Neutral Citation Number: [2020] EWHC 1684 (QB)

Case No: QB-2018-000850

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MEDIA AND COMMUNICATIONS LIST

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/06/2020

Before :

THE HONOURABLE MRS JUSTICE STEYN DBE

- -

Between :

CXZ	**Claimant**
- and -	
ZXC	**Defendant**

- -
- -

The **Claimant** appeared in person
Paul Mitchell QC (instructed by **The Wilkes Partnership LLP**) for the **Defendant**

Hearing date: 10 June 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MRS JUSTICE STEYN DBE

Covid-19 Protocol: This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 26 June 2020 at 14:00

Mrs Justice Steyn :

A. Introduction

1. The Claimant and the Defendant married in 2012. During the course of their relationship they had two children together. Their marriage broke down and, in 2014, the Defendant petitioned for divorce. By May 2015, the couple had been granted a decree absolute. In 2017, while proceedings were ongoing concerning access to their children, the Defendant reported the Claimant to the police, alleging that he had sexually abused his own children. The Defendant has acknowledged in these proceedings, and previously in the family proceedings, that those allegations are not true – the Claimant did not sexually abuse their children – and there was no proper basis for the allegations (albeit this is acknowledged "with hindsight").

2. The Claimant brought a claim for malicious prosecution against the Defendant.

3. This judgment addresses the Defendant's application, filed on 25 July 2019, for an order that the claim be struck out or alternatively the Defendant be given summary judgment. In short, the Defendant contends that the first element of the cause of action in malicious prosecution is not met because the Claimant was not prosecuted.

4. The Defendant's application was originally listed to be heard before a Master on 9 December 2019. At that stage, the Claimant was represented by solicitors and Counsel. Unfortunately, on 6 December 2019, the hearing was vacated due to the unavailability of a Master to hear it. It was further directed that the Defendant's application should be listed before a High Court Judge.

5. The Claimant appeared in person at the remote video hearing. His submissions were brief, but he spoke eloquently of the damaging effect of such false allegations being made against him and (in effect) of his wish for this wrong to be remedied. I have been greatly assisted by the skeleton argument for the Claimant which had been prepared by Gervase de Wilde of Counsel for the December hearing, upon which the Claimant relied, as well as by the written and oral submissions of Mr Paul Mitchell QC, Counsel for the Defendant.

6. In addition, there is before me an application for relief from sanctions made on behalf of the Claimant on 3 January 2020, in relation to the late filing and service of the Notice of Funding. Neither party made any written or oral submissions on this application. I shall address it briefly at the end of this judgment.

B. Anonymity

7. An anonymity order was made in these proceedings on 23 November 2018 by Master Gidden and it is clearly right to maintain that order, having regard to the detrimental impact that publication of the (admittedly untrue) allegations could have on the Claimant and on the parties' children.

C. Procedural framework

8. Rule 3.4(2)(a) of the Civil Procedure Rules ("CPR") provides:

> "The court may strike out a statement of case if it appears to the court –
>
> > (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim".

9. The Claimant acknowledges, in his skeleton argument, that an example of a case where the court may strike out a statement of case pursuant to r. 3.4(2)(a) is one where the facts, even if true, do not disclose a legally recognisable claim against the defendant.

10. The Claimant relies on the following commentary in the White Book 2020 at 3.4.2, which I accept applies:

> "However, it is not appropriate to strike out a claim in an area of developing jurisprudence, since, in such areas, decisions as to novel points of law should be based on actual findings of fact (*Farah v British Airways, The Times, 26 January 2000, CA* referring to *Barrett v Enfield BC [1989] 3 W.L.R. 83, HL; [1999] 3 All E.R. 193*). A statement of case is not suitable for striking out if it raises a serious live issue of fact which can only be properly determined by hearing oral evidence (*Bridgeman v McAlpine-Brown, 19 January 2000, unrep., CA*). An application to strike out should not be granted unless the court is certain that the claim is bound to fail (*Hughes v Colin Richards & Co [2004] EWCA Civ 266; [2004] P.N.L.R. 35, CA* (relevant area of law subject to some uncertainty and developing, and it was highly desirable that the facts should be found so that any further development of the law should be on the basis of actual and not hypothetical facts))."

11. CPR r.24.2(a)(i) provides:

> "The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if –
>
> > (a) it considers that
> >
> > > (i) that claimant has no real prospect of succeeding on the claim or issue; …"
> >
> > > (ii) …; and
> >
> > (b) there is no other compelling reason why the case or issue should be disposed of at a trial."
>
> .

