

JUDGMENT Express

[2026] 5 MLRA 407
Siti Fairuz Shamsuri & Ors
v. Nik Mohd Suhaimi Ahmad Ghazali
& Other Appeals

SITI FAIRUZ SHAMSURI & ORS
v.
NIK MOHD SUHAIMI AHMAD GHAZALI
& OTHER APPEALS

Court of Appeal, Putrajaya
Azhahari Kamal Ramli, Ahmad Kamal Md Shahid, Nadzarin Wok Nordin
JJCA
[Civil Appeal Nos: W-01(NCvC)(W)-484-09-2023, W-01(IM)(NCvC)(W)-386-
06-2024 & W-01(IM)(NCvC)(W)-406-06-2024]
2 July 2026

Tort: *Malicious prosecution — Appeals against liability and quantum — The Malaysian Anti-Corruption Commission (“MACC”) officers and Deputy Public Prosecutors sued for false imprisonment and malicious prosecution following plaintiff’s arrest, charge under s 468 Penal Code, and subsequent acquittal without defence being called — Three consolidated appeals to Court of Appeal against liability and quantum — Whether plaintiff’s Notice of Cross-Appeal filed under r 8 Rules of the Court of Appeal 1994 (“RCA 1994”) was competent to challenge a substantive finding adverse to plaintiff that was not the subject of defendants’ appeal and in respect of which no independent Notice of Appeal had been filed under r 5 RCA 1994 — Whether material facts pleaded in the Statement of Claim pursuant to O 18 r 7 Rules of Court 2012 were sufficient to disclose a cause of action in the tort of abuse of process/malicious process notwithstanding the absence of express pleading of that tort by name — Whether tort of abuse of process/malicious process applied to abuse of criminal investigation and criminal proceedings or was confined to abuse of civil process*

The plaintiff, a Director of a security services company, was investigated by the 1st to 4th defendants, officers of the 8th defendant (the Malaysian Anti-Corruption Commission (“MACC”)), following information received in or around March 2013 that he had committed bribery. The investigation disclosed no sufficient evidence of bribery but identified a possible offence under s 468 of the Penal Code. On 17 March 2014, the plaintiff was ordered to be present at the MACC Headquarters, Putrajaya, on 19 March 2014 without being informed that he was a suspect. Upon arrival, he was arrested, transported to Kuantan, and detained overnight in a lock-up. On 20 March 2014, he was brought in tight handcuffs before the Kuantan Sessions Court and charged under s 468 of the Penal Code. He was thereafter paraded before the media in the court’s lobby, and his appearance was broadcast on prime-time television and in print media. He was subsequently acquitted at the close of the prosecution’s case without his defence being called, and the Public Prosecutor’s appeal against that acquittal was later withdrawn. The plaintiff thereupon commenced proceedings in the High Court against all defendants, claiming damages for false imprisonment, wrongful arrest, wrongful detention and harassment, and



for malicious prosecution. On 25 August 2023, the High Court found that the plaintiff had proved his claims for wrongful arrest, detention, and harassment. The High Court then rebranded those claims as the tort of malicious process or abuse of process. The High Court dismissed the malicious prosecution claim on the ground that the prosecutorial discretion under art 145(3) of the Federal Constitution rendered that tort unsustainable. On 28 May 2024, damages were assessed at RM200,000.00 (general), RM100,000.00 (special), RM400,000.00 (aggravated), and RM200,000.00 (exemplary/punitive). The defendants appealed against liability (“Appeal 484”); the plaintiff filed a Notice of Cross-Appeal challenging the dismissal of the malicious prosecution claim without filing a separate Notice of Appeal. The plaintiff filed a further appeal on quantum (“Appeal 386”) and the defendants filed a separate appeal on quantum (“Appeal 406”), all three being heard together. The issues before the Court of Appeal were: (i) whether the plaintiff’s Notice of Cross-Appeal, filed pursuant to r 8 of the Rules of the Court of Appeal 1994 (“RCA”), was competent to challenge the dismissal of the malicious prosecution claim, a substantive finding adverse to the plaintiff that was not the subject of the defendants’ appeal and in respect of which no independent Notice of Appeal had been filed under r 5 of the RCA; (ii) whether the material facts pleaded in the Statement of Claim, pursuant to O 18 r 7 of the Rules of Court 2012, were sufficient to disclose a cause of action in the tort of abuse of process/malicious process notwithstanding the absence of express pleading of that tort by name; and (iii) whether the tort of abuse of process/malicious process was applicable to abuse of criminal investigation and/or criminal proceedings, or was confined to abuse of civil process.

Held (allowing Appeal 484 and Appeal 406 and dismissing Appeal 386):

(1) The plaintiff’s Notice of Cross-Appeal was incompetent and was struck out. Since the defendants’ appeal was limited solely to the change of cause of action from unlawful arrest and detention to the tort of abuse of process/malicious process, the plaintiff’s cross-appeal must be similarly limited to that issue. The operative words of r 8(1) of the RCA which were “to contend” and “decision of the High Court should be varied”, limited the contentions under a Notice of Cross-Appeal to effectively vary a decision, not set aside a judgment or order and accordingly the plaintiff was precluded from challenging the dismissal of the malicious prosecution claim, which was not the subject of the defendants’ appeal. It was incumbent on the plaintiff to independently file a Notice of Appeal under r 5 of the RCA to rehear the issues that were not decided in the plaintiff’s favour since the Notice of Cross-Appeal did not provide for a complaint to be reheard. (paras 36, 37, 38, 39, 40 & 162(a))

(2) The Statement of Claim disclosed sufficient material facts to support the tort of abuse of process/malicious process notwithstanding the absence of express pleading of that tort by name. So long as the facts as pleaded gave rise to a cause of action in tort of abuse of process/malicious process, that was a sufficient basis to construe a cause of action in the claim, and the fact that it



had not been pleaded expressly did not detract from the existence of the cause of action in the pleading. It sufficed that the plaintiff had averred the facts in the pleadings on which he was relying, and not the legal effect, such that the defendants could not be said to be caught by surprise. (paras 48-52)

(3) The tort of abuse of process/malicious process applied only to abuse of civil process and was not applicable to criminal investigation or criminal proceedings, and on that ground, the Court of Appeal unanimously set aside the High Court's liability finding. Since the High Court had dismissed the malicious prosecution claim and the plaintiff had not filed a competent appeal against that dismissal, it necessarily implied the satisfaction by the High Court that the essential elements of the absence of reasonable and probable cause and malice were not made out. Consequently, having found no case for the claim under the tort of malicious prosecution, there was no basis for the High Court Judge to then find liability for a cause of action under the tort of abuse of process/malicious process. (paras 55, 56, 60, 61, 65, 67, 69, 70, 71, 72, 73 & 162)

Case(s) referred to:

Borneo Co (M) Sdn Bhd v. Penang Port Commission [1975] 1 MLRA 510 (folld)
Ellamah d/o Ellapen v. Renganathan s/o Komarasamy & Ors [1987] 2 MLRH 618 (refd)
Goldsmith v. Sperrings Ltd [1977] 1 WLR 478; [1977] 2 All ER 566 (distd)
Hassan Marsom & Ors v. Mohd Hady Ya'akop [2018] 5 MLRA 263 (refd)
Ilkiw v. Samuels and Others [1963] 2 All ER 879 (refd)
Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor [1997] 1 MLRA 605 (folld)
Kabushiki Kaisha Ngu v. Leisure Farm Corporation Sdn Bhd & Ors [2016] 6 MLRA 373 (folld)
Khairuddin Abu Hassan v. Wan Aedil Wan Abdullah & Ors And Another Appeal [2025] 4 MLRA 254 (refd)
Malaysia Building Society Bhd v. Tan Sri General Ungku Nazaruddin Ungku Mohamed [1998] 1 MLRA 67 (distd)
McIntyre v. Lewis [1991] 1 IR 121 (refd)
Mkini Dotcom Sdn Bhd & Ors v. Raub Australian Gold Mining Sdn Bhd [2021] 5 MLRA 37 (refd)
Mohammad Najib Tun Haji Abdul Razak v. Thomas Thomas @ Mohan K Thomas [2026] 3 MLRA 740 (folld)
Nik Mohd Suhaimi Ahmad Ghazali v. Siti Fairuz Shamsuri & Ors [2023] MLRHU 2062 (refd)
Ong Ah Long v. Dr S Underwood [1983] 1 MLRA 154 (folld)
Rookes v. Barnard [1964] AC 1129 (refd)
Rawther v. Abdul Kareem [1966] 1 MLRA 398 (refd)
Rowlands v. Chief Constable of Merseyside Police [2006] All ER 298; [2006] EWCA Civ 1773 (refd)



Sambaga Valli KR Ponnusamy v. Datuk Bandar Kuala Lumpur & Ors And Another Appeal [2018] 3 MLRA 488 (folld)

Sri Sanjeevan Ramakrishnan v. ASP Poonnam E Keling & Ors [2025] 4 MLRA 284 (folld)

Thompson v. Commissioner of Police of the Metropolis [1997] 2 All ER 782 (refd)

TN Metal Industries Sdn Bhd & Ors v. Ng Pyak Yeow [1995] 5 MLRH 110 (dstd)

Venture SKL Sdn Bhd v. Geonex (M) Sdn Bhd [2023] 5 MLRA 322 (refd)

Legislation referred to:

Criminal Procedure Code, s 117

Federal Constitution, art 145(3)

Penal Code, s 468

Rules of Court 2012, O 18 r 7

Rules of the Court of Appeal 1994, rr 5, 8(1)

Other(s) referred to:

Clerk & Lindsell on Torts, 24th Edn, [2023], paras 15-06-15-07

Lauree Coci, *It's Time Exemplary Damages were Part of the Judicial Armory in Contract* [2015] UWA Law Rw 39; (2015) 40(1) University of Western Australia Law Review 1

Nicholas McBride, *A Case for Awarding Punitive Damages in Response to Deliberate Breaches of Contract*, 24 Anglo-Am. L. Rev. 369 [1995]

Pollock & Mulla, *Indian Contract and Specific Relief Acts*, 13th Edn, Vol 2, LexisNexis Butterworths Wadhwa Nagpur, pp 1521-1522

Counsel:

For the appellants: Liew Horng Bin (Siti Syakimah Ibrahim with him); AG's Chambers

For the respondent: Kamalanathan Ratnam (Vinod R Kamalanathan & Nor Wafa Mohd Habir with him); M/s Vinod Kamalanathan & Associates

[For the High Court judgment, please refer to *Nik Mohd Suhaimi Ahmad Ghazali v. Siti Fairuz Shamsuri & Ors* [2024] MLRHU 1262]

JUDGMENT

Ahmad Kamal Md Shahid JCA:

Introduction

[1] This is another case filed by a citizen of Malaysia who was aggrieved by the conduct of the anti-corruption agency in carrying out the investigation and prosecution against him.

[2] The learned High Court Judge (HCJ) held that Nik Mohd Suhaimi Bin Ahmad Ghazali (the Plaintiff) had successfully proved his claims for wrongful



imprisonment/arrest/harassment, which the learned HCJ had “rebranded” as “malicious process or abuse of process” and awarded damages and costs for the Plaintiff as follows:

- a. General Damages — RM200,000.00.
- b. Special Damages — RM100,000.00.
- c. Aggravated Damages — RM400,000.00.
- d. Exemplary/Punitive Damages — RM200,000.00.
- e. Costs RM10,000.00.

However, the learned HCJ disallowed the Plaintiff’s claim for malicious prosecution against the Defendants.

[3] The above decision by the learned HCJ led to three (3) appeals in the Court of Appeal, the decision and full reasoning of which will now be deliberated.

Brief Facts Of The Case

[4] The Plaintiff is a Malaysian citizen who was a Director of a security-related company called Setia Perkasa Sendirian Berhad (SPSB), a company engaged in providing security services to various Government and non-Government agencies.

[5] Siti Fairuz Binti Shamsuri (the 1st Defendant), Pang Teck Mai (the 2nd Defendant), Ameer Anuar Bin Minhad (the 3rd Defendant), and Mohd Tharuzi Bin Mohd Nor (the 4th Defendant) are the officers of the 8th Defendant, i.e., the Malaysian Anti-Corruption Commission (MACC).

[6] Dato’ Abdul Razak Bin Musa (the 5th Defendant) is the Deputy Public Prosecutor of MACC who gave consent to prosecute the Plaintiff. Syafinas Binti Shabudin (the 6th Defendant) and Rozana Binti Abdul Hadi (the 7th Defendant) are the Deputy Public Prosecutors (DPPs) who conducted the prosecution against the Plaintiff in the Sessions Court.

[7] Around March 2013, the MACC received early information that the Plaintiff had committed bribery in his conduct as the director of SPSB. The 1st Defendant (SP1) conducted an initial investigation to verify the early information. SP1 was of the opinion that there was not enough evidence to link the Plaintiff to the allegation. However, in the course of his investigation, SP1 was of the view that the Plaintiff might have committed another possible offence, i.e., using a fake document under s 468 of the Penal Code.

[8] The Defendants then carried out an investigation. Upon completion, the outcome was then referred to the DPP. Upon the DPP’s instruction, the Plaintiff was charged under s 468 of the Penal Code.



[9] He was issued with an order dated 17 March 2014 to attend an investigation to be held on 19 March 2014 at MACC Headquarters in Putrajaya. However, he was arrested upon arrival after a brief examination.

[10] He was not prepared for the arrest as none of the Defendants or other MACC officers had alerted him nor informed him, all the while that he was a suspect and not merely a witness. Thereafter, he was brought by car to Kuantan that evening and spent the night in a lockup, which was in a deplorable condition. He was then brought to the Kuantan Sessions Court, tightly handcuffed, the next morning, 20 March 2014, where he was charged.

