

Civil Liability in Administrative Law: Recent Developments and Prospects for the Future

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Damages for administrative decision-making is a topic that, until recently, received scant attention. This area is now receiving much more attention: there have been many recent developments, each significantly extending the law.

In this short paper, I examine a few of the more noteworthy developments concerning when governments will be liable for damages, with developments in the area of negligence,¹ malicious prosecution,² restitution,³ abuse of public office,⁴ “bad faith” liability⁵ and constitutional torts.⁶ I examine many of these developments in more detail below.

Government negligence liability

It is clear that government can be held liable in negligence.⁷ In order to be able to recover, one must demonstrate that government, in an operational aspect (as opposed to policy) owes a duty of care, has performed below a standard of care and has caused damage.

A duty of care will be found to exist if the two step test in *Anns v. Merton London Borough Council*⁸ is met. Although this case applies to determine whether a duty

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¹ *Ingles v. Tutkaluk Construction Ltd.*, [2000] 1 S.C.R. 298.

² *Proulx v. Quebec (Attorney General)*, [2001] 3 S.C.R. 9.

³ *Pacific National Investments Ltd. v. Victoria (City)*, [2004] 3 S.C.R. 575.

⁴ *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263.

⁵ *Entreprises Sibeca Inc. v. Frelighsburg (Municipality)*, [2004] 3 S.C.R. 304.

⁶ *Mackin v. New Brunswick (Minister of Finance)*; *Rice v. New Brunswick*, [2002] 1 S.C.R. 405; *Guimond v. Quebec (Attorney General)*, [1996] 3 S.C.R. 347.

⁷ *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201; *Ingles v. Tutkaluk Construction Ltd.*, *supra*, n. 1. See also the analysis in *Odhavji Estate*, *supra*, n. 4 at paras. 52-72 (police); *Cooper v. Hobart*, [2001] 3 S.C.R. 537 (registrar of mortgage brokers acting under authority of statute); *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1997] 1 S.C.R. 12 (Minister); *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562 (law society acting under authority of statute).

⁸ [1978] A.C. 728 (H.L.), at pp. 751-52.

of care exists in the private law context, it also applies in suits against government.⁹ The two steps in that test are as follows:

(1) is there a sufficiently close relationship between the parties (the [defendant] and the person who has suffered the damage) so that, in the reasonable contemplation of the [defendant], carelessness on its part might cause damage to that person? If so,

(2) are there any considerations which ought to negative or limit (a) the scope of the duty and (b) the class of persons to whom it is owed or (c) the damages to which a breach of it may give rise?¹⁰

The second part of this two-fold test is particularly important in litigation against government.

Often government activity will be authorized and governed by legislature. Given that the second part of the two-fold test requires a consideration of all relevant circumstances, including any applicable statutes or regulations, it is to be expected that the second part of the two-fold test will be important.

Another important aspect to the second part of the two-fold test is that it requires a consideration of whether policy considerations prevent the law of negligence from regulating certain relationships or relieving certain injuries, notwithstanding a finding of proximity between the parties. The concern here is the need to shield activities from judicial control or to prevent the "floodgates of litigation" from opening areas of potentially unlimited liability.¹¹

In the case of government, whose activities are so broad, concerns about opening areas of potentially unlimited activity assume greater significance.

Further, since government activities are often authorized and regulated by legislation – the clearest embodiment of “policy” – concerns about whether the law of negligence should be used to mix with or affect that policy are accentuated.

Finally, underlying *Anns* considerations is a broader concern about the constitutional doctrine of separation of powers. Courts are forced, under the

⁹ *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2. For other applications of the *Anns* test in government litigation, see *Just v. British Columbia*, [1989] 2 S.C.R. 1228; *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165; *Ryan v. Victoria (City)*, *supra*, n. 7.

¹⁰ *Kamloops*, *supra*, n. 9 at pp. 9-10.

¹¹ See *Ryan*, *supra*, n. 7, at para. 24 where these concerns were clearly articulated.

rubric of the *Anns* test, to consider whether and the extent to which courts can legitimately control governmental activity.

