TORTS—MALICIOUS PROSECUTION—CIVIL LIABILITY OF PERPETRATORS OF CRIME TO THOSE WRONGFULLY PROSECUTED FOR SUCH CRIME—*Seidel v. Greenberg*, 108 N.J. Super. 248, 260 A.2d 863 (L. Div. 1969).

Plaintiff was employed as credit manager and bookkeeper for a corporation of which defendants were the principal stockholders and principal officers. Defendants conspired with a third party, one Nathaniel Wallace, to burn the premises of the corporation and collect the insurance thereon. Wallace subsequently procured a fourth party, one Clarence Moore, to do the actual burning of the premises.[1] Following the fire, there apparently was a falling-out between defendants and their co-conspirator, Wallace, over the division of the insurance proceeds which culminated in a complaint to police by one of the defendants that Wallace had threatened his life. Following his apprehension because of the complaint, Wallace disclosed the conspiracy and also implicated plaintiff whom Wallace had observed in the corporation offices[2] during one or more meetings held there in furtherance of the conspiracy.

Plaintiff, defendants, Wallace and Moore were "charged with arson to defraud insurance companies and conspiracy to commit arson."[3] Charges against plaintiff and defendants subsequently were dropped but Wallace and Moore were indicted and convicted. Approximately two years later, defendants also were indicted and convicted on four counts growing out of the incident, including conspiring with Wallace and Moore to burn the premises and contents with intent to defraud insurance companies.

After defendants' indictment, plaintiff instituted this action against defendants complaining, *inter alia*,

> that the Greenbergs [defendants] willfully and deliberately caused the fire, as a result of which plaintiff was arrested on a warrant of the Newark arson squad and charged with having conspired with defendants and others to have caused the fire.[4]

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1 Seidel v. Greenberg, 108 N.J. Super. 248, 250, 260 A.2d 863, 865 (L. Div. 1969).

2 Plaintiff's duties normally required his presence in the corporation's offices. *Id.* at 250-51, 260 A.2d at 865.

3 *Id.* at 251, 260 A.2d at 865.

4 *Id.* at 254, 260 A.2d at 866. The complaint also included counts essentially for negligence in starting the fire, willful and deliberate acts which in essence led to plaintiff's prosecution, breach of an agreement to pay plaintiff's legal expenses in his earlier criminal prosecution, and negligent or willful interference with prospective economic advantage. *Id.* at 253-54, 260 A.2d at 866-67.

In effect, this part of plaintiff's claim was analogous to conventional claims for malicious prosecution.[5] The complaint alleged various injuries[6] resulting from defendants' acts and prayed for both compensatory and punitive damages.[7]

In a trial without a jury, the court held:

> [D]efendants are liable to plaintiff for the damages which he suffered because of his criminal prosecution. In effect, the holding of the court is that they [defendants] are liable to him [plaintiff] for malicious prosecution . . . .[8]

The court awarded plaintiff $10,000 with costs for compensatory damages but denied punitive damages.[9] No appeal from the decision of the trial court was taken.[10]

*Seidel* is a case of first impression in New Jersey concerning the civil liability of "perpetrators of a crime . . . to an innocent person

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5 Elements required to support a malicious prosecution action are:
(a) institution or continuation of an original judicial proceeding, either civil or criminal, against plaintiff;
(b) institution of such proceeding by or at the instance of defendant;
(c) termination of such proceeding in plaintiff's favor;
(d) malice by defendant in instituting the original proceeding;
(e) lack of probable cause in instituting the original proceeding; and
(f) suffering of injury or damage by plaintiff as a result of the institution of the original proceeding.

34 AM. JUR. *Malicious Prosecution* § 6 (1941); 54 C.J.S. *Malicious Prosecution* § 4 (1948).

6 Injuries usually alleged in malicious prosecution actions include:
(a) injury to plaintiff's reputation, standing and credit without actual proof of damages. Drakos v. Jones, 189 Okla. 593, 118 P.2d 388 (1941);
(b) humiliation, injury to feelings and mental suffering without actual proof of damages. Kirkpatrick v. Hollingsworth, 207 Okla. 292, 249 P.2d 434 (1952);
(c) injury from arrest or imprisonment. Wong v. Earle C. Anthony, Inc., 199 Cal. 15, 247 P. 894 (1926); Tutton v. Olsen & Ebann, 251 Mich. 642, 232 N.W. 399 (1930); and
(d) specific financial loss based on actual proof. H.S. Leyman Co. v. Short, 214 Ky. 272, 283 S.W. 96 (1926).