[11] After the proceedings, he was again tightly handcuffed and paraded outside the Court in front of the media that were awaiting him. According to him, throughout the process from Putrajaya until the Court appearance in Kuantan Court, he was harassed, threatened, intimidated, humiliated, and induced (to plead guilty).

[12] During that Court appearance when he was charged (i.e., on 20 March 2014), he did not plead guilty. Following that Court appearance, during the ensuing days, he experienced psychological and mental health issues, apart from anxiety, stress, and tension.

[13] Later in the ensuing months after the trial started, his condition was exacerbated.

[14] Meanwhile, his trial ended with an acquittal at the end of the Prosecution's case without his defence being called. The Public Prosecutor then filed an appeal to the Court of Appeal, but subsequently withdrew it.

In The High Court

[15] Hence, this suit by the Plaintiff for false imprisonment/wrongful arrest/detention/harassment and malicious prosecution against all the Defendants in the High Court.

Findings Of The Learned High Court Judge

[16] On 25 August 2023, the High Court, on a balance of probabilities, ruled that the Plaintiff had successfully proved his claims for wrongful imprisonment/arrest/harassment, which the Court had "rebranded" as "malicious process or abuse of process" with costs of RM40,000.00. However, the learned HCJ disallowed the claim for malicious prosecution against the Defendants

(Findings On Liability).

[17] In arriving at those findings on liability, the learned HCJ found, among others:

- a. The Malaysian court formally recognized the tort of "abuse of process/malicious process", following precedents from other



Commonwealth countries. This tort is distinguished from malicious prosecution as it applies to the entire process from arrest through investigation, not just the prosecution phase.

- b. The court applied the “eggshell skull rule”, acknowledging that law enforcement must take victims as they find them, with white-collar crime suspects being particularly vulnerable to psychological harm. Different treatment should be accorded to white-collar suspects compared to “hardcore criminals” due to their heightened vulnerability to reputational damage and mental distress.
- c. The Plaintiff was physically mistreated by being handcuffed tightly, causing documented injuries that were noted in his medical report. He was denied necessary medication despite being visibly sick with flu symptoms. During detention, he was forced to sleep on the floor without basic comfort and was inadequately fed. The psychological mistreatment was equally severe, as he was deliberately paraded in handcuffs before media cameras and coaxed to plead guilty through false promises. The Plaintiff was humiliated publicly as though already convicted and denied opportunities to make necessary arrangements for his personal and business affairs.
- d. As a direct result of this mistreatment, the Plaintiff developed profound depressive symptoms that eventually progressed to psychotic illness. Medical reports confirmed that he suffered from anhedonia, an inability to feel pleasure that is associated with serious mental disorders.
- e. His personal life collapsed as his wife and children deserted him following the public humiliation. The Plaintiff experienced complete financial ruin, eventually declaring bankruptcy and being forced to sell his home. His business reputation was irreparably damaged, leading to lost opportunities and ongoing financial hardship.
- f. Reference was also made to the other previous MACC cases with troubling outcomes, such as Teoh Beng Hock, who died while under MACC custody in 2009, with a Court of Appeal ruling that his death was caused or accelerated by unlawful acts of persons, including MACC officers. A Royal Commission of Inquiry later determined Teoh was driven to suicide by aggressive interrogation tactics. Similarly, Ahmad Sarbaini Mohamed, a Senior Customs officer, died in 2011 while under MACC investigation. The court also noted the testimony of Sivanesan a/l Thangavelo, who provided “similar fact evidence” that he was physically and mentally abused by MACC officers while under detention.



- g. The Plaintiff had successfully proven the tort of abuse of process/malicious process, holding MACC liable for his suffering. Specific pleading of “abuse of process/malicious process” was unnecessary, as the alleged facts clearly supported the claim. The judgment called for greater transparency, compassion, and humanity in arrest and detention processes, with strict observance of the rule of law and standard operating procedures. The court warned that abuse of power erodes public trust in institutions and recognized mental health as a vital component of general wellbeing that deserves protection.
- h. The court’s new approach to justice was described as being built on fairness, reasonableness, compassion, and respect for vulnerable suspects. This case recognized courts as essential platforms for protecting the rights of suspects who have not been convicted. While awarding the Plaintiff damages and costs, the court balanced its criticism by acknowledging that MACC and police should still be commended when they perform their duties within legal parameters.

[18] The High Court then proceeded to assess the damages and, on 28 May 2024, made the following order:

- a. General damages — RM200,000.00;
- b. Special damages — RM100,000.00;
- c. Aggravated damages — RM400,000.00;
- d. Exemplary/punitive damages — RM200,000.00; and
- e. Costs — RM10,000.00.

(Findings On Quantum).

[19] The HCJ had based his findings on the quantum on the following grounds:

- a. The Plaintiff sought approximately RM6 million in damages, which the court rejected as it was unreasonable and excessive. The court noted that, unlike medical negligence cases, this situation did not involve significant bodily or limb injuries requiring intensive follow-up care. Public policy considerations regarding taxpayer money also influenced the court’s decision to reduce the award substantially.
- b. For general damages, RM200,000.00 was awarded for hand injuries caused by handcuffs and for depressive symptoms that eventually developed into bipolar depressive disorder and anhedonia.



- c. Special damages of RM100,000.00 were granted, of which RM50,000.00 was allocated for loss of earnings, profits, investments, and business opportunities (reduced because these claims were deemed too remote and speculative). Another RM50,000.00 was awarded for loss of business with “Dixny” (also reduced as too remote).
- d. The claim for legal fees incurred while defending the criminal case was disallowed.
- e. Aggravated damages of RM400,000.00 were awarded to compensate for the significant impact on the Plaintiff’s feelings and self-esteem, recognizing that the Plaintiff now has Orang Kelainan Upaya (OKU) mental status (disability), has been deserted by family, and faces permanent stigma.
- f. The exemplary/punitive damages of RM200,000.00 were granted to express disapproval of the oppressive conduct by MACC officers.
- g. The total award amounted to RM900,000.00 with nominal costs of RM10,000.00 assessed against the Defendants.

In The Court of Appeal

[20] Dissatisfied with the decision, both parties had filed a total of three (3) appeals and one cross-appeal in the Court of Appeal, namely:

- a. W-01(NCVC)(W)-484-09/2023- by the Defendants against the liability which the learned HCJ allowed the Plaintiff’s claim on malicious process/abuse process and costs of RM40,000.00 (Appeal 484);
- b. The Plaintiff, on the other hand, filed a Notice of Cross Appeal vide encl 13, briefly, on the dismissal of the malicious prosecution;
- c. W-01(IM)(NCVC)-386-06/2024- by the Plaintiff against the decision of the learned HCJ on quantum (Appeal 386); and
- d. W-01(IM)(NCVC)-406-06/2024- by the Defendants, also on quantum (Appeal 406).

Our Findings

Appeal 484 (On Liability)

[21] These three (3) Appeals were heard together. For the purpose of these grounds of judgment (GOJ), we will first deal with the appeal on liability, i.e., Appeal 484 by the Defendants. However, before we deal with the merits of the appeal, we will first address the Notice of Cross Appeal filed by the Plaintiff.



Notice Of Cross Appeal

Preliminary Objection

[22] Before us, the Defendants raised a preliminary objection concerning the Plaintiff's Notice of Cross Appeal in encl 13 due to non-compliance with r 8 of the Rules of the Court of Appeal 1994 (RCA 1994). The Defendants submit that the Plaintiff has raised an issue unconnected with the Defendants' appeal. The Defendants' Notice of Appeal dated 12 September 2023 is only against part of the decision of the High Court of 25 August 2023 regarding the change of cause of action by the learned HCJ, i.e., from unlawful arrest and unlawful detention to malicious process/abuse of process, which was allowed, and costs of RM40,000.00. Meanwhile, the Plaintiff's Notice of Cross Appeal concerns malicious prosecution.

[23] The Defendants' Notice of Appeal dated 12 September 2023 against only some parts of the decision of the learned HCJ (not the whole), the material parts of which are reproduced below:-

NOTIS RAYUAN

SILA AMBIL PERHATIAN bahawa Perayu-Perayu (**Defendants**) di sini, tidak berpuas hati dengan keputusan Mahkamah Tinggi yang diberikan di Mahkamah Tinggi Kuala Lumpur pada 25 Ogos 2023, merayu kepada Mahkamah Rayuan terhadap **sebahagian keputusan tersebut yang memutuskan bahawa-**

- (a) **Kausa tindakan Proses Berniat Jahat (*Malicious Process*) dibenarkan, Ganti rugi untuk ditaksirkan; dan**
- (b) Kos tindakan sebanyak RM40,000.00.

Bertarikh pada 12 haribulan September 2023"

[Emphasis Added]

[24] On 30 November 2023, the Plaintiff's solicitors filed the now contentious Notice of Cross Appeal, the English translation of which is set out here:-

"NOTICE OF CROSS APPEAL

TAKE NOTICE THAT, on the hearing of the Appellant's appeal, NIK MOHD SUHAIMI BIN AHMAD GHAZALI i.e **the Respondent** named above, **will contend that the decision of the Learned High Court Judge at Kuala Lumpur, Dato' Ahmad bin Bache on 25 August 2023, ought to be varied to the extent and on the grounds hereinafter set out-**

1. **The Learned High Court Judge erred in law and in fact in failing to hold that the Plaintiff has established a case to support the claim for malicious prosecution.**



2. The Learned High Court Judge erred in law and in fact in holding that art 145(3) of the Federal Constitution provides the prosecution with a discretion to prosecute that could not be challenged and that therefore such unchallengeable right runs through the entire course of the prosecution from proffering the charge up to conviction or acquittal.
3. Alternatively, the Learned High Court Judge erred in failing to hold that even though such a discretion to institute, conduct or discontinue a charge is provided for pursuant to art 145(3) of the Federal Constitution, the Learned Public Prosecutor being the upholder of the balance of justice between the Government and the public is duty bound to also exercise his discretion when in proceeding through the course of the prosecution, the prosecution has evidence:
 - a) That will show that the evidence of key prosecution witnesses tell conflicting versions and that if the prosecution, which has no choice but to call both the witnesses, called the said witnesses, the result will lead to an inevitable acquittal;
 - b) That statements were recorded from material witnesses and that if such witnesses were called to testify, the result will lead to an inevitable acquittal;
 - c) That other than the conflicting evidence of the said witnesses in implicating the accused, there was no other favourable evidence that the prosecution could rely on; and
 - d) That in such circumstances, the failure of the Public Prosecutor to exercise his discretion in offering no further evidence and which exercisable right has been specifically given to the prosecution pursuant to s 173(g) of the Criminal Procedure Code, constituted malicious prosecution.
4. The Learned High Court Judge erred in law and in fact in failing to hold that, whilst knowing about the inconsistencies of its key witness during the continued trial and yet the failure of the prosecution in not applying to impeach the said witness nor informing the Court that the witness had turned hostile and that the prosecution wanted to treat the said witness as a hostile witness, the prosecution had maliciously prosecuted the accused/Respondent herein.
5. The Learned High Court Judge erred in law and in fact in failing to hold as a fact that, by continuing with the proceedings until the Court decided and made a formal ruling on the inconsistent evidence, the prosecution had thereby failed to exercise its prosecutorial discretion to offer no further evidence pursuant to s 173(g) of the Criminal Procedure Code and not to let the Sessions Court Judge make the decision, thus establishing the case for malicious prosecution.
6. The Learned High Court Judge erred in law and in fact in failing to find that where the Public Prosecutor erred in failing to abide by the provision in art 145(3), in failing to exercise his discretion in offering no further evidence after the trial had begun and thereby abdicating his vested right



to discontinue the action and by shifting the decision making process to the Sessions Court Judge, the Public Prosecutor had de-cloaked his own immunity and the presumption of the legality of his decision making process is sufficiently rebutted, and therefore opening the conduct of the prosecution subject to judicial scrutiny, to support the case of malicious prosecution.

7. The law must hold that the word discretion as stated in art 145(3) of the Federal Constitution means that the prosecution has the right to decide either (a) or (b) and where there is such a right vested in the Public Prosecutor, there must be a right to challenge such a discretion at least to have a check and balance to avoid abuse of power.

Wherefore, the Respondent prays that the appeal be dismissed with costs and the cross appeal be allowed with costs.

Solicitors for the Respondent

Dated this 30th day of November, 2023”

[Emphasis Added]

[25] The distinction between a Notice of Appeal and a Notice of Cross Appeal can be seen in rr 5 and 8 of the RCA 1994 as follows:-

“Appeals

5. Appeal to be by re-hearing on notice

- (1) Appeals to the court shall be by way of rehearing and shall be brought by giving notice of appeal.
- (2) Security for costs shall be given as provided in r 17;
- (3) A notice of appeal shall substantially be in **Form 1 in the First Schedule**.
- (4) Any appellant may appeal from the whole or part of a judgment or order and the notice of appeal shall state whether the whole or part only and what part, of the judgment or order is complained of.

Notice and memorandum of appeal

8. Notice of cross-appeal.

- (1) It shall not be necessary for a respondent to give notice of appeal, but if a respondent intends, upon the hearing of the appeal, to contend that the decision of the High Court should be varied, he may, at any time after entry of the appeal and not more than ten days after the service on him of the record of appeal, give notice of cross-appeal specifying the grounds thereof, to the appellant and any other party who may be affected by such notice, and shall file within the like period a copy of such notice, accompanied by copies thereof for the use of each of the judges of the court.