In the area of standard of care, the fact that the defendant is government complicates things considerably.¹² The normal law is that a person must exercise the standard of care that would be expected of an ordinary, reasonable and prudent person in the same circumstances. The measure of what is reasonable depends on the facts of each case, including the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost which would be incurred to prevent the injury. In addition, one may look to external indicators of reasonable conduct, such as custom, industry practice, and statutory or regulatory standards.

This test is not easily applied to government activities. Courts find themselves in the unusual position of having to evaluate what the reasonable government ought to do. Governments also find themselves with large sized budgets, which raises the question whether government should act to avert a risk. Of course, government budgets are not limitless. But the standard of care assessment can involve courts in the tricky issue of second-guessing government budget priorities, a task that many courts are reluctant to do.

A further complication, again, is that the standard of care is often defined by the existence of statutory standards and governments are invariably acting under a statutory umbrella.¹³ A recent case suggests that the extent to which statutes will influence the analysis depends on the degree of discretion afforded under the statute:

Where a statute authorizes certain activities and strictly defines the manner of performance and the precautions to be taken, it is more likely to be found that compliance with the statute constitutes reasonable care and that no additional measures are required. By contrast, where a statute is general or permits discretion as to the manner of performance, or where unusual circumstances exist

¹² For important, recent cases in this area, see *Edwards v. Law Society of Upper Canada*, *supra*, n. 7; *Cooper v. Hobart*, [2001] 3 S.C.R. 537; *Odhavji Estate v. Woodhouse*, *supra*, n. 4.

¹³ Legislative standards are relevant to the common law standard of care, but the two are not necessarily co-extensive. The fact that a statute prescribes or prohibits certain activities may constitute evidence of reasonable conduct in a given situation, but it does not extinguish the underlying obligation of reasonableness. See *R. in Right of Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205.

which are not clearly within the scope of the statute, mere compliance is unlikely to exhaust the standard of care.¹⁴

Of course, if one is dealing with government as a defendant and the issue is one of government discretion under a statute, serious and largely unexplored issues concerning the relationship between civil actions and judicial review of administrative decision-making arise. To what extent does standard of care mirror the standard of review analysis in administrative law? Is it possible that a court could impose a demanding standard of review in the case of administrative decision-making while a review court would afford considerable deference to the decision-making? And how does the standard of care to be imposed on government relate to other judicial statements to the effect that administrative agencies can only be sued for decisions that are made in bad faith? These issues have largely be unexplored in the law.

A traditional area of complication in the area of negligence suits against government is the “policy” and “operational” distinction, with negligence being unavailable to review government policy, but available in the case of the carrying out (or “operation”) of government activities. The distinction between the two can be extraordinarily difficult. Many government activities are conducted under policies or are affected significantly by policies. If the activity results in damage, and if the activity appears substandard, is the problem the activity itself or the policy that was in place? Substandard activities can be attacked but substandard policies cannot.¹⁵

Despite these thorny questions, there have been recent examples of fairly aggressive impositions of civil liability on government. For example, despite the spectre of “indeterminate liability”, certain building inspectors employed by the City of Toronto were found liable for negligence.¹⁶

Another important limit placed on the negligence liability of public authorities is the doctrine of “alternative administrative law remedy”. A party cannot dress up what is in reality an administrative law challenge to a decision by “dressing it up”

¹⁴ Ryan, *supra*, n. 7.

¹⁵ *Just v. British Columbia*, [1989] 2 S.C.R. 1228; *City of Kamloops v. Nielsen*, [1984] 2 S.C.R. 2; *Swinamer v. Nova Scotia (Attorney General)*, [1994] 1 S.C.R. 445. Closely related to the bar against suing for “policy aspects” of government conduct is the principle that governments cannot be sued for invalid legislation. See, e.g., *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1169; *Welbridge Holdings Ltd. v. Greater Winnipeg*, [1971] S.C.R. 957; *Central Canada Potash Co. v. Government of Saskatchewan*, [1979] 1 S.C.R. 42. But see *Kingstreet Investments*, *infra*, n. 27.

¹⁶ *Ingles v. Tutkaluk Construction Ltd.*, *supra*, n. 1.

as a negligence claim. In a recent case,¹⁷ a party sought to challenge a denial of benefits not by challenging it through a grievance and arbitration process that was available to him but by starting a negligence action against the agency. The Supreme Court held that the grievance and arbitration process was an adequate alternative forum for the adjudication of the claimant's right to benefits and it could not be circumvented by the commencement of a negligence action.

