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concurring opinion are signs that federal supremacy, though dormant, is not yet dead.

JEAN T. ROTH

## NEGLIGENCE: LIABILITY OF PUBLIC OFFICERS — ARREST WARRANTS

Plaintiff, in a negligence action, sought to recover damages from a State Beverage Department employee for careless performance of duty and failure to make due inquiry before charging the plaintiff with a crime by causing the issuance of an arrest warrant. The trial court found the defendant guilty of negligence. *Held*, reversed: there is no legally recognized cause of action in *negligence* for improperly causing the issuance of an arrest warrant. *Wilson v. O'Neal*, 118 So.2d 101 (Fla. App.), *cert. denied*, 122 So.2d 403 (Fla. 1960).

Inasmuch as the instant case appears to be one of first impression in Anglo-American jurisdictions, it is necessary to discuss analogous concepts in order to develop properly the dichotomy existing between intentional and unintentional tort liability for improperly causing an arrest warrant to be issued.

The action of malicious prosecution is the remedy available to protect persons from unjustifiable litigation.<sup>1</sup> This remedy exists against a person who causes an arrest by maliciously bringing a suit upon false charges, or who maliciously makes out a false affidavit.<sup>2</sup> Two distinct elements, malice and want of probable cause, are the gist of this action.<sup>3</sup> Malice may exist as a matter of fact (actual malice) which requires an *intent* to inflict

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1. 34 AM. JUR. *Malicious Prosecution* §§ 1, 2 (1941); 54 C.J.S. *Malicious Prosecution* § 4 (1948); PROSSER, *TORTS* § 98 (2d ed. 1955).

2. *Delk v. Killen*, 201 Md. 381, 93 A.2d 545 (1953); *Everett v. Henderson*, 146 Mass. 89, 14 N.E. 932 (1888); *Hunter v. Karchmer*, 285 S.W.2d 918 (Mo. App. 1955); *Brusco v. Morry*, 54 R.I. 108, 170 Atl. 84 (1934); 4 AM. JUR. *Arrest* § 132 (1936); *Waite, Torts—Malicious use of legal process—Pleading*, 15 GA. B.J. 81 (1952).

3. *McClinton v. Rice*, 76 Ariz. 358, 265 P.2d 425 (1953); *Singleton v. Perry*, 45 Cal.2d 489, 289 P.2d 794 (1955); *Louder v. Jacobs*, 119 Colo. 511, 205 P.2d 236 (1949); *Glass v. Parrish*, 51 So.2d 717 (Fla. 1951); *Auld v. Colonial Stores*, 76 Ga. App. 329, 45 S.E.2d 827 (1947); *Dauphine v. Herbert*, 37 So.2d 829 (La. App. 1948); *Muniz v. Mehlman*, 327 Mass. 353, 99 N.E.2d 37 (1951); *Kennedy v. Crouch*, 191 Md. 495, 62 A.2d 582 (1948); *Merriam v. Continental Motors Corp.*, 339 Mich. 546, 64 N.W.2d 691 (1954); *Ripley v. Bank of Skidmore*, 355 Mo. 897, 198 S.W.2d 861 (1947); *Rainier's Dairies v. Raritan Valley Farms*, 19 N.J. 552, 117 A.2d 889 (1955); *Hugee v. Penn. R.R. Co.*, 376 Pa. 286, 101 A.2d 740 (1954); *Peters v. Hall*, 263 Wis. 450, 57 N.W.2d 723 (1953); 54 C.J.S. *Malicious Prosecution* § 18 (1948).

injury without legal justification.<sup>4</sup> It also may exist as a matter of law (implied malice)<sup>5</sup> which is a mere legal fiction.<sup>6</sup> Implied malice may be established by a presumption of law, in relation to the facts of the case,<sup>7</sup> or may be inferred from want of probable cause.<sup>8</sup> Probable cause consists of facts and circumstances warranting a cautious and reasonable man in the honest belief that his action and the means taken in prosecution of it are just, legal, and proper.<sup>9</sup> The burden of proving want of probable cause and malice is on the plaintiff.<sup>10</sup> An officer arresting the wrong person based upon a writ properly issued under legal authority,<sup>11</sup> may be held liable for damages if all of the essential elements of this action are present.<sup>12</sup>

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4. *Huffstutler v. Edge*, 254 Ala. 102, 47 So.2d 197 (1950); *O'Brien v. Howell*, 92 So.2d 608 (Fla. 1957); *Farish v. Smoot*, 58 So.2d 534 (Fla. 1952); *Parker v. State*, 124 Fla. 789, 169 So. 411 (1936); *Ramsey v. State*, 114 Fla. 766, 154 So. 855 (1934); *John B. Stetson Univ. v. Hunt*, 88 Fla. 510, 102 So. 637 (1925); 54 C.J.S. *Malicious Prosecution* § 41 (1948). Actual malice is never presumed, but must be proved: *Berryman v. Sinclair Prairie Oil Co.*, 164 F.2d 734 (10th Cir. 1947); *Davis v. Hearst*, 160 Cal. 143, 116 Pac. 530 (1911); 54 C.J.S. *Malice* at 926 (1948).