- (2) Notice of cross-appeal shall be substantially in Form 2 in the First Schedule.
- (3) If the respondent fails to give such notice within the time prescribed he shall not be allowed, except by leave of the court, to contend on the hearing of the appeal that the decision of the High Court should be varied; but the court may in its discretion hear any such contention and may, if it thinks fit, impose terms as to costs, adjournment or otherwise.”

[26] The operative part of Form 2 was as follows:

“NOTICE OF CROSS — APPEAL

Take notice that on hearing of the above appeal, C.D., the respondent above named, will contend that the decision(s) of the Honourable Mr Justice... ought to be varied to the extent and on the grounds hereinafter set out:

(set out in numbered paragraphs;

- (a) The nature of the relief claimed; and
- (b) The grounds relied upon).”

[27] The question posed was as to the scope or extent of matters that could rightfully be pursued under a cross-appeal, in this case, within the purview of the notice of cross-appeal filed by the Plaintiff in the matter of the appeal of the Defendants.

[28] The Federal Court had addressed this issue in *Kabushiki Kaisha Ngu v. Leisure Farm Corporation Sdn Bhd & Ors* [2016] 6 MLRA 373 when it held as follows:-

[15] In construing r 8 and Form 2 of the RCA 1994, the Court of Appeal had rightly considered the critical words used, namely “should be varied... specifying the grounds thereof and “to be varied to the extent”. Following this, **the Court of Appeal had rightly held that the word “vary” by itself should be given its ordinary and natural meaning as stated in the Concise Oxford Dictionary to mean “change, make different, modify.”**

[16] We also agree with the Court of Appeal’s finding that it had considered the clear provisions under r 5 of the RCA 1994, and holding that r 5 of the RCA 1994 provided for an appeal to be lodged against the whole or part of any judgment or order of court, and such an appeal in contrast to a cross-appeal is by way of a rehearing. The word “rehearing” used clearly anticipated a review or regurgitation before the appeal court of all the points and arguments taken at the court below. Hence, **if it was the substantive finding of the court that was intended to be attacked, it behoved upon the party aggrieved to file a proper Notice of Appeal.**

[17] We noted that the Court of Appeal’s decision on the issues raised in the present appeal has been recently followed by another panel of the Court of Appeal in the case of *Pengerusi Suruhanjaya Pilihanraya Malaysia (Election*



Commission of Malaysia) v. See Chee How & Anor [2015] 6 MLRA 353 wherein Abdul Rahman Sebli JCA had this to say:

“[81] In the appeal before us, **the High Court’s refusal to grant prayers (a) and (b) of the application is a decision that is adverse to the respondents and appealable at their instance. The respondents should have filed a separate notice of appeal if they wanted the decision to be reversed or set aside and not by filing a cross-appeal as was done in this case.**”

[Emphasis Added]

[29] The Defendants submitted that case law is clear that the Plaintiff should have filed an independent Notice of Appeal against the dismissal of his claim under the tort of malicious prosecution. It is insufficient for the Plaintiff to file a cross-appeal to collaterally challenge the dismissal of the malicious prosecution claim.

[30] The Plaintiff, on the other hand, submitted that evidence was led as to the unlawful arrest and unlawful detention and the abuse of process that the Plaintiff suffered in the lock-up prior to departing for Kuantan, and ultimately the Plaintiff’s case was for malicious prosecution. The learned HCJ found that the evidence led was sufficient for him to ground a case in malicious process and gave his reasons.

[31] Therefore, according to the Plaintiff, since this was the pleaded case of the Plaintiff and since the learned HCJ refused to find a case for malicious prosecution, the Plaintiff cross-appealed against that refusal.

[32] In the instant case, the Plaintiff sued the MACC and its officers for false imprisonment, wrongful arrest, and harassment. He also sued the Attorney General’s DPPs for malicious prosecution. At the end of the full trial, the learned HCJ found that the Plaintiff had proved his claim for wrongful imprisonment, wrongful arrest, and harassment against the MACC. However, the learned HCJ disallowed the claim for malicious prosecution against the Attorney General on the ground that it is unsustainable because of the discretionary prosecutorial power under art 145(3) of the Federal Constitution. The judgment of the High Court was reported in *Nik Mohd Suhaimi Ahmad Ghazali v. Siti Fairuz Shamsuri & Ors* [2023] MLRHU 2062 (reported GOJ).

[33] The learned HCJ in his reported GOJ (*supra*) had stated in paragraphs 1, 5, 6 and 7 as follows:-

“[1] The Plaintiff had filed a suit against all the Defendants for the tort of False Imprisonment which entails wrongful arrest, wrongful

[5] Hence this suit by the Plaintiff for false imprisonment/wrongful arrest/harassment and malicious prosecution against all the Defendants. (Technically the tort of False Imprisonment was against the MACC and its Officers and the tort of Malicious Prosecution against the Public Prosecutor and its Deputies).



[6] Regarding this civil trial, at the end of the trial, this Court, on a balance of probability found that **the Plaintiff had successfully proved his claims for wrongful imprisonment/arrest/harassment which this Court had “rebranded” it as “malicious process or abuse of process”** with cost of RM40,000.00. However, **this Court disallowed the claim for malicious prosecution against the Defendants as the Court ruled that this tort is simply unsustainable in Malaysia because of the discretionary power accorded to the Attorney General/Public Prosecutor under art 145(3) of the Federal Constitution, amongst others.**

[7] Dissatisfied with that decision, **the Defendants had filed an appeal to the Court of Appeal for abuse of process/malicious process. The Plaintiff did not file an appeal regarding the claim for malicious prosecution.”**

[Emphasis Added]

[34] Based on the above, it was clear that the learned HCJ had, as a matter of fact, found that the Plaintiff had on a balance of probabilities proved his claims for wrongful imprisonment/arrest/harassment which the learned HCJ “rebranded” it as “malicious process or abuse of process” but disallowed the claim for malicious prosecution against the Defendants.

[35] It is to be noted that the appeal before us was only against part of the judgment of the High Court in relation to the change of cause of action by the learned HCJ, i.e., from unlawful arrest and unlawful detention to the tort of abuse of process/malicious process. The Plaintiff, meanwhile, filed a cross-appeal vide encl 13 appealing against the decision of the High Court in relation to the dismissal of his claim under the tort of malicious prosecution.

[36] Therefore, we are of the considered view that since the Defendants’ appeal was limited to the change of cause of action from unlawful arrest and unlawful detention to the tort of abuse of process/malicious process, the Plaintiff’s cross-appeal must be similarly limited to that issue. The Plaintiff could not be heard on other matters not raised in the original appeal.

[37] It is our view that pursuant to r 8 of the RCA 1994 and the specified Form 2 of the RCA 1994, the Plaintiff was limited to varying such part of the order of court which was the subject of the appeal. The Plaintiff was precluded, therefore, from challenging any other substantive finding of fact, including, as was being attempted here to set aside or overturn the finding of the court to dismiss or disallow the claim for malicious prosecution against the Defendants, which was not the subject of the Defendants’ appeal.

[38] In the appeal before us, we find that the High Court’s refusal to allow the claim for malicious prosecution against the Defendants is a decision that is adverse to the Plaintiff and appealable at their instance. The Plaintiff should have filed a separate Notice of Appeal if he wanted the decision of the High Court in disallowing the claim for malicious prosecution to be reversed or set aside, and not by filing a cross-appeal as was done in this case,



[39] The operative words of “to contend” and “decision of the High Court should be varied” under r 8(1) of the RCA 1994 clearly limit the contentions under a Notice of Cross-Appeal to effectively vary a decision, not set aside a judgment or order. It is incumbent on the Plaintiff to independently file a Notice of Appeal under r 5 of the RCA 1994 to rehear the issues that were not decided in the Plaintiff’s favour. A Notice of Cross-Appeal does not provide for a complaint to be reheard.

[40] For the reasons elaborated above, we found merit in the contention of the Defendants. As the Plaintiff’s Notice of Cross-Appeal is incompetent, we allowed the preliminary objection raised by the Defendants, and therefore, the Notice of Cross-Appeal was struck out. On that score, there is no necessity for us to deliberate on the merits of the cross-appeal, i.e., malicious prosecution.

Whether The Cause Of Action Based On ‘Abuse Of Process/Malicious Process’ Has Been Pleaded By The Plaintiff

[41] The Defendants argued that the learned HCJ erred in fact and law in allowing the Plaintiff’s claim based on a new cause of action of abuse of process/malicious process which had not been pleaded by the Plaintiff.

[42] The Defendants submit that the law of pleading is a trite law where the parties are bound by their pleadings. The court has no jurisdiction to amend or vary the pleadings.

[43] This brings to the fore a primary question. Is the entire claim of the Plaintiff premised solely on “false imprisonment/malicious prosecution”? Or does it contain sufficient material facts related to any other cause of action, be it in “abuse of process/malicious process”?

[44] It is trite that only material facts are pleaded, not the law or evidence.

[45] Order 18 r 7 of the Rules of Court 2012 (ROC) states:-

Facts, not evidence, to be pleaded

- “(1) Subject to the provisions of this rule and rr 10, 11 and 12, **every pleading shall contain, and contain only a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which those facts are to be proved, and the statement shall be as brief as the nature of the case admits.**
- (2) Without prejudice to paragraph (1), the effect of any document or the purport of any conversation referred to in the pleading shall, if material, be briefly stated, and the precise words of the document or conversation shall not be stated, except in so far as those words are themselves material.
- (3) A party need not plead any fact if it is presumed by law to be true or the burden of disproving it lies on the other party, unless the other party has specifically denied it in his pleading.”

[Emphasis Added]



[46] The above O 18 r 7 of the ROC unequivocally states that pleadings shall contain a concise statement of the material facts relied upon, and not the evidential matters to prove those facts.

[47] In the present case, we found that the Plaintiff has sufficiently pleaded all relevant and material facts to support the cause of action of abuse of process/malicious process.

[48] A perusal of the Statement of Claim clearly establishes sufficient facts to construe a cause of action of abuse of process/malicious process.

[49] This can be gleaned in paras 18 to 20 of the Statement of Claim, which states as follows:-

“BUTIR-BUTIR TANGKAPAN/PENAHANAN SALAH DAN/ATAU CURANG OLEH DEFENDAN PERTAMA DAN/ATAU DEFENDAN KEDUA DAN/ATAU DEFENDAN KETIGA DAN/ATAU DEFENDAN KEEMPAT

18. Plaintiff menegaskan bahawa aduan dan/atau siasatan terhadap Plaintiff oleh Defendan Pertama dan/atau Defendan Kedua dan/atau Defendan Ketiga dan/atau Defendan Keempat adalah salah dan/atau curang dan/atau berniat jahat, di atas perkara-perkara seperti berikut:

- (i) Pada 19 March 2014, Plaintiff telah ditangkap oleh Defendan Pertama dan/atau Defendan Kedua dan/atau Defendan Ketiga dan/atau Defendan Keempat di Ibu Pejabat SPRM di Putrajaya;
- (ii) Hakikatnya, Defendan Pertama dan/atau Defendan Kedua, dan/atau Defendan Ketiga dan/atau Defendan Keempat telah bersiap sedia untuk menangkap Plaintiff ketika memaklumkan dan/atau memberi notis kepada Plaintiff untuk hadir dan memberikan keterangan di Ibu Pejabat SPRM;
- (iii) Plaintiff telah merayu kepada Defendan Pertama dan/atau Defendan Kedua dan/atau Defendan Ketiga dan/atau Defendan Keempat untuk menghubungi keluarganya bagi perkara-perkara berikut:
 - (a) Plaintiff memohon untuk menghubungi keluarganya bagi tujuan pengurusan wang jaminan;
 - (b) Plaintiff memohon untuk menghubungi keluarganya bagi tujuan makluman kepada peguam;
 - (c) Plaintiff memohon untuk menghubungi keluarganya dan/atau pelanggannya bagi tujuan untuk menangguhkan tarikh penerbangan ke Chennai, India untuk urusan perniagaan SPSB; dan
 - (d) Plaintiff memohon untuk menghubungi keluarga bagi tujuan memaklumkan keadaan kesihatan Plaintiff pada ketika itu dan membawa ubat-ubatan kepada Plaintiff yang pada ketika



penahanan tersebut, mengalami masalah kesihatan yang teruk seperti selsema, batuk yang teruk dan sakit tekak.

- (e) Plaintiff memohon untuk menghubungi keluarga bagi tujuan untuk meminta pertolongan mereka untuk menguruskan kenderaan yang ditinggalkan di Putrajaya.

Namun, Plaintiff telah dinafikan haknya untuk berbuat sedemikian oleh Defendan Pertama dan/atau Defendan Kedua dan/atau Defendan Ketiga dan/atau Defendan Keempat.

19. Defendan Pertama dan/atau Defendan Kedua dan/atau Defendan Ketiga dan/atau Defendan Keempat telah dengan sengaja menggari tangan Plaintiff dengan ketat sehingga menyukarkan Plaintiff untuk bergerak dan mengambil sapu tangan untuk mengelap muka dan hidung kerana Plaintiff pada ketika itu sedang mengalami selsema, batuk yang teruk dan sakit tekak.
20. Defendan Ketiga telah cuba menghasut dan/atau secara tidak langsung untuk mempengaruhi Plaintiff untuk mengaku bersalah dan mengatakan bahawa sekiranya Plaintiff mengaku bersalah, Plaintiff hanya akan dikenakan dengan hukuman denda sahaja.”

[50] It should be borne in mind that so long as the facts as pleaded give rise to a cause of action in tort of abuse of process/malicious process, that is a sufficient basis to construe a cause of action in the claim. The fact that it may not be pleaded expressly, as found in the textbook, does not detract from the existence of the cause of action in the pleading.

