

# Damages as a Remedy Against Administrative Authorities: An Area Needing Clarification

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David STRATAS\*

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\* Of the Ontario Bar. LL.B. (Queen's), B.C.L. (Oxon.). At the time this article was written, the author was a partner of Heenan Blaikie LLP, Toronto, Ontario. The author is now a Justice of the Federal Court of Appeal.



When are damages available against administrative authorities?

There are few legal questions in Canada today that are more fraught with uncertainty, conflicting principles and unresolved questions.

The policy considerations in this area are clear: the need for aggrieved individuals to have their rights vindicated and to modify the behaviour of substandard actors on the one hand (the “justice” concern) and, on the other hand, the necessity that administrative authorities be able to exercise their discretions and formulate policies in the public interest without excessive deterrence arising from the threat of legal proceedings (the “governance” concern).

But where is the compromise between justice and governance? Unfortunately, this is an area where incoherence reigns—different causes of action use different tools to achieve a compromise, but the compromise is different for each cause of action.

The uncertainty and policy confusion in this area is perhaps understandable because of the nature of this difficult area, but certain judicial approaches have helped to complicate matters:

- In attempting to achieve a compromise between justice and governance, courts, in defining the elements of various causes of action, create special rules. These special rules inject further complexity, uncertainty and difficulty:
- Those who place more emphasis on the governance concern import additional requirements into causes of action, such as proof of pursuit by the administrative authority of an improper purpose or the existence of bad faith or malice.<sup>1</sup> But these elements are left undefined, perhaps because a definition is elusive, and

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<sup>1</sup> *Infra* text to nn. 38–52.

the elasticity in definition encourages lawsuits, frustrating the objective of imposing tough requirements to limit lawsuits. Further, such requirements create new problems. Plaintiffs trying to prove “bad faith,” for example, are driven to use mechanisms in our civil procedure<sup>2</sup> and access to information laws.<sup>3</sup> These have their own difficult policy issues, such as the point at which administrative authorities are allowed to assert privileges and confidentiality interests in the public interest,<sup>4</sup> or whether some of the traditional civil procedure mechanisms are even available against an administrative authority.<sup>5</sup>

- Another way of accomplishing a reconciliation and balance of these two competing policy objectives and managing the “justice-governance” policy tension is to create special substantive defences.<sup>6</sup> Many of these defences, however, have been constructed within the confines of a particular tort or the facts of a particular case, often a private law case, with the result that there now exists a web of special, sometimes competing defences that may be inapt for public law cases. Also it is unclear whether many of these defences, developed within and available for certain torts, are available for other torts.
- The civil procedure governing law suits can be most complex in this context. Jurisdictional provisions often

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<sup>2</sup> Such as documentary disclosure rights, oral discovery rights, rights to subpoena third parties, requests to admit, rights to call witnesses at trial, and examination and cross-examination rights at trial.

<sup>3</sup> *Access to Information Act*, R.S.C. 1985, c. A-1; *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31; *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56.

<sup>4</sup> For example, Crown privilege at common law (e.g., *Carey v. Ontario*, [1986] 2 S.C.R. 637) or privilege under the *Canada Evidence Act*, R.S.C. 1985, c. C-5, ss. 37-39.

<sup>5</sup> See, e.g., the restrictions on the use of the civil subpoena power described by the Supreme Court in *Consortium Developments (Clearwater) Ltd. v. Sarnia (City)*, [1998] 3 S.C.R. 3.

<sup>6</sup> See nn. 84-91, *infra*, for examples.

require that judicial reviews take place in one forum and damages claims in another forum.<sup>7</sup> This can create the real possibility of damages claims being foreclosed because an administrative decision has not been set aside and is final, or has already been challenged and upheld in a judicial review forum, in which case any challenge to its validity would be stopped by the doctrine against collateral attack.<sup>8</sup>

- The traditional remedy for improper decision-making by administrative authorities has been *certiorari*. This remedy is usually seen, by courts and by litigants, to be sufficient. Whatever costs arise from decisions that are quashed are seen as costs that people must bear in a regulated society. However, there are cases where, by virtue of the conduct of the administrative authority, justice seems to require a remedial response. The distinction between decisions that are quashed because they are invalid, unacceptable or irrational but not worthy of a damages response, and those that are invalid, unacceptable or irrational but are worthy of a damages response is, by its very nature, somewhat elusive of description.

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<sup>7</sup> For example, see s. 18.1(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, which requires that judicial reviews of federal administrative decisions take place in the Federal Courts. Judicial reviews must be brought within 30 days: s. 18.1(2). On an application for judicial review, only the relief set out in s. 18 can be granted (*certiorari*, *mandamus*, *prohibition*, *injunction* and *declaration*); damages are unavailable.

<sup>8</sup> See *Grenier v. Canada (Attorney General)* (2005), 262 D.L.R. (4th) 337 (F.C.A.). The leading case on the bar against collateral attack from the Supreme Court of Canada is *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706. This bar is one part of the overall policy against relitigation of the same matter, also manifested by the doctrines of issue estoppel (*Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460) and abuse of process (*Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77). The Ontario Court of Appeal recently interpreted the bar against collateral attack and the interplay between civil damages proceedings in Ontario courts and judicial review proceedings under s. 18.1 of the *Federal Courts Act* in a manner different from *Grenier: TeleZone Inc. v. Attorney General (Canada)* (2008), 245 O.A.C. 91 (C.A.), leave to appeal to S.C.C. granted, [2009] S.C.C.A. No. 77, heard and reserved January 21, 2010. This issue is being considered with several other cases: *Dennis Manuge v. Her Majesty the Queen* (33103), *Attorney General of Canada, et al. v. Michiel McArthur* (33043), *Canadian Food Inspection Agency v. Professional Institute of the Public Service of Canada, et al.* (32880), *Nu-Pharm Inc. v. Her Majesty the Queen in Right of Canada, et al.* (32830), *Parrish & Heimbecker Limited v. Her Majesty the Queen in Right of Canada as Represented by the Minister of Agriculture and Agri-Food, et al.* (33006).

