

**IN THE SUPREME COURT OF NOVA SCOTIA**

**Citation:** *Cave v. Bambury*, 2012 NSSC 129

**Date:** 20120328

**Docket:** Hfx No. 280323

**Registry:** Halifax

**Between:**

Ralph Douglas Cave

Plaintiff

- and -

Jacqueline Bambury, Lance Trevor Sparks (aka Lance Trevor States)  
Tammy MacDonald, Mark Kellock and Halifax Regional Municipality  
and Attorney General of Canada (on behalf of the Royal Canadian Mounted Police)

Defendants

- and -

Jacqueline Bambury and Lance Trevor Sparks

Plaintiffs by Counterclaim

- and -

Ralph Douglas Cave

Defendant by Counterclaim

**Judge:** The Honourable Justice N.M. Scaravelli

**Heard:** November 7, 8, 9, 10, 14, 15, 2011, and March 14-15, 2012,  
in Halifax, Nova Scotia

**Counsel:** Stephen C. Kent, for the plaintiff and defendant by  
counterclaim, Ralph Douglas Cave

Martin C. Ward, Q.C. and Karen MacDonald,  
Co-Counsel, for the defendants, Tammy MacDonald and  
Halifax Regional Municipality

Michael P. Scott, for the defendants and plaintiffs by  
counterclaim, Jacqueline Bambury and  
Lance Trevor Sparks

**By the Court:**

[1] This Action involves a claim for damages arising out of three arrests of the Plaintiff, Ralph Cave, on February 27<sup>th</sup>, March 6<sup>th</sup>, and April 8<sup>th</sup>, 2004. Mr. Cave commenced proceedings against Constable Tammy MacDonald of the Halifax Police and Corporal Mark Kellock of the R.C.M.P., and vicariously against their respective employers, Halifax Regional Municipality and The Attorney General of Canada. In addition, Mr. Cave claims against the Defendants, Jacqueline Bambury and Lance Sparks who were the complainants in the matters leading to the three arrests.

[2] The Plaintiff claimed against the police and their employers for negligent investigation, false arrest and imprisonment and violation of rights under the *Canadian Charter of Rights and Freedoms*. The claim against Corporal Kellock and the Attorney General of Canada was settled and dismissed prior to trial.

[3] The Plaintiff alleges that Ms. Bambury and Mr. Sparks made false and misleading statements or negligent statements to the police. He claims against them for malicious prosecution, wrongful imprisonment, abuse of legal process and negligence.

[4] The Defendants, Bambury and Sparks, have counterclaimed for damages against Mr. Cave alleging several incidents of damage to their motor vehicles.

## **BACKGROUND**

[5] This matter arose out of a past, friendly relationship between Mr. Cave, 71 years old at the time, and Ms. Bambury 26 years old. They were introduced in 2002 by Mr. Cave's daughter who, at the time, shared an apartment with Ms. Bambury on Chebucto Road, Halifax. Mr. Cave resided in Middle Sackville and would socialize with Ms. Bambury, his daughter and others by visiting the apartment, having group lunches, making phone calls to the apartment, including friendly conversations with Ms. Bambury. Other outings included walks with the family dog. In 2002 Mr. Cave as a gift, funded a trip to Vietnam for his daughter, Ms. Bambury and another roommate.

[6] This relationship continued when Ms. Bambury moved to her own apartment in Lower Sackville the end of May 2003. Mr. Cave would regularly telephone Ms. Bambury and drop by her apartment. The group lunches continued. At times Mr. Cave and Ms. Bambury would go to dinner alone. Mr. Cave would occasionally drop off

food and other items to Ms. Bambury, either personally or leaving them at the door of her residence.

[7] The complaints to police regarding Mr. Cave's behaviour in late 2003, occurred after Ms. Bambury began dating the Defendant, Lance Sparks, who regularly stayed over at Ms. Bambury's residence. Ms. Bambury ultimately complained of stalking-type behaviour on the part of Mr. Cave, including following her, driving by and parking near her house, showing up at locations that were part of her normal routine, making disturbing phone calls and leaving disturbing messages. Ms. Bambury and Mr. Sparks also complained about several incidents of damage to their vehicles alleged to have been committed by Mr. Cave.

