Neutral Citation Number: [2009] EWCA Civ 1092

Case No: A2/2008/2960

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MR JUSTICE BLAKE
HQ06X03909

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/10/2009

Before :

LORD JUSTICE SEDLEY
LORD JUSTICE WALL
and
LORD JUSTICE MOORE-BICK

- -

Between :

ANTHONY HUNT	**Claimant/ Appellant**
- and -	
AB	**Defendant/ Respondent**

- -
- -

Mr Mark Warby QC and Mr Stephen Ferguson (instructed by Messrs Coyle White Devine) for the **Appellant**
Mr Roger ter Haar QC, Mr Anthony Metzer and Ms Sarah Harris (instructed by Messrs Lovells) for the **Respondent**

Hearing dates: 15 and 17 July 2009

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Judgment

Lord Justice Sedley :

The appeal in summary

1. AB, the respondent, is a married woman who allowed or invited the appellant, a work colleague, into her home for a cup of tea. An act of sexual intercourse took place which he has always asserted was consensual and she has always asserted was not. She did not go to the police, but some years later a colleague in whom she had confided did so. The police approached her and persuaded her to give evidence. The appellant was convicted of rape, but after he had served some two years in prison the conviction was overset. He then issued the present proceedings against AB for malicious prosecution.

2. Blake J, on the trial without a jury of a preliminary issue, held that AB was not the prosecutor and therefore not able to be sued for malicious prosecution. Although, in the view of this court, he was undoubtedly right so to hold, the appeal touches on at least one question of potentially wide importance: if, like most people who believe themselves to have witnessed or been the victim of a serious crime, AB had gone immediately to the police, would she now be open to a civil action as the prosecutor if the outcome of the prosecution had been an acquittal?

3. The factual answer to this appeal, however, is that the prosecutor manifestly was not AB, who had neither approached the police nor sought a prosecution of the appellant. Her role, albeit as the key witness, was limited to agreeing to give evidence and to doing so. The answer of principle is that, even if AB had gone straight to the police and made it clear that she wanted Mr Hunt prosecuted, the independent intervention first of the police and then of the CPS would, in the absence of proof that the prosecution was in reality her doing and not theirs, have made the latter the prosecutor.

The facts

4. There has never been any dispute that on 15 July 1995 the respondent, a special constable, allowed the appellant, a senior traffic warden, into her home or that sexual intercourse took place there. Nor is there any need to detail each party's account of it, save to say that AB's account is consistent only with rape and the appellant's consistent only with consent. I will return later to the implications of this polarity.

5. AB made no complaint to the police. The reason she subsequently gave was that she did not know whether she would be believed and that she was worried about the impact that the episode would have on her marriage. But evidence was given at the trial that within half an hour she had telephoned her supervisor to say that she had been raped by a traffic warden. She believed that she had named him, but the supervisor did not recall this. In the course of that summer she gave her account to

two other work colleagues, and in May the following year to another traffic warden, Ms Whelan.

6. It was not until March 2002 that Ms Whelan, in circumstances which are not material here but might have been material had the full action gone to trial, related AB's account to a senior officer, who immediately reported it to the police. A criminal investigation was initiated under the supervision of DCI Scott who, however, did not approach AB directly until mid-April.

7. AB, who until then was not aware that Ms Whelan had passed on the allegation, declined to make a statement or otherwise assist in a prosecution. It was under the persistent pressure of DCI Scott that she finally agreed to make a statement and give evidence. The appellant was arrested on 14 May 2002. Interviewed under caution, he gave the account of consensual intercourse which he has given consistently ever since.

8. DCI Scott referred the papers to the Crown Prosecution Service for a decision as to whether the criteria for a prosecution were met. She included a report to the effect that AB was in her judgment a credible witness whose evidence was supported by such investigations as had so far been made and who had no apparent motive for making an untruthful accusation.

9. The head of the local criminal justice unit of the CPS on 12 June 2002 sent a response to the Deputy Chief Constable which, after summarising the factual allegations and noting the appellant's answer, continued:

> …..
>
> Having reviewed the evidence supplied to me it is my view that there is sufficient evidence to provide a realistic [prospect] of conviction in respect of an allegation of rape. In reaching this decision I have considered the following:-
>
> (1) [AB] made a complaint within 30 minutes of the incident to Barry Young her sub-divisional officer. Mr Young recalls the conversation and states that [AB] appeared to be upset and hesitant and told him in a disjointed way that a traffic warden had raped her. Mr Young's account of the conversation is consistent with [AB's] version of it.
>
> (2) [AB] appeared at work 2 days after the attack in a distressed manner. When pressed by Fiona Medway a work colleague and close friend, [AB] burst into tears and told her that she had been raped by a traffic warden. Again Mrs Medway's statement is consistent with the statement of [AB].
>
> (3) [AB] subsequently confided in a serving police officer PC Whitfield during the summer of 1996 and subsequently to Marie-Claire Whelan a traffic warden and work colleague of Mr Hunt. Both PC Whitfield (now retired) and Mrs Whelan

> have made statements that are consistent with the statement of [AB].
>
> (4) There is no suggestion that [AB] and Mr Hunt had been having a sexual relationship or that they knew each other on a social basis.
>
> (5) A number of witnesses have described how after the alleged incident [AB's] personality changed. In her statement [AB] states that her work declined and as a result of this her employer offered her counselling for stress which she declined. It would be helpful if evidence could be obtained from [AB's] manager confirming this.
>
> (6) [AB] is described by a number of witnesses as being very reliable and honest. She has confirmed that although initially she felt unable to proceed with the matter she now feels strong enough to give evidence in court. I have spoken to the senior investigating officer Detective Inspector Scott and she has confirmed to me that she considers that [AB] would make a very good witness.
>
> (7) Detective Inspector Scott has confirmed that there is nothing in [AB's] background that is likely to weaken the prosecution case.
>
> In view of the serious nature of the allegation a prosecution is clearly in the public interest.

10. Accordingly the appellant was charged with rape. He was convicted by a majority verdict and sentenced on 18 December 2003 to 4 years' imprisonment.

11. While in her third witness statement AB had finally expressed herself "happy to attend court", at trial the cross-examination of her included the following:

> Q. You never wanted this case to be brought, did you?
>
> A. No.
>
> Q. You made it very clear in your statement of 22 April of last year that you would not support a police prosecution and you would not attend court?
>
> A. That's right.
>
> Q. And you would never yourself have made a complaint, would you?
>
> A. No.

> Q. It was Traffic Warden Whelan betraying your confidence?
>
> A. That's correct.
>
> Q. That resulted in the police coming round and taking a statement from you?
>
> A. That's correct.
>
> Q. And even at that point you did not want anything to do with a prosecution?
>
> A. No, I didn't.
>
> Q. Did you then after 22 April of your own free will and volition contact the police?
>
> A. No.
>
> Q. So the police came back to you?
>
> A. Yes.