5. *Montgomery Ward & Co. v. Pherson*, 129 Colo. 502, 272 P.2d 643 (1954); *Brown v. Guaranty Estates Corp.*, 239 N.C. 595, 80 S.E.2d 645 (1954); *Hugee v. Penn. R.R. Co.*, 376 Pa. 286, 101 A.2d 740 (1954); 54 C.J.S. *Malicious Prosecution* § 41 (1948).

6. *Gudger v. Manton*, 21 Cal.2d 537, 134 P.2d 217 (1943); *Chesapeake Ferry Co. v. Hudgins*, 155 Va. 874, 156 S.E. 429 (1931). This is predicated on the doing of an unlawful act or the doing of a lawful act in an unlawful manner. Therefore, it cannot exist where the thing done is lawful and the means employed are lawful: *Nelson v. Melvin*, 236 Iowa 604, 19 N.W.2d 685 (1945); 54 C.J.S. *Malice* at 913 (1948).

7. *John B. Stetson Univ. v. Hunt*, 88 Fla. 510, 102 So. 637 (1925); *Rickman v. Safeway Stores*, 124 Mont. 451, 227 P.2d 607 (1951); *Davis v. Tunison*, 168 Ohio St. 471, 155 N.E.2d 904 (1959); *Stephens v. State*, 145 Tex. Crim. 100, 165 S.W.2d 721 (1942).

8. *Duval Jewelry Co. v. Smith*, 102 Fla. 717, 136 So. 878 (1931); *Progressive Life Ins. Co. v. Doster*, 98 Ga. App. 641, 106 S.E.2d 307 (1958); *Ferrell v. Livingston*, 344 Ill. App. 488, 101 N.E.2d 599 (1951); *Earle v. Winne*, 14 N.J. 119, 101 A.2d 62 (1953); *Vallon v. Ramage*, 196 Misc. 740, 93 N.Y.S.2d 56 (Sup. Ct. 1949). Although malice may be implied from want of probable cause, want of probable cause cannot be inferred from malice: *McClinton v. Rice*, 76 Ariz. 358, 265 P.2d 425 (1953); *Centers v. Dollar Markets*, 99 Cal. App.2d 534, 222 P.2d 136 (1950); *Ward v. Allen*, 152 Fla. 82, 11 So.2d 193 (1943); *Kennedy v. Crouch*, 191 Md. 495, 62 A.2d 582 (1948); *Rivkind, Malicious Prosecution in Florida*, 9 U. MIAMI L.Q. 1 (1954).

9. *Brock v. Southern Pac. Co.*, 86 Cal. App.2d 182, 195 P.2d 66 (1948); *Goldstein v. Sabella*, 88 So.2d 910 (Fla. 1956); *Harter v. Lewis Stores*, 240 S.W.2d 86 (Ky. App. 1951); 54 C.J.S. *Malicious Prosecution* § 22 (1948).

10. *Metzenbaum v. Metzenbaum*, 121 Cal. App. 64, 262 P.2d 596 (1953); *Glass v. Parrish*, 51 So.2d 717 (Fla. 1951); *Rainier's Dairies v. Raritan Valley Farms*, 19 N.J. 552, 117 A.2d 889 (1955); *Vallon v. Ramage*, 196 Misc. 740, 93 N.Y.S.2d 56 (Sup. Ct. 1949); *Perry v. Hurdle*, 229 N.C. 216, 49 S.E.2d 400 (1948); *Hugee v. Penn. R.R. Co.*, 376 Pa. 286, 101 A.2d 740 (1954).

11. *S. H. Kress & Co. v. Powell*, 132 Fla. 471, 180 So. 757 (1938); *Hawkins v. Reynolds*, 236 N.C. 422, 72 S.E.2d 874 (1952); *Caudle v. Benbow*, 228 N.C. 282, 45 S.E.2d 361 (1947); *Hobbs v. Ray*, 18 R.I. 84, 25 Atl. 694 (1892); 4 AM. JUR. *Arrest* § 132 (1936); *Rivkind, Malicious Prosecution in Florida*, 9 U. MIAMI L.Q. 1 (1954).

