her prosecutorial discretion or dishonestly prejudiced her judgment. The question on the summary judgment application was whether the plaintiff had any prospect of establishing at trial that the fourth defendant was, on any of those bases, the prosecutor.

The statement of claim

[3] The further amended statement of claim pleaded against the fourth defendant that:

- he had falsely told Constable Lawrence that although repairs to the boat would cost only $330,000, the plaintiff stood to gain an insurance payment of $500,000, when in fact the insurer had a right under the policy to undertake repairs without any payout to the plaintiff;
- that statement to Constable Lawrence was, together with a statement by the third defendant that the nature of the policy meant that the plaintiff would be paid $500,000 if the insurer settled, the only information she had in her possession about the obligations of the insurer in relation to indemnity under the policy, prior to the bringing of the charges;
- he had claimed to Constable Lawrence that he had received information that a valuer of the boat had been paid to inflate its valuation, when he had not received any such information;
- that claim to Constable Lawrence, together with the opinions of two valuers (one the allegedly inflated one, the other given in May 1996) was the only information she had in her possession about the value of the boat, prior to the bringing of the charges;

- he had made those statements either knowing they were false or recklessly indifferent as to whether they were false, and had never corrected them;
- "one of the main reasons for the decision of the Police to charge" the plaintiff was the belief the fourth defendant had engendered that the boat was over-insured and that if the insurer indemnified him the plaintiff would receive a payout of $500,000, regardless of the insurer's option to repair instead;
- he had acted maliciously and without probable cause.

[4] The pleading as to the statements made by the fourth defendant obviously has its source in a running sheet maintained through the investigation by Constable Lawrence, which attributes to him remarks to that effect. As against the first three defendants, the thrust of the allegations in the statement of claim is that they (through the third defendant and through an un-named employee or agent) falsely told Constable Lawrence that the plaintiff was trying to claim $500,000 and had never indicated that he wanted to get the boat repaired, when they knew the contrary was true. The pleading goes on to assert that these defendants were the source of the only information that Constable Lawrence had in her possession about the nature of the plaintiff's insurance claim prior to his being charged, and that "one of the main reasons for the decision of the Police to charge" the plaintiff was the belief gained from their acts or omissions that the plaintiff wanted $500,000.

[5] The statement of claim seeks to put the respective defendants' contributions to the prosecution into context by setting out the "main reasons" for Constable Lawrence's decision to charge the plaintiff. It is alleged that she considered or believed: that another individual had been eliminated as a suspect in the arson; that the plaintiff wanted to sell the boat despite claiming to have an affection for it; that a loan application for $500,000 had been rejected a month before the fire; that the boat was over-insured; and that the plaintiff stood to make a lot of money from the insurance claim.

Constable Lawrence's evidence

[6] That part of the pleading seems to be based on Constable Lawrence's cross-examination at the committal proceedings as to the matters on which she relied when she made the decision to charge the plaintiff. She said that rumours she had heard about the boat being worth much less than its insured value had sparked her interest, but had not been the basis of charging. Factors she had taken into account were that the plaintiff had produced an apparently incriminating telephone message, said to have been recorded at the time of the fire, from a former associate, with the inference that he was responsible, when she was able to establish that that individual had a convincing alibi and had said the words in question at a different time, to someone else, and not in relation to the fire; that although the plaintiff had professed to be emotionally attached to the boat, he had been attempting to sell it; that he had made a loan application for $500,000, which was rejected a month before the fire; that the boat was actually purchased for $150,000, not $300,000 as claimed by the plaintiff; and other indications that the boat was over-insured, which she had received from its previous owner and tradesmen involved in its re-fit.

The summary judgment

[7] The fourth defendant applied for summary judgment, arguing that the plaintiff's case was doomed to failure for two reasons: the pleadings themselves did not establish that the fourth defendant had procured the prosecution of the plaintiff, in the sense of the information provided by him having been the proximate or real cause of the decision to prosecute; and the evidence of Constable Lawrence made it plain that the decision to charge was not based on the conversations she was alleged to have had with the fourth defendant.

[8] The learned judge at first instance reviewed a number of authorities indicating that a person who, by false testimony, influences the prosecuting authority to institute proceedings can himself be regarded as the prosecutor.[1] She adverted particularly to the judgment of Richardson J in *Commercial Union Assurance Co of NZ Ltd v Lamont*[2]; his approach, she noted, had been adopted by Brooke LJ in the English Court of Appeal in *Mahon v Rahn (No. 2)*[3]. Her Honour turned then to Constable Lawrence's evidence at committal and the running sheet she had kept (which detailed contact with a large number of individuals over a 20 month period), observing that there was "little or nothing" to indicate that the fourth defendant's alleged statements were instrumental in Constable Lawrence's charging the plaintiff. To the contrary, Constable Lawrence's evidence was that it was the plaintiff's own conduct, together with his apparent need for $500,000 and information received from a number of sources about the value of the boat, which influenced her decision.

