

Anti-SLAPP and malicious prosecution: Section 137.1 in the context of an alleged sexual assault

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In [*Emma Joyce Jansen et al v. J.T et al, 2026 ONSC 1304*](#), the Superior Court of Justice for Ontario considered the test under section 137.1 of the *Courts of Justice Act* (CJA) in the context of an action for malicious prosecution involving a complaint of sexual assault by a minor.

Key takeaways

1. In motions under section 137.1 of the CJA, the motion judge does not conduct a deep dive into the record; instead, they conduct a limited weighing of the evidence.
2. In determining whether the expression relates to a matter of public interest, there is no qualitative assessment of the expression; it does not matter whether it is valuable or vexatious.
3. An allegation of sexual assault on a child by a person in a position of trust relates to an issue of public interest, and is plainly worthy of protection.
4. Generally, the complainant who reports a sexual assault will not be considered the entity who initiates the prosecution for the purposes of an allegation in malicious prosecution.

The case: Sexual assault complaint and acquittal lead to malicious prosecution claim

In 2022, the defendant, J.T., made a complaint to the Durham Regional Police Service alleging that the plaintiff, who was a teacher's aide at the time, sexually assaulted them. Following these allegations an investigation ensued, and the plaintiff was charged with sexual assault and sexual interference.

At her criminal trial, the plaintiff was acquitted, with the trial judge finding J.T.'s evidence to be "fabricated or contrived," while the plaintiff's evidence was found to be "reliable and credible." Following her acquittal, the plaintiff commenced an action against multiple defendants, including allegations for malicious prosecution against J.T.

In response to the plaintiff's claim, J.T. brought an anti-SLAPP motion under section 137.1 of the *Courts of Justice Act*.

Court ruling: Anti-SLAPP motion granted under section 137.1

J.T.'s motion was granted, with the plaintiff's claim and associated crossclaims being dismissed against them.

The function of section 137.1 of the CJA is to screen out lawsuits that unduly limit expression on matters of public interest through the identification and pre-trial dismissal of such actions.

The framework for a motion to dismiss under section 137.1 was established by the Supreme Court of Canada in [1704604 Ontario Ltd. v. Pointes Protection Association, 2020 SCC 22](#):

1. There is a burden on the moving party (the defendant in the action) to satisfy the judge that:
 - a. the proceeding at issue arises from an expression made by the moving party; and
 - b. the expression relates to a matter of public interest.
2. Once that is established, the burden shifts to the responding party (the plaintiff in the action) to satisfy the judge that:
 - a. there are grounds to believe that the proceeding has substantial merit;
 - b. the moving party has no valid defence; and
 - c. the public interest in permitting the proceeding to continue outweighs the public interest in protecting the expression.

The Court rejected the plaintiff's argument that J.T.'s statements were not in the public interest because they were false and misleading. The Court noted that there has been considerable jurisprudence confirming that reports about alleged sexual abuse to the police and regulatory bodies are expressions on a matter of public interest.

The section 137.1 framework: Burden shifting and public interest

The burden then shifted to the plaintiff to provide grounds to believe the proceeding against J.T. for malicious prosecution had substantial merit. The tort of malicious prosecution requires that the proceedings were initiated by the defendant. The Court highlighted that the general rule is that the police officer who laid the charge is considered to have initiated the prosecution. There are exceptions to that rule, and a complainant who reported an event to the police can be found to have initiated a prosecution.

Citing the Court of Appeal's decision in [Konstan v. Berkovits, 2024 ONCA 510](#), "the question is whether, through knowingly supplying misinformation or withholding evidence, or through other wrongful conduct, the complainant compromised the police investigation and/or the independence of the decision by police to lay charges."

The Court noted that while J.T. did make a report of sexual abuse to the police, “the police did more than merely accept J.T.’s allegation at face value.” The police conducted an investigation and told J.T. that whether charges would be laid would be the decision of the police, and not J.T.’s decision. Because J.T. did not initiate the prosecution, the plaintiff’s malicious prosecution claim lacked substantial merit. This finding alone was sufficient to grant the section 137.1 motion and dismiss the plaintiff’s claim against J.T.

Nevertheless, the Court went on to consider the final step on a motion under section 137.1: whether the public interest in allowing the action to continue due to the harm suffered by the plaintiff outweighs its deleterious effects on expression and public participation.

With respect to the harm suffered by the plaintiff, the Court described the causal link between J.T.’s complaint and the harm to the plaintiff as “tenuous,” since J.T. did not initiate the prosecution. Furthermore, unlike other cases where “vindictive adults” made a complaint to police, J.T. was a child when the complaint was made.

The Court found no evidence that J.T. had motive to make a false complaint, nor did they publicize this complaint. The Court also found that permitting the plaintiffs’ action to continue against J.T. would have a chilling effect on victims of sexual assault, and would fly in the face of changes in the law relating to the investigation and prosecution of sexually based offences.

The Court was also critical of the plaintiffs’ strategic decision to commence the claim shortly after J.T.’s eighteenth birthday, which required them to undertake their own defence, rather than be provided with a court-appointed litigation guardian.

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