CURRENT AND EMERGING TRENDS: NEGLIGENT INVESTIGATION AND MALICIOUS PROSECUTION

Andrew J. Heal*
Blaney McMurtry LLP
416.593.3934
aheal@blaney.com

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*LL.M., (Osgoode), J.D. (University of Toronto), B.A. (Hons) (McGill University) at Blaney McMurtry LLP, 1500, 2 Queen St. East, Toronto, Ontario, M5C 3G5
This paper addresses some emerging trends in civil liability claims against public authorities, and Crown attorneys and police in particular. Since the Nelles case\(^2\), 20 years ago Crown attorneys have been subject to actions for malicious prosecution where they step outside their role as Ministers of Justice in their prosecutorial function. The police are additionally exposed to civil liability claims arising out of negligent investigation. Civil claims for Charter damages or Charter breaches arising in the criminal context which now often accompany civil claims for malicious prosecution or negligent investigation, are beyond the scope of this paper, and the subject of talks by others at this conference.\(^3\)

The central cases decided by the Supreme Court of Canada in the last three years are the October 4, 2007 decision of the Supreme Court of Canada in \textit{Hill v. Hamilton Wentworth Regional Police} \(^4\) and the November 6, 2009 decision of the Supreme Court of Canada in \textit{Miazga v. Kvello Estate}.\(^5\) Tort law does not remedy failures of criminal justice. One learned author has argued that the Attorney Generals must take leadership over issues of mistreatment before trial, in its various forms.\(^6\)


\(^3\) Including claims of misfeasance in public office. See also, for example, Wilson and Peruzza, “The Rise of the Tort of Misfeasance in Public Office” (2007) \	extit{Canadian Institute: Litigation Against the Crown}

\(^4\) \textit{Hill v. Hamilton Wentworth Police} 2007 SCC 41

\(^5\) \textit{Miazga v. Kvello Estate} 2009 SCC 51

\(^6\) Hon. Marc Rosenberg, “\textit{The Attorney General and the Administration of Criminal Justice}”, (2009), 34 Queen’s L.J. 813-862, a 2003 paper published more widely in 2009. As of the author’s writing, the author argued two watershed events occurred in the last 20 years -- one being the release of the Royal Commission Inquiry into the treatment of Donald Marshall. In the words of the author “Th[at] Report demonstrated profound systemic failures in the way that justice was administered in our criminal courts. The miscarriage of justice in Donald Marshall, Jr.’s case was not ‘more apparent than real’… [but rather] Mr. Marshall was the victim of a seriously flawed system,” at para 2. The author does not address the torts dealt with in this paper in any great detail, except to capture the very high standard for proving malicious prosecution: “The elements of malicious prosecution… closely mirror the standard of flagrant impropriety for judicial review. The burden on a plaintiff is to show that the Attorney General or
I. Negligent Investigation

The *Hill* case of October, 2007 was and remains noteworthy, not simply because the Supreme Court of Canada affirmed that the police owe duties to take reasonable care when conducting an investigation, but also because the case applied established principles of negligence law and confirmed that all available defences continue to apply to protect reasonable errors in judgment. Mr. Hill had sued the Hamilton Wentworth police for in excess of $3 million following his conviction, appeal, new trial and his ultimate acquittal. This lengthy criminal process had put Mr. Hill through a 20 month ordeal, significant financial and personal cost. The result in the case turned on whether the use of a 12 photo line up where Mr. Hill, an aboriginal Canadian, was the only non-white participant amounted to negligence or was an error in judgment. Unfortunately, this error appeared to have resulted in significant harm.

It is often overlooked that in the appeal of the civil trial dismissal, the Ontario Court of Appeal split 3:2 in favour of the defendants on the merits -- the trial judge had dismissed the civil case. Two appellate justices were of the view that the conduct of the police failed to meet the standard of care in the circumstances, and would have awarded compensation.

By the time of arguments at the Supreme Court of Canada, some of the balance had shifted back in the debate to the duty of care stage. A minority of Supreme Court justices in *Hill* expressed the view that no duty of care ought to have arisen in the circumstances, leaving the standard of care question moot.

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Crown counsel perpetrated what amounts to a fraud on the process of criminal justice and in doing so has perverted or abused his office and the process of criminal justice.” … Because the bar has been set so high… very few [such civil claims] have survived a summary judgment motion.” at para 67.
There can be no doubt that police officers, when deciding to lay criminal charges, must continue to have the courage of their reasonably held convictions arrived at dispassionately and objectively, based on reasonable and probable grounds.

Although the dissent in the Supreme Court of Canada in *Hill* would have rejected the recognition of a cause of action for negligent investigation on policy grounds, it is clear in the cases that have followed *Hill* in the last three years that the tort of negligent investigation is now well established as a civil cause of action. It has also been expanded to apply to non-police investigators.

The minority in *Hill* predicted that the creation of conflicting duties between a police officer’s public law duty to act in the best interests of society as a whole, and an individual officer’s positive legal duty to take reasonable care not to harm an individual suspect, could ultimately lead to an erosion of the “reasonable and probable grounds” standard. Police officers could become reluctant to lay charges unless the evidence against a suspect was overwhelming, thereby raising the bar too high. Presumably, this would leave many investigations unpursued. Predictions following the Supreme Court of Canada in *Hill* were that the flood gates would open to more claims against the police. In practice, this does not appear to have been the case.