12. In *Tatum Bros. Real Estate & Inv. Co. v. Watson*, 92 Fla. 278, 109 So. 623 (1926), the court stated that six elements must be present in order for an action for malicious prosecution to lie: (1) the commencement or continuance of an original civil or criminal judicial proceeding; (2) its legal causation by the present defendant against the plaintiff who was the defendant in the original proceeding; (3) a bona fide termination in favor of the present plaintiff; (4) the absence of probable cause for

Judicial and quasi-judicial officers acting within the scope of their jurisdiction are exempted from liability for malicious prosecution, even though they have acted without probable cause and with malice.<sup>13</sup> However, this doctrine of immunity does not extend to police officers or other ministerial officers.<sup>14</sup>

An action of false imprisonment lies for an arrest, or some similar detentive act of the defendant, which is manifestly *illegal* in that the legal process is burdened with irregularity, as contrasted to malicious prosecution which lies for a prosecution clearly under *legal authority*.<sup>15</sup> It is a complete defense to a false imprisonment suit to show that the arrest or detention was by virtue of process, *legally* sufficient in form and not void on its face, and duly issued by a court or official having jurisdiction.<sup>16</sup> False imprisonment may be brought against an *officer* when a person not named in the

such proceeding; (5) the presence of malice therein; (6) damage conforming to legal standards resulting to the plaintiff. Nolan v. Allstate Home Equip. Co., 149 A.2d 426 (D.C. Munic. Ct. 1959); Glass v. Parrish, 51 So.2d 717 (Fla. 1951); Ward v. Allen, 152 Fla. 82, 11 So.2d 193 (1943); Duval Jewelry Co. v. Smith, 102 Fla. 717, 136 So. 878 (1931); Shelton v. Barry, 328 Ill. App. 497, 66 N.E.2d 697 (1946); Losi v. Natalicchio, 112 N.Y.S.2d 706 (Sup. Ct. 1952); Hill v. Carlstrom, 216 Ore. 300, 338 P.2d 645 (1959); Byers v. Ward, 368 Pa. 416, 84 A.2d 307 (1951); Elmer v. Chicago & N. W. Ry. Co., 257 Wis. 228, 43 N.W.2d 244 (1950); Rivkind, *Malicious Prosecution in Florida*, 9 U. MIAMI L.Q. 1 (1954); 54 C.J.S. *Malicious Prosecution* § 4 (1948).

13. Cooper v. O'Connor, 69 App. D.C. 100, 99 F.2d 135 (1938); Anderson v. Roher, 3 F. Supp. 367 (D.C. 1933); White v. Towers, 235 P.2d 209 (Cal. 1951); Prentice v. Bertken, 50 Cal. App.2d 344, 123 P.2d 96 (1942); White v. Brinkman, 23 Cal. App.2d 307, 73 P.2d 254 (1937); Pearson v. Reed, 6 Cal. App.2d 277, 44 P.2d 592 (1935); Smith v. Parman, 101 Kan. 115, 165 Pac. 663 (1917); Mitchelle v. Steele, 39 Wash.2d 473, 236 P.2d 349 (1951); Anderson v. Manley, 181 Wash. 327, 43 P.2d 39 (1935); *Ex parte* Bentine, 181 Wis. 579, 196 N.W. 213 (1923); Compare, where liability is imposed upon officers who act beyond the scope of their authority: Earl v. Winne, 14 N.J. 119, 101 A.2d 535 (1953); Hoppe v. Klapperich, 224 Minn. 224, 28 N.W.2d 780 (1947).

14. In Prentice v. Bertken, 50 Cal. App.2d 344, 350, 123 P.2d 96, 99 (1942), the court stated, "No case has been cited, and we have been unable to discover any, in which a police or peace officer was held to be exempt from civil liability in an action for malicious prosecution, where he has acted maliciously and without probable cause."; Johnson v. Moser, 181 Okla. 75, 72 P.2d 715 (1937).

