

Malicious Prosecution

Involves Civil Litigation Resulting From Improperly Motivated Criminal Proceedings

Helpful Guide to Understanding What Constitutes as the Tort of Malicious Prosecution



Legal processes can sometimes become malicious tools improperly used as a form of illicitly motivated conduct such as criminal allegations brought unjustly against an innocent person. For a successful malicious prosecution case, the Plaintiff, who would be a person previously accused with a crime or other wrongdoing and involving a formal prosecution, must be fully acquitted or exonerated during the process of the prosecution. Additionally, per the summary of the full elements below, a lack of reasonableness involving malice or wrongful purpose for the accusations must exist.

Elements Required

In a malicious prosecution case, the Plaintiff must prove the four elements as articulated in *Nelles v. Ontario*, [\[1989\] 2 S.C.R. 170](#) at 192 to 193:

There are four necessary elements which must be proved for a plaintiff to succeed in an action for malicious prosecution:

a) the proceedings must have been initiated by the defendant;

b) the proceedings must have terminated in favour of the plaintiff;

c) the absence of reasonable and probable cause;

d) malice, or a primary purpose other than that of carrying the law into effect.

(See J. G. Fleming, *The Law of Torts* (5th ed. 1977), at p. 598.)

The first two elements are straightforward and largely speak for themselves. The latter two elements require explicit discussion. Reasonable and probable cause has been defined as "an honest belief in the guilt of the accused based upon a full conviction, founded on reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed" (*Hicks v. Faulkner* (1878), 8 Q.B.D. 167, at p. 171, Hawkins J.)

This test contains both a subjective and objective element. There must be both actual belief on the part of the prosecutor and that belief must be reasonable in the circumstances. The existence of reasonable and probable cause is a matter for the judge to decide as opposed to the jury.

Complaint by Individual

Per *Kefeli v. Centennial College of Applied Arts and Technology*, [2002 CanLII 45008](#) at paragraph 24, the Court of Appeal held that, as a general rule, the court will view the police officer that laid the charge as the person who initiated the prosecution; however, the Court of Appeal did state that in exceptional circumstances a private citizen as complainant may be found as having maliciously initiated a prosecution. In such a matter, three elements must exist:

- ▶ The complainant desired and intended that the plaintiff be prosecuted;
- ▶ The facts were so peculiarly within the complainant's knowledge that it was virtually impossible for the professional prosecutor or police officer to exercise any independent discretion or judgment in determining whether or not to lay the charge; and
- ▶ The complainant procured the institution of proceedings by the professional prosecutor or the police officer, either by furnishing information relevant to the determination of whether or not a charge should be laid that he knew to be false, or by withholding information that he knew to be true, or both.

An example of a citizen suing their employer, rather than the police, for malicious prosecution can be found in *McNeil v. Brewers Retail Inc.*, [2008 ONCA 405](#), [2008] O.J. No. 1990, whereby Brewer's Retail Inc. knowingly withheld security footage from

the police while aware that the tapes would exonerate McNeil. It was successfully argued by McNeil that by failing to forward that evidence to the police all three elements of the three part test as above were met.

Malice, defined

Inherent to the elements of a malicious prosecution case is the element of malice. In certain circumstances the 'malice' element may be plain and obvious; however, malice can be demonstrated by showing that the proceeding was commenced illicitly; *St-Jacques v. Doyle*, [2008 CanLII 9381](#):

[8] Malice is established by showing that the actual motive was improper, or the circumstances were such that the prosecution can only be accounted for by imputing some wrong or indirect motive to the defendant. The burden is on the plaintiff to show malice.

Lloyd v. Toronto (City) Police Services Board, O.J. No. 83 (S.C.J.) at paras.142 and 143.

[9] With respect to allegations of malice, a suit for malicious prosecution must be based on more than recklessness or gross negligence. The test for malicious prosecution requires that the plaintiff show that the actual motive was improper, or demonstrate that the prosecution can only be explained by imputing a wrong motive. Neither bald allegations of malice, nor inferences in the face of other explanations, nor assumption and innuendo will satisfy the elements of the test.

Punitive Damages

Against Lawyer

In the matter of *Curley v. Taafe*, [2018 ONSC 3150](#) punitive damages against a lawyer were awarded whereas the lawyer was found as having brought malicious criminal proceedings as well as malicious complaints about a colleague to the Law Society of Ontario (the Law Society of Upper Canada as it was then):

[83] There remains the Plaintiff's claim for punitive damages. As noted by Carole J. Brown J. in *Campbell v. Lauwers*, 2013 ONSC 2306 at para. 37:

With respect to punitive damages, the Court should consider how the combination of compensatory damages, punitive damages and any other kind of punishment related to the same misconduct contributes to achieving the objectives of retribution, deterrence, and denunciation. Where a defendant has already been punished, either criminally or through professional disciplinary process, punitive damages are generally not awarded, because this would amount to double punishment.

[84] In this case there is no evidence that the Defendant has been the subject of any disciplinary process, or any form of punishment. The Defendant is a lawyer, and she should have come to this court and told the truth. In my view, she did not. The Defendant is an officer of this court, quite independent of her role as a litigant within these proceedings. This is a case where an award of punitive damages is appropriate to reflect the Defendant's misconduct so as to achieve objectives of retribution, deterrence and denunciation. The award, in my view, should not be a crippling award. An award suggested by Plaintiff's counsel in the range of \$350,000 to compensate the Plaintiff for all her damages, which would include punitive damages, would result in a crushing award that would not be a complete reflection of the Defendant's misconduct in this case. An award of \$25,000 for punitive damages is, in my view, sufficient to reflect the principles upon which punitive damages have been awarded in the past.