Nelles *v.* Ontario, [1989] 2 S.C.R. 170

Susan Nelles *Appellant*

v.

**Her Majesty The Queen in right of Ontario,
the Attorney General for Ontario,
John W. Ackroyd, James Crawford,
Jack Press and Anthony Warr** *Respondents*

indexed as: nelles *v.* ontario

File No.: 19598.

1988: February 29; 1989: August 14.

Present: Dickson C.J. and Beetz*, Estey*, McIntyre, Lamer, Wilson, Le Dain*, La Forest and L'Heureux-Dubé JJ.

on appeal from the court of appeal for ontario

Crown -- Immunity -- Civil action -- Malicious prosecution -- Whether Crown, Attorney General and Crown Attorneys are immune from suit for malicious prosecution -- Whether a ruling on the issue of prosecutorial immunity should be made on an appeal of a preliminary motion -- Proceedings against the Crown Act, R.S.O. 1980, c. 393, s. 5(6) -- Rules of Practice and Procedure, R.R.O. 1980, Reg. 540, Rule 126.

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*Beetz, Estey and Le Dain JJ. took no part in the judgment.

The appellant was charged with the murder of four infants and was discharged on all counts at the conclusion of the preliminary inquiry. She then brought an action against the Crown in right of Ontario, the Attorney General for Ontario, and several police officers, alleging that the Attorney General and his agents, the Crown Attorneys, counselled, aided and abetted the police in charging and prosecuting her and that the Attorney General and the Crown Attorneys were actuated by malice. Proceedings were later discontinued against the police officers and the Crown Attorneys were not named as defendants. Before trial, the respondents moved to have the action dismissed under Rule 126 of the Ontario Rules of Practice on the ground that the pleadings disclosed no reasonable cause of action and, in the alternative, for leave under Rule 124 to set down a point of law raised in the pleadings and to argue it on the return of the motion. The Supreme Court of Ontario allowed the motion and struck out the statement of claim. The Court of Appeal upheld the judgment. Both the Supreme Court of Ontario and the Court of Appeal seemed to have acted under Rule 126. This appeal is to determine whether the Crown, the Attorney General and the Crown Attorneys enjoy an absolute immunity from a suit for malicious prosecution.

Held (L'Heureux-Dubé J. dissenting in part): The appeal should be dismissed as against the Crown. The appeal should be allowed as against the Attorney General and the matter returned to the Supreme Court of Ontario for trial of the claim against the Attorney General.

The Crown enjoys absolute immunity from a suit for malicious prosecution. Section 5(6) of the Ontario *Proceedings Against the Crown Act* exempts the Crown from any proceedings in respect of anything done or omitted to be done by a person while discharging or purporting to discharge responsibilities of a judicial nature or responsibilities that he has in connection with the execution of judicial process. The decision to prosecute is a judicial decision vested in the Attorney General and executed on his behalf by his agents, the Crown Attorneys. The Crown

Attorneys and the Attorney General in deciding to prosecute the appellant came within s. 5(6) of the Act and the Crown is thus immune from liability to the appellant.

Per Dickson C.J. and Lamer and Wilson JJ.: There is no need for a trial to permit a conclusion on the question of prosecutorial immunity. This issue, disposed of in the courts below upon a pre-trial motion under Rule 124 or Rule 126 of the Ontario Rules of Practice, should be addressed by this Court. The issue has been given careful consideration in the Court of Appeal and in argument before this Court. To send the matter back for trial without resolving the issue would not be expeditious and would add both time and cost to an already lengthy case. The rules of civil procedure should not act as obstacles to a just and expeditious resolution of a case.

The Attorney General and Crown Attorneys are not immune from suits for malicious prosecution. A review of the authorities on the issue of prosecutorial immunity reveals that the matter ultimately boils down to a question of policy. In the interests of public policy, an absolute immunity for the Attorney General and his agents, the Crown Attorneys, is not justified. An absolute immunity has the effect of negating a private right of action and in some cases may bar a remedy under the *Canadian Charter of Rights and Freedoms*. As such, the existence of absolute immunity is a threat to the individual rights of citizens who have been wrongly and maliciously prosecuted. While the policy considerations in favour of absolute immunity have some merit, these considerations must give way to the right of a private citizen to seek a remedy when the prosecutor acts maliciously in fraud of his duties with the result that he causes damage to the victim. The tort of malicious prosecution requires not only proof of an absence of reasonable and probable cause for commencing the proceedings but also proof of an improper purpose or motive, a motive that involves an abuse or perversion of the system of criminal justice for ends it was not designed to serve and as such incorporates an abuse of the office of the Attorney General and his agents the Crown Attorneys. The inherent difficulty in proving a case of malicious prosecution

combined with the mechanisms available within the system of civil procedure to weed out meritless claims is sufficient to ensure that the Attorney General and Crown Attorneys will not be hindered in the proper execution of their important public duties. Finally, attempts to qualify prosecutorial immunity in the United States by the so-called functional approach and its many variations have proven to be unsuccessful.

Per La Forest J.: The common law position as set out by Lamer J. is accepted. The *Charter* implications need not be considered.

Per McIntyre J.: The state of the law relating to the immunity of the Attorney General is far from clear and a ruling on a point of this importance should not be made on an appeal of a preliminary motion. Before laying down any proposition to the effect that the Attorney General and his agents enjoy absolute immunity from civil suit, there should be a trial to permit a conclusion on the question of prosecutorial immunity and to provide -- in the event that it is decided that the immunity is not absolute -- a factual basis for a determination of whether or not in this case the conduct of the prosecution was such that the appellant is entitled to a remedy.

Furthermore, the Attorney General's immunity from judicial review, which is based on the exercise of a judicial function, does not equate with immunity from civil suit for damages for wrongful conduct in the performance of prosecutorial functions which do not involve the exercise of a judicial function. Indeed, most of the functions and acts performed by Crown Attorneys as agents of the Attorney General would fall into this category and, accordingly, the immunity may not extend to claims for damages as a result of a prosecution, however instituted, that is carried out with malice. A ruling on a preliminary motion to the effect that Attorneys General and their agents are absolutely immune from all liability for suits for malicious prosecution may be too expansive and even ill-founded.

This case, therefore, should not have been disposed of upon a pre-trial motion under Rule 126 of the Ontario Rules of Practice. Under that rule, it is only in the clearest of cases that an action should be struck out. This is not such a case.

Per L'Heureux-Dubé J. (dissenting in part): Appellant's action is completely dependent upon whether or not Attorneys General and Crown Attorneys are immune from civil suit and, as such, the matter can and should be decided by this Court in the present appeal. While, in general, important questions should not be disposed of in interlocutory fashion, this rule does not apply where the defence offered at the outset is one of law only -- namely, that the right of action is barred independently of the facts alleged. There is every advantage, in terms of saving the time and cost of a trial, to decide a question of law at the outset. This, in fact, is the very reason for the existence of Rule 126 of the Ontario Rules of Practice.

Adopting the reasons of the Ontario Court of Appeal, the Attorneys General and Crown Attorneys enjoy an absolute immunity from civil suit when they are acting within the bounds of their authority. The role of absolute immunity is not to protect the interests of the individual holding the office but rather to advance the greater public good. The Attorneys General and Crown Attorneys are often faced with difficult decisions as to whether to proceed in matters which come before them and their freedom of action is vital to the effective functioning of our criminal justice system.

Cases Cited

By Lamer J.

Considered: *Imbler v. Pachtman*, 424 U.S. 409 (1976); **referred to**: *Owsley v. The Queen in right of Ontario* (1983), 34 C.P.C. 96; *Richman v. McMurtry* (1983), 41 O.R. (2d) 559; *Levesque v. Picard* (1985), 66 N.B.R. (2d) 87; *Curry v. Dargie* (1984), 28 C.C.L.T. 93; *German v. Major* (1985), 39 Alta. L.R. (2d) 270; *Wilkinson v. Ellis*, 484 F. Supp. 1072 (1980); *Marrero v. City of Hialeah*, 625 F.2d 499 (1980), *cert.* denied, 450 U.S. 913 (1981); *Taylor v. Kavanagh*, 640 F.2d 450 (1981); *Riches v. Director of Public Prosecutions*, [1973] 2 All E.R. 935; *Hester v. MacDonald*, [1961] S.C. 370; *Boucher v. The Queen*, [1955] S.C.R. 16; *Hicks v. Faulkner* (1878), 8 Q.B.D. 167; *Mitchell v. John Heine and Son Ltd.* (1938), 38 S.R. (N.S.W.) 466; *Bosada v. Pinos* (1984), 44 O.R. (2d) 789; *R. v. Groves* (1977), 37 C.C.C. (2d) 429.

By McIntyre J.

Referred to: *Owsley v. The Queen in right of Ontario* (1983), 34 C.P.C. 96; *Richman v. McMurtry* (1983), 41 O.R. (2d) 559; *The Queen v. Comptroller-General of Patents, Designs, and Trade Marks*, [1899] 1 Q.B. 909; *Curry v. Dargie* (1984), 28 C.C.L.T. 93; *Roncarelli v. Duplessis*, [1959] S.C.R. 121; *Mostyn v. Fabrigas* (1774), 1 Cowp. 161, 98 E.R. 1021; *Henly v. Mayor of Lyme* (1828), 5 Bing. 91, 130 E.R. 995; *Asoka Kumar David v. Abdul Cader*, [1963] 3 All E.R. 579; *Imbler v. Pachtman*, 424 U.S. 409 (1976); *Unterreiner v. Wilson* (1982), 40 O.R. (2d) 197 (H.C.), aff'd (1983), 41 O.R. (2d) 472 (C.A.); *Bosada v. Pinos* (1984), 44 O.R. (2d) 789; *German v. Major* (1985), 39 Alta. L.R. (2d) 270; *Levesque v. Picard* (1985), 66 N.B.R. (2d) 87; *Gregoire v. Biddle*, 177 F.2d 579 (1949); *Riches v. Director of Public Prosecutions*, [1973] 2 All E.R. 935; *Warne v. Province of Nova Scotia* (1969), 1 N.S.R. (2d) 27; *Re Van Gelder's Patent* (1888), 6 R.P.C. 22; *Morier v. Rivard*, [1985] 2 S.C.R. 716; *Barrisove v. McDonald*, B.C.C.A., No. 490/74, November 1, 1974.

By L'Heureux-Dubé J. (dissenting in part)

Roncarelli v. Duplessis, [1959] S.C.R. 121; *Morier v. Rivard*, [1985] 2 S.C.R. 716; *Gregoire v. Biddle*, 177 F.2d 579 (1949); *Imbler v. Pachtman*, 424 U.S. 409 (1976); *Yaselli v. Goff*, 12 F.2d 396 (1926).

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 7, 11, 24(1).

Code of Civil Procedure, R.S.Q., c. C-25, art. 94.

Criminal Code, R.S.C., 1985, c. C-46, ss. 122, 139(2), (3), 465(1)(*b*), 504, 579(1) [rep. & subs. c. 27 (1st Supp.), s. 117], 737.

Crown Attorneys Act, R.S.O. 1980, c. 107.

Ministry of the Attorney General Act, R.S.O. 1980, c. 271.

