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Abuse of Process

Tobi Goldoftas*

ABUSE OF PROCESS is the tort that is said to exist when an individual obtains an advantage in litigation over his opponent through the malicious and unfounded use of some regular legal process or procedure.¹ Prosser states that tort action for abuse of process may be maintained if the legal process, whether criminal or civil, is used against another to accomplish a purpose for which it was not designed.² This is considered a tortious act for which the offender may be compelled to answer in damages.³ However, note that the *proper* use of this legal process (even though used for a bad intention and to satisfy malicious intentions) is not actionable.⁴ Confusion of abuse of process with the separate tort of malicious prosecution is common, and very troublesome.

Abuse of process is not the act of starting an unjustified action. Rather it is the misuse or misapplication of process for an end other than that which it was designed to accomplish.⁵ In an action for abuse of process, the defendant need not prove that the proceeding terminated in his favor, nor that it was obtained without probable cause or in the course of a proceeding begun without probable cause.⁶

All of the following elements must be present in order to sustain an action for abuse of process: (1) the defendant must have made an illegal, perverted, improper use of the process—a

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¹ Black's Law Dictionary, 25 (4th ed. 1951).

² Prosser, *Law of Torts*, 667 § 100 (2nd ed., 1955).

³ *Rothbard v. Ringler*, 77 N. Y. S. 2d 351 (Sup. Ct. 1947). In *Malone v. Belcher*, 216 Mass. 209, 103 N. E. 637 (1913), an attachment was issued, seemingly to collect a brokerage commission which the defendant claimed. In fact, however, the real purpose of issuing the attachment was to prevent the plaintiff from transferring the realty and thus enable the defendant to acquire it for himself. The Court held that this was abuse of process.

⁴ *Ibid.*

⁵ *Wood v. Graves*, 144 Mass. 365, 11 N. E. 567, 59 Am. Rep. 95 (1887); *Gabriel v. Borowy*, 324 Mass. 231, 85 N. E. 2d 435 (1949); *Abernathy v. Burns*, 210 N. C. 636, 188 S. E. 97 (1936); *Barnette v. Woody*, 242 N. C. 424, 88 S. E. 2d 223 (1955).

⁶ *Mayer v. Walter*, 64 Pa. 283 (1870); *Glidewell v. Murray-Lacy & Co.*, 124 Va. 563, 98 S. E. 665, 4 A. L. R. 225 (1919); *Ross v. Peck Iron & Metal Co.*, 264 F. 2d 262 (4th Cir. 1959).

use which the process neither warranted, intended, nor authorized; (2) the defendant must have had an ulterior motive or purpose in exercising such illegal, perverted, or improper use of the process;⁷ and (3) the plaintiff must sustain damage from this irregularity.⁸

Action for abuse of process must be distinguished from an action for malicious prosecution. The action for abuse of process hinges on the *misuse of a regularly issued process*, while malicious prosecution has reference to the *wrong issuance of a process*.⁹ In a case for malicious prosecution, malice, want of probable cause, and termination in favor of the plaintiff of proceedings on which the action was based, must be alleged and proved. This is not the case with abuse of process. Here an action can lie for improper use of the process after it has been issued, and not for maliciously causing the process to issue.¹⁰ As distinguished from malicious prosecution and false imprisonment, abuse of process is an independent cause of action.¹¹

Some jurisdictions differentiate abuse of process and malicious prosecution, holding that an action for abuse of process cannot be maintained for maliciously causing the process to issue.¹² According to Ohio law, there is no distinction between abuse of process and malicious prosecution. There abuse of process is malicious prosecution, and malicious prosecution is abuse of process.¹³ Where a differentiation is made, the plaintiff does not have to prove a lack of probable cause nor termination of the proceeding in his favor.¹⁴

Regardless of whether the action for malicious prosecution is for criminal or civil proceedings, it does not provide a remedy for a group of cases in which legal procedure has been started in

⁷ *Morfessis v. Baum*, 281 F. 2d 938 (D. C. Cir. 1960); *Coplea v. Bybee*, 290 Ill. App. 117, 8 N. E. 2d 55 (1937); *Brown v. Robertson*, 120 Ind. App. 434, 92 N. E. 2d 856 (1950); *Pimentel v. Houk*, 101 Cal. App. 2d 884, 226 P. 2d 739 (1951). In *Vanga v. Pareles*, 137 Conn. 663, 81 A. 2d 112 (1951), the Court held that while an ulterior motive is often present, it is not an essential element for a cause of action.