12. The Claimant refers to the following part of the commentary in the White Book at 24.2.3, and again I accept that it applies:

> "**no real prospect of succeeding/successfully defending**"

> The following principles applicable to applications for summary judgment were formulated by Lewison J in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15] and approved by the Court of Appeal in *AC Ward & Sons Ltd v Catlin (Five) Ltd* [2009] EWCA Civ 1098; [2010] Lloyd's Rep. I.R. 301 at 24:
>
> i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 1 All E.R. 91*;*
>
> ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8];…"

13. In determining the Defendant's application, I must assume that the facts asserted by the Claimant, in his Particulars of Claim, are true. Although, as I have said, the Defendant admits that the allegations she reported to the police are not true and had no proper basis, she denies that she acted with malice or believing them not to be true at the time. Nevertheless, in determining this application, I must assume that the Claimant will succeed in establishing his pleaded case, including that the Defendant maliciously concocted the allegations, knowing them to be false when making them.

D. The elements of the tort of malicious prosecution

14. It is common ground that the essential elements of the tort of malicious prosecution are accurately expressed in *Clerk & Lindsell on Torts*, 22nd ed., at 16-12:

> "In an action for malicious prosecution the claimant must first show that he was prosecuted by the defendant, that is to say, that the law was set in motion against him by the defendant on a criminal charge or, now, via civil proceedings; secondly, that the prosecution was determined in his favour; thirdly, that it was without reasonable and probable cause; fourthly, that it was malicious." (emphasis added)

15. Lord Keith of Kinkel, giving a speech with which all members of the Judicial Committee of the House of Lords agreed, cited with approval an earlier version of this passage - in essentially the same terms as the current version, save for the words "*or, now, via civil proceedings*" - in *Martin v Watson* [1996] 1 AC 74 at 80B-D.

16. Although on the pleadings the Defendant takes issue with each of these elements, on this application I am only concerned with the first, that is, whether, on the Claimant's pleaded case, the law was set in motion against him on a criminal charge.

E. The Particulars of Claim

17. The Particulars of Claim state:

> "22. On 4 September 2017, the Defendant reported the Claimant to the Police for a sexual assault on the Older Son ("the Defendant's Allegations"). …
>
> 23. On 4 September 2017, in relation to the Defendant's Allegations, the Police: made a report to Children's services; created a crime report number; and categorised the Defendant's allegations as offences of assault of a male child under 13 by penetration and child sexual exploitation ("the Offences").
>
> 24. On 5 September 2017, the Defendant gave a Witness Statement to the Police. …
>
> 25. On 5 September 2017, the Children were interviewed by the Police."

18. At paragraph 30 the Particulars of Claim state:

> "On 14 September 2017, the Claimant attended the Police station for a voluntary interview under caution.
>
> 30.1 The Claimant was contacted, by telephone, by Warwickshire Police whilst he was at work. The Claimant was told about the Defendant's Allegations. The Police told the Claimant that he could either agree a time voluntarily to surrender himself to the Police station in Leamington Spa, or a warrant for his arrest would be issued. The Claimant immediately arranged a date to attend the Police station and contacted a criminal lawyer to support him during the process because the Defendant's Allegations were extremely serious and the Claimant wished to ensure that he would avoid criminal liability, or any further damage to his relationship with the Children. In all the circumstances, the Claimant was required to attend the voluntary interview, or face arrest.
>
> 30.2 The Claimant categorically denied the allegations made." (emphasis added)

19. The Particulars of Claim describe further calls by the Defendant to the police both before the Claimant was interviewed (on 10 and 12 September 2017), and after he was interviewed (on 14, 15 and 27 September, and 6 October), detailing further information she is said to have provided to the Police in support of her allegations.

20. Following the Claimant's interview, the police conducted a search of his mother's house (where he had been staying), "*seizing a pair of pyjamas and a train set*", and subsequently took a statement from the Claimant's mother in relation to the allegations.

21. According to paragraph 37 of the Particulars of Claim, on 24 November 2017, "*the Police confirmed to the Claimant's then solicitors that they would not be taking any further action against the Claimant*".

22. At paragraph 41.3 the Claimant further pleads:

> "The Claimant was prosecuted by the Defendant as complainant when, based on the information set out above, the Claimant was required to attend a voluntary interview under caution or face having a warrant issued for his arrest, and was the subject of a Police investigation for two months and 10 days in relation to the Offences." (emphasis added)

F. The parties' submissions

23. The Defendant submits that as a matter of law, on the pleaded facts, the Claimant was not prosecuted.

24. First, Mr Mitchell referred to *Yates v The Queen* (1885) 14 QBD 687 in which the Court of Appeal considered whether a procedural step taken towards bringing a (criminal) libel action amounted to the commencement of a "criminal prosecution" within the meaning of s.3 of the Newspaper Libel and Registration Act 1881. Mr Mitchell submitted that, although this case concerned the construction of a statute rather than malicious prosecution, the instinct of the court was that prosecution involves bringing a person before a judicial authority, even if not physically (see pp. 657 and 661).