12. On 6 December 2005 the appellant's case came before the Criminal Division of this court (Richards LJ, McCombe J and Judge Stewart QC). The appeal was allowed, in part because of inadequacies in the trial judge's direction to the jury and his approach to the admission of evidence, and in part because fresh evidence was tendered which was capable of having made a difference to the verdict. The latter consisted of statements from two witnesses who recounted having seen AB, apparently relaxed, in the company of the appellant after the date of the material incident. In the nature of things, neither statement had been tested; nor was it to be, because the court declined, in view of the time the appellant had already served in prison, to order a retrial.

Malicious prosecution

13. In these circumstances the appellant is entitled not only to the benefit of the presumption of innocence but to the status of a person accused and acquitted. It is the latter that gives him the necessary standing to sue for malicious prosecution. The other ingredients of the tort are, as counsel agree, that the prosecution must have caused him damage (as it plainly did), that the civil defendant must have instituted or continued the prosecution, that she must be proved to have done this without reasonable and probable cause, and that she must be proved to have done it maliciously.

14. The final step – from want of good cause to malice – is not simply an exercise in recycling the claimant's allegation that he was innocent. A witness who has convinced himself of critical facts, and whose testimony about them has secured a conviction which is later overset because he is proved to have been wholly wrong,

may well have acted without reasonable or probable cause but may equally have acted without malice.

15. In this light, as well as for reasons to which I will come, it is relevant to look at how the appellant has put his case. Having pleaded that the act of intercourse was consensual and that AB's claim to the contrary was false, the particulars of claim set out the procedural history of the case and then say:

> 18. In the circumstances, the Defendant maliciously prosecuted the Claimant.
>
> PARTICULARS OF MALICIOUS PROSECUTION
>
> 18.1 The defendant provided information to Hampshire Constabulary which she had concocted and knew to be false. The defendant thereby acted maliciously.
>
> 18.2 The Defendant stated her desire to give evidence in court of the matters in question.
>
> 18.3 Given the seriousness of the allegation and the difficulty of resolving who was telling the truth, Hampshire Constabulary had no realistic option but to charge the Claimant and allow the criminal justice system to takes its course.
>
> 18.4 As the only witness (apart from the Claimant) to what had occurred on 15th July 1995, so that the Hampshire constabulary could not realistically exercise any discretion, the Defendant should properly be regarded as having set the law in motion against the Claimant and be treated as the prosecutor of the Claimant on the basis of the principle in *Martin v Watson* [1996] A.C.74.
>
> 18.5 The Claimant relies on the matters pleaded above. The prosecution was malicious and without reasonable and probable cause.
>
> 18.6 The prosecution terminated in the Claimant's favour upon his successful appeal against his conviction.

16. Before turning to the decision of Blake J, it is worth recording what this action potentially involves, because there is no reason to think it untypical. The appellant is funding the action entirely out of his own, probably modest, resources. The particulars of claim detail the drastic effect of the prosecution on his life, prosperity and wellbeing, and seek an award of both aggravated and exemplary damages. The respondent initially had to rely on the county police solicitor to help her to file a defence. She has now been fortunate enough to find representation initially pro bono but now with a conditional fee arrangement which has potential uplift implications for the claimant if he loses. The trial of the action, but for the judge's decision on this preliminary issue, was set down for 3 weeks with a jury. At it, the entire rape trial would have been conducted in reverse, the claimant setting out to prove not only that

the defendant had consented but that – as his counsel put it to us – she knew it. From this, it would be argued, the jury could and should infer both want of good cause and malice. Her case would be that she had been truthful throughout. Nobody would be entitled to consider the possibility – which would afford a full defence - that she had acted out of confusion and shame; indeed both parties, AB in particular, would regard the suggestion as insulting.

These proceedings

17. I have mentioned that the county police solicitor gave AB some initial help. This included the making of an application to strike out the claim on the ground that the assertion that AB was the prosecutor was unarguable. Master Fontaine, having been shown the House of Lords' decision in *Martin v Watson*, to which I shall come, dismissed the application and ordered AB to pay almost £7,000 in costs. Her decision was not appealed.

18. It was in the course of giving directions for trial of the action that Blake J identified the present issue as one on which he would require counsel's assistance at trial. He suggested trial as a preliminary issue of the question whether AB was the prosecutor in the rape case. Both counsel agreed to this course. Blake J determined that it was an issue suitable for trial by judge alone, and that the trial date should meanwhile be vacated. He has since given his reasons, but his decision, with the parties' consent, to take this as a preliminary issue, and his further decision that it was suitable for determination by judge alone, are not challenged on this appeal.

19. In a carefully reasoned judgment, [2008] EWHC 2756 (QB), Blake J concluded that AB was not the prosecutor and so was not amenable to an action for malicious prosecution. While such a decision is a mixed determination of fact and law, the great majority of the relevant facts were either common ground or were taken by agreement from witness statements which were open to, but were not in the event subjected to, cross-examination. In this situation the major question is one of law.

20. The grounds of appeal are, in short, that the judge failed to follow the decisions of the House of Lords in *Martin v Watson* [1996] AC 74 and of this court in *Mahon v Rahn* (No 2) [2000] 1 WLR 2150; that he went beyond the preliminary issue by forming a view about AB's veracity and by doing so on no admissible evidence; and that he either devised or introduced inappropriate policy grounds for his decision.

The action for malicious prosecution

21. Before turning to modern authority, it is relevant to recall the origins of this tort. Professor Sir John Baker in the new *Oxford History of the Laws of England*, VI. 797 traces it to the tort of defamation: the plea seems to have originated in slander actions where a defence of lawful prosecution was anticipated. In the course of time,

however, the action came to serve in its own right as a corrective to a criminal justice system which, until the mid-19th century, was based on private prosecutions and open to many forms of self-interested abuse by prosecutors. Professor J.H.Langbein, in *The Origins of Adversary Criminal Trial* (2003), paints a vivid picture of the endemic abuse and corruption of the criminal process in Georgian and Regency England. The possibility of being sued by a defendant who had escaped the gallows or transportation by the exposure of perjured evidence (he could not give evidence in his own defence) was one of the few restraints on prosecutors, who included not only private individuals but prosecuting societies.

22. Another distinguished historian of the common law, Professor Douglas Hay, in *Policing and Prosecution in Britain* 1750-1850, ed. Hay and Snyder (1989) (ch.8, 'Prosecution and power') attributes the development of the action for malicious prosecution to the exponential increase in private prosecutions in the aftermath of the Napoleonic wars. It was the growing use of such prosecutions to harass, to blackmail and to secure unjustified awards of costs which prompted first the establishment of uniformed police forces and then, when some of these became used as surrogates by prosecuting societies (see ibid. ch.1, 'Using the criminal law') or by corrupt lawyers to secure awards of costs, of a public prosecution service.

23. The establishment of police forces after Peel's Act of 1829, first in the boroughs and then in the counties until, in 1856, every local government area was required by law to have one, radically altered the pattern of prosecution, both in systematising the conduct of cases and in weeding out those that ought not to be pursued. The first Director of Public Prosecutions, appointed in 1880, had the conduct of only a limited class of cases, but the establishment of the Crown Prosecution Service by the Prosecution of Offences Act 1985 greatly enlarged the DPP's responsibility for prosecutions, and the Criminal Justice Act 2003 made him or her responsible for almost all of them.

