Neutral Citation Number: [2014] EWCA Civ 1035

Case No: B2/2013/2939

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE CENTRAL LONDON COUNTY COURT
HER HONOUR JUDGE BAUCHER

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/07/2014

Before:

LORD JUSTICE BEATSON
LADY JUSTICE SHARP
and
SIR TIMOTHY LLOYD

- -

Between:

LINCOLN CRAWFORD	**Appellant Claimant**
- and -	
BRONWEN JENKINS	**Respondent Defendant**

- -
- -

Richard Wilson Q.C. and **Piers von Berg** (instructed through direct access) for the **Appellant**
Adam Speker (instructed through direct access) for the **Respondent**

Hearing date: 9 July 2014

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Approved Judgment

Sir Timothy Lloyd:

Introduction and summary

1. This appeal by the Claimant, Mr Lincoln Crawford, is brought against an order of Her Honour Judge Baucher in the Central London County Court dated 2 October 2013. Her order was made on submissions by way of preliminary issues of law on the facts alleged by the Claimant. The Claimant Appellant and the Defendant Respondent, Ms Bronwen Jenkins, were formerly husband and wife. He is a barrister, she a solicitor. They have two children. The present proceedings are part of an acrimonious sequence of litigation arising from the breakdown of the marriage.

2. On 16 July 2009 the Claimant was arrested for breach of an order made in the matrimonial proceedings. An hour later he was arrested again for breach of a different order made in other proceedings. He was detained for just over four hours as a result of the two arrests. The arrests were effected following information being given to the police by the Defendant. The Claimant was released on bail and no prosecution ensued.

3. By her order the judge declared, in paragraph 3, that the Defendant's "complaint to the police was protected by immunity from suit" and, in paragraph 4, that the remainder of the claim against the Defendant under the Protection from Harassment Act 1997 ("the 1997 Act"), based on two text messages identified in the Amended Particulars of Claim, should be struck out.

4. The Claimant's action was at first brought only against the Metropolitan Police Commissioner, but that claim has been settled and the police have played no part in the appeal.

5. I will need to describe the dispute and the proceedings in more detail below, but the first point in the appeal is whether the judge was correct to hold that the Defendant was not liable to be sued for damages for false imprisonment on the basis that her acts which would be relevant to the cause of action were statements made to the police which might have been the basis of evidence in court if the matter had led to a prosecution; I will call this the witness immunity rule. The judge came to that conclusion on the basis of the decision of the Court of Appeal in *Westcott v Westcott* [2009] QB 407, [2008] EWCA Civ 818. The Appellant contends that this is wrong and that the contrary conclusion follows from the House of Lords' decision in *Roy v Prior* [1971] AC 470 and subsequent decisions following it.

6. Issues also arise from the claim under the 1997 Act. One is whether such a claim is also barred by immunity from suit on the same principle, insofar as it relies on statements made to the police; the other, as regards two text messages, is whether the claim should be struck out on ordinary principles as lacking substance.

7. The Defendant filed a Respondent's Notice seeking to uphold the judge's order on other grounds which she did not decide.

8. For reasons which I set out below, I have come to the conclusion that the judge was right both as regards the scope of the witness immunity rule and also as regards the claim under the 1997 Act. I would therefore dismiss the appeal.

The relevant events

9. Both parties provided the court with a vast amount of information and documents about the history of the relations between them. Most of it is of no relevance to this appeal. I will confine my summary of the facts to those that appear to me to be relevant. I take these from the Claimant's Amended Particulars of Claim, which has to be taken at face value for this purpose, so far as relevant, and from other sources so far as uncontested facts are concerned.

10. On 29 October 2003 District Judge Brasse, in the Principal Registry of the Family Division, made an order as regards contact and residence. The children were to reside with the Defendant. She was to allow the Claimant specified contact which included provision for him to collect the two children from their home and to take them to their respective schools on two occasions during the week, to be agreed. Otherwise the Claimant was not to "attend the children's schools during the week save by agreement". Failure to comply with this order would not of itself have penal consequences.

11. On 15 May 2006 the Claimant was convicted of an offence under the 1997 Act in the Highbury Corner Magistrates' Court. The court made a restraining order against the Claimant under section 5 of the Act prohibiting him from doing various specified acts. These included contacting the Defendant, whether directly or indirectly, and attending specified locations (which did not include the school attended by the parties' daughter). The effect of section 5 is that if he did any of these specified acts without reasonable excuse he would be guilty of an offence.

12. On Saturday 13 June 2009 the parties' daughter's school held an Open Day. Both Claimant and Defendant attended the school during that event. While they were both there the Defendant sent to the Claimant two text messages objecting to his presence, at 12.15 and at 16.13 respectively. They were as follows:

> "You should leave. Both children are conflicted. I feel awkward in your presence. You pay nothing. Have just spent 65 pounds on new uniform. Go away."
>
> "You were in breach of your restriction today being at school as you well know, no arrangements for you to be there and not in accordance with any order."