Proceedings Against the Crown Act, R.S.O. 1980, c. 393, ss. 2(2)(*d*), 5(2) to (6).

Rules of Civil Procedure, O. Reg. 560/84, Rules 1.04(1), 20, 21.01.

Rules of Practice and Procedure, R.R.O. 1980, Reg. 540, Rules 124, 126.

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Manning, Morris. "Abuse of Power by Crown Attorneys," [1979] *L.S.U.C. Lectures* 571.

Note, "Delimiting the Scope of Prosecutorial Immunity from Section 1983 Damage Suits" (1977), 52 *N.Y.U. L. Rev.* 173.

Pilkington, Marilyn L. "Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms" (1984), 62 *Can. Bar. Rev.* 517.

APPEAL from a judgment of the Ontario Court of Appeal (1985), 51 O.R. (2d) 513, 21 D.L.R. (4th) 103, 16 C.R.R. 320, 1 C.P.C. (2d) 113, affirming an order of Fitzpatrick J. granting respondents' application to strike out appellant's statement of claim and dismissing her action. Appeal dismissed as against the Crown and appeal allowed as against the Attorney General, L'Heureux-Dubé J. dissenting in part.

John Sopinka, Q.C., and *David Brown*, for the appellant.

T. C. Marshall, Q.C., and *L. A. Hunter*, for the respondents.

//*Lamer J.*//

The judgment of Dickson C.J. and Lamer and Wilson JJ. was delivered by

LAMER J. -- I have read the reasons for judgment of my colleague McIntyre J. and I agree with his disposition of the appeal but I do so for somewhat different reasons. McIntyre J. in his reasons for judgment concludes that there must be a trial to permit a conclusion on the question of prosecutorial immunity. I am in respectful disagreement with him in this regard. I am of the opinion that the question of immunity should be addressed by this Court in this case, and that nothing prevents the Court from so doing. I set out the relevant rules of the Ontario Rules of Practice as they were at the time of the case for ease of reference:

> **124.** Either party is entitled to raise by his pleadings any point of law, and by consent of the parties or by leave of a judge, the point of law may be set down for hearing at any time before the trial, otherwise it shall be disposed of at the trial.
>
> **126.** A judge may order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer, and in any such case, or in the case of the action or defence being shown to be frivolous or vexatious, may order the action to be stayed or dismissed, or judgment to be entered accordingly.

As McIntyre J. points out the respondents moved to have the action dismissed under Rule 126 on the ground that the pleadings disclosed no reasonable cause of action and, in the alternative, for leave under Rule 124 to set down a point of law raised in the pleadings and to argue the same on the return of the motion. Both Fitzpatrick J. of the Supreme Court of Ontario and the Court of Appeal for Ontario (1985), 51 O.R. (2d) 513, in allowing the motion to strike out the statement of claim, seemed to have acted under Rule 126.

A review of the cases dealing with the application of Rule 124 and Rule 126 reveals the following. The difference between the two rules lies in the summary nature of Rule 126 as opposed to the more detailed consideration of issues under Rule 124. A court should strike a pleading under Rule 126 only in plain and obvious cases where the pleading is bad beyond argument. Rule 124 is designed to provide a means of determining, without deciding the issues of fact raised by the pleadings, a question of law that goes to the root of the action. I would like to point out that what is at issue here is not whether malicious prosecution is a reasonable cause of action. A suit for malicious prosecution has been recognized at common law for centuries dating back to the reign of Edward I. What is at issue is whether the Crown, Attorney General and Crown Attorneys are absolutely immune from suit for the well-established tort of malicious prosecution. This particular issue has been given careful consideration both by the Court of Appeal and in argument before this Court. The Court of Appeal for Ontario undertook a thorough review of authorities in the course of a lengthy discussion of arguments on both sides

of the issue. As such it matters not in my view whether the matter was disposed of under Rule 124 or 126. To send this matter back for trial without resolving the issue of prosecutorial immunity would not be expeditious and would add both time and cost to an already lengthy case.

Furthermore I am of the view that the rules of civil procedure should not act as obstacles to a just and expeditious resolution of a case. Rule 1.04(1) of the Rules of Civil Procedure in Ontario confirms this principle in stating that "[t]hese rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits."

In terms of whether the Crown enjoys absolute immunity from a suit for malicious prosecution, McIntyre J. concludes that s. 5(6) of the *Proceedings Against the Crown Act*, R.S.O. 1980, c. 393, exempts the Crown from any proceedings in respect of anything done or omitted to be done by a person while discharging or purporting to discharge responsibilities of a judicial nature or responsibilities that he has in connection with the execution of judicial process. I am of the opinion that McIntyre J. was correct in holding that the Crown is rendered immune from liability by the express terms of s. 5(6) of the Act, for the action by the Crown Attorney and the Attorney General in deciding to prosecute the appellant. I would like to point out, however, that for the reasons set out below, I am of the view that a functional approach to prosecutorial immunity at common law is inadequate. In this case the applicable legislation requires the Court to draw a distinction between prosecutorial functions in so far as Crown immunity under s. 5(6) is not available unless the function is "judicial" in nature. Therefore, although I agree with McIntyre J. that in this case the decision to prosecute is a "judicial" function for the purposes of s. 5(6), I hasten to add that in dealing with the policy considerations governing the availability of absolute immunity at common law for the Attorney General and Crown Attorneys the functional approach is not the proper test. In addition it should be noted that the constitutionality

of the section was not an issue and was not addressed by counsel in this appeal. As such this issue is not before this Court, and therefore the constitutionality of s. 5(6) of the Act is still an open question.

Consequently, the remaining issue at hand is whether the Attorney General and his agents, the Crown Attorneys, are absolutely immune from civil liability in a suit for malicious prosecution. In resolving this question, a brief review of the situation prevailing in a few jurisdictions could be helpful and useful. While McIntyre J. in his reasons provides a detailed review of the authorities, I would like to add some further observations.

I. Different Approaches to Immunity

The situation in Canada is unclear and does not seem to be uniform throughout the country.

1. *Absolute Immunity -- the Ontario Position*

The Ontario Court of Appeal in the case at bar found that an absolute immunity exists, and in reaching this conclusion relied extensively on the decision by the Supreme Court of the United States in *Imbler v. Pachtman*, 424 U.S. 409 (1976). The Court of Appeal found the idea of an absolute immunity "troubling" but determined that it was justified by the following policy concerns. First, the rule encourages public trust in the fairness and impartiality of those who act and exercise discretion in the bringing and conducting of criminal prosecution; the rule is designed for the benefit of the public not the benefit of the individual prosecutor. Second, the threat of personal liability for tortious conduct would have a chilling effect on the prosecutor's exercise of discretion and third, to permit civil suits against prosecutors would invite a flood of litigation which would deflect a prosecutor's energies from the discharge of his public duties.

In short, the absence of an absolute immunity would open the door to unmeritorious claims and would be a threat to prosecutorial independence. The Court also relied on two decisions of the Ontario High Court, *Owsley v. The Queen in right of Ontario* (1983), 34 C.P.C. 96 and *Richman v. McMurtry* (1983), 41 O.R. (2d) 559. Both these decisions rely extensively on the American position as found in *Imbler*, *supra*. The case law in Ontario therefore, uniformly stands for the proposition that the Attorney General and Crown Attorneys enjoy absolute immunity from civil liability for malicious prosecution. Outside of Ontario, the issue is somewhat more ambiguous.

2. *Elsewhere in Canada -- Absolute Immunity Questioned*

In *Levesque v. Picard* (1985), 66 N.B.R. (2d) 87, the New Brunswick Court of Appeal held on the authority of the Ontario cases, especially the case at bar, that an absolute immunity shielded a provincial Crown prosecutor from suit for malicious prosecution. By contrast the appellate courts of Nova Scotia and Alberta have cast some doubts on the existence of an absolute immunity. First, in *Curry v. Dargie* (1984), 28 C.C.L.T. 93 (N.S.C.A.), the Crown was sued as being vicariously liable for the action of a residential tenancy officer. Hart J.A. held that while the *Proceedings Against the Crown Act*, R.S.N.S. 1967, c. 239, might absolve the provincial Crown from civil liability, a Crown servant could still be personally liable for misconduct. In the course of his decision Hart J.A. considered the Ontario decisions especially that of Galligan J. in *Richman*, *supra* (at p. 110):

> I am not prepared to go as far as Galligan J. in holding that an officer of the Crown cannot be liable for a proceeding commenced maliciously, but it is not necessary to consider that issue at the moment. I do not believe that in the case at bar it can be said that the respondent in laying the information against the appellant was in fact carrying out a judicial function similar to those carried out by Attorneys General and prosecutors.

In *German v. Major* (1985), 39 Alta. L.R. (2d) 270, a Crown prosecutor was sued for alleged misconduct in the preferment of a charge of tax evasion, a charge on which the accused was acquitted. Kerans J.A. speaking for the Alberta Court of Appeal assumes throughout that a suit for malicious prosecution is possible and disposes of the case on the ground that there had been "reasonable and probable cause" to initiate the prosecution. The case was dismissed pursuant to Rule 129 of the Alberta Rules of Civil Procedure, a rule similar to the old Ontario Rule 126. In this context Kerans J.A. said the following (at p. 276):

> The rule upon which I rely has much to commend it. It falls short of the absolute immunity suggested by Major and accepted by the Supreme Court of the United States in *Imbler v. Pachtman* . . . but offers some protection from the harassment which he says would otherwise afflict prosecuting counsel because suit would not be permitted to proceed if utterly without merit. It would indeed be a curious thing if we chose a stern immunity rule in preference to an effective striking-out rule.

Further support for the view that Kerans J.A. is not inclined to accept the existence of an absolute immunity for prosecutors can be found in the following statements (at pp. 277 and 286):

> I will assume, for the sake of argument, that, <u>if counsel, with malice, continues a prosecution he once thought sound but now knows is unsound, he may be sued</u>.
>
> . . .
>
> Counsel for the Attorney General who acts as his agent in the prosecution of a criminal case is not accountable in civil proceedings to the accused <u>except possibly to the extent that it is alleged against him that he has not acted in good faith, and to that extent the allegation falls within the nominative tort of malicious prosecution</u> . . . [Emphasis added.]

Therefore the Canadian position ranges from a strong assertion of absolute immunity in Ontario to an acceptance of the possibility of suing the Attorney General and Crown Attorneys if bad faith or malice can be proven as evidenced by the cases from Nova Scotia and Alberta.

The situation in Quebec differs in that since 1966 the *Code of Civil Procedure*, R.S.Q., c. C-25, specifically provides for claims against the Crown in the following terms:

> **94.** Any person having a claim to exercise against the Crown, whether it be a revendication of moveable or immoveable property, or a claim for the payment of moneys on an alleged contract, or for damages, or otherwise, may exercise it in the same manner as if it were a claim against a person of full age and capacity, subject only to the provisions of this chapter.

No provisions in this chapter prevent a suit for malicious prosecution against the Crown. However, the substantive issue of immunity of Crown prosecutors has not been finally determined.