24. The current (March 2009) edition of the CPS's *Policy for Prosecuting Cases of Rape* includes the following passages:

> 5.1 Rape usually takes place in a private setting where the victim is the only witness. Unless the defendant pleads guilty, the victim will almost certainly have to give evidence in court. Where there is conflicting evidence, the prosecutor has a duty to assess the credibility and reliability of the victim's evidence. This will always be done in a careful and sensitive way, using all the information provided to the prosecutor. A case may not proceed, not because the prosecution does not believe the victim, but because, when considering all the available evidence in the case, there is not enough to meet the evidential stage of the Code test.
>
> ……
>
> 5.7 Sometimes a victim may withdraw support for a prosecution and may no longer wish to give evidence. This does not mean that the case will automatically be stopped. If the victim has decided to withdraw support for the prosecution,

> we have to find out why. This may involve delaying the court hearing to investigate the facts and decide the best course of action.
>
> …..
>
> 5.14 Generally, the more serious the offence (for example, because of the level of violence used or the real and continuing threat to the victim or others), the more likely we are to prosecute in the public interest, even if the victim says they do not wish us to do so.

25. The right to bring a private prosecution still of course survives, subject to statutory restrictions on the prosecution of serious offences and to the Attorney General's power at any stage to enter a nolle prosequi. There is no reason why a private prosecutor ought to enjoy any greater immunity than the tort itself affords if sued by an acquitted individual. But, while the law has not changed in form, radical changes in the prosecution process, in particular the general transition from private to public prosecution, have necessarily changed its content.

26. One striking example of this, as will be seen, is the House of Lords' 1995 decision in *Martin v Watson*, which concerned the role of a complainant in a prosecution brought by the police. The case was argued and decided by extrapolation from older cases but without reference to their historical context and genesis; and we in turn are bound by its reasoning.

27. In Canada, by contrast, malicious prosecution is now being supplanted by a tort of negligent investigation: see *Hill v Hamilton-Wentworth Regional Police Services Board* (2007) SCC 41; 285 DLR (4th) 620. There is a manifest difficulty in this country, where the law has for well-known policy reasons declined to let victims sue the police for negligent investigation, in letting accused persons do so. But the Canadian departure stems from a recognition that in a modern legal system prosecution is ordinarily the responsibility of the state.

28. Separately from the tort of malicious prosecution, an individual who maliciously induces the authorities to bring unwarranted charges will face prosecution for wasting police time, for perverting or attempting to pervert the course of justice, or (if he or she gives evidence) for perjury. Nevertheless the civil action survives alongside these sanctions and is not, on authority, confined to actions against private prosecutors.

Martin v Watson

29. *Martin v Watson* was a case far removed on its facts from the present one. The Watsons and the Martins were next-door neighbours with a long history of mutual antipathy. Mrs Watson made a succession of complaints to the police that Mr Martin had been exposing himself to her over the garden wall. Although she decided not to make a statement in support of her initial complaint, she expressed her willingness to

give evidence in support of the subsequent ones. The police obtained a warrant and, following two further complaints from Mrs Watson, finally arrested Mr Martin. He was charged only with the incident that had led to the issue of the warrant. On his first appearance before the justices no evidence was offered and he was discharged. (Although I can find no reference to it in the judgment of the Court of Appeal [1994] QB 425 and would therefore have assumed that the conduct of the case remained with the local police, Lord Keith in the House of Lords [1996] 1 AC 74, 79H, records that it was the CPS who offered no evidence.)

30. When Mr Martin sued Mrs Watson for malicious prosecution, the officer who had obtained the arrest warrant was ill and unable to give evidence, and the officer to whom the subsequent complaint was made gave evidence that he did not believe her. Judge Goodman found that "it was all clearly done to get the plaintiff arrested" and that it was because of pressure from the defendant that the first officer had applied for a warrant. In a judgment which was eventually approved by the House of Lords, he set out his understanding of the law in the following principles:

> "(i) It is not essential to prove that the defendant herself was the actual prosecutor in the sense that she personally applied for the warrant that was duly issued by the justices.
>
> (ii) The defendant may be liable if she was actively instrumental by representing herself as the prosecutor or by helping, influencing or urging some other person to set the law in motion. This does not necessarily involve signing a charge sheet or some overt act of that kind.
>
> (iii) On the other hand, it is not enough merely to show that she made a complaint to a police officer which was followed by an application for a warrant by the police officer, even if the complaint was, to her knowledge, quite untrue and the police officer was unaware that it was untrue. The fact that she was lying goes more to the question of reasonable and probable cause and malice."

31. This court, by a majority, overset Judge Goodman's judgment in favour of Mr Martin. It sought in doing so to accommodate the conflicting policy demands of, on the one hand, deterring abuse of the prosecution process and, on the other, not deterring citizens from helping in law enforcement.

32. The House of Lords restored the decision of Judge Goodman, Lord Keith in the single reasoned speech holding that he had "reached the right conclusion for the right reasons" (87F-G). This, if it stood alone, would have given binding force to Judge Goodman's three propositions. What have principally exercised this court on the present appeal, however, are some of Lord Keith's additional propositions.

33. It was common ground before the House that if Mrs Watson was the prosecutor the judge's findings made her liable. The question therefore, as Lord Keith posed it, was whether she was properly to be regarded in all the circumstances as having set the law in motion against Mr Martin.

34. In the absence of any English or Scottish authority directly on the point (a gap which, although Lord Keith described it as curious, may be explained by the history noted above), Lord Keith derived from a number of Commonwealth authorities a formulation which appears (at 86G-87A) within his discussion of the English case of *Danby v Beardsley* (1880) 43 LT 603. The passage reads:

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

35. The two sentences constituting this passage must be incremental: deliberate falsehood evidences an intent that there should be a prosecution, and sole knowledge means that the police have no independent check on it. This might suggest that the two things together – malicious intent and malign effect – will make the complainant a prosecutor. But that is in apparent tension with the principles adopted (from well-established sources) by Judge Goodman and approved by the House. The third of those principles distinguishes (though it does not decisively segregate) both malice and sole knowledge from the question of who is the prosecutor, whereas Lord Keith's formulation at first sight appears to conflate them. But a manifest corollary of his dual proposition is that where the police do have independent verification and decide to prosecute, even a malicious key witness will not, or may not, be regarded in law as the prosecutor. If so, it would appear that the intervention of a public prosecutor may preserve a witness, even a malicious one, from liability in tort.