For an analysis of the types of harm which plaintiff must allege to maintain a malicious prosecution action based on an original administrative proceeding, as distinguished from a criminal proceeding, see 75 HARV. L. REV. 629 (1962).

7 Malicious prosecution is peculiarly subject to the award of punitive damages because of its intentional and outrageous character, especially where personal ill will or oppressive conduct are involved. Western Union Tel. Co. v. Thomasson, 251 F. 833 (4th Cir. 1918); Gierman v. Toman, 77 N.J. Super. 18, 185 A.2d 241 (L. Div. 1962); Virginia Elec. & Power Co. v. Wynne, 149 Va. 882, 141 S.E. 829 (1928).

8 108 N.J. Super. at 267, 260 A.2d at 875.

9 Since the court predicated its finding of proximate cause and the resulting liability on defendants' degree of fault, i.e., intentional and aggravated acts, it is not understood why the court did not award punitive damages. *See* note 7 *supra*.

10 Telephone interviews with Ashley Goodman, plaintiff's attorney, and Harvey Weissbard, defendants' attorney, June 30, 1970.

who was . . . subjected to criminal prosecution for . . . such crime"[11] without some affirmative action or participation of the perpetrators in such prosecution. In fact, *Seidel* is noteworthy in that no direct precedent for this action was found in any jurisdiction.

As was recognized by the court, actions for malicious prosecution are not favored[12] because of their potential for discouraging citizens from disclosing information to law enforcement officers for fear of civil suits. Consequently, in order to make actions for malicious prosecution more difficult to maintain, plaintiff has the burden of proving all of the elements[13] of the action.

*Seidel* was primarily concerned with the question of who may be held liable in a malicious prosecution action; or stated otherwise, who may be charged with the institution of the original proceeding[14] from which the malicious prosecution action arose. This question can be answered readily in many malicious prosecution actions because it can be established that defendant swore out the warrant in an earlier criminal proceeding or was the plaintiff in an earlier civil action.[15]

11 108 N.J. Super. at 250, 260 A.2d at 864.

12 *Id.* at 257, 260 A.2d at 868. *See* Griswold v. Horne, 19 Ariz. 56, 165 P. 318 (1917); Schubkegel v. Gordino, 56 Cal. App. 2d 667, 133 P.2d 475 (Dist. Ct. App. 1943); Renda v. International Union, UAW, 366 Mich. 58, 114 N.W.2d 343 (1962).

13 *See* note 5 *supra*. One of the elements most difficult to prove is that of lack of probable cause in initiating the original proceeding. Probable cause is "a reasonable ground of suspicion, supported by circumstances sufficient to warrant an ordinarily prudent man in believing the party is guilty of the offense." W. PROSSER, HANDBOOK OF THE LAW OF TORTS 860 (3d ed. 1964). Probable cause is almost always found where the prosecution was initiated with the advice of counsel. *See* Annot., 10 A.L.R.2d 1215 (1950). For a discussion of the effects of defects in the original complaint on a later action for malicious prosecution, *see* Annot., 36 A.L.R.2d 786 (1954). For a discussion of liability for malicious prosecution of plaintiff who was mistakenly identified as one who committed an offense, *see* Annot., 43 A.L.R.2d 1048 (1955).

14 *See* note 5 *supra*.

15 One who wrongfully procures initiation of proceedings is liable to the same extent as the one who actually initiates such proceedings. Security Underground Storage, Inc. v. Anderson, 347 F.2d 964 (10th Cir. 1965). However, if defendant did not swear out the warrant which initiated the original proceeding, he can only be held liable for malicious prosecution if he voluntarily aided and assisted in its prosecution. Fertitta v. Herndon, 175 Md. 560, 3 A.2d 502 (1939); Atkinson v. Birmingham, 44 R.I. 123, 116 A. 205 (1922); Gibson v. Brown, 245 S.C. 547, 141 S.E.2d 653 (1965). In the case of Soule v. Winslow, 66 Me. 447 (1876), defendant was held not liable for malicious prosecution even though he had been the nominal plaintiff as next friend of a minor in the original proceeding.