[8] During the relevant time period, Constable MacDonald was seconded to the R.C.M.P. pursuant to a Temporary Exchange of Personnel Agreement between Halifax Regional Police and the R.C.M.P. Mark Kellock of the R.C.M.P. was stationed at the Sackville Detachment and worked with Constable MacDonald on the complaints received from Ms. Bambury and Mr. Sparks.

[9] As indicated, Mr. Cave was arrested on three occasions in February, March and April of 2004. He was ultimately charged with criminal harassment, property damage and breach of undertaking. These charges worked their way through the Court system until July 2006 when the Crown withdrew the charges.

## **NON-SUIT**

[10] Following presentation of the Plaintiff's evidence, the Defendants, Constable MacDonald and Halifax Regional Municipality (HRM), made a Motion for Non-Suit pursuant to *Civil Procedure Rule 51.06*, on the ground there was no evidence adduced by the Plaintiff on which a properly instructed jury could find for the Plaintiff. On a Motion for Non-Suit, it is not the function of the court to weigh evidence, to determine credibility or to evaluate the positions of the parties as against one another.

### False Arrest and Imprisonment

[11] Regarding the claim of false arrest and imprisonment, the legal issues involved the establishment by the Plaintiff of the fact of an arrest and imprisonment. If

established, the burden shifts to the Defendants to show it was legally justified based on the test of reasonableness or reasonable grounds.

[12] I was satisfied the Plaintiff adduced evidence regarding involvement of Constable MacDonald in causing the Plaintiff's arrest and imprisonment from which standing on its own and if believed, required the Defendant to adduce evidence of reasonable and probable grounds for arrest. Accordingly, the Motion for Non-Suit as it relates to the claim of false arrest and imprisonment, was refused.

#### Negligent Investigation

[13] The claim for the tort of negligent investigation against a police officer required the Plaintiff to demonstrate there were no reasonable and probable grounds upon which to lay charges against him. Absent overwhelming evidence, which did not exist in this case, the Plaintiff must adduce evidence as to the appropriate standard of care. That is, evidence of what a reasonable police officer would do in similar circumstances. Although Constable MacDonald owed a duty of care to the Plaintiff, there was no evidence adduced by the Plaintiff as to the standard of care required in these circumstances. As a result, the Plaintiff had not adduced evidence from which a

reasonable jury could infer liability for negligent investigation. The Motion for Non-Suit with respect to this claim was granted.

Breach of *Charter* Rights

[14] The Plaintiff's action did not specify the sections of the *Charter* alleged to have been violated, although at trial the parties addressed Sections 7 and 9. That is, the right not to be deprived of liberty, except in accordance with fundamental principles of justice, and the right not to be arbitrarily detained. In the context of a civil action against a police officer there must be some evidence of maliciousness or capriciousness likened to bad faith on the part of Constable MacDonald. This test is beyond the test of acting on reasonable and probable grounds to arrest. There was no evidence adduced by the Plaintiff that Constable MacDonald engaged in conduct of this nature. The Motion for Non-Suit as it related to this claim was granted.

## **FALSE ARREST AND IMPRISONMENT**

### February 27, 2004 Arrest

[15] Constable MacDonald's involvement began on February 17<sup>th</sup>, 2004 when she and Corporal Kellock responded to an early morning call from Ms. Bambury regarding damage caused to Mr. Sparks' motor vehicle while parked at the Sackville Sports Stadium. Constable MacDonald observed a long scratch along the passenger side, rear quarter panel of the vehicle. Ms. Bambury identified Mr. Cave as the person she observed crouching by the vehicle in the area of the damage. As she approached, Mr. Cave fled the area. Constable MacDonald took a written statement from Mr. Sparks while Corporal Kellock took a statement from Ms. Bambury. Constable MacDonald also took her own notes at the time.