25. Secondly, Mr Mitchell submitted that *Martin v Watson*, in particular Lord Keith's discussion of a number of authorities from other jurisdictions at 80E-84H, strongly supports the contention that merely making a complaint to the police, without that leading to the consequence of a charge being laid, does not amount to setting the law in motion.

26. Thirdly, Mr Mitchell relied on the judgment of Moore-Bick LJ in *AH v AB* [2009] EWCA Civ 1092 at [68]-[69] where he said:

> "68. In *Martin v Watson* Lord Keith, having approved the statement of principle in *Clerk & Lindsell* to which I have referred, identified at page 80E of the report the question at issue as being "whether or not the defendant is properly to be regarded, in all the circumstances, as having set the law in motion against the plaintiff." In my view, it is essential for a correct understanding of later passages in his Lordship's speech to keep that question well in mind. …
>
> 69. I think it is clear from Lord Keith's speech and from the authorities to which he referred that the concept of "setting the

> law in motion" requires something more than merely making a complaint or report which suggests that an offence has been committed; it also involves active steps of some kind to ensure that a prosecution ensues (what Richardson J in *Commercial Union Assurance Co of New Zealand Ltd v Lamont* [1989] 3 NZLR 187 at page 199 described as "procuring the use of the power of the state"). Invoking the power of the state against the claimant is central to the tort of malicious prosecution and requires a positive desire and intention to procure a prosecution. In effect, it must be the defendant's purpose to bring about a prosecution and that purpose must be translated into actions which are effective in bringing about proceedings. …" (emphasis added)

27. Fourthly, Mr Mitchell relied on the judgment of Warby J in *Barkhuysen v Hamilton* [2016] EWHC 2858 (QB). The case concerned a long-running neighbour dispute and raised numerous factual issues and causes of action. One of the causes of action was for malicious prosecution based on the police complaint of 1 January 2013 which is described at [20]-[21]. Warby J held at [143] that the claimant had

> "amply made out the third and fourth elements of this tort: the defendant made a false, entirely unfounded, and malicious accusation. That accusation set in train the actions of the police that followed: the claimant's arrest and detention, the seizure of his property, the intimate sampling and other steps I have identified above. The defendant procured a criminal investigation of the claimant lasting several months."

28. However, there was no prosecution for the purposes of the tort. Warby J explained at [145]-[146]:

> "All of that shows that there was a false arrest and false imprisonment thereafter, which were maliciously procured by the defendant. But in my judgment that is not enough to bring home the claim for damages for malicious prosecution. I accept Mr Samson's argument that there was no "prosecution" for the purposes of this tort. Ms Marzec submits that the underlying principle of the law of malicious prosecution is that an abuse of the process of the law that causes another injury is actionable; the key feature in considering whether there has been a "prosecution" is whether the actions taken against the claimant were such as to cause him injury. She refers me to *Churchill v Siggers* (1854) 3 E & B 929, *Mohamed Amin v Banerjee* [1947] AC 322 at 331 (PC), *Roy v Prior* [1971] AC 470, 477-9 (HL) and the recent decision of the Supreme Court in *Willers v Joyce* [2016] UKSC 43. But in none of those cases was a mere arrest held to be actionable in the tort of malicious prosecution. Nor, in my judgment, does any of them stand as authority for any principle that would make a mere arrest so actionable. It is important not to treat passages in judgments, however high their authority, as tantamount to statutory wording.

> The pleaded case for the defendant is that a prosecution begins when a person is charged. Mr Samson submits that this is too generous an approach. He argues that the authorities point to the conclusion that the malicious institution of proceedings before a judicial body is actionable in this tort, but not anything short of that. I agree, and add that the established rationale of the tort appears to be that compensation should be available for injury caused by a malicious abuse of the judicial power of the state. All of the cases cited above can be explained on this basis. See also the analysis of Sir Timothy Lloyd in *Crawford v Jenkins* [2014] EWCA Civ 1035 [2014] EMLR 25 [48]-[50]." (emphasis added)

29. This case, Mr Mitchell submits, is *a fortiori* because the claimant was not even arrested.

30. The final authority on which Mr Mitchell relied, which was handed down in the same month as *Barkhuysen*, is *CFC 26 Ltd v Brown Shipley & Co Ltd* [2016] EWHC 3048 (Ch). Newey J considered a claim that one of the defendants, a local council, was liable for malicious prosecution of an enforcement notice. The Council's case was that the tort "*cannot apply in relation to the mere service of an enforcement notice*" because, as it is put in Clerk & Lindsell (now at 16-14):

> "To prosecute is to set the law in motion and the law is only set in motion by an appeal to some person clothed with judicial authority in regard to the matter in question."