[51] We also find that the learned HCJ had addressed this issue in his reported GOJ (*supra*) in paras 46 and 49 when His Lordship said as follows:-

“Can the Plaintiff’s claims be sustained, when he did not specifically plead in his Pleading/Statements of Claim?

[46]...This Court opined that **although in this case, the Plaintiff had not used the word “malicious process” but relied on “false imprisonment/malicious prosecution”, this Court observed that the facts pleaded and the evidence relied on, show clearly that the Plaintiff has pleaded facts sufficient to show the existence of the new tort of malicious process against the Defendants, and therefore the Defendants are liable for the same. This is permissible, because what is important is that the Plaintiff has averred the facts in the pleadings which he is relying on, and not the legal effect.**

[49] Put it in another way, the **Statement of Claim might not have mentioned particulars exactly to “abuse of process/malicious process” but the Plaintiff did plead or allude to facts that pointed to abuse of process/malicious process. Hence, the Defendants cannot be said to be caught by surprise.**”

[Emphasis Added]



(See: *Mkini Dotcom Sdn Bhd & Ors v. Raub Australian Gold Mining Sdn Bhd* [2021] 5 MLRA 37 (Federal Court); *Venture SKL Sdn Bhd v. Geonex (M) Sdn Bhd* [2023] 5 MLRA 322 (Court of Appeal); *Ellamah d/o Ellapen v. Renganathan s/o Komarasamy & Ors* [1987] 2 MLRH 618 (Court of Appeal)).

[52] For these reasons, we find that the Statement of Claim discloses material facts sufficient to show the existence of the tort of abuse of process/malicious process against the Defendants, although it was not specifically pleaded.

Whether The Tort Of Abuse Of Process/Malicious Process Is Applicable To Criminal Investigation/Criminal Proceeding And/Or Abuse Of Criminal Process

[53] In the present case, at the end of the trial, the learned HCJ allowed the Plaintiff's claim on a cause of action of tort of "abuse of process/malicious process" but disallowed the claim for malicious prosecution against the Defendants.

[54] The grounds for the decision regarding abuse of process/malicious process can be gleaned from the learned HCJ's reported GOJ (*supra*) in paras [6], [11] to [18] as follows:-

"[6] Regarding this civil trial, at the end of the trial, this Court, on a balance of probabilities found that the Plaintiff had successfully proved his claims for wrongful imprisonment/arrest/harassment which this Court had "rebranded" it as "malicious process or abuse of process" with cost of RM40,000.00. However, this Court disallowed the claim for malicious prosecution against the Defendants as the Court ruled that this tort is simply unsustainable in Malaysia because of the discretionary power accorded to the Attorney General/Public Prosecutor under art 145(3) of the Federal Constitution, amongst others.

The tort of Malicious Process/Abuse of Process

[11] The tort of malicious process or abuse of process was introduced earlier in United Kingdom, where the Police were found to be liable for procuring arrests maliciously and without reasonable cause. This tort is newly introduced in Malaysia. It entails the torts of wrongful arrest/detention/wrongful imprisonment etc. and the lists are not closed. Apart from the United Kingdom, some other Commonwealth Countries, example New Zealand, Australia and Canada has recognized it. As we will see later, the Supreme Court of Canada earlier had even introduced the tort of negligent investigation against the Police, as they recognized that the torts of false imprisonment, misfeasance etc. do not provide an adequate remedy.

[12] It is distinct from the tort of malicious prosecution which applies against the Public Prosecutor. In the case of *Everett v. Ribbands And Another* [1952] 1 All ER 823, at p 826, lines B — D, the Court held:

"This action was known as an action for malicious process. It differed from malicious prosecution in that there was no need for the plaintiff to



prove that he had been acquitted. There could be no question of acquittal, because the process issued without his innocence or guilt being decided at all. It issued, indeed, without his being heard at all. A modern parallel is the issue of a search warrant. If it is obtained maliciously and without reasonable and probable cause, an action lies. See also *Roy v. Prior* [1971] AC 470.”

[13] This tort prevails in a situation like the present case before the Court whereby the Claimant/Plaintiff was rightfully and legally arrested but in the process, he was subjected to abuse, harassment, intimidation, inducement, harm which had affected him not only physically but mentally and psychologically. (This Court agreed that the arrest and detention was legal). Hence, he should be entitled to some form of redress or remedy for malicious process/abuse of process, as this Court ruled that the arrest and detention was legal.

[14] In the English case of *Goldsmith v. Sperrings Ltd* [1977] 2 All ER 566, p 574 lines E — F, the Court of Appeal in a dissenting judgment said this about the tort of abuse of process:

“What may make it (the legal process) wrongful is the purpose for which it is used. If it is done in order to exert pressure so as to achieve an end which is improper in itself then it is a wrong known to the law.”

[15] This dissenting judgment was applied by our court in *TN Metal Industries Sdn Bhd & Ors v. Ng Pyak Yeow* [1995] 5 MLRH 110. The judge held that the tort of abuse of process is distinct from malicious prosecution. It is applied in cases when a legal process has been misused to satisfy some other ulterior motives, thus:

“Where a legal process, the basis for which in itself could have proper foundation, has been perverted to satisfy some other motive such as extortion or oppression, an action will lie at the feet of a party that suffers the wrong. This is the tort of abuse of process. Unlike the tort of malicious prosecution, the tort of abuse of process does not depend on the wrongful procurement of the legal process but in the misuse of the process however correctly it was obtained...”

[16] The Court of Appeal in the case of *Malaysia Building Society Bhd v. Tan Sri General Ungku Nazaruddin Ungku Mohamed* [1998] 1 MLRA 67, at p 76 above also applied the dissenting judgment in *Goldsmith v. Sperrings Ltd (supra)*. The court ruled that, if a legal process is abused for an ulterior motive, and harm is done to the person for which the process is initiated against, then the court can award damages against the wrongdoer.

[17] This position has been neatly summed up by Lord Denning MR in his dissenting judgment in *Goldsmith v. Sperrings Ltd & Ors* [1977] 1 WLR 478, where at p 489 His Lordship said:

“In a civilized society, legal process is the machinery for keeping and doing justice. It can be used properly or it can be abused. It is used properly when it is invoked for the vindication of men’s rights or the enforcement of just claims.



It is abused when it is diverted from its true course so as to serve extortion or oppression: or to exert pressure so as to achieve an improper end. When it is so abused, it is a tort, a wrong known to the law. The judges can and will intervene to stop it. They will stay the legal process, they can, before any harm is done. If they cannot stop it in time, and harm is done, they will give damages against the wrongdoer.”

[18] Though a dissenting judgment, the principle enunciated by Lord Denning has been accepted as authoritative of what constitutes an abuse of process.

(See: *Malaysia Building Society v. Tan Sri General Ungku Nazaruddin (supra)*, at p 73.”

[55] We find that the three (3) cases relied upon by the learned HCJ namely the dissenting judgment of Lord Denning in *Goldsmith v. Sperrings Ltd* [1977] 1 WLR 478; [1977] 2 All ER 566, *TN Metal Industries Sdn Bhd & Ors v. Ng Pyak Yeow* [1995] 5 MLRH 110 and *Malaysia Building Society Bhd v. Tan Sri General Ungku Nazaruddin Ungku Mohamed* [1998] 1 MLRA 67, pertain to abuse of process by litigants who had initiated a civil process. How about the abuse of process in criminal process?

[56] From our observation, we find that there is no local reported case law where the tort of abuse of process/malicious process was applied in the case of criminal process.

[57] The dissenting judgment of the Federal Court in *Hassan Marsom & Ors v. Mohd Hady Ya’akop* [2018] 5 MLRA 263 held at paragraph [128] that the remand order obtained without reasonable cause and without compliance with s 117 of the Criminal Procedure Code is a malicious prosecution. In paragraph [131], it was held that malicious prosecution is an abuse of the legal system. An action in tort for malicious prosecution may be brought once criminal proceedings have been instigated, without reasonable or probable cause; have failed and have caused damage to the accused. If no adequate justification for the proceedings is put forward, then malicious intent may be implied. Malice on the defendant’s part, absence of reasonable cause for the prosecution, and actual damage are necessary.

[58] The Federal Court further held at paras [133] — [135] that the tort of malicious prosecution covers a situation where a person wrongfully made a complaint with ulterior motive which led to the arrest and prosecution of the Plaintiff by the authority: “he is liable, if at all, only for the misuse of legal process by procuring an arrest for an improper purpose for which the appropriate remedy is an action for malicious prosecution”.

[59] This part of the judgment in *Hassan Marsom*, although a dissenting judgment, was recently approved by the subsequent Federal Court decision in *Sri Sanjeevan Ramakrishnan v. ASP Poonnam E Keling & Ors* [2025] 4 MLRA 284 when it was held that:



“[49] The Federal Court in *Hassan Marsom & Ors v. Mohd Hady Ya’akop* [2018] 5 MLRA 263 (*supra*) in dealing with the issue of whether damages for false imprisonment can be awarded for detention under an Order of the Magistrate under s 117 of the Criminal Procedure Code, held that since the respondent was remanded under a judicial order of a Magistrate, it could not be false imprisonment. The remand order might have been wrongly applied. It might even have been that there was no reasonable cause or basis for a remand order. The remand order might have been applied and/or issued without compliance with s 117 of the CPC. The remand order might even have been set aside. However, that was all inconsequential in a claim for false imprisonment. Rather than false imprisonment, if at all, it was malicious prosecution.”

[60] Based on the above, we are of the view that the tort of abuse of process/ malicious process applies only to abuse of civil process and is not applicable to criminal process.

[61] Our view is supported by a recent Court of Appeal case of *Mohammad Najib Tun Haji Abdul Razak v. Thomas Thomas @ Mohan K Thomas* [2026] 3 MLRA 740, when it held as follows:-

“[84]... In the instant case, as **the matters in question are criminal charges, it is plain to us that the tort of malicious process or abuse of process (even if it was pleaded) cannot apply.**”

[62] In fact, the Court of Appeal in the *Mohammad Najib* case had disapproved the decision of the learned HCJ in our case at hand when it held that:

“[52] For my part, I agree with the views expressed in the trio of cases that I discussed above. At the risk of repetition, I note that whilst art 145(3) of the Federal Constitution grants prosecutorial discretion to the Attorney General, it does not immunize the wrongful exercise of it from civil actions. Neither does any other written law provide such protection to the Attorney General. Furthermore, in all the cases in the law reports where the Attorney General or Deputy Public Prosecutors have been sued for malicious prosecution, save in the instant case in the court below and in the *Nik Suhaimi* case that was decided by the same High Court Judge, no court has said that said tort cannot be availed in a civil action because the prosecutorial discretion under art 145(3) will operate to extinguish it at the outset. For the above reasons, I am of the view that the exercise of prosecutorial discretion of the Attorney General under art 145(3) is not immunized from civil actions if it is abused and exercised in bad faith.”

[63] Wong Kian Kheong, JCA, in His Lordship’s supporting Judgment in the *Mohammad Najib* case, held the following:

“[97] Firstly, it is not disputed that by virtue of art 145(3) of the FC and s 376(1) of the CPC, the AG/PP has a constitutional discretion to:

- (i) institute any prosecution;
- (ii) amend any charge before the commencement of the trial of the accused person(s);



- (iii) conduct any prosecution; and
- (iv) discontinue any prosecution.

(Four prosecutorial powers).

[108] With regard to the exercise of the 4 Prosecutorial Powers, I am of the view that the **tort of malicious prosecution (as recognised in *Rawther and Khairuddin*) provides a just, effective and adequate remedy for accused persons who had been-**

- (1) **charged with offences by the AG/PP and/or DPPs; and**
- (2) **ultimately acquitted of those charges.**

Premised on the above reasons, there is no necessity to rely on the tort of misfeasance in public office in respect of the invocation of the 4 Prosecutorial Powers by the AG/PP and/or DPPs. Having said that, a plaintiff may still rely on the tort of misfeasance in public office regarding the exercise of any public power or authority by the AG/PP and/or DPPs, which does not concern the 4 Prosecutorial Powers.

G. Whether This Suit Could Be Filed Against The Respondent For The Tort Of Abuse Of Process

[110] With regard to the tort of abuse of process, Gopal Sri Ram JCA (as he then was) had decided as follows in the Court of Appeal case of *Malaysia Building Society Bhd v. Tan Sri General Ungku Nazaruddin Ungku Mohamed* [1998] 1 MLRA 67, at pp 67, 68, 73, 76 and 77 (*MBSB's Case*):

“On 3 April 1984, the appellant before us obtained judgment in Civil Suit C431 of 1984 for the sum of RM1,475,529.68. It was a judgment in default of appearance. Later, on 4 April 1986, acting on the judgment, the appellant, as petitioning creditor, instituted bankruptcy proceedings against the respondent which culminated in the making of receiving and adjudicating orders on 10 March 1986.

On 20 October 1987, the respondent took out a motion to set aside these orders. He also asked for other relief, including an order that ‘damages be paid by the petitioning creditor to the debtor’. On 19 June 1992, the learned judge who heard the respondent’s motion granted an order in its terms. Apart from annulling the adjudicating order and rescinding the receiving order, he directed that damages be paid by the appellant to the respondent....

On 10 July 1995, the appellant filed a summons in chambers to set aside that part of the order dated 19 June 1992 that awarded damages to the respondent. The ground upon which the application was made was that the judge had no jurisdiction to make that order. The appellant’s summons was heard before the learned judicial commissioner who, after hearing arguments, dismissed it on 2 March 1996. It is against that decision that the present appeal has been brought.