The tort of abuse of public office

The tort of abuse of public office, sometimes also called "misfeasance in public office", is an ancient cause of action. For decades it was seldom invoked. However, in recent years it has assumed much greater prominence. And it is poised to be used much more. The Supreme Court in *Odhavji Estate* has recently affirmed the existence of the tort and has defined its constituent elements.¹⁸

The tort can apply to acts or omissions of government. Further, it is not restricted to exceedance of statutory authority. The tort deals with:

- Category (A): conduct that is specifically intended to injure a person or class of persons; and
- Category (B): conduct by a public officer who acts with knowledge both that she or he has no power to do the act complained of and that the act is likely to injure the plaintiff.¹⁹

In describing the elements of this tort, Iacobucci J. writing for the unanimous Supreme Court in *Odhavji Estate* commented as follows:

First, the public officer must have engaged in deliberate and unlawful conduct in his or her capacity as a public officer. Second, the public officer must have been aware both that his or her conduct was unlawful and that it was likely to harm the plaintiff.

¹⁷ *Vaughan v. Canada*, [2005] 1 S.C.R. 146.

¹⁸ *Odhavji Estate v. Woodhouse*, *supra*, n. 4. See also *Three Rivers District Council v. Bank of England* (No. 3), [2000] 2 W.L.R. 1220. Iacobucci J., writing for the unanimous Supreme Court in *Odhavji*, observed (at para. 18) that the origins of the tort of misfeasance in a public office can be traced to *Ashby v. White* (1703), 2 Ld. Raym. 938, 92 E.R. 126, in which Holt C.J. found that a cause of action lay against an elections officer who maliciously and fraudulently deprived Mr. White of the right to vote. Although the defendant possessed the power to deprive certain persons from participating in the election, he did not have the power to do so for an improper purpose. .

¹⁹ *Odhavji Estate*, *supra*, n. 4.

What distinguishes one form of misfeasance in a public office from the other is the manner in which the plaintiff proves each ingredient of the tort. In Category B, the plaintiff must prove the two ingredients of the tort independently of one another. In Category A, the fact that the public officer has acted for the express purpose of harming the plaintiff is sufficient to satisfy each ingredient of the tort, owing to the fact that a public officer does not have the authority to exercise his or her powers for an improper purpose, such as deliberately harming a member of the public. In each instance, the tort involves deliberate disregard of official duty coupled with knowledge that the misconduct is likely to injure the plaintiff.²⁰

As can be seen in the above paragraph, the essential question to be determined is not whether the government official has unlawfully exercised a power actually possessed, but whether the alleged misconduct is deliberate and unlawful. In the words of Iacobucci J. in *Odhavji Estate*, “misfeasance in a public office is not directed at a public officer who inadvertently or negligently fails adequately to discharge the obligations of his or her office... nor is the tort directed at a public officer who fails adequately to discharge the obligations of the office as a consequence of budgetary constraints or other factors beyond his or her control”.²¹ Instead, the tort is aimed at a government official who “could have discharged his or her public obligations, yet wilfully chose to do otherwise”.

The Supreme Court in *Odhavji Estate* was not concerned about the ambit of the tort. The *mens rea*, namely the requirement that the defendant must have been aware that his or her conduct was unlawful, serves to limit the tort. Further, the requirement that the defendant must have been aware that his or her unlawful conduct would harm the plaintiff further restricts the ambit of the tort.

These limits, however, may not be effective in limiting the scope of the tort to any significant degree. One way for potential plaintiffs to enhance their prospects of suing for this tort is for them to write a letter, putting the government on notice of the scope of its authority and the fact that if its authority is exceeded, damage will be caused to the plaintiff. If government proceeds in the face of this knowledge, perhaps because it takes a different view of the law, it could be liable for this tort. In short, the *mens rea* requirement may not act as a very significant limit on liability if plaintiffs begin (by letter-writing) to ensure that the government officials they are dealing with have the necessary *mens rea* to trigger the tort.

²⁰ At para. 23.

²¹ At para. 26.