3. *Immunity in the United States*

A consideration of the position in respect of prosecutorial immunity in the United States is vital both because it is relied extensively upon by the Court of Appeal in the case at bar, and because it has been the source of a healthy debate in courts and among academics in that country. This position is furthermore interesting since a variety of approaches have been proposed and many critical comments have been made.

i) The Functional Approach -- *Imbler v. Pachtman*: "The Powell Judgment"

In 1972 Paul Imbler filed a claim under 42 U.S.C. {SS} 1983 alleging that the prosecutor and various members of the police force conspired to cause him loss of liberty by allowing a witness to give false testimony, suppressing evidence, prosecuting with knowledge of an exculpatory lie-detector test and introducing an altered police artist's sketch. Section 1983 of the *Civil Rights Act* creates a federal damage action against anyone who acts under colour of state law to deprive a

person of his civil rights as protected by the U.S. Constitution. Powell J., speaking for five members of the Supreme Court, held that a prosecutor is absolutely immune from s. 1983 actions when the actions arise out of the prosecutor's initiation of prosecution and presentation of the State's case. In addition, the Court seemed to suggest that absolute immunity also attached to activities that "were intimately associated with the judicial phase of the criminal process" (p. 430). The Court then adopted what has become known as the "functional approach" of prosecutorial immunity.

The *Imbler* decision recognizes that prosecutors perform many functions in the course of fulfilling their duties, among them being the decision to initiate a prosecution, which witnesses to call, what other evidence to present, and obtaining, reviewing and evaluating evidence. The Court accepts that drawing a line between these functions is a difficult task but concludes that prosecutorial functions of a quasi-judicial or advocatory nature should be afforded absolute immunity. The Court refused to comment on whether a similar immunity attaches to what it called the "administrative" or "investigative" role of the prosecutor. In the course of justifying its position, the Court noted that the same policy considerations that afford absolute immunity to judges acting within the scope of their duties support a prosecutor's common law absolute immunity. The Court simply extended that line of reasoning to s. 1983 claims.

The policy considerations canvassed by the Court are familiar ones and can be summarized as follows:

1. Public Confidence

> "The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages."

2. Diversion from Duties

" . . . if the prosecutor could be made to answer in court each time such a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law."

3. Balancing of Evils

" . . . we find ourselves in agreement with Judge Learned Hand, who wrote of the prosecutor's immunity from actions for malicious prosecution:

> " . . . it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation." *Gregoire* v. *Biddle*, 177 F. (2d) 579, 581 (CA2 1949) cert. denied, 339 U.S. 949 (1950)."

4. Other Available Remedies

"Even judges . . . could be punished criminally for willful deprivations of constitutional rights. . . The prosecutor would fare no better for his willful acts. . . Moreover, a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers."

(*Imbler*, *supra*, at pp. 424-29)

Therefore, Powell J. affirmed the judgment of the Court of Appeal for the Ninth Circuit and held that a prosecutor is absolutely immune from suit in initiating a prosecution and in presenting the State's case.

ii) The Functional Approach -- *Imbler v. Pachtman*: "The White Judgment"

While concurring with the judgment of Powell J. and much of his reasoning, White J. (Brennan and Marshall JJ. joining) would carve out an exception to the rule of absolute immunity for the unconstitutional suppression of evidence. In doing so White J. examined the rationale for granting absolute immunity to prosecutors at common law (at p. 442):

> The absolute immunity . . . is designed to encourage [the prosecutors] to bring information to the court which will resolve the criminal case. . . . Lest they withhold valuable but questionable evidence or refrain from making valuable but questionable arguments, prosecutors are protected from liability for submitting before the court information later determined to have been false to their knowledge.

According to White J. immunity from suit based on the unconstitutional suppression of evidence would "stand this immunity rule on its head" (p. 442) by discouraging precisely the disclosure of evidence sought to be encouraged by the rule (at p. 443):

> A prosecutor seeking to protect himself from liability for failure to disclose evidence may be induced to disclose more than is required. But this will hardly injure the judicial process. Indeed, it will help it. Accordingly, lower courts have held that unconstitutional suppression of exculpatory evidence is beyond the scope of "duties constituting an integral part of the judicial process" and have refused to extend absolute immunity to suits based on such claims. *Hilliard v. Williams*, 465 F. 2d 1212, 1218 (CA6), cert. denied, 409 U.S. 1029 (1972) . . . .

White J.'s position then would limit the scope of absolute immunity but would not eliminate the theoretical underpinning of the Powell majority judgment, namely the functional approach to absolute immunity.

The functional approach has been criticized on a number of grounds. First, there is the ever present problem of line-drawing between functions that are quasi-judicial and those that are administrative or investigative. Drawing the line is made more difficult by multi-faceted functions, functions that simultaneously serve quasi-judicial, administrative and investigative

functions. (See Anthony Luppino, "Supplementing the Functional Test of Prosecutorial Immunity" (1982), 34 *Stan. L. Rev.* 487, at pp. 493-94.) Aside from the problem of distinguishing between prosecutorial functions, there is the conceptual difficulty in justifying differential treatment of malicious acts based on the criterion of function. If a prosecutor acts maliciously in the course of the prosecution of an accused, does it really matter whether the function being carried out is characterized as "quasi-judicial" or "administrative"?

An example of the difficulty with the functional approach is the disagreement in the lower courts in the United States over whether quasi-judicial absolute immunity extends to investigative functions of a prosecutor. In addition, and in light of the White concurring judgment in *Imbler*, there is disagreement over whether leaks of information and destruction or alteration of evidence are acts that are protected by absolute immunity: see cases cited by J. C. Filosa, "Prosecutorial Immunity: No Place for Absolutes," [1983] *U. Ill. L. Rev.* 977, at pp. 985-86. In my view, these disagreements demonstrate the futility of attempting to differentiate between functions of a prosecutor in a principled way. The result is often arbitrary line-drawing which leads to seemingly unresolvable conflict and the diversion of attention from the central issue, namely whether or not a prosecutor has acted maliciously.

Second, it has been argued that the policy rationales supporting absolute immunity for prosecutors, derived as they are from judicial immunity, rely on an inaccurate reading of history. Filosa in his article challenges the derivation of the prosecutor's quasi-judicial immunity from s. 1983 claims from the absolute immunity of judges at common law (at pp. 980-81):

> In the sixteenth century, English judges were typically liable for their torts. Throughout the nineteenth century, judges remained liable for malicious conduct done without reasonable and probable cause. In America before *Bradley v. Fisher* [80 U.S. (13 Wall.) 335 (1872)], courts held many judicial officers liable for their wrongful acts. . . . Of the thirty-seven states in

existence in 1871, thirteen had judicial immunity, six states held judges liable for malicious actions, nine had not taken a clear position, and nine had not faced the question.

Filosa goes on to argue that Congress could not have meant to incorporate a doctrine of absolute immunity into s. 1983 because *Bradley*, which firmly entrenched judicial immunity in the common law, was not decided until 1872, one year after the *Civil Rights Act of 1871* that contained s. 1983.

4. *Alternatives to Imbler*

i) The Functional Approach Reapproached

The difficulties in applying the functional test have led American courts and academic commentators to suggest alternatives or reassessments of the test. One such attempt has been described by its proponent as the "functional approach reapproached". (See Note, "Delimiting the Scope of Prosecutorial Immunity from Section 1983 Damage Suits" (1977), 52 *N.Y.U. L. Rev.* 173, at pp. 190-91.) This approach seeks to avoid a judicial hearing to determine whether a prosecutor's action is quasi-judicial. As such the test states that "the only duties clearly not entitled to quasi-judicial immunity are those so divorced from the judicial process that they could readily be assigned to another official who could be completely independent of the prosecutor" (see Note, loc. cit., at p. 191). This approach seeks to grant to the prosecutor absolute immunity in a wider sphere of activities in the hopes of clarifying the distinction between quasi-judicial and investigative activities. In my view, this modification still has the drawback of requiring a line to be drawn between prosecutorial functions, a difficult task in itself. The modification, in seeking to make that task easier, errs on the side of including more activities within the realm of absolute prosecutorial immunity, a modification that, with respect, offers an immunity

considerably wider than that given to judges from which prosecutorial immunity is allegedly derived.

ii) General Features Test: *Wilkinson v. Ellis*

In *Wilkinson v. Ellis*, 484 F. Supp. 1072 (E.D. Pa. 1980), the plaintiff alleged that a prosecutor destroyed a tape recorded interview with a man who admitted involvement in the alleged criminal activity, thereby exonerating the plaintiff. The prosecutor moved to dismiss the action, arguing that the destruction of evidence is a quasi-judicial act shielded by absolute immunity. The *Wilkinson* court refused to characterize the destruction as either investigative or quasi-judicial. Rather, it resolved the difficulty of classifying activities by asking whether the activity contained features "which generally characterize quasi-judicial activity" (p. 1083). In deciding that the destruction did not have the "general features" of quasi-judicial activity, the court identified three factors to be taken into account: (1) the activity's physical and temporal proximity to the judicial process; (2) the degree of dependence upon legal opinions and prosecutorial discretion involved in the conduct; and (3) whether the activity is primarily advocatory (p. 1080). This approach in my view, does little to get away from the inherent problems involved in categorizing prosecutorial actions.

iii) The *Imbler* "Umbrella"

This variation of the functional approach involves limiting the scope of the prosecutor's quasi-judicial function to conduct that falls within the narrowest confines of the *Imbler* test: in other words within the "umbrella" of coverage defined by the language of *Imbler*. Acts that are under the "umbrella" attract absolute immunity; all others receive at most qualified immunity. (See *Marrero v. City of Hialeah*, 625 F.2d 499 (5th Cir. 1980), *cert*. denied, 450 U.S. 913 (1981).) This

approach merely re-states the categorization problem found in *Imbler*. The test requires a determination of what constitutes the coverage of the so-called "*Imbler* umbrella" and thereby takes us back to the original problem of line-drawing.

iv) The Harm Test

This variation of *Imbler* construes that decision broadly by granting absolute immunity to prosecutorial conduct that causes a defendant to "face prosecution, or to suffer imprisonment or pretrial detention". (See *Taylor v. Kavanagh*, 640 F.2d 450 (2d Cir. 1981), at p. 453.) The test denies absolute immunity to prosecutorial conduct that inflicts harm independent of the prosecution itself. This approach looks to the effects of prosecutorial conduct and as such purports to reduce the issue to a factual determination of harms. If the harm is unrelated to the judicial phase of the criminal justice process then the prosecutorial act causing the harm is not quasi-judicial.

v) The Supplemental Functional Approach

This approach involves a two-step process: first, determining what conduct normally merits absolute or qualified immunity and second, in the remaining cases, identifying the substantive values affected by conduct that is not susceptible to traditional categorization. (See Luppino, loc. cit., at p. 505.) This variation recognizes that there will be occasions when conduct does not clearly fall into one of the two traditional categories: quasi-judicial and non-quasi-judicial. When conduct does not fall into either category explicit balancing of competing interests becomes necessary. In this respect, courts should weigh the cost to the judicial system resulting from the unredressed civil wrong against the cost to the efficiency of the criminal justice system. This approach recognizes that the *Imbler* functional approach cannot account for all prosecutorial

functions; there will be some conduct that is multi-faceted and uncategorizable. As a result the approach resorts to a consideration of first principles, namely a balancing of the policy considerations both in favour and opposed to prosecutorial immunity in the first place. In short, we have come full circle.

