**1.0 Malicious Prosecution**

The tort of malicious prosecution which is a trespass to person connotes the process of initiating criminal proceedings against a person without any reasonable or just cause and such criminal proceedings ends in favour of the accused person.

This type of tort entails criminal proceedings which is not aimed at bringing the accused to justice but for any improper reason without legal justification and which ends to favour the accused person.

Finally in simple term, the concept connotes using the legal process maliciously and wrongfully which ends in favour of the accused person.

* 1. **Rationale for the tort of Malicious Prosecution**

The rationale behind the tort of malicious prosecution is to prohibit in whatever form unlawful prosecution and seek to provide a remedy for a person who has been unjustly prosecuted. The law in this type of tort seeks to create a balance between two opposing interest of encouraging people to assist in the prosecution of erring members of the society through the volunteering of information to the law enforcement agencies like the police.

Also, it is for the need to effectively protect and safeguard persons rights and prevent persons from being harassed by malicious, wrongful and justifiable prosecution, on the other hand.

* 1. **Ingredients of Malicious Prosecution**

Where a plaintiff commences a suit alleging that an unjust prosecution was commenced against him by the defendant in an earlier action, the onus is on him to prove the four essential ingredients which will make his claim succeed. These ingredients were stated by the Supreme Court in the case of ***Balogun v Amubikanhu***[[1]](#footnote-1) thus:

1. That the defendant instigated or initiated the prosecution against him.
2. That the prosecution terminated in the plaintiff’s favour
3. That the defendant had no reasonable and probable cause for the prosecution; and
4. That the defendant acted maliciously

It is very vital for the plaintiff to prove all these ingredients conjunctively to be able to succeed in his claim and thus this subsequent discourse will now focus on an elaborate explanation on these ingredients.

1. **That the defendant instigated or initiated the prosecution against him**

This is the first ingredient which the plaintiff must by clear evidence prove and it must been shown that the defendant indeed set the law in motion against him alone. The plaintiff under this heading must clearly show that the defendant actively participated in such initiation. In ***Balogun v. Amubikahun,***[[2]](#footnote-2) the Supreme Court held that to prosecute in this context means to set the law in motion whereby an appeal is made by the defendant to some person with judicial authority in regard to the matter in question. Thus, merely reporting a matter to the authority is not enough except the defendant knowingly makes a false accusation to the police or a judicial officer with the result that an innocent man is sent for trial.

In ***Inneh V. Aruegbon***,[[3]](#footnote-3) the defendant in this case made a report to the police that the plaintiff had stolen some goods from his home and laid information before a magistrate. The charge was trumped as a means to get the plaintiff to Benin and serve her with summons for adultery. She succeeded in an action for malicious prosecution. In this case it can be seen to be a clear demonstration of the first instance of the general rule, for the defendant made a complaint to the police that the plaintiff be prosecuted for an offence and based on that the magistrate issued summons.

Similarly in the case of ***Ogbonna V. Ogbonna*** ***& Anor[[4]](#footnote-4)*** (Supra), the appellant reported to the police that the respondent threatened to kill him and the police arrested the respondent. The appellant t and respondent are both members of the same family, they shared the same father. Evidence was lead to show that the respondent at the station stated that he does not want the police to press charges that he just wanted to teach the respondent and his mother a lesson. The judgment of the lower court was upheld and the appellant was held liable.

On where the defendant merely gives information of certain facts to the police, which tends to incriminate the plaintiff with a wide room for discretion, the defendant will not be regarded as having instituted the proceeding.

Also in ***Evans v London Hospital Medical College***,[[5]](#footnote-5) the defendant at the request of the police prepared a post-mortem report on the basis of which the plaintiff was charged with murder. The claim of the plaintiff was dismissed because the law was not set in motion by the defendant.

In addition it was established in the case of ***Tewari V. Singh***,[[6]](#footnote-6) that if the defendant knowingly makes a false accusation to the police or a judicial officer , with the result that the an innocent man is sent for trial, he will be liable as the prosecutor, even though the prosecution was not technically conducted by him.