[16] In her statement, Ms. Bambury detailed her background involvement with Mr. Cave. She stated that Mr. Cave eventually began offering her money to "sleep over" at his residence and later to have sex with him. She refused. After she moved to Sackville, Mr. Cave showed up at her residence and thereafter continued to contact her and leave items at her door, and show up at places she would frequent. Ms. Bambury



stated that she continued contact with Mr. Cave as she felt sorry for him. In November 2003, Mr. Cave, to her surprise, drove her to a car dealership and purchased a used Honda vehicle. He told her the vehicle was for her and would be transferred into her name in January 2004, after they had “four sleep overs.” Afterwards, he left a telephone message telling Ms. Bambury that he purchased an air mattress and bedding for the sleep overs. Two days later when Mr. Cave discovered Ms. Bambury and Mr. Sparks together, he demanded the vehicle back. He picked up the vehicle the next day. Ms. Bambury stated to the police that Mr. Cave’s attitude had changed when she began dating Mr. Sparks. He continued to follow her. The telephone calls and messages became nasty. Mr. Sparks car was damaged on several occasions, with this incident being the most recent.

[17] At the time, Constable MacDonald seized two letters from Mr. Cave’s former solicitor responding to allegations of damage to vehicle. Also a card with a note and an unsigned \$1,000 cheque from Mr. Cave as well as a tape containing four voice mail messages left by Mr. Cave, which Constable MacDonald transcribed. In the voice mail messages, Mr. Cave speaks of the gifts he gave Ms. Bambury and acknowledged that she had told him that she didn’t want them. He also speaks of having a sleep over with Ms. Bambury, and in one message states: “That the car will be yours, just let Ralph

make love to you, on each of your floors.” In these rambling calls, Mr. Cave has referred to Mr. Sparks going to get what he didn’t have a chance of getting and referred to Mr. Sparks as “the freak”.

[18] Constable MacDonald testified she became aware of an ongoing harassment file at the R.C.M.P. Detachment concerning Ms. Bambury and Mr. Cave. These complaints were investigated by other officers and the file indicated the R.C.M.P. previously cautioned Mr. Cave to stay away from Ms. Bambury.

[19] On February 17<sup>th</sup>, 2004, Constable MacDonald travelled to Mr. Cave’s residence to speak to him. He was not at home. She left her business card in his door. She attempted, without success, to contact him by telephone. At 6:30 p.m. on the same date, Ms. Bambury contacted the R.C.M.P. and advised that both rear tires on one of Mr. Sparks’ vehicles had been flattened. Based on information and evidence gathered to date, Constable MacDonald and Corporal Kellock made a determination that Mr. Cave was arrestable for criminal harassment and property damage.

[20] Constable MacDonald went on vacation from February 21<sup>st</sup> to March 4<sup>th</sup>, 2004. On February 27<sup>th</sup>, 2004, Corporal Kellock attended Mr. Cave’s residence and arrested

him for criminal harassment and property damage. Corporal Kellock did not have a warrant for his arrest at that time. Mr. Cave was read his *Charter* Rights and Police Caution and was provided an opportunity to call his lawyer once back at the Sackville Detachment. He was released on a Promise to Appear and Undertaking to have no contact, direct or indirect, with Ms. Bambury or Mr. Sparks. Corporal Kellock transported Mr. Cave back to his home.

March 6<sup>th</sup>, 2004 Arrest

[21] Constable MacDonald's testimony and notes indicate that on March 5<sup>th</sup>, 2004 she received a call from Ms. Bambury reporting another incident of damage to their motor vehicle while parked in the Staples parking lot where both she and Mr. Sparks worked. A substance believed to be acid was sprayed on the vehicle, causing the paint to bubble. Ms. Bambury advised the vehicle was parked near a video surveillance camera and would implicate Mr. Cave. On Saturday, March 6<sup>th</sup>, while on patrol, Constable MacDonald received a telephone call from Ms. Bambury regarding an encounter with Mr. Cave at the Superstore. Ms. Bambury stated she drove into the parking lot and observed Mr. Cave's vehicle parked by a coral. She drove to the opposite end of the lot and stopped to call Mr. Sparks. Mr. Cave drove his vehicle to

her location, stopped, smirked and nodded at her. Constable MacDonald testified she placed a call over the air advising that Mr. Cave breached his undertaking. Around the same time, Constable MacDonald listened to a call over the air from Dispatch advising that Mr. Cave called in a complaint that a vehicle nearly ran over him at the Superstore lot. He gave a description and license number similar to the vehicle driven by Ms. Bambury.