However, there has been an increased potential for conflict between the police and the Crown when civil suits for negligent investigation/malicious prosecution have been commenced against jointly. Crown attorneys remain immune from claims of negligent investigation, or for vicarious liability for the police. This is so because of the continued division between the prosecutorial and investigative functions, both in policy and practice, in the criminal justice system. Some years ago some authors predicted that a new group of experts will be identified
with respect to demonstrating the standard of care in policing and it would appear that this seems to be true.\(^\text{7}\)

The test for negligence is that of a reasonable police officer in all of the circumstances. The particular conduct required is also informed by the stage of the investigation: what would “a reasonable officer in like circumstances” do? In applying this standard, due recognition must be given to the exercise of discretion inherent in police investigation. A number of choices may be open, and as long as discretion is exercised within this reasonable range, there is no breach of the standard of care.\(^\text{8}\) The Supreme Court of Canada in \textit{Hill} also signalled that police officers are to be considered \textit{like other professionals} and held to a standard of performance in exercise their professional judgment required by their positions.\(^\text{9}\) If the duty and standard of care\(^\text{10}\) questions have been answered by the Supreme Court in \textit{Hill}, questions of causation and damages mitigation remain not fully analyzed, and left for future cases to determine.

\(^7\) K. Boggs, “\textit{Hill} v. Hamilton Wentworth Regional Police Service, SCC grants suspects the right to sue police officers for negligent investigation” (2007-08) 9 Mun.L.R. Mgt. 17 K. at 20

\(^8\) \textit{Hill} at paragraph 68, 69 and 73.

\(^9\) This may turn out to be somewhat problematic as simultaneously the courts have taken a more critical eye towards accepting expert evidence. Plaintiffs may find it problematic to locate and retain a sufficiently knowledgeable person who can speak to the appropriate standard of care in the circumstance and whether or not it was met. Further the hallmarks of a professional do not easily fit into the often limited training and study that accompany becoming a police officer, and one of the beneficial effects may be that more and longer training and more identifiable apprenticeships or secondments for junior officers are required over time.

\(^10\) In \textit{Collis v. Toronto Police Services Board et al.},[2007] O.J. 3301 (Div. Ct.) decided a month before the Supreme Court’s decision in \textit{Hill}, Justice Swinton, for the Divisional Court, applied the Ontario Court of Appeal decision in \textit{Hill} to reverse the trial judge’s decision awarding damages to the plaintiff, Susan Collis, for negligent investigation, false arrest and false detention, in connection with her arrest for breaching the terms of her recognizance by attending a demonstration. Notably, Justice Swinton found that police had not breached the standard of care in arresting the plaintiff, and had not negligently investigated, and that a reasonably prudent police officer would not have obtained legal advice from a Crown attorney before making the decision to arrest Ms. Collis.
The case of causation, the usual “but for” test proved on a balance of probabilities applies\(^{11}\). It is particularly important because there is often causal challenges in any tort case but particularly so in a wrongful conviction case where so many actors may have had a hand in the problem: “cases of negligent investigation will often involve multiple causes”.\(^{12}\)

Some authors forcefully point out that the tort of malicious prosecution must conform to the structure and substantive requirements of any tort action, that is, the plaintiff must show not only that he has been wronged, but also that he has been wronged by the defendant’s conduct.\(^{13}\) Causation is the key defining element that distinguishes tort law, and causation defences apply regardless of whether the claim is in negligence or for an intentional tort.\(^{14}\) For the tort to provide a principled basis of recovery, one must still be able to look to the plaintiff’s injuries and point to the defendant’s conduct and say that but for that conduct, the injuries would not have occurred:

A legal arrangement under which compensation was triggered by the injury itself and not by its tortious infliction might be desirable, but it would be an alternative to tort law, not a version of it.\(^{15}\)

It appears that recent developments in the case law have occurred because courts are attempting to use the tort of malicious prosecution to redress other problems in the criminal justice system.

\(^{11}\) *Hill* at paragraph 93

\(^{12}\) *Hill* supra at paragraph 94


\(^{15}\) *Weinrib*, ibid
The majority in the Supreme Court of Canada was careful to say that police should not be blamed for the mistakes of others:

…Where the police investigate a suspect reasonably, but lawyers, judges or prosecutors act unreasonably in the course of determining his legal guilt or innocence, then the police officer will have met the standard of care and cannot be held liable either for failing to perform the job of a lawyer, judge or prosecutor, or for the unreasonable conduct of other actors in the criminal justice system.\(^{16}\)

However, this begs the question of whether the police should bear the consequences of these other actors’ actions, where their own conduct contributed only minimally to the ultimately consequences. It would appear that, in the latter situation, police officers could be left ‘holding the bag’:

…the causation requirement will be met even if other causes contributed to the injury as well. On the other hand, if the contributions of others to the injury are so significant that the same damage would have been sustained even if the police had investigated responsibly, causation will not be established. It follows that the police will not necessarily be absolved of responsibility just because another person, such as a prosecutor, lawyer or judge, may have contributed to wrongful conviction causing compensable damage.\(^{17}\)

What is relatively clear from Ontario cases decided since *Beckstead*,\(^{18}\) which was the case in which the Ontario Court of Appeal first recognized the tort of negligent investigation predating and perhaps signalling the outcome in *Hill*, is that Ontario courts continue to proceed cautiously in this area. In *Stevens v. Toronto Police Services Board*,\(^{19}\) Justice Juriansz held that

\(^{16}\) *Hill*, ibid, at para. 50

\(^{17}\) *Hill*, ibid

\(^{18}\) *Beckstead v. Ottawa (City)*, [1997] O.J. No. 5169 (C.A.). In Beckstead, the plaintiff was awarded $20,000.00 in general damages where the police laid charges without any proper investigation that would have established her innocence. Her damages were constrained by the fact that the Crown Attorney withdrew the charges at a relatively early stage.