- The concept of absolute immunity from suit, in effect an assertion of supremacy of governance concerns over justice concerns, is itself rather unclear in scope, and casts a shadow over this area.<sup>9</sup> Administrative authorities often adjudicate matters, and that adjudicative function, when exercised by superior court judges, is often protected with substantial or absolute immunity. However, administrative authorities are not superior court judges, their adjudications are sometimes not entirely legal in nature, and administrative authorities often have an operational role that is closely associated with whatever adjudicative role they have. What is the line between immunity or near-immunity from law suit, and accountability through law suit?
- There are a broad range of administrative authorities, from purely adjudicative, investigative and regulatory bodies such as labour relations boards and securities commissions, to state-employed officials such as building inspectors and police officers. The case law in this area has developed in

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<sup>9</sup> Law-makers have general immunity for damage caused by their valid laws: *Welbridge Holdings Ltd. v. Greater Winnipeg (Municipality)*, [1971] S.C.R. 957; *Dunlop v. Woollahra Municipal Council*, [1982] A.C. 158. Superior court judges enjoy immunity from suit (*Morier v. Rivard*, [1985] 2 S.C.R. 716), but there may be limited exceptions to that (see *Charters v. Harper* (1986), 31 D.L.R. (4th) 468 (N.B.Q.B.)). Inferior court judges may only have a qualified immunity: *Re McC*, [1985] A.C. 528 (H.L.). Prosecutors enjoy a broad immunity, unless malice or bad faith is present: *Al's Steak House and Tavern Inc. v. Deloitte & Touche* (1994), 20 O.R. (3d) 673 (Gen. Div.), aff'd (1997) 102 O.A.C. 144. Absolute immunity has long been seen as unacceptable in the common law: *Amax Potash Ltd. v. Saskatchewan*, [1977] 2 S.C.R. 576 (law preventing recovery of taxes collected under an unconstitutional statute is unconstitutional); *Nelles v. Ontario*, [1989] 2 S.C.R. 170; *Prete v. Ontario (Attorney General)* (1993), 110 D.L.R. (4th) 94 (Ont. C.A.); *McGillivray v. New Brunswick* (1993), 26 C.R. (4th) 371 (Q.B.) The immunity of superior court judges from lawsuit is one of the few surviving examples, and that immunity itself is probably based on a constitutional principle, judicial independence: *MacKeigan v. Hickman*, [1989] 2 S.C.R. 796. However, even this immunity may be subject to an exception for 'bad faith decision-making': *Charters v. Harper* (1986), 31 D.L.R. (4th) 468 (N.B.Q.B.) (reference to 'bona fide' exercises of decision-making being protected, and judges being subject to the law like everyone else), and it is possible that the State may be liable for judges' conduct even if the judges are personally immune: see *Maharaj v. Attorney-General of Trinidad and Tobago (No. 2)*, [1979] A.C. 385 (P.C.), *R. v. Germain* (1984), 10 C.R.R. 232 (Q.B.) and *R. v. F.(R.G.)* (1991), 90 Nfld. & P.E.I.R. 113 (Nfld. S.C.) (Crown found liable for judge's detention order, which violated the detainee's s. 9 rights).

reaction to the facts of a particular case, without considering the question of whether there might be a single, unifying principle of liability that would govern all administrative authorities.

- But does the broad range of administrative authorities mean that it is impossible to have a single, unifying principle of liability that would govern all administrative authorities? Is there a distinction that should be drawn between an administrative authority's adjudicative functions, policy functions and operational functions? Do we really want to recognize such distinctions, thereby walking down the road of the difficult policy-operational distinction in liability,<sup>10</sup> or go back to the frustrating task of defining and distinguishing "judicial/quasi-judicial decisions" from "administrative decisions"?<sup>11</sup>
- Another problem in the area is that courts are often constrained by what torts are pleaded. Their analyses are directed to the traditional requirements of the torts that are pleaded. There is little scope to consider broad principles of liability of administrative authorities across different types of torts. This has allowed anomalies to develop between torts.
- There have been relatively few cases. It takes a certain number of cases, and resulting confusion, until the Supreme Court has an opportunity to develop a wider,

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<sup>10</sup> See, e.g., *Neilson v. Kamloops (City)*, [1984] 2 S.C.R. 2; *Laurentide Motels Ltd. v. Beauport*, [1989] 1 S.C.R. 705; *Just v. British Columbia*, [1989] 2 S.C.R. 1228; *Brown v. British Columbia (Minister of Transportation and Highways)*, [1994] 1 S.C.R. 445; *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201 (useful discussion of the issue); *Ingles v. Tutkaluk Construction Ltd.*, [2000] 1 S.C.R. 298 (another useful discussion of the issue).

<sup>11</sup> See *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission)*, [1989] 2 S.C.R. 879, which discusses the distinction. Under the former s. 28 of the *Federal Court Act*, R.S.C. 1985, c. F-7 (since repealed), the Court of Appeal had jurisdiction to review a decision or order other than those "of an administrative nature not required by law to be made on a judicial or quasi-judicial basis." There was an explosion of case law exploring what was "administrative," "judicial" and "quasi-judicial," an issue irrelevant to the merits of the case. Only the greediest of litigation lawyers would want to go back to those days of rather pointless litigation.

overarching theory of liability against administrative authorities. We may be nearing that point now, with many recent cases that would appear to conflict with each other.

This paper will look at the current law concerning when administrative authorities are liable in damages. It will do so by examining three categories of liability: abuse of public office, negligence liability and *Charter* damages.

In each of these areas, we see courts striving to balance and reconcile the two competing policy objectives and manage the “justice-governance” policy tension. However, the mechanisms chosen by courts to do this are different depending on the area of liability. Basically different words and concepts are used to manage the same problem—often with different results—with the effect that, for no real policy reason, some causes of action are quite easy to assert, while others are more difficult to assert.

## I. ABUSE OF PUBLIC OFFICE

This tort is “founded on the fundamental rule of law principle that those who hold public office and exercise public functions are subject to the law and must not abuse their powers to the detriment of the ordinary citizen.”<sup>12</sup> The purpose of the tort is “to protect each citizen’s reasonable expectation that a public officer will not intentionally injure a member of the public through deliberate and unlawful conduct in the exercise of public functions.”<sup>13</sup>

A public officer, such as an administrative authority, is liable for the tort when:

- he or she engages in deliberate and unlawful conduct in his or her capacity as a public officer; and
- the public officer has knowledge both that his or her conduct was unlawful and that it was likely to harm the plaintiff.<sup>14</sup>

The tort typically arises in two possible ways:

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<sup>12</sup> *Freeman-Maloy v. Marsden* (2006), 79 O.R. (3d) 401 (C.A.), at para. 10.