[22] Constable MacDonald considered the matter serious given the history, prior arrests and undertaking, and Ms. Bambury's increasing concern for her safety.

[23] Corporal Kellock responded to the calls and drove to a location near the Superstore where he arrested Mr. Cave for breach of undertaking. Mr. Cave was remanded into custody until the following Monday, when he appeared before a judge. He was charged with criminal harassment, property damage to vehicles on February 17<sup>th</sup> and March 5<sup>th</sup>, 2004, and breach of his undertaking given on February 28<sup>th</sup>, 2004. Mr. Cave was released on a recognizance with conditions, including no contact with Bambury or Sparks.

April 8<sup>th</sup>, 2004 Arrest

[24] Constable MacDonald received an evening call from Mr. Sparks alleging a breach of recognizance by Mr. Cave as a result of an encounter between Sparks, Bambury and Cave inside the Superstore. Sparks stated that Cave approached them at the Deli Counter where a heated exchange took place, after which Mr. Cave left.

[25] Constable MacDonald and Corporal Kellock determined there were grounds to arrest Mr. Cave for breach. Constable MacDonald travelled to the Superstore, while Corporal Kellock and another officer travelled to Mr. Cave's residence. Corporal Kellock testified that Mr. Cave was at home. He did not answer the door. From inside the house, Mr. Cave stated that he was going to end his life—that he would be dead before they got into the house. The police then forced the door open and took Mr. Cave into custody under the *Hospital Act*. Mr. Cave was transported to the Dartmouth General Hospital, where Corporal Kellock advised that he was under arrest for breach. Constable MacDonald travelled to the Superstore to interview staff. From their prospective, the altercation appeared to be a chance encounter. With that information and Mr. Cave's suicide utterance, Constable MacDonald concluded she would not

charge him with the breach. She travelled to Dartmouth Hospital. Mr. Cave was admitted to the Nova Scotia Hospital that evening.

## **DISPOSITION OF CHARGES**

[26] There were delays in bringing the charges to trial caused by adjournments. The matters were finally set for trial July 2006. Constable MacDonald testified that on the date of trial she met with the Crown attorney, Bambury and Sparks. The prosecution was unable to locate the person required to testify as to damages and repairs to the vehicles. Mr. Harley, who viewed and as was in charge of the video taken at Staples parking lot was not available for trial. Bambury and Sparks were content with not having any had any further contact with Mr. Cave in the previous two years. As a result, a decision was made not to proceed with the prosecution and the charges against Mr. Cave were dismissed.

## **LAW**

[27] A concise statement regarding the tort of wrongful arrest is found in *Frazier v. Purdy* (1991), 6 O.R. (3d) 429 at p. 435:

This tort is a branch of the trespass action and no actual loss is required to establish a claim for damages. The plaintiffs must only prove that they were arrested or detained and that the arrest or detention was caused by the defendants. Once the plaintiffs prove the arrest occurred the onus shifts to the defendants to justify their actions. The Supreme Court of Canada in *R. v. Whitfield*, [1970] S.C.R. 46 [1970] 1 C.C.C. 129, restates the long-standing rule that no one can lawfully detain another person without lawfully arresting him first. Once an arrest has been made, it constitutes an imprisonment and must be justifiable. Once the plaintiff has established that his arrest occurred, the onus shifts to the defendants to prove the arrest was lawful.