The American position, in any of its forms, demonstrates the impracticality of the functional approach to prosecutorial immunity. In my view, the functional approach leads to arbitrary line drawing between prosecutorial functions. This line drawing exercise is made nearly impossible by the reality that many prosecutorial functions are multi-faceted and cannot be neatly categorized. Further, it must be noted that however one categorizes a prosecutor's function it is still that of the prosecutor. If it can be demonstrated that a prosecutor has acted without reasonable cause and has acted with malice then does it really matter which functions he was carrying out? In my view to decide the scope of immunity on the basis of categorization of functions is an unprincipled approach that obscures the central issue, namely whether the prosecutor has acted maliciously. If immunity is to be qualified it should be done in a manner other than by the drawing of lines between quasi-judicial and other prosecutorial functions.

5. *The English Position*

The position in respect of prosecutorial immunity in England is somewhat unique in that jurisdiction owing in part to the tradition of private prosecution. Private prosecutors have always been liable to suit for malicious prosecution though few, if any, reported cases exist. The Director of Public Prosecutions, who performs the same or similar function as a Canadian provincial Attorney General, was not created until 1879. In *Riches v. Director of Public Prosecutions*, [1973] 2 All E.R. 935 (C.A.), the Court said the following in respect of suits against the D.P.P. (at p. 941):

> I do not wish to be taken as saying that there may never be a case where a prosecution has been initiated and pursued by the Director of Public Prosecutions in which it would be impossible for an acquitted defendant to succeed in an action for malicious prosecution, or as saying, that the existence of the Attorney General's fiat where required conclusively negates the existence of malice and conclusively proves that there was reasonable and probable cause for the prosecution. There may be cases where there has been, by even a responsible authority, the suppression of evidence which has led to a false view being taken by those who carried on a prosecution and by those who ultimately convicted.

The English position then, at the very least, leaves the door open for suits against the equivalent of our Attorneys General and Crown Attorneys when what is at issue is the suppression of evidence. It is apposite to note that this position is reflective of White J.'s concurring opinion in *Imbler*, *supra,* wherein he carved out an exception to the rule of absolute immunity for the unconstitutional suppression of evidence.

6. *Scotland*

It would appear that in Scotland the equivalent of our Attorney General and Crown Attorneys are absolutely immune from civil liability. In *Hester v. MacDonald*, [1961] S.C. 370, the court said at p. 377:

> It is, therefore, an essential element in the very structure of our criminal administration in Scotland that the Lord Advocate is protected by an absolute privilege in respect of matters in connexion with proceedings brought before a Scottish Criminal Court by way of indictment . . . . Never in our history has a Lord Advocate been sued for damages in connexion with such proceedings. On the contrary, our Courts have consistently affirmed the existence of such immunity on his part.

The rationale underlying this comment has been disputed by Professor Edwards in *The Attorney General, Politics and the Public Interest* (1984) in which he argues that the Scottish rationale is based upon the idea that the Lord Advocate and his agents enjoy a constitutional trust

which assumes good faith in commencing a prosecution, a rationale far removed from that invoked by the Ontario courts.

7. *Australia and New Zealand*

The position in respect of prosecutorial immunity in Australia and New Zealand is not clear. As far as I can determine, there does not seem to be any reported case on the issue.

Although the situation prevailing in European civil law jurisdictions is interesting, its application to the case at bar is of limited usefulness because of the wide differences between the civil law system and our common law tradition.

II. The Preferred Canadian Position

1. *The Role of the Attorney General and Crown Attorney*

Historically the Attorney General's role was that of legal adviser to the Crown and to the various departments of government. More specifically the principal function was and still is the prosecution of offenders. The appointment of Crown Attorneys as agents of the Attorney General, arose from the increasing difficulty of the Attorney General to attend effectively to all of his duties amid increases in population, and the expansion of settlement.

The office of the Crown Attorney has as its main function the prosecution of and supervision over indictable and summary conviction offences. The Crown Attorney is to administer justice at a local level and in so doing acts as agent for the Attorney General. Traditionally the Crown Attorney has been described as a "minister of justice" and "ought to regard himself as part of the

Court rather than as an advocate". (Morris Manning, "Abuse of Power by Crown Attorneys," [1979] *L.S.U.C. Lectures* 571, at p. 580, quoting Henry Bull, Q.C.) As regards the proper role of the Crown Attorney, perhaps no more often quoted statement is that of Rand J. in *Boucher v. The Queen*, [1955] S.C.R. 16, at p. 23-24:

> It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.

Among the many powers of a prosecutor are the following: the power to detain in custody, the power to prosecute, the power to negotiate a plea, the power to charge multiple offences, the power of disclosure/non-disclosure of evidence before trial, the power to prefer an indictment, the power to proceed summarily or by indictment, the power to withdraw charges, and the power to appeal. (For a fuller description of the genesis and operation of these powers see Manning, op. cit., at pp. 586-608, and P. Béliveau, J. Bellemare and J.-P. Lussier, *On Criminal Procedure* (1982), at pp. 69-83.)

With this background in mind, it is now necessary to turn to a consideration of the tort at issue, malicious prosecution, and the policy rationales in favour of an absolute immunity for the Attorney General and Crown Attorneys in respect of that tort.

2. *The Tort of Malicious Prosecution*

There are four necessary elements which must be proved for a plaintiff to succeed in an action for malicious prosecution:

a) the proceedings must have been initiated by the defendant;

b) the proceedings must have terminated in favour of the plaintiff;

c) the absence of reasonable and probable cause;

d) malice, or a primary purpose other than that of carrying the law into effect.

(See J. G. Fleming, *The Law of Torts* (5th ed. 1977), at p. 598.)

The first two elements are straightforward and largely speak for themselves. The latter two elements require explicit discussion. Reasonable and probable cause has been defined as "an honest belief in the guilt of the accused based upon a full conviction, founded on reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed" (*Hicks v. Faulkner* (1878), 8 Q.B.D. 167, at p. 171, Hawkins J.)

This test contains both a subjective and objective element. There must be both actual belief on the part of the prosecutor and that belief must be reasonable in the circumstances. The existence of reasonable and probable cause is a matter for the judge to decide as opposed to the jury.

The required element of malice is for all intents, the equivalent of "improper purpose". It has according to Fleming, a "wider meaning than spite, ill-will or a spirit of vengeance, and includes any other improper purpose, such as to gain a private collateral advantage" (Fleming, op. cit., at p. 609). To succeed in an action for malicious prosecution against the Attorney General or Crown Attorney, the plaintiff would have to prove both the absence of reasonable and probable cause in commencing the prosecution, and malice in the form of a deliberate and improper use of the office of the Attorney General or Crown Attorney, a use inconsistent with the status of "minister of justice". In my view this burden on the plaintiff amounts to a requirement that the Attorney General or Crown Attorney perpetrated a fraud on the process of criminal justice and in doing so has perverted or abused his office and the process of criminal justice. In fact, in some cases this would seem to amount to criminal conduct. (See for example breach of trust, s. 122, conspiracy re: false prosecution s. 465(1)(*b*), obstructing justice s. 139(2) and (3) of the *Criminal Code*, R.S.C., 1985, c. C-46.)

Further, it should be noted that in many, if not all cases of malicious prosecution by an Attorney General or Crown Attorney, there will have been an infringement of an accused's rights as guaranteed by ss. 7 and 11 of the *Canadian Charter of Rights and Freedoms.*

By way of summary then, a plaintiff bringing a claim for malicious prosecution has no easy task. Not only does the plaintiff have the notoriously difficult task of establishing a negative, that is the absence of reasonable and probable cause, but he is held to a very high standard of proof to avoid a non-suit or directed verdict (see Fleming, op. cit., at p. 606, and *Mitchell v. John Heine and Son Ltd.* (1938), 38 S.R. (N.S.W.) 466, at pp. 469-71). Professor Fleming has gone so far as to conclude that there are built-in devices particular to the tort of malicious prosecution to dissuade civil suits (at p. 606):

> The disfavour with which the law has traditionally viewed the action for malicious prosecution is most clearly revealed by the hedging devices with which it has been surrounded in order to deter this kind of litigation and protect private citizens who discharge their public duty of prosecuting those reasonably suspected of crime.

3. *Policy Considerations*

In light of what I have said regarding the role of the prosecutor in Canada, and the tort of malicious prosecution, it now is necessary to assess the policy rationales. I would begin by noting that even those decisions that have come out firmly in favour of absolute immunity have described the rule as "troubling", a "startling proposition", "strained and difficult to sustain" (see *Nelles v. The Queen in right of Ontario* (1985), 51 O.R. (2d) 513 (Ont. C.A.), at p. 531, and *Bosada v. Pinos* (1984), 44 O.R. (2d) 789 (H.C.), at p. 794).

It is said by those in favour of absolute immunity that the rule encourages public trust and confidence in the impartiality of prosecutors. However, it seems to me that public confidence in the office of a public prosecutor suffers greatly when the person who is in a position of knowledge in respect of the constitutional and legal impact of his conduct is shielded from civil liability when he abuses the process through a malicious prosecution. The existence of an absolute immunity strikes at the very principle of equality under the law and is especially alarming when the wrong has been committed by a person who should be held to the highest standards of conduct in exercising a public trust. (See Filosa, op. cit., at p. 982, and Marilyn L. Pilkington, "Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms" (1984), 62 *Can. Bar. Rev.* 517, at pp. 560-61.)

Regard must also be had for the victim of the malicious prosecution. The fundamental flaw with an absolute immunity for prosecutors is that the wrongdoer cannot be held accountable by

the victim through the legal process. As I have stated earlier, the plaintiff in a malicious prosecution suit bears a formidable burden of proof and in those cases where a case can be made out, the plaintiff's *Charter* rights may have been infringed as well. Granting an absolute immunity to prosecutors is akin to granting a license to subvert individual rights. Not only does absolute immunity negate a private right of action, but in addition, it seems to me, it may be that it would effectively bar the seeking of a remedy pursuant to s. 24(1) of the *Charter*. It seems clear that in using his office to maliciously prosecute an accused, the prosecutor would be depriving an individual of the right to liberty and security of the person in a manner that does not accord with the principles of fundamental justice. Such an individual would normally have the right under s. 24(1) of the *Charter* to apply to a court of competent jurisdiction to obtain a remedy that the court considers appropriate and just if he can establish that one of his *Charter* rights has been infringed. The question arises then, whether s. 24(1) of the *Charter* confers a right to an individual to seek a remedy from a competent court. In my view it does. When a person can demonstrate that one of his *Charter* rights has been infringed, access to a court of competent jurisdiction to seek a remedy is essential for the vindication of a constitutional wrong. To create a right without a remedy is antithetical to one of the purposes of the *Charter* which surely is to allow courts to fashion remedies when constitutional infringements occur. Whether or not a common law or statutory rule can constitutionally have the effect of excluding the courts from granting the just and appropriate remedy, their most meaningful function under the *Charter*, does not have to be decided in this appeal. It is, in any case, clear that such a result is undesirable and provides a compelling underlying reason for finding that the common law itself does not mandate absolute immunity.