Restitutionary recovery

Plaintiffs may recover in restitution if there is (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of juristic reasons for the enrichment.²² The last element of this cause of action – an absence of juristic reasons for the enrichment – involves a two-stage inquiry. At the first stage, a plaintiff must show that there is no juristic reason within the established categories that would deny it recovery such as the existence of a contract, disposition of law, donative intent and other valid common law, equitable or statutory obligation. At the second stage, the defendant must rebut the *prima facie* case by showing that there is some other valid reason to deny recovery.

How does this apply to administrative bodies when they are defendants? In particular, is the fact that administrative bodies are public bodies a relevant consideration under the second stage of the determination whether there are juristic reasons for the enrichment? The Supreme Court examined these questions in *Pacific National Investments Ltd. v. Victoria (City)*.²³

In this case, the City and a developer entered into an agreement for a development on Victoria's inner harbour. The developer agreed to build roads, parkland, walkways and a new seawall. The City agreed to re-zone certain lands from industrial to residential and commercial and did so. The developer then completed the agreed-upon projects at a cost of \$1.08 million. However, the City later down-zoned the lands to permit only one-story commercial buildings, a down-zoning that also had the effect of eliminating two stories of residential condominiums. The City later challenged its own authority to make the commitment it did, arguing that under the provincial law governing municipalities at the relevant time, the City lacked the statutory authority to make and be bound by an implied term to keep the zoning in place for a reasonable time to allow for completion of the project.

The developer sued for breach of contract and for restitutionary recovery of the amounts expended. The breach of contract claim failed because the City lacked the statutory authority to make and be bound by that implied term and so its

²² This general principle was first recognized in our law in *Deglman v. Guaranty Trust Co.*, [1954] S.C.R. 725. *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762; *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629 are recent examples.

²³ *Supra*, n. 3, a unanimous decision (*per* Binnie J.).

breach could not give rise to an action for damages. What was left after dismissal of the contractual claim was restitutionary recovery for part of the expenses incurred, namely those expenses that the municipality had no authority to demand under the provincial *Municipal Act*.

Binnie J., writing for the Court, found that all of the requirements for restitutionary recovery were made out. The key part of the judgment, for present purposes, is how Binnie J. dealt with the second part of the “juristic reasons” portion of the test for restitutionary liability. The City argued that it acted with no bad faith and that, as a public body, it should be free to change its mind, as a matter of public policy. Certainly the general rule against recovery against bodies merely because they passed invalid legislation or made an invalid decision would seem to support the City’s position.

Binnie J., however, imposed liability against the City. He confirmed that there was no “bad faith” on the part of the City and that the City had acted in accordance with its view of what was best for the community.²⁴ Nevertheless, quite at odds with developing trends in the case law concerning other causes of action which require “bad faith” in order to establish liability,²⁵ Binnie J. found that the City had acted inequitably and as this was an equitable cause of action, this was a key consideration.²⁶

I am not persuaded that it would be good public policy to have municipalities making development commitments, then not only have them turn around and attack those commitments as illegal and beyond their own powers, but allow them to scoop a financial windfall at the expense of those who contracted with them in good faith.

Restitutionary recovery, then, would appear to be an area where liability can be found against public authorities in the absence of “bad faith”.²⁷

²⁴ At para. 56.

²⁵ See, for example, *Odhavji Estate v. Woodhouse*, *supra*, n. 4; *Proulx v. Quebec (Attorney General)*, *supra*, n. 2; *Entreprises Sibeca Inc. v. Frelighsburg (Municipality)*, *supra*, n. 5; *Mackin*, *supra*, n. 6.

²⁶ At para. 57.

²⁷ Another emerging development concerning restitution against governmental authorities is the growing tendency to restrict the rule against non-recoverability of *ultra vires* fees and charges. The rule is best expressed in the judgment of La Forest J. in *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1169. The New Brunswick Court of Appeal in *Kingstreet Investments Ltd. and 501638 N.B. Ltd. v. New Brunswick*, 2005 NBCA 56 (Canlii) was “not prepared to immunize public authorities from restitutionary claims tied to invalid legislation” and granted recovery.

Bad faith decision-making

Liability for bad faith decision-making by government existed long before the *Odhavji Estate* case.²⁸ In this context, “bad faith decision-making” comes very close to a malicious use of one’s powers to injure a party, knowing that injury is likely to result. It may well be that this category of recovery is subsumed by the recently re-energized tort of abuse of public office.