⁸ *Italian Star Line v. U. S. Shipping Bd. Emergency Fleet Corp.*, 53 F. 2d 359, 80 L. A. R. 576 (2d Cir. 931).

⁹ *Clikoss v. Long*, 231 Ala. 424, 165 So. 394 (1936).

¹⁰ *Abernathy v. Burns*, *supra* note 5; *Ledford v. Smith*, 212 N. C. 447, 193 S. E. 722 (1937).

¹¹ *Glidewell v. Murray-Lacy & Co.*, *supra*, note 6.

¹² 80 A. L. R. 581.

¹³ *Pope v. Pollock*, 46 Ohio St. 367, 21 N. E. 356, 4 L. R. A. 255 (1889); *Detwilder Co. v. Holly*, 3 Ohio L. A. 121 (Ohio App. 1925).

¹⁴ *Prosser, op. cit. supra* note 2.

proper form with probable cause, and even with ultimate success, and nevertheless has been perverted to accomplish an ulterior purpose for which it was not intended.¹⁵ Thus, in the leading English case,¹⁶ the defendant had the plaintiff arrested under civil process to force him to surrender the register of a vessel without which the defendant well knew the plaintiff could not sail. Although action for malicious prosecution could not be maintained, because the proceeding had not been terminated, the court refused to allow the process to be misused for such an end, and held the defendant liable. This decision has been widely followed, and the tort of abuse of process is a well established one.

In *Weiss v. Hunna*,¹⁷ the plaintiff brought an action against an Austrian attorney, maintaining that while the latter was prosecuting Austrian litigation against the plaintiff and obtaining an injunction, defendant was not really acting in the name of plaintiff's mother, as the defendant alleged, but was really representing the interests of some unnamed clients. Plaintiff further claimed that the defendant's purpose in pursuing this litigation (allegedly in the name of plaintiff's mother) was specifically designed to prevent the plaintiff from delivering certain shares of stock before a certain deadline. As a result of this misuse of a legally issued process the stocks were eventually sold at a lower price, to the unnamed clients, assuring the latter of control of a certain corporation and damaging the plaintiff. The gravamen¹⁸ of the misconduct was not the wrongful initiation of criminal or civil procedure. Rather it was the misuse of the process (no matter how properly it was obtained) for purposes other than those for which it was intended. In other words, it is immaterial that the process was issued properly, or that it was obtained in the course of proper proceedings which were started and brought with proper probable cause and for a proper purpose, or even that the proceeding terminated in favor of the party instituting the proceeding. What does matter is the subsequent misuse of the process.¹⁹

It is of no consequence that if plaintiff had been required to rely on Austrian law the complaint could properly have been

¹⁵ Prosser, *op. cit.* supra note 2.

¹⁶ *Grainger v. Hill*, 4 Bing. N. C. 212, 132 Eng. Rep. 769 (1838).

¹⁷ 312 F. 2d 711 (2d Cir. 1963).

¹⁸ The burden or gist of a charge; the grievance or injury especially complained of.

¹⁹ Amer. Law Inst., Restatement of Torts, § 682.

dismissed because (1) the plaintiff was guilty of a tort under Austrian law, (2) the tort of wrongful use of process does not involve such elementary principles that New York Courts would simply assume it to be recognized in a country not following the common law,²⁰ and (3) New York might regard it as an abuse of discretion to use judicial notice (New York Civil Practice Act §344-a) of a civil law system when the party who had the burden has not adequately assisted the Court to learn of it.²¹

In *Ludwig v. Penny*,²² the court held that abuse of process is the willful and wrongful use of the process itself, and does not require a termination of the suit in issue to make it actionable. Abuse of process means perversion of process to accomplish some illegal purpose for which the process was not legally intended.²³

A recent case held that attachment of \$800 by a creditor in order to collect a debt of \$356 is not abuse of process.²⁴

In *Jones v. Van Bever*,²⁵ the court held a sheriff liable for the act of his deputy where the deputy, provided with a properly issued warrant of arrest, abused the writ by arresting the wrong person by mistake, or where, having an execution on the goods of one person, he seized the goods of another by mistake.