Mahon v Rahn (No 2)

36. An approach of this kind is endorsed by the leading judgment in this court of Brooke LJ in *Mahon v Rahn* (No 2) [2000] 1 WLR 2150. Having given careful attention to *Martin v Watson*, Brooke LJ said:

> 267. It appears to me, in the light of these authorities, that it would be unwise to be over-prescriptive in setting out the circumstances in which a lay informant may properly be regarded as the prosecutor, or as one of the prosecutors, for the purposes of the tort of malicious prosecution.
>
> 268. A distinction must be drawn between a simple case like *Martin v Watson* [1996] A.C.74 and a more complex case in

> which a prosecuting authority such as the S.F.O. or the Crown Prosecution Service is in receipt of evidence from a variety of sources and has to decide in the exercise of its discretion whether it is in possession of sufficient evidence to justify setting the law in motion against the defendant.
>
> 269. In a simple case it may be possible to determine the issue quite easily by asking these questions:
>
> (1) Did A desire and intend that B should be prosecuted? (2) If so, were the facts so peculiarly within A's knowledge that it was virtually impossible for the professional prosecutor to exercise any independent discretion or judgment? (3) Has A procured the institution of proceedings by the professional prosecutor, either by furnishing information which he knew to be false, or by withholding information which he knew to be true, or both?
>
> 270. In the more complex case it is likely to be more difficult to apply these tests, but I would adopt the approach suggested by Richardson J in *Commercial Union Assurance Co of NZ Ltd v Lamont* [1989] 3 N.Z.L.R. 187, 199 when he said that the tests should be the same when the police had conducted an investigation and decided to prosecute, but that they should be cautiously applied. The reason, of course, is, as he also took into account, that prosecuting authorities are trained and accustomed to consider the evidence placed before them with an appropriately critical eye. Crown prosecutors, for instance, have to be satisfied that there is enough evidence to provide a realistic prospect of conviction, and paragraph 5 of the current Code for Crown Prosecutors describes in clear terms the tests they have to apply before they can allow themselves to be so satisfied.

37. In the present state of the law, this is probably as near as one can get to a working test of the identity of the prosecutor. It offers no bright line, but it attempts to recognise the reality of prosecutorial decision-making in a modern criminal justice system.

Other authority

38. Mr Ter Haar QC for AB has drawn attention to a passage in the judgment of Hobhouse LJ in *Martin v Watson* in this court, [1994] QB 425, 455F-G, a passage which he submits (in my view correctly) was neither expressly nor impliedly controverted in their Lordships' House:

> "If it were to suffice that the defendant had done no more than give dishonest evidence upon which the prosecutor relied, the

> first element in the tort of malicious prosecution becomes otiose; all that would need to be shown would be a causal connection between the provision of the dishonest evidence and the institution or the continuation of the prosecution. This is not the law of England."

The 'first element' to which Hobhouse LJ was referring is the requirement that the civil defendant must have been the prosecutor. If this is right – and it seems to me incontrovertible - it is not legitimate for the claimant in a malicious prosecution action to deduce authorship of the prosecution simply from malice in the supplying and giving of evidence. While the two things may be related, more is needed.

39. Following the House of Lords' decision in *Martin v Watson*, this court had to consider the case of *Moon v Kent County Council* (unreported, 15 February 1996). The action arose out of a failed CPS prosecution for a fraud on a local authority. The real defendant to the action was a council employee, a Mr Walters, who was shown to have withheld potentially crucial facts from both the prosecuting authority and, initially, the court. McCowan LJ considered that Walters' sole command of the material negated any independent filter, making it "virtually impossible for the police officers to exercise an independent judgment" and establishing that the prosecution was "procured" by him. Significantly, the allegation of fraud had not come originally from Walters but from the claimant's partner; but, as McCowan LJ said,

> "the one who starts the stone rolling is not necessarily the one who causes the police to prosecute."

The remark highlights how fact-sensitive the prosecutor issue may be, but it does not mean that there is no boundary set by principle.

This case

40. In the skeleton argument before Blake J, the appellant's counsel described the defendant's argument that she was not the prosecutor because she was telling the truth (and so fell outside the presumption which he contended was set up by *Martin v Watson*) as "illogical, presumptive and circular". But the appellant's own pleaded and argued case is exactly the same argument in reverse: it is that because the respondent was *not* telling the truth, she *is* to be regarded as the prosecutor.

41. How then was the logical circle to be broken? Blake J found an answer in the judgment of Stark J in the Australian case of *Commonwealth Life Assurance v Brain* (1935) 53 CLR 343:

> "A person giving information to the police is by no means necessarily a prosecutor. The question in all cases of this kind must be, who was the prosecutor, and the answer must depend on the whole circumstances of the case."

42. This approach does not exclude the question of mendacity or veracity, but it does not elevate it – and I do not consider that Lord Keith intended to elevate it – to a litmus test of prosecutorial status. If the defendant is proved to have lied and the lie to have brought about the charge, the court may the more readily conclude that he was the real author of the prosecution, for why else would he have lied? If, however, that question is unresolved, as in the circumstances of this preliminary issue it was, the judge cannot assume mendacity on the defendant's part any more than he can assume her veracity. All he can do is see whether the defendant's veracity is impugned by the evidential material before the court, as it would be where there was an uncontested admission of falsehood or a conviction for perjury.

43. That is what Blake J did. I do not accept Mr Warby's submission that he ought to have assumed the claimant's allegation of mendacity to be correct. I would also reject his submission that the judge went further than was permissible in looking at the issue at all. On authority he was required, as an aspect of the preliminary issue, to consider whether there was some proof of mendacity capable of making AB the prosecutor where otherwise she could not be. He found that there was none. This, in my judgment, precisely satisfied the test laid down by *Martin v Watson* and explained in *Mahon v Rahn* (No 2). If the issue had not been taken separately and had gone to the jury with the whole case, the judge would have had to direct them in very similar terms.

44. I do not accept the criticism that the judge either brought in irrelevant policy considerations or misapplied those which inform *Martin v Watson*. The policy issues thrown up by this action were manifest, and it was entirely right that Blake J should note them so long as he did not let them determine the outcome. Without setting it out, the passage at §61-2 of his judgment notes the admitted consequence for prosecution witnesses generally, and for rape complainants in particular, of the argument advanced on the appellant's behalf. The passage at §69-71 cites judicial and academic comment on the policy conflict and concludes, in my view unexceptionably:

> "The difficulty, therefore, is to find precisely where the balance between those two competing considerations falls, how it is to be assessed and whether there is a single test … or a somewhat broader analysis of all relevant circumstances."

The remaining passage of which complaint is made under this head, at §94-5, follows the conclusion that AB was not the prosecutor. It acknowledges the gap between acquittal and compensation but explains that this is not enough to alter AB's legal position. Rightly, Mr Warby's skeleton argument does not take issue with the formulation of the judge's actual conclusion at §93:

> "I have, therefore, no hesitation in concluding on this overall assessment of the evidence against the competing interests of public policy noted earlier that the defendant is not a prosecutor …"

Conclusion on this appeal

45. On the facts of this case I consider that the decision of Blake J that AB was not the prosecutor was correct. The prosecution was in every material sense the responsibility of the police and the CPS. AB, far from instigating it, did nothing to promote a charge until the police, alerted by a friend in whom she had confided, approached her and persuaded her to give evidence. If she is to be regarded by the law as a prosecutor, so is every key witness whom an acquitted defendant considers to have lied, with incalculable consequences for both the civil and the criminal justice systems.