\(^{19}\) [2003] O.J. No. 4664 (S.C.J.)
police were immune from any activities that could be connected to the Crown, and that their conduct in investigating an accused for marijuana possession was not negligent.

In Miguna v. Toronto Police Services Board, a civil case involving allegations of both negligent investigation and malicious prosecution, the motions judge at first instance struck claims of negligent investigation (though some claims of malicious prosecution were allowed to stand), noting that “liability for negligent investigation is rare,” and that “[s]uch conduct will occur only where there has been a basic failure to investigate before determining whether or not to lay a charge.

In overturning this early dismissal, the Ontario Court of Appeal noted the difficulty in terminating serious claims of negligent investigation and malicious prosecution, at the pleadings stage, and the low threshold for sustaining such pleadings. Miguna was to some extent an unusual case as, the Ontario Court of Appeal was concerned the very claims attacked by the police and the Crown attorneys had effectively been previously ruled upon as legitimately, if not properly, pleaded causes of action. This was the second time the matter was back to the Court of Appeal on a pleadings issue. Public defendants may be keen to dismiss proceedings at the very outset because of reputational or other concerns but this remains difficult at the pleadings stage. For allegations that survive a challenge at this stage, the only remedy is costs if the allegations are ultimately unproven.

“These are very serious allegations, and are, of course, only allegations at this stage of the proceedings. Mr. Miguna fails to


establish them at his peril in terms of costs and, possibly, his reputation. For the most part, the allegations are pleaded in an unacceptably bald fashion. However, if appropriately supported by material facts, and proven, they – and other facts pleaded – could support claims for malicious prosecution, breach of the Charter and misfeasance in public office as against the Crown attorney and Police defendants, and as against the Police defendants alone claims for negligent investigation, unlawful arrest, false imprisonment, and assault and battery. In my view, the plaintiff should be entitled to one more chance to attempt to plead these claims properly.

The foregoing allegations remain the centrepiece of Mr. Miguna’s claim. What he has done in his amended pleading, however, is to endeavour to provide the particulars of those allegations that he was previously criticized for omitting and that the defendants continued to demand. As the motion judge noted, “the Plaintiff has pleaded a very considerable amount of additional material.” It seems ironic that the causes of action which this Court had already ruled could be supported by the core facts initially pleaded should be struck completely when the pleading has been amended to provide further particulars.”

The Ontario Court of Appeal emphasized that an inference of malice may still be open, at the early pleadings assessment stage, such as on a motion to strike, where allegations must be deemed to be true for analytical purposes. The sad outcome here for defendants are the allegations are usually sensational and accompanied by wide publicity, notwithstanding they are mere allegations. Further, the courts have generally been reluctant to truly punish unproven allegations with substantial indemnity or full indemnity costs involving public defendants which should nonetheless be the presumptive outcome for unproven allegations of malicious conduct.

The Court of Appeal went further in Miguna in terms of allowing “inferences of malice at the pleadings stage where an absence of reasonable and probably grounds is alleged:

This Court has held that continuing a prosecution in the absence of reasonable and probable grounds is capable of giving rise to an inference of malice: see *Oniel v. Metropolitan Toronto (Municipality) Police Force*, [2001] O.J. No. 90 (C.A.); *Folland v. Ontario* 2003 CanLII 52139 (ON C.A.), (2003), 64 O.R. (3d) 89 (C.A.). In *Oniel*, at paras. 54-55, Borins J.A. said:

> Although the prosecutor may have reasonable and probable cause to commence a prosecution, if the prosecutor obtains information which suggests that the person probably did not commit the offence, or recklessly disregards advice that such information could be obtained through routine investigative steps, the prosecutor lacks reasonable and probable cause to continue the prosecution, and malice may be inferred.

> … Continuing the prosecution in the absence of an honest belief in the appellant’s guilt would be incompatible with securing the ends of justice, and malice could be inferred if the respondents continued the prosecution with reckless indifference to the truth. Continuing a prosecution in these circumstances would not be using the criminal justice system for the purpose for which it was intended.\(^\footnote{23}{2008 ONCA 799 at para. 59.}\)

There is significant danger for both policy reasons and in practice to allow a mere pleading of a lack of reasonable and probable grounds without requiring a pleading of something more to show malice. To this extent I would argue that *Miazga* now clearly separates the third and fourth elements of the tort of malicious prosecution, and warns against conflating the two elements of this tort.\(^\footnote{24}{And on this basis the Ontario Court of Appeal case of *Ferri, Oniel and Folland* (referred to below) ought to be now distinguishable.}\)

If the Supreme Court of Canada in *Miazga* has significantly narrowed, or eliminated, when an inference of malice can be drawn from an absence of reasonable and probable cause alone, it follows as a matter of logic that something more must both be pleaded, and adduced in

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\(^{23}\) 2008 ONCA 799 at para. 59.