In a recent decision, *Entreprises Sibeca Inc. v. Frelighsburg (Municipality)*,²⁹ the Supreme Court of Canada underscored the need in this area of law for a plaintiff to demonstrate bad faith in order to recover for damages. Although this is a decision based on the private civil law of Quebec rather than the common law, there is every reason to expect that the law would be the same in the rest of Canada.³⁰

In *Entreprises Sibeca*, a developer had acquired a 1500 acre lot in the municipality of Frelighsburg. The lot included Mount Pinacle. The developer’s plan was to construct a golf course, a ski hill and a residential development. The developer submitted its plan to the municipality, which approved the plan. The developer obtained building permits. But further by-law changes were required in order for the project to be built.

A controversy arose between those favouring the development and conservation interests. Further, certain practical problems arose which delayed the construction of the project, but at one point construction did begin. Certain building permits, once granted, had lapsed. Finally, in an election, the composition of the municipal council had changed and as a result the zoning changed and certain new conditions were attached to the project, altering it dramatically. The developer essentially had to abandon the project as originally contemplated. It subdivided its land and sold lots individually. This resulted in far less revenue than if the project were allowed to proceed. The developer sued the municipality.

²⁸ *Gershman v. Manitoba (Vegetable Producers’ Marketing Board)*, [1976] M.J. No. 129 (Man. C.A.). Bad faith is central to recovery.

²⁹ [2004] 3 S.C.R. 304.

³⁰ The Supreme Court refers to decisions widely accepted in the common law, such as *Roncarelli v. Duplessis*, [1959] S.C.R. 121 and *Welbridge Holdings Ltd. v. Greater Winnipeg*, *supra*, n. 15, *Brown v. British Columbia (Minister of Transportation and Highways)*, [1994] 1 S.C.R. 420 and *City of Ottawa v. Boyd Builders Ltd.*, [1965] S.C.R. 408.

The Quebec Superior Court granted recovery on the basis of bad faith and awarded \$330,000 damages. The Quebec Court of Appeal reversed, finding no bad faith. The Supreme Court upheld the Quebec Court of Appeal and, in so doing, confirmed that the existence of bad faith is required in order for a plaintiff to recover damages and defined what bad faith is.

Writing for the majority of the Court, Deschamps J.³¹ reaffirmed the general rule in public law, that agencies that engage in good faith decision-making are protected from civil liability.³²

Municipalities perform functions that require them to take multiple and sometimes conflicting interests into consideration. To ensure that political disputes are resolved democratically to the extent possible, elected public bodies must have considerable latitude. Where no constitutional issues are in play, it would be inconceivable for the courts to interfere in this process and set themselves up as arbitrators to dictate that any particular interest be taken into consideration. They may intervene only if there is evidence of bad faith. The onerous and complex nature of the functions that are inherent in the exercise of a regulatory power justify incorporating a form of protection both in civil law and at common law.

Deschamps J. defined “bad faith” in a manner that extends it beyond cases where deliberate intention to harm is found³³ to cases where the evidence is more circumstantial:³⁴

Based on this interpretation, the concept of bad faith can encompass not only acts committed deliberately with intent to harm, which corresponds to the classical concept of bad faith, but also acts that are so markedly inconsistent with the relevant legislative context that a court cannot reasonably conclude that they were performed in good faith. What appears to be an extension of bad faith is, in a way, no more than the admission in

³¹ Owing to the retirement of Iacobucci J., six Justices decided the case. Deschamps J. (McLachlin C.J. and Bastarache and Binnie JJ. concurring) wrote for the majority. LeBel and Fish JJ. wrote a joint concurring judgment in which they held that the lapsing of the building permits broke the chain of causation and was sufficient to end any possibility of liability on the part of the municipality.

³² At para. 24, citing *Welbridge Holdings Ltd. v. Greater Winnipeg*, *supra*, n. 15.

³³ For example, *Roncarelli v. Duplessis*, [1959] S.C.R. 121.

³⁴ At para. 26, citing *Finney v. Barreau du Québec*, [2004] 2 S.C.R. 17.

evidence of facts that amount to circumstantial evidence of bad faith where a victim is unable to present direct evidence of it.