46. I do not consider that the appellant derives the support he claims from *Martin v Watson*. The narrow reason for this is that there was no basis on which the judge could find malice on AB's part and no requirement of law that he should presume it. But the larger reason, in my judgment, is that where from start to finish the defendant has been no more than a witness, albeit the key witness, in a police investigation leading to a public prosecution and has done nothing improper designed to cause either of those authorities to take a course it would not otherwise have taken, she will not be regarded by the law as the prosecutor.

47. It follows – and I understand all members of the court to assent to this – that while the fact that the respondent did nothing designed to promote the prosecution of the appellant was a sufficient ground for the judge's decision that she was not the prosecutor, it was not a necessary one. Even if she had gone directly to the authorities, the professional responsibility for the case assumed first by the police and then by the CPS would prima facie have made the latter for all legal purposes the prosecutor. It would have been necessary to establish that she had deliberately manipulated them into taking a course which they would not otherwise have taken if, pursuant to *Martin v Watson*, she was to be regarded in law as the prosecutor. The assertion that the claimant was telling the truth and the defendant was not, even if a jury were satisfied of it, would not establish this.

Further considerations

48. The particulars of malicious prosecution, which I have set out above in §15, contain no particularity whatever. As Mr Warby QC confirmed, the nature of his client's case is that AB has throughout known perfectly well that she consented, and his evidence of it is his client's testimony that she unmistakably did consent. Even if the defendant were the prosecutor, I have serious doubts whether a pleading such as this is sufficient to sustain an affirmative case of want of good cause and of malice.

49. A criminal justice system can undertake to be fair, but it cannot undertake to be infallible. The price that an eventually acquitted person pays for a mistake in the criminal justice process can be very high indeed, and Parliament has legislated for such individuals to be compensated out of public funds only in very limited circumstances. But who would willingly give evidence if they had to be warned that,

> should it come down to their word against that of the accused and the accused for whatever reason be acquitted, they could be sued as the prosecutor and made to pay heavy damages on the bare footing that the accused was telling the truth and they had therefore lied? Master Fontaine's refusal to strike out the claim, which might have been appealable, was not appealed, so that the question hangs fire. While it does so, the only constraint on the chilling effect of lawsuits is caution in locating the potential defendant to an action for malicious prosecution in a legal system in which, save in rare cases, the private prosecutor has been supplanted by a public authority.

Disposal

50. I would dismiss this appeal.

Lord Justice Wall:

51. I have had the advantage of reading in draft the judgments to be delivered in this case by Sedley and Moore-Bick LJJ. I am in no doubt whatsoever that this appeal should be dismissed. However, as my approach to the case differs to some extend from that taken by them, I propose to set out my own conclusions.

52. In my judgment, this appeal fails comprehensively on the facts. Wherever the line as to the identity of the prosecutor falls to be drawn, I agree with Sedley LJ in paragraph 3 of his judgment that, on the facts, the prosecutor in this case manifestly was not AB. Two aspects of the case seem to me conclusive in this respect. I will deal with each in turn.

(1) The evidence of Detective Chief Inspector Scott

53. In my judgment, the judge was right to agree with the proposal advanced by both parties that the question of the identity of the prosecutor should be tried as a preliminary issue. It is, however, to be noted that this was **not** a preliminary issue tried on assumed facts. In particular, it was open to the appellant to call for the attendance of DCI Scott and to cross-examine her on her statement. DCI Scott, it will be recalled, was the senior investigating officer in the case. Paragraph 5 of DCI Scott's statement reads as follows: -

> > This investigation was independent from the influence of any party and the consideration for charging was made entirely by the Crown Prosecution Service (CPS) and again was independent of meeting AB. I applied a great deal of pressure and influence to make AB provide s statement for the purpose of a criminal investigation. She was consistently reluctant to support the criminal case and I was concerned that she would not support a criminal prosecution and I cannot stress enough how much pressure I put her under to assist the prosecution.

54. Unsurprisingly, DCI Scott was not required for cross-examination, and her statement thus stands uncontradicted. It is, of course, entirely consistent with what counsel for the appellant put to AB at the appellant's criminal trial – see the extract from the transcript cited by Sedley LJ in paragraph 11 of his judgment, which I need not repeat.

(2) The binding effect of the judgment of this court in Mahon v Rahn (No 2)

55. In my judgment, both the judge and this court are bound by the approach set out by Brooke LJ in paragraph 267 et seq of his judgment in ***Mahon v Rahn***. On any view, the judge cannot be criticised for citing and following that approach. Both Sedley and Moore-Bick LJJ have set out the passage in question: in their judgments, the former at paragraph 36 and the latter at paragraph 74, and I will not repeat it, save to cite the opening question identified by Brooke LJ in paragraph 269: -

> In a simple case, it may be possible to determine the issue quite easily by asking these questions: -
>
> (1) Did A desire and intend that B should be prosecuted?

56. On Brooke LJ's analysis, the remaining two questions only arise if the answer to the first question is "yes". I reach that conclusion because question (2) is prefaced by the words "if so".

57. In my judgment, it cannot be any stretch of the imagination be held on these facts that AB was the prosecutor. The evidence of DCI Scott is uncontradicted, and the fact that AB did not want Mr. Hunt prosecuted was part of the appellant's case at his criminal trial. In my judgment, therefore, the judge was plainly right to hold – on the objective evidence – that AB was not the prosecutor.

The wider questions

58. On the wider questions of policy raised by both Sedley and Moore-Bick LJ I respectfully agree with the former's analysis in paragraphs 45 et seq. of his judgment. It is plainly undesirable as a matter of public policy that key witnesses should be deterred from reporting allegedly criminal acts to the police for fear of an action for malicious prosecution if the defendant is acquitted. I also agree with Moore-Bick LJ, however, that a decision by the CPS to pursue proceedings will not automatically make it inappropriate to regard the informant as the prosecutor. Like Moore-Bick LJ, I would anticipate that cases in which an action for malicious prosecution would lie following a decision by the CPS to prosecute would be rare.

59. In my judgment, provided the CPS makes an independent decision to prosecute, and its process is not overborne or perverted in some way by the complainant, the complainant is protected. Plainly, that is the case here.

60. In my view, the judge plainly reached the right conclusion and the appeal from his decision should be dismissed.

Lord Justice Moore-Bick:

61. This appeal raises an important question concerning the tort of malicious prosecution: under what circumstances, if any, will an informant, whose evidence provides the essential foundation for criminal proceedings, be regarded as the prosecutor, despite the fact that a decision to pursue the proceedings has been taken by the Crown Prosecution Service?

62. In November 2003 the appellant, Mr. Hunt, was convicted of raping the respondent, AB. Sexual intercourse was admitted; the only issue was consent. The circumstances of the offence have been described, so far as is necessary for this appeal, by Sedley L.J. and I need not repeat them. Suffice it to say that they were such that the prosecution depended almost entirely on her evidence. It was, in substance, her word against his. In December 2003 Mr. Hunt was sentenced to four years' imprisonment, but in December 2005 his conviction was quashed on appeal. A re-trial was not ordered because by then he had served almost half of his sentence and would therefore have been eligible for release within a few days in any event.