13. On 19 June the Defendant complained to the police that the Claimant had been in breach of the two court orders that I have mentioned by virtue of his presence at the school open day. She made statements to the police orally on that day and in writing on 26 June. On 15 July she sent a copy of the 2003 order to the police by fax. The Claimant contends that the allegations made on 19 June were made intending to cause him distress, which they did, and that when she signed the statement on 26 June which alleged that he had committed a criminal act, she knew that this statement was false.

14. On 16 July the Claimant attended Holborn Police Station and was arrested at 15.29 for breach of the 2003 contact order, and detained in police custody. At 16.41, it having been pointed out that the contact order contained no power of arrest, the

Claimant was arrested again, this time for breach of the restraining order made in 2006. His detention continued until he was released on bail; according to the police this happened at 19.40. The Crown Prosecution Service decided that no further action should be taken. There was, therefore, no prosecution to complain of, but the Claimant had been arrested, unlawfully so he contends, and he therefore sued in respect of the arrest and the resulting period of detention. His case is that the arrests were made on the basis of the Defendant's complaints to the police.

15. He contends that the first arrest was unlawful, as the 2003 order carried no power of arrest, and that the second arrest was unlawful, not being founded on reasonable suspicion of the commission by the Claimant of any arrestable offence, and being without any other lawful authority.

16. The Claimant alleges that the Defendant made her complaint to the police knowing that there was no breach of the 2003 order, and that any issue under that order could only be resolved in the family courts, and that the 2006 order did not apply to attendance at the school. On that basis he alleges that her allegations to the police were premeditated and false, and were intended to paint the Claimant in a bad light in connection with an imminent disciplinary hearing.

17. His claim as regards harassment alleges a course of conduct which consisted of (a) the two successive text messages quoted above and (b) the complaint to the police on 19 June, the written statement supplied on 26 June and the supply of a copy of the 2003 order on 15 July, resulting in the arrest of the Claimant. He also alleges that by reason of the text messages quoted above, the Defendant's complaints to the police and his arrests, he was deeply alarmed and suffered profound distress.

The proceedings and the claims at issue in the appeal

18. The proceedings were commenced by the issue of a Claim Form against the police alone on 26 February 2010. The Defendant was added by an order dated 4 February 2013.

19. In his Amended Particulars of Claim, the Claimant put forward a variety of claims against the Defendant. Of these, only two are now relevant: claims for damages against the Defendant for false imprisonment, and for harassment under the 1997 Act. From the facts which I have described above, it is clear that his case as regards false imprisonment is not that the Defendant herself effected the imprisonment, but that she procured the police to arrest and detain the Claimant, and that she did so maliciously. Thus, as against her it is really a case of malicious procurement of imprisonment.

20. In her Amended Defence, the Defendant contends that she is immune from suit in both these respects as regards her complaint to the police. She takes issue with many other aspects of the Claimant's allegations, but the point relevant for present purposes is the claim to immunity.

21. On 13 September 2013 His Honour Judge Freeland Q.C. gave directions for trial, which was to start on 30 September, and various case management directions. He directed the parties to address the issue of immunity from suit in their skeleton arguments, and contemplated that the trial judge might be asked to rule on this issue at

the outset of the trial. It was after this order and before 30 September that the claim against the police was settled.

22. The case came on for trial according to these directions before Her Honour Judge Baucher on 30 September. As at the hearing before Judge Freeland, the parties, though without retained solicitors, had the benefit of representation by Counsel instructed on a direct access basis, as in turn they have before us. The judge was invited to rule on the immunity issue first, which she did in a first judgment given on 1 October. She held that the Defendant was immune from suit in respect of her complaints to the police, and what she had said to the police in that context, both as regards false imprisonment and as regards harassment. She then heard further argument as to whether the two text messages quoted above could on their own provide the basis for a claim for harassment, or whether they were protected by the statutory defence in section 1(3)(c) of the Act, which applies if the person who pursues a relevant course of conduct shows that in the particular circumstances its pursuit was reasonable. She held in a further judgment that the claim for harassment based on those two messages could not succeed because the statutory defence would be made out. She therefore dismissed the Claimant's claim against the Defendant. She refused permission to appeal, the order recording that this was sought only on the issue of immunity from suit.

23. The Claimant then filed an Appellant's Notice. That document does not set out, at section 5, the order, or the part of the order, that he wished to appeal against. At that point it merely said "Please see attached". I take it that the attached document referred to was one headed "Grounds for permission to appeal to the Court of Appeal" signed by Mr Wilson Q.C., running to eight pages, dated 11 October 2013, which was a few days before the date when the Appellant's Notice was filed. This document contains submissions both about false imprisonment and about harassment; the latter submissions address both the question of immunity and whether the judge was justified in ruling that a claim based on the two text messages would fail, regardless of immunity. Consistently with this, the Claimant's skeleton argument for the appeal, signed by Mr Wilson and dated 29 October 2013, challenges the judge's decision on the harassment claim as regards the two text messages as well as on the immunity issue.

24. The Appellant's Notice ought to have set out, either within the document itself or in an annexed or attached document, exactly what part of the order was sought to be challenged on appeal. It did not. The grounds of appeal ought to have been set out clearly and succinctly, in the Appellant's Notice itself or in a short annexed document, much shorter than the eight page document to which I have referred, which was largely devoted to argument, and in that way overlapped with the skeleton argument which was submitted later.

