

Rights and Remedies – Remarks

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I consider it a great honour to have been chosen to deliver the opening address at this important conference.

As judges, we have the privilege of being taken seriously most of the time. The subject of remedies, however, has not fared as well in recent years. This title of this conference, “Taking Remedies Seriously,” suggests that remedies have received too little attention. As the conference program states, “[r]emedies often seem to receive less attention than they deserve and less attention than the rights that animate them.”

This raises the question—why have remedies—the basic stuff of the common law—been so neglected as of late? Has the 300-year old Latin phrase *ubi jus ibi remedium*—there is no right without a remedy—become antiquated, trite even? Indeed, can you imagine a conference titled “Taking Torts Seriously” or “Taking the *Charter* Seriously”? I think not. So why is it that we must remind ourselves of the seriousness of a subject that, writes Helge Dedek, “translates the abstract and lofty discourse of law into the life world of the disputants”?¹

The first reason may be simply that rights, or principles, or statutes, or whatever we call the words that define basic legal entitlement, are the first thing we have to look at when we confront a legal problem. We tend to focus on the legal rule and tend to stay focused on it until the need to actually achieve a result is forced upon us. Despite the common law’s traditional leaning towards remedial monism—one of the great

* P.C., Right Honourable, Chief Justice of Canada, Ottawa, Ontario, October 1, 2009. Copyright in this article is held by the author and the article is published here with her permission.

¹ Dedek, “The Relationship between Rights and Remedies in Private Law: A Comparison between the Common Law and the Civil Law,” *infra*.

strengths of the common law—I believe that we have become selectively attentive to rights discourse.²

The second reason why remedies have been neglected may stem from the nature of the respective intellectual exercises involved in engaging in rights and remedies. Legal principles are elegant. They speak of abstract and exalted ideals. They invite us to talk in sweetly elevated terms. “We are endowed with rights” slips off the legal tongue with satisfying ease. “We are endowed with remedies” has a more prosaic ring. Adding to the pleasure of abstract legal rules is the challenge of employing them harmoniously to the facts. Such an exercise engages our imaginations. Mere lawyers we may be but, for this moment, we are creative lawyers. Those of us who focus on remedies, by contrast, are “merely” pragmatic realists, as Professor Charles A. Wright has put it.³

A third reason why we pay less attention to remedies may stem from our academic legal training. Big principle subjects like constitutional law and torts dominate core curricula, and newly popular subjects, such as aboriginal law, health law, legal feminism or critical race studies, fill in the space that remains. Remedies get whatever space and energy is left over. Viewed as “practical” but not necessarily “exciting,” remedies are relegated to the “if I have room” or “if I must” categories of most student and teaching timetables.

When I began teaching law at U.B.C. many years ago, I quickly discovered that all of the “good” courses—understood as the big principle courses—had been appropriated by more senior, more worthy professors. I was condemned to till the rocky fields of remedial law—creditors’ remedies, civil litigation and, at the bottom of the heap and as good as it gets for remedial law, evidence. At one point I decided that, seniority be damned, I was going to write an article on torts. The subject was nothing less than the Supreme Court’s then-recent cap on damages for pain and suffering. To my chagrin, upon completion of my opus of principle, I discovered that what I had in fact produced was an article on remedies.

² See Grant Hammond, “Rethinking Remedies: The Changing Conception of the Relationship between Legal and Equitable Remedies” in Jerry Berryman, ed., *Remedies: Issues and Perspectives* (Scarborough, Ont.: Carswell, 1991), at p. 90 [Hammond].

³ In 1955, Professor Charles A. Wright wrote in “The Law of Remedies as a Social Institution” (1955) 18 *U. Det. L.J.* 376, at p. 377, that civil actions “are not brought to vindicate nice theories as to negligence or nuisance or consideration.”

Thirty-seven-and-a-half pages of pain and suffering poetically devoted to a remedy for pain and suffering. The article was generally well-received but, to my great disappointment, I soon realized it did little to advance my standing among my academic, principle-obsessed colleagues. On the contrary, the article's only effect was to convince them once and for all that my intellect was suited only for grubbing about in the underworld of remedial law.

