SOUTH  AUSTRALIA

EIGHTY-THIRD REPORT

of the

LAW REFORM COMMITTEE

of

SOUTH AUSTRALIA

to

THE ATTORNEY-GENERAL

RELATING TO CIVIL ACTIONS FOR PERJURY COMMITTED IN CRIMINAL PROCEEDINGS AND TO THE TORT OF MALICIOUS PROSECUTION

1984

The Law Reform Committee of South Australia was established by Proclamation which appeared in the *South Australian Government Gazette* of 19th September, 1968. The Members are:

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EIGHTY-THIRD REPORT OF THE LAW REFORM COMMITTEE OF SOUTH AUSTRALIA RELATING TO CIVIL ACTIONS FOR PERJURY COMMITTED IN CRIMINAL PROCEEDINGS AND TO THE TORT OF MALICIOUS PROSECUTION

TO:

The Honourable C.J. Sumner, M.L.C.,
Attorney-General for South Australia.

Sir,

Further to the Twenty-Third Report of this Committee on civil actions for persons sustaining damage by reason of perjury committed in civil proceedings, you have referred to us the following further questions for consideration:—

(1) Whether a civil action should lie against a person who commits perjury in a criminal action at the suit of the person who has suffered damage as a result of that perjury.

(2) The fact that there is no provision for the recovery of costs or damages where a private prosecution is instituted and a Magistrate finds no case to answer unless it can be established that the proceedings were instituted "maliciously", which is not an easy matter to prove.

(3) Malicious prosecution relating particularly to the recovery of damages but canvassing also the institution and discontinuance of private proceedings.

Perjury:

The judicial policy that denies a tort for injurious statements made in the course of a judicial proceeding can be traced as far back as 1596, to the case of *Damport v. Sympson (1596) Cro. Eliz. 520; 78 E.R. 769.* In *Damport's case* the plaintiff sought to recover damages against a witness who testified in an earlier suit for conversion. The plaintiff alleged that the defendant committed perjury by testifying that the value of the converted property was no more than one hundred and eighty pounds, whereas the actual value was five hundred pounds. As a result, the jury gave only two hundred pounds damages and the plaintiff sued the witness for the defence, but it was held at page 521 of the report in Croke that an action did not lie for the following reasons:—

(a) the law intends the oath of all to be true—this is simply wrong or there would be no prosecutions for perjury;

(b) such perjury can be punished by statute and if a civil action was allowed it would be a double punishment which would not be reasonable—but there are many causes of action which are both a crime and a tort;

(c) if there was such an action there would be a precedent by then, but as there is not, it is a good argument that the action is not maintainable—that will not apply following the Twenty-Third Report of this Committee and the ensuing amendment to the Wrongs Act in 1983;

(d) perjury was not punishable at common law and it did not become a criminal offence justiciable in the ordinary courts until the reign of Elizabeth I (5 Eliz. I c.9)—this seems to be irrelevant;

(e) an action based on such an order necessarily involved an inquiry into what the jury would have given by way of increased damages, if it were not for the perjury, and that could not be tried. If it were otherwise, the evidence of every witness might be questioned—civil actions are now in this State tried by a Judge alone who gives reasons for his judgment and allows damages under nominated heads, so that this objection is no longer tenable.

Even in recent times the Courts have put forward reasons why an action for damages should not lie.

Lord Denning M.R. in *Roy v. Prior [1970] 1 Q.B. 283 at page 287* said:—

> "Witnesses must be able to give their evidence without fear of consequences. They might be deterred from doing so if they were at risk of being sued for what they said."

In the same case at page 480 Lord Wilberforce expressed the view that there is a need to "avoid a multiplicity of actions in which the value of the truth of [the] evidence would be tried over again."

In *Hargreaves v. Bretherton [1959] 1 Q.B. 45* Lord Goddard C.J. raised the spectre of "half the prisoners in England" bringing actions against prosecution witnesses, and this is a very real problem in relation to the extension of a civil action for perjury to perjury alleged to have been committed in the course of a criminal trial.

This line of authority has been followed in Australia. The High Court in *Cabassi v. Vila (1940) 64 C.L.R. 130* held in relation to alleged perjury in civil proceedings, that a witness, against whom it is alleged that his evidence amounted to perjury, cannot be made liable by framing the claim as one for conspiracy with others to defraud the plaintiff by the giving of false evidence.