25. The application for permission to appeal was considered on the papers by Aikens LJ who granted permission. His express reasoning referred to the issue of immunity only, but he did not expressly limit the grant of permission to appeal to that point, nor did he refuse permission to appeal on any issue. Accordingly, as it seems to me, he must be taken to have granted permission to appeal both on the immunity point (as regards both false imprisonment and harassment) and as regards whether the two text messages could give rise to a claim in harassment. It is possible that the presence of the separate appeal against the striking out of the claim for harassment based only on

the two text messages may not have sprung off the page to his notice. That would be speculation, but the question would not have arisen if the Appellant's Notice had been in the proper form.

26. The Defendant served a Respondent's Notice. In part this proceeds on the basis that there is no appeal against the striking out of the claim in harassment based on the two text messages. As I have indicated, that seems to me to be a false premise. Otherwise the Defendant seeks to uphold the judge's order on the basis that, first, the claim for false imprisonment has no reasonable prospect of success, secondly, that the claim under the 1997 Act has no reasonable prospect of success, and thirdly that the action is an abuse of process and should be struck out for that reason. These are therefore striking-out remedies, which were not sought before the judge below, save as to the claim based on the two text messages once she had held that witness immunity applied to the rest of the claim under the 1997 Act. The point made about the 1997 Act claim is expressly made on the footing that there was no challenge on appeal to the decision about the two text messages. Since, as I have explained, this is a false assumption, it seems appropriate to treat that ground in the Respondent's Notice as applying to the claim so far as it is based on the two text messages.

The witness immunity rule

27. Undoubtedly the most important and contentious issue is whether the Defendant is immune from the claims made against her as regards her complaint and her statements to the police by reason of the principle of absolute privilege and immunity for witnesses.

28. The essence of the principle, long established and not in doubt, is that no action will lie against a witness for words spoken in giving evidence in a court, even if the evidence is given falsely and maliciously. It applies to the contents of a proof of evidence, and to communications leading towards the giving of evidence. No action lies against the witness, or potential witness, for defamation or otherwise for damages in respect of the words spoken or written. The immunity has been held to apply to out of court statements which can fairly be said to be part of the process of investigating a crime or a possible crime with a view to prosecution: see *Taylor v Director of the Serious Fraud Office* [1999] 2 AC 177, Lord Hoffmann at 215 approving what Drake J said in *Evans v London Hospital Medical College* [1981] 1 WLR 184 at 192. It has been held to apply from the time of the first complaint to the police as regards a matter which might lead to a prosecution, and therefore to cover the initial complaint: see *Westcott v Westcott* [2009] QB 407.

29. The courts have recognised a conflict between this immunity, on the one hand, and the need to afford a remedy to a person who has been injured by wrongful conduct on the part of another. The immunity is afforded for sound reasons of policy, but it must not be extended further than is necessary. Thus, in *Darker v Chief Constable of West Midlands* [2001] 1 AC 435 Lord Hope of Craighead said, at page 446:

> "The question that has been raised relates to the further extent of the immunity. Where are the boundaries to be drawn? It arises because there is another factor that must always be balanced against the public interest in matters relating to the administration of justice. It is the principle that a wrong ought

> not to be without a remedy. The immunity is a derogation from a person's right of access to the court which requires to be justified."

30. In the same vein Lord Cooke of Thorndon said at page 453:

> "Absolute immunity is in principle inconsistent with the rule of law but in a few, strictly limited, categories of cases it has to be granted for practical reasons. It is granted grudgingly, the standard formulation of the test for inclusion of a case in any of the categories being Sir Thaddeus McCarthy P's proposition in *Rees v Sinclair* [1974] 1 NZLR 180, 187, "The protection should not be given any wider application than is absolutely necessary in the interests of the administration of justice ..."."

31. Likewise Lord Clyde at 456-7:

> "It is temptingly easy to talk of the application of immunities from civil liability in general terms. But since the immunity may cut across the rights of others to a legal remedy and so runs counter to the policy that no wrong should be without a remedy, it should be only allowed with reluctance, and should not readily be extended. It should only be allowed where it is necessary to do so."

32. In his speech in *Taylor v Director of the Serious Fraud Office* Lord Hoffmann observed at page 215 that "as the policy of the immunity is to encourage freedom of expression, it is limited to actions in which the alleged statement constitutes the cause of action". He pointed out that the immunity does not apply to actions for malicious prosecution "where the cause of action consists in abusing legal process by maliciously and without reasonable cause setting the law in motion" against the claimant, regardless of whether "an essential step in setting the law in motion was a statement made by the defendant to a prosecuting authority or even the court". He said that actions for defamation and for conspiracy to give false evidence plainly fall within the policy of the immunity and actions for malicious prosecution fall outside it, and commented that this left "some disputed ground" between those categories.