Abuse of process implies an irregular and improper use of the process, not merely the regular and proper use with a bad motive.²⁶ If it is the *intention* of the user of the process to use it for bad purposes, but it is used in a regular manner, this is not considered to be an abuse of the process.²⁷ To constitute the tort it is not enough that the offender have an ulterior motive in using the process of court, but it also must be shown that he used the process for a purpose *other* than that for which it was intended,

²⁰ *Cuba R. R. v. Crosby*, 222 U. S. 473, 32 S. Ct. 132, 56 L. Ed. 274 (1912); *Riley v. Pierce Oil Corp.*, 245 N. Y. 152, 156 N. E. 647 (1927); *Industrial Export & Import Corp. v. Hongkong & Shanghai Banking Corp.*, 302 N. Y. 342, 349-350, 98 N. E. 2d 466, 469-470 (1951); *International Film Distribution Establishment v. Paramount Pictures Corp.*, 14 Misc. 2d 203, 155 N. Y. S. 2d 767 (Sup. Ct. 1956).

²¹ *Sonnesen v. Panama Transport Co.*, 298 N. Y. 262, 82 N. E. 2d 659 (1948); *Walton v. Arabian American Oil Co.*, 233 F. 2d 541, 544 (2 Cir. 1956), cert. denied, 352 U. S. 872 (1956).

²² 73 S. E. 228 (N. Car. 1911).

²³ *Dixon v. Smith-Wallace Shoe Co.*, 283 Ill. 234, 119 N. E. 265, 268 (1918).

²⁴ *Quaranto v. Silverman*, 187 N. E. 2d 857 (Mass. Supr. Jud. 1962).

²⁵ 164 Ky. 80, 174 S. W. 795 (1915).

²⁶ *Jeffery v. Robbins*, 73 Ill. App. 353 (1897).

²⁷ *Crews v. Mayo*, 165 Cal. 493, 132 P. 1032 (1913).

e.g., achieving a collateral object. If this can be proved, the offender has committed an actionable tort.²⁸

The existence of an ulterior motive sometimes may be inferred from the fact that the process has been misused or misapplied.²⁹ However, the reverse is not true. If the act of the prosecutor is in itself *regular*, the motive, whether ulterior or otherwise, is immaterial.³⁰ Ulterior motive or bad intention in using the process is not sufficient *per se*.³¹ The bad intent must culminate in the abuse. This is really the gist of the action.³²

An action cannot be maintained if the process was used to perform a function *intended* by the law.³³ In other words, mere issuance of the process is not actionable as an abuse of process.³⁴ The process must be misused,³⁵ or used beyond the scope of the process, in order to make its use improper.³⁶

An action for abuse of process can be maintained only where there has been an injury to a person or property;³⁷ indirect injury to a person's business or to his good name is in itself not actionable.³⁸ The view has been taken that in an action for abuse of process the property of the plaintiff must actually be seized or the individual be arrested.³⁹

²⁸ *Hauser v. Bartow*, 273 N. Y. 370, 7 N. E. 2d 268 (1937).

²⁹ *Hall v. Hollywood Credit Clothing Co.*, 147 A. 2d 866 (Mun. Ct. App. D. C. 1959); *Jeffery v. Robbins*, *supra* note 26.

³⁰ *Pimentel v. Houk*, *supra* note 7; *Jeffery v. Robbins*, *supra* note 26; *Saliem v. Glovsky*, 132 Me. 402, 172 A. 4 (1934); *Priest v. Union Agency*, 174 Tenn. 304, 125 S. W. 2d 142 (1939).

³¹ *Keithley v. Stevens*, 338 Ill. 199, 87 N. E. 375 (1909); *Brown v. Robertson*, *supra* note 7; *McClenny v. Inverarity*, 80 Kan. 569, 103 P. 82 (1909); *Glide-well v. Murray-Lacy & Co.*, *supra* note 6.

³² *Earl v. Winne*, 34 N. J. Super 605, 112 A. 2d 791 (1955); *Melton v. Rickman*, 225 N. C. 700, 36 S. E. 2d 276, 162 A. L. R. 793 (1945).