Although it is desirable for the state to prosecute perjured testimony, this does not necessarily mean that there should be a denial of a parallel civil action for damages. Indeed there are many legal wrongs which are both crimes and invasions of civil rights and redressible as such. While a private action would not necessarily interfere with the Government's right to prosecute, the absence of a private action leaves injured parties without compensation.

Some Courts have urged that such an action would deter witnesses from full co-operation with the Courts. In *Dawkins v. Lord Rokeby (1875) L.R. 7 H.L. 744,* the House of Lords affirmed the following statement of Kelly C.B.:

> "The principle we apprehend, is that public policy requires that witnesses should give their testimony free from any fear of being harassed by an action or an allegation, whether true or false, that they acted with malice."

However the rule of witness immunity has its primary application in preventing suits for libel. Defamation actions are readily distinguishable from the proposed action to remedy loss sustained through perjury. Perjured testimony is given maliciously and, unlike defamation or libel, intentionally false testimony strikes at the core of judicial administration. It taints the basic evidentiary facts upon which the judgment is rendered. Assuming that full disclosure of the truth is the goal of judicial policies, the application of civil immunity to witnesses should not extend to falsehoods that can be clearly proven.

For these reasons we made the recommendations contained in the Twenty-Third Report of the Committee.

Professor Alec Samuels in an article entitled *"A Remedy for the Victim of Perjury" 114 Sol. Jo. 675 at 676* made the following points in relation to perjury in the course of criminal proceedings:—

> "one can see the reason for refusing to allow the statements of a witness in Court to be made the subject of a defamation action, because defamation is usually self-evident and the Judge is in control of the proceedings in his Court and can prevent abuse. But ex hypothesi the judicial control argument is not very strong in the face of perjury, unless one is to assume that the Judge can and should always detect perjury. The tort of malicious prosecution has never been challenged as unnecessary or undesirable. Why should we not have the tort of giving malicious testimony? The reason for the distinction between malicious prosecutors and malicious witnesses, namely that the former are initiators whereas the latter are compellable, is not very convincing, especially when the perjuring witness is not compelled but is voluntary and eager. The proposition that because a witness is compellable and even compelled therefore he is to be absolutely protected from any malicious abuse resulting in the loss of liberty by a victim is not acceptable. The subpoenaed witness ought not to be given a licence to lie as the price of his compulsory attendance."

Yet another reason is the possibility that in the future the state may be held liable to pay compensation for wrongful conviction and imprisonment—suggestion of the Criminal Law and Penal Methods Reform Committee of South Australia. If such a reform were to come about, it appears reasonable that the witness, whose perjured testimony resulted in the gaol sentence, should be the one to pay damages rather than the State. That would be a good reason for allowing a right over to the Crown to recover compensation paid out by it under such circumstances but does not solve the problem of whether a right of action should be given generally in relation to perjury in criminal proceedings.

Perjury by a prosecution witness in a criminal case may result in the sentencing of an innocent man to a term of imprisonment, which in turn may lead to loss of employment, loss of prospects for future employment, loss of reputation and a considerable amount of suffering. Equally perjury by a defence witness may induce an unjust acquittal, cause the State substantial loss in relation to prosecution costs, and leave a criminal at large in the community.

In 1971 "Justice", when proposing that a new tort be created to deal with perjury, certainly intended to include criminal matters, proposing that the action be extended to any person found to have been wrongly convicted by a criminal court, any party to other proceedings who had suffered from a wrong finding by a civil court or tribunal, any person, not a party to the proceedings who had lost his livelihood or suffered other loss because of the perjured evidence given in the course of the proceedings, but not to the realm of defamation.

"Justice" recommended that compensation of the injured party be assessed on the usual principles in tort, that is that an attempt should be made to assess the harm suffered (e.g. wrongful imprisonment and injured feelings) in monetary terms.

It did not deal with the difficulty that a jury gives its verdict on the general issue of guilt or innocence and no-one knows or is entitled to ask a jury what evidence it accepted and what is rejected. The jury may

well have regarded the perjured evidence as worthless and yet have found on the basis of legitimate evidence that the charge had been proved beyond reasonable doubt.