33. In *Roy v Prior* [1971] AC 470 it was held that the immunity did not extend to an action for malicious arrest, where the arrest of the plaintiff, under a bench warrant, had been procured by evidence given by the defendant to a judge in support of an application for the issue of the bench warrant. Lord Morris of Borth-y-Gest said, at page 477:

> "What the plaintiff alleges is that the defendant, acting both maliciously and without reasonable cause, procured and brought about his arrest. The plaintiff is not suing the defendant on or in respect of the evidence which the defendant gave in court. The plaintiff is suing the defendant because he alleges that the defendant procured his arrest by means of judicial process which the defendant instituted both maliciously and without reasonable cause. … The gist of the complaint,

> where malicious arrest is asserted, is not that some evidence is given (though if evidence is given falsely it may be contended that malice is indicated) but that an arrest has been secured as a result of some malicious proceeding for which there was no reasonable cause.
>
> …
>
> It must often happen that a defendant who is sued for damages for malicious prosecution will have given evidence in the criminal prosecution of which the plaintiff complains. The essence of the complaint in such a case is that criminal proceedings have been instituted not only without reasonable and probable cause but also maliciously. So also in actions based upon alleged abuses of the process of the court it will often have happened that the court will have been induced to act by reason of some false evidence given by someone. In such cases the actions are not brought on or in respect of any evidence given but in respect of malicious abuse of process (see *Elsee v. Smith* (1822) 2 Chit. 304)."

34. In that case the arrest as such was no doubt lawful, having been effected under the authority of a court order. The judge could not be sued, so there was no remedy for the plaintiff unless he could sue the person who had applied for and procured the issue of the bench warrant.

35. In *Martin v Watson* [1996] 1 AC 74, the claim was for malicious prosecution where the defendant had given information to a police officer indicating that the claimant was guilty of an offence and the facts relating to the alleged offence were solely within the defendant's knowledge. The defendant was held to have been in substance the person responsible for the prosecution that followed. In that case the issue at trial seems to have been whether the defendant caused the prosecution, but reference was made to the immunity principle in the House of Lords by analogy.

36. I have already mentioned *Taylor v Director of the Serious Fraud Office* in which the House of Lords held that the immunity applied to statements made by one investigator to another, or by an investigator to another person helping with the enquiry, or to an investigator by a person helping the enquiry who is not expected to be called as a witness.

37. I have also mentioned *Darker v Chief Constable of West Midlands Police* [2001] 1 AC 435 where the immunity was held not to extend to things done by the police during an investigative process which could not fairly be said to form part of their participation in the judicial process, and in particular not to the fabrication of false evidence when performing functions as enforcers of the law or as investigators. A police officer who gave evidence that he had found a quantity of drugs in premises in the possession of an accused would be immune from suit even if the evidence was perjured, but a police officer who had planted the drugs in those premises, which were said in evidence to have been found there, would not be immune from suit in respect of the act of planting the drugs there: see Lord Hope of Craighead at page 449.

38. The cases in this area have recently been reviewed by Lewison LJ in *Singh v Reading Borough Council* [2013] 1 WLR 3052, [2013] EWCA Civ 909. In that case the claimant alleged that the council had constructively dismissed her, and had done so unfairly. One of the things she alleged in support of this was that the council had exerted undue pressure on another member of the staff to procure a witness statement containing false evidence, this being alleged to be a breach of the employer's implied contractual duty of trust and confidence. The Court of Appeal held that this allegation in support of the unfair dismissal claim was not excluded by the immunity principle, since the complaint was not made of the words of the statement themselves but of the manner in which the council had acted in order to procure that it be made.

39. Lewison LJ started by pointing to the clash between the principle that those who suffer a wrong should not be without a remedy and the other principle that those involved in the judicial process should be immune from civil suit for what they do or say in the course of the litigation. At paragraph 20 he also pointed out that any exception to the basic principle that a wrong should not be without a remedy, which is the basic principle of any system of justice, should be necessary, strict and cogent. At paragraph 21 he set out the basic rule, namely that no action in defamation should lie against a witness for anything said in evidence before a court or tribunal, and that this also applied to the parties, the advocates and the judges. He also noted at paragraph 22 that the scope of the witness immunity rule should not be generalised. At paragraph 23 he identified two strands of policy underlying the immunity rule: first, that those engaged in litigation should be able to speak freely without fear of civil liability; secondly the need to avoid a multiplicity of actions, where one court would have to examine whether evidence given before another was true or not.

40. Then Lewison LJ considered attempts that had been made to get round the immunity rule, first by bringing an action based on a cause of action other than defamation, and secondly by proceeding on the basis of what happened out of court rather than in court. The former attempts include claiming in conspiracy, the latter include claims based on the contents of the proof of evidence and other preparatory statements, including the communications at issue in *Taylor v Director of the Serious Fraud Office*, already quoted. He did not refer to the initial complaint leading to consideration of a possible prosecution, which was relevant in *Westcott v Westcott*, and that case may not have been cited, but it is within the same category and principle.

41. Then the judge considered a number of general statements that had been relied on in argument, and pointed out that they needed to be taken with care according to the context, and also in the light of later developments in the law, such as that advocates and expert witnesses can now be sued for negligence (though still not for defamation) in respect of acts or omissions arising out of their respective parts in the conduct of litigation.