When the appeal was called on yesterday, we formed the preliminary view that the High Court lacked the power to do what it did, namely to make a summary award of damages to be assessed....

I am therefore in agreement with Mr Das' submission that there is absent in the High Court in our country, any power to award damages upon making orders under s 105 [of the then Bankruptcy Act 1967 (BA)]. Put another way, a High Court exercising bankruptcy jurisdiction under 105 [BA] may only make those orders referred to in the five subsections thereunder. It cannot make any other orders.

Every person who is aggrieved by some wrong he considers done him is at liberty to invoke the process of the court. Equally may a litigant invoke the process to enforce some claim which he perceives he has against another. When however, the process of the court is invoked, not for the genuine purpose of obtaining the relief claimed, but for a collateral purpose, for example, to oppress the defendant, it becomes an abuse of process. Where the court's process is abused, the proceedings complained of may be stayed, or if it is too late to grant a stay, the party injured may bring an action based on the tort of collateral abuse of process.

In my judgment, the essential elements of the tort of abuse of process are these:

- (1) The process complained of must have been initiated;
- (2) the purpose for initiating that process must be some purpose other than to obtain genuine redress which the process offers. In other words, the dominant purpose for which the process was invoked must be collateral, that is to say, aimed at producing a result not intended by the invocation of the process; and
- (3) the plaintiff must have suffered some damage or injury in consequence.

It is to be stressed that neither malice nor the termination of the proceedings in the plaintiff's favour are necessary elements of the tort. To put it plainly, a plaintiff in an action for abuse of process need not prove that the defendant had invoked the process of the court maliciously. Neither does he have to prove that the proceedings terminated in his favour.

It is only upon proof of the elements that go to make up the tort of collateral abuse of process, that a plaintiff is entitled to an award of damages."

...

[113] I am of the opinion that a **plaintiff cannot file a Civil Suit (Tort of Abuse of Process) in respect of the invocation of the 4 Prosecutorial Powers by the AG/PP and DPPs. This view is due to the fact that with regard to the exercise of the 4 Prosecutorial Powers by the AG/PP and DPPs, Malaysian case law (in *Rawther* and *Khairuddin*) has already provided for the tort of malicious prosecution as a just, effective and adequate remedy**



for any accused person. Needless to say, a plaintiff may institute a Civil Suit (Tort of Abuse of Process) regarding the exercise of the powers of the AG/PP and DPPs in proceedings in respect of the plaintiff which do not concern the 4 Prosecutorial Powers.

...

H. Should Our Courts Recognise The Tort Of Malicious Process Against AG/PP And DPPs?

[115] Firstly, the categories of torts are never closed, and Malaysian courts may recognise new torts in the interest of justice. In *Ou Yang Chow Min v. Green Venture Capital Sdn Bhd & Another Case* [2022] 6 MLRH 489, at [35], the High Court decided as follows:

“[35] I would take this opportunity to express my view as to whether Malaysian case law should recognize a tort of abuse of adjudication process under CIPAA [Construction Industry Payment and Adjudication Act 2012]. Firstly, as decided by Lord MacMillan in the House of Lords in *Donoghue v. Stevenson* [1932] AC 562, at p 619, the categories of tort are never closed. Secondly, without the benefit of argument from learned counsel, I cannot envisage a tort of abuse of adjudication process unless all the following three circumstances are present:

- (1) a claimant (Y) has instituted adjudication proceedings against a respondent (Z) and the adjudicator has dismissed Y’s adjudication claim against Z [Dismissal (Adjudication Claim)]. Alternatively, if an adjudication decision has been delivered in favour of Y against Z, Z has successfully applied to the High Court to set aside the adjudication decision and the High Court’s setting aside order has been affirmed on appeal by the Court of Appeal or Federal Court, as the case may be (Setting Aside Order). When there is a Setting Aside Order, Y cannot obtain leave of court under s 28 CIPAA to enforce the adjudication decision;
- (2) no Litigation/Arbitration has been commenced between Y and Z. Alternatively, Litigation/Arbitration has been instituted and resolved in favour of Z against Y [Z’s Success (Litigation/ Arbitration)]. If Y is successful in Litigation/Arbitration against Z, this means that Y has performed construction work for which Z should be liable to Y. In such a case, I cannot foresee how Y has abused the adjudication process under CIPAA; and
- (3) Z has suffered loss due to the Dismissal (Adjudication Claim) or the Setting Aside Order [Z’s Loss (Adjudication)]. Z’s Loss (Adjudication) should be distinguished from Z’s loss due to Litigation/Arbitration in Z’s Success (Litigation/Arbitration) [Z’s Loss (Litigation/Arbitration)]. This is because Z’s Loss (Litigation/Arbitration) may be claimed by Z from Y pursuant to tort of Y’s abuse of court process, tort of arbitral process (if recognized by Malaysian case law) and/or tort of malicious prosecution.”

[Emphasis Added]



[117]...

- (5) **the tort of malicious process should not be recognised against the invocation of the 4 Prosecutorial Powers by the AG/PP and DPPs because-**
 - (a) **our case law (in *Rawther* and *Khairuddin*) has already enforced the tort of malicious prosecution with regard to the exercise of 4 Prosecutorial Powers by the AG/PP and DPPs; and**
 - (b) **if our courts recognise the tort of malicious process against the AG/PP and DPPs in respect of the Prosecution(s), a Duplicity (Proceedings) would arise and such an outcome is neither just nor desirable...**

[118] As explained in the above sub-paragraph 29(5), the Appellant could not file this suit against the Respondent based on the tort of malicious process. Consequently, the learned High Court Judge did not err in law and in fact by striking out This Suit with regard to the tort of malicious process.

I. A Summary Of This Judgment

[119] In summary, This Appeal is dismissed with costs on the following brief grounds:

- (1) in respect of the tort of negligence, the Respondent, as the then AG/PP, did not owe any duty of care to the Appellant with regard to the exercise of the Respondent's discretion in the filing of the Charges against the Appellant;
- (2) the Appellant could not file This Suit against the Respondent premised on the 3 Torts because at the time of the filing of This Suit, the Appellant had not been finally acquitted of the Charges;
- (3) **Malaysian courts should not recognise the tort of malicious process against the Respondent as the then AG/PP."**

[Emphasis Added]

[64] Apart from the above cases, we also made reference to *Clerk & Lindsell on Torts* (24th Edn, 2023), where it explained that the tort of malicious prosecution encompasses damage caused to the person's character/reputation, injury to feelings, mental distress and anxiety, loss of liberty or loss of property (at paras [15-06]-[15-07]).

[65] In this present case, the learned HCJ in his reported GOJ (*supra*) had made a finding of fact that there are at least three (3) instances of abuse of process, namely:

- a. the Plaintiff was unnecessarily handcuffed tightly (at para [28]);
- b. pre-planned malice that 'the media was already informed' of the Plaintiff's impending presence in court, amounted to an act of



harassment and inducement for the Plaintiff to plead guilty (at para [30]); and

- c. adverse ‘malicious’ ‘parading in court’s lobby’ and publicity in primetime news and print media of the plaintiff’s criminal charges (at para [31]).

[66] All the above are kinds of damage, in our view, covered by the tort of malicious prosecution as demonstrated in *Clerk & Lindsell*.

[67] Given the above, we are of the considered view that the tort of malicious process/abuse of process applies only to abuse of civil process and is not applicable to criminal investigation/criminal proceeding, i.e., criminal process, no matter if the so-called abuse is within the four (4) Prosecutorial Powers by the AG/PP and DPPs or not.

[68] If it falls within, our case law in *Rawther v. Abdul Kareem* [1966] 1 MLRA 398 and *Khairuddin Abu Hassan v. Wan Aedil Wan Abdullah & Ors And Another Appeal* [2025] 4 MLRA 254 has already enforced the tort of malicious prosecution. If it is not, the aggrieved party was not left without remedy, as he can still seek redress under the tort of misfeasance, which is not the pleaded case here.

[69] Therefore, we find that the legal approach taken by the learned HCJ in the present case in extending the general tort of malicious process/abuse of process in civil process to a case of abuse of criminal process is clearly unsustainable and inconsistent with the prevailing trend in the UK and the Commonwealth.

[70] We are also of the considered view that since the present case concerned the allegation of abuse of criminal process where the only recognized cause of action for such abuse is confined to the tort of malicious prosecution, in light of the fact that the High Court has dismissed the claim for malicious prosecution and the Plaintiff did not file any appeal against the dismissal of the claim for malicious prosecution, it necessarily implies the satisfaction by the High Court that the all-important elements of ‘no reasonable and probable cause’ and ‘malice’ to constitute a tort of malicious prosecution were not made out by the Plaintiff. In the converse, what it means is that the High Court was satisfied that the entire journey leading to the charging of the Plaintiff was supported by reasonable and probable cause, and the Defendants were not malicious.

[71] In the upshot, we find that having found no case for the claim under the tort of malicious prosecution, there was no basis for the learned HCJ to then find liability for a cause of action under the tort of abuse of process/malicious process, which was applicable only to abuse of civil process.

Conclusion On Liability

[72] For the reasons given above, we find that the learned HCJ erred in allowing the Plaintiff’s claim against the Defendants.



[73] We therefore unanimously set aside the decision of the High Court dated 25 August 2023 on liability, resulting in Appeal 484 by the Defendants being hereby allowed.

Appeal 386 And Appeal 406 (On Quantum)

[74] As a consequence of our above finding on liability, our hands are tied to also set aside the decision of the learned HCJ dated 28 May 2024 (on quantum).

[75] Notwithstanding our findings on liability in the above paragraphs, for completeness, we will address the appeal on quantum by the Plaintiff in Appeal 386 and by the Defendants in Appeal 406. With regard to these two (2) Appeals, we will deal with them together.

[76] The Plaintiff, as the appellant in Appeal 386, complains that the learned HCJ erred in law and fact in:

- a. failing to make an award for the injuries sustained by the Plaintiff with regard to the handcuffing of the Plaintiff, which injuries were documented in the medical report;
- b. in including the pain and suffering sustained by the Plaintiff for the handcuff injuries in the lump sum award of RM200,000.00 as general damages;
- c. not sufficiently given judicial consideration in awarding a global award of RM200,000.00 for the injuries sustained, such as depression, loss of mood, anhedonia, insomnia, poor appetite, loss of weight, lethargy, social withdrawal, and persistent worries;
- d. failing to consider making an award for his condition of Bipolar Depressive Disorder;
- e. in failing to make a sufficiently large award for the tort of malicious process/prosecution to reflect the suffering endured by the Plaintiff;
- f. not making a separate award for loss of income;
- g. in failing to consider at all the specific claims made by the Plaintiff in respect of special damages and instead erred in law by merely “plucking a figure from the air”, and awarding RM100,000.00 as special damages.
- h. in failing to be guided by the principles relating to the award of aggravated and exemplary damages, and thereby erred in making an award of only RM400,000.00 for aggravated damages and RM200,000.00 for exemplary damages.



[77] The Defendants, on the other hand, as the appellants in Appeal 406, are dissatisfied with the decision of the learned HCJ in:

- a. allowing RM200,000.00 as general damages since the Plaintiff had failed to prove that he had suffered any damages. Neither were doctors called to prove his mental illness, nor to determine whether it was caused by the Defendants. Several medical reports referred to by the Plaintiff were categorized in Part B of the Bundle of Documents and were never declassified as Part A;
- b. allowing special damages to be awarded to the Plaintiff. The Plaintiff failed to specifically plead and particularize any item of damage that represents the out-of-pocket expenses or loss of earnings incurred prior to the trial and that is capable of substantiating an exact calculation in his Statement of Claim;
- c. deciding to allow special damages of RM50,000.00 (nominal) for loss of earnings, profit, loss of investment, and business opportunities because they were too remote and speculative;
- d. awarding exemplary/punitive damages of RM200,000.00 as the conduct of the Defendants was not outrageous but rather a routine procedure in arresting and investigating any suspect of MACC. The Plaintiff had been arrested, brought to lock-up, and spent a night there before he was brought to the Kuantan Sessions Court to be prosecuted. Also, handcuffing is a normal procedure;
- e. allowing RM400,000.00 aggravated damages as the Plaintiff had failed to prove the element of aggravated damages.

Our Findings On Quantum

General Damages

[78] The learned HCJ had allowed general damages of RM200,000.00. Based on His Lordship's Broad GOJ in para 13(a), this award was allowed based on the following reasons:

“(a) General Damages

This is allowed. Injuries to the hand “akibat digari” (see medical report). Depressive symptom developed since 15 April 2014. This persisted till 2016. The Plaintiff has no previous history of depressive symptoms or psychiatric history but for this case Aggravated later and developed into bipolar depressive disorder & later suffered anhedonia. Therefore, this claim allowed — sum awarded RM200K.”

[79] The Defendants submit that the burden of proof lies on the Plaintiff to prove that he suffered from injuries or even psychiatric illness.



[80] The Defendants further submit that the Plaintiff failed to prove that he had suffered any damages. Neither doctor was called to prove his mental illness nor to determine whether it was caused by the Defendants. Since none of the doctors were called to testify, the Defendants did not have the opportunity to cross-examine the doctors who diagnosed the Plaintiff's condition to prove whether or not it was the result of the arrest or it's hereditary.

[81] What happened during the trial was that the Plaintiff himself testified about the findings of the doctors. Such evidence, as submitted by the Defendants, is unreliable, and the learned HCJ had erred in allowing such an amount as general damages.