1. **That the prosecution terminated in the plaintiff’s favour**

Favourable termination of the prosecution can be described as trial which came to an end without conviction being pronounced. The underlying principle is that a man is deemed to be innocent until he is proved innocent. So what is required is not a judicial determination of his innocence; but merely, absence of judicial determination of his guilt. The requirement is satisfied if;

a) He is discharge on merit;

b) The plaintiff was convicted in a lower court; but, his conviction was quashed on appeal because of irregularity of procedure;[[7]](#footnote-7)

c) Where the plaintiff was acquitted of the charge in question but convicted of a lesser offence;[[8]](#footnote-8)

d) Where the plaintiff was acquitted on technicality such as a defect in the indictment;[[9]](#footnote-9)

e) Where the prosecutor discontinued the proceeding or withdrew the charge even without prejudice to the right to recommence;[[10]](#footnote-10)

f) Where the Attorney General enters a *nolle prosequi* staying further proceedings on the indictment; and,[[11]](#footnote-11)

g) Where the charge was struck out for want of prosecution or lack of diligent prosecution.

In ***Basebe V. Mathews***,[[12]](#footnote-12) the plaintiff brought an action against the defendant for malicious without reasonable or probable cause making a false, scandalous statement before the magistrate which caused the plaintiff to be wrongfully convicted of assault. The action failed because the criminal proceeding was not determined in favour of the plaintiff.

In ***Fadeyi & Anor V. Owolabi & Anor***,[[13]](#footnote-13) the appellant was building on a land sold to him by a member of a family when another branch came to him and asked him to stop work on the land, the respondent lodged complain with the police, subsequently they were charged before a magistrate court for the offence of malicious damage to property. They were discharged and acquitted on the count. The Court of Appeal held that for an action on malicious prosecution to fail, it should be shown that the trial ended in the conviction of the accused.

In ***Ogbonna V. Ogbonna &Anor***,[[14]](#footnote-14) the court held that If the prosecution proceedings are terminated in a way that means that the accused person is not actually found guilty by a Court (such as where a ***nolle prosequi*** is entered), the plaintiff does not need to positively prove his innocence in order to recover damages for malicious prosecution.

iii. **That the defendant had no reasonable and probable cause for the prosecution**

A reasonable and probable cause entails the defendant having in his position as a reasonable and sane person a set of fact which to an ordinary man will lead to the conclusion that the plaintiff has committed a criminal offence. It is for the plaintiff to establish the absence of reasonable and probable cause not for the defendant to establish its presence. The test is objective and subjective.

However as an element of malicious prosecution, such prosecution must have been without a reasonable and probable cause.

In ***Garba V. Maigoro***,[[15]](#footnote-15) the appellant lodged a complaint with the police that his vehicle parked in front of his house was set on fire. In an answer to a question put to him by the police, he stated that he suspected no one. When he was further questioned whether he has a misunderstanding with any person, he mentioned the respondent as his political rival. Consequent upon his report, the respondent was arrested, detained for two days and finally prosecuted on a charge of mischief by fire before an Upper Area Court. He was discharged for want of evidence. He brought an action for malicious prosecution against the appellant. The Court of Appeal held that the appellant had reasonable and probable cause for the prosecution and was not liable for malicious prosecution.

The fact upon which the defendant based his belief must be one within his knowledge at the time of the institution of the prosecution. In ***Delegal V. Highley***,[[16]](#footnote-16) the defendant in an action for malicious prosecution pleaded specifically facts showing the guilt of the accused of the crime charged, it was held that he cannot rely on them because they were altogether independent of the existence of the facts since he had knowledge of them for the first time after the charge was made.

In establishing reasonable and probable cause evidence showing a prima facie case against the accused is sufficient. In ***Eriavbe V. Okotie & Ors***,[[17]](#footnote-17) it was held that mere suspicion will not furnish evidence of the existence of reasonable and probable cause.

It is for the plaintiff to establish lack of reasonable and probable cause not for the defendant to prove its existence.

**iv. That the defendant acted maliciously**

This simply means that the complainant was actuated by an improper motive for prosecution. The proper motive is the desire to secure the ends of justice. Anything outside it is malicious.

In addition words the term ‘malice’ connotes an improper and indirect motive and in relation to malicious prosecution means that a party sets the law in motion based on improper motive.

The burden on the plaintiff to prove malice was succinctly stated by Bowen L.J in ***Arbrath V. North Easter Rly Co***,[[18]](#footnote-18) where he stated that the plaintiff must show “that the proceedings of which he complains of are instituted in malicious spirit that is from an indirect and improper motive and not in furtherance of justice. Unless he so proves, the plaintiff cannot succeed in an action for malicious prosecution.”