It is also said in favour of absolute immunity that anything less would act as a "chilling effect" on the Crown Attorney's exercise of discretion. It should be noted that what is at issue here is not the exercise of a prosecutor's discretion within the proper sphere of prosecutorial activity as

defined by his role as a "minister of justice". Rather, in cases of malicious prosecution we are dealing with allegations of misuse and abuse of the criminal process and of the office of the Crown Attorney. We are not dealing with merely second-guessing a Crown Attorney's judgment in the prosecution of a case but rather with the deliberate and malicious use of the office for ends that are improper and inconsistent with the traditional prosecutorial function.

Therefore it seems to me that the "chilling effect" argument is largely speculative and assumes that many suits for malicious prosecution will arise from disgruntled persons who have been prosecuted but not convicted of an offence. I am of the view that this "flood-gates" argument ignores the fact that one element of the tort of malicious prosecution requires a demonstration of improper motive or purpose; errors in the exercise of discretion and judgment are not actionable. Furthermore, there exist built-in deterrents on bringing a claim for malicious prosecution. As I have noted, the burden on the plaintiff is onerous and strict. The fact that the absence of reasonable cause is a matter of law to be decided by a judge means that an action for malicious prosecution can be struck before trial as a matter of substantive inadequacy (see Rule 21.01 of the Ontario Rules of Civil Procedure for example). In fact this was the approach adopted by Kerans J.A. in *German v. Major, supra*. I agree with Kerans J.A. that "[i]t would indeed be a curious thing if we chose a stern immunity rule in preference to an effective striking-out rule" (p. 276). In addition most jurisdictions, including Ontario, have provisions that allow a defendant to move for summary judgment before a full-fledged trial takes place (see for example Rule 20 in Ontario). Finally, the potential that costs will be awarded to the defendant if an unmeritorious claim is brought acts as financial deterrent to meritless claims. Therefore, ample mechanisms exist within the system to ensure that frivolous claims are not brought. In fact, the difficulty in proving a claim for malicious prosecution itself acts as a deterrent. This high threshold of liability is evidenced by the small number of malicious prosecution suits brought against police officers each year. In addition, since 1966, the province of Quebec

permits suits against the Attorney General and Crown prosecutors without any evidence of a flood of claims. Therefore, I find unpersuasive the claim that absolute immunity is necessary to prevent a flood of litigation.

As for alternative remedies available to persons who have been maliciously prosecuted, none seem to adequately redress the wrong done to the plaintiff. The use of the criminal process against a prosecutor who in the course of a malicious prosecution has committed an offence under the *Criminal Code*, addresses itself mainly to the vindication of a public wrong not the affirmation of a private right of action. Of special interest in this regard is s. 737 of the *Criminal Code* which deals with the making of a probation order. Section 737(2) stipulates that certain conditions may be prescribed in a probation order, one of them being that the convicted person "make restitution or reparation to any person aggrieved or injured by the commission of the offence for the actual loss or damage sustained by that person as a result thereof" (s. 737(2)(*e*)). This section would seem to be an indirect method of at least partially remedying a wrong done to an individual as a result of a malicious prosecution. However the section is only operative when an accused has been convicted of an offence and when a probation order is made. In addition, the Court's power to award compensation to a victim is limited to damages that are relatively concrete and ascertainable. (See *R. v. Groves* (1977), 37 C.C.C. (2d) 429 (Ont. H.C.)) As such it would seem a rather inadequate substitute for a private right of action. I do however pause to note that many cases of genuine malicious prosecution will also be offences under the *Criminal Code*, and it seems rather odd if not incongruous for reparation to be possible through a probation order but not through a private right of action.

Further, the use of professional disciplinary proceedings, while serving to some extent as punishment and deterrence, do not address the central issue of making the victim whole again. And as has already been noted, it is quite discomforting to realize that the existence of absolute

immunity may bar a person whose *Charter* rights have been infringed from applying to a competent court for a just and appropriate remedy in the form of damages.

III. Conclusion

A review of the authorities on the issue of prosecutorial immunity reveals that the matter ultimately boils down to a question of policy. For the reasons I have stated above I am of the view that absolute immunity for the Attorney General and his agents, the Crown Attorneys, is not justified in the interests of public policy. We must be mindful that an absolute immunity has the effect of negating a private right of action and in some cases may bar a remedy under the *Charter*. As such, the existence of absolute immunity is a threat to the individual rights of citizens who have been wrongly and maliciously prosecuted. Further, it is important to note that what we are dealing with here is an immunity from suit for malicious prosecution; we are not dealing with errors in judgment or discretion or even professional negligence. By contrast the tort of malicious prosecution requires proof of an improper purpose or motive, a motive that involves an abuse or perversion of the system of criminal justice for ends it was not designed to serve and as such incorporates an abuse of the office of the Attorney General and his agents the Crown Attorneys.

There is no doubt that the policy considerations in favour of absolute immunity have some merit. But in my view those considerations must give way to the right of a private citizen to seek a remedy when the prosecutor acts maliciously in fraud of his duties with the result that he causes damage to the victim. In my view the inherent difficulty in proving a case of malicious prosecution combined with the mechanisms available within the system of civil procedure to weed out meritless claims is sufficient to ensure that the Attorney General and Crown Attorneys will not be hindered in the proper execution of their important public duties. Attempts to qualify

prosecutorial immunity in the United States by the so-called functional approach and its many variations have proven to be unsuccessful and unprincipled as I have previously noted. As a result I conclude that the Attorney General and Crown Attorneys do not enjoy an absolute immunity in respect of suits for malicious prosecution. I would therefore dismiss the appeal as against the Crown, there being no order as to costs. I would allow the appeal as against the Attorney General with costs and direct that the matter be returned to the Supreme Court of Ontario for trial of the claim against the Attorney General.

//*McIntyre J.*//

The following are the reasons delivered by

MCINTYRE J. -- This appeal concerns the question of the liability of the Crown and the Attorney General of the province in a suit for malicious prosecution arising out of the institution of criminal proceedings, charges of murder, brought against the appellant.

In March, 1981, the appellant, then a nurse at the Toronto Hospital for Sick Children, was charged with the murder of four infant patients. At the conclusion of her preliminary hearing, the Provincial Court Judge who conducted the proceedings discharged the appellant upon a finding of an absence of evidence: (1982), 16 C.C.C. (3d) 97. The appellant later commenced an action against the Crown in right of Ontario, the Attorney General for Ontario, and several police officers, alleging that the Attorney General and his agents, the Crown Attorneys, counselled, aided and abetted the police in charging and prosecuting the plaintiff, and that in so doing the Attorney General, the Crown Attorneys, and police were acting as agents for the Crown in right of Ontario. It was also alleged that in the prosecution the Attorney General and the Crown Attorneys were actuated by malice while acting as agents for the Crown. Proceedings

were later discontinued against the police officers and the Crown Attorneys were not named as defendants. The Crown and the Attorney General remained the only defendants and are the respondents in this Court.

Before trial, the respondents moved to have the action dismissed under Rule 126 of the Ontario Rules of Practice, on the ground that the pleadings disclosed no reasonable cause of action and, in the alternative, for leave under Rule 124 to set down a point of law raised in the pleadings and to argue the same on the return of the motion. Rule 124 and Rule 126 are set out hereunder:

> **124.** Either party is entitled to raise by his pleadings any point of law, and by consent of the parties or by leave of a judge, the point of law may be set down for hearing at any time before the trial, otherwise it shall be disposed of at the trial.
>
> **126.** A judge may order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer, and in any such case, or in case of the action or defence being shown to be frivolous or vexatious, may order the action to be stayed or dismissed, or judgment to be entered accordingly.

The question of law for which leave was sought was in these terms:

> A defendant in a preliminary inquiry held under the provisions of the Criminal Code of Canada and discharged thereof has no cause of action based in malicious prosecution or negligence against the Crown Attorneys conducting such proceedings or as against those in law responsible for their conduct.

Fitzpatrick J., of the Supreme Court of Ontario, allowed the motion and struck out the statement of claim. In doing so, he seems to have acted under Rule 126. He concluded on the basis of two decisions of the Supreme Court of Ontario (*Owsley v. The Queen in right of Ontario* (1983), 34 C.P.C. 96 (Ont. H.C.), and *Richman v. McMurtry* (1983), 41 O.R. (2d) 559 (Ont. H.C.)), that the Attorney General for Ontario has an absolute immunity from civil action while performing his duties as a public prosecutor, even if he acted maliciously. He concluded that the

immunity had not been removed by the *Canadian Charter of Rights and Freedoms* and allowed the motion and struck out the statement of claim.

An appeal was dismissed in the Ontario Court of Appeal: (1985), 51 O.R. (2d) 513. At the outset, Thorson J.A., speaking for the Court (Houlden, Thorson and Robins JJ.A.) said, at pp. 514-15:

> This Court reserved its judgment on the appeal following lengthy argument on whether, as a matter of law, any action can be asserted against the Crown or the Attorney-General, or both, in the circumstances which are found to be present in this case. My conclusion is that as a matter of law it cannot, and that the plaintiff's appeal must therefore be dismissed. The reasons for this conclusion follow.

From the foregoing, it may be somewhat doubtful whether the Court of Appeal acted under Rule 124 or 126. The record, however, does not disclose any consent by the parties or any grant of leave for the hearing of the point of law under Rule 124. Furthermore, in answer to arguments raised in the Court of Appeal in this form, at p. 518:

> At the outset of his submissions counsel for the appellant, Mr. Sopinka, contended that on an application to a judge under Rule 126 of the Rules of Practice, the judge hearing the application ought not to strike out a plaintiff's statement of claim unless he was persuaded that the claim could have no hope of succeeding, even if the facts alleged in the statement of claim were proved. In considering such an application, the facts must be taken to be as they are alleged in the statement of claim. Moreover, where the statement of claim raises a "substantial issue of law" it ought not to be struck out under Rule 126, and where an allegation is made that an executive of ministerial act has been performed in bad faith or for an improper purpose, that issue should not be dealt with on a summary application under Rule 126 but should be left to be determined by the judge at trial. Similarly, where an issue arises as to whether any conduct is unconstitutional, it is important to have the kind of factual underpinning which is needed to determine that issue and which can only be brought out at a trial in the ordinary course.

Thorson J.A. said, at pp. 518-19:

> With respect I cannot agree that Fitzpatrick J. erred in dealing with this application as one properly brought under Rule 126, albeit that the power conferred on a judge under that rule is one that ought to be used "sparingly", as noted by Dupont J. in *Owsley v. The Queen in right of Ontario* (1983), 34 C.P.C. 96 at p. 102. Nor can I agree with the assertion that merely because the statement of claim raises a "substantial issue of law" it ought not to be dealt with on an application under that rule. If the latter assertion were correct, it seems to me that the purpose of the rule would be largely defeated. That purpose, surely, is to make it possible for a person who has been named in an action to avoid having to go to the considerable trouble and expense of defending himself in court against a claim made in that action which has no reasonable expectation of succeeding against him, even if all the facts alleged are proved. If, in this case, the learned motions court judge had concluded that the Attorney-General, and thus by extension the Crown, did not enjoy an absolute immunity in law, it might well have been improper to decide the issue before him on an application under Rule 126 since in that event, and for the reasons explained by Linden J. in *King v. Liquor Control Board of Ontario* (1981), 33 O.R. (2d) 816 at p. 825, ... a "factual underpinning" for the claim would then have been necessary for its disposition, but where, as here, he concluded that the immunity was absolute, the same kind of factual underpinning was not needed, for even if the facts as alleged were proved the claim could not succeed. Accordingly, I find no error on the part of Fitzpatrick J. in acting on the application as one which could be properly considered and dealt with by him under Rule 126....