\(^{24}\) And on this basis the Ontario Court of Appeal case of *Ferri, Oniel and Folland* (referred to below) ought to be now distinguishable.
evidence to properly support a claim of malice. Malice pleadings usually made in aggravation of claims of negligent investigation, or in conjunction with concurrent pleadings of malicious prosecution.

II. Malicious Prosecution

The elements of the tort of malicious prosecution, established in England for private prosecutions, were adopted for actions against Crown attorneys by the Supreme Court in Nelles.²⁵

The Court chose these found criteria so that Crown attorneys could be held to account for conduct such as deliberately withholding exculpatory evidence or other acts of bad faith, while plaintiffs had to meet a high standard in order to prevent frivolous of vexatious claims.²⁶

In Miazga, the Supreme Court of Canada exhaustively traced the roots of the private law cause of action for malicious prosecution. This tort was originally only available against non Crown defendants, and arose in connection with private prosecutions. An individual who had invoked the coercive powers of the state in the criminal process for an end other than carrying the law into effect, for in effect an improper purpose, was liable for civil damages.

Malicious prosecution is an intentional tort designed to provide redress for losses flowing from an unjustified prosecution. The four-part test for malicious prosecution was born and evolved in England in the 18th and 19th centuries at a time when prosecutions were conducted by private litigants and the Crown was immune from civil liability. Indeed, all of the early English and Canadian cases of malicious prosecution involved disputes between private litigants: see, e.g., Heath v. Heape (1856), 1 H. & N. 478 (Ex.), 156 E.R. 1289; Hicks v. Faulkner

²⁵ Nelles, supra, note 27.

²⁶ Nelles, ibid, at para. 52.

Crown immunity at common law endured until the 1950s, when Canadian governments began adopting Crown liability legislation: see, e.g., the federal Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50, s. 3; and Saskatchewan’s Proceedings against the Crown Act, R.S.S. 1978, c. P-27, s. 5.

This body of statute law sparked divergent lines of judicial authority on the question of whether the absolute immunity from civil liability historically afforded Crown prosecutors should continue. This Court in Nelles decided the debate in favour of extending the tort of malicious prosecution to Crown prosecutors. However, as Vancise J.A. aptly noted in the court below, the policy reasons underlying the historical immunity enjoyed by Crown prosecutors “justified an extremely high threshold to succeed in an action for malicious prosecution.”27

It has been said that few cases have led to a successful action for malicious prosecution, Proulx being the most notable. In Proulx, the effect of the conduct was not only an egregious miscarriage of justice, the prosecutor’s conduct, in the eyes of the majority decision in Proulx was calculated to pervert justice. In cases seeking to apply Proulx, the active, repeated and subversive nature of the prosecutor’s conduct is often ignored. Reference is made to the more general statements of principle such as conduct “inconsistent with a Minister of Justice”, in an effort to lower the bar for malice. The noteworthy passage from the majority’s judgment is instructive as to how high the bar is:

At the outset, the absence of reasonable and probable cause, which has been discussed above, is particularly noteworthy. The Crown prosecutor ignored the probable inadmissibility and lack of probative value of the recorded communications between the appellant and the victim’s father. He also relied on the extremely tenuous identification evidence offered by Paquet as the primary basis for reopening the investigation and prosecuting the appellant. All of this

27 Miazga, at para. 42-43.
occurred in the context of the well-publicized million dollar defamation action brought by the appellant. In these exceptional circumstances, in our opinion, no prosecutor acting in good faith would have proceeded to trial on a first degree murder charge with such substandard and incomplete proof. The decision to recruit the retired policeman, Tardif, to assist in the resurrected prosecution file, notwithstanding Tardif’s status as a defendant in the appellant’s defamation suit, is further evidence of malice in the sense of the prosecutor’s apparent indifference to the improper mixing of public and private business.

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As found by the Court of Appeal in the criminal case, this manipulative approach [the prosecutor invited the jury to read in missing information to the prejudice of the accused] effectively distorted the appellant’s words, and improperly transformed them into a full confession of guilt. The Crown’s actions thus were more than careless. Rather, they represented an active effort to obtain a conviction at any price. This ran counter to the nature and spirit of the Crown attorney’s role, which was aptly described by Rand J. in Boucher, supra, at pp. 23-24, in a well-known passage [omitted]

The tangled relationship between the criminal proceedings initiated against the appellant, and the appellant’s defamation suits against Tardif and André Arthur, also suggests that the prosecution was motivated by an improper purpose.

... The Crown made the decision to prosecute with the full knowledge that prosecuting the appellant would potentially assist the defendants in the defamation actions. This was thus more than a simple abdication of prosecutorial responsibilities to the police or, in the case of Tardif, to a former police officer. Rather, the prosecutor lent his office to a defence strategy in the defamation suits and, in so doing, was compromised by Tardif’s manipulation of the evidence and the irregularities that took place during the 1991 investigation process.