63. In December 2006 Mr. Hunt started proceedings against AB claiming damages for malicious prosecution. His case was that she had lied to the police and that, given the serious nature of the allegation, both they and the CPS had no alternative but to charge him and pursue the case to trial. As the only witness capable of giving substantial evidence in support of the prosecution AB was properly to be regarded in those circumstances as the prosecutor for the purposes of the tort of malicious prosecution.

64. One of the striking aspects of this case is that AB was not herself directly responsible for the matter coming to the attention of the police. The events in question occurred in July 1995, but she made no complaint to the police and the matter did not come to their attention until March 2002 as a result of the actions of a person in whom she had confided. Even then she was reluctant to support a prosecution and eventually agreed to do so only after a considerable amount of pressure had been exerted on her by the police. The decision to pursue the prosecution was that of the Crown Prosecution Service alone. Indeed, at the trial counsel for Mr. Hunt, no doubt wishing to undermine her credibility, put it to AB that she had never wanted the case to be brought, a suggestion to which she readily agreed. In those circumstances it might be thought surprising, whether as a matter of common sense or as a matter of law, that AB should be regarded as the prosecutor of Mr. Hunt, that is, as the person who set the law in motion against him. However, that is said to be the result of the authorities, in particular of the decision of the House of Lords in *Martin v Watson* [1996] A.C. 74.

65. It is convenient to begin by reminding oneself of the essential elements of the tort of malicious prosecution. In *Martin v Watson* the House of Lords approved the following statement of principle now to be found (with immaterial amendments) in *Clerk & Lindsell on Torts*, 19th ed., paragraph 16-06:

> "In action of malicious prosecution the claimant must show *first* that he was prosecuted by the defendant, that is to say, that the law was set in motion against him on a criminal charge; *secondly*, that the prosecution was determined in his favour; *thirdly*, that it was without reasonable and probable cause;

> *fourthly*, that it was malicious. The onus of proving every one of these is on the claimant."

66. This appeal is concerned only with the first of those elements, but having regard to the nature of the allegations being made by Mr. Hunt, it is necessary to bear in mind the third and fourth, each of which in the particular circumstances of this case turns on whether the account which AB eventually gave to the police and her evidence at the criminal trial were to her knowledge false. In the event the judge, having considered the authorities, in particular *Martin v Watson* and the subsequent cases of *Moon v Kent County Council and another* (C.A., 15th February 1996, unreported) and *Mahon and others v Rahn and others (No. 2)* [2000] 1 W.L.R. 2150, concluded that AB was not the prosecutor. His reasons for reaching that conclusion were in substance threefold: that AB did not desire or intend that Mr. Hunt should be prosecuted; that although she was the central prosecution witness, the facts were not so peculiarly within her knowledge as to make the independent exercise of discretion by the Crown Prosecution Service virtually impossible; and that there was no evidence, apart from that of Mr. Hunt, to indicate that she had lied. In concentrating on these three aspects of the case the judge was seeking to follow the guidance given by Brooke L.J. in *Mahon v Rahn (No. 2)*, to which it will be necessary to refer in more detail in due course.

67. On behalf of Mr. Hunt Mr. Mark Warby Q.C. (who did not appear below) criticised the judge's decision in a number of respects. In summary, he submitted that the judge had failed properly to identify and apply the principles to be derived from the decided cases, in particular *Martin v Watson*; that he had made findings about the honesty of AB which ought to have been the subject of a decision by a jury; and that he had decided the case by reference to his own assessment of competing policy considerations that had already been resolved by the House of Lords. Of these the first gives rise to the most difficult issues and it is to that which I now turn.

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. Mr. Warby submitted that the test is essentially one of causation: it is satisfied whenever an informant provides information and gives evidence which is fundamental to the success of a prosecution, but in most cases the chain of causation is broken by the exercise of independent judgment on the part of the prosecuting authorities. Where, however, an informant has knowingly given false information, he cannot rely on the actions of the authorities as relieving him from responsibility and the chain of causation remains intact.

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 N.Z.L.R. 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. These characteristics of the prosecutor are, however, distinct from the elements of want of reasonable and probable cause and malice, each of which must be separately proved. Malice in this context is not limited to ill will in the ordinary sense but is wide enough to encompass any improper motive.

70. Much of the debate in this case has revolved around a passage in Lord Keith's speech at page 86G-87A, which Mr. Warby submitted encapsulated the principles that his Lordship had derived from the Commonwealth decisions and the earlier English cases to which he had referred. He submitted that, taken as a whole, it supported the conclusion that whenever the facts on which the prosecution is based lie wholly within the knowledge of the complainant, he or she is to be regarded as the prosecutor, at any rate where the complaint is untruthful.

71. In view of its importance it may be helpful to set out that passage in full at this point, although it will be necessary to return to it at a later stage. Lord Keith said:

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

72. In view of the emphasis that Mr. Warby placed on this passage it is not surprising that the honesty or otherwise of AB was regarded as an important issue. However, in principle one would not have thought that the honesty or otherwise of the informant should determine whether he is the prosecutor. A person who makes a true allegation against another for the purpose and with the intention of procuring his prosecution sets the law in motion against him just as much as one who, with the same purpose and intention, makes a false allegation believing it to be true, or one who knowingly makes a false allegation. It is difficult to see, therefore, why, for the limited purpose of deciding whether the defendant is properly to be regarded as the prosecutor, his honesty should be relevant otherwise than as evidence bearing on the essential elements of purpose and intention and effective action. Lord Keith himself accepted in *Martin v Watson* at page 86B-C that the mere fact that a person has given information to the police which leads to a prosecution does not make him the prosecutor, even if the information is false.

73. The next case to which it is necessary to refer is *Moon v Kent County Council*. In that case the plaintiff was the managing director and principal shareholder in a company that operated regulated bus services for the council, one of which fell within a scheme under which the council undertook to subsidise any shortfall in revenue. The plaintiff was accused of four offences of falsely understating the company's revenue from the

service in question in order to obtain subsidy payments to which it was not entitled. The principal evidence against him was provided by the second defendant, a Mr. Walters, based on an analysis of the company's records. In due course the plaintiff was acquitted on the direction of the judge after Mr. Walters had accepted in cross-examination that it was possible that in fact, far from having been overcharged, the council still owed money to the company. He subsequently brought proceedings for malicious prosecution against Mr. Walters and the council as his employer. The defendants sought to have the action struck out on the grounds that Mr. Walters could not properly be regarded as the prosecutor since there existed an independent filtering system in the form of the police and the Crown Prosecution Service which made an independent decision to pursue the proceedings. The judge struck out the action, but this court, applying *Martin v Watson*, reversed his decision on the grounds that, since Mr. Walters had failed to reveal to the police the full implications of a very complex analysis of the company's records, it was arguable that it had been virtually impossible for the prosecuting authorities to exercise independent judgment and that he was therefore to be regarded as the prosecutor. McCowan L.J., with whom the other members of the court agreed, was satisfied that there was evidence to support the conclusion that Mr. Walters had deliberately made a false accusation against the plaintiff.