<sup>13</sup> *Odhayji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, at para. 30.

<sup>14</sup> *Ibid.* at para. 23.



- A public officer specifically intends to injure a person or class of persons by engaging in certain conduct. In such a case, the purpose is deliberately to injure—a purpose that is not authorized by law, and injury is known to be likely.
- A public officer acts with actual<sup>15</sup> knowledge that:
  - she or he has no power to do the act complained of;<sup>16</sup>
  - the act is likely to injure the plaintiff.<sup>17</sup> Again, in such a case, the two elements of deliberateness and knowledge are present.

The *mens rea* element—“deliberate” conduct and “knowledge” of both unlawfulness and harmful effect—is key to limiting the scope of the tort. However, there are at least four problems with this limit, all of which suggest that the “justice-governance” policy tension is resolved too much in favour of “justice” at the expense of “governance”:

1. *The mens rea requirement may be present more often, in relatively benign circumstances.* Many administrative authorities often come close to satisfying the *mens rea* requirement and attracting liability. Suppose that an administrative authority deliberately makes a decision knowing that certain members of the public may be adversely affected or harmed by it. This is not an uncommon circumstance—after all, most decisions adversely affect someone. Further suppose that the administrative authority making this decision adopts an aggressive interpretation of its statutory jurisdiction, knowing full well, but not for certain, that a reviewing court might find that the administrative agency is acting

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<sup>15</sup> The standpoint is subjective knowledge, not objective knowledge (*i.e.*, actually knew, not ‘ought to have known’): *Ibid.* at para. 38. Older, pre-*Odhavji* cases might be useful in illustrating the type of knowledge needed in order to establish liability: see e.g., *Gerrard v. Manitoba* (1993), 98 D.L.R. (4th) 167 (Man. C.A.) and *Francoeur v. Canada* (1994), 78 F.T.R. 109, aff’d [1996] F.C.J. No. 306 (C.A.).

<sup>16</sup> This likely embraces “acting for a reason and purpose knowingly foreign to the administration,” discussed in *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at 141 per Rand J.

<sup>17</sup> *Odhavji Estate*, *supra* note 13 at para. 22, citing *Powder Mountain Resorts Ltd. v. British Columbia* (2001), 94 B.C.L.R. (3d) 14 (C.A.), *Alberta (Minister of Public Works, Supply and Services) v. Nilsson* (2002), 220 D.L.R. (4th) 474 (Alta. C.A.) and *Granite Power Corp. v. Ontario*, [2002] O.J. No. 2188 (QL) (S.C.J.).

beyond legal limits. This also happens from time to time. In this circumstance, are not the requirements of “deliberate” conduct and “knowledge” of both unlawfulness and harmful effect present? Those who make aggressive, controversial decisions that may be defensible may nevertheless find themselves on the receiving end of a lawsuit.

2. *The mens rea requirement is not much of a limit on liability at all.* The limiting factors of deliberateness and knowledge are not so limiting. Parties in their submissions often place public officers on notice that a particular decision, if made, will be beyond jurisdiction and will cause damage. Some lawyers, whose clients have an argument that the administrative authority is acting beyond its jurisdiction, write threatening letters in advance of a decision, putting administrative authorities on notice that they are exceeding their jurisdiction (when in fact the legal situation is most debatable or unclear) and advising them of all of the possible consequential damage that will be caused.<sup>18</sup> If, in those circumstances, the administrative authority makes a decision against the party, that decision will be made deliberately and with full knowledge. Is the tort made out? *Odhavji*, literally read, suggests “yes.”<sup>19</sup>
3. *The mens rea requirement is easily alleged, and lawsuits*

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<sup>18</sup> Satisfying the requirement of foreseeability of damage in *Odhavji*, and also making the consequential loss proximate and foreseeable (*Fidler v. Sun Life Assurance Co. of Canada*, [2006] 2 S.C.R. 3 and *Hadley v. Baxendale* (1854), 9 Ex. 341, 156 E.R. 145).

<sup>19</sup> Possible solutions to this include a more careful description of what ‘knowledge’ means for the purposes of this tort. However, until that clarification happens, the danger here is clear. Where circumstances warrant, especially where the potential public harm through administrative inaction is high, administrative authorities may want to take more aggressive interpretations of their jurisdiction to act. The public interest may favour this, but cases where the potential public harm is high are often where the activity of the regulatee is large in monetary value or in scope. The potential economic loss to the regulatee from invalid administrative action may be very high. Situations of aggressive jurisdictional assertions combined with high risk of loss are precisely the situations where lawyers’ threatening letters, arguably satisfying the knowledge requirement in *Odhavji*, are written. Administrative authorities that knowingly incur risk and go to the fringes of their jurisdiction, based on their *bona fide* view of the public interest, may be running headlong into substantial liability.

*can survive for a while, with detrimental consequences.* The effects of substantive rules of liability must always be assessed in light of how they are asserted under our litigation procedures. In this context, it is easy for plaintiffs, particularly unscrupulous ones, to make allegations of deliberate conduct and knowledge of unlawfulness and harmful effect. Such allegations survive unless it is plain and obvious that they cannot succeed. This is a high test. Realistically, the only opportunity for administrative authorities to end such a lawsuit is through a motion for summary judgment. In such a motion, the plaintiff must bring forward affirmative evidence supporting the allegations. As a tactical matter, administrative authorities are driven to bring forward their own evidence, outside of the reasons, explaining why a decision was made, and to submit to cross-examination. It can be foreseen that this can place administrative authorities in an invidious position and tear against their larger administrative objectives.

4. *In some respects, the mens rea requirement can broaden administrative authorities' liability.* The *mens rea* of this tort, similar to bad faith or dishonesty, may remove a number of defences and increase liability: the presence of bad faith or dishonesty removes statutory immunity provisions, common law immunities,<sup>20</sup> and limitations defences, and the heinous quality of the conduct often attracts a significant award of punitive damages.<sup>21</sup> There is older authority that suggests that failure to follow requirements prescribed by legislation may remove statutory immunity, so satisfying the requirement that jurisdiction has been exceeded may dispose of that

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<sup>20</sup> *Falloncrest Financial Corp. v. Ontario* (1995), 33 Admin. L.R. (2d) 87 (Ont. Gen. Div.), rev'd in part (1995), 27 O.R. (3d) 1 (C.A.); *Milgaard v. Kujawa*, [1994] 9 W.W.R. 305 (Sask. C.A.); *Jane Doe v. Metropolitan Toronto* (1990), 74 O.R. (2d) 225 (Div. Ct.); *Nelles*, *supra* note 9.