15. George v. Leonard, 71 F. Supp. 662 (E.D.S.C. 1947); Riegal v. Hygrade Seed Co., 47 F. Supp. 290 (W.D.N.Y. 1942); Singleton v. Perry, 45 Cal.2d 489, 289 P.2d 794 (1955); Dodson v. Solomon, 134 Fla. 284, 183 So. 825 (1938); Barfield v. Marron, 222 La. 210, 62 So.2d 276 (1952); Earl v. Winne, 14 N.J. 119, 101 A.2d 535 (1953); Goodman v. Frank & Seder of Philadelphia Inc., 70 D. & C. 622 (Philadelphia County 1950); Dallas Joint Stock Land Bank of Dallas v. Britton, 134 Tex. 529, 135 S.W.2d 981 (1940); Murphy v. Martin, 58 Wis. 276, 16 N.W. 603 (1883); The gravamen of false imprisonment is the *unlawful detention* of another without his consent. Hobbs v. Ray, 18 R.I. 84, 25 Atl. 694 (1892); 4 AM. JUR. *Arrest* § 132 (1936); 1 JAGGARD, *TORTS* § 146 (1895).

16. Jackson v. Osborn, 254 P.2d 871 (Cal. App. 1953); Elwell v. Reynolds, 6 Kan. App. 545, 51 Pac. 578 (1897); Lepre v. Kessler, 206 Misc. 60, 134 N.Y.S.2d 286 (Sup. Ct. 1954); Mudge v. State, 45 N.Y.S.2d 896 (Ct. Cl. 1944). The burden of proof to establish reasonable grounds for the arrest is upon the defendant: Coyne v. Nelson, 237 P.2d 45 (Cal. App. 1951); Blocker v. Clark, 126 Ga. 484, 54 S.E. 1022 (1906); Muniz v. Mehlman, 327 Mass. 353, 99 N.E.2d 37 (1951); Vallon v. Romage, 196 Misc. 740, 93 N.Y.S.2d 56 (Sup. Ct. 1949); Johnson v. Reddy, 163 Ohio St. 347, 126 N.E.2d 911 (1955); 4 AM. JUR. *Arrest* § 118 (1936).

warrant is wrongfully arrested.<sup>17</sup> If the officer arrests the right party under a warrant issued in the name of another person, this action will lie.<sup>18</sup> In case the arrest is made without a warrant and the offense complained of does not amount to a crime,<sup>19</sup> or when the wrong person arrested has the same name as the party intended to be arrested, false imprisonment is the proper action.<sup>20</sup> The mistake of the officer in arresting the wrong person will not be an absolute defense, but may go in mitigation of damages.<sup>21</sup>

In the instant case,<sup>22</sup> the court discussed the public policy aspects of expanding the field of liability for wrongful arrest by a public officer to an action in negligence. Adhering to the rationale expressed in another jurisdiction,<sup>23</sup> the court stated that "the protection of society from crime

17. *Ryburn v. Moore*, 72 Tex. 85, 10 S.W. 393 (1888); *Hays v. Creary*, 60 Tex. 445 (1883); *Melton v. Rickman*, 225 N.C. 700, 36 S.E.2d 276 (1945) (*dictum*); See also *George v. Leonard*, 71 F. Supp. 662 (E.D.S.C. 1947) (approving *dictum* in *Melton*).

18. *West v. Cabell*, 153 U.S. 78 (1894); 4 AM. JUR. *Arrest* § 132 (1936).

19. *Adair v. Williams*, 24 Ariz. 422, 210 Pac. 853 (1922); *Standard Sur. & Cas. Co. of N.Y. v. Johnson*, 74 Ga. App. 823, 41 S.E.2d 576 (1947); *Filer v. Smith*, 96 Mich. 347, 55 N.W. 999 (1893); *Gill v. Montgomery Ward & Co.*, 129 N.Y.S.2d 288 (App. Div. 1954); *Formalt v. Hylton*, 66 Tex. 85, 1 S.W. 376 (1886). An officer will not be liable for false arrest if he arrests a person without a warrant provided the officer has reasonable ground to believe that a felony has been committed: *American Ry. Exp. Co. v. Summers*, 208 Ala. 531, 94 So. 737 (1922); PROSSER, *TORTS* § 26 (2d ed. 1955).