31. The Council argued that the service of an enforcement notice involved no "*appeal to some person clothed in judicial authority*", whereas the claimant contended that the passage from Clerk & Lindsell pre-dated *Willers v Joyce* (as it then did) and contended that the tort can apply in relation to any kind of legal process. Newey J held at [68]:

> "In my view, [Counsel for the Council] is right on this point. While it is now clear that the tort of malicious prosecution can apply without a criminal prosecution, there remains a requirement that the law has been "set in motion by an appeal to some person clothed with judicial authority" and service of an enforcement notice cannot, as it seems to me, suffice for this purpose. I do not see *Churchill v Siggers* as providing authority to the contrary." (emphasis added)

32. Mr Mitchell contends that none of the steps taken in this case to investigate the allegations, such as interviewing the claimant under caution and searching his mother's house, amounted to setting the law in motion by an appeal to any person clothed with judicial authority.

33. The Claimant's position is that his "*compulsory interview under caution on threat of arrest and investigation by the Police do amount to prosecution for the purposes of the tort*". He contends, first, that there is clear authority which supports his claim, namely, *Sallows v Griffiths* [2001] FSR 15; and, secondly, that "*this is a paradigm*

case in which findings of fact on the various issues between the parties must be made before any decision is reached in this complex and developing area of law".

34. The Claimant refers to the passage in Clerk & Lindsell at 16-15 where *Sallows v Griffiths* is addressed by the editors in these terms:

> "The boundary between malicious prosecution and false imprisonment is not always easy to draw. In principle, directing a police constable to make an arrest might lead to liability in an action for false imprisonment, rather than malicious prosecution, on the ground that the defendant has directed the arrest and therefore the arrest is the defendant's own act and not the act of the law. However, simply supplying information to the police on the basis of which a police officer decides to make an arrest will not itself engage liability for false imprisonment. In *Sallows v Griffiths*, the Court of Appeal applied the reasoning of the House of Lords in *Martin v Watson* to find the defendant liable in tort where he had falsely and maliciously given a police officer information that the claimant had been guilty of a criminal offence, thereby procuring his arrest. It appears that no distinction was drawn by the Court of Appeal on the facts between maliciously procuring an arrest and maliciously procuring a prosecution." (emphasis added)

35. The Claimant contends that the consequences he suffered as a result of the allegations went beyond those suffered by the claimant in *Sallows v Griffiths*. He draws attention to the November 2012 guidance issued by the Association of Chief Police Officers which he submits demonstrates "*a shift in Police culture in recent years away from arrests and towards voluntary interviews under caution with suspects*" and "*makes it clear that the absence of agreement to a voluntary interview may be grounds for arrest*". The Claimant submits that his experience was "*tantamount to an arrest, and was highly intrusive and distressing*".

36. The Claimant contends that there is a developing recognition in the law of the capacity for allegations of criminality and related matters such as arrests or police investigations to engage article 8 of the European Convention on Human Rights. In this regard, his skeleton argument drew attention to *ERY v Associated Newspapers* [2017] EMLR 9 and *Richard v BBC* [2019] Ch 169. He submits that while the tort has historically focused on the reputational damage caused by a prosecution, developments in the law surrounding police investigation and arrest indicate that the harm occasioned to a person's privacy rights caused by this process should arguably now come within the scope of the matters for which the tort provides compensation. The Claimant contends that the developments in this area in respect of privacy, the changes introduced by the police guidance, and the significant development of the tort in *Willers v Joyce* demonstrate that his claim has a realistic prospect of success and/or provide a compelling reason for the claim to be allowed to proceed to trial.

G. Analysis

37. The Claimant must show that he was prosecuted, in other words, that the law was set in motion against him. In my judgment, the clear effect of *Martin v Watson*, *AH v AB*,

Barkhuysen and *CFC 26* is that the requirement to show that the claimant was prosecuted involves showing that the law was set in motion by an appeal to some person clothed with judicial authority. The tort of malicious prosecution is a form of wrongful use of process: see, for example, the heading to the section of *Halsbury's Laws of England*, *Tort*, vol.97 (2015), in which the malicious prosecution is addressed.