<sup>21</sup> See e.g. *Lapointe v. Canada (Minister of Fisheries and Oceans)* (1992), 4 Admin L.R. (2d) 298 (Fed. T.D.); *White Hatter Limousine Service Ltd. v. Calgary (City)* (1993), 22 Admin. L.R. (2d) 120 (Alta. Q.B.); *LeBar v. Canada* (1988), 33 Admin. L.R. 107 (Fed. C.A.).

traditional defence.<sup>22</sup>

For all the foregoing reasons, the tort may cause a chilling effect, preventing certain decisions from being made. As presently defined, it does not manage effectively the balance between the two competing policy objectives, or what I have called the “justice-governance” policy tension.

Often, in addition to the requirements for the tort of abuse of public office, courts have offered certain additional comments, designed to limit the scope of the tort, or comments designed to express confidence that the “justice-governance” policy tension is being managed well. For example, courts have told us that acting beyond the limits of a statute cannot itself found the tort.<sup>23</sup> Further, it is often said that knowledge that people may be affected adversely by a decision is not enough to found liability—after all, administrative authorities often decide matters knowing full well that certain members of the public may be adversely affected. It has repeatedly been held that the *mens rea* for this tort is made out only by clear, strong proof.<sup>24</sup> Finally, courts emphasize that what is needed is an element of “bad faith” or “dishonesty”<sup>25</sup> that goes beyond mere negligence or inadvertence.<sup>26</sup> However, “bad faith” and “dishonesty” are defined by the requirements for liability set out above, requirements that, as we have seen, can be circumvented with a well-written letter placing the administrative authority on notice.

Finally, an added difficulty is that while “bad faith,” knowledge and deliberateness may be easy to inject into a test for liability under a tort, it is most difficult to prove—and the attempts to prove it can create many other difficult practical issues.

Evidence of motivations, purposes and intentions is sometimes evident in documents, but sometimes it is not. In public law cases, access

<sup>22</sup> *Montreal v. John Layton & Co.* (1913), 47 S.C.R. 514.

<sup>23</sup> *Odhavji Estate*, *supra* note 13 at para. 31, citing *R. v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205. More recently, see *Holland v. Saskatchewan*, [2008] 2 S.C.R. 551.

<sup>24</sup> *Powder Mountain Resorts Ltd.* (C.A.), *supra* note 17 at para. 8: “where bad faith on the part of a public official is alleged, clear proof commensurate with the seriousness of the wrong should be provided.” See also *MacMillan Bloedel Ltd. v. Galiano Island Trust Committee* (1995), 10 B.C.L.R. (3d) 121 (C.A.); *First National Properties Ltd. v. McMinn* (2001), 198 D.L.R. (4th) 443 (B.C.C.A.).

<sup>25</sup> *Odhavji Estate*, *supra* note 13 at paras. 24–28.

<sup>26</sup> *Ibid.* at para. 26.

to this sort of evidence is often hard to come by. Evidence of *mens rea*, intention and purpose is the very sort of evidence that gives rise to claims of Crown privilege,<sup>27</sup> the secrecy provisions under the *Canada Evidence Act*,<sup>28</sup> exemptions under freedom of information legislation<sup>29</sup> and discovery objections. Frequently it is not part of the record that is passed in judicial review proceedings.<sup>30</sup> Some attempts to subpoena evidence that are arguably necessary to satisfy a legal test in a constitutional case have failed.<sup>31</sup> Further complicating the situation is that *Charter* and other constitutional standards may also be brought to bear in the interlocutory skirmishes in this area.<sup>32</sup> Courts will be driven to devise creative means by which a balance can be achieved between the ability of litigants to litigate their public law cases while maximizing government confidentiality. A good example is seen in a recent British Columbia case where access to cabinet documents for the purposes of litigating a *Charter* case was given, but on extremely strict conditions, including written undertakings.<sup>33</sup> Some of the procedures adopted in litigation over national security certificates may supply further ideas for achieving the

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<sup>27</sup> *Carey v. Ontario*, *supra* note 4.

<sup>28</sup> R.S. 1985, c. C-5, ss. 37-39, as added by 2001, c. 41, s. 43.

<sup>29</sup> *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31.

<sup>30</sup> *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1; *Federal Court Rules*, SOR/98-106, Rule 317.

<sup>31</sup> See *Consortium Developments (Clearwater) Ltd.*, *supra* note 5.

<sup>32</sup> A right to a fair trial, which includes access to evidence necessary to prove one's case, has now been recognized as having some constitutional force in the civil context: *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522, at para. 50. The issue of access to evidence in certain circumstances may raise s. 2(b) *Charter* issues and other constitutional issues. Section 2(b) has not been raised against the secrecy provisions of the *Canada Evidence Act* but an attack based on the unwritten principles and s. 96 of the *Constitution Act, 1867* has been rejected: *Babcock v. Canada (Attorney General)*, [2002] 3 S.C.R. 3. A constitutionalized guarantee of freedom of expression has been used to limit the scope of Crown privilege in India: *S.P. Gupta v. President of India and Ors*, [1982] A.I.R. (S.C.) 149. As for freedom of information legislation, the fundamental importance of freedom of information in a democracy has been recognized (*Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403) and a underlying constitutional principle of democracy that can be asserted as a cause of action has been recognized (*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217), which leads to the possibility of direct attacks against limitations in freedom of information legislation. On some of these issues, see *Criminal Lawyers' Association v. Ontario (Ministry of Public Safety and Security)* (2007), 86 O.R. (3d) 259 (C.A.).

<sup>33</sup> *Health Services and Support-Facilities Subsector Bargaining Association v. British Columbia*, 2002 BCSC 1509 (S.C.).

right balance between access to evidence and government's confidentiality needs.<sup>34</sup>

## II. CHARTER DAMAGES

The general rule is that government cannot be sued for making *valid* laws that happen to cause damage to people.<sup>35</sup> One would expect that this general rule of immunity also extends to subordinate law-making, including law-making by agencies and other administrative bodies.