So this fledgling academic reconciled herself to her status as a mere remedial lawyer. To be sure, I never quite overcame the hankering to teach a class on the principle of foreseeability. Yet I began to positively enjoy remedies. They are practical and down-to-earth. They related to real people and real problems. Remedies flow inevitably from the experiences of human beings, both men and women. In this context, problems arise for which adequate solutions must be found. Remedies engage real problems about what works and what won't work. Borrowing the language of O.W. Holmes, they can be viewed as the law stripped of its pretensions, "the prophesies of what the courts will do."⁴

This is the point in the speech when the speaker, looking at the clock, decides to fast-forward. I moved on to judging. As a County Court judge, 98 per cent of my time was occupied with remedies. As a Supreme Court trial judge, there was a little more principle but 60 per cent of it was still remedies. At the Court of Appeal, it decreased to maybe 50 per cent remedies. Finally, at the Supreme Court of Canada, I looked to being able to indulge my yearning to work in the pure world of principle.

High principles—notably various legal rules and guarantees of the *Charter* that are of capital importance in the decision-making context—dominate the agenda of the Court. The table of the Court is laden with issues of legal principle, garnished with fine phrases and high tones. And yet, like basic meat and potatoes, the remedial is forever present, a necessary requirement for survival. Again, the same old experience: my pursuit of principle inevitably returns me to the world of remedies.

I have finally recognized what I should have seen all along—that while it is convenient to distinguish broadly between the legal rules that determine rights on the one hand and the remedies that apply to their breach on the other, rights and remedies cannot be separated. They remain interwoven in the single fabric we call justice. Professor Smith

⁴ See Hammond, *supra* note 2 at p. 91.

will be offering learned reflections on this reality in a few minutes, and I leave it to him to tackle the nuances of the complex relationship.

Rights and remedies are both fundamental elements of the legal order. Let me put it this way: the conference title, “Taking Remedies Seriously,” might just as well be called “Taking Legal Principles Seriously.” Unless we take remedies seriously, we cannot deal effectively or responsibly with legal principles.

The intimate relationship between rights and remedies was brought home to me last year when I, at long last, found myself invited to give a class on the basic principles of liability for negligence. If it exists anywhere, I thought, here is a matter of pure principle. I began my preparations by reading the seminal 1928 American decision on relational negligence, *Palsgraf v. Long Island Railroad Company*.⁵

I am sure you are all familiar with the simple facts of the case. A train stops at the station. A man runs forward to catch it. As he vaults up the steps of the train, a guard in the car reaches forward to help him and another guard on the platform pushes him from behind. During the pushing, a package of fireworks the man is carrying dislodges, falls on the rails and explodes. Standing some distance away from the train is a woman, Mrs. Palsgraf. She is injured. The question addressed by the court is whether the railway company, which employs the guards, is liable.

Two of the most formidable pens in legal history squared off in the New York Court of Appeals: Justices Cardozo and Andrews. Justice Cardozo won the day, holding that the railway company was not liable to Mrs. Palsgraf because the necessary relation for duty and liability was not present. Various fine phrases were used: the risk of her being injured was not within the “range of apprehension” or foreseeability; “relative to her it was not negligence at all”; Mrs. Palsgraf had not shown “a wrong to herself, i.e. a violation of her right.” For these principled reasons, there was no liability and consequently there could be no remedy. As Justice Cardozo famously put it, in words that resonate with the commonly accepted pre-eminence of right over remedy, “[t]he question of liability is always anterior to the question of the measure of the consequences that go with liability.”⁶

⁵ *Palsgraf v. Long Island Railroad Company* (1928), 248 N.Y. 339.