42. Following on from this he addressed the limits that have been established to the immunity rule. As already noted the immunity rule does not apply to torts concerned with malicious prosecution, as in *Roy v Prior*, nor to the creation of real evidence (e.g. the presence of drugs on particular premises), as opposed to the preparation and giving of witness evidence about such matters.

43. Lewison LJ concluded his review of the law with this summary at paragraph 66:

> "Summarising this part of the case: (i) the core immunity relates to the giving of evidence and its rationale is to ensure that persons who may be witnesses in other cases in the future will not be deterred from giving evidence by fear of being sued for what they say in court; (ii) the core immunity also comprises statements of case and other documents placed before the court; (iii) that immunity is extended only to that which is necessary in order to prevent the core immunity from being outflanked; (iv) whether something is necessary is to be decided by reference to what is practically necessary; (v) where the gist of the cause of action is not the allegedly false statement itself, but is based on things that would not form part of the evidence in a judicial inquiry, there is no necessity to extend the immunity; (vi) in such cases the principle that a wrong should not be without a remedy prevails."

44. On that basis the court held that the claimant was not precluded from alleging that the council had exercised undue pressure in order to procure the making of a false witness statement, as part of her case of constructive and unfair dismissal.

45. With that by way of a review of the authorities about the witness immunity rule, I turn to the circumstances of the present case. As regards the claim for false imprisonment against the Defendant, which is in essence that she maliciously procured the Claimant's arrest and detention by the police, the statements by her to the police which are relied on by the Claimant are within the ambit of the immunity rule, as decided in *Westcott v Westcott*. That is a binding decision to that effect. However, the cause of action in that case was defamation. The question is whether it makes a difference that, in the present case, the claim is for malicious procurement of arrest. For the Claimant Mr Wilson Q.C. contends that the case is within the precedent set by *Roy v Prior* and therefore is not barred by the immunity rule.

46. Although the claim is expressed to be for false imprisonment (and, as against the police, was properly so framed) it is important to draw a distinction between that cause of action, and that which is asserted in this respect against the Defendant. False imprisonment requires no more than an allegation that the claimant was imprisoned, and by the defendant. It is then for the defendant to show, if the imprisonment is admitted or proved, that it was done with lawful authority. If it was so done, then the claim fails; if not the claim succeeds. No issue arises as to motive or state of mind, other than, for example, as to reasonable or probable cause if the lawfulness of the detention depends on that. The claim against the police in the present case was settled, we are told, on the basis of an acceptance by the police of one unlawful arrest, namely the first, under the 2003 order. That is logical.

47. The claim against the Defendant in this respect is of a different order. It was not she who detained the Claimant. The claim is analogous to that advanced in *Roy v Prior*, where the plaintiff had been lawfully arrested under the bench warrant. The defendant in that case was alleged to have procured the issue of the bench warrant, and therefore the arrest of the plaintiff, maliciously and without reasonable cause. So here, whether or not the arrest by the police was lawful, the Claimant alleges that the Defendant procured the arrest maliciously and without reasonable cause.

48. The claim recognised in *Roy v Prior* is one variant of a number of causes of action concerned with the abuse of the process of the court. Malicious prosecution is the best known. For this the claimant must show that he was prosecuted by the defendant, that the prosecution failed, that it was brought or continued without reasonable cause and that it was done maliciously. In general the prosecution has to be for a criminal charge, though the Privy Council has recently held (by a majority) that the malicious prosecution of civil proceedings is also tortious: *Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd* [2014] AC 366, [2013] UKPC 17. In their review of the law in that case the Justices of the Supreme Court referred to a miscellaneous group of cases in which claims akin to malicious prosecution in civil cases had been recognised: see Lord Wilson JSC at paragraph 67 and Lord Sumption JSC at paragraph 143. These include the malicious presentation of a bankruptcy petition or a winding-up petition, the malicious procurement of a bench warrant (*Roy v Prior*) or other warrant of arrest or a search warrant. Lord Sumption (in the minority) described these, at paragraph 143, as a "small and anomalous class of civil cases in which an action has been held to lie for maliciously procuring an order of the court". In all of these cases a court process has been involved, whether by the making of a court order, as in *Roy v Prior*, or at least by the initiation of proceedings, as in the presentation of a bankruptcy or winding-up petition.

49. The basis of tortious liability for bringing proceedings maliciously and without reasonable or probable cause was explained by Lord Campbell CJ in *Churchill v Siggers* (1854) 3 E & B 929 at 937 as follows:

> "To put into force the process of the law maliciously and without any reasonable or probable cause is wrongful; and, if thereby another is prejudiced in property or person, there is that conjunction of injury and loss which is the foundation of an action on the case. Process of execution on a judgment seeking to obtain satisfaction for the sum recovered is primâ facie lawful; and the creditor cannot be rendered liable to an action, the debtor merely alleging and proving that the judgment had been partly satisfied and that execution was sued out for a larger sum than remained due upon the judgment. Without malice and the want of probable cause, the only remedy for the judgment debtor is to apply to the Court or a Judge that he may be discharged, and that satisfaction may be entered up on payment of the balance justly due. But it would not be creditable to our jurisprudence if the debtor had no remedy by action where his person or his goods have been taken in execution for a larger sum than remained due on the judgment, this having been done by the creditor maliciously and without reasonable or probable cause: *i.e.* the creditor well knowing that the sum for which execution is sued out is excessive, and his motive being to oppress and injure the debtor. The Court or Judge, to whom a summary application is made for the debtor's liberation, can give no redress beyond putting an end to the process of execution on payment of the sum due, although, by

> the excess, the debtor may have suffered long imprisonment and have been utterly ruined in his circumstances."