[28] The Court in *Charlton v. St. Thomas Police Services Board*, [2009] O.J. No. 2132 (Sup. Ct.) summarized the law with respect to what constitutes reasonable and probable grounds to arrest:

37 In *R. v. Storrey*, [1990] S.C.J. No. 12, the Supreme Court of Canada defined the concept of reasonable and probable grounds in the following way:

In summary then, the *Criminal Code* requires that an arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. Those grounds must, in addition, be justifiable from an objective point of view. That is to say, a reasonable person placed in that position of the officer, must be able to conclude that there were indeed reasonable and probable grounds for the arrest. On the other hand, the police need not demonstrate anything more than reasonable and probable grounds.

38 In establishing reasonable and probable grounds, investigating officers must take into account all information available to them and are only allowed to disregard information which they have good reason to believe is unreliable. Further, reasonable and probable grounds can still exist, even where the information relied upon changes at a future date or otherwise turns out to be inaccurate. The requirement is that the

information be reliable at the time the decision was made to arrest the accused: *R. v. Golub*, [1997] O.J. No. 3097 (C.A.).

39 An arresting officer does not have to establish a *prima facie* case for conviction before having reasonable and probable grounds. See, for example, *R. v. Storrey, supra*; and *Collis v. Toronto Police Services Board*, [2007] O.J. No. 8301 (Div. Ct.)

40 An arresting officer does not need to establish that the accused has no valid defence to the charge before making an arrest. Moreover, an arresting officer is not required to obtain the accused's version of events before being able to form reasonable and probable grounds. Similarly, an arresting officer is not required to assess the validity of competing versions of events before being able to form reasonable and probable grounds: *Wyles v. Ontario (Police Complaints Commissioner)*, [1997] O.J. No. 6274 I(Div. Ct.)

41 An arresting officer does not have to complete an investigation before being able to lawfully arrest a suspect, nor does the intention to conduct further investigation after an arrest undermine the formation of reasonable and probable grounds: *R. v. Storrey, supra*. Police officers are not required to evaluate information that they receive according to legal standards, nor are they required to make legal judgments. Police are required to weigh evidence to some extent in the course of an investigation. But they are not required to evaluate evidence according to legal standards to make legal judgments. That is the task of prosecutors, defence attorneys and judges: *Hill v. Hamilton-Wentworth Regional Police Services Board, supra*. Furthermore, the withdrawal of charges at a later time, or the absence of a criminal conviction, does not lead to an automatic conclusion reasonable and probable grounds did not exist for an accused's arrest: *Collis v. Toronto Police Services Board, supra*.

42 Finally, arresting officers have significant discretion in how they conduct investigations, and for good reason. Officers are not to be judged with the acuity of hindsight, nor are they held to a standard of perfection. Investigations are frequently carried out in dynamic and changing circumstances. The fact that a different investigation, or a more detailed investigation, may have led to a different or a more optimal result is not determinative of whether reasonable and probable grounds existed. In *MacPhee v. Ottawa Police Services Board*, [2003] O.J. No. 3786 (S.C.J.) the court made the following observation:



It is also important to remember that the arresting police officers were not seized with the responsibility of deciding guilt or innocence, but rather whether the information received by them required action by them and what action ... A further and more detailed investigation may have elicited more information and may have caused the police officers to act differently. However, the conduct of the defendants cannot be examined in minute detail on an after-the-fact basis. As aforesaid the question is whether their conduct was reasonable in the circumstances.

## **ANALYSIS**

[29] The plaintiff, Mr. Cave, denies any involvement in harassment, property damage or breach of undertaking as alleged by the complainants, Bambury and Sparks.

[30] During closing submissions, Mr. Cave acknowledged the police (Constable MacDonald and Corporal Kellock) had reasonable grounds to arrest him on February 17<sup>th</sup>, 2004. He submits that, as a result of participating in the decision to arrest him, Constable MacDonald is liable for Corporal Kellock's unlawful arrest of Mr. Cave at his home on February 27<sup>th</sup>, 2004, without a warrant. I have already determined in the non-suit motion there is no evidence that Constable MacDonald breached any *Charter* rights. While Constable MacDonald could face liability for the arrest of Mr. Cave on February 27<sup>th</sup>, 2004 without reasonable grounds, there is no evidence she participated or was in any way connected to the decision to arrest Mr. Cave at his house without a

warrant on that date. The evidence at trial was that Constable MacDonald was on vacation from February 21<sup>st</sup> to March 4<sup>th</sup>, 2004.