[82] The Defendants further submit that the several medical reports referred to by the Plaintiff were categorized in Part B of the Bundle of Documents and thus, it was never declassified as Part A. The maker of the medical reports or the doctors were not called in Court. Hence, by merely relying on the said medical reports, the learned HCJ had erred in allowing such damages, as he was motivated by sympathy and descended into a domain of speculation.

[83] On the issue that no doctors were called to prove the Plaintiff's mental illness and that the maker of the medical reports, which were categorized in Part B of the Bundle of Documents, was not called in court, we find that the issue raised has no merit.

[84] We took the pains to go through the Notes of Proceedings (NOP) dated 8 November 2022 to understand what actually happened during the trial. The NOP revealed as follows:-

"TARIKH:	8 NOVEMBER 2022
KORUM:	YA DATO' AHMAD BIN BACHE
P. PLAINTIF:	1) DATO' KAMALANATHAN RATNAM 2) VINOD KAMALANATHAN 3) ANIS AMIRAH ZAKARIA (PDK)
P. DEFENDAN:	1) PN. SYAHRIAH SHAFIEE (SFC) 2) TN. MOHD ASHRAF ABD HAMID (FC)

JB: Dengan izin Yang Arif, guaman sivil 21NCVC-79-09/2018. Nik Mohd Suhaimi lawan Siti Fairuz Binti Shamsuri and 8 others.

PP: If it may please my lord, R, Kamalanathan and Vinod Kamalanathan for Plaintiff and I also have with me my lord, Anis Amirah, she's a Pelatih Dalam Kamar my lord and she is going to be admitted soon to the bar. So, if with your permission I need her to produce the documents my lord. She's been working on this file with me my lord and I also have Senior Federal Counsel, Syahriah Shafiee with Federal Counsel En Mohd Ashraf Bin Abd Hamid appearing for the Defendant. **My lord, we are pleased to inform my lord that**



my learned friends have very graciously agreed to all the documents so we will not be wanting to tender each page and what not my lord so that, the documents have been agreed as Ikatan Pliding will be bundle A my lord, the Ikatan Dokumen Bersama, where the documents have been used in the lower courts would be B1, B2 and B3 and there's this Ikatan Dokumen Plaintiff, which is the medical report and all that which is also agreed C1 and C2 my lord and C3 and then we have the isu dipertikaikan bundle D, E is the fakta dipersetujui and F is the ringkasan kes Plaintiff and G, the ringkasan kes Defendant. My lord, there's also one issue where at in regards to bundle C1 pp 19 to 23 my lord or rather to, and 19 to 24 have been substituted my lord by fresh bundle, I will be adducing evidence on that basis and of course based on that, pp 24 and 25 will also be redundant because we have narrowed the issues down. So, therefore pp 19 to 25 will only encompass the 4 sheets which we have now produced as additional copies. My lord, I'm also pleased to inform my lord that my learned friends and I have agreed that the witness statement, pernyataan saksi would be deemed read my lord to save the time so that my learned friends can start cross straight away. Except that in respect of the additional witness statement which is regarding quantum, I will have to take the witness through the questions my lord because there's some amendments to be made and he would have to adduce evidence to show. I will go at it quickly my lord so that we can save time and hopefully by lunch my learned friends could start cross examining, thank you my lord. With that may I call my witness to the stand my lord.

MAH: How many witnesses?

PP: My lord, **I have only, today only the Plaintiff** because by the time we finish him, I think and **since my learned friends have already agreed on all the medical reports, I will maybe call only one more witness** my lord.

MAH: Tiada settlement?

PD: Maaf Yang Arif, tiada settlement.

PP: You to speak loud.

..."

[Emphasis Added]

(See: Appeal 386: Encl 10, pp 22-23)

[85] Based on the NOP above, we find that there was an admission by both sides appearing before the court that the parties, by consent, have agreed to all the documents.

[86] We take note from the NOP that not even once did the Defendants object to the Plaintiff's counsel's statement that the Defendants have agreed and admitted to all the medical reports.

[87] We find that, except for the medical report for the handcuffing injuries from Klinik Ilham (See: Appeal 386, Encl 21, p 1), the rest of the reports are



from Universiti Kebangsaan Malaysia (UKM), the servants or agents of the 9th Defendant, the Government Of Malaysia.

[88] We are of the considered view that once the documents have been agreed to by both parties, there is no need to call witnesses to prove the contents. In the event the Defendants wanted any agreed documents to be proved or to be referred to in cross-examination, the *onus* shifted to the Defendants to call the doctor in question, as all the reports were from the Government doctors. However, the Defendants opted not to send the Plaintiff for any further re-examination because no such request was made.

[89] Therefore, we are of the considered view that it is totally unjust and unfair for the Defendants to submit that “the Defendants were not given the opportunity to cross-examine the doctors who diagnosed the Plaintiff’s condition, whether or not it was the result of the arrest or hereditary” after the Defendants had agreed to all medical reports and this had been recorded in the NOP.

[90] On this issue of admissibility of documents, the Federal Court in *Borneo Co (M) Sdn Bhd v. Penang Port Commission* [1975] 1 MLRA 510 had stated as follows:-

“[15] Counsel for respondent stated that he objected to the “Agreed Bundles” because they included documents, the admission and contents of which were disputed. The “Agreed Bundles” were prepared by appellants. He was informed by Counsel for appellants of the practice in Kuala Lumpur. In any case he told appellants of his objection and that he would raise his objection in Court. Objection was apparently taken in Court. He said the bills of lading were not supposed to be in the Agreed Bundles. From the record nothing was said about them at trial. *Sarkar on Evidence*, 12th Edn, Vol 1 p 581 states that:

“Documents are either proved by witnesses or marked on admission. When it is marked on admission without reservation, the contents are not only evidence but are taken as admitted, and cannot be challenged by cross-examination or otherwise. In case of **documents marked on admission dispensing with formal proof, the contents are evidence, although the party admitting does not thereby accept the truth of the contents which can be challenged by cross-examination or otherwise** (*Lionel Edwards Ltd v. SA* 1976 C 191).

Where documents were produced and not disputed, the Privy Council held that **they should be received without proof** (*Takai v. Beglar* 6 MIA 521; *Ninda Kishore v. Ram Kalpa* 6 BLR Ap 49).”

[Emphasis Added]



[91] Further in *Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor* [1997] 1 MLRA 605, the then Supreme Court held:-

“[24] First and foremost, the **agreed bundle of documents means that the documents therein are authentic and they do exist, therefore they require no proof of their authenticity** by calling e.g their makers”.

[Emphasis Added]

[92] Given the above, we are of the view that the non-objection by the Defendants of the admission of the documents (including the medical reports) in Bundles B1, B2, B3, C1, C2 and C3 is fatal to the Defendants’ case and there is no necessity for the Plaintiff to call the witness to prove the contents of the document.

[93] Back to the merit, the Plaintiff submits that the learned HCJ erred in law in failing to make an award for the injuries sustained by the Plaintiff with regard to the handcuffing of the Plaintiff, which injuries were documented in the medical report dated 20 March 2014 and 4 July 2024, respectively. (See Appeal 386: Encl 4, pp 315 and 337)

[94] The Plaintiff also submits that the learned HCJ erred in law in failing to make a separate award for pain and suffering sustained by the Plaintiff.

[95] We have perused the Broad GOJ of the learned HCJ, and we found that in giving the award of RM200,000.00 for general damages, His Lordship failed to take into consideration the medical report of the Plaintiff obtained from the 9th Defendant dated 15 April 2014 and the pain and suffering sustained by the Plaintiff for the handcuff injuries as follows:-

- i. Plaintiff was well until April 2014 (after the arrest), when he began experiencing depressive symptoms such as loss of mood, anhedonia, insomnia, poor appetite, loss of weight, lethargy, social withdrawal and persistent worries regarding his business.
- ii. Prior to the onset of depression in March 2014 when the Plaintiff was charged under s 468 of the Penal Code the Plaintiff was thereafter preoccupied with worries about the consequences that he would have to face if he was found guilty.
- iii. His depressive symptoms persisted and worsened in anticipation of the Court hearing on 5 August 2016.
- iv. After he was acquitted, his depressive symptoms improved.
- v. However, he was still having residual symptoms like irritability, loss of mood and insomnia.



- vi. Currently he is still distressed and he perceives that his business has been negatively impacted by the events surrounding the Court case.
- vii. His wife corroborated the history from the patient.
- viii. There was no previous psychiatric history prior to the first episode and no family history of psychiatric illness.
- ix. Currently he is on continued psychiatric follow-up.

[96] Therefore, we find that the Defendants' contention that the learned HCJ erred in awarding RM200,000.00 for the injuries caused by handcuffing and the psychological effects and mentally being affected and suffered by the Plaintiff and that the Plaintiff did not rely on any evidence of any specialist cannot be true.

[97] In making such a claim, the Defendants have failed to consider their admission of the medical reports (See: Appeal 386: Encl 21, pp 5-6, 12 and 13). The report on pp 12-13 was prepared by Doctor Kanit Tha Deang from UKM, a servant/agent of the 9th Defendant.

[98] Further, we find that the Defendants did not challenge the reports nor refer the Plaintiff to their own specialist. To compound the matter, on the first day of the trial, the Defendants had admitted to all the medical reports as mentioned above.

[99] We are of the considered view that, looking at the background of the Plaintiff, the injuries sustained by the Plaintiff, the medical history and medical reports of the Plaintiff, the learned HCJ did not give sufficient judicial consideration in His Lordship's Broad GOJ when he awarded a global sum of RM200,000.00 as general damages. The learned HCJ failed to take into consideration the Plaintiff's injuries such as depression, loss of mood, anhedonia, insomnia, poor appetite, loss of weight, lethargy, social withdrawal and persistent worries.

[100] We found that the Plaintiff had set out and itemized as (a) to (i) (See: Appeal 386: Encl 7, pp 83-84) the sufferings he underwent and is continuing to undergo, as he is on follow-up psychiatric treatment.

[101] Further, we find that the learned HCJ in his Broad GOJ had accepted as a finding of fact that "the Plaintiff had no previous history of depressive symptoms or psychiatric history", and that it began after arrest and that it persisted till 2016, but the learned HCJ had erred when he failed to consider the medical evidence that said that the symptoms continue till today and the Plaintiff even testified to this fact and the learned HCJ had in fact accepted the Plaintiff's evidence.



[102] The evidence produced before the court shows that Dr Nor Hajar Binti Ismail from UKM had on 14 November 2016 confirmed that the Plaintiff's final diagnosis was that he was suffering from "Major Depressive Disorder" (MDD) (See: Appeal 386: Encl 21, pp 9-11). The learned HCJ failed to consider in his Broad GOJ that Dr Nor Hajar's report elaborated that the depression still persisted and that it had caused him to suffer insomnia and to be constantly irritable.

[103] More importantly, we find that the Plaintiff testified and had confirmed that these sufferings still persist, and the Defendants, by not referring to another specialist, had agreed and admitted that the Plaintiff continues to suffer these injuries to date.

[104] The medical report of the Plaintiff also confirmed that he was suffering from "anhedonia" and this was in the specialist report dated 14 November 2016 from UKM, prepared by the 9th Defendant (See: Appeal 386: Encl 21, pp 9-11). The 9th Defendant had every opportunity to have challenged this finding of anhedonia, and yet the learned HCJ had failed to consider the same in his Broad GOJ and by failing to refer to and accept the meaning of anhedonia as described in the Google report, which is:

"The reduced ability to feel pleasure, which is, to lose interest in the activities, hobbies, and experiences they used to love."

[105] We are of the considered view that by failing to consider this particular suffering, which is a permanent injury, occurring as a result of the Defendants' cumulative tortious acts, the Plaintiff surely deserves a larger award than RM200,000.00. The Defendant could have challenged the reference to the Google report by referring to their own specialist. Therefore, by failing to do so, this court must presume that the Defendants had accepted the description of anhedonia as set out in the Google report.

[106] Further, we find that the learned HCJ failed to take into consideration the loss suffered by the Plaintiff as a result of anhedonia. The learned HCJ failed to appreciate that losing interest in the activities, hobbies, or exercises that the Plaintiff used to love is a loss that cannot be compensated with money. We noticed that this is the first time such an issue has come before the Court.

[107] We are of the considered view that if the Defendants had intended to challenge these injuries suffered by the Plaintiff they ought to have referred the Plaintiff again to the same specialist, (being the 9th Defendant's servant or agent), for a further report and in failing to do so, we view that the Defendants were satisfied that the said injuries were persisting and continuing and in failing to consider these residual symptoms suffered by the Plaintiff, we find that the learned HCJ's global award of RM200,000.00 is clearly to be manifestly low.

[108] Based on the reasons given above, we are of the considered view that a global award of RM800,000.00 is fair and reasonable.



Special Damages

[109] The learned HCJ had allowed special damages of RM100,000.00. Based on His Lordship's Broad GOJ in para 13(b), this award was allowed based on the following reasons:-

Regarding loss of earnings, profit, loss of investment, business opportunities allowed only RM50,000.00 (nominal). This is because it is too remote and speculative. Regarding loss of business with Dixny. This is allowed for RM50,000.00 only (nominal). This is because it is too remote. Regarding the cost of defending criminal case — (legal fees) this is disallowed — (Plaintiff has to bear his own expenses)."

[110] The Defendants submit that the learned HCJ had erred in allowing special damages to be awarded to the Plaintiff since the Plaintiff failed to specifically plead and particularize any item of damage that represents the out of pocket expenses or loss of earnings incurred prior to the trial.

[111] The Plaintiff, on the other hand, contended that the learned HCJ erred in law and fact in failing to consider at all the specific claims made by the Plaintiff in respect of special damages and instead erred in law by merely "plucking a figure from the air", and awarding RM100,000.00 as special damages.

