

Neighbourly Duties: Malicious Abuse of Process and Witness Immunity in Nikita

Hand's claims against her neighbours

This ideas paper examines two doctrinal hurdles to holding witnesses accountable for providing false evidence under the Irish tort of maliciously abusing the process of the court. The first stems from the tort's requirement that the primary litigation should have been instituted or maintained without reasonable belief in its chances of success. As witnesses are not expected to consider the chances of the action's success, this requirement would need to be suitably modified. The second is grounded in principles of witness immunity, grounded in the idea that witnesses owe duties to courts and not to individual litigants. Emerging case law on expert witness liability, as well as a broader understanding of relationality, I argue, may help us overcome this problem, and pave a path forward.

In July 2025, Conor McGregor lost an appeal against a civil rape case instituted against him by Nikita Hand. Soon after this, Ms Hand's solicitors began proceedings for maliciously abusing the process of the court¹ against McGregor as well as her former neighbours, Samantha O'Reilly and Steven Cummins. The facts leading up to the proceedings against O'Reilly and Cummins are as such: When McGregor had filed his appeal in the civil rape case, his legal team had sought to introduce fresh evidence by Ms O'Reilly and Mr Cummins, who had been Ms Hand's neighbours at the time the incident took place. O'Reilly and Cummins had signed affidavits to say that they had seen Ms Hand's boyfriend assault her on the same night as when McGregor had allegedly raped her. Their statements were intended to provide an alternative explanation of for the bruises on Ms Hand's body – evidence that had been relevant to the initial verdict against McGregor. The application to introduce new evidence in the form of these statements, which Ms Hand describes as 'lies', was withdrawn soon after it was filed under 'mysterious circumstances'. The withdrawn evidence was referred to the DPP for perjury, and now, Ms Hand is pursuing a civil claim for the harm that these statements caused her.

The claim against McGregor is not the concern of this article. I am more concerned by the claim brought against would-be witnesses in proceedings for maliciously abusing the process of the court. In the common law world, it is unusual to sue a witness for their

¹ Mislabelled as malicious prosecution in the court's listings.

participation in legal proceedings. To do so as part of the tort of malicious abuse is even rarer. Such an action brings up at least two doctrinal hurdles which Irish courts will have to work with if they are to find against Ms O'Reilly and Mr Cummins, in addition to evidentiary ones. Both doctrinal hurdles hinge on questions on who owes what duties to whom.

The Tort of Maliciously Abusing the Process of Court

The action for maliciously abusing the process of court is a relatively new tort. It enables a claimant to bring of a tort claim (the secondary litigation) in relation to a harm incurred on account of the institution of a preceding judicial proceeding of a civil nature (the primary litigation). The defendant in the secondary litigation is usually the party who instituted the primary litigation or 'used' a court process maliciously or in bad faith. This is a variation on the tort of malicious prosecution, which is available for harm suffered on account of maliciously pursued criminal proceedings. In this case, the primary litigation would be McGregor's unsuccessful appeal, and the secondary litigation is the present action being pursued against McGregor, O'Reilly, and Cummins. Available in Ireland since the 1981 case of *Dorene Ltd v Suedes (Ireland) Ltd (1981)*,² the action for malicious abuse of process has been used sparingly in the 45 years of its legal life. In 2006, Clarke J. of the High Court observed that the 'precise parameters of such a cause of action remain to be clearly defined'.³ But a review of the Irish law on the point reveals a nascent set of settled principles on the basis of which the evolving tort has so far been decided.

The first of these is that the primary litigation must be instituted in the absence of reasonable or probable cause, and without an even reasonable chance of success.⁴ In other words, the case should have been 'stateable', and the test for this is evidentiary. In *Dorene*, the

² [1981] 1 IR 312.

³ *Independent Newspapers v Murphy* [2006] 3 IR 566.