[31] Mr. Cave submits the police decision to arrest him on March 6<sup>th</sup>, 2004 for breach of undertaking immediately upon receiving the complaint of Ms. Bambury, was unreasonable. Mr. Cave had complained to the police at the same time and he remained in the area. The police did not question him prior to his arrest. Further, Mr. Cave submits the police were not entitled to consider the background of this matter in determining to arrest him on that date. I disagree. In considering reasonable and probable grounds, Constable MacDonald was required to consider all information available at the time. In addition to the history of this matter, Constable MacDonald was aware of the acid damage to the complainant's vehicle the day before and was informed a video would implicate Mr. Cave. Based on the information provided by Ms. Bambury on March 6<sup>th</sup>, 2004, Mr. Cave drove his vehicle to her location after the encounter at the Superstore parking lot despite his undertaking to have no contact. Constable MacDonald believed there was an escalation of Mr. Cave's behaviour which viewed objectively, given the circumstances, was reasonable.

[32] Mr. Cave was not charged for breach following the arrest on April 8<sup>th</sup>, 2012 as a result of Constable MacDonald's further investigation. He submits that had Constable MacDonald interviewed the witnesses at Superstore directly after receipt of the complaint, the arrest would not have occurred. The issue before the court is whether Constable MacDonald's action, viewed objectively, justified her decision to arrest after receiving the complaint of the altercation inside the Superstore. Given the circumstances of this case, her decision was reasonable. The fact that the police did not charge Mr. Cave as a result of further investigation is not relevant. The decision to arrest is not predicated on completing an investigation to the extent of establishing grounds for conviction.

[33] Having considered all the factors surrounding the arrests objectively, I conclude that Constable MacDonald had reasonable and probable grounds upon which to arrest Mr. Cave on these occasions.

[34] As a result, Mr. Cave's claim against Constable MacDonald and HRM is dismissed.

## MALICIOUS PROSECUTION

[35] The plaintiff, Cave, claims that the defendants, Bambury and Sparks, wrongfully set the law in motion resulting in his arrests and detention. He claims damages for malicious prosecution.

[36] The tort of malicious prosecution is reviewed in *Nelles v. Ontario*, [1989] 2 S.C.R. 170:

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* (5<sup>th</sup> 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 spirit of vengeance and includes any other improper purpose, such as to gain a private collateral advantage” (Fleming, op. cit., at p. 609)...

...

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 to 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.

[37] Ms. Bambury and Mr. Sparks deny they initiated the prosecution against Mr. Cave. In any event, they submit they had reasonable and probable cause.

[38] The onus is on the plaintiff to prove all of the elements of malicious prosecution. In order to prove the first element of the test, the plaintiff must prove the defendants played an active role in the decision to prosecute beyond supplying information. As stated in *St. Jacques v. Doyle*, [2008] CanII 9381(ONSCDC):

[16] Only in exceptional circumstances will a private citizen or complainant be found to have initiated a prosecution for purposes of an action in malicious prosecution. The Ontario Court of Appeal has identified the following as indicia of such exceptional circumstances:

- (a) the complainant desired and intended that the plaintiff be prosecuted;
- (b) the facts were so peculiarly within the complainant's knowledge that it was virtually impossible for the professional prosecutor to exercise any independent discretion or judgment; and
- (c) the complainant procured the institution of proceedings by the professional prosecutor, either by furnishing information that he knew to be false, or by withholding information that he knew to be true, or both.

*Kefeli, supra*, at para. 24 [[2002] O.J. 3023 (C.A.) added]

[39] Although there was a desire on the part of the defendants to prosecute Mr. Cave, there were other material facts provided to the prosecutor at the time that enabled an independent determination to prosecute. As a result, I am not satisfied the plaintiff has proven the first element of the test for malicious prosecution.