Therefore, I will proceed on the basis that the Court of Appeal reached its determination by the application of Rule 126. In so doing, the court concluded that there existed an absolute immunity for the Crown and the Attorney General and the Crown Attorneys against suit for all acts done in relation to criminal proceedings, even though malice be shown. If this Court should hold that the immunity asserted for the Crown and the Attorney General is clearly absolute, the action would be at an end. If, however, it should conclude that the immunity is in any way limited or qualified or that its existence is doubtful, the matter would have to go to trial in the usual way, so that evidence could be heard on the matters of fact and the issues raised in order to provide a factual underpinning for the determination of any possible liability. In approaching the matter at this stage, it must be borne in mind that in proceedings under Rule 126 the facts alleged must be taken as true and this motion must be disposed of on the basis that the Crown Attorneys and the Attorney General acted with malice in the initiation and conduct of these proceedings.

There are four necessary elements which must be proved for success in an action for malicious prosecution:

A. The proceedings must have been initiated by the defendant.

B. The proceedings must have terminated in favour of the plaintiff.

C. The plaintiff must show that the proceedings were instituted without reasonable cause, and

D. The defendant was actuated by malice.

This appeal must therefore be approached on the footing that all these elements are shown.

It was argued on behalf of the Crown that it enjoyed a complete immunity from liability for malicious prosecution, on the basis of a common law immunity of the Attorney General and the Crown Attorneys. Any liability on the part of the Crown arising from the conduct of its servants would be vicarious. Therefore, it was contended that because the common law accorded a full immunity to the Crown's servants, the Crown itself would not be liable. It was also contended that the Crown had an absolute immunity under the provisions of the *Proceedings Against the Crown Act*, R.S.O. 1980, c. 393 (the Act).

Any consideration of Crown liability must now be based upon the Act and I do not find it necessary for the purposes of this case to consider the common law position respecting Crown immunity. The purpose of the Act, clearly discernible from its form and structure, was to remove Crown immunities and place the Crown upon the same footing as any other person before the

courts, save for the exceptions which are set out in the Act. The effective sections for this purpose are ss. 2 and 5. Section 2(2)(*d*) was relied upon by the Crown. It provides:

> **2.** ...
>
> (2) Nothing in this Act
>
> ...
>
> (*d*) subjects the Crown to proceedings under this Act in respect of anything done in the due enforcement of the criminal law or of the penal provisions of any Act of the Legislature;

It may be argued that commencing and conducting proceedings with malice against the object of the proceedings could not be considered as the "due" enforcement of the criminal law. But any opening in the wall of immunity found by the Court of Appeal would be, in my view, effectively closed by s. 5(6) of the Act, which provides:

> **5.** ...
>
> (6) No proceedings lie against the Crown under this section in respect of anything done or omitted to be done by a person while discharging or purporting to discharge responsibilities of a judicial nature vested in him or responsibilities that he has in connection with the execution of judicial process.

Section 5 expresses the general rule which subjects the Crown to all liabilities in tort to which, if it were a person of full age and capacity, it would be subject. Subsections (2) to (5) provide interpretative guides while subs. (6), excepts from the general rule Crown liability in respect of anything done or omitted to be done by a person, while discharging or purporting to discharge responsibilities of a judicial nature vested in him or responsibilities that he has in connection with the execution of the judicial process.

The claim asserted here depends upon the actions of the Crown Attorneys and the Attorney General, specifically the decision to prosecute the appellant for murder. The decision to prosecute is a judicial decision and is obviously vested in the Attorney General and executed on his behalf by his agents, the Crown Attorneys: see *The Queen v. Comptroller-General of Patents, Designs, and Trade Marks*, [1899] 1 Q.B. 909 (C.A.) A.L. Smith L.J. said, at pp. 913-14:

> I wish to say a word or two about the position of the Attorney-General, because in my judgment it is of importance in this case, and his position appears likely to be lost sight of. Everybody knows that he is the head of the English Bar. We know that he has had from the earliest times to perform high judicial functions which are left to his discretion to decide. For example, where a man who is tried for his life and convicted alleges that there is error on the record, he cannot take advantage of that error unless he obtains the fiat of the Attorney-General, and no Court in the kingdom has any controlling jurisdiction over him. That perhaps is the strongest case that can be put as to the position of the Attorney-General in exercising judicial functions. Another case in which the Attorney-General is pre-eminent is the power to enter a nolle prosequi in a criminal case. I do not say that when a case is before a judge a prosecutor may not ask the judge to allow the case to be withdrawn, and the judge may do so if he is satisfied that there is no case; but the Attorney-General alone has power to enter a nolle prosequi, and that power is not subject to any control. Another case is that of a criminal information at the suit of the Attorney-General -- a practice which has, I am sorry to say, fallen into disuse. The issue of such an information is entirely in the discretion of the Attorney-General, and no one can set such an information aside. There are other cases to which I could refer to be found in old and in recent statutes, but I have said enough to shew the high judicial functions which the Attorney-General performs....

The Crown Attorneys and the Attorney General in deciding to prosecute the appellant would therefore come within s. 5(6) of the Act, and the Crown would have its statutory immunity despite any uncertainty which might arise because of an argument under s. 2(2)(*d*) of the Act, based on the concept of "due" enforcement of the criminal law. The Attorney General and his agents, whatever the motives underlying their conduct, were surely, in the words of s. 5(6), "discharging or purporting" to discharge responsibilities of a judicial nature. In my view, the Crown is rendered immune by the express terms of s. 5(6) of the Act from liability to the appellant.

The fact of Crown immunity in this case does not necessarily mean that a similar immunity for the Attorney General and his agents follows. Any immunity that they might enjoy must find its own independent footing and the fact that the Act extends an immunity to the Crown in this case, therefore, cannot be understood as conferring or evidencing an immunity for the Attorney General and the Crown Attorneys. This point was made by Hart J.A. in the case of *Curry v. Dargie* (1984), 28 C.C.L.T. 93 (N.S.C.A.), where he held that, while the *Proceedings Against the Crown Act*, R.S.N.S. 1967, c. 239, at p. 107, might absolve the provincial Crown from liability, a Crown servant, in that case a residential tenancy officer, could still be personally liable for misconduct:

> It seems to me that we are dealing here, once again, with the immunity of the Crown and not that of a tortfeasor.
>
> It has been pointed out that the Proceedings Against the Crown Act was passed to give citizens the right to sue the Crown for the tortious acts of its officers and servants. The Act also prevents suits against the Crown for acts of its officers or servants carried out in the due enforcement of valid legislation. The Act was not designed, however, to protect the officers and servants of the Crown personally from actions arising out of torts committed by them against members of the public, whether during the course of their employment or not, which were not done solely for the due enforcement of the criminal law or the provisions of any act of the Legislature....

What then is the nature of the immunity, if any, enjoyed by the Attorney General at common law?

There is clear authority in the jurisprudence of most common law, and some civil law, jurisdictions for the proposition that public officers and officials discharging or purporting to discharge the duties and powers of their offices may be personally liable in damages for wrongful conduct. The leading case in Canada on this point is *Roncarelli v. Duplessis*, [1959] S.C.R. 121. The facts are well known. Roncarelli was a restaurant owner in Quebec. He was a member of a religious group, the Jehovah's Witnesses, and he supported their cause financially and in

assisting members of the group who from time to time ran afoul of the law. Duplessis was the Premier of Quebec and, as well, Attorney General of the province. The policy of the Government was opposed to the Jehovah's Witnesses and Duplessis sought to eliminate Roncarelli as an opponent in his efforts to curb the Jehovah's Witnesses. He ordered the General Director of the Quebec Liquor Commission, which had the legislative authority to "grant, refuse or cancel permits for the sale of alcoholic liquors," to revoke Roncarelli's liquor licence and to forever bar him from obtaining another. This ruined his business and he brought action for damages against Duplessis for the wrongful revocation of his licence and the prohibition against his obtaining a further licence. A majority in this Court held that Duplessis was liable. The judgment of Rand J. (with whom Judson J. concurred) has been regarded as the leading judgment in the case. He saw the issue in these terms, at p. 137:

> In these circumstances, when the *de facto* power of the Executive over its appointees at will to such a statutory public function is exercised deliberately and intentionally to destroy the vital business interests of a citizen, is there legal redress by him against the person so acting?

He concluded that there was legal redress in the form of damages. He expressed the view that there existed a general presumption in legislation and regulation that powers given by the legislation will be exercised in good faith and without improper motives. At page 140, he said:

> In public regulation of this sort there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. Fraud and corruption in the Commission may not be mentioned in such statutes but they are always implied as exceptions. "Discretion" necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption.

In this context, it should be noted that in commencing and prosecuting criminal offences the Attorney General and his agents, the Crown Attorneys, are exercising statutory powers: see *Ministry of the Attorney General Act*, R.S.O. 1980, c. 271; *Crown Attorneys Act*, R.S.O. 1980, c. 107; and the *Criminal Code*, R.S.C. 1985, c. C-46, s. 504. Rand J. was also of the view that the acts shown to have been done by the respondent put him beyond the protection of any immunity which could attach to his office. He added, at pp. 141-42:

> The act of the respondent [Duplessis] through the instrumentality of the Commission brought about a breach of an implied public statutory duty toward the appellant; it was a gross abuse of legal power expressly intended to punish him for an act wholly irrelevant to the statute, a punishment which inflicted on him, as it was intended to do, the destruction of his economic life as a restaurant keeper within the province. Whatever may be the immunity of the Commission or its member from an action for damages, there is none in the respondent. He was under no duty in relation to the appellant and his act was an intrusion upon the functions of a statutory body. The injury done by him was a fault engaging liability within the principles of the underlying public law of Quebec: *Mostyn v. Fabrigas*, and under art. 1053 of the *Civil Code*. That, in the presence of expanding administrative regulation of economic activities, such a step and its consequences are to be suffered by the victim without recourse or remedy, that an administration according to law is to be superseded by action dictated by and according to the arbitrary likes, dislikes and irrelevant purposes of public officers acting beyond their duty, would signalize the beginning of disintegration of the rule of law as a fundamental postulate of our constitutional structure.

It will be observed that Duplessis in the *Roncarelli* case purported to act not only as the Premier of Quebec but also as the Attorney General. It would appear to be clear from the majority judgments in *Roncarelli* that the principle that public officers of the highest rank in Canada who exercise the powers of their office in excess or in abuse of those powers will be liable in damages for injuries resulting. This principle has been well founded in English authority: see *Mostyn v. Fabrigas* (1774), 1 Cowp. 161, 98 E.R. 1021, where the Governor of Minorca was held to be liable in damages in a civil action for false imprisonment of a native Minorcan. Lord Mansfield rejected the Governor's claim for immunity at p. 175 Cowp., p. 1029 E.R.:

> Therefore to lay down in an English Court of Justice such a monstrous proposition, as that a governor acting by virtue of letters patent under the Great Seal, is accountable only to God, and his own conscience; that he is absolutely despotic, and can spoil, plunder, and affect His Majesty's subjects, both in their liberty and property, with impunity, is a doctrine that cannot be maintained.

