

received a lighter sentence. Wells J. held that counsel was protected by an immunity for statements made in these circumstances, because:

To find otherwise would place counsel in an intolerable position whereby others with a real or perceived interest in the outcome of a case, would be able to sue if counsel's statements did not meet with their approval or were considered to be factually incorrect.¹⁸¹

f. Conspiracy to Injure

The tort of conspiracy, or conspiracy to injure/harm, bears brief mention only because it is so frequently pleaded in cases in which malicious prosecution is also alleged. In *Hunt v. Carey Canada Inc.*,¹⁸² the Supreme Court accepted Professor Fridman's definition of the tort:

"In modern Canada, therefore, conspiracy as a tort comprehends three distinct situations. In the first place there will be an actionable conspiracy if two or more persons agree and combine to act unlawfully with the predominating purpose of injuring the plaintiff. Second, there will be an actionable conspiracy if the defendants combine to act lawfully with the predominating purpose of injuring the plaintiff. Third, an actionable conspiracy will exist if defendants combine to act unlawfully, their conduct is directed towards the plaintiff (or the plaintiff and others), and the likelihood of injury to the plaintiff is known to the defendants or should have been known to them in the circumstances."¹⁸³

In the context of prosecutorial misconduct, the foregoing definition would seem to describe "malice" in a particularly noxious form. It seems unlikely that a plaintiff would be able to prove conspiracy without also proving malicious prosecution. The fact that the malicious conduct was done in combination with others would probably lead to a heightened damage award, whether or not the tort was specifically pleaded.

g. Malicious Non-Prosecution

Can a prosecutor act improperly by refusing to prosecute? Two cases have suggested that there may be a tort of malicious non-prosecution. In *Leung v. Kilgour* it was suggested that such an action may be open where the prosecutor acted with "flagrant impropriety",¹⁸⁴ although the claim was struck in the case for failure to allege material facts upon which to base a claim. Similarly, in *Paquette v. Desrochers*, Mackinnon J. found that such a tort could exist.¹⁸⁵ On

¹⁸¹ *Piercey v. Newfoundland (Attorney General)*, *supra*, at para. 22.

¹⁸² [1990] 2 S.C.R. 959, 74 D.L.R. (4th) 321.

¹⁸³ *Supra*, at p. 340, quoting from G. H. L. Fridman, *The Law of Torts in Canada*, vol. 2 (Toronto: Carswell, 1990), at p. 265.

¹⁸⁴ (2004), 360 A.R. 71, 131 A.C.W.S. (3d) 1047 at para. 19 (Q.B.), *affd* 380 A.R. 253, 363 W.A.C. 253 (C.A.); compare *Griffith v. British Columbia (Crown Counsel)* (2000), 109 A.C.W.S. (3d) 177, [2000] B.C.J. No. 2783 (QL) at para. 32 (S.C.), *affd* 121 A.C.W.S. (3d) 464, 2003 BCCA 211, leave to appeal to S.C.C. refused [2003] 3 S.C.R. vi, 326 N.R. 196n.

¹⁸⁵ (2000), 52 O.R. (3d) 74

¹⁸⁶ *Paquette v. Desrochers*, S.C.C. refused [2002] 3