This leads, on a balance of probabilities, to one of two conclusions. Either the prosecutor allowed his office to be used in aid of the defence of a civil defamation action, which is a perversion of powers (détournement de pouvoirs) and an abuse of prosecutorial power, and thus malice in law; or, the prosecutor decided in 1991 to go after the appellant to secure a conviction at all costs, despite his earlier decision that there was no case for the appellant to answer, and was quite willing to harness the tainted assistance of Tardif to this end.  

28 Proulx, para 39-45. It must be noted three justices of the Supreme Court of Canada in the minority in Proulx, and the entire Quebec Court of Appeal would not have found the prosecution was malicious, however negligently it was handled.
Until *Miazga*, the concept of “inferred malice” has been adopted in several Ontario Court of Appeal judgments. For example, in *Folland v. Ontario*, the Ontario Court of Appeal quoted this passage from *Oniel* as the basis to argue that malice could be inferred, and “that the jurisprudence is not fully settled as to whether the four elements for the tort of malicious prosecution must be proven in every civil action against a prosecutor.” Likewise, in *Ferri v. Root*, the Court of Appeal concluded that:

"Finally, proceeding with a prosecution in a case where there is no reasonable and probable cause may not of itself constitute malice, but it is certainly evidence from which an inference of malice can be drawn in an appropriate case."

Even in cases in which the plaintiffs’ claim is struck, courts have left open the possibility that malice on the part of police could be inferred from “reckless indifference” or a particularly “sloppy or negligent” investigation. In *Dix v. Canada (A.G.)*, the Alberta Court of Queen’s Bench went to great lengths to infer malice, finding first that malice could not be established on the facts independently but citing *Oniel* for the proposition that malice could be inferred from some aspects of the lack of reasonable and probably cause.

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30 (2003), 64 O.R. (3d) 89 (C.A.)

31 *Folland*, ibid, at para. 22


33 *Ferri*, ibid, at para. 94


37 *Dix*, ibid, at para. 528
The Saskatchewan Court of Appeal majority decision in *Kvello Estate v. Miazga*, referred to the independent requirement of malice as articulated in *Nelles*, but chose to ignore it, in favour of adopting a broader test encompassing “the totality of the circumstances” said to be drawn from *Proulx*:

There is a good deal of merit to the argument for a test requiring some proof of malice in addition to and independent of the lack of reasonable and probable cause. However, as will be seen from our conclusion in this case, the test cannot be reduced to such a rigid formula. As stated in *Proulx*, at para. 37, in determining an issue of malice, “it is the totality of all the circumstances that are to be considered in cases of this kind.”

Arguably attempts to loosen the malice requirement have been reined in by the Supreme Court in *Miazga*, and malice remains the necessary requirement to make out this intentional tort. In *Hawlye v. Bapoo*, the Ontario Court of Appeal affirmed that proof of malice is still a necessary and independent requirement for a successful malicious prosecution claim:

The succeed in a claim for malicious prosecution, a plaintiff must establish that the defendant acted with malice: *Nelles v. Ontario*, [1989] 2 S.C.R. 170. The trial judge reviewed the evidence carefully and found that none of the defendants were actuated by malice. There was substantial evidence to support those findings. None of the errors that the appellants submit the trial judge made relate to his finding that there was no malice.

And a lack of reasonable and probable grounds ought to almost always be insufficient to infer malice, there must be something more:

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39 *Maizaga, ibid*, at para. 92.


41 *Hawley, ibid*, at para 5.
In appropriate circumstances, for example when the existence of objective grounds is woefully inadequate, the absence of a subjective belief in the existence of sufficient grounds may well be inferred. However, even if the plaintiff should succeed in proving that the prosecutor did not have a subjective belief in the existence of reasonable and probable cause, this does not suffice to prove malice, as the prosecutor’s failure to fulfill his or her proper role may be the result of inexperience, incompetence, negligence, or even gross negligence, none of which is actionable: *Nelles*, at p. 199; *Proulx*, at para. 35. **Malice requires a plaintiff to prove that the prosecutor willfully perverted or abused the office of the Attorney General or the process of criminal justice. The third and fourth elements of the tort must not be conflated.** [emphasis added]

As discussed earlier, a demonstrable “improper purpose” is the key to maintaining the balance struck in *Nelles* between the need to ensure that the Attorney General and Crown prosecutors will not be hindered in the proper execution of their important public duties and the need to provide a remedy to individuals who have been wrongly and maliciously prosecuted. By requiring proof of an improper purpose, the malice element of the tort of malicious prosecution ensures that liability will not be imposed in cases where a prosecutor proceeds, absent reasonable and probable grounds, by reason of incompetence, inexperience, poor judgment, lack of professionalism, laziness, recklessness, honest mistake, negligence, or even gross negligence.42

Conversely, as the Supreme Court said in *Miazga*, if there are, objectively speaking, reasonable and probable grounds, then the subjective beliefs (or intent) of the prosecutor become irrelevant, for good policy reasons.

The prosecutor’s mere lack of subjective belief in sufficient cause, where objective reasonable grounds do in fact exist, cannot provide the same determinative answer on the third element in the context of a public prosecution. Unlike the situation in a purely private dispute, the public interest is engaged in a public prosecution and the Crown attorney is duty-bound to act solely in the public interest in making the decision whether to initiate or continue a prosecution. Consequently, where objective reasonable grounds did in fact exist at the relevant time, it cannot be said that the criminal process was wrongfully invoked. Further, as discussed above, the decision to initiate or continue the prosecution may not entirely accord with the individual prosecutor’s personal

42 *Miazga*, at para. 80 and 81.
views about a case as Crown counsel must take care not to substitute his or her own views for that of the judge or the jury.