⁶ *Ibid.*

Then I read Justice Andrews' dissent, a brilliant counterpart to a brilliant majority decision. Whereas Justice Cardozo curtailed principle in order to avoid indeterminate responsibility, Justice Andrews argued that the relationship upon which liability for negligence is predicated could not, in principle, be confined by foreseeability. It is not merely a "relationship between man and those whom he might reasonably expect his acts would injure. Rather, a relationship between him and those whom he does in fact injure."⁷

Justice Andrews, however, went on to concede that there must be limits on liability. The protection against indeterminate liability, he suggested, lay not in the formulation of the negligence principle as Justice Cardozo would have it, but in restricting damages to those proximately connected to the negligent act. In other words, the solution lay not in pure principle but in the remedy. Speaking the practical language typical of remedial law, Justice Andrews stated, "[w]hat we ... mean by the word 'proximate' is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics."⁸

The two decisions in *Palsgraf* demonstrate the relationship between legal rules and legal remedies. Both justices accept that the law cannot countenance indeterminate liability. One does this by the route of constraining the principle of negligence by the concept of foreseeability. The other accomplishes the same practical result by expressing the negligence principle broadly but limiting recovery at the stage of remedy. Ironically, I discovered that my foray into the realm of pure principle had brought me back, full circle, within the sphere of remedy.

That was when I realized that time and time again in my legal career, whether as teacher, litigator or judge, my quest for the proper expression of principle has always brought me back to articulations of remedy. Principle and remedy are distinct yet complementary parts of every legal picture. Each of them has an impact on the other, and they must always be considered together. Neither can be overlooked.

The reciprocal interlocking of principle and penalty, so vividly illustrated by the majority and dissent in *Palsgraf*, dictates one of the basic precepts—dare I use the word 'principles'—of remedial law: the

⁷ *Ibid.*

⁸ *Ibid.*

remedy must be responsive to the right. Or as Gilbert and Sullivan put it more succinctly in the *Mikado*, “Let the penalty fit the crime.”

This afternoon you will be considering whether there are limits to the efficacy of traditional legal remedies like damages and injunctive relief. You will also be considering whether the future will see cross-fertilization between public and private law remedies. As you examine these questions, I suspect you will return time and time again to this question: what is required to ensure that the remedies available to citizens, government and corporations fit the “anterior” rights and rules? Rights without remedies can be viewed as empty promises, and rights with inappropriate, vague or incomplete remedies are crippled rights. The extent of the injustice is the extent to which rights overreach remedies.

Nowhere is this better illustrated than in Canada’s *Charter* jurisprudence, which you will be discussing tomorrow. Your program is blunt: “Have the first 25 years of the *Charter* resulted in the granting of just and effective remedies?” I do not know what your answers will be, but I can venture this: Canadian courts have worked with diligence and sometimes considerable imagination to fashion appropriate *Charter* remedies—remedies that fit the rights guaranteed by the Charter, respect the proper roles of the legislative and executive branches of government, and are practical. Let me pause for a moment to consider each of the characteristics I have just mentioned—characteristics that I believe have the mark of good remedies not only for the *Charter* but for all areas of the law.

First, remedies that fit the rights guaranteed by the *Charter*. From the start, the Supreme Court insisted that the large and purposive construction that attaches to the conceptual definition of *Charter* rights must be mirrored by a large and generous approach to *Charter* remedies. Despite concerns in the early years that too many laws were falling and criticisms that the Court was treading waters better navigated by Parliament, the Court did not hesitate to find laws inconsistent with the *Charter*. To the extent of their inconsistency, such laws were struck out under s. 52 of the Constitution.

Similarly, the Court did not take a cramped approach to s. 24(2). This section provides that evidence taken in breach of the *Charter* should be excluded where its admission would bring the administration of justice into disrepute. Most recently in *Grant*, a unanimous Court said this about s. 24(2):

its purpose [is] to maintain the good repute of the administration of justice. The term ... embraces maintaining the rule of law and upholding *Charter* rights in the justice system as a whole.⁹

The language of s. 24(1), the general remedy-granting power, can also be read as providing courts with broad discretion in crafting appropriate remedies.¹⁰ As Justice Lamer observed in *Mills v. The Queen*, s. 24(1) “establishes the right to a remedy as the foundation stone for the effective enforcement of *Charter* rights.”¹¹ As an enforcement mechanism, s. 24(1) “above all else ensures that the *Charter* will be a vibrant and vigorous instrument for the protection of the rights and freedoms of Canadians.”¹²