However, government can be liable for making an *invalid* law<sup>36</sup> and one would also expect that this exception to the general rule also extends to law-making by agencies and other administrative authorities. Further, government actors, including administrative authorities, who, acting under a valid law, violate the *Charter*, can be liable.<sup>37</sup>

### A. LIABILITY FOR MAKING INVALID LAWS

It has consistently been held that those that make laws that are later found to be constitutionally invalid are not liable, absent proof of some additional requirement.<sup>38</sup> That additional requirement is variously described as “maliciousness,”<sup>39</sup> “discrimination” or “oppression,”<sup>40</sup>

<sup>34</sup> *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350.

<sup>35</sup> *Welbridge Holdings Ltd.*, *supra* note 9.

<sup>36</sup> *Mackin v. New Brunswick (Minister of Finance)*; *Rice v. New Brunswick*, [2002] 1 S.C.R. 405; *Canada (Attorney General) v. Hislop*, [2007] 1 S.C.R. 429.

<sup>37</sup> See e.g. *Ward v. City of Vancouver*, [2007] 4 W.W.R. 502 (B.C.S.C.), *aff'd* [2009] 304 D.L.R. (4th) 653 (B.C.C.A.), leave to appeal to S.C.C. granted, [2009] S.C.C.A. No. 125, heard and reserved January 18, 2010.

<sup>38</sup> *Welbridge Holdings*, *supra* note 9; *Dunlop*, *supra* note 9; *Guimond v. Quebec (Attorney General)*, [1996] 3 S.C.R. 347. A recognized exception to this general principle is *Kingstreet Investments Ltd. v. New Brunswick (Department of Finance)*, [2007] 1 S.C.R. 3. Restitutionary recovery may be granted for taxes paid under an unconstitutional provision; the plaintiff in *Kingstreet* was not obligated to prove any sort of additional requirement such as bad faith or abuse of power.

<sup>39</sup> *Nelles v. Ontario*, *supra* note 9; *Saskatchewan Provincial Court Judges Association v. Saskatchewan (Minister of Justice)*, [1996] 2 W.W.R. 129; *R. v. Mills*, [1986] 1 S.C.R. 863, at para. 241 per Lamer J.

<sup>40</sup> *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161, but see *Kingstreet Investments Ltd.*, *supra* note 38.

“abuse of authority,”<sup>41</sup> “collateral purpose,”<sup>42</sup> “abuse of power,”<sup>43</sup> “bad faith,”<sup>44</sup> conduct that is “clearly wrong,”<sup>45</sup> “wrongful conduct,”<sup>46</sup> “wilful blindness with respect to its constitutional obligations,”<sup>47</sup> knowledge of lack of authority,<sup>48</sup> “negligence ... with respect to its constitutional obligations,”<sup>49</sup> lack of reasonable reliance on the law,<sup>50</sup> the presence of an unforeseeable, drastic change in the law,<sup>51</sup> or a mix of the foregoing.<sup>52</sup> These terms are used often; seldom are they defined.

The rationale behind this additional requirement is to ensure that there is a balance between “the protection of constitutional rights” with “the need for effective government”; in other words, what I have called the “justice-governance” policy tension.<sup>53</sup>

The problem in this area is imprecision in exactly what the superadded requirement is, the meaning of the words that courts are using, such as “bad faith”, and the civil procedure and evidentiary challenges (noted above in the context of the tort of abuse of public office) faced by plaintiffs trying to obtain evidence and administrative authorities legitimately trying to maintain confidentiality.

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<sup>41</sup> *Air Canada*, *supra* note 40.

<sup>42</sup> *Crown Trust Co. v. Ontario* (1986), 265 D.L.R. (4th) 41 (Ont. Div. Ct.) at p. 49.

<sup>43</sup> *Mackin*, *supra* note 36 at paras. 78–79.

<sup>44</sup> *Hislop*, *supra* note 36 at paras. 115, 117; *Mackin*, *supra* note 36 at paras. 78–79; *Guimond*, *supra* note 38; *R. v. Lagiorgia*, [1985] 1 F.C. 438, *aff'd* (1985), 42 D.L.R. (4th) 764 (F.C.A.); *Crown Trust Co.*, *supra* note 42.

<sup>45</sup> *Hislop*, *supra* note 36 at para. 117; *Mackin*, *supra* note 36, at paras. 78–79.

<sup>46</sup> *Crown Trust Co.*, *supra* note 42 at p. 49.

<sup>47</sup> *Mackin*, *supra* note 36 at para. 82.

<sup>48</sup> *R. v. Lagiorgia*, *supra* note 44.

<sup>49</sup> *Mackin*, *supra* note 36 at para. 82; *Crown Trust Co.*, *supra* note 42 at p. 49.

<sup>50</sup> *Hislop*, *supra* note 36 at paras. 110–111, 117.

<sup>51</sup> *Ibid.* at paras. 112–114.

<sup>52</sup> *Ibid.* at paras. 109–117. *Hislop* is the first Supreme Court case to group a number of these factors under the label “qualified immunity,” an approach similar to that adopted in the United States.

<sup>53</sup> *Mackin*, *supra* note 36 at para. 77.

## B. LIABILITY FOR UNCONSTITUTIONAL ACTIONS, DECISIONS OR CONDUCT

Unconstitutional actions under otherwise valid statutes may stand in a different position. There is a major conflict in the case law:

- A number of cases provide for liability in damages when the plaintiff establishes a *Charter* rights breach, causation and foreseeability of damage.<sup>54</sup>
- Others require some superadded element, similar to those for liability for unconstitutional law-making;<sup>55</sup> however, there is a very broad spectrum of opinion regarding what that superadded requirement might be.<sup>56</sup> Some have raised

<sup>54</sup> *Ward v. City of Vancouver*, *supra* note 37; *Morin v. Prince Edward Island Regional Administrative Unit No. 3 School Board* (2005), 254 D.L.R. (4th) 410 (P.E.I.S.C.A.D.); *Blouin v. R.* (1991), 51 F.T.R. 194 (T.D.), at para. 24; *Bevis v. Burns* (2006), 269 D.L.R. (4th) 696 (N.S.C.A.) (no requirement to show “clearly wrong, engaged in abuse of process or engaged in bad faith”); *Krznaric v. Chevrette* (1997), 154 D.L.R. (4th) 527 (Ont. Div. Ct.) (“a finding of malice is not a necessary precondition to an award of damages pursuant to section 24(1) of the *Charter*”); *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 per Wilson J. (dissenting) (no need to prove “animus”; one only need a breach of s. 15 and absence of s. 1 justification, and that the remedy is “appropriate and just” under s. 24(1)). Wilson J.’s view in *McKinney* was that “[c]ompensation for losses which flow as a direct result of the infringement of constitutional rights should generally be awarded unless compelling reasons dictate otherwise.”