[9] There was, the learned judge considered, no realistic chance that Constable Lawrence might give different evidence at the trial: the plaintiff had conceded on an earlier application that she would be his witness and that she was declining to speak to his solicitors. She had answered clear questions about the factors behind her bringing of the charges and had repeated those answers when questioned further. Accordingly, the plaintiff had no real prospect of proving at trial that the fourth defendant ought to be regarded as the prosecutor. On that basis, the learned judge gave judgment for the fourth defendant against the plaintiff.

The plaintiff's arguments on appeal

[10] Here, the plaintiff's counsel in his written submissions identified the question on the application for summary judgment as whether the plaintiff had real prospects of proving that the fourth defendant was "a prosecutor". He argued, relying on *Davis v Gell*[4] and *Commonwealth Life Assurance Society v Brain;*[5] *Mahon v Rahn (No. 2)*[6] and *Little v Law Institute of Victoria*[7], that it would suffice to establish that the defendant was the prosecutor if it were shown that he misled the prosecutorial discretion by false information. The learned judge erred, he contended, when she said that there was "little or nothing" to indicate that the fourth defendants information was instrumental in the bringing of the charges; when she found that there was no realistic chance of Constable Lawrence's giving different evidence at

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1 *Davis v Gell* (1924) 35 CLR 275 at 283; *Commonwealth Life Assurance Society Ltd v Brain* (1935) 53 CLR 343 at 379; *Balson v State of Queensland* [2002] QSC 419 at [23]

2 (1989) 3 NZLR 187 at 199

3 [2000] 1 WLR 2150

4 (1924) 35 CLR 275

5 (1935) 53 CLR 343

6 [2000] 1 WLR 2150

7 [1990] VR 247

trial; and when she concluded that there was no real prospect of proving that the fourth defendant was properly to be regarded as the prosecutor.

[11] Counsel for the plaintiff pointed to Constable Lawrence's reference to "rumours" and her inclusion of "the value of the boat, the fact that the boat was over-insured" in the factors relevant to the decision to charge as giving rise to a reasonable inference that the fourth defendant's statements had influenced, prejudiced or misled the prosecution. The fact that the fourth defendant was referred to a number of times in the running sheet also indicated that he was of some importance in the investigation. Significantly, one of the charges was attempted false pretence in order to obtain $500,000: the very sum to which the fourth defendant had alluded. All of those things taken together showed that the fourth defendant's statements were relied on by the police officer. Constable Lawrence had maintained her silence out of court, but that was not to say she would not give evidence that the fourth defendant's statements had an influence on her decision to charge. But in any event, what she had said at the committal was capable of being interpreted as indicating that the fourth defendant's statements did have such an influence.

The "prosecutor" in malicious prosecution

[12] Malicious prosecution is an action for "setting the criminal law in motion".[8] It has long been established that a defendant to such an action need not be the prosecutor in a formal sense:

> "… the law looks beyond theory and regards the person in fact instrumental in prosecuting the accused as the real prosecutor. It enables the person innocently accused to treat his virtual accuser as party to the criminal charge …"[9]

Provision of information to investigating authorities in good faith cannot occasion liability, but

> "… if the [prosecutorial] discretion is misled by false information, or is otherwise practised upon in order to procure the laying of the charge, those who thus brought about the prosecution are responsible".[10]

[13] In *Commercial Union Assurance Company of NZ Ltd v Lamont*, Richardson J expanded on that qualification:

> "In the difficult area where the defendant has given false information to the police that in itself is not a sufficient basis in law for treating the defendant as prosecutor. That conduct must at least have influenced the police decision to prosecute."[11]

He went on to review authorities from other jurisdictions, and observed that there were two important considerations in the modern New Zealand context. The first was that given the training, experience and professionalism of police investigators, it was not to be assumed that the provision of false information rendered a proper exercise of the discretion to prosecute impossible. The other was that members of the public should not be regarded as having instigated a prosecution except in rare

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8 *Davis v Gell* (1924) 35 CLR 275 at 284 per Isaacs ACJ

9 *Supra* at 282 per Isaacs ACJ

10 *Commonwealth Life Assurance Society Ltd v Brain* (1935) 53 CLR 343 per Dixon J at 379

11 [1989] 3 NZLR 187 at 196

and exceptional circumstances, because of the public interest in encouraging the provision of information to police.