⁴ *Dorene Ltd v. Suedes*, [1981] 1 IR 312, *Behan v. McGinley* [2008] IEHC 18, *Dublin Waterworld Ltd v National Sports Development Authority*, [2017] IEHC 293, *Dublin Waterworld Ltd v National Sports Campus Development Authority* [2019] IECA 214.

defendant's had received legal advice that the primary litigation had no chances of success. To add to this, the defendant had a clear ulterior motive for pursuing the case, demonstrating that the primary litigation 'had been instituted for an improper purpose'. On the other hand, the secondary litigation in *Bank of Ireland v McSorely* (1994)⁵ failed because 'it was by no means improbable' that the primary litigation would succeed. The 2017 High Court decision in *Dublin Waterworld Limited v National Sports Campus Development Authority* (2017)⁶ viewed the primary litigation's success before one of various adjudication and arbitration authorities in its litigation history, as supporting the claim's apparent stateability. On appeal, it was held that the litigation history did not matter as much as whether the defendant did have actual and reasonable cause to have brought the claim in the first place.⁷

In addition to having no realistic chances of success, the tort is that the primary litigation should have failed in its entirety, or have been discontinued. If it had succeeded, it must have done so on account of a fraud on the court. Finally, and most importantly, there should be evidence of the tort having been instituted maliciously or in bad faith.⁸ Rachael Mulheron writes that even though the concept of 'malice has a 400-year history [...], it has proven to be something of a slippery eel'.⁹ This is largely because the tort of malicious abuse requires courts to examine exactly *why* the primary litigation was perused. Clear evidence of an ulterior motive or improper cause, like in *Dorene*, makes it easier. However, in other cases, it is more difficult to demonstrate. Issues of lawyers' professional privilege arise when examining the reasons why the primary litigation was instituted, or whether the defendant believed that the primary litigation had any reasonable chance of success. This came up in the

⁵ (unreported High Court 24th July 1994).

⁶ *Dublin Waterworld Ltd v National Sports Development Authority*, [2017] IEHC 293.

⁷ *Dublin Waterworld Ltd v National Sports Campus Development Authority* [2019] IECA 214.

⁸ *Dublin Waterworld Ltd v National Sports Campus Development Authority* [2019] IECA 214.

⁹ Rachael Mulheron, 'The Tort of malicious prosecution in civil proceedings: A critique and a proposal', 42(3) *Legal Studies* 420 (2022).

aftermath to *Willers v Joyce* (2006),¹⁰ where the tort was recognised, but could not be proven because legal advice received by the primary petitioner could not be reviewed on account of professional privilege. For Ms Hand's claim against O'Reilly and Cummins to succeed, she will need to show that her former neighbours acted maliciously. This would need to be an evidentiary determination, and may require an examination of legal exchanges preceding the trial. If it is found that O'Reilly and Cummins acted out of pressure exerted by McGregor and his legal team, and not out of malice or bad faith, it may not be enough to satisfy the third requirement.

More significant is the stage at which O'Reilly's and Cummins' got involved in the primary litigation. So far, the cases arising for malicious abuse of process have been against those who 'institute or maintain' legal proceedings maliciously. To 'use' or misuse' the court's process is a active conduct, and the bringing or initiation of proceedings is relevant. The ambit of the tort has been extended to include the initiation of other adjudicatory proceedings as well as court processes, but what remains important is that the defendant should have been the bringer of the legal proceedings. This flows from the first element of the action, that the defendant must have believed that the primary litigation had reasonable and probable chances of success. It is a misuse of court process to bring a claim that one doesn't have confidence in succeeding. Ms Hand's case will be a first because in addition to the bringer of a proceeding, it will also lie against witnesses in the litigation. As potential witnesses, the former neighbours did not institute the appeal in the civil rape case. However, if the requirement is read down to merely mean the malicious participation in court processes, we will still encounter difficulties relating to the first element. As witnesses, Ms O'Reilly and Mr Cummins are not expected to assess the chances of the action's success whatsoever. They are to serve as impartial and independent witnesses, and the nature of their participation must not depend on whether the

¹⁰ [2016] UKSC 43.

appeal would have succeeded on not. In view of this, to the court will need to do away with the first element while examining abuse of process actions against witnesses. Doing thus, however, would convert the tort into the one of malicious participation in court process. To prevent casting the net too wide or too vague, the scope of the action would need to be defined using intelligible criteria and elements.