She also cited, with apparent approval, a statement in *Finney*³⁵ to the effect that a reckless act, “in terms of how it is performed, [that] is ... inexplicable and incomprehensible, to the point that it can be regarded as an actual abuse of power, having regard to the purposes for which it is meant to be exercised”, may also attract “bad faith” liability.³⁶

Deschamps J. found no bad faith on the facts.³⁷ She identified “protecting the natural environment” as being the municipal council’s goal, a goal that was within its proper jurisdiction. She rejected the argument that bad faith could be founded upon the fact that certain individual councilors had been publicly identified with the conservation of Mount Pinacle. In the course of her argument, she emphasized that the burden of finding “bad faith” rests upon the plaintiff. The trial judge had wrongly reversed the burden of proof.

Charter damages

When a *Charter* section is breached, damages may be available as a “just and appropriate” remedy under s. 24(1) of the *Charter*.

A breach of a *Charter* section, however, does not automatically give rise to a damages remedy. The law in this area is restrictive.

In order to recover damages under s. 24(1), one must demonstrate “conduct that is clearly wrong, in bad faith or an abuse of power”.³⁸ It may be that “negligence” is possible but this is not certain.³⁹ Unhelpfully, in the leading damages case of *Mackin*, the Supreme Court did not define or explain those terms.⁴⁰

³⁵ *Ibid.*

³⁶ At para. 25.

³⁷ At para. 38.

³⁸ *Mackin v. New Brunswick (Minister of Finance)*, *supra*, n. 6 at paras. 78-84; *Guimond v. Quebec (Attorney General)*, [1996] 3 S.C.R. 347.

³⁹ The Supreme Court in *Mackin*, *ibid.*, in paras. 78-84 seems to use the term “clearly wrong” and “negligence” interchangeably. “Clearly wrong”, however, may import a standard higher than negligence – perhaps “gross negligence is intended.”

⁴⁰ The test was reiterated without elaboration in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*, [2004] 1 S.C.R. 789, at para. 19.

Compensatory damages are available if the requirements for *Charter* damages are met. However, where the quantum of damages is hard to assess, possibilities other than compensatory damages may be available. For example, in *Auton*, the British Columbia courts awarded “symbolic damages”.⁴¹ These are damages designed not to compensate *Charter* claimants but instead to symbolize “in some tangible fashion, the fact that [they] have achieved a real victory”. In *Auton*, the symbolic damages acknowledged “the intransigence of the government in responding to long-standing requests and demands for autism treatment”.⁴²

In the case of damages for breach of the *Charter*, there are many questions still to be worked out, including the availability of punitive damages,⁴³ rules concerning causation, foreseeability and remoteness of damage and the extent to which intangible losses and “pain and suffering” are recoverable.⁴⁴

The law on *Charter* damages was developed before the leading case on s. 24(1) of the *Charter*, *Doucet-Boudreau*, was decided by the Supreme Court.⁴⁵ *Doucet-Boudreau* offers a general test for the design of s. 24(1) *Charter* remedies and one must consider whether the older test for *Charter* damages might be liberalized.

⁴¹ (2002), 220 D.L.R. (4th) 411 (C.A.) and [2000] 8 W.W.R. 227 (S.C.) and [2001] 3 W.W.R. 447 (B.C.S.C.), both rev'd on different grounds by the S.C.C., [2004] 3 S.C.C. 657.

⁴² (2002), 220 D.L.R. (4th) 411 (C.A.), at para. 64.

⁴³ In *Patenaude v Roy* (1994) 123 D.L.R. (4th) 78 (Que. C.A.) exemplary damages of \$50,000 were awarded by the trial judge for a deliberate violation of the Quebec Charter of Human Rights and Freedoms, where police officers used excessive and unnecessary force in executing a search warrant. This decision was upheld on appeal and the appeal court increased the award of exemplary damages to \$100,000.