20. When an officer, pursuant to valid process, with *due diligence* arrests a man bearing the same name as the one mentioned in the process, honestly believing that he is arresting the person intended, he cannot be held liable for false imprisonment. *Schneider v. Kessler*, 97 F.2d 542 (3d Cir. 1938); *accord*, *Inmon v. Miss.*, 278 Fed. 23 (5th Cir. 1922); *Kalish v. White*, 36 Cal. App. 604, 173 Pac. 494 (1918); *Blocker v. Clark*, 126 Ga. 484, 54 S.E. 1022 (1906). In *Blocker v. Clark*, *supra*, the court stated that if an officer arrests a person bearing the same name stated in the warrant, and there is only one person bearing that name in the area of the officer, the officer will be protected in making the arrest; while if there are two or more persons of the same name within the territory, the officer should make a diligent identity of the person named in the warrant. If after making such inquiry he arrests a person in good faith, believing him to be the person named in the warrant, the rule seems to be that the officer will be protected. *accord*, *King v. Robertson*, 227 Ala. 378, 150 So. 154 (1933). In *Wolf v. Perryman*, 82 Tex. 112, 123, 17 S.W. 772, 777 (1891), where the wrong man with the same name as the intended was arrested, the court stated, "the defendants had time and opportunity to investigate as to the legality and reasonable grounds of holding appellant as a felon. They failed to investigate, or if they investigated, they disregarded the plain, evident truth, and still on speculation held him." It seems evident from authority that an officer arresting the wrong person with the same name as the intended will be held liable for failure to make a diligent investigation and *bona fide* identification of the person named in the warrant: *Walton v. Will*, 66 Cal. App.2d 509, 152 P.2d 639 (1944); *Clark v. Winn*, 19 Tex. Civ. App. 223, 46 S.W. 915 (1898).

21. *Simpson v. Boyd* 221 Ala. 14, 101 So. 664 (1924); *Goodwin v. Allen*, 89 Ga. App. 187, 78 S.E.2d 804 (1953); *Standard Sur. & Cas. Co., of N.Y. v. Johnson*, 74 Ga. App. 823, 41 S.E.2d 576 (1947); *Mitchell v. Malone*, 77 Ga. 301 (1886); *Formwalt v. Hylton*, 66 Tex. 288, 1 S.W. 376 (1886); *Hays v. Creary*, 60 Tex. 445 (1883); 22 AM. JUR. *False Imprisonment* § 109 (1939).

22. 118 So.2d 101 (Fla. App. 1960).

23. In *Atkinson v. Birmingham*, 44 R.I. 123, 128, 116 Atl. 205, 207 (1922), the court stated that ". . . public policy requires the protection of those who in good faith and upon reasonable ground have instituted criminal proceedings. This perhaps

would likely be adversely affected if law enforcement agents were subject to liability . . . for simple negligence in the performance of their duties. . . ."<sup>24</sup> More cogent weight was given to this rationale than to the opposing theory<sup>25</sup> which adopts the belief that citizens should be given greater protection against the irresponsible institution of civil or criminal proceedings. The court refused to extend the field of liability for the careless performance of an officer in causing the issuance of an arrest warrant from an *intentional* tort action (malicious prosecution) to an *unintentional* tort action (negligence).<sup>26</sup>

The court deserves commendation for its determination that law enforcement officers require protection and immunity from liability in negligence for improperly causing the issuance of an arrest warrant.<sup>27</sup> This decision reduces the officer's apprehension of constant law suits and increases his efficiency.<sup>28</sup> The fear that responsible, capable men would not accept public office because of the threat of personal liability is also diminished.<sup>29</sup> To expand the field of liability to *unintentional* tort would seriously cripple the effective administration of public safety against crime.

STANTON S. KAPLAN

## COURTS — APPEALS FROM ADMINISTRATIVE BOARDS

The appellees applied to the Pinellas County Water and Navigation Control Authority for a permit to fill certain submerged lands. The appellants excepted to a ruling in favor of the appellees, and an appeal was taken to the circuit court which affirmed the order of the County Authority. The appellants thereupon appealed to the district court of appeal which ruled that it did not have authority to entertain the appeal as such but would treat it as a petition for certiorari. Upon review by the Florida Supreme Court, *held*, the circuit court sat as a "trial court" for purposes of the constitutional provision giving district courts of appeal

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amounts to no more than saying that no one shall be found liable for instituting a criminal prosecution unless . . . he acted without probable cause and with malice." (*Negligent* arrest was not at issue in this case).

24. See note 22 *supra* at 105.

25. In *Melvin v. Pence*, 76 U.S. App. D.C. 154, 159, 130 F.2d 423, 428 (1942), an action by a private detective against private citizens for instigating the revocation of the plaintiff's license, the court stated that "While members of the public should be careful not to make unfounded charges of criminal conduct, it is better that some charges be made than that persons having the knowledge of the commission of a crime or reasonable ground for believing it has been committed shall be deterred from reporting it to the proper officials by fear of civil liability for doing so."

26. See note 22 *supra* at 105.

27. See note 22 *supra* at 104.

28. Keefe, *Personal Tort Liability of Administrative Officials*, 12 *FORDHAM L. REV.* 130 (1943).

29. *Ibid.*