... If the court concludes, on the basis of the circumstances known to the prosecutor at the relevant time, that reasonable and probable cause existed to commence or continue a criminal prosecution from an objective standpoint, the criminal process was properly employed, and the inquiry need go no further. See, e.g., *Al’s Steak House & Tavern Inc. v. Deloitte & Touche* (1999), 45 C.C.L.T. (2d) 98 (Ont. Ct. (Gen. Div.)), at paras. 11-13.  

Crown attorneys are required to screen charges, and to assess and reassess the likelihood of a criminal conviction once charges have been laid. In Ontario, this assessment is mandated by the “reasonable prospect of conviction” test. The test is objective. The standard is higher than a “prima facie” case that merely requires that there is evidence such that a reasonable jury, properly instructed, could convict. The standard is lower than a probability of conviction, a prosecutor is correct in proceeding even if it cannot be determined that a conviction is more likely than not.

At the root of this function is the separation of the investigation and prosecution functions. Some years ago, the Martin Report addressed the distinction between the role of police in laying charges and the role of prosecutors.

As a matter of law, police officers exercise their discretion in conducting investigations and laying charges entirely independently of Crown counsel... It seems to me that to vest the authority for the investigation functions of the

43 *Miazga*, at para. 73 and 75.


45 *Crown Policy Manual*, ibid
government in the same person who is going to conduct the criminal process is foreign to the spirit of justice.\textsuperscript{46}

Preserving prosecution independence is vital. The Martin Report concluded that a prosecution should not turn on the prosecutor’s personal feelings or opinions as to whether or not the accused is guilty:

It is also generally inappropriate, in the Committee’s view, for the prosecution to turn on the prosecutor’s personal feelings or opinion as to whether or not the accused is guilty. This is inconsistent with Crown counsel’s role as Minister of Justice.\textsuperscript{47}

The person laying the charges must hold the belief in guilt. Part of the Crown attorney’s role as the Minister of Justice is to maintain independence from the party who laid the charges, so that he can evaluate the reasonable prospect of conviction, the public interest, and the interests of justice, in deciding whether to proceed with a prosecution.

A prosecutor does not need to be convinced of guilt beyond a reasonable doubt, as this is the issue for the trier of fact. However, the prosecutor must have sufficient evidence to ground a reasonable belief that guilt could be established beyond reasonable doubt.

Consequently, claims for malicious prosecution against Crown attorneys and the police ought to be amenable to early substantive challenges on motions to strike and for summary judgment, on the basis of an absence of malice or the existence of reasonable and probable cause. As was said in \textit{Miazga}:

The Court’s analysis in \textit{Nelles}, lends further support to the conclusion that the third element of the tort turns on the objective assessment of reasonable and

\textsuperscript{46} \textit{Report of the Attorney General’s Advisory Committee on Charge Screening, Disclosure and Resolution Discussions} (the “Martin Report”)\textsuperscript{(Toronto: Ontario Ministry of the Attorney General, 1993) at pp. 37-38.}

\textsuperscript{47} \textit{Martin Report}, ibid, at p. 64.
probable cause. Unlike the question of subjective belief which is a question of fact, the objective existence of absence of grounds is a question of law to be decided by the judge. As noted in Nelles, the fact that the absence of reasonable and probable cause is a question of law means “that an action for malicious prosecution can be struck before trial as a matter of substantive inadequacy”, or on a motion for summary judgment [at para 74]

The Supreme Court gave guidance in Miazga that early challenges to the substantive adequacy of claims for malicious prosecution are particularly appropriate when assessing whether there were reasonable and probable grounds to continue with a prosecution. This makes such claims amenable to challenges by way of summary judgment because it is an objective assessment, and a legal question which ought to be determinable on the known facts.

This approach and application of Miazga was recently seen in Wong v. Toronto Police Service where Justice Thorburn granted a summary judgment motion by the defendant police officers:

“Summary judgment plays a particularly important role in actions brought against prosecutorial entities. The availability of summary judgment protects the exercise of prosecutorial function in the absence of those entities being given complete immunity from tort claims. Accordingly courts confronted with motions for summary judgment in factually laden claims of negligent investigation, false arrest, false imprisonment, and malicious prosecution, are encouraged to carefully examine the factual record and the case as pleaded to determine whether summary judgment should be granted.” [at para 49]

“Malicious prosecution will only be made out where there is proof that the prosecutor’s conduct was fuelled by an improper motive, a motive that involves an abuse of process or perversion of the criminal justice system for ends it was not designed to serve”. In other words, it is only where the prosecutor steps out of his or her role as ‘minister of justice’”. [at para 7]48

48 2009 CanLII 66385 (Superior Court of Justice)
More recently, in *Hawkins v. Attorney General (Ontario)* the Superior Court dismissed a motion for summary judgement by former Crown attorneys while finding the bringing of the motion was nonetheless reasonable.\(^{49}\)