The Act No. 87 of 1983 amending the Wrongs Act provides by section 2, inserting a new clause 36, as follows in Clause 36(2)—

"36. (2) In proceedings under this section, the plaintiff must establish—

(a) that the defendant—

(i) has been convicted of perjury;

(ii) has been found guilty of contempt of court on the ground of having committed perjury; or

(iii) has been committed for trial on a charge of perjury but by reason of the fact that no indictment has been preferred, or a nolle prosequi has been entered, has not been tried on that charge;

and

(b) that the perjured evidence was material to the outcome of the proceedings in which it was given."

Of the above provisions it is *(b)* which would cause real difficulties if an attempt was made to transpose it into a provision creating liability for perjury in the course of criminal proceedings for no-one knows what the jury treated as relevant material for the purpose of convicting. If the perjured evidence had merely been one of many factors which led to the conviction, or had played no part in the jury's deliberations because they rejected the perjured evidence, and the conviction was in fact correct, the prisoner should not be entitled to damages because he has in fact not suffered any.

D.W. Pollard in an article entitled *"False Witness" A Comment (1974) Crim. L.Rev. 588* when commenting upon the Justice Report, also pointed to this problem. He said that while an essential element of tort liability is that the act impugned caused the injury to the plaintiff, and that while occasionally this will be obvious; for example a person convicted when all the evidence was false, so often however all the evidence is not so clear and convictions result from an amalgam of true and false evidence.

At the very least it should be necessary as a pre-requisite to the cause of action for the Court of Criminal Appeal to have reversed the conviction expressly on the ground that it was obtained by perjured evidence.

A convicted person attempting to overturn a verdict based upon perjured evidence would have to rely upon Sections 352 and 353 of the Criminal Law Consolidation Act. Under these provisions the Full Court may grant leave to appeal and set aside a verdict if it thinks that it constitutes a miscarriage of justice. It appears from the cases of *R. v. Flower [1966] 1 Q.B. 146, Davies and Cody v. The King (1937) 57 C.L.R. 170* and *R. v. Poulter (1978) 19 S.A.S.R. 370*, that a Court of Criminal Appeal will not necessarily order a new trial in cases where it is alleged that the verdict was reached upon perjured evidence. However those cases were concerned with the situation where a witness merely came back and said that he had lied at the trial, not where he had actually been convicted of perjury; and as has been said in those cases, a witness has many reasons for altering his story and often it is difficult to ascertain which version is the truth.

The basic problem however is that it is unlikely that a situation would arise where the Court of Criminal Appeal would, in giving reasons for setting aside a verdict, expressly attribute it solely to perjured evidence. Quite often there are a number of matters which taken together are considered by the Court to constitute a miscarriage of justice. Even if the perjured evidence is one of the matters enumerated by the Court, this gets back to the causation problem:—namely was it the perjury which caused the wrongful conviction and hence the damage, or was it some other evidence in the case.

The accused may for example have elected to give evidence on oath and the jury may have simply disbelieved him and indeed may well have thought that he was committing perjury and so brought in a conviction.

As far as the Committee can gauge, proof of causation that perjured evidence caused the conviction and thus all subsequent injury would be such a difficult matter to prove in all but the most exceptional cases, that it is pointless to change the existing law and they so recommend.

Turning now to malicious prosecution, the history of the action is as follows:—

Anglo-Saxon Courts employed a simple system for guarding against false suits: the complainant unfortunate enough to lose his cause also lost his tongue, or alternatively was compelled to pay his opponent compensation which was fixed according to the complainant's status. Each complainant was required to provide sureties who were subjected to the same penalties if the complainant could not be found.

After the Norman Conquest a system known as amercement developed in England under which most losing plaintiffs were required to pay or find pledges who would pay the Crown a penalty graded according to the magnitude of the injury done. Wronged defendants however received no compensation.

In 1293 the Statute of Champerty (21 Edward I) established the writ of conspiracy which enabled an injured plaintiff to sue those who maliciously brought meritless actions through straw claimants. The gradual decline of amercement led by Tudor-Stuart times to a new round of statutory activity. Cost statutes developed that expanded defendants' ability to recover their litigation expenses from losing claimants.

In the seventeenth century an action on the case was held to lie for manifest vexation stemming from groundless suits: see *Savill v. Roberts (1698) 12 Mod. 208; 91 E.R. 1147 at 1151,* a case involving a false criminal indictment.

It was from these antecedents that the tort of malicious prosecution developed.