50. In each case where liability has been recognised, the processes of the court have been invoked, either by (or, as in *Roy v Prior*, by an application in the course of) a criminal prosecution or by civil proceedings. Leaving aside the newly recognised tort of maliciously bringing civil proceedings, the instances in the cases have involved obtaining court orders for the arrest of the plaintiff, for example under a writ of capias ad satisfaciendum for non-payment of a debt (*Gilding v Eyre* (1861) 10 CBNS 592), or for the arrest of a ship (*The Walter D Wallet* [1893] P 202) or of other assets of the plaintiff (*Clissold v Cratchley* [1910] 2 KB 244, and *The Nicholas M* [2009] 1 All ER (Comm) 479) or a search warrant (*Gibbs v Rea* [1998] AC 786). In all of these cases, and also in *Johnson v Emerson* (1871) LR 6 Ex 329, where the allegation was of maliciously initiating bankruptcy proceedings and procuring the adjudication of the plaintiff as bankrupt, action on the part of the court was involved, for which, evidently, the court could not be made liable. In *Quartz Hill Consolidated Gold Mining Co v Eyre* (1883) 11 QBD 674 the wrongful act alleged was maliciously presenting a winding-up petition. That was held to be sufficient, in that the effect of presentation of such a petition was immediately damaging to the company which was the subject of the petition. In that case, therefore, the court was not involved other than in receiving and processing the petition when presented for issue. In none of these cases could there be a claim against the court for compensation for loss suffered.

51. In the present case, no court process was involved at any stage. The Defendant's complaint to the police is within the scope of the immunity rule because it was the first step in a process that might have involved the criminal justice system, just as was the complaint in *Westcott v Westcott*. It is clear that no action in defamation would lie against the Defendant in respect of her complaint to the police. But Mr Wilson's argument, for the Claimant, is that the same is not true of the claim analogous (he says) to *Roy v Prior* of malicious procurement of arrest.

52. For the Defendant Mr Speker submitted that the absence of any court process at any stage makes all the difference. His contention was that this group of torts, to which the witness immunity does not apply, as held in *Roy v Prior*, are all concerned with the malicious use or manipulation of the process of the court, whether criminal or civil. The essence of them is abuse of the process of the court. He therefore argued that, if no court process is involved at any stage, then the case does not fall within this category and there is no reason for it to fall outside the scope of the witness immunity rule.

53. To the contrary, Mr Wilson argued that the essence is abuse of the processes of the law, and that there should be no good reason to distinguish between the case of a defendant who maliciously procures the police to arrest the claimant where no prosecution follows, and a case where a prosecution has already been brought or is later commenced. It might be said to be anomalous to allow the witness immunity rule to apply where the complaint leads to an arrest but no prosecution follows, and not to allow it to apply if a prosecution does follow, with or without an arrest.

54. As it seems to me, there is a significant difference between a case where what happens is that the claimant is arrested by the police on the basis of information provided by the defendant, but no prosecution follows, and a case where criminal or

civil proceedings are brought, in the case of criminal proceedings being based on information provided by the defendant and, in the case of civil proceedings, being brought by the defendant. If the interference with the claimant's liberty or his assets is the result of a court order of some kind (arrest under a bench warrant or some form of execution) or is the effect of the issue of proceedings (as in the case of an insolvency petition), there can be no remedy by way of compensation to the claimant by recourse to the court which made the order. The order may be set aside, but that will not undo loss already caused. Accordingly, it is right that there should be a distinct remedy, if the necessary elements can be proved, against the person who invoked the court procedure.

55. By contrast, if the defendant is said to have procured the arrest of the claimant by the police without any prosecution following, then in principle the police, being responsible for the arrest, may themselves be liable to the claimant for the fact and consequences of the arrest. Moreover, now that the decision whether or not to prosecute is not for the police but for the Crown Prosecution Service, there will be an independent consideration of the circumstances before any decision to prosecute is taken. (I disregard cases of private prosecution, but they are not likely to have been preceded by an arrest.)

56. That seems to me to make a difference which is significant in the present context. If proceedings are commenced, and if the events complained of either lead to those proceedings or occur in the course of the proceedings, so that the court process is abused, then it is appropriate for the tort of malicious prosecution, or a related tort based on malicious abuse of the process of the court, to be available so as to afford the claimant a remedy, and it is justifiable that such a claim should not be defeated or precluded by the witness immunity rule. If, however, there are no court proceedings, the claimant's arrest not being preceded or followed by any proceedings, whether criminal or civil, then there is no question of an abuse of the process of the court, no reason why (if the relevant facts can be proved) the person responsible for the arrest should not be answerable for the imprisonment, and correspondingly no reason to treat a claim for compensation for the arrest as one to which the otherwise general witness immunity rule does not apply.