⁴⁴ The main debate here is whether the rules applicable to common law torts apply in the case of constitutional torts. Much guidance can be obtained from abroad. Many cases suggest that constitutional torts do not necessarily follow common law tort principles, as a constitutional tort is not a common law tort: *Simpson v Attorney-General (Baigent's case)*, [1994] 3 N.Z.L.R. 667 (C.A.); *Maharaj v Attorney-General of Trinidad and Tobago (No. 2)*, [1979] A.C. 385 (P.C.); *The State (At the Prosecution of Quinn) v Ryan*, [1965] I.R. 70, 122; *Kearney v Minister for Justice Ireland and the Attorney General*, [1986] I.R. 116, 122; *Byrne v Ireland*, [1972] I.R. 241, 264-265, 297-9, 303 and *Meskeil v C  ras Iompair Eireann*, [1973] I.R. 121, 132-133; *Nilabati Behera v State of Orissa*, [1993] A.I.R. 1960 (S.C.) 1969; *Saman v Leeladasa and Another*, [1989] 1 Sri. L.R. 1 (SC). It may be that intangible harm such as distress and injured feelings may be the subject of compensation: *Simpson v Attorney-General (Baigent's case)*, [1994] 3 N.Z.L.R. 667 (C.A.) at 678. Contra, *Memphis Community School District v Stachura*, 477 U.S. 299 (1986) (damages for breach of constitutional rights under *United States Code*, s. 1983); the situation may be different for damages as a constitutional remedy outside of the *United States Code*: *Bivens v Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

⁴⁵ *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3.

In the area of *Charter* remedies, we have been placed on notice that there is now a general basis upon which remedies under s. 24 of the *Charter* should be granted, a basis which may give rise to innovative remedial approaches, perhaps even under the law of damages:⁴⁶

- *Meaningful remedy for the plaintiff/applicant.* The remedy must be “meaningful” by “[taking] account of the nature of the right that has been violated and the situation of the claimant”, being “relevant to the experience of the claimant” and addressing “the circumstances in which the right was infringed or denied”. A remedy that is “ineffective” or “smothered in procedural delays and difficulties” is not a “meaningful vindication of the right” and therefore not appropriate and just.⁴⁷
- *Fairness to the defendant/respondent.* The remedy must be “fair to the party against whom the order is made” by not imposing “substantial hardships that are unrelated to securing the right”.⁴⁸
- *Democratic concerns.* The remedy “must employ means that are legitimate within the framework of our constitutional democracy”, respecting “the relationships with and separation of functions among the legislature, the executive and the judiciary”. While courts may “touch on functions that are principally assigned to the executive”, they may not “depart unduly or unnecessarily from their role of adjudicating disputes and granting remedies that address the matter of those disputes”.⁴⁹
- *Institutional capability.* The remedy must “invoke “the function and powers of a court”. A court should not “leap into the kinds of decisions and functions for which its design and expertise are manifestly unsuited”. Guidance on this “can be inferred, in part, from the tasks with which they are normally charged and for which they have developed procedures and precedent”.⁵⁰
- *Openmindedness, flexibility and evolution.* While historical remedial practice is important, “tradition and history cannot be barriers to what

⁴⁶ *Ibid.*, at paras. 54-59.

⁴⁷ *Ibid.*, at para. 55. This seems to have been a key factor in the granting of a remedy in the quasi-constitutional case of *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*, *supra*, n. 40, at para. 24-28.

⁴⁸ *Doucet-Boudreau*, *supra*, n. 45, at para. 58.

⁴⁹ *Ibid.*, at para. 56.

⁵⁰ *Ibid.*, at para. 57.

reasoned and compelling notions of appropriate and just remedies demand”, so the lack of precedent is not a bar. A court must “remain flexible and responsive to the needs of a given case”.⁵¹

Remedies for breaches of quasi-constitutional law and underlying constitutional principles

Courts may have to consider in the near future a particularly thorny question: what remedies exist for violations of the *Canadian Bill of Rights*⁵² and the underlying constitutional principles recognized in the *Secession Reference*?⁵³ Section 24(1) of the *Charter*, discussed in *Doucet-Boudreau*, applies only to violations of the *Charter*.

Recently the Supreme Court held, citing *Doucet-Boudreau*, that the enforcement of the quasi-constitutional *Quebec Charter*⁵⁴ “can lead to the imposition of affirmative or negative obligations designed to correct or bring an end to situations that are incompatible with the *Quebec Charter*”⁵⁵ but this ruling could be distinguished on the basis of the broad statutory jurisdiction in s. 50 of the *Quebec Charter* to grant appropriate remedies “where consistent with the public interest”. The Supreme Court also held that any remedy must be fashioned in a manner consistent with public law principles, many of which have been developed in the constitutional context.⁵⁶

In the case of the *Canadian Bill of Rights*, s. 2 sets out a remedy: legislation is to “be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared”. This suggests a remedial jurisdiction paralleling that of s. 52 of the *Constitution Act, 1982*. Is there scope for injunctive relief or mandatory orders based on the *Canadian Bill of Rights*? Do courts have any inherent jurisdiction or common law jurisdiction that can be invoked to enforce *Canadian Bill of Rights* standards? Or must there be a statutory grant of

⁵¹ *Ibid.*, at para. 59.

