

**REASONABLE AND PROBABLE CAUSE IN THE LAW OF MALICIOUS
PROSECUTION: A REVIEW OF SOUTH AFRICAN AND COMMONWEALTH
DECISIONS**

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SUMMARY

The requirement that the plaintiff in an action for malicious prosecution must prove a lack of reasonable and probable cause to initiate, instigate or continue the prosecution on the part of the instigator or prosecutor is one of the four elements of that cause of action. It is a vital link between the lawfulness of the prosecution and the state of mind of the defendant. Again, whether a prosecution is wrongful or lawful depends on whether there was a reasonable and probable cause coupled with the *animus iniuriandi* of the defendant in instigating, initiating or continuing it. It is not whether the prosecutor possessed evidence to secure a conviction since that is for the trial court to decide after the conclusion of evidence; but, the honest belief by the prosecutor that, having carefully collected and objectively assessed the available information, the plaintiff was probably guilty of the crime. In coming to that decision the prosecutor must have grappled with both the subjective and objective elements in the exercise of that discretion. The Australian High Court judgment in *A v New South Wales* 2007 230 CLR 500 (HCA) has brought clarity to this aspect of the problem. However, as this paper contends, the ten-point guidelines enunciated by that court in that case and designed to provide the courts with a seemingly less complicated formula for determining if the prosecutor lacked reasonable and probable cause do not appear to have provided the panacea to the problem. Meanwhile, the distinct nature of the requirement of reasonable and probable cause is made clearer when it is compared with reasonable ground to arrest in the case of wrongful arrest and the tort of abuse of process. Also problematic and equally challenging is identifying where a reasonable and probable

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cause inquiry stops and malice begins. This is brought out in the attempt by the Supreme Court of Canada to unravel the tension between the proof of the existence of malice and reasonable and probable cause in the law of malicious prosecution in *Miazga v Kvello Estate* 2009 3 SCR 339 (SCC). The extent to which the guidelines laid down in these recent cases would have resolved the confusion in this field of the law is yet to be realised.

KEYWORDS: Malicious prosecution; instigation or continuation of prosecution; absence of reasonable and probable cause; whether distinguishable from reasonable ground to suspect; arrest without warrant; whether amounts to abuse of process; proof of *animus iniuriandi*; whether dependent upon proof of reasonable and probable cause; relevance of objective sufficiency of information available to prosecutor.