57. I bear well in mind the comments of judges, some of which I have already quoted, that the scope of the immunity rule must be limited to that which is necessary in the interests of the administration of justice. I also bear in mind Lewison LJ's comment that it is dangerous to generalise in this area. However, it does seem to me that, in this particular contested zone, part of Lord Hoffmann's disputed ground, both principle and policy support the distinction that I have drawn, between, on the one hand, a case where what is complained of is or involves the invocation of the process of the court, where a claim for, or akin to, malicious prosecution may be brought against the person who invoked the court process, and where the witness immunity rule does not prevent the claim being brought even though it may rely in part on statements which would be immune from a claim in defamation, and, on the other hand, a claim in circumstances where no court proceedings have taken place, so that no issue arises of a claim based on the malicious abuse of the process of the court. In such a case I see no reason to make an exception from the normal scope of the witness immunity rule. It would preclude a claim in defamation; it should also, in my judgment, preclude a claim of the kind brought by the Claimant in the present case.

The policy behind the witness immunity rule is the same in relation to the present claim as it would be as regards a defamation claim, and the case does not have the feature of abuse of the process of the court which, because no claim can be made against the court, justifies the possibility of a separate claim for the malicious abuse of the court's process, which should be possible despite the witness immunity rule.

58. Accordingly, it seems to me that the judge was right in her decision on this aspect of the case.

Harassment

59. I can deal more briefly with the question whether the Defendant's complaint to the police can be the subject of a claim under the 1997 Act.

60. The necessary elements of the cause of action afforded by section 3 of the 1997 Act are those defined by section 1. (I will ignore in these citations any text which is not relevant to the present case.) According to section 1(1) a person must not pursue a course of conduct which amounts to harassment of another and which he knows or ought to know amounts to harassment of the other. Section 1(2) provides that the person whose course of conduct is in question ought to know that it amounts to harassment if a reasonable person in possession of the same information would think that it did amount to harassment of the other person. There are some qualifications in section 1(3) so that the section does not apply to a course of conduct if the person who pursued it shows one of three things, two of which are relevant. Paragraph (a) applies if the course of conduct was pursued for the purpose of preventing or detecting crime. Paragraph (c) covers the case where in the particular circumstances the pursuit of the course of conduct was reasonable.

61. Subject to that and other qualifications, a course of conduct which amounts to harassment is a criminal offence and also gives rise to a civil remedy.

62. Thus the first thing which must be alleged and proved is a course of conduct which, of its nature, must consist of conduct on at least two occasions: see section 7(3). For the Defendant Mr Speker submitted that a statement which is subject to the immunity rule, so that it cannot be sued on in defamation, cannot be used as part of a course of conduct for the purposes of the 1997 Act either, as regards a civil remedy. The judge below accepted that submission.

63. Mr Wilson submitted that this is not correct. He argued that what has to be proved in this instance is a course of conduct and that, although it would of course be right to plead particulars of the course of conduct, which may include statements as regards which the maker would be immune from a defamation action, nevertheless these are no more than the evidence by which the course of conduct is established, and that the claim is therefore not brought on the statements themselves. Accordingly he submitted that this is a situation which is outside the scope and the policy of the immunity rule.

64. Shortly after we had heard argument on the appeal, judgment was delivered by His Honour Judge Richard Seymour Q.C., sitting in the Queen's Bench Division, in the case of *Halcyon House Ltd v Baines and others* [2014] EWHC 2216 (QB). One of the two claims which the judge had to determine in that case was brought under the

1997 Act. He had submissions about the interaction of the witness immunity rule and liability under the 1997 Act. Counsel drew the decision to our attention and presented written submissions about it.

65. In that case the judge found that there was only one act which could have amounted to harassment, and since there had to be at least two to amount to a course of conduct he dismissed the claim under the Act. But he did deal with submissions that had been made to him about the witness immunity rule, because the one act that could have been relevant was what he held to be the malicious making of a complaint to the police, which resulted in an arrest but no prosecution.

66. He said that he would not have regarded the witness immunity rule as applying to a civil action under the 1997 Act, principally because the action is not based on the particular statement but on the fact of making a complaint to the police in the course of conduct amounting to harassment. He also said that, if that were wrong, he would come to the same conclusion because the inclusion of the express provision in section 1(3)(a) made it clear that that was to be the limit of any defence of that kind to the claim.

67. Mr Wilson relied on these observations, albeit obiter, in support of his arguments already presented to the court. Mr Speker submitted that both of the judge's reasons were wrong. As for the first, he argued that, in substance, what is relied on as the course of conduct in the present case (apart from the initial two text messages, to which I will come below) is the complaint to the police, albeit that it went through three stages. He submitted that it would be artificial to divide it up into these three stages (occurring over a short time) in order to make it seem a course of conduct. He also contended that there is no good reason to suppose that section 1(3)(a) sets out the whole of the circumstances in which an equivalent of witness immunity can apply under the 1997 Act. A course of conduct which could be justified under section 1(3)(a) might well not be limited to the making of statements. It might include surveillance of various kinds which, in other circumstances, could well be regarded as harassment.