The action for malicious prosecution being an action on the case, it is essential for the plaintiff to prove damage, and in *Savill v. Roberts (supra)* Holt C.J. classified damage for the purpose of this tort as of three kinds, any one of which might ground the action; malicious prosecution which might damage a man's fame, or the safety of his person, or the security of his property by reason of his expense in repelling an unjust charge.

Assuming that there is damage under one of these heads, the plaintiff in a malicious prosecution action must then prove *(a)* that the defendant prosecuted him, *(b)* that the prosecution ended in the plaintiff's favour, *(c)* that the prosecution lacked reasonable and probable cause; and *(d)* that the defendant acted maliciously.

Prosecution:

Halsbury: Laws of England, 3rd Edition Volume 25 says of "prosecution" at paragraph 684—

> "A prosecution exists where a criminal charge is made before a judicial officer or tribunal, and any person who makes or is actively instrumental in the making or prosecuting of such a charge is deemed to prosecute it, and is called the prosecutor.
>
> Thus a person who lays before a Magistrate an information stating that he suspects and has good reason to suspect another, or who prefers a bill of indictment, is engaged in a prosecution, and he may be responsible for the prosecution even though the charge made before the Magistrate is an oral one, and even though, after making the charge before the Magistrate, or even without making one, he is bound over to prosecute and does so."

Termination of previous proceedings in plaintiff's favour:

The proceedings sufficiently terminate in the plaintiff's favour if the Magistrate dismisses the charge, if the proceedings fail through a defect in the indictment, or because they are coram non judice, or by acquittal by a jury, even as to one part only of the indictment.

Where there has been a successful appeal from the conviction, this is a sufficient termination of the proceedings in the plaintiff's favour. However the conviction though reversed might be evidence on which the Judge might find that there was a reasonable and probable cause for laying the prosecution.

At one time it was held that entry by the Attorney-General of a nolle prosequi to an indictment would not be a sufficient termination of the proceedings in favour of the accused to enable him to bring an action: see *Goddard v. Smith (1704) 1 Salk. 21, 6 Mod. 261.* However in *Gilchrist v. Gardiner (1891) 12 N.S.W.L.R. (L) 184* it was held that the entry of a nolle prosequi was a termination of proceedings: see also *Mann v. Jacombe (1960) 78 W.N. N.S.W. 635* and *Taylor v. Shire of Eltham [1922] V.R. 1.* In America it would also seem to be the prevailing view that a nolle prosequi is a sufficient termination of proceedings. The matter should however be put beyond doubt by legislation in South Australia.

Lack of reasonable and probable cause:

The classic definition of reasonable and probable cause was given by Hawkins J. in *Hicks v. Faulkner (1878) 8 Q.B.D. 167 at 171* as:

> "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 an 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."

A simpler definition was given by Lord Devlin in *Glinski v. McIvor [1962] A.C. 726* where he said at pages 766-7, reasonable and probable cause "means that there must be a cause (that is sufficient grounds . . .) for thinking that the plaintiff was probably guilty of the crime imputed".

Malice:

No prosecution, however devoid of reasonable cause, exposes the accuser to liability, unless he was also animated by "malice". "Malice" has a wider meaning than spite, ill-will or a spirit of vengeance, and includes any improper purpose, for example to gain a private collateral advantage. Indignation or anger aroused by the imagined crime is not

sufficient because far from being a wrong or devious motive, it is one on which the law relies to secure the prosecution of offenders. If there is an honest belief in facts which would warrant a prosecution, there is no room for the imputation of improper motive and therefore of malice: see the judgment of May J. in *Wershof. v. Commissioner of Police [1978] 3 All E.R. 540 at 553.*

The plaintiff may discharge the burden of proving malice by showing either what the motive was and that it was improper, or that the circumstances were such that the prosecution can only be accounted for by imputing some wrong and indirect motive to the prosecutor. This however is a difficult burden to discharge in practice and is the reason why most suits for malicious prosecution fail, because the plaintiff is compelled to prove a negative in relation to facts which are within the knowledge of the defendant.

Damage:

As was stated earlier, a claim for malicious prosecution must be founded on actual injury. This must consist either in injury to reputation, presumed whenever the plaintiff was accused of a crime involving scandalous reflection on his good name, injury to the person as when he is imprisoned or put in jeopardy of it; or damage to his pecuniary interests, such as being put to expense in defending himself against the change. But once this requirement is satisfied, damages are at large, and may take account of injury to the plaintiff's repute and credit as well as any mental distress inseparable from a serious criminal accusation, and incidental arrest or detention.