Questions concerning the vicarious liability of defendant because of the acts of his partner or employee in initiating the original proceeding frequently arise. In regard to cases involving partnerships, the general rule is that a malicious prosecution is not within the scope of a partnership. Thus, mere knowledge of a partner's acts will not create liability, but rather consent of such character as to amount to advice and cooperation is required for liability. In cases involving a master-servant relationship, the master is liable for malicious prosecution arising from acts of the servant only if such acts are specifically

The question becomes more difficult where the original proceeding was actually initiated by a public official based on information supplied by defendant.[16] This question of liability was particularly difficult in *Seidel* because the original proceeding had been initiated by police without any participation, including furnishing of information, by defendant.

The "normal"[17] rule in malicious prosecution actions similar to that herein is that:

> In order to charge a private person with responsibility for the initiation of proceedings by a public official, it must . . . appear that his desire to have the proceedings initiated expressed by direction, request, or pressure of any kind was the determining factor in the official's decision to commence the prosecution or that the information furnished by him upon which the official acted was known to be false.[18]

A mere passive knowledge of the acts of someone, for whom defendant is not otherwise responsible,[19] is not sufficient to place liability upon defendant in an action for malicious prosecution. There must be some affirmative action by defendant in instituting or maintaining the original proceeding before liability can be imposed on him.[20]

The court in *Seidel* did not follow the "normal" rule for malicious prosecution cases ostensibly because defendants were the perpetrators of the crime for which plaintiff was prosecuted.[21] Forsaking the relatively objective test outlined by the "normal" rule in determining if

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directed, are within the scope of the servant's employment, or are subsequently ratified by the master. Silent acquiescence and retention of the servant in employment are not normally sufficient for liability of the master. Annot., 120 A.L.R. 1322 (1939).

16 Where a full and frank disclosure of facts is made by a defendant to a public official who makes an independent judgment thereon and subsequently initiates proceedings, defendant is shielded from liability for malicious prosecution. Seelig v. Harvard Co-op Soc., 355 Mass. 532, 246 N.E.2d 642 (1969); Renda v. International Union, UAW, 366 Mich. 58, 114 N.W.2d 343 (1962); Klein v. Elliot, 436 S.W.2d 867 (Tenn. Ct. App. 1968); Annot., 36 A.L.R.2d 786 (1954). However, if defendant knowingly gives false information, withholds part of the information, or actively induces or persuades prosecution such that the public official does not make an independent decision, defendant may be liable. White v. Chicago, B.&Q.R.R., 417 F.2d 941 (8th Cir. 1969); Humbert v. Knutson, 224 Ore. 133, 354 P.2d 826 (1960).

17 The rule appears to be universal as no different authority was found in any jurisdiction.

18 RESTATEMENT OF TORTS § 653, comment *g* at 387 (1938); *see also* Humbert v. Knutson, 224 Ore. 133, 354 P.2d 826 (1960).

19 *See* note 15 *supra*, for discussion of liability of defendant for acts of others for whom defendant may be responsible.

20 Gowin v. Heider, 237 Ore. 266, 386 P.2d 1 (1963); Annot., 120 A.L.R. 1322 (1939).

21 108 N.J. Super. at 257, 260 A.2d at 869.

defendants were *actively instrumental* in putting the original proceeding in motion, the court took a more subjective approach in determining if defendants' acts were the "proximate and efficient cause" of the original criminal proceeding against plaintiff. The court stated that where intentional acts are involved as herein, the rules of causation are applied more liberally, resulting in extended liability.[22] The court stated that once causation in fact has been established for intentional acts such as herein, concepts of fairness, justice, and policy are entitled to more weight than the concept of "foreseeability" in determining proximate causation and subsequent liability.[23] Applying these concepts, the court held that defendants' acts were the proximate cause of plaintiff's wrongful criminal prosecution, and thus defendants were liable for malicious prosecution. The intervening acts of the prosecuting authorities and co-conspirator in accusing plaintiff did not relieve defendants of liability.[24]