[112] With regard to special damages, the Plaintiff claims the actual loss of earnings, loss of EPF, loss of profit, claim in respect of employing Nepalese and "Rugi pelaburan modal" amounting to RM920,373.90. The Plaintiff's claim for special damages can be summarized as follows:

Actual loss of earnings	RM168,000.00
Loss of EPF	RM21,840.00
Loss of Profit	RM84,253.93
Claim in respect of employing Nepalese	RM588,000.00
Rugi pelaburan modal	RM58,279.97
Total	RM920,373.90

[113] However, having perused the evidence produced before the court, we find that the Plaintiff failed to plead the relevant particulars in relation to special damages, which is fatal to the Plaintiff's case.

[114] We find support for our view by referring to the case of *Ilkiw v. Samuels and Others* [1963] 2 All ER 879, where Diplock LJ said:

"As regards the question of damages, I would put it in this way. **Special damage in the sense of a monetary loss which the plaintiff has sustained up to the date of trial must be pleaded and particularised.** In this case special damages were so pleaded and particularised at the sum of £77 odd. Shortly



before the trial, the special damage (as so particularised) was agreed at £77 by letter.

In my view, it is plain law — so plain that there appears to be no direct authority, because everyone has accepted it as being the law for the last hundred years — that **one can recover in an action only special damage which has been pleaded, and, of course, proved.**”

[Emphasis Added]

[115] In *Ong Ah Long v. Dr S Underwood* [1983] 1 MLRA 154, the Federal Court summed up the law comprehensively as follows:-

[11] It is a well-established principle that special damages in contrast to general damages, have to be specifically pleaded and strictly proved. They are recoverable only where they can be included in the proper measure of damages and are not too remote (see *Halsbury's Laws of England* (4th Ed, Vol 11) p 218 para 386). That in our view is the cardinal principle adopted by all courts both in England and this country. The same principle was adopted by Ong Hock Thye FJ (as he then was) in *Yee Hup Transport & Company & Anor v. Wong Kong* [1967] 1 MLRA 247 which was an appeal on quantum of damages. Quoting an excerpt from the judgment of Wilmer LJ in *Ilkiw v. Samuels & Ors* [1963] 1 WLR 991; [1963] at 2112 All ER 879 he held that the general damages should not be awarded as though they were special damages properly pleaded and proved. Similarly Chang Min Tat FJ (as he then was) in *Murtadza bin Mohamed Hassan v. Chong Swee Pian* [1979] 1 MLRA 307 applied the principle in *Ilkiw v. Samuels & Ors* that special damages if pleaded as in that case could be recovered. The principle was also adopted by Mohamed Azmi J (as he then was) in *Sam Wun Hoong v. Kader Ibramshah* [1980] 1 MLRA 712 in the Federal Court.

[12] The reason that special damages have to be specifically pleaded is to comply with its object which is to crystallise the issue and to enable both parties to prepare for trial (per Edmund Davies, LJ in *Domsalla v. Barr* [1969] 1 WLR 630 at p 635. In special damages claims the exact loss must be pleaded where the precise amount of item of damages has become clear before the trial either because it has already occurred and so become crystallised or because it can be measured with complete accuracy (*McGregor on Damages* (14th Edn) p 1012 para 1498). The purpose is to put the defendants on their guard and tell them what they have to meet when the case comes on trial (per Cotton LJ in *Phillips v. Phillips* (1878) 4 QBD 127 at p 139.

And, continue at p 158:

[18].... Be that as it may, we prefer the view that in practice special damages have to be specifically pleaded having regard to prevalent authorities. It requires the plaintiff to plead and particularise any item of damage which represents the out-of-pocket expenses or loss of earnings incurred prior to the trial, and which is capable of substantially the exact calculation. It is commonly referred to as special damages in the sense that fairness to the defendant requires it to be pleaded. (Per Lord Donovan in *Perestrello E Companhia Limitada v. United Paint Co Ltd* and per Lord Goddard in *Yee Hup*



Transport & Company & Anor v. Wong Kong [1967] 1 MLRA 247. The obligation to particularise is stated in *Mayne and McGregor on Damages* (12th Ed) para 970:

Special damage consists in all items of loss which must be specified by (the plaintiff) before they may be proved and recovery granted. The basic test of whether damage is general or special is **whether particularity is necessary or useful to warn the defendant of the type of claim and evidence, or of the specific amount of claim, which he will be confronted with at the trial...."**

[Emphasis Added]

[116] From the above-mentioned cases, we find that the Plaintiff had failed to specifically plead and particularize any item of damage which represents the out-of-pocket expenses or loss of earnings incurred prior to the trial, and which is capable of substantially the exact calculation, in this statement of claim. Therefore, based on the rule of pleading alone, the claim shall be dismissed.

[117] Notwithstanding the rule of pleading, we are of the view that the Plaintiff is not entitled to claim the special damages as itemised above based on the following reasons:-

- a) The Plaintiff himself had tendered his resignation and sold his shares in the company. This can be seen at p 23 of Ikatan Dokumen Tambahan Plaintiff, which clearly shows that the new company, i.e., Kawalan Keselamatan Anugerah Sdn Bhd had decided to buy shares from the Plaintiff's company prior to the Plaintiff's arrest and charge in court;
- b) The company bought the Plaintiff's company on 5 July 2013. The Plaintiff was arrested on 19 March 2014 and charged in court on 20 March 2014. Therefore, we are of the view that the Plaintiff is not entitled to his claim because the decision to sell the shares was not due to the Plaintiff's arrest and charge in court; and
- c) With respect to the claim in respect of employing Nepalese, we noticed that no contract was made between the Plaintiff's company and other company in respect of bringing and employing Nepalese. We find that the letter referred to by the Plaintiff is merely a permission letter by the Kementerian Dalam Negeri (p 19 of Ikatan Dokumen Tambahan Plaintiff) to allow the Plaintiff's company to employ Nepalese as a security guard and no cost had been incurred by the Plaintiff's company in respect of this permission.

[118] In conclusion, we find that the learned HCJ erred in awarding RM100,000.00 as nominal special damages despite having made a finding that the Plaintiff's claim on special damages is too remote and speculative.



[119] Based on the reasons given above, we are of the considered view that the learned HCJ's decision in awarding RM100,000.00 as a nominal special damages award is untenable and devoid of merit and is hereby set aside.

Aggravated Damages

[120] The learned HCJ had allowed Aggravated Damages of RM400,000.00. Based on His Lordship's Broad GOJ in para 13(c), this award was allowed based on the following reasons:

"(c) Aggravated Damages

Should be awarded as it has affected the feelings and self-esteem of the Plaintiff who has suffered until now. He is OKU mental now. The family has deserted him, and he is alone now. The stigma will be permanent. Allowed RM400,000.00."

[121] The Defendants submit that the Plaintiff is not entitled to any aggravated damages as the Plaintiff had failed to prove the element of aggravated damages.

[122] The Plaintiff, on the other hand, submits that the conduct of the Defendants warrants the court to award aggravated damages which will continue for the rest of his life and therefore the Plaintiff claims RM500,000.00.

[123] It is to be noted that Aggravated Damages are awarded as additional compensation where the injury has been caused by the exceptionally bad conduct of the Defendants.

[124] Normally, Aggravated Damages are awarded to the Plaintiff where the Defendant's conduct amounts to a tortious act that causes the Plaintiff to suffer humiliating and malicious circumstances.

[125] Since the Aggravated Damages are compensatory in nature, the Plaintiff is required to establish some form of injury(ies) sustained due to the Defendants' breach of the act.

[126] In the case of *Rowlands v. Chief Constable of Merseyside Police* [2006] All ER 298; [2006] EWCA Civ 1773, the English Court of Appeal held as follows:

"... However, I am unable to accept that the mere fact that the basic award includes an element to compensate for psychiatric harm necessarily precludes an award of aggravated damages. It is now generally recognized that an award of aggravated damages is essentially compensatory in nature, notwithstanding the fact that it may have a punitive effect by increasing the overall amount the Defendant is ordered to pay. That was explicitly acknowledged by Lord Woolf MR in *Thompson* as one can see from the passages cited earlier. Whether damages awarded to compensate the claimant for distress, humiliation and injury to feelings are treated as part of the basic damages (as Thomas LJ. Suggested in *Richardson v. Howie* [2004] EWCA Civ 1127, (unreported, 13 August 2004) or are separately identified by the name of aggravated damages, the important factor to bear in mind is that they are primarily intended to be



compensatory, not punitive. It follows that any injury for which compensation has been given as part of the award of basic damages should not be the subject of further compensation in the form of an award of aggravated damages. However, the **distinction between basic and aggravated damages will continue to have a part to play as long as the right to recover for intangible consequences such as humiliation, injury to pride and dignity as well as for the hurt caused by the spiteful, malicious, insulting or arrogant conduct of the Defendant attaches to some causes of action and not others.**"

[Emphasis Added]

[127] Furthermore, in the case of *Sambaga Valli KR Ponnusamy v. Datuk Bandar Kuala Lumpur & Ors And Another Appeal* [2018] 3 MLRA 488, the Court of Appeal held as follows:

"[32] Now, **aggravated damages are classified as a species of compensatory damages, which are awarded as additional compensation where there has been intangible injury to the interest of personality of the Plaintiff, where this injury has been caused or exacerbated by the exceptional conduct of the Defendant.**"

[Emphasis Added]

[128] We have perused the evidence produced before the court, and we find that the Plaintiff had suffered serious injuries due to the conduct of the prosecution of the Plaintiff during the trial.

[129] In the present case, the Defendants' own specialist Dr Nor Hajar Ismail from UKM had confirmed her final diagnosis was that the Plaintiff was suffering from MDD.

[130] The Medical Report prepared by Dr Nor Hajar Ismail dated 14 November 2016 clearly stated that despite treatment, "he still has some residual depressive symptoms such as insomnia, irritability and non-optimal work performance."

[131] More importantly, we find that the Plaintiff had testified and had confirmed that these sufferings still persist and the Defendants, by not referring to another specialist, have therefore agreed and admitted that the Plaintiff continues to suffer these injuries to date.

[132] The learned HCJ failed to consider in his judgment that Dr Nor Hajar's Report had elaborated that the depression still persisted and that it had caused the Plaintiff to suffer insomnia and to be constantly irritable.

[133] In fact, the Plaintiff testified that he is alone and his wife and children have left him and he has to tie himself to a chair so that he will not get up in the night and go out as he is not aware of his movement.

[134] The Medical Report dated 20 January 2020 says that he reminds himself about his losses in life, ranging from wealth, health and relationship. His mood



was neither improved nor worsened. But rather fluctuating. He has difficulty in controlling anger and easily get irritable.

(See: Appeal 386: Encl 21, pp 12.)

Anhedonia

[135] In his 2014 report (p 667 B2), the Doctor diagnosed the Plaintiff as suffering from anhedonia. The Plaintiff tenders the research from the Google report, defining what is Anhedonia. It is the reduced ability to feel pleasure, i.e., to lose interest in the activities, hobbies or experiences they used to love.

[136] Anhedonia has been associated with many mental disorders, including depression, bipolar disorder, schizophrenia.

[137] Since the Plaintiff is still suffering from depression, he therefore must be continuously suffering from this ailment called anhedonia.

[138] Further, we found that because of the wanton conduct of the Defendants by deliberately causing the Plaintiff to suffer, the Plaintiff has now become an OKU (mental). This is a stigma that the Plaintiff will carry with him for life. Therefore, the quantum prayed for is commensurate with the sufferings that the Plaintiff has undergone.

[139] Based on the reasons given above, we are of the considered view that a sum of RM500,000.00 is appropriate.

Exemplary/Punitive Damages

[140] The learned HCJ had allowed Exemplary Damages of RM200,000.00. Based on His Lordship's Broad GOJ in para 13(d), this award was allowed based on the following reasons:-

“(d) Exemplary/Punitive Damages

Should be awarded as conduct of SPRM officers are quite oppressive. Court must show some form of disapproval. Allowed nominal RM20,000.00 (*sic*) (should be RM200,000.00).”

[141] The Defendants submit that the learned HCJ failed to consider that the Defendants' conduct was not outrageous but rather a routine procedure for arresting and investigating any MACC suspect. The Plaintiff had been arrested, brought to lock-up, and spent a night there before he was brought to the Kuantan Sessions Court to be prosecuted. The procedure of handcuffing is a normal procedure.

[142] In addition, there was media coverage in the Kuantan Court regarding the Plaintiff's charge. There was no “intentional” parade set by MACC for the media to cover the Plaintiff's charge. The trial ended up with an acquittal



without a defence being called. The Public Prosecutor filed an appeal and later withdrew the appeal.

[143] The Defendants further submit that all the actions by the Defendants were done with no malice but were a normal procedure in arresting, investigating, and prosecuting the Plaintiff, and therefore no action by the Defendants entitles the Plaintiff to receive exemplary damages.

[144] We shall now discuss the law on exemplary damages. Nicholas McBride, in an article “*A Case for Awarding Punitive Damages in Response to Deliberate Breaches of Contract*”, 24 Anglo-Am. L. Rev. 369 [1995] advocates for the use of the term ‘punitive damages’ because whichever term is used, the award made is aimed at punishing the defendant for his deliberate wrongdoing, not at making an example of the defendant pour encourager les autres (literally “in order to encourage the others” but used ironically to mean “as a warning to others”).