See, as well, *Henly v. Mayor of Lyme* (1828), 5 Bing. 91, 130 E.R. 995.

Another case expressing the same or a similar proposition is *Asoka Kumar David v. Abdul Cader*, [1963] 3 All E.R. 579 (P.C.) In that case, a licensing authority had refused a licence for the operation of a cinema and the appellant brought action alleging a malicious refusal of licence. The action was struck out in a pre-trial motion and the Court of Appeal of Ceylon supported the respondent. In the judicial committee, Viscount Radcliffe expressed the view that the case was not one which should have been the subject of a pre-trial disposition, and said, at p. 582:

> Since then [1907] the English courts have had to give much consideration to the general question of the rights of the individual dependent on the exercise of statutory powers by a public authority.... In their lordships' opinion it would not be correct today to treat it as establishing any wide general principle in this field: certainly it would not be correct to treat it as sufficient to found the proposition, as asserted here, that an applicant for a statutory licence can in no circumstances have a right to damages if there has been a malicious misuse of the statutory power to grant the licence. Much must turn in such cases on what may prove to be the facts of the alleged misuse and in what the malice is found to consist. The presence of spite or ill-will may be insufficient in itself to render actionable a decision which has been based on unexceptionable grounds of consideration and has not been vitiated by the badness of the motive. But a "malicious" misuse of authority, such as is pleaded by the appellant in his plaint, may cover a set of circumstances which go beyond the mere presence of ill-will, and in their lordships' view it is only after the facts of malice relied on by a plaintiff have been properly ascertained that it is possible to say in a case of this sort whether or not there has been any actionable breach of duty.

It would appear on the basis of the authorities cited that in general terms public officers are entitled to no special immunities or privileges when they act beyond the powers which are accorded to them by law in their official capacities. It would follow, then, that where a public officer, a servant of the Crown, exceeds the powers of his office or acts improperly in fraud of

his duties and powers, or acts with malice in the discharge of his duties, he does not have immunity from civil suit and where, by reason of such excess of power or improper motive, he causes damage he may be civilly liable in damages. This, indeed, seems clear as far at least at it may concern public servants who act in administrative capacities. However, the question before us involves a consideration of the position of the Attorney General, acting in his capacity as the chief law officer of the Crown concerned with the commencement and prosecution of criminal proceedings against accused persons.

The Court of Appeal, as has been said, found an absolute immunity from civil liability on the part of the Attorney General and the Crown Attorneys, and in reaching this conclusion they placed special emphasis on *Owsley v. The Queen in right of Ontario* and *Richman v. McMurtry*, *supra*, in the Ontario High Court and, as well, on *Imbler v. Pachtman*, 424 U.S. 409 (1976). They formed the view that the absolute immunity was a clearly established feature of the common law. This issue has been considered in many Canadian cases in recent years: see *Unterreiner v. Wilson* (1982), 40 O.R. (2d) 197 (H.C.), *per* Gray J., affirmed (1983), 41 O.R. (2d) 472 (C.A.); *Owsley v. The Queen in right of Ontario*, *supra*; *Richman v. McMurtry*, *supra*; *Bosada v. Pinos* (1984), 44 O.R. (2d) 789 (H.C.), *per* Pennell J.; *Curry v. Dargie*, *supra*; *German v. Major* (1985), 39 Alta. L.R. (2d) 270 (C.A.); and *Levesque v. Picard* (1985), 66 N.B.R. (2d) 87 (C.A.), leave to appeal to the Supreme Court of Canada granted May 22, 1986, [1986] 1 S.C.R. x, notice of discontinuance filed January 7, 1987, [1987] 1 S.C.R. x.

These cases do not offer complete support for the position taken in the Court of Appeal. The cases decided in the Ontario courts, which are noted above, reach the conclusion that the prosecutorial immunity is absolute. In reaching a similar conclusion in the case at bar, Thorson J.A. relied extensively on American authority with particular emphasis on the judgments of Learned Hand J. in *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949), and of Powell and White JJ.,

of the U.S. Supreme Court, in *Imbler v. Pachtman*, *supra*. These cases adopt the view that the social need to have prosecutors who are charged with the prosecution of criminal cases freed from the threat of civil action, so that they may fearlessly and objectively conduct the prosecutions justifies the adoption of the absolute rule. Powell J. in *Pachtman*, *supra*, at p. 428, expressed agreement with the words of Learned Hand J. in *Gregoire*, *supra*, at p. 581, where he said:

> As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation....

But the position respecting prosecutorial immunity is not unanimous. Other courts in other jurisdictions have indicated that they would not necessarily extend absolute immunity to those executing prosecutorial functions. In *Riches v. Director of Public Prosecutions*, [1973] 2 All E.R. 935 (C.A.), the plaintiff had been acquitted of a criminal charge and sought damages for malicious prosecution against the Director of Public Prosecutions. I observe, that in respect of the institution of prosecutions against individuals, the Director of Public Prosecutions is effectively performing the same function as a Canadian provincial Attorney General. In that case, although Stephenson L.J. held that the material before the Court disclosed that there had been a basis in evidence for the plaintiff's prosecution and that there was no cause of action disclosed by the statement of claim, he rejected the proposition that the Director of Public Prosecutions could never be found liable for malicious prosecution. He said, at p. 941:

> I do not wish to be taken as saying that there may never be a case where a prosecution has been initiated and pursued by the Director of Public Prosecutions in which it would be impossible for an acquitted defendant to succeed in an action for malicious prosecution, or as saying that the existence of the Attorney-General's fiat where required conclusively negates the existence of malice and conclusively proves that there was reasonable and probable cause for the prosecution. There may be cases where there has been, by even a

> responsible authority, the suppression of evidence which has led to a false view being taken by those who carried on a prosecution and by those who ultimately convicted. But that case is, as it seems to me, many miles from this one. There is nothing in the judgment of the Court of Criminal Appeal in this particular case which lends any support to the view that there was no case for the plaintiff to answer; and I cannot find in anything that he has said to us or in any document that has been put before us anything to suggest that there was in existence material showing that there was no basis in evidence for a prosecution of him on the conspiracy charge or on any of the three substantive charges which he had to meet at the Suffolk Assizes. In those circumstances, as it seems to me, he has failed to show that the defendant put the facts unfairly before prosecuting counsel, that there was anything like a lack of reasonable or probable cause, or malice, on the defendant's part or that there is any possibility of such material being produced.

In Canada, decisions in the Alberta and Nova Scotia courts cast doubt on the existence of the complete immunity. In *German v. Major*, *supra*, the plaintiff had been prosecuted under the *Income Tax Act*. The trial judge acquitted on the basis of a doubt as to guilt and the defendant taxpayer then sued the prosecutor for malicious prosecution. Though Kerans, J.A. considered that the material before the court disclosed that the plaintiff's case was "doomed beyond doubt to fail", for absence of proof of malice, and because there were reasonable grounds for the prosecution he also considered that the prosecutor's immunity to prosecution was not absolute. In the closing paragraph of his judgment, at p. 286, he said:

> Counsel for the Attorney General who acts as his agent in the prosecution of a criminal case is not accountable in civil proceedings to the accused <u>except possibly to the extent that it is alleged against him that he has not acted in good faith</u>, and to that extent the allegation falls within the nominative tort of malicious prosecution, and that cause of action has been dealt with [see p. 282]. I would therefore strike those portions of the statement of claim which deal with the remaining claims by German against Major. [Emphasis added.]

It would follow that had the prosecutor proceeded solely or principally on an improper motive: for example, malice, then coming within Kerans J.A.'s conception there would be no immunity against malicious prosecution. In *Curry v. Dargie*, *supra*, it was held that a residential tenancy officer who had instituted proceedings against a tenant could not claim an absolute prosecutorial immunity. Relying in part on the earlier case of *Warne v. Province of Nova Scotia* (1969), 1

N.S.R. (2d) 27 (S.C.T.D.), where Gillis J. refused to strike out a personal claim against the provincial Minister of Agriculture, Hart J.A. explained that he was not willing to go as far as the Ontario cases had gone in extending prosecutorial immunity. Although he distinguished the case before him from a case where the Attorney General or a Crown Attorney had instituted a prosecution, he made it clear that he was not deciding the issue as to the immunity of Attorneys General and Crown Attorneys. He said, at p. 110:

> I am not prepared to go as far as Galligan J. [in *Richman, supra*] in holding that an officer of the Crown cannot be liable for a proceeding commenced maliciously, but it is not necessary to consider that issue at the moment. I do not believe that in the case at Bar it can be said that the respondent in laying the information against the appellant was in fact carrying out a judicial function similar to those carried out by Attorneys General and prosecutors. An information can be laid by any person and there is no obligation under the Residential Tenancies Act requiring that it be laid by the respondent. Surely a person who undertakes to swear that she has reasonable and probable cause to believe that an offence has been committed must take personal responsibility for the results of that act and cannot simply say that she was merely following instructions of her superiors. Nor can it be said that she was by her act enforcing the criminal law or the provisions of any statute. She was simply setting in motion the forces of the justice system which would enable the persons charged with its administration to perform their duties. She was in no different position from the police informant or other person who lays an information in a criminal case without reasonable and probable cause for believing that the offence had been committed and with some malicious intent. Such a person is always liable to an action for malicious prosecution. [Emphasis added.]

The basis upon which Hart J.A. draws the distinction between the residential tenancy officer and the Attorney General, and which erases any doubt as to the non-existence of an immunity for the residential tenancy officer, is the fact that the Attorney General exercises a "judicial function" in commencing a prosecution, whereas the residential tenancy officer does not. I have already referred to the "judicial" nature of the Attorney General's decision to prosecute: see the discussion of *The Queen v. Comptroller-General of Patents, Designs, and Trade Marks, supra*. But can it be said that the mere fact of the Attorney General's decision being "judicial" confers an absolute immunity? I do not think the law is decided on this point.

The "judicial" nature of the Attorney General's decision to prosecute does not in any way render him a "court", that is, an adjudicative entity. See on this point, *Re Van Gelder's Patent* (1888), 6 R.P.C. 22 (C.A.), where Lord Esher, M.R., said, at p. 27:

> If what I have said is true, after all the *Attorney-General* is not a Court. He may have a judicial function to perform, but he is not a Court, and prohibition does not lie to him .... [Emphasis added.]

What is meant by the words "prohibition does not lie to him" is that the Attorney General's decision to prosecute is not reviewable by any court. As A.L. Smith L.J. noted in *Comptroller-General of Patents*, *supra*, at p. 914:

> The issue of such an [a criminal] information is entirely in the discretion of the Attorney-General, and no one can set such an information aside .... [Emphasis added.]

Hence, the law is settled that the Attorney General's exercise of his "judicial" functions, such as the commencement of criminal proceedings, the entering of a *nolle prosequi*, the entering of a stay under s. 579(1) of the *Criminal Code*, or the preferring of direct indictments in the absence of a committal for trial after a preliminary hearing, are all incapable of judicial review and to that extent, the Attorney General enjoys an absolute and total immunity on the basis that he is performing a judicial function.