74. In *Mahon v Rahn (No. 2)* the plaintiffs brought an action for malicious prosecution against the defendants following the failure of a prosecution brought by the Serious Fraud Office based in part on evidence provided by the defendants and in part on evidence from a variety of sources obtained through its own investigations. Brooke L.J., having considered *Martin v Watson* and the authorities to which Lord Keith refers, made the following observations:

> "267. It appears to me, in the light of these authorities, that it would be unwise to be over-prescriptive in setting out the circumstances in which a lay informant may properly be regarded as the prosecutor, or as one of the prosecutors, for the purposes of the tort of malicious prosecution.
>
> 268. A distinction must be drawn between a simple case like *Martin v Watson* and a more complex case in which a prosecuting authority such as the SFO or the Crown Prosecution Service is in receipt of evidence from a variety of sources and has to decide in the exercise of its discretion whether it is in possession of sufficient evidence to justify setting the law in motion against the defendant.
>
> 269. In a simple case it may be possible to determine the issue quite easily by asking these questions:
>
> (1) Did A desire and intend that B should be prosecuted?
>
> (2) If so, were the facts so peculiarly within A's knowledge that it was virtually impossible for the

> professional prosecutor to exercise any independent discretion or judgment?
>
> (3) Has A procured the institution of proceedings by the professional prosecutor, either by furnishing information which he knew to be false, or by withholding information which he knew to be true, or both?
>
> 270. In the more complex case it is likely to be more difficult to apply these tests, but I would adopt the approach suggested by Richardson J in *Commercial Union Assurance Co of NZ Ltd v Lamont* when he said that the tests should be the same when the police had conducted an investigation and decided to prosecute, but that they should be cautiously applied. The reason, of course, is, as he also took into account, that prosecuting authorities are trained and accustomed to consider the evidence placed before them with an appropriately critical eye. Crown prosecutors, for instance, have to be satisfied that there is enough evidence to provide a realistic prospect of conviction, and Section 5 of the current Code for Crown Prosecutors describes in clear terms the tests they have to apply before they can allow themselves to be so satisfied."

75. Mr. Warby accepted that in order to be regarded as the prosecutor the defendant must have been actively instrumental in bringing about the prosecution with the intention of achieving that end. However, basing himself on the passage in Lord Keith's speech cited earlier he submitted that those requirements will be satisfied whenever a person deceives the authorities by giving them false information without which they would not have proceeded and indicates a willingness to support a prosecution, or whenever the facts relating to the alleged offence are solely within the knowledge of the informant so that it becomes virtually impossible for the authorities to exercise an independent discretion.

76. Mr. Ter Haar Q.C. submitted that, since the essence of the tort of malicious prosecution is abuse of the process of the court, it is necessary to show that the defendant's involvement went beyond merely providing evidence and extended to some form of active involvement in the pursuit of the proceedings, as was the case in *Martin v Watson* where there was evidence of an active campaign on the part of Mrs. Watson to procure Mr. Martin's arrest and prosecution. He submitted that the introduction of an independent body in the form of the Crown Prosecution Service charged with the duty of exercising its own judgment in relation to all serious prosecutions has led to a situation in which it is no longer appropriate to regard an informant, whether honest or dishonest, as the prosecutor if there has been a decision by that authority to pursue a prosecution. When pressed, however, he was prepared to accept that an action for malicious prosecution might lie in very rare cases where it could be shown that an informant had actively manipulated the decision, but he submitted that in all other cases the informant would be protected by the exercise of independent judgment on the part of the police and Crown Prosecution Service.

77. The present case provides a classic example of a situation in which only the claimant and the defendant can provide direct evidence of the circumstances said by the defendant to constitute an offence. In such cases the difficulty for the prosecuting authorities in exercising independent judgment is the same, whether the complainant is telling the truth or not, but I do not understand Lord Keith to be saying that in all such cases the complainant is to be regarded as the prosecutor; the context suggests that he was referring only to cases where the complaint is known to be false. That is understandable because a deliberately false accusation is some evidence of a purpose and intention to set the law in motion against the plaintiff and the limitation on the ability of the prosecuting authority to scrutinise it by reference to independent evidence may in some cases undermine any exercise of independent judgment. However, cases vary and each case must be considered on its own facts. The question will always be whether the defendant actively procured the prosecution of the plaintiff.

78. This was certainly a case in which the facts relating to the alleged offence fell entirely within the knowledge of the complainant and Mr. Hunt; it is therefore one that can properly be described as a "simple" rather than "complex" in the sense in which those terms were used by Brooke L.J. in *Mahon v Rahn (No. 2)*. However, the difficulty facing the prosecuting authorities in such cases is the same, whether the complainant is telling the truth or not. In either case there is likely to be little scope for obtaining evidence from independent sources to corroborate or undermine the complainant's account and accordingly the ability of the Crown Prosecution Service to exercise independent judgment could be said to be limited. Nonetheless, the authorities do not support the conclusion that that is sufficient to render AB the prosecutor in this case in the absence of some evidence to show that she, rather than the authorities, was the driving force behind the prosecution. The three-stage test suggested by Brooke L.J. in *Mahon v Rahn (No. 2)* begins with the question whether the defendant desired and intended that the claimant should be prosecuted and treats that as a requirement separate and distinct from the ability of the prosecuting authorities to exercise independent judgment, a question which is directed to the practical effect of his actions.

79. The statements of principle to be found in the decided cases must be read and understood against the background of their particular facts. To treat them as tests of universal applicability risks losing sight of the essential principles. Brooke L.J. in *Mahon v Rahn (No. 2)* was well aware of that, since he specifically pointed out the danger of being over-prescriptive in setting out the circumstances in which a lay informant may properly be regarded as the prosecutor. The passage in Lord Keith's speech in *Martin v Watson* at pages 86G-87A, on which Mr. Warby relied so heavily, follows a discussion of the case of *Danby v Beardsley* (1880) 43 L.T. 603, in which the defendant had erroneously, but in good faith, reported to the police the theft of two pairs of horse clippers which he said had last been seen in the plaintiff's possession. The police found the clippers, which in fact belonged to the plaintiff, in his house and as a result he was prosecuted but acquitted. The plaintiff's action for malicious prosecution was withdrawn from the jury on the grounds that the defendant could not properly be regarded as the prosecutor.

80. Lord Keith thought it significant that there was no evidence of malice in that case, perhaps because such evidence would have tended to suggest that the defendant did

indeed desire and intend to procure the prosecution of the plaintiff. That would seem to follow from the sentence beginning "Where an individual falsely and maliciously gives a police officer information . . . ." On the facts of that case, however, no such conclusion could be drawn. As Lindley J. pointed out in the passage from his judgment cited by Lord Keith, the defendant had done no more than raise a suspicion in the minds of the police who were themselves responsible for the decision to prosecute.