In ***Ogbonna V. Ogbonna & Anor***,[[19]](#footnote-19) the appellant said under cross examination that the main complaint before the Chief Magistrate was the threat to his life and that of his half-brother Barnabas. The court based on that record observed and stated that it appears to expose the dishonesty and mischief behind the complaint by the Appellant, to the effect that the allegation of threat to his life and that of Barnabas was not well founded; that it was fuelled by malice. If Barnabas, whose life was also (allegedly) threatened, comes out to say that he did not know the substance of the case, and that he begged the Appellant to withdraw at the Magistrate’s Court, then the real intention of the Appellant in subjecting his half-brothers (Respondents) and their mother to the ordeal of arrests and detention and subsequent prosecution, went beyond the allegation of threat to his life.

1.**3 Damages in a Malicious Prosecution Case**

In the event of a malicious prosecution case, the plaintiff can be awarded compensation from the defendant for punitive damages, as well as injuries to their well-being. For a civil suit, these injuries can include economic loss from mounting legal fees and time off work, harm to their reputation, and harm to their credit, humiliation, and mental suffering. In a malicious prosecution case brought forth from an original criminal case, the aforementioned injuries can be taken into account along with loss of time, health deterioration, and deprivation from society and loved ones.

It is important to note that in all cases of malicious prosecution the plaintiff must prove that by virtue of the prosecution against him he suffered damage either to his reputation, person or property. He must satisfy the court either that he was corporally punished or imprisoned or that he had been in jeopardy of such punishment or that he incurred cost in the course of the prosecution.

In ***Ogbonna V. Ogbonna & Anor***,[[20]](#footnote-20) the respondent was able to satisfy the court that he and his mother suffered damage, for the were detained in the police cell at Kafanchan on several occasions, he had to part with some amount of money in order to bail himself out and also the money he had expended as legal fees. The Court of Appeal in this case upheld both the general and special damages awarded by the lower court.

If the plaintiff had been prosecuted for any crime which could lead to imprisonment for instance, it does not matter that he was not actually imprisoned, this is sufficient damage to his person.

* 1. **Defences for Malicious Prosecution**

It can be possible that there is a reasonable cause for the prosecution of the accused which is justifiable under the law. This discourse will now focus on some of these defences thus:

1. Reasoanble suspicion that the plaintiff committed the alleged crime for which he was prosecuted. A reasonable and probable cause entails the defendant having in his position as a reasonable and sane person a set of fact which to an ordinary man will lead to the conclusion that the plaintiff has committed a criminal offence is a good defence.
2. That the plaintiff contributed to the situation through a misleading conducts which created the false impression which formed the basis for the reasonable suspicion and prosecution for the alleged crime.
3. Preservation of the security of the state[[21]](#footnote-21)
4. Judicial immunity[[22]](#footnote-22)
5. That the case is statute bar.[[23]](#footnote-23)
6. That the prosecution was an act of the officers of the law.[[24]](#footnote-24)

1. (1989) 3 NWLR pt 107, p.18 SC. [↑](#footnote-ref-1)
2. Supra [↑](#footnote-ref-2)
3. (1952) 14 WACA 73 [↑](#footnote-ref-3)
4. (2014) LPELR- 22308(CA) [↑](#footnote-ref-4)
5. (1981) 1 ALL E.R. 715 [↑](#footnote-ref-5)
6. (1908) 24 T.L.R. 884 [↑](#footnote-ref-6)
7. Wicks v Fentham (1791) 100 ER 100 [↑](#footnote-ref-7)
8. Boaler v Holder (1887) 3 TLR 546 [↑](#footnote-ref-8)
9. Supra [↑](#footnote-ref-9)
10. Casey v Automobiles Renault of Canada (1965) 4 DLR 2nd 600. [↑](#footnote-ref-10)
11. Khoury v Tabbara (1953) 12 WACA 246 [↑](#footnote-ref-11)
12. (1867) L.R.2C.P. 684 [↑](#footnote-ref-12)
13. (2014) LPELR- 22475 (CA) [↑](#footnote-ref-13)
14. Supra [↑](#footnote-ref-14)
15. (1992) 5 NWLR (Pt.243) 588 [↑](#footnote-ref-15)
16. (1837)3 BING N.C. 950 [↑](#footnote-ref-16)
17. (1959) WNLR 63 [↑](#footnote-ref-17)
18. (1883) LR11 Q.B.D 440 [↑](#footnote-ref-18)
19. Supra [↑](#footnote-ref-19)
20. Supra [↑](#footnote-ref-20)
21. 1999 Constitution, Section 45 [↑](#footnote-ref-21)
22. Egbe v Adefarasin (1987), 1 NWLR pt. 47, P.1 SC [↑](#footnote-ref-22)
23. Supra [↑](#footnote-ref-23)
24. Garba, Supra. [↑](#footnote-ref-24)