<sup>55</sup> *Hawley v. Bapoo* (2007), 156 C.R.R. (2d) 351 (Ont. C.A.); *Ferri v. Ontario (Attorney General)* (2007), 279 D.L.R. (4th) 643 (Ont. C.A.); *Wynberg v. Ontario* (2006), 269 D.L.R. (4th) 435 (Ont. C.A.) (potentially huge liability would interfere with the functioning of government by diverting money from present treatment of autistic children to payment of damages claims); *Sagharian (Litigation Guardian of) v. Ontario (Minister of Education)* (2008), 172 C.R.R. (2d) 105 (Ont.C.A.) (“improper purposes” needed); *McGillivray v. New Brunswick* (1994), 116 D.L.R. (4th) 104 at 108 (N.B.C.A.); *R. v. Ravndahl*, [2007] 10 W.W.R. 606, at para. 77 (Sask C.A.) (in addition to *Charter* breach, must show “clearly wrong, engaged in abuse of process or engaged in bad faith”); *Chrispen v. Kalinowski* (1997), 148 D.L.R. (4th) 720 (Sask. Q.B.) (“reckless” and “unreasonable” conduct); *Sens v. Dobko* (2002), 202 Sask. R. 256 (Q.B.) (“recklessness, malice or bad faith”).

<sup>56</sup> For example, a number of courts reject liability based solely on mere negligence and require a higher standard of misconduct, such as intention, malice, bad faith, or gross negligence: *McGillivray*, *supra* note 56 (*mala fides* needed); *Hawley v. Bapoo* (2000), 187 D.L.R. (4th) 533 (Ont. Div. Ct.); *Persaud v. Ottawa (City) Police* (1995), 25 O.R. (3d) 270 (Gen. Div.) (gross negligence), *rev’d sub nom Persaud v. Donaldson* (1997), 143 D.L.R. (4th) 326 (Ont. Div. Ct.) (abuse of powers needed); *Thompson v. Ontario* (1998), 113 O.A.C. 82 (C.A.); *Howell v. Ontario* (1998), 159 D.L.R. (4th) 566 (Ont. Gen. Div.).



the issue that the particular mental state of the perpetrator of the constitutional violation makes no difference to the victim, suggesting that liability should be based solely on the existence of a rights breach.<sup>57</sup> But this does not take into account that a broad principle of liability in such circumstances may deter officials from pursuing their mandates that might be quite legitimate, but untested in the courts.

A “middle ground” approach may be evolving. In one case, the government was found liable for a s. 15 *Charter* breach despite the absence of bad faith, but the absence of bad faith was a factor in limiting the damages award.<sup>58</sup> In another case, the government infringed s. 23 of the *Charter*, but the absence of intentional, reckless or negligent conduct meant that damages were not available; nevertheless, the judge awarded solicitor and client costs to recognize the longstanding denial of the *Charter* right.<sup>59</sup>

Another issue in this area of law is a theoretical debate. Should *Charter* damages claims develop by analogy to tort principles and consider issues such as duty, standard of care, proximity and foreseeability?<sup>60</sup> Or should the analysis consider a list of relevant policy factors developed and gathered under the rubric of “appropriate and just” under s. 24(1) of the *Charter*?<sup>61</sup> Initial indications are that the latter

<sup>57</sup> *Krznaric*, *supra* note 55: “Whether the infringement of the right is committed maliciously or merely negligently may make little difference to the victim.”

<sup>58</sup> *Auton (Guardian ad Litem of) v. British Columbia (Attorney General)* (2001), 197 D.L.R. (4th) 165 (B.C.S.C.), *aff’d* (2003), 220 D.L.R. (4th) 411 (B.C.C.A.), at para. 98, *rev’d* on s. 15 *Charter* violation issues, [2004] 3 S.C.R. 658. The trial judge awarded \$20,000 as “symbolic” damages. The Court of Appeal upheld this ruling and dismissed arguments that full compensatory damages should have been given, noting the absence of any bad faith on the part of the government. *Dulude v. Canada* (2000), 192 D.L.R. (4th) 714 (F.C.A.), *Morin*, *supra* note 54, *Campbell v. Canada* (2004), 125 C.R.R. (2d) 65 (Tax Ct.), *Hawley v. Bapoo* (2005), 134 C.R.R. (2d) 86 (Ont. S.C.J.), and *Ayangma v. Prince Edward Island* (2001), 205 Nfld. & P.E.I.R. 333 (P.E.I.C.A.) may be other examples of awards of damages made that do not reflect actual loss (i.e., they are not compensatory awards).

<sup>59</sup> *Arsenault-Cameron v. Prince Edward Island* (1997), 147 Nfld. & P.I.E.R. 308 (P.E.I.S.C.), *rev’d* (1998), 160 D.L.R. (4th) 89 (P.E.I.C.A.), [2000] 1 S.C.R. 3.

<sup>60</sup> See e.g. K. Cooper-Stephenson, *Charter Damages Claims* (Carswell, 1990).

<sup>61</sup> See e.g. M. Pilkington, “Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms” (1984), 62 Can. Bar. Rev. 517. See also *Krznaric*, *supra* note 55 (“Policy reasons which limit relief for negligent breach of a statutory duty are not necessarily appropriate in the context of a *Charter* breach, given the

approach is the most likely to prevail.<sup>62</sup>

A major issue, as yet unexplored in the jurisprudence, is the role of causation in *Charter* liability. Is a government actor liable when it breaches the *Charter*, damages are caused to the plaintiff, and the plaintiff would not have suffered those damages “but for” the *Charter* breach?<sup>63</sup> Or should a looser standard sometimes known as probabilistic causation be applied.<sup>64</sup> Under probabilistic causation, the government is made liable for creating a higher risk of harm to the plaintiff. The meaning of causation is yet another tool that courts can use to manage the “justice-governance” policy tension.