³³ *Waters v. Winn*, 142 Ga. 138, 82 S. E. 537 (1914); *Malone v. Belcher*, *supra* note 3; *Martin v. Sanford*, 129 Neb. 212, 261 N. W. 136, 100 A. L. R. 179 (1935); *Jerome v. Shaw*, 172 N. C. 862, 90 S. E. 764 (1916); *Priest v. Union Agency*, *supra* note 30.

³⁴ *Hall v. Hollywood Credit Clothing Co.*, *supra* note 29; *Edmonds v. Delta Democrat Publishing Co.*, 230 Miss. 583, 93 So. 2d 171 (1957).

³⁵ *Earl v. Winne*, *supra* note 32.

³⁶ *Brashear v. West*, 7 Pet. (U. S.) 608, 8 L. Ed. 801 (1833); *Pimentel v. Houk*, *supra* note 7; *Priest v. Union Agency*, *supra* note 30.

³⁷ *Earl v. Winne*, *supra* note 32.

³⁸ *Baird v. Aluminum Seal Co.*, 250 F. 2d 595 (3d Cir. 1957); *Bartlett v. Christhilf*, 69 Md. 219, 14 A. 518 (1888); *Hoppe v. Klapperich*, 224 Minn. 224, 28 N. W. 2d 780, 173 A. L. R. 819 (1947); *Nelson v. National Casualty Co.*, 179 Minn. 53, 228 N. W. 437, 67 A. L. R. 509 (1929).

³⁹ *Baird v. Aluminum Seal Co.*, *supra*; *Siebrand v. Eyerly Aircraft Co.*, 185 F. Supp. 538 (D. C. Or. 1960); *Bartlett v. Christhilf*, *supra* n. 38; *Pittsburgh*,

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Abuse of process is the use of the process for a purpose "not contemplated by the law."⁴⁰ It is a malicious misapplication of a regularly issued process, which an individual uses to secure a result which is otherwise not lawful or properly obtainable.⁴¹ The test is to determine whether the process was used to accomplish an end which was without the regular purpose of that process, or which compelled the party against whom the process was used to do some collateral thing which he could not otherwise have been legally or regularly compelled to do.⁴²

Abuse of process in some states is termed *malicious* abuse of process.⁴³ The alternate use of such redundant expressions is not usually intended to be discriminatory,⁴⁴ even though some jurisdictions indicate that it is not necessary to establish malice,⁴⁵ or want of probable cause.⁴⁶ However, other jurisdictions hold that malice⁴⁷ and want of probable cause⁴⁸ are essential elements of the cause of action.

To maintain an action for abuse of process, the plaintiff must *prove* willful and intentional misuse of abuse of the process to accomplish some wrongful object or ulterior purpose not intended

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J. E. & E. R. Co. v. Wakefield Hardware Co., 138 N. C. 174, 50 S. E. 571 (1905); Garland v. Wilson, 289 Pa. 272, 137 A. 266 (1927). Where plaintiff's property was levied and he lost dominion over it, abuse of process was maintained, even though the goods were neither removed nor sold and the levy was later abandoned. Adelman v. Rosenbaum, 133 Pa. Super. 386, 3 A. 2d 15 (1938).

⁴⁰ Edwards v. Jenkins, 247 N. C. 565, 101 S. E. 2d 410 (1958).

⁴¹ Rothbard v. Ringler, *supra* note 3.

⁴² Coplea v. Bybee, *supra* note 7.

⁴³ Coplea v. Bybee, *supra* note 7; Glidewell v. Murray-Lacy & Co., *supra* note 6. In Grimstad v. Lofgren, 105 Minn. 286, 117 N. W. 515 (1908) the action is called malicious abuse of process.

⁴⁴ Glidewell v. Murray-Lacy & Co., *supra* note 6.

⁴⁵ Peterson v. Wilson, 88 Cal. App. 2d 617, 199 P. 2d 757, 6 A. L. R. 2d 258 (1948); Wicker v. Hotchkiss, 62 Ill. 107 (1871); Klander v. West, 205 N. C. 524, 171 S. E. 782 (1933); Morphy v. Shipley, 351 Pa. 425, 41 A. 2d 671 (1945); Kool v. Lee, 43 Utah 394, 134 P. 906 (1913).