In addition, the plaintiff may recover for any "special" damage proximately caused, like legal costs incurred in repelling the charge levelled against him.

Criticisms of the present System:

The requirement of proof of both malice and lack of reasonable and probable cause makes the task of the plaintiff in malicious prosecution actions extremely difficult. Fridman in an article entitled *"Abuse of Legal Process" (1970) 114 L.J.N. 335 at 337* made the following comment with respect to this problem:—

> "What is surprising is that there are actually cases of malicious prosecution in which the plaintiff succeeds. It may be that the law is too strict in this matter, and requires alteration so as to discourage the too-easy bringing of prosecutions which fail. Certainly, it may be said, the whole question of actions for the malicious institution of criminal or civil proceedings requires renewed consideration in the light of recent cases, and recent developments in the field of criminal investigation."

Two centuries ago, when this branch of the law was being developed, there was not the large well organized police force which exists today, or indeed any police force, and the law was anxious to encourage private prosecutors to come forward, even if at times this was at the expense of persons unjustly accused. However things have changed in the ensuing years and as *Winfield and Jolowitz on Tort* say *(9th Edition pages 488-9)*:—

> ". . . now that in fact the enormous majority of prosecutions are brought by the police and reliance need no longer be placed upon the private citizen for this purpose, the law is open to the criticism that it is too difficult for the innocent to obtain redress. It is notable how rarely an action is brought at all, much less a successful one, for this tort."

One of the most serious impediments to obtaining damages for malicious prosecution is, as we have pointed out above, the fact that the burden of proving absence of reasonable and probable cause is placed on the plaintiff, since he has thereby placed on him the notoriously difficult task of establishing a negative.

Thus in order to establish the prosecutor's disbelief in his guilt, the plaintiff must give evidence from which an inference can be drawn as to what the defendant's belief actually was. It is not enough merely to adduce reasons for non-belief, without showing that they were in fact operative.

While this requirement is a very high one, one has to consider that altering the burden of proof might result in injustice to private prosecutors. However, except in assault cases and applications to bind over, private prosecutions are a rarity in this State.

However the burden on plaintiffs in malicious prosecution proceedings could be lessened by altering the burden of proof with respect to malice where lack of reasonable and probable cause has been found.

Of interest on this point is *The American Restatement (2nd edition) at paragraph 653* which states:—

> "653. A private person who initiates or procures the institution of criminal proceedings against another who is not guilty of the offence charged is subject to liability for malicious prosecution if—
>
> *(a)* he initiates or procures the proceedings without probable cause and primarily for a purpose other than that of bringing an offender to justice, and
>
> *(b)* the proceedings have terminated in the favour of the accused."
>
> "669. Lack of probable cause for the initiation of criminal proceedings, in so far as it tends to show that the accused did not believe in the guilt of the accused, is evidence that he did not initiate the proceedings for a proper purpose."

This, however, does not alter the burden of proof, except to the extent that the presumption from lack of probable cause will prevent the defendant from submitting that there is no case to answer. This would be strengthened in this country by a statutory provision such as:—

> "Where the plaintiff has proved that criminal proceedings were instituted against him by the defendant without reasonable and probable cause, the defendant shall prove that the proceedings were not instituted for a purpose other than that of bringing an offender to justice."

The plaintiff may also be assisted by extensive pre-trial statements and interrogatories, which make it clear that there were reasonable and probable grounds for instituting the action.

Halsbury's Laws of England (3rd edition) Volume 25 paragraph 714 states that interrogatories as to the defendant's ground for instituting proceedings are not as a rule allowed and, if the defendant denies that he acted without reasonable and probable cause, the plaintiff is not normally entitled to particulars of reasonable and probable cause. If this is so then it makes the burden on the plaintiff unduly great. At least if he has some idea of the defendant's purported reasons, he has some opportunity of showing that the defendant could not possibly have believed that he had reasonable and probable cause.

A majority of us think that a plaintiff should be able to question the defendant prior to the trial as to his beliefs and motives and if this requires an alteration to the substantive law, then the necessary amendment should be made by statute.

We do not think that any alteration is required to the law relating to damage in malicious prosecution suits.