[40] Even if the plaintiff were to succeed in establishing the first element, I am not satisfied that the plaintiff has established the absence of reasonable and probable cause or malice operating in the minds of the defendants. This evidence would necessarily have to evolve from the circumstances in which the prosecution was initiated. In this regard, I find the plaintiff failed to establish any motive, statement of ill intentions or other collateral objectives on the part of Bambury and Sparks.

[41] In terms of Mr. Cave's testimony, I find he was not a credible witness. He was evasive and at times argumentative in cross-examination. He either refused to acknowledge prior inconsistent statements or gave implausible explanations. His explanations for driving by Ms. Bambury's residence, parking outside her home or showing up at her regular destinations after the relationship broke down, were not plausible. His explanations and denials regarding the content of his recorded telephone messages are not believable. His alibi evidence of being at work 12 hours a day, 6 days a week, was contradicted by documented records from the security gate. His employer (a relative) contradicted Mr. Cave's evidence regarding payment for work.

[42] Mr. Cave did not state that Bambury and Sparks gave false information to police when asked under cross-examination to explain his reason for bringing this legal action against them. His response was directly related to the first time he discovered Bambury and Sparks together in her car when he drove to her home after she made a false excuse for not going out with him over the phone. It is evident Mr. Cave wanted more out of the relationship with Ms. Bambury than she was prepared to give. Whether she took advantage of Mr. Cave's generosity is not an issue in this trial. His attitude and actions toward Ms. Bambury and Mr. Sparks clearly changed once their

relationship became known to him. They responded appropriately by complaining to the police.

[43] The plaintiff's action for malicious prosecution is dismissed.

### **COUNTERCLAIM**

[44] Ms. Bambury claims Mr. Cave severely damaged her vehicle "on about seven occasions" from October 2003 continuing into 2004. Mr. Sparks claims Mr. Cave damaged his vehicle beyond repair "on or about January 2004." They claim special damages as well as general damages for emotional suffering.

[45] According to the evidence of Bambury and Sparks, the incidents of damage to their vehicles began after Mr. Cave learned of their relationship in October of 2003 and ended after his third arrest which resulted in remand in jail the weekend of March 5<sup>th</sup>, 2004. Damage included scratches, slashed tires, sugar in the gas tank and acid-type spray causing the paint to bubble. On the morning of February 27<sup>th</sup>, 2004, Ms. Bambury testified she left the Sackville Sports Gym and noticed Mr. Cave standing beside her vehicle in the parking lot. As she approached, Mr. Cave "scoted away".



Ms. Bambury observed a scratch on the rear passenger side of the vehicle in a similar location to a scratch that had previously been repaired. There were also nails in her tires.

[46] On March 5<sup>th</sup>, 2004, their vehicle was sprayed with an acid-type substance while parked near a video camera in the Staples parking lot where Bambury and Sparks were employed. Mr. Sparks testified he viewed a video of the incident. While he was unable to identify Mr. Cave's face, he observed Mr. Cave's vehicle enter the parking lot. Mr. Sparks identified the person who later walked by his motor vehicle as Mr. Cave based upon the same clothing he continually wore and the manner in which he walked. This person made a motion with his arm alongside the vehicle. Damage caused to the vehicle was a result of acid-type spray. Mr. Sparks testified that he was unable to get a copy of the video as it had been inadvertently taped over. Mr. Sparks viewed the video tape in the presence of the Operations Manager at the time.

Similar Fact Evidence

[47] An issue regarding the admissibility of similar fact evidence adduced on behalf of Bambury and Sparks was heard on *voir dire*. The purpose of adducing the evidence was to establish situation-specific behaviour that would identify Mr. Cave as the person responsible for damage to the vehicles. The framework for admissibility of similar fact evidence is set out in *R. v. Handy*, [2002] S.C.R. 908. Evidence of discreditable conduct on other occasions is presumptively inadmissible. Evidence tendered solely to show a disposition or propensity to act in a similar way is inadmissible. The evidence must be relevant and substantially similar in nature as to render coincidence improbable. The court must be satisfied on a balance of probabilities that the probative value of the evidence outweighs its potential prejudice.