The appropriate test to be applied on a motion for summary judgment is satisfied when the applicant (moving party) has shown that there is no genuine issue of material fact requiring a trial, and therefore summary judgment is a proper question for consideration by this court: See *Hercules Management v. Ernst & Young* [1997] 2 S.C.R. 165 at para 15, *Dawson v. Rexcraft Storage* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.) at pp.267-68, *Irving Ungerman v. Galanis* (1991), 4 O.R. (3d) 545 (Ont. C.A.) at pp.550-51. Once the moving party has made this showing the respondent must then establish “his claim as being one with a real chance of success”.\(^{50}\)

*Proulx* confirms *Nelles*, and that there are four necessary elements which must be proved for a plaintiff to succeed in an action for malicious prosecution.\(^{51}\) The failure of any of the four defeats the claim:

1. The proceedings must have been initiated by the defendant;
2. The proceedings must have been terminated in favour of the plaintiff;
3. The absence of reasonable and probable cause; and
4. Malice, or a primary purpose other than that of carrying the law into effect.

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\(^{49}\) 2010 O.J. No. 116 and 2010 O.J. No. 1193. A motion for leave to appeal to the Divisional Court is pending.

\(^{50}\) *Guarantee Co. v. Gordon Capital* 1999CarswellOnt 3171 at para 27

\(^{51}\) *Nelles v. Ontario* [1989] 2 S.C.R. 170 at para. 42
The existence of reasonable and probable cause is a legal question, and it can be objectively determined on the factual record on motion.

The required element of malice is, for all intents, the equivalent of “improper purpose”. Even given a wide meaning, [see J.G. Fleming, The Law of Torts, 7th ed. (1987), at p.590], a “wider meaning that spite, ill-will or a spirit of vengeance, and includes any other improper purpose, such as to gain a private collateral advantage” the necessary element of “malice” must be present.52

In Nelles, supra, Lamer J., writing for the majority, held that:

To succeed in an action for malicious prosecution against the Attorney General or Crown attorney, the plaintiff would have to prove both the absence of reasonable and probable cause in commencing the prosecution, and malice in the form of a deliberate and improper use of the office of the Attorney General or Crown attorney, a use inconsistent with the status of “minister of justice”. In my view, this burden on the plaintiff amounts to a requirement that the Attorney General or Crown Attorney perpetrated a fraud on the process of criminal justice and in doing so has perverted or abused his office and the process of criminal justice. In fact, in some cases, this would seem to amount to criminal conduct.53

Lamer J. further noted:

By way of summary, then, a plaintiff bringing a claim for malicious prosecution has no easy task. Not only does the plaintiff have the notoriously difficult task of establishing a negative, that is the absence of reasonable and probable cause, but he is held to a very high standard of proof to avoid a non-suit or directed verdict.54

As the majority of the Saskatchewan Court of Appeal said in Miazga:

“For a Crown prosecutor to proceed with a prosecution without a belief in the credibility of his complainants, and without a belief in the guilt of the accused amounts to the “wilful and intentional effort on the Crown’s part to abuse or

52 Nelles, supra

53 Nelles, supra

54 Nelles, supra
distort its proper role within the criminal justice system” as referred to in *Proulx* at para. 35, and takes the case beyond bad judgment, negligence or recklessness and into the realm of malice.

Furthermore, the finding that Miazga did not have an honest belief in the guilt of the respondents casts quite different light on those indicators of malice referred to above which the trial judgment had properly taken into account. The prosecutor’s actions in those cases are tainted by the lack of belief. They can no longer be considered as possibly matters or bad judgment, negligence or recklessness.” (at para 141-142)

In dissent, Vancise JA came to a different conclusion as a matter of law in *Miazga* as to whether the Crown attorney Miazga acted with malice. In *Miazga* the argument was squarely made by the Canadian Association of Crown Counsel that the only way to give effect to the policy considerations as outlined in *Nelles* is to (1) identify the improper purpose Crown counsel is alleged to have had and (2) to then provide evidence, other than an absence of reasonable cause, that justifies the drawing of an inference of malice.

It has been suggested the improper purpose must be one personal to the Crown counsel involved. Both in *Proulx* and *Miazga* the prosecutions were based on fragments of tenuous, unreliable and likely inadmissible evidence grounded in mere suspicion and hypothesis. Malice is more than second guessing and more than recklessness or gross negligence. The dissent in *Miazga* properly viewed the conduct of the prosecutor within the lens of the timeframe that the prosecution took place in the 1990s, and not today. There were no indications that the Crown was a “win it all cross-prosecutor” or abdicated his responsibility to carry the law into effect. Perhaps presciently, the dissent says at paragraph 259 of the Saskatchewan Court of Appeal judgment:

“The difficulty in establishing an absence of reasonable and probable cause is particularly problematic in cases where credibility is in issue. Credibility was certainly an issue in this case and it may be easy in hindsight to find that the evidence of the [redacted] children lacked credibility, but I am not satisfied that in
the milieu and context in which these actions originated and were eventually brought that one could say that. Clearly an experienced trial judge found the evidence credible.”

For the majority in Miazga, no reasonable lawyer could suppose that the complainants' bizarre and fanciful allegations, which included stories of apparitions popping in and out of toilets, was sufficiently reliable to establish guilt, without corroboration. Mr. Miazga was required to engage in a limited weighing of all of the evidence, not to consider bits in isolation which might point to an offence having been committed, and to assess if there was any realistic prospect that guilt could be established beyond a reasonable doubt.