[145] Lauree Coci, in an article titled “*It’s Time Exemplary Damages were Part of the Judicial Armory in Contract*” [2015] UWA Law Rev 39; (2015) 40(1) University of Western Australia Law Review 1 stated: “Exemplary damages are sometimes referred to as punitive, penal, retributive and vindictive damages. However, the term ‘exemplary damages’ has found judicial favour in Australia...”. Likewise, we will use the term exemplary damages as this is what it is normally called in Malaysia.

[146] Volume II of Pollock & Mulla’s text on *Indian Contract and Specific Relief Acts* (13th Edn, LexisNexis Butterworths Wadhwa Nagpur) p 1521 states: “(ii) ‘exemplary damages’ are intended to make an example of the defendant; they are punitive and not intended to compensate the plaintiff for any loss, but rather to punish the defendant.” On the same page, Pollock & Mulla referred to the Report of the (English) Law Commission (Law Com No 247 of 1997) on ‘*Aggravated, Exemplary and Restitutionary Damages*’ which recommended that exemplary damages be awarded if the defendant in committing the wrong, or later, deliberately and outrageously disregarded the plaintiff’s rights, but should not be awarded for breach of contract.

[147] Pollock & Mulla, at p 1522, further explain exemplary damages as follows:

“Exemplary damages are those awarded against the defendant as a punishment, and hence the assessment exceeds compensation to the plaintiff. These are awarded not to compensate the claimant, nor even to strip the defendant of his profit, but to express the court’s disapproval of the defendant’s conduct...”

[148] Further, in the case of *Sambaga Valli*, the Court of Appeal held as follows:-

“[33] The exemplary damages or punitive damages — the two terms now regarded as interchangeable — are additional damages awarded with reference to the conduct of the Defendant, to signify disapproval, condemnation or denunciation of the Defendant’s tortious act, and to punish the Defendant,



Exemplary damages may be awarded where the Defendant has acted with vindictiveness or malice, or where he has acted with a 'contumelious disregard' for the right to the Plaintiff. **The primary purpose of an award of exemplary damages may be deterrent, or punitive and retributory, and the award may also have an important function in vindicating the rights of the Plaintiff...**

[Emphasis Added]

[149] It is to be noted that the purpose of awarding the Exemplary Damages is to deter future occurrences and also to punish the wrongdoer. It is usually awarded when the court wishes to signify its disapproval or condemnation of the defendant's conduct.

[150] Returning to the facts of the present case, having perused the evidence produced before the court, we find that the manner in which the Plaintiff was treated by the arresting officers and the officers escorting the Plaintiff to Kuantan Court, and the manner in which he was paraded with total disregard for his self-esteem, reputation, and standing in society. The exposure of the Plaintiff to TV viewing being handcuffed with his head bowed and with the same screen shot being shown on the news reports, agitated his wife and children to such an extent as when family and friends jeered their husband/father as being a man of ill-repute and so much so that according to the Plaintiff even to date if one clicks his name in the Google search one would see the same report on him that the wife divorced him, and the children left him. He has endured this even to date.

[151] The learned HCJ in his reported GOJ (*supra*) in paras 28-38, has made a finding of fact as follows:

“(a) The Breach

[28] From the evidence, **this Court observed that the Plaintiff was mistreated and abused whereby he was unnecessarily handcuffed tightly as though he is a hardcore criminal as this is another form of oppression. That has caused bruises on his hands. The medical report specifically mentioned “handcuff injury” and “happened during arrest by SPRM”.** (See p 639 B2)

[29] The Plaintiff as like any businessman already had his ticket to fly to Chennai the next day for business. Because of his abrupt arrest and detention, on 19 March 2014 he was unable to attend and was not given the opportunity to inform the other parties of his inability to attend and also to participate in the meeting, He has lost that business opportunities.

[30] This Court ruled that, his arrest, detention and being charged on 20 March 2014 although legal but the adverse publicity was very damaging to his life and reputation as a businessman. This has also greatly affected the reputation of his family as a whole. That had changed his life not for the better, thereafter. From the evidence adduced, **this Court found that this action by the Defendants (SPRM) was deliberate and hence malicious as it was pre planned. This was because the 3rd defendant had at the SPRM Headquarters, Putrajaya informed the Plaintiff of his eventual charging**



the next day and that the media was already informed. This is an act of harassment and inducement to lure the Plaintiff to plead guilty. Infact during his arrest, he was also deprived of making preparations regarding his bails, medication etc. at that period of time. The Plaintiff was brought to Kuantan handcuffed during the journey where he was charged at the Kuantan Sessions Court the next day.

[31] This Court has had the opportunity of viewing the scenarios after he was charged, recorded by a TV Station and aired on prime-time news slot that evening. This Court observed that the Plaintiff was deliberately paraded around the Court's lobby after he was charged, in the full view of the medias. The next day the print medias reported the news, some displaying the Plaintiff's full picture of being handcuffed with his full personal details.

[32] The Plaintiff felt humiliated as he strongly believed that he is innocent, unless otherwise proven. He was sick at that point of time and was denied medication. As a result of ail the above, in the ensuing days, he gradually experienced depressive symptoms — loss of mood, sleep loss (insomnia), poor appetite, lethargy, withdrawal symptoms persistent worries regarding loss of business and his mind was consistently preoccupied with worries about the charge he was then facing.

[33] Following the charge and the humiliation he was facing, he lost everything. His wife and the 2 children left him. He was in great financial debt because of the lost in his business. He was declared a bankrupt. He had to sell his house to release the bankruptcy proceeding.

[34] Through some form of corroboration in certain circumstances are needed but in this case this Court ruled that the established facts above speaks more eloquent than words. This Court has had the opportunity to see his demeanor whilst testifying in Court. He has to pluck some courage and confidence to testify and occasionally he broke down but tried hard to compose himself. Be that as it may, this Court ruled that he is a credible witness and there was no reasons for this Court to rule otherwise.

[35] This Court also had considered judicial notice of the surrounding circumstances and the circumstantial evidence in this case.

[36] Evidently, he suffers from mental health — that led him to psychotic illness. He also suffered from Anhedonia (see report p 667), which are associated to mental disorders, including depression.

[37] The following are the extract of the Plaintiff's statement/evidence:

"S39: Boleh terangkan kejadian-kejadian yang berlaku kepada kamu setelah ditangkap oleh SPRM?

J39: Atas arahan Defendan Keempat dan/atau Defendan Ketiga, Pegawai-Pegawai Defendan Kelapan membenarkan saya membuat hanya satu panggilan telefon sahaja bagi memaklumkan keluarga bahawa saya telah ditangkap oleh SPRM. Defendan Ketiga seterusnya telah mencabar



saya untuk saya dapatkan “cable” (kenalan/rakan berpengaruh) agar boleh terlepas daripada pertuduhan yang bakal dihadapkan kepada saya.

S43: Semasa kamu dibawa ke Mahkamah, apakah tindakan tindakan Pegawai-Pegawai SPRM terhadap kamu?

J43: Semasa menunggu untuk kes saya dipanggil oleh Hakim Mahkamah Sesyen, Defendan Ketiga juga telah cuba menghasut dan/atau secara tidak langsung untuk mempengaruhi saya untuk mengaku bersalah dan bahawa sekiranya saya mengaku bersalah, hanya hukuman denda sahaja yang akan dikenakan terhadap saya. Tindakan Defendan Ketiga tersebut seolah-olah menganggap saya sememangnya bersalah tanpa dibicarakan dengan adil terlebih dahulu.

Saya juga telah digari dengan ketat sehingga sukar untuk bergerak dan mengambil sapu tangan untuk mengelap muka dan hidung saya kerana saya sedang mengalami selsema dan batuk yang teruk. Sementara menunggu proses ikat jamin selesai, saya berada di bilik saksi/bilik menunggu Mahkamah. Di situ, seorang Polis pengawal Mahkamah bersimpati melihat keadaan saya telah meminta agar gari saya dibuka atau dilonggarkan kerana saya kelihatan tenang dan tidak berbahaya atau mendatangkan ancaman, namun Polis pengawal Mahkamah tersebut telah ditengking dengan keras oleh Pegawai pengiring SPRM tersebut.”

[38] **The situation above underscores the need for transparency to prevail in all process of investigation by the investigating and enforcement agencies’ officers and that the rule of law to be strictly observed and that they should not abuse the legal process in discharging their duties. As public servants, they are stewards of public trust and they have to ensure not to erode this trust.**

[44] It will be a gross injustice if Courts were to keep its eyes shut in not making such distinction. For instance, a Director General of a Government department or a CEO of a company was arrested because of some suspected bribery activity and was remanded. The news about his arrest/detention will be publicly made known (because of his signal position). The after effect will be very damaging and devastating. He will lose his job, will lose his reputation which could give rise to friends/society shunning away from him. Worse of all, the family will desert him. Hence, the Court will have to take this into consideration in determining liability and assessment of damages. What is more, the Plaintiff in this case was sick at the time of the arrest

[Emphasis Added]

[152] In the case of *Rookes v. Barnard* [1964] AC 1129, Lord Devlin set out three (3) categories where exemplary damages could be awarded:

- (a) oppressive, arbitrary, or unconstitutional actions by Government officials;
- (b) defendants who calculated that the profit from their wrongdoing would exceed any compensation they might have to pay; and
- (c) cases where exemplary damages were expressly authorized by statute.



[153] The evidential basis for such an award of damages must necessarily arise from a consideration of the factual matrix of the case, in this context, the GOJ of the High Court comprises the proper mode of assessing whether there is any evidential basis for such a claim. This is because the Court of first instance enjoyed the audio-visual advantage and was best positioned to assess the factual matrix of this matter.

[154] We are therefore giving serious consideration to the findings of the learned HCJ. We find that the Defendants' conduct warrants an inference of *mala fide* and an abuse of power. The function, power, obligations and the discretion exercised by the Defendants are those of a public trustee which must be exercised reasonably, fairly, and with the utmost good faith.

[155] For the above reasons, we are unable to agree with the Defendants' submission to refuse the claim for exemplary damages. There is sufficient evidential basis to take the facts of this case outside the general or ordinary line of cases where special and/or general damages suffice.

[156] Given the totality of the circumstances, we find that this is a fit case for the award of exemplary damages to the Plaintiff. The primary purpose is to communicate to the Defendants that the functions, power, obligations and discretion exercised by the Defendants are those of a public trustee which must be exercised reasonably, fairly, and with the utmost good faith.

[157] The sole remaining issue is the quantum of exemplary damages to be awarded. We find that it is inaccurate to say that there is any hard and fast rule that exemplary damages ought to be calculated. Rather than utilising a formula to calculate exemplary damages, we are of the view that exemplary damages are to be assessed based on the peculiar facts of each particular case.

[158] Again, we quote from the Court of Appeal judgment in *Sambaga Valli*, which the High Court Judge had relied on:

"... exemplary damages are not intended to compensate the plaintiff and are not recoverable as a matter of right. **The amount of the exemplary damages award is left to the judge's discretion and is determined by considering the character of the defendant's misconduct, the nature and extension of the plaintiff's injury and the means of the defendant.** The quantum of exemplary damages to be awarded must be appropriate to the wrongdoing inflicted to the parties involved. Exemplary damages must not be uncontrolled or arbitrary; they must be of an amount that is the minimum necessary to achieve their purpose in the context of the particular case."

[Emphasis Added]

[159] The Court of Appeal in *Sambaga Valli* also referred to the approach in other jurisdictions. Other Commonwealth countries do not use a formula to calculate exemplary damages. For example, Lord Woolf in the English case of *Thompson v. Commissioner of Police of the Metropolis* [1997] 2 All ER 782 stated that it was not "possible to indicate a precise arithmetical relationship



between basic damages and aggravated damages... “. Meanwhile, O’Flaherty J in the Irish case of *McIntyre v. Lewis* [1991] 1 IR 121 disapproved of calculating exemplary damages at 12 times compensatory damages.

[160] Given the above and the totality of the circumstances, we are of the view that a sum of RM400,000.00 is appropriate to show this court’s disapproval of the Defendants’ conduct.

[161] Based on the aforesaid reasons, **IN THE EVENT** our finding on liability is in the Plaintiff’s favour (which we found earlier is not), the judgment of the High Court on quantum dated 28 May 2024 is to be varied as follows:-

Items	Amount allowed by the High Court (RM)	Amount allowed by the Court of Appeal (RM)
General Damages	200,000.00	800,000.00
Special Damages	100,000.00	Set-aside (0)
Aggravated Damages	400,000.00	500,000.00
Exemplary/Punitive Damages	200,000.00	400,000.00
Total	900,000.00	1,700,000.00

Summary And Conclusion

[162] In conclusion, based on the reasons given above, we find that:-

- a) The Plaintiff’s Notice of Cross-Appeal is incompetent. We allow the preliminary objection raised by the Defendants. Therefore, the Notice of Cross-Appeal is hereby struck out with no order as to costs;
- b) The tort of abuse of process/malicious process applies only to a case of abuse of civil process and is not applicable to criminal investigation/criminal proceeding and/or abuse of criminal process. The only recognized tort for abuse of criminal process is limited to the tort of malicious prosecution;
- c) The learned HCJ erred in allowing the Plaintiff’s claim against the Defendants;

[163] We therefore unanimously set aside the decisions of the High Court dated 25 August 2023 (on liability) and 28 May 2024 (on quantum), respectively.



[164] We allow both appeals by the Defendants, i.e., on liability in Appeal 484 and on quantum in Appeal 406. The Plaintiff's appeal on quantum in Appeal 386 is hereby dismissed.

[165] We also make an order for costs to be paid by the Plaintiff to the Defendants in Appeal 484, Appeal 406, and Appeal 386, of RM30,000.00 respectively. The costs are not subject to the allocatur.