[14] Richardson J concluded his observations with a passage set out in the judgment of the learned judge at first instance:

> "The core requirement is that the defendant actually procured the use of the power of the State to hurt the plaintiff. One should never assume that tainted evidence persuaded the police to prosecute. In some very special cases however the prosecutor may in practical terms have been obliged to act on apparently reliable and damning evidence supplied to the police. The onus properly rests on the plaintiff to establish that it was the false evidence tendered by a third party which led the police to prosecute before that party may be characterised as having procured the prosecution." [12]

In the same case, McMullin J put the matter thus:

> "A person may be regarded as the prosecutor if, inter alia, he puts the police in possession of information which virtually compels an officer to lay an information; if he deliberately deceives the police by supplying false information in the absence of which the police would not have proceeded or if he withholds information in the knowledge of which the police would not prosecute."[13]

[15] Lord Keith of Kinkel, with whom the other members of the House of Lords agreed, in *Martin v Watson*[14] adopted those passages from *Lamont* as embodying a correct statement of the relevant principles. He went on to add:

> "Where an individual falsely and maliciously gives a police officer information indicating that some person is guilty of a criminal offence and states that he is willing to give evidence in court of the matters in question, it is properly to be inferred that he desires and intends that the person he names should be prosecuted. Where the circumstances are such that the facts relating to the alleged offence can be within the knowledge only of the complainant, as was the position here, then it becomes virtually impossible for the police officer to exercise any independent discretion or judgment, and if a prosecution is instituted by the police officer the proper view of the matter is that the prosecution has been procured by the complainant."[15]

[16] In *Mahon v Rahn (No. 2)*[16] Brooke LJ paraphrased that passage as a series of tests, which he suggested could be directed to a simple case, perhaps one in which "a limited number of malicious lay informants are acting in concert"[17]:

> "(1) Did A desire and intend that B should be prosecuted? (2) If so, were the facts so peculiarly within A's knowledge that it was virtually impossible for the professional prosecutor to exercise any independent discretion or judgment? (3) Has A procured the

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12 [1989] 3 NZLR 187 at 199
13 *Supra* at 207-208
14 [1996] 1 AC 74 at 84
15 *Supra* at 86-87
16 [2000] 1 WLR 2150
17 *Supra* at 2201

> institution of proceedings by the professional prosecutor, either by furnishing information which he knew to be false, or by withholding information which he knew to be true, or both?"[18]

Brooke LJ went on to endorse Richardson J's recommendation of caution in assessing the influence of informants in prosecutions brought by trained and independent prosecuting authorities.

The prospects of proving the fourth defendant to be the "prosecutor"

[17] In considering the summary judgment given in this case, it is appropriate to proceed on an assumption that the statements were made by the fourth defendant, that they were false and that he knew that to be so. But what the authorities establish is that the false information must have had some real role in inducing the police officer to commence the prosecution; so much so that the informant must "virtually" have driven the prosecution. It is doubtful, I think, that different individuals or entities not said to be acting in concert can each be said to have so influenced the prosecutorial discretion as to become, in substance, the prosecutor.

[18] Importantly, although the makers of the various statements identified in the statement of claim are said to be, in different ways, agents or employees of the first and second defendants, it is not alleged in the pleading that they were acting in concert in making the statements to Constable Lawrence. Of the two matters in respect of which the fourth defendant is alleged to have conveyed information, the assertion that the plaintiff stood to receive $500,000 was also said to have been made by the third defendant, and, as made by him, to have formed part of the information on which Constable Lawrence relied. Given that alternative source for the information, and in the absence of any allegation of collusion, it is difficult to see how the plaintiff can assert that one rather than the other was the cause of the officer's acting. And, of course, Constable Lawrence did not in her evidence identify what was said by the fourth defendant as any part of her reasons for deciding to charge the plaintiff.

[19] The second statement attributed to the fourth defendant, that is, that he had received anonymous advice that one of the valuers had inflated his valuation, was alleged to have been part of the information available to the police officer as to the boat's value; but it is pleaded that that information also extended to the valuers' actual opinions. One of those was the valuation of the boat at $500,000. The other was a valuation from May 1996, which is referred to in the running log in an entry for 6 July 1997 in these terms:

> "CRAWFORD valued boat on 14/05/96 at $245 000 (but previous owner still only sold for $150 000)"

It is obvious, both from that entry and Constable Lawrence's evidence as to what she had heard from its previous owner and the tradesmen who had worked on it, that there were reasons, apart from anything the fourth defendant said, to question the boat's real value. In any case, the fourth defendant's claim of anonymous information would seem to fall within the category of "rumours", on which Constable Lawrence disavowed acting.

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18 *Supra* at 2206

[20] Not only, then, was there no evidence that the fourth defendant put the law in motion against the plaintiff, but there was evidence to the contrary: that the police officer formed the view she should charge on information from a number of sources and for a number of reasons. There was no prospect of a finding on that evidence that the information provided by the fourth defendant had any real role in the decision to charge, or that he was to be regarded in any sense as the prosecutor. And it was fanciful to suppose that, having clearly identified the various bases on which she acted, Constable Lawrence would, at trial, suddenly attribute her decision to charge the plaintiff to the information provided by the fourth defendant. The learned judge correctly concluded that there was no real prospect of the plaintiff proving his case against the fourth defendant. It follows that there was no need for a trial of the action.

[21] I would dismiss the appeal with costs against the appellant.

[22] **HELMAN J:** I agree with the orders proposed by Holmes JA and with her reasons.