The most recent example of the expansion of the tort of negligent investigation outside of the policing context was the decision of the Ontario Court of Appeal in Correia v. Canac Kitchens and McNeil v. Brewers Retail Inc.55

Employee fraud or defalcation will be the quintessential non public law application of the principles in Hill, as shown in a number of cases pre and post-dating it. Negligent investigation, if caught sufficiently early, should not give rise to significant damages and the independent review role of Crown attorney performing their screening function should ensure those cases which afford “no reasonable prospect of conviction” are worked out.

Ultimately some authors are critical of the relative difficulty plaintiffs, deserving or otherwise, have in obtaining recovery.56


As of 2009, the process through which claims are procedurally advanced has changed. Under s.8\(^{57}\) of the *Ministry of the Attorney General Act*, R.S.O. 1990, c. M17 as amended by the *Good Government Act*, 2009, c. 33, Sched. 2, s. 46. Crown attorneys can no longer be sued personally for torts alleged to have been committed in their prosecutorial function.

### III. Observations and Conclusions

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\(^{57}\) Limit on proceedings against Crown Attorneys, etc.

8. (1) No action or other proceeding for damages shall be commenced by a person who is or was the subject of a prosecution, in respect of any act done or omitted to be done in the performance or purported performance of a duty or authority in relation to the prosecution, against any of the following:


2. A person authorized under section 6 of the *Crown Attorneys Act* to be a provincial prosecutor.

3. Any other employee appointed for the purposes of section 4.

4. A person who was, but no longer is, a person described in paragraph 1, 2 or 3. 2009, c. 33, Sched. 2, s. 46.

**Proceedings against Attorney General**

(2) An action or other proceeding described in subsection (1) may be commenced against the Attorney General by a person who is or was the subject of a prosecution and, for the purpose, the Attorney General stands in the place of the person against whom the action or other proceeding would have been brought but for that subsection, and may be found liable in his or her stead. 2009, c. 33, Sched. 2, s. 46.

**Same**

(3) An action or other proceeding may only be brought against the Attorney General under subsection (2) if, but for subsection (1), the action or proceeding could have been brought against a person referred to in that subsection. 2009, c. 33, Sched. 2, s. 46.

**Liability without prejudice**

(4) A finding of liability against the Attorney General under subsection (2) is without prejudice to the right of the Attorney General or the Crown to indemnity or other relief from the person in whose place the Attorney General stood in the action or other proceeding. 2009, c. 33, Sched. 2, s. 46.

**Notice of claim; discovery; service; trial without jury; payment by Attorney General**

(5) Subsections 7 (1) and (2) and sections 8, 10, 11 and 22 of the *Proceedings Against the Crown Act* apply, with necessary modifications, to an action or other proceeding under subsection (2) and, for the purpose, a reference to the Crown shall be read as a reference to the Attorney General. 2009, c. 33, Sched. 2, s. 46.
A number of articles after the release of the Supreme Court of Canada’s decision in *Miazga*, have by and large, concluded the bar has been raised in order to succeed in a civil claim for malicious prosecution.\(^{58}\)

It has also been said that a plaintiff has never been successful on a malicious prosecution action against a Crown attorney in Ontario. On the other hand, Crown attorneys in Ontario have been the subject of hundreds of malicious prosecution actions in the decade since the *Nelles* case and no fewer than 1 in 10 Crown attorneys are presently the subject of a malicious prosecution action according to statistics compiled by staff at the Crown Law Office - Civil.\(^{59}\)

Prior to the *Miazga* case, debate raged as to whether malice should or should not be an element of the tort, but the Supreme Court on *Miazga* seems to have squarely answered, unanimously, that to some extend individuals may disproportionately share in the burden of an injustice or error when it occurs in the criminal justice system. In the words of Madam Justice Charron in *Miazga* “There is no question that the respondents for the victims have a clear miscarriage of justice which undoubtedly had a devastating effect on their lives.”\(^{60}\)

There are some who have been through the criminal justice system whose ordeal can aptly be described this way. For those, there may be remedies other than tort law that should be


\(^{59}\) *Manual and Brabazone* supra at page 6. Other statistics recently cited in November 2009 by the Canadian Association of Crown Counsel indicate that there are approximately 100 lawsuits pending in Ontario among only about 700 current and former Crown Attorneys.

\(^{60}\) Interveners including the Criminal Lawyers Association counsel predicated more wrongful convictions. It was suggested the Supreme Court of Canada was not prepared to move forward in addressing wrongful convictions and were actually re-trenching, and essentially while not calling it such, bestowing civil immunity on Crowns for malicious prosecution for all intents and purposes, C. Schmitz at page 2.
pursued as tort law does not always provide a remedy, and justly so. For the vast majority of cases, tort law does not exist to vindicate someone who was not guilty, nor to compensate those at the expense of dutiful public actors whose judgment may have been incorrect at the time, as opposed to negligent or malicious, and certainly as we look at it from the lens of today. Indeed, the line between errors in judgment and negligence is a fine one - and a line that ought not to be blurred, and certainly a line that ought to be a bright and obvious line before a police officer or Crown attorney is said to have been malicious.