While most criminal prosecutions are actionable as satisfying all three conditions, there may be certain criminal prosecutions which satisfy none, that is do not involve scandal or attack the accused's fair fame, can only result in a fine, and in which the accused if successful can recover costs. If the decision of the Court of Appeal in *Berry v. British Transport Commission [1962] 1 Q.B. 306* that the additional costs properly incurred by a plaintiff beyond the costs awarded constitute legal damage sufficient to ground the action, is followed in Australia, it may be that all criminal prosecutions can be regarded as satisfying the third condition.

McGregor on Damages (14th edition) says of this point at pages 931-3:

> "The cogent criticisms in *Berry v. British Transport Commission [1962] 1 Q.B. 306* of the law as laid down in the *Quartz Hill case (1883) 11 Q.B.D. 674* may herald the day when it will become established that a plaintiff's extra costs beyond his taxed costs, will suffice to ground an action. Such a change in the law is certainly justifiable and indeed desirable; it should, however, be realised that it would make actionable the malicious institution of all civil actions and proceedings as long as the system of taxation of costs is such that it fails to provide a full indemnity to a successful litigant."

Rather than having the initial hurdle of having to fit the plaintiff's case into one of Holt C.J.'s three heads of damages, it may be better to have provisions similar to the American Restatement on this topic. The Restatement, paragraphs 670 and 671, states as follows:—

> "670. When the essential elements of a cause of action for malicious prosecution have been established, the plaintiff is entitled to recover damages for
>
> *(a)* the harm to his reputation resulting from the accusation brought against him, and
>
> *(b)* the emotional distress resulting from the bringing of proceedings.
>
> 671. Special Damages.
>
> When the essential elements of a cause of action as for malicious prosecution have been established, the plaintiff is entitled to recover for
>
> *(a)* the harm legally caused by any arrest or imprisonment suffered during the course of the proceedings, and
>
> *(b)* the expense that he has reasonably incurred in defending himself from the accusation, and
>
> *(c)* any specific pecuniary loss legally caused by the proceedings.
>
> (Punitive Damages are also available)."

While the Committee holds the view that a plaintiff in a malicious prosecution action should be entitled to recover all general and special damages incurred, it was agreed that aggravated or punitive damages should not be available. It should be added that this recommendation was reached on the basis that the onus of disproving malice would now shift to the defendant following our recommendation to that effect.

We do not think there should be any special rule to cover the case where a Magistrate finds that there is no case to answer on a prosecution laid privately. We think that the suggested amendments set out above are sufficient to cover all cases where an action is brought to recover damages for malicious prosecution. The same observations apply to the case of a private prosecution which has been instituted and either no evidence is led to establish criminal liability or the prosecution is abandoned after some evidence has been tendered.

The Committee is of the view that in addition to these recommendations relating to the tort of malicious prosecution, there should be a summary remedy in costs where a person is subjected to criminal proceedings and it appears to the Magistrate that the proceedings were instituted without reasonable and probable cause. The objective of this recommendation is to provide a limited summary remedy which can be utilised there and then by the Magistrate who has already heard all the facts adduced by the Crown and has found that there was no case to answer.

At the present time there is a power to award costs given by Section 77 of the Justices Act, 1921-1983 but those costs are at most in the nature of party and party costs (see *Hamdorf v. Riddle [1971] S.A.S.R. 398* and *Willing v. Hollobone (1972) 2 S.A.S.R. 434*), and usually considerably less than party and party costs so that courts of summary jurisdiction remain inexpensive courts from the point of view of the general public.

It is envisaged that this new remedy would empower the court to award to the applicant his full costs of defending the proceedings. Those costs should include all proper solicitor and client costs and all necessary out of pocket expenses.

The Committee were divided as to when the remedy should be available. The majority were of the view that the remedy should only be available at the no case to answer stage whether in committal or summary proceedings. Before that stage the Magistrate may not have heard enough evidence to gauge whether the proceedings were brought without reasonable and probable cause.

After that stage the defendant unless he has elected not to give evidence as the price of being able to make a submission of no case, will have given evidence and his evidence will be an important ingredient in producing a reasonable doubt which is all that he needs for an acquittal at that stage. As this additional costs remedy was principally designed to allow the Magistrate to give a speedy remedy straight after a holding of no case to answer, its main virtues would disappear if the costs remedy turned into a second hearing which may not come on for a number of months thereafter. The majority held the view that in such circumstances, the defendant should be forced to rely upon his civil remedy of malicious prosecution. However it was felt that where a finding of no case to answer had been made, the Magistrate should have the power to allow proof of a matter showing lack of reasonable cause to be adduced by the defendant, before making a decision on the question of costs.