[48] The similar act evidence adduced by the similar fact witness was strikingly similar to Ms. Bambury's fact scenario. A younger woman befriended by Mr. Cave, daily contact by telephone or drop by. Leaving food and gifts, including jewellery, at the her home. Buying her a car at the same Honda dealership. Termination of direct contact when she began dating a boyfriend, followed by several identical incidents of damage to her motor vehicle. Allegations of following her and showing up at her

destinations. The only dissimilarity was no evidence of Mr. Cave seeking sexual favours.

[49] The similar fact witness complained to the police resulting in criminal charges against Mr. Cave that were ultimately dismissed. Subsequent civil action against her by Mr. Cave has yet to be dealt with at trial.

[50] Although the evidence as it relates to this case is both unique and distinctive, I have concerns over its probative value weighed against the obvious prejudicial effect. The allegations of the similar fact witness are unproven. Both Ms. Bambury and the similar fact witness testified on the *voir dire*. They acknowledge having retained the same lawyer regarding these matters. Both these witnesses met to discuss their situations. The concern is for the possibility of unconscious colouring or tailoring of evidence. Both witnesses are the subject of similar unresolved litigation with Mr. Cave which creates a motive for collaboration.

[51] Under these circumstances, I would not admit the evidence of similar acts for the purposes of identifying Mr. Cave as the person responsible for damage to the vehicles.

[52] In addition to the direct testimony identifying Mr. Cave alongside the vehicles on two occasions of damage, which I accept, there is further circumstantial evidence. I reject the submission that the incidents of damage to the vehicles could have been the result of random acts of vandalism. The damage to the same vehicles occurred repeatedly and at different locations. Their vehicles were targeted. Ms. Bambury was the subject of stalking-type behaviour on the part of Mr. Cave. The damage to vehicles began after he discovered Bambury and Sparks together in October of 2003 and ended with his arrest and incarceration March 2004. His voice messages exhibited jealousy and to some extent, anger. In this case the court must consider the evidence as a whole. I am satisfied on a balance of probabilities that Mr. Cave was responsible for damage to the vehicles.

## **DAMAGES**

[53] There was no evidence adduced regarding general damages for emotional suffering.

[54] Bambury and Sparks produced invoices for tire repairs to vehicles totalling \$289.30 which were not challenged. I order this amount to be paid by Mr. Cave.

However, claims for other repairs to the vehicles were challenged as unproven and unreliable. I agree. Mr. Sparks produced several invoices in support of the costs of repairs to motor vehicles. He acknowledged these invoices were not prepared at the time the repairs were carried out. The work was performed by a distant relative who did not testify at trial. These invoices were prepared much later and back dated. Mr. Sparks testified he paid for the work by way of cash advances from his Visa. No documented evidence was produced verifying cash withdrawals. One invoice for \$2,150 was actually explained as an estimate to repair a damaged engine. However, Mr. Sparks testified the repairs were not made as the vehicle was written off. In his estimation, the value of the vehicle was between \$1,200 to \$1,500. No evidence was produced to support this claim. Under the circumstances, I am not satisfied that the burden of proving the damages for these repairs has been met.

[55] In summary, the plaintiff's action against the defendants, Tammy MacDonald and Halifax Regional Municipality, is dismissed with costs to these defendants. The plaintiff's action against the defendants, Jacqueline Bambury and Lance Trevor Sparks, is dismissed. The Counterclaim by Bambury and Sparks against the plaintiff, Ralph Douglas Cave, is allowed. Mr. Cave is ordered to pay Bambury and Sparks the sum

of \$289.30. The defendants and plaintiffs by counterclaim, Bambury and Sparks, are entitled to costs.

[56] I reserve jurisdiction to deal with costs should the parties disagree.

J.