It is difficult to dispute the court's arguments that defendants' acts were a "proximate cause" of plaintiff's injuries since they are based largely on concepts of fairness, justice and policy. However, *Seidel* has gone well beyond established precedent regarding persons who may be liable in malicious prosecution actions. While the court is correct in stating that no precedent has been found which would deny relief in a case such as *Seidel*,[25] it should also be emphasized that no precedent was found which would justify such a substantial departure from the universal rule requiring some *active participation* by defendant before liability is imposed.

It appears that the only possible way *Seidel* can be reconciled with the clear weight of precedent is by charging defendants with "vicarious active participation" in initiating the original proceeding because of the acts of their co-conspirator. All those who actively take part in the pursuance of a common plan to commit a tortious or criminal act are equally liable for the damage inflicted by one tortfeasor or criminal even though that damage exceeds what might rea-

22 *Id.* at 261-62, 260 A.2d at 871-73. *See* Bauer, *The Degree of Moral Fault as Affecting Defendant's Liability*, 81 U. PA. L. REV. 586 (1933); 14 STAN. L. REV. 362 (1962) indicating that the standards utilized for proximate cause in intentional torts should be the same as those utilized in negligence cases.

23 108 N.J. Super. at 266, 260 A.2d at 874. *See* Caputzal v. The Lindsay Co., 48 N.J. 69, 222 A.2d 513 (1966); Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1 (1959); Menth v. Breeze Corp., 4 N.J. 428, 73 A.2d 183 (1950), for views of the importance of concepts such as fairness, justice and policy in determining liability.

24 108 N.J. Super. at 265, 260 A.2d at 873.

25 *Id.* at 257, 260 A.2d at 868.

sonably have been foreseen.[26] Thus in *Seidel*, defendants might be chargeable with the acts of their co-conspirator in apparently furnishing information to police which he did not know to be true and which set in motion the criminal proceedings against plaintiff.[27] This "vicarious active participation" might lead to liability under the "normal" rule for liability in malicious prosecution actions. However, it appears that testimony involving the accusation of plaintiff by the co-conspirator was not admitted into evidence.[28] Thus, even this possible way of reconciling *Seidel* with precedent by charging defendants with "vicarious active participation" is not justified.

The only basis remaining for holding defendants liable was their criminal conduct. To disregard the "normal" rule because defendants were the perpetrators of the crime for which plaintiff was prosecuted and to hold defendants liable for mere passive knowledge and failure to take action to establish plaintiff's innocence by remaining silent raises a fundamental question regarding violation of defendants' constitutional privilege against self-incrimination.[29] The court mentioned this issue but expressed no opinion on the point.[30]

Another fundamental question raised by the court's holding, but not considered by the court, concerns the use of tort law to punish criminal conduct.[31] Further, the holding of the court in *Seidel* will make the civil liability of one guilty of criminal conduct directly dependent upon the efficiency and accuracy of the police in investigating information before initiating criminal proceedings. Such a situation should be avoided unless required by overriding policy considerations which are not found in *Seidel*. Compensating plaintiff for damages resulting from his unjustified criminal prosecution is a worthy goal. However, this goal should not be attained by disregarding defendants' fundamental rights or making defendants' liability dependent upon the efficiency with which public officials perform their duties. It is believed that *Seidel* went too far in attempting to balance justice, fairness, and policy considerations against those underlying restrictions on malicious prosecution actions.

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26 Thompson v. Johnson, 180 F.2d 431, 433-34 (5th Cir. 1950). *See* Griffin v. Clark, 55 Idaho 364, 42 P.2d 297 (1935).

27 108 N.J. Super. at 251 n.1, 260 A.2d at 865 n.1.

28 *Id.*

29 U.S. CONST. amend. V.

30 108 N.J. Super. at 270 n.2, 260 A.2d at 876 n.2.

31 *See* 14 STAN. L. REV. 362, 364-65 (1962).