Witness Immunity in Common Law

In common law, witnesses have traditionally enjoyed civil immunity from their participation in judicial proceedings. Witnesses can be prosecuted for the crime of perjury if found lying in court, but they are generally immune from tortious liability for their misstatements. The Court of Appeals has already referred the potentially perjurious statements made by O'Reilly and Cummins to the DPP for criminal action. It is in tort, however, that Ms Hand is suing them. There are policy reasons, as well as conceptual ones to justify witness immunity from civil action. There is public interest in ensuring that witnesses are able to give full and frank evidence in courts, and it is thought that the fear of civil prosecution may make witnesses reticent to do.¹¹ While this is an important consideration, it is not borne out by the experiences civil law jurisdictions which do impose such liability. Despite this, the need to ensure witness impartiality and independence has been used to justify absolute witness immunity in many common law jurisdictions, including that of England and Wales. In Ireland, however, witness immunity is not absolute, but only qualified. There are rare conditions under which a litigant can proceed against a witnesses, but this is usually invoked for expert witnesses.¹² If the Irish courts are to carve out an exception for Ms Hand's former neighbours as non-expert witnesses, they will need to consider the extent to which it would impact witness independence and frankness.

¹¹ Mercy University Hospital Cork v. Khalid M Ali Chaid Al-Safi [2019] 2 IR 478.

¹² Mercy University Hospital Cork v. Khalid M Ali Chaid Al-Safi [2019] 2 IR 478.

More troubling, however, is a conceptual hurdle, grounded in the organising principles of the law of obligations, to tortious action against witnesses. Witnesses are understood to owe their duties to courts and not to individual litigants.¹³ It follows that lying under oath is an offence against courts, and best dealt with, as a crime. Since witnesses are expected to be independent and impartial, it is argued that they do not owe duties of care or truth to their fellow citizens, including those who may be part of the litigation process.¹⁴ Seen that way, O'Reilly and Cummins did not breach any duty that they might have owed to Ms Hand, which would be a necessary element of any tortious claim against them. It is my argument, however, that this characterisation of duties is both too simplistic, and ignores the lived experiences of relationality upon which tort law was built.

What are a witness' obligations and to whom?

In recent years, there has been a move towards holding expert witnesses responsible in tort for negligently provided expert evidence. In several judgements including *Re Haughey (1971)*¹⁵ and *O'K v D'K (2001)*,¹⁶ the Irish judiciary has upheld the immunity of expert witnesses, while conceding there may be exceptional circumstances when waiving such immunity was necessary. In *Looney v Bank of Ireland (1996)*,¹⁷ a case concerning a non-expert witness, the judges agreed upon 'setting that boundary to the immunity', in situations where 'someone for a malicious purpose, or in order to abuse what he might have thought was a situation of immunity' was to make a defamatory or malicious statement. In the same case, Barrington J. expressed that there had to be a limit to witness immunity in cases of 'flagrant abuse'.¹⁸

¹³ Jones v Kaney [2010] UKSC 13, O'K v DK [2001] IESC 84, In Re Haughey [1971] IR 217

¹⁴ Jones v Kaney [2010] UKSC 13

¹⁵ [1971] IR 217

¹⁶ [2001] IESC 84

¹⁷ [1996] 1 IR 157

¹⁸ [1996] 1 IR 157

When limitations upon the immunity enjoyed by witnesses is discussed, the remuneration paid to them often comes to question. Expert witness remuneration is usually paid by the litigating party who instructed them, and the amount of their fees often comes into question when deciding cases of expert negligence.¹⁹ In *O’K*, the court reasoned that the expert witness had not been appointed or paid by the appellant, and this was relevant to the finding that the expert witness had not abused their position. The question of the fee amount also came up in *Mercy University Hospital Cork v. Khalid M Ali Chaid Al-Safi (2019)*,²⁰ although the Supreme Court eventually found no evidence of witness negligence or abuse. In 2017, the Irish Law Commission recommended the abolition of expert witness immunity. What seems relevant is a growing understanding that an expert, by virtue of their specific relationship with paying litigants, seems to have a duty towards them.