68. I do not accept the validity of the distinction which Mr Wilson sought to draw in his oral submissions between the statements alleged and relied on, on the one hand, and the course of conduct on the other. To the extent that the course of conduct alleged consists of the making of statements, then it seems to me that the claim is based on those statements. Here the Claimant properly gave particulars in paragraph 76 of the Amended Particulars of Claim of the course of conduct alleged. The statements to the police were three of the five acts on the Defendant's part which are so alleged. For the same reason I would not accept the first reason given by Judge Seymour for the conclusion that he would have come to, if there had been more than one relevant act, that the complaint to the police was not protected by the witness immunity rule. It seems to me that it would be inconsistent with the policy of the witness immunity rule to draw such a distinction as regards a course of conduct alleged under the 1997 Act, so far as it consists of or includes statements which would be within the rule in the case of a defamation claim, so that the rule would not apply to such an allegation whereas it would apply to a defamation claim based on the same statements.

69. I would also not accept the judge's second reason. It seems to me that Mr Speker is right to point out that section 1(3)(a) is not limited to statements, and that therefore it

cannot only be explained as an implicit statutory substitute for the witness immunity rule. I see no reason to suppose that the witness immunity rule does not apply to the full in relation to claims under the 1997 Act.

70. It seems to me that the policy of the immunity rule applies just as much to a claim in harassment based on such a statement as it does to a claim in defamation. In my judgment Judge Baucher was right to hold that the harassment claim could not be brought on the basis of the complaint to the police or the statements made in support of that complaint. Paragraphs (c) to (e) of the particulars of harassment given in paragraph 76 of the Amended Particulars of Claim must be ignored.

71. That leaves the two text messages, set out above. In her second judgment the judge held that no claim for harassment could possibly succeed if based only on those two text messages. She said that although the two text messages were close in time and related to the same incident, they could possibly be capable of amounting to a course of conduct. Arguably, therefore, they were "conduct on at least two occasions". She did not then go on to ask whether the two messages were capable of amounting to harassment of the Claimant. Instead she considered whether the Defendant would be able to show that, in the particular circumstances, to send the two text messages was reasonable. If it was clear that this would be shown, then the claim in harassment based only on the two text messages could not succeed. She held that it was self-evidently reasonable.

72. Mr Wilson submitted that it was not open to the judge to come to that conclusion without considering fully the context in which the text messages were sent, and that this would require evidence to be heard and tested. I see some force in that argument, insofar as it invokes the history of the relations between the parties, although it does seem somewhat unreal in relation to a course of conduct which, as alleged, would consist of no more than the two text messages themselves.

73. Nevertheless, it seems to me that the judge's reasoning also leads to the conclusion, which I would reach, for myself, simply from a reading of the two messages, that, even if the two text messages might constitute a course of conduct, they cannot be held to amount to harassment. Their language is simply not capable of being seen as harassment. There is no statutory definition of harassment; section 7(2) states that references to harassing a person include alarming the person or causing the person distress, but that is merely inclusive. In *Thomas v News Group Newspapers Ltd* [2001] EWCA Civ 1233, [2002] EMLR 4, at paragraph 30 Lord Phillips MR said that harassment was "a word which has a meaning which is generally understood" and that it described "conduct targeted at an individual which is calculated to produce the consequences described in section 7 and which is oppressive and unreasonable". Informed by this observation and later cases under the Act, Simon J in *Dowson v Chief Constable of Northumbria* [2010] EWHC 2612 set out the following summary of the law:

> "142. I turn then to a summary of what must be proved as a matter of law in order for the claim in harassment to succeed.
>
> (1) There must be conduct which occurs on at least two occasions,

> (2) which is targeted at the claimant,
>
> (3) which is calculated in an objective sense to cause alarm or distress, and
>
> (4) which is objectively judged to be oppressive and unacceptable.
>
> (5) What is oppressive and unacceptable may depend on the social or working context in which the conduct occurs.
>
> (6) A line is to be drawn between conduct which is unattractive and unreasonable, and conduct which has been described in various ways: 'torment' of the victim, 'of an order which would sustain criminal liability'."

74. I do not take that as definitive, but it seems to me that it is a helpful guide to the issues that arise. Looked at in that context, it seems to me that it would not be possible to hold that the two text messages constitute harassment, even on the assumption that they amount to a course of conduct by themselves. I do not see that they can be categorised as, objectively, likely to cause alarm or distress, or that they could be judged, in the context of the long-running dispute between these parties and the existence of the indefinite restraining order, as oppressive or unacceptable.

75. That is not quite the same as the judge's reasoning and it may be that, to that extent, my conclusion should be regarded as reached on the Respondent's Notice rather than on the appeal. Be that as it may, it seems to me that the conclusion is obvious.

Conclusion

76. Those, therefore, are the reasons which lead me to the conclusion that the appeal should be dismissed.

Lady Justice Sharp

77. I agree.

Lord Justice Beatson

78. I also agree.