The minority were of the view that if the application for costs was limited to the evidence before the court, there would be no particular reason to limit the remedy to where there had been a finding of no case to answer. It was suggested that a provision along the following lines would cover the minority's recommendation—

> "If a complaint is dismissed and on the whole of the evidence adduced the Court is satisfied that the proceedings were brought without reasonable cause, the Court may award costs as between solicitor and client."

The Committee envisages that the remedy would be achieved by an amendment to the Justices Act. There should be a requirement for the application to be made immediately upon the finding being announced and the Court would then determine the application forthwith.

The application would proceed with the applicant bearing the onus of showing that the prosecution was instituted without reasonable cause. In some cases that would be apparent from the evidence adduced in the primary hearing. In other cases it may be necessary for the Court to allow the applicant to supplement that evidence. The Committee is divided on this point as if the defendant can adduce supplementary evidence, then logically the Crown should be able to adduce further evidence also which would defeat the object of having a speedy summary procedure to deal with the claim.

The Committee holds the view that an election to pursue the summary remedy should preclude subsequent civil proceedings for malicious prosecution.

In considering this recommendation the Committee thinks it desirable to point out the differing practice in courts of summary jurisdiction when—

(a) the ruling of no case to answer is made at the close of the prosecution case for indictable offences—section 122 of the Justices Act and as amended by Act No. 109 of 1981 and Section 109 of the Act as discussed by Legoe J. in *Tepper v. Francesco* (judgment No. 7150 delivered on 16th November, 1983); and

(b) a submission is made in a case of summary offences and the defendant is called upon to elect—see *Brauer v. O'Sullivan [1957] S.A.S.R. 185 at 188-189.*

A further question that may arise is the standard of proof that the Court should apply when a submission of no case to answer is made in respect of indictable offences—see *Wilson v. Buttery [1926] S.A.S.R. 150, May v. O'Sullivan [1955] 92 C.L.R. 654 at 657, Tepper v. Francesco (supra), and Reg. v. Bilick & Starke, Court of Criminal Appeal, 21st February, 1984* per King C.J. (judgment No. 7321) pages 20-26 particularly at page 23 where the Chief Justice concludes that the test of "a substantial balance of probability" (*Wilson v. Buttery (supra)*), is a "question of fact". The Chief Justice added that he considered the *Wilson v. Buttery* test has been rejected in *May v. O'Sullivan (supra).* Other references are *Zanetti v. Hill (1961) 108 C.L.R. 433* and an article entitled "The Insufficiency of Evidence to Raise a Case to Answer" by Mr. Justice Glass in *55 A.L.J. page 842.*

We therefore recommend:

(1) Due to problems of causation no civil action should be created giving a right to sue a person who commits perjury in the course of a criminal prosecution.

(2) It should be made easier for an action of malicious prosecution to be maintained.

(3) To achieve this two reforms should be made:—

(a) If the plaintiff proves absence of reasonable and probable cause, the onus should shift to the defendant to disprove malice.

(b) The plaintiff should be empowered to administer interrogatories and employ any other available pretrial procedures to compel the defendant to disclose his beliefs and motives.

(4) Because of the reforms in (3) above, a plaintiff in a malicious prosecution action should be entitled to recover general and special damages, but not punitive or aggravated damages.

(5) A summary remedy to grant costs as between solicitor and client should be available to a defendant in summary proceedings where it can be shown that the proceedings were brought without reasonable and probable cause.

The majority of the Committee were of the view that this remedy should only be available where a finding of no case to answer had been reached at the end of the prosecution case. The minority were of the view that the remedy should be available at any time when the complaint was dismissed, and on the evidence before the Court at that time the Court was satisfied that the proceedings were brought without reasonable and probable cause.

The application for costs as between solicitor and client should be dealt with as an ancillary proceeding immediately after the decision of the Court is given in relation to the prosecution.

(6) A person who takes the summary remedy of costs set out above is to be precluded from taking subsequent civil proceedings for damages for malicious prosecution.

We have the honour to be

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CHRISTOPHER J. LEGOE.
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Law Reform Committee of South Australia.

15 March, 1984.

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