38. In *Sallows v Griffiths* the claimant was arrested and charged: see [13] where Beldam LJ states that six months later "*all charges against him were dropped*". At [22] Beldam LJ refers to the period of six months during which "*the criminal proceedings were hanging over his head*" (my emphasis), from which it is apparent that legal proceedings had been instituted, not merely an investigation. Similarly, Staughton LJ referred at [30] to "*the arrest and prosecution of Mr Sallows*" (my emphasis), which suggests that he was not equating the arrest with prosecution, but referring to a prosecution that had been instituted following the arrest.

39. In this case, the Claimant's pleaded case makes clear that he was not arrested. I readily accept that he felt he had no real choice but to attend the police station voluntarily, to be interviewed under caution. He took the sensible course of cooperating with the police investigation. Nevertheless, there is a clear conceptual difference between an arrest, which has the effect that a person is deprived of his liberty, and voluntarily agreeing to be interviewed by the police, which does not involve being detained. Indeed, the fact that the police offered the Claimant a way to attend an interview without being arrested, and that this accords with modern police practice, underlines the significant distinction between being arrested and voluntarily attending an interview.

40. It is also clear on the Claimant's pleaded case that he was never charged. No step was taken which involved bringing any criminal charge against him before any judicial authority.

41. The effect of *Willers v Joyce* is that the tort extends to civil proceedings. That is a significant development, but it confirms that the essence of the tort is the malicious institution of proceedings. *Willers v Joyce* does not provide any assistance for the Claimant's argument that the tort extends, or should be extended, to circumstances where no form of process has been instituted. I also note that *Barkhuysen* and *CFC 26* were determined after *Willers v Joyce* and both judgments are firmly contrary to the Claimant's case.

42. The Claimant correctly points to recent developments regarding the privacy rights of those subject to arrest or police investigation. Since the Claimant's skeleton argument was drafted, the Court of Appeal has given judgment in *ZXC v Bloomberg LP* [2020] EWCA Civ 611, holding that in general a person has a reasonable expectation of privacy in an investigation up to the point of charge. I accept that this development recognises the harm that can potentially be caused to a person's reputation as a consequence of allegations made to the police, even where those allegations never result in any offence being charged. But it does not follow that the tort of malicious prosecution should be extended to enable a claim to be made where the claimant has not been arrested or charged, let alone that the tort can or should be so extended at this level.

43. In circumstances where it is plain on the pleaded facts that the Claimant does not have a realistic prospect of succeeding on the claim because he cannot establish the first essential element of the cause of action, the appropriate course is to grant the Defendant's application to strike out the claim and for summary judgment. The Claimant has not established any compelling reason why, in the absence of a realistic prospect of success, his claim should nevertheless be allowed to proceed to trial.

H. The Claimant's application for relief from sanctions

44. On 3 January 2020, the Claimant made an application for relief from sanction in accordance with CPR 3.9 in relation to the late filing of a Notice of Funding. The application was supported by the second witness of Mr Jennings, the Claimant's former solicitor.

45. In short, Mr Jennings has explained that in the letter of claim of 19 October 2018 the Claimant's solicitors informed the Defendant's solicitors that their client had the benefit of a Conditional Fee Agreement. However, when the claim was issued on 23 November 2018 and when it was served on the Defendant's solicitors on 23 March 2019, the Claimant's solicitors omitted to file a Notice of Funding. This omission was noticed on 23 May 2019 and remedied the following day.

46. The Claimant's solicitors ask for the issue of relief to be determined, but at the same time they state that the "*issue of whether or not a success fee is recoverable from the Defendant should be reserved to any detailed assessment hearing*".

47. As the Claimant was no longer represented at the hearing, he understandably did not feel able to make any submissions on this application, and it was not a matter that had been addressed in the skeleton argument drafted by his former Counsel. The Defendant's position was that it was a matter for the applicant to explain the application, but the Defendant was neutral.

48. I am not prepared to grant this application in circumstances where it is not clear what the sanction is in respect of which I am being asked to grant relief. It is not possible to apply the *Denton v White* test without knowing what sanction is being disapplied. In any event, this application would appear to be academic in light of my conclusion on the Defendant's application. Accordingly, I shall make no order on the Claimant's application for relief from sanctions.

I. Conclusion

49. For the reasons given above, I shall make an order striking out the claim and giving summary judgment to the Defendant; and I shall make no order on the Claimant's application.