⁵² S.C. 1960, c. 44.

⁵³ *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217.

⁵⁴ *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12.

⁵⁵ *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*, *supra*, n. 40, at para. 26.

⁵⁶ *Ibid.*, at para. 15: “the appropriate remedy for a violation cannot be chosen without taking into account the constitutional framework and principles governing the organization and practices of Canada's public institutions so that the relationships between the various components of the legal hierarchy applicable to the situation under Quebec law are articulated appropriately.”

jurisdiction, similar to s. 50 of the *Quebec Charter*, to give broader forms of relief, such as damages? These questions are unresolved.

The underlying constitutional principles identified in the *Secession Reference*, namely the principles of federalism, democracy, constitutionalism and the rule of law and respect for minorities, can be invoked to challenge legislation or administrative decisions. What remedies apply? Since the underlying constitutional principles are part of the Constitution of Canada, s. 52 of the *Constitution Act, 1867* certainly applies and so legislation or administrative decisions may be declared to be of “no force or effect”.⁵⁷ Suspension of such a declaration would also appear to be available.⁵⁸ The underlying principles also create values that administrative decision-makers may have to take into account.⁵⁹ What other remedies are available? Are damages available? These questions are at present unresolved.

Towards a coherent theory of public law civil liability

In recent years, suits against government for damages have become more and more common. This is perhaps reflective of an increasing public consciousness, likely caused by the *Charter*, that people possess rights against government.

As has been seen, there are many different ways in which governments can be liable for damages.

These various areas of government liability have been developed separately, without regard to each other. As a result, they specify tests and *mens rea* requirements that are different from each other. Yet, the policy concerns articulated in these cases are often exactly the same. There is a general concern expressed in the cases against the inhibiting effect on the actions of government that would be caused by imposing too great a liability on government. Another

⁵⁷ See, e.g., the declaration in *Polewsky v. Home Hardware* (2003), 66 O.R.(3d) 600 (Div. Ct.), that the Rule of Law and the common law constitutional right of access to justice compels the enactment of statutory provisions that permit persons to proceed *in forma pauperis* in the Small Claims Court.

⁵⁸ See *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, where a declaration of invalidity was suspended, a power perhaps emanating from the inherent jurisdiction of the Court.

⁵⁹ *Lalonde v. Ontario (Commission de restructuration des services de santé)* (2001), 56 O.R. (3d) 505 (C.A.) (Commission was required by the fundamental principles of the Constitution to give serious weight and consideration to the importance of the Montfort Hospital as an institution to the survival of the Franco-Ontarian minority.)

frequently expressed concern is the indeterminate nature of governmental liability if the gates are thrown open too widely.

In my view, we may well begin to see courts developing a theory of governmental liability that is common to all of these torts. In the United States, a defence of “qualified immunity” has developed in the area of governmental liability and applies to all torts, constitutional and other causes of action, a defence that implements the public policy reasons against imposing broad liability against government.⁶⁰ United States courts have also developed a rich jurisprudence concerning causation, remoteness, quantification of damage and assessment of punitive damages. Amazingly, this rich body of jurisprudence remains completely unexplored by Canadian courts. I expect that soon it will be discovered and applied in Canada and we will begin to see a more general, uniform approach to governmental liability adopted in Canada.

⁶⁰ *E.g.*, *Saucier v. Katz*, 533 US 194 (2001). See, generally, Michael L. Wells and Thomas A. Eaton, *Constitutional Remedies: A Reference Guide to the United States Constitution* (2002) and Peter L. Strauss, *Administrative Justice in the United States* (2d ed., 2002). An excellent analysis of governmental liability in the British Commonwealth (particularly Australia and the United Kingdom), thus far not cited by any Canadian court, is Susan Kneebone, *Tort Liability of Public Authorities* (1998).