⁴⁶ Hall v. Field Enterprises, Inc., *supra* note 29; Baldwin v. Davis, 188 Ga. 587, 4 S. E. 2d 458 (1939); Coplea v. Bybee, *supra* note 7; Foy v. Barry, 87 App. Div. 291, 84 N. Y. S. 335 (1963); Abernathy v. Burns, *supra* note 5; Morphy v. Shipley, *Ibid* n. 45; Kool v. Lee, *Ibid* n. 45; 14 A. L. R. 2d 323, § 17. See Restatement, Torts § 682, Comment a.

⁴⁷ Nix v. Goodhill, 95 Iowa 282, 63 N. W. 701 (1895); Malone v. Belcher, *supra* note 3; Keller v. Butler, 246 N. Y. 249, 158 N. E. 510, 55 A. L. R. 349 (1927).

⁴⁸ Nix v. Goodhill, *supra* n. 47; Bore v. Condon, 87 Md. 368, 39 A. 1042 (1898); Keller v. Butler, *Ibid*, n. 47; Tucker v. Davis, 77 N. C. 330 (1877); Norcross v. Otis Bros. & Co., 152 Pa. 481, 25 A. 575, 14 A. L. R. 2d 324 § 17 (1893).

by the law.⁴⁹ Such misuse of the law usually implies malice,⁵⁰ because unlawful, willful acts are considered malicious by those whom these acts injure.⁵¹ Similarly, want of probable cause is not essential, because there can be no such thing as probable cause for a willful or intentional misuse of process for a wrongful or unlawful object, or for an ulterior purpose not intended by the law.⁵²

The abuse is considered to be the unlawful *method* used to do the act. Thus, intentional use of such method constitutes malice in law,⁵³ and the action can be maintained if the plaintiff can prove that the process was used under circumstances which amount to actual⁵⁴ or implied malice.⁵⁵

The plaintiff must further show that the abuse injured him,⁵⁶ or compelled him to do, to his injury, something he would not otherwise have had to do.⁵⁷ No action can be maintained if the plaintiff cannot prove that the process was used under circumstances amounting to actual or implied malice.⁵⁸ However, direct evidence of an ulterior motive in the use of the process is not necessary, as such motive may be inferred from its improper use.

Using a legal writ or process to seize property, to harass, or to injure an owner or possessor of property⁵⁹ constitutes an actionable abuse of process; for example, actively preventing the conveyance of property to an intended individual.⁶⁰ Use of a

⁴⁹ *Psinakis v. Psinakis*, 221 F. 2d 418 (3d Cir. 1955); *Nix v. Goodhill*, *supra* note 47; *Marlotte v. Weickgenant*, 147 Mich. 266, 110 N. W. 1061 (1907); *Glidewell v. Murray-Lacy & Co.*, *supra* note 6; 80 A. L. R. 582.

⁵⁰ *Spellens v. Spellens*, 49 Cal. 2d 210, 317 P. 2d 613 (1957); *Phoenix Mutual L. Ins. Co. v. Arbuckle*, 52 Ill. App. 33 (1893); *Kool v. Lee*, *supra* note 45.

⁵¹ *Clikos v. Long*, *supra* note 9; *Tranchina v. Arcinas*, 78 Cal. App. 2d 522, 178 P. 2d 65 (1947); *Shatz v. Paul*, 7 Ill. App. 2d 223, 129 N. E. 2d 348 (1955); *Coplea v. Bybee*, *supra* note 7; *Page v. Cushing*, 38 Me. 523 (1854).

⁵² *Kool v. Lee*, *supra* note 45.

⁵³ *Shatz v. Paul*, *supra* note 51; *Ledford v. Smith*, *supra* note 10.

⁵⁴ Where malice cannot be inferred, it must be proved. *Humphrey v. Sutcliffe*, 192 Pa. 336, 43 A. 954 (1899).

⁵⁵ *Glidewell v. Murray-Lacy & Co.*, *supra* note 6.

⁵⁶ *Gore v. Gorman's Inc.*, 148 F. Supp. 241 (D. C. Mo.), appeal dismissed, 244 F. 2d 716 (8th Cir. 1957); *Italian Star Line v. U. S. Shipping Bd. Emergency Fleet Corp.*, *supra* note 8.

⁵⁷ *Earl v. Winne*, *supra* note 32.

⁵⁸ *Glidewell v. Murray-Lacy & Co.*, *supra* note 6.