Immunity from judicial review, however, does not equate to immunity from civil suit for damages incurred as a result of a maliciously instituted and executed prosecution. This Court has held that, in respect of adjudicative judicial decisions, there is a complete immunity from civil suit: *Morier v. Rivard*, [1985] 2 S.C.R. 716. In light of the reservations expressed by learned justices of the Alberta, Nova Scotia and English Courts of Appeal, however, I am loath to make

a ruling on an appeal of a preliminary motion that a similar absolute immunity exists for the benefit of the Attorney General and his agents in respect of suits for malicious prosecution. If the Court were to make such a ruling on a point of this importance in a total absence of evidence, it would, in my view, be adopting a dangerous course. Let us not forget that, when Lord Mansfield was faced with the bleak reality of a colonial governor gone awry, imprisoning innocent people without proper trials and in contravention of the law, "absolutely despotic" and "accountable only to God, and his own conscience", he felt compelled to reject any notion of immunity by virtue of the Governor's office: see *Mostyn v. Fabrigas*, *supra*. The state of the law relating to the immunity of the Attorney General is, as has been shown, far from clear. Before laying down any proposition to the effect that the Attorney General and his agents enjoy absolute immunity from civil suit, there must be a trial to permit a conclusion on the question of prosecutorial immunity and to furnish -- in the event that it is decided that the immunity is not absolute -- a factual basis for a determination of whether or not in this case the conduct of the prosecution was such that the appellant is entitled to a remedy.

Furthermore, the Attorney General's immunity from judicial review, based on the exercise of a judicial function, does not equate with immunity from civil suit for damages for wrongful conduct in the performance of prosecutorial functions which do not involve the exercise of a judicial function. Indeed, most of the functions and acts performed by Crown Attorneys, as agents of the Attorney General, would fall into this category and, accordingly, the immunity may not extend to claims for damages as a result of a prosecution, however instituted but carried out with malice. A ruling on a preliminary motion to the effect that Attorneys General and their agents are absolutely immune from all liability for suits for malicious prosecution may therefore be too expansive and even ill-founded.

Therefore, my view is that this case is not one which should have been disposed of upon a pre-trial motion under Rule 126. The law has long been settled that it is only in the clearest of cases that actions will be struck out, and this is not such a clear case. Of interest in this connection are the comments made in an unreported case in the British Columbia Court of Appeal (*Barrisove v. McDonald*, B.C.C.A., No. 490/74, November 1, 1974 (McFarlane, Robertson and Carrothers JJ.A.)) where an action was commenced against a county court judge for alleged misconduct in the course of the plaintiff's trial. The pleadings were struck out in the Supreme Court of British Columbia as alleging no reasonable cause of action, but an appeal was allowed, holding, in effect, that the allegations against the judge were cognizable in a civil action for damages. This case cannot now be considered as authoritative in view of the judgment in this Court in *Morier v. Rivard*, *supra*, but the comments made by Robertson J.A. in agreeing with the disposition made of the appeal are significant. He said (at p. 10):

> I agree with the disposition proposed by my brother [McFarlane] and agree substantially with what he has said. I wish, however, to guard myself against being said to have made a pronouncement on the law which will be binding on the trial judge or upon this Court if following a trial, there should be an appeal to the Court. Rather than saying categorically that the endorsement on the writ and the Statement of Claim discloses a cause of action to which there can be no defence, I prefer to put my reasons on the ground that the question is not one which should have been decided in a proceeding of the sort that was taken here. It is so far from clear that no cause of action <u>is</u> disclosed that, as I have indicated, that stage of the proceedings was not one at which the question should have been decided.

In view of the uncertainty of the law upon this question, it is not possible, in my view, to conclude that the appellant has not alleged a reasonable cause of action in her pleadings and, therefore, the move to strike out the pleadings and dismiss the action as against the Attorney General must fail.

I would therefore dismiss the appeal as against the Crown. There is no order as to costs. I would allow the appeal as against the Attorney General with costs, and direct that the matter be returned to the Supreme Court of Ontario for trial of the claim against the Attorney General.

//*La Forest J.*//

The following are the reasons delivered by

LA FOREST J. -- I agree with my colleague Lamer J. except that I prefer to rely solely on the common law position as set forth by him, leaving consideration of *Charter* implications to another day when it becomes necessary to deal with them.

//*L'Heureux-Dubé J.*//

The following are the reasons delivered by

L'HEUREUX-DUBÉ J. (dissenting in part) -- While I agree with my colleague, Justice McIntyre, that the Crown enjoys absolute immunity from suit even for malicious prosecution, I respectfully disagree with his conclusion that the Attorney General and, by extension, Crown Attorneys, may not. Consequently, I would dismiss the appeal.

My colleague McIntyre J. is of the view that the lower courts erred in striking out the appellant's statement of claim under Rule 126 of the Ontario Rules of Practice under circumstances where there was sufficient doubt as to the actual state of the law on the question. He finds that the law in Canada is somewhat ambiguous as to the question of the degree of immunity of Attorneys General and Crown Attorneys. For that reason, he orders the matter to

proceed to trial. My point of divergence from the reasons of McIntyre J. concerns the appropriate response of this Court under the circumstances. Since, in my view, strong policy reasons exist for granting Attorneys General and Crown Attorneys absolute immunity from prosecution for actions taken in the proper exercise of their powers, I see no reason to prolong this matter any further by remitting it to trial to decide this very same issue.

I would like to make it clear at the outset that I am proceeding from the premise that any decisions taken or acts performed by the respondents in this case were done within the scope of their authority. I perceive the claim of the appellant to be founded on the idea that her prosecution by the respondents, though carried out within the bounds of their authority, was malicious. In this respect, I would distinguish the situation from that which arose in *Roncarelli v. Duplessis*, [1959] S.C.R. 121. In that case, the claim was brought on the basis that the respondent had acted outside the scope of his legitimate authority. The civil action was brought against Maurice Duplessis in his capacity as an individual, and not against Duplessis in either of his official roles as Premier of the province or as Attorney General. As Rand J. stated, at pp. 142-43:

> The office of Attorney-General traditionally and by statute carries duties that relate to advising the Executive, including here, administrative bodies, enforcing the public law and directing the administration of justice. In any decision of the statutory body in this case, he had no part to play beyond giving advice on legal questions arising. In that role his action should have been limited to advice on the validity of a revocation for such a reason or purpose and what that advice should have been does not seem to me to admit of any doubt. To pass from this limited scope of action to that of bringing about a step by the Commission beyond the bounds prescribed by the legislature for its exclusive action converted what was done into his personal act. [Emphasis added.]

And at p. 144:

> Was the act here, then, done by the respondent in the course of that exercise [of his functions]? The basis of the claim, as I have found it, is that the act was quite beyond the scope of any function or duty committed to him, so far so that it was one done exclusively in a private capacity, however much in fact the influence of public office and power may have carried over into it.

It may well be that a governmental authority who acts with malice acts outside of the scope of his authority. However, this is not the issue which was put before us. It is to be noted that the appellant chose to proceed against the Attorney General in his official, rather than personal, capacity. In her factum, the appellant also maintains that all of the respondents were acting, "at all material times" as agents of the Attorney General for Ontario, who "acted as an agent" of Her Majesty the Queen in right of Ontario.

For the purposes of Rule 126, as McIntyre J. has indicated, we must assume that all the facts alleged by the appellant in her submissions are true. The question then, to be decided before the matter is allowed to go to trial, is simply: does the appellant's claim disclose a reasonable cause of action? This is a pure question of law, and no evidence is required for its determination. In fact, there is every advantage, in terms of saving the time and cost of a trial, to decide a question of law at the outset. This, in fact, is the very reason for the existence of Rule 126.

In the present case, a determination that the Attorney General and Crown Attorneys enjoy absolute immunity would settle the question definitively. Both the judge at first instance and the Court of Appeal of Ontario proceeded on this basis. I intend to do so as well. This is also the course followed in *Morier v. Rivard*, [1985] 2 S.C.R. 716, which came to this Court on an interlocutory question similar to the one in this case.

This, of course, does not mean that I disagree with McIntyre J. when he proposes that, in general, important questions should not be disposed of in interlocutory fashion. However, this,

in my view, does not apply in cases such as the one before us, where the defense offered at the outset is one of law only, namely that the right of action is barred independently of the facts alleged.

The action brought by Nelles is completely dependent upon the answer to the question of whether Attorneys General and Crown Attorneys are immune from civil suit. As such, the matter can and should be decided by this Court in the present appeal. My answer to the question is that the immunity from civil suit enjoyed by Attorneys General and Crown Attorneys is absolute when they are acting within the bounds of their authority. I rest my reasons on the very carefully considered judgment of the unanimous Ontario Court of Appeal: *Nelles v. The Queen in right of Ontario* (1985), 51 O.R. (2d) 513. The Court of Appeal (Houlden, Thorson and Robins JJ.A.) undertook a thorough review of the authorities in the course of a lengthy and well reasoned discussion of the arguments on either side of the issue.

As Thorson J.A. put it, at p. 531:

> . . . the concept that the Attorney-General and Crown Attorneys should enjoy an absolute immunity from civil suit for their conduct in initiating and conducting criminal prosecutions is a troubling one. That it confronts thoughtful and fair-minded persons with the need to make what cannot be other than a difficult choice, is obvious.

Ultimately, however, "[a]s is so often the case, the answer must be found in a balance between the evils inevitable in either alternative" (*Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949), at p. 581).

While there are significant differences between the role of prosecutors in the American legal system, and the role of Crown Attorneys in Canada, it is my view that the basic principles

underlying the grant of immunity to these agents are the same. These principles have been clearly elucidated in American case law. For example, in *Gregoire, supra,* Learned Hand J. expanded on the underlying rationale for the immunity of officials, at p. 581:

> The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors.

Similarly, Powell J. in *Imbler v. Pachtman,* 424 U.S. 409 (1976), observed, at pp. 422-23:

> The common-law immunity of a prosecutor is based upon the same considerations that underlie the common-law immunities of judges and grand jurors acting within the scope of their duties. These include concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust.

The role of absolute immunity is not to protect the interests of the individual holding the office, rather it is to advance the greater public good. Absolute immunity is based upon principles of public policy. In *Yaselli v. Goff,* 12 F.2d 396 (2d Cir. 1926), Rogers J. wrote, at p. 406:

> The public interest requires that persons occupying such important positions and so closely identified with the judicial departments of the government should speak and act freely and fearlessly in the discharge of their important official functions. They should be no more liable to private suits for what they say and do in the discharge of their duties than are the judges and jurors, to say nothing of the witnesses who testify in a case.

Attorneys General and Crown Attorneys are often faced with difficult decisions as to whether to proceed in matters which come before them. It is unfortunate that, like all human beings, they cannot be immune from error. However, the holders of such offices can and should be immune from prosecution for any such errors which occur in the course of the exercise of their functions. The freedom of action of Attorneys General and Crown Attorneys is vital to the effective functioning of our criminal justice system. In my view, the greater public interest is best served by giving absolute immunity to these agents.

I would dismiss the appeal.

Appeal dismissed as against the Crown and appeal allowed with costs as against the Attorney General, L'HEUREUX-DUBÉ J. *dissenting in part.*

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