Finally, a very important, unresolved question is how to value certain losses of an intangible nature, for example, wrongful detention or improper strip searches, for the purposes of *Charter* damages awards. No methodology has been established. However, the cases seem to award only damages at a small level that likely does not deter wrongful conduct.<sup>65</sup> Another question is whether punitive damages, which occasionally are awarded in *Charter* damages claims,<sup>66</sup> should be more readily available than in private damages claims.<sup>67</sup> Obviously the size of damages awards will greatly affect the “justice-governance” policy

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importance of the values enshrined in the *Charter*”).

<sup>62</sup> See the list of factors considered by Rothstein J., for the majority of the Supreme Court, in *Hislop*, *supra* note 36 at paras. 109–117. This list of factors mirrors the various criteria that should govern the award of s. 24(1) remedies, as explained by the Supreme Court in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3. The Ontario Court of Appeal has suggested that s. 24(1) damages claims might depart from “normal” tort principles in *Eutenier v. Lee* (2005), 133 C.R.R. (2d) 294 (Ont. C.A.). In the earlier case of *Béliveau St. Jacques v. Federation des Employées de Services Public Inc.*, [1996] 2 S.C.R. 345, at para. 121, Gonthier J. suggested that “[t]he Charter does not create a parallel compensation system,” perhaps raising the possibility that, at least as he was concerned, the principles of *Charter* damages liability should mirror existing tort liability.

<sup>63</sup> *Morin*, *supra* note 54. The rule in the United States is “but for” causation (*Doyle v. Mount Healthy School Board*, 429 U.S. 274 (1977)).

<sup>64</sup> K. Cooper-Stephenson, *supra* note 61 at pp. 265–266; John Fleming, “Probabilistic Causation in Tort Law” (1989), 68 Can. Bar Rev. 661.

<sup>65</sup> *Bloum v. Canada* (1991), 51 F.T.R. 194 (\$5,000 for improper strip search); *Chrispen*, *supra* note 56 (\$500 for an improper search and X-ray).

<sup>66</sup> See, e.g. *Patenaude v. Roy* (1989), 123 D.L.R. (4th) 78 (Que. C.A.).

<sup>67</sup> *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 196. At para. 69 of *Whiten*, the majority of the Supreme Court held that punitive damages should be “resorted to only in exceptional cases and with restraint.”

tension.

### III. NEGLIGENCE LIABILITY

The key issue here is whether an administrative agency owes a duty of care. The standard test for determining whether a duty of care exists is the same for both administrative agencies and private parties. It is a two-stage test. The first stage is as follows:

At the first stage ... two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here?<sup>68</sup>

Under the first question, “reasonable foreseeability of the harm must be supplemented by proximity.”<sup>69</sup> “Proximity,” meaning “close and direct,”<sup>70</sup> is poorly described. Frequently, proximity is established by reference to categories of relationships that have previously been recognized in the case law.<sup>71</sup> However, “[t]he categories are not closed and new categories of negligence may be introduced.”<sup>72</sup> What is missing in the case law is a principled explanation of what categories should be embraced by the term “proximity.”

Recent cases have shown a reluctance to impose duties of care by governments and administrative agencies who are exercising public functions under statute to the general public,<sup>73</sup> and who are exercising a

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<sup>68</sup> *Cooper v. Hobart*, [2001] 3 S.C.R. 537, at para. 30; *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.); *Yuen Kun Yeu v. Attorney-General of Hong Kong*, [1988] 1 A.C. 175 (J.C.P.C.).

<sup>69</sup> *Cooper*, *ibid.* at para. 31.

<sup>70</sup> *Donoghue v. Stevenson* [1932] A.C. 562, at pp. 580–81: “Who then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

<sup>71</sup> *Cooper*, *supra* note 69 at para. 31.

<sup>72</sup> *Ibid.* at para. 31.

<sup>73</sup> *Ibid.* (reluctance to impose private duty of care when government is exercising public functions under statute); *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562 (reluctance to impose private duty of care when government is exercising public functions under statute); see also *Syl Apps Secure Treatment Centre v. B.D.*, [2007] 3 S.C.R. 83, especially at paras. 28 and 41; *Abarquez v. Ontario*, 2009 ONCA 374 and

quasi-judicial function,<sup>74</sup> in part due to problems of foreseeability of harm and proximity to specific people. This will especially be the case where statutes create duties only to the public at large.<sup>75</sup> In these cases, the imposition of a private law duty may conflict with the regulator's public law duty.

There are cases that are hard to reconcile with these authorities. For example, while the Law Society of Upper Canada was held not to owe a duty of care to persons (not clients of the lawyer) injured by a lawyer's conduct,<sup>76</sup> the Barreau du Quebec was made liable to a person (not clients of the lawyer) for failing to investigate, regulate and discipline a member.<sup>77</sup>

These are cases where regulators are exercising highly fact-based discretionary authority regarding how their powers should be used. One might be concerned about measuring such liability up against strict yardsticks under the law of tort. Further, such exercises of discretion are precisely the sorts of matters that attract deference in judicial review.<sup>78</sup> These considerations are what make the result in *Hill v. Hamilton-Wentworth Regional Municipality Police Services Board* so surprising.<sup>79</sup>

The plaintiff, Jason Hill, brought a suit against the Toronto Police Services Board for negligent criminal investigation. He had been charged with several counts of robbery, but many of these were dropped, and he was ultimately acquitted on the one remaining charge. Hill alleged that the investigating officer owed a duty of care to him, a suspect, in the course of an investigation. That allegation was met with a pleadings attack on the basis that such an allegation could not succeed.

The Supreme Court, faced with a sharp policy conflict, held that the allegation could succeed, *i.e.*, that an investigating officer can owe a

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*Williams v. Ontario*, 2009 ONCA 378; *Eliopoulos Estate v. Ontario (Minister of Health and Long-Term Care)* (2006), 82 O.R. (3d) 321 (Ont. C.A.); *Haskett v. Equifax Canada Inc.* (2003), 63 O.R. (3d) 577 (C.A.) (good discussion of remoteness and foreseeability in negligence cases against government).

<sup>74</sup> *Cooper*, *supra* note 69 at paras. 50, 52.

<sup>75</sup> *Eliopoulos Estate*, *supra* note 74 and *Attis v. Canada (Minister of Health)* (2008), 93 O.R. (3d) 35 (C.A.)

<sup>76</sup> *Edwards*, *supra* note 74.

<sup>77</sup> *Finney v. Barreau du Québec*, [2004] 2 S.C.R. 17.