⁵⁹ *Nix v. Goodhill*, *supra* note 47; *Pittsburgh, J. E. & E. R. Co. v. Wakefield Hardware Co.*, *supra* note 39.

⁶⁰ *Malone v. Belcher*, *supra* note 3.

process to enforce payment of a judgment known to be false, fraudulent, or nonexistent, would also be actionable.⁶¹

An attorney can be held liable in an action for damages for abuse of process if it can be shown that the acts complained of are his own or of one whose purpose he investigated or knowingly carried out.⁶² He may also be held personally liable if he maliciously participates with others in the abuse of the process, or again if he maliciously encourages or induces another to act for him in committing an act constituting an abuse of process.⁶³

Malice or willfulness in the abuse of process cannot be inferred from mere mistake;⁶⁴ therefore good faith is a valid defense.⁶⁵ A person guilty of abuse of process can derive no advantage by claiming that the injured party did not do everything possible to prevent the wrong.

The plaintiff may recover whatever actual damages he has suffered as a natural and probable consequence of the tort,⁶⁶ including any special or peculiar damages, if such are pleaded.⁶⁷ Special damages may include physical or mental injury,⁶⁸ expenses, loss of time, and injury to business, property, or financial standing.⁶⁹

Where the abuse of process is accompanied by malice, exemplary or punitive damages may be awarded.⁷⁰ A proper basis

⁶¹ *Shipe v. Schenk*, 158 A. 2d 910 (Mun. App. D. C. 1960); *Atlanta Ice & Coal Co. v. Reeves*, 136 Ga. 294, 71 S. E. 421 (1911); *Little v. Sowers*, 167 Kan. 72, 204 P. 2d 605 (1949); *Ankliff v. June*, 81 Mich. 477, 45 N. W. 1019 (1890).

⁶² *Little v. Sowers*, *Ibid* n. 61; *Hoppe v. Klapperich*, *supra* note 38; *Ash v. Cohn*, 119 N. J. L. 54, 194 A. 174 (1937); *Dishaw v. Wadleigh*, 15 App. Div. 205, 44 N. Y. S. 207 (1897); *Adelman v. Rosenbaum*, *supra* note 39.

⁶³ *Hoppe v. Klapperich*, *supra* note 38.

⁶⁴ *Clikos v. Long*, *supra* note 9.

⁶⁵ *Saliem v. Glovsky*, *supra* note 30; *Blair v. Maxbass Sec. Bank*, 44 N. D. 12, 176 N. W. 98 (1919).

⁶⁶ *Giddings v. Freedley*, 128 F. 355 (2d Cir. 1904); *McGann v. Allen*, 105 Conn. 177, 134 A. 810 (1926); *Malone v. Belcher*, *supra* note 3; *Barnett v. Reed*, 51 Pa. 190 (1865). See Restatement, Torts, § 682.

⁶⁷ *McClenny v. Inverarity*, *supra* note 31.

⁶⁸ *Spellens v. Spellens*, *supra* note 50; *McGann v. Allen*, *Ibid*; *Saliem v. Glovsky*, *supra* note 30; *Adelman v. Rosenbaum*, *supra* note 39.

⁶⁹ *Saliem v. Glovsky*, *supra* note 30; *Malone v. Belcher*, *supra* note 3; *Barnett v. Reed*, *supra* note 66.

⁷⁰ *Spellens v. Spellens*, *supra* note 50; *McGann v. Allen*, *supra* note 66; *Tapley v. Taumans*, 95 Ga. App. 161, 97 S. E. 2d 365 (1957); *Wanzer v. Bright*, 52 Ill. 35 (1869); *Sherman v. Dutch*, 16 Ill. 283 (1855); *Sokolowske v. Wilson*, 211 Iowa 1112, 235 N. W. 80 (1931); *Saliem v. Glovsky*, *supra*

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for punitive damages exists, for example, where property normally exempt from execution is seized in order to break up a person's business.⁷¹

It is a mistake to lump abuse of process together with malicious prosecution. The two torts are clearly distinguishable, and each merits detailed treatment by the law.

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note 30; *Barnett v. Reed*, *supra* note 66; *Adelman v. Rosenbaum*, *supra* note 39. But see *Malone v. Belcher*, *supra* note 3, where the court held that exemplary damages are not recoverable.

⁷¹ *Coleman v. Ryan*, 58 Ga. 132 (1877).