While it is relatively clear that there is a special relationship between expert witnesses and paying litigants, there appear to be no intelligible reasons for not revisiting witness immunity for witnesses who share other relational links with litigants. Reasonable neighbourliness has long been Tort Law’s main justifying principle.²¹ Not just were O’Reilly and Cummins neighbours to Ms Hand in tort i.e. it could be foreseen that their unreasonable actions could harm Ms Hand, they were also her neighbours in fact. Considering the physical and well as interpersonal proximity between neighbours, as well as the many ways in which neighbours know, and can speak about, each other’s interpersonal lives, the relational bond should be of evidence. In signing an affidavit that we know was likely to be false, the neighbours were not only violating their duty to the court, but also a relational duty owed to Ms Hand. To lie about your neighbours is as much an interpersonal, horizontal wrong as it is breach of duty to the authority whom the lie was said to.

¹⁹ [2019] 2 IR 478.

²⁰ [2019] 2 IR 478.

²¹ *Mercy University Hospital Cork v. Khalid M Ali Chaid Al-Safi* [2019] 2 IR 478.

The High Court of South Africa returned to the first principles governing witness immunity from tortious proceedings in the *Black v Joffe (2006)*.²² The judgement is a first in the common law world, as it recognises tortious (in this case, delictual) liability for the provision of false testimony by a witness. The primary litigation in this case had been a contractual dispute, where engineer's builder had provided false testimony, based on which the primary litigation had failed. Thus affected, plaintiff in the primary litigation had, had brought secondary litigation against the witness for deliberate misstatements causing economic loss. The South African High Court undertook a thorough comparative examination of legal positions across the common law world, including that of Ireland in *O'K* to develop its own position that a witness may be liable in tort for their negligent misstatements. Dlodlo J. justified his decision on principles of reasonableness, wrong, and harm in tort law, while making minimal references to malice. To him, the witness had acted unreasonably and wrongfully in making the material misstatement and this had resulted in harm to the litigant, and therefore he should be held responsible.

Even though *Black* has not been followed widely in the common law world, its principles were followed in *Jeffrey v The Minister of Justice (2022)*²³ before the Irish Supreme Court. Here, it was held that a garda officer, who made a negligent misstatement in a criminal trial, was not immune from tortious proceedings for negligent misstatement. Clarke J. examined the question of whether the presenting garda 'owes a duty of care to persons about whom a statement may be made'. His conclusion was that it was not clear that the garda did not owe such duty, even though 'sufficient doubt about the precise parameters of any duty of care owed' in such a situation. The outcome of the decision was to permit the pursuit of a claim of negligent misstatement against the witness. While Jeffrey was about the tort of negligent

²² [2007] 2 All SA 161 (C).

²³ [2019] IESC 27.

misstatement, and not the tort of maliciously abusing the process of the court, the path opened by it is one that the Irish judiciary can develop on, with due consideration of the factors noted in this piece, to hold Ms O'Reilly and Mr Cummins responsible.

Ultimately, there are two things to determine with regard to O'Reilly's and Cummins' liability are questions of what obligations do witnesses owe to whom. It is clear that witnesses are not obliged to consider a litigation's chances of success when providing evidence, and to this extent, the first test for malicious abuse of process will need to be modified. Second, courts will have to re-examine, and widen their understanding of the relational and neighbourly duties that witnesses owe to other parties in an adjudicatory process.