<sup>78</sup> *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190.

<sup>79</sup> [2007] 3 S.C.R. 129.

duty of care to a suspect during an investigation. The policy conflict was between the need to prevent wrongful convictions and damage on the one hand, and the need to allow investigations to proceed in the public interest with no undue inhibition. The majority held that while a duty of care should not be imposed where it might conflict with public duty, that conflict must “give rise to a *real potential* for negative policy consequences” (emphasis added).<sup>80</sup>

By adopting the “real potential for negative policy consequences” test, *Hill* significantly increases the number of situations in which administrative authorities may be liable in negligence. Some years before *Hill*, there was a suggestion of increased liability for administrative authorities in a throw-away line in a Supreme Court case: the Court suggested that a regulator could be subject to a duty to a regulatee to exercise due care in ascertaining the scope of the regulator’s statutory authority.<sup>81</sup> Far from a throw-away line, it now seems that it portended broader duties of care on the part of administrative authorities. Perhaps *Hill* has brought us to the point where we must ask a very interesting question: if an administrative authority makes a decision that is irrational (and the decision is quashed),<sup>82</sup> and damage is caused, can it be found liable in damages for negligence? Courts may soon be confronted with that question.

Defences, of course, are available, and help to limit liability and manage the “justice-governance” policy tension. For example, it is well-known that limitations in budgets and resources can affect decision-making and this can afford the administrative body some latitude as a defendant in a negligence claim; reliance on such matters may be consistent with the requisite standard of care.<sup>83</sup> Other possible defences include statutory authority to do the impugned act,<sup>84</sup> court authorization to do the impugned act,<sup>85</sup> legislative immunity from suit,<sup>86</sup> common law

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<sup>80</sup> *Ibid.* at paras. 43, 48.

<sup>81</sup> *Comeau’s Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1997] 1 S.C.R. 12.

<sup>82</sup> In accordance with *Dunsmuir*, *supra* note 79.

<sup>83</sup> *Just v. British Columbia*, *supra* note 10.

<sup>84</sup> *Tock v. St. John’s Metropolitan Area Board*, [1989] 2 S.C.R. 1181.

<sup>85</sup> For example, a court-issued warrant.

<sup>86</sup> If conduct is negligent, but in good faith (no malice), the administrative body may benefit from a statutory immunity: *Stenner v. British Columbia (Securities Commission)* (1993), 23 Admin. L.R. (2d) 247 (B.C.S.C.). There are many statutory

immunity from suit,<sup>87</sup> immunity for policy decisions,<sup>88</sup> and the doctrine of collateral attack.<sup>89</sup> However, these suffer from lack of definition and conceptual uncertainty, a point best illustrated by the sharply divided judicial decisions in the area.<sup>90</sup>

#### IV. AN APPROACH NOT TAKEN

No court has yet looked at the law of damages against administrative authorities at a macro level, by looking at all possible causes of action and trying to achieve an overall coherence.

The analysis above, may suggest that such an approach may be useful. At present, with each cause of action developing independently from the other, there are anomalies.

The *Charter* is part of our Constitution, our supreme law. The Supreme Court has repeatedly declared the *Charter* to be an essential framework of guarantees that courts should be vigilant to protect and enforce. But, bizarrely perhaps, it may be harder for a plaintiff to get damages for a *Charter* breach than a breach of a common law duty of care. *Hill* suggests that administrative authorities may be liable for negligence in their investigations if they fail to meet a duty of care; but to get damages for breach of the *Charter*, it may be necessary to prove “bad faith” or “abuse of power.” And, given the weaknesses associated with the tort of abuse of public office that disproportionately favour the “justice” side of the “justice-governance” policy tension, that tort may be the easiest of all to establish.

It would be more coherent if there were a single standard of misconduct by administrative authorities that invites liability, and a single set of defences; then there would be one vision of the “justice-governance” policy tension. At present though, the analysis above shows that we have much uncertainty and many questions surrounding a

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immunities. See e.g. *Public Authorities Protection Act*, R.S.O. 1990, c. P.38, s. 8: “No action or other proceeding shall be commenced or prosecuted against any person for or by reason of anything done in obedience to a mandamus or mandatory order.”

<sup>87</sup> *Supra* note 9.

<sup>88</sup> *Supra* note 10.

<sup>89</sup> *R. v. Consolidated Maybrun Mines Ltd.*, *supra* note 8; *TeleZone Inc.*, *supra* note 8; *Grenier*, *supra* note 8.

<sup>90</sup> See e.g. *Tock*, *supra* note 85.

patchwork array of causes of action and defences.

## V. TOWARDS A SOLUTION

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 is aimed at regulating the “justice-governance” policy tension.<sup>91</sup> There, the general position is that “officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate any clearly established statutory or constitutional rights of which a reasonable person would have known.”<sup>92</sup> Some may object that this favours the governance concern unduly, and that suits should be allowed more frequently to ensure greater accountability of administrative authorities who, some believe, are not subject to enough accountability.<sup>93</sup>

The way forward—toward a coherent, simpler and more understandable law of administrative liability—may be to develop a single, compendious “qualified immunity” defence available to governments and administrative authorities, regardless of the particular cause of action asserted,<sup>94</sup> and, when developing our law, to borrow with suitable modifications from the decade of experience found in the

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<sup>91</sup> 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* (Westport, Ct: Praeger, 2002) and Peter L. Strauss, *Administrative Justice in the United States, 2nd ed.* (Durham, NC: Carolina Academic Press, 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* (North Ryde, Australia: LBC Information Services, 1998).

<sup>92</sup> *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

<sup>93</sup> An interesting observation here is that while professionals and judges are subject to internal discipline (e.g., various law societies and judicial councils), administrative tribunal members, many of whom enjoy a measure of security of tenure, are not subject to professional discipline.

<sup>94</sup> This movement, in fact, may already be underway. In *Hislop*, *supra* note 36, Rothstein J. used the term “qualified immunity,” and under that label, set out a number of factors, all aimed at managing the “justice-governance” tension. See note 63. The factors selected by Rothstein J. likely do not encompass all of the factors that are relevant to a compromise between justice and governance, and certain of the factors (e.g., bad faith), suffer from insufficient definition, but in my view the approach taken in *Hislop* is a good start.

jurisprudence south of the border.<sup>95</sup>

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<sup>95</sup> 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.