

The law around malicious prosecution is still emerging



A Toronto lawyer who is suing the police for malicious prosecution and defamation after she was accused of smuggling drugs into a courthouse and arrested in front of colleagues and clients will have to prove that officers had a primary purpose other than that of carrying the law into effect, says Toronto civil litigator [Sarah O'Connor](#).

"The tort of malicious prosecution is still an emerging area of law," she tells [AdvocateDaily.com](#).

Laura Liscio filed a defamation lawsuit in May against the Peel Regional Police Service seeking \$1.5 million in damages; her lawyer has said she's planning to amend the claim now that all criminal charges have been dropped, reports the [Canadian Press](#).

Louis Sokolov, Liscio's lawyer, said in the article that they will file new documents alleging the police force conducted a negligent investigation and engaged in a malicious prosecution. He said Liscio may also seek more financial compensation, says the article.

O'Connor, the principal of [O'Connor Richardson Professional Corporation](#), says the first (legal) test to prove malicious prosecution was adopted by Justice Antonio Lamer in the *Nelles v. Ontario*, [1989] 2 SCR 170, case.

In *Nelles*, the four-point test for malicious prosecution is: the proceedings must have been initiated by the defendant; the proceedings must have been terminated in favour of the plaintiff; the absence of reasonable and probable cause; and malice, or a primary purpose other than that of carrying the law into effect, she says.

O'Connor says the second two parts of the test are more difficult to prove and in general, the test has been applied inconsistently.

She says the decisions in *Oneil*, *Proulx* and *Miazga* further clarified the test for malicious prosecution.

"An absence of reasonable and probable grounds to initiate prosecution is, in and of itself, insufficient to establish malice; there must also be evidence of an improper purpose," she says. "This is still a difficult threshold to prove and keeps the scope fairly narrow."

O'Connor says the *Miazga* matter was specifically regarding a Crown prosecutor, and it will be interesting to see how it will be applied in the Liscio case where the allegations of malicious prosecution are against the police and not the Crown.

Liscio was charged with drug possession, trafficking, obstructing justice and breach of trust, but those charges were withdrawn after the Crown determined there was no reasonable prospect of conviction, says the Canadian Press.

"Liscio's statement of claim alleges that her professional reputation as a criminal lawyer was irreparably damaged on Feb. 12 as she was preparing to defend a client in the courthouse in Brampton, Ont. According to the statement, Liscio had obtained permission to bring a change of clothes for her client and collected the garments from one of his friends before the trial was to get underway," says the article.

Court inspectors found marijuana hidden in the hollowed-out heels of shoes and soon afterward, Liscio was arrested in the courtroom, handcuffed and marched through the courthouse in full view of the public, says the wire service.

In addition, Peel Police originally issued two press releases offering a different version of her arrest; the police force would later retract some of those details, says the article.

In order to prove the defamation allegation, says O'Connor, Liscio's lawyer will focus on s. 16 of the [Libel and Slander Act](#) as it relates to her professional reputation being discredited.

She says the press releases presents another legal issue that will be raised during the case.

"It will be interesting to see how those are dealt with and if additional punitive damages would be awarded for the second release, as well as whether the police knew or ought to have known that clarifying and/or correcting the first release would cause further damages to Liscio's reputation," she says.

O'Connor says there will be significant attention given to the conduct of the arrest, as well as whether there should be any damages for future loss of earnings or loss of competitiveness awarded.

"Despite the withdrawing of charges and this lawsuit, the court will look at whether Liscio could still face additional scrutiny entering court or even visiting incarcerated clients," she says.