81. Mr. Warby relied primarily on the second sentence of the passage cited earlier which begins with the words "Where the circumstances are such that the facts relating to the alleged offence can be within the knowledge only of the complainant, . . . ". Taken in isolation it might suggest that whenever the circumstances of the complaint lie solely within the knowledge of the complainant the prosecuting authorities are deprived of the opportunity to exercise any independent discretion or judgment, with the result that the complainant is to be regarded as the prosecutor. However, this sentence must be read in the context of what precedes it, that is, the giving of false and malicious information. In my view the authorities do not support the conclusion that an informant who provides information to the police about a matter which is solely within his own knowledge is always to be regarded as the prosecutor; indeed, Mr. Warby's submission, if correct, would involve attributing to an honest informant a desire and an intention that he may well not possess. Moreover, I do not think that in that passage Lord Keith was seeking to provide a definitive statement of the law. He was simply making two points which followed naturally from his discussion of *Danby v Beardsley*: first, that deliberately giving the police false information about another is evidence of a desire and intention that that person should be prosecuted; and second, that if the circumstances are such as to prevent the authorities from exercising their independent judgment, he can properly be treated as having brought about the prosecution. That is how this court in *Mahon v Rahn (No. 2)* appears to have understood the position: otherwise it would not have been possible for Brooke L.J. to formulate the three-stage test suggested in paragraph 269 of his judgment.

82. Despite the care that is taken in the modern criminal justice system to ensure that prosecutions are not brought unless proper grounds exist and that the proceedings are in the public interest, human ingenuity is such that it will always be possible to concoct a false case of sufficient plausibility to mislead the authorities and manipulate their decision. It is for this reason that I am unable to accept Mr. Ter Haar's submission that a decision by the Crown Prosecution Service to pursue proceedings will always make it inappropriate to regard the informant as the prosecutor. Such cases, however, are likely to be rare. *Moon v Kent County Council* provides an example of one in which the evidence was considered sufficient to give rise to an arguable case that the prosecuting authorities had, in effect, been manipulated by the informant and as such is inconsistent with Mr. Ter Haar's submission. The decision does not, however, turn solely on the fact that the information provided to the police was too complex to admit of independent scrutiny; there was in addition evidence which tended to suggest that, whatever his motives, Mr. Walters desired and intended that the plaintiff should be prosecuted.

83. Mr. Warby submitted that the judge was wrong to have regard to AB's actual state of mind because that is a matter to be judged objectively by reference to the informant's conduct, but in my view the authorities do not support that conclusion. Malicious

prosecution involves the deliberate abuse of the prosecution process and as such is a tort of intention; nothing less will do. As McCowan L.J. pointed out in *Moon v Kent County Council* at page 15H-16B, negligence is not sufficient. The authorities do not suggest that a desire and intention to procure a prosecution is to be attributed to an informant who is mistaken simply because his evidence is essential to the prosecution case. In my view Mr. Warby's submission proceeds on a misunderstanding of what Lord Keith said in *Martin v Watson*. Although making a dishonest complaint is not itself conclusive evidence of a desire and intention to procure a prosecution, I do not think that the informant's honesty can be disregarded when deciding whether he can properly be regarded as the prosecutor; on the contrary, it may be an important aspect of the circumstances that have to be taken into account when deciding whether he desired and intended to bring about a prosecution. It is principally for this reason that I think it was wrong for the judge in this case to try as a preliminary issue the broad question whether AB was the prosecutor. A finding that AB had lied to the police might tend to suggest that she desired and intended a prosecution, but such a finding could not be made without hearing evidence from both parties and in any event was one that should properly have been made by a jury. If the jury did make such a finding, it would have to be weighed in the context of the all other evidence before them. The judge set out to answer the three questions posed by Brooke L.J. in *Mahon v Rahn (No. 2)*, but in answering the third question ("has A procured the institution of proceedings by the professional prosecutor, either by furnishing information which he knew to be false, or by withholding information which he knew to be true, or both?") he appears to have overlooked the fact that he was trying a preliminary issue and proceeded to answer it without hearing evidence from the parties. That was not a proper course to take when making a final decision on one of the issues in the action. In those respects, therefore, I think that Mr. Warby's criticisms of the judge were well-founded.

84. Despite that, however, I think the judge was right to hold that AB was not the prosecutor in this case for two reasons. First, he was right, in my view, to find that she did not have the necessary desire and intention that Mr. Hunt should be prosecuted. That is a question of fact that has to be decided by reference to all the evidence before the court. Although giving false information may well be powerful evidence of such a desire and intention, a person who knowingly gives false information to the authorities does not necessarily thereby seek to bring about a prosecution. For example, people sometimes become trapped in a web of their own deceit and feel unable to retract an earlier untrue account. In this case even if a jury had been satisfied that AB's account was untruthful, in the face of the powerful evidence that she was a reluctant witness who did not wish to see Mr. Hunt prosecuted that could not properly support a finding that she desired and intended his prosecution. More importantly, however, I think he was right to hold that this was not a case in which the prosecuting authorities were deprived of the ability to exercise independent judgment. Unfortunately, cases of this kind, in which the complainant's word is pitted against that of the accused, are not uncommon, especially if there has been any significant lapse of time between the events in question and the investigation. However, that does not normally prevent the authorities from assessing the credibility of the complainant by reference to the inherent plausibility of the account and such circumstantial evidence as may be available. As to this, I entirely agree with the observations made by Sedley L.J. in paragraph 47 of his judgment. In my view the court should be very cautious before reaching the conclusion that the authorities were unable (or even, as

Mr. Warby emphasised, *virtually* unable) to exercise independent judgment. Clearly this was not such a case.

85. Before the judge Mr. Ferguson submitted on the basis of what Lord Keith had said in *Martin v Watson* that whenever a person who alone can give the evidence that is fundamental to the success of a prosecution is willing to give that evidence in court he is to be regarded as the prosecutor. As is apparent, I do not think that is correct, but the stark nature of the argument inevitably led the judge to consider its wider implications and in doing so he touched on questions of the kind with which their Lordships had grappled in that case. However, that does not appear to have formed any significant part of his decision and the criticism that he conducted his own assessment of the competing policy considerations without proper regard to the decision in *Martin v Watson* is not in my view well founded.

86. I can well understand why the judge thought that it would be in the interests of all concerned to try the question whether AB was the prosecutor as a preliminary issue, since it offered the possibility of relieving the parties of the considerable burden, both financial and emotional, of a lengthy trial. Nonetheless, I think it was unwise of him to approach the matter in that way. As this appeal has shown, the question whether the defendant was the prosecutor raises a number of issues, some of which may be suitable for determination as preliminary issues and some not. For example, the question whether the defendant desired and intended to bring about a prosecution will often raise issues relating to the defendant's honesty. Such issues, which are likely to be closely related to want of reasonable and probable cause and malice, are for a jury (unless the parties agree otherwise) and ought therefore to be determined at the main trial. Conversely, the question whether the prosecuting authorities were able to exercise independent judgment can often be determined without trespassing on other issues. In the present case I think it would have been better to limit the scope of the preliminary issue to the latter question. The outcome would have been the same, but Mr. Hunt would not have had reason to feel aggrieved at the fact that AB's veracity had been accepted without his having had a chance to give evidence. Nonetheless, for the reasons given earlier I think the judge's decision was right and I would therefore dismiss the appeal.