Though the jurisprudence under s. 24(1) remains to be fully developed, it is clear that the provision is free of common law and equitable limits. *Perera v. Canada*, for example, dealt with ordering an apology.¹³ *Eldridge v. British Columbia* mandated the provision of translation services in hospitals for the hearing impaired.¹⁴ *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, was similarly creative. It ordered the provision of legal aid to a woman seeking to remove her children from state custody thereby affecting her *Charter* rights.¹⁵

Such remedial discretion is crucial, notes Kent Roach.¹⁶ It allows the provisions of the *Charter* to have regulatory objectives in their ability to achieve future compliance with the Constitution.¹⁷ The Court, for instance, presently has on reserve the issue of whether s. 24(1) can be used to reduce sentences on account of abusive police conduct. While I cannot speak to the specifics of the case, the Court’s record is clear: it

⁹ *Ibid.*, at para. 67.

¹⁰ *R v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575, at para. 18.

¹¹ *Mills v. The Queen*, [1986] 1 S.C.R. 863.

¹² *Ibid.*

¹³ *Perera v. Canada*, [1998] 3 F.C. 381.

¹⁴ *Eldridge v. British Columbia*, [1997] 3 S.C.R. 624.

¹⁵ *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46.

¹⁶ Kent Roach, “Principled Remedial Discretion Under the *Charter*” (2004) 25 *Supreme Court Law Review* (2d) 101, at pp. 106–113.

¹⁷ See also Kent Roach, *Constitutional Remedies in Canada* (Toronto: Canada Law Book, 1994), at para. 3.40.

takes seriously its duty of crafting remedies that give *Charter* rights full and concrete expression.

Second, the Court's *Charter* record reflects the fact that remedies must respect the role of the legislative and executive branches of government. The Court established early on that laws limiting rights under s. 1 of the *Charter* may require deference by the courts to the legislator, particularly where the laws seek to regulate complex social problems. The most dramatic example is the Court's use of deferred declarations of inconsistency with respect to language rights protected in the Constitution, as seen in *Re Manitoba Language Rights*.¹⁸ Section 52 of the Constitution simply provides that laws are invalid to the extent that they are inconsistent with the *Charter*. The failure of Manitoba to enact laws in both French and English therefore meant that all Manitoba statutes were inconsistent with the *Charter*. Had they been allowed to fall, the result would have been nothing short of disastrous, both in terms of respect for the legislature's will and day-to-day governance. The Court solved this problem by suspending its declaration of inconsistency, giving the laws "temporary force and effect." Such remedies ensure that the Court's ruling on rights is consistent with the role of the legislature and good governance.

Finally, the Court strives to ensure that *Charter* remedies are practical—that they are enforceable in ways that do justice in the case at hand and cases to come. For example, where a plaintiff has succeeded in having a law struck down, the plaintiff may in theory be given a personal remedy. Technically, such a remedy would be retrospective, since the law becomes invalid only after the court decision declaring it inconsistent with the *Charter*. But justice may require recompense, and ways have been found to provide it. The remedy proposed in *Conseil des Écoles Séparées Catholiques Romaines de Dufferin et Peel v. Ontario (Ministère de l'Éducation et de la Formation)* was just as ingenious.¹⁹ The Ontario Court of Appeal refused to reverse the trial judge's decision ordering the province to pay the applicant more than 10 million dollars to build a French-language school in light, in particular, of the fact that instruction in the language of the minority is protected by the *Charter*.

¹⁸ *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721.

¹⁹ *Conseil des Écoles Séparées Catholiques Romaines de Dufferin et Peel c. Ontario (Ministère de l'Éducation et de la Formation)* (1996), 136 D.L.R. (4th) 704, aff'd (1996), 30 O.R. (3d) 681.

On occasion, the Court has used the technique of reading a statute down or reading a missing right into a statute to provide a practical, immediate remedy. For example, in *Vriend v. Alberta*, the majority of the Court held that *homosexuality* must be ‘read in’ to the *Alberta Human Rights Act* as a ground of discrimination.²⁰ This brought the legislation into compliance with the *Charter*. The decision attracted considerable debate; some, including Justice Major in dissent, saw it as trenching too far on provincial legislative power.

The need to provide a practical remedy for a persistently violated language right drove the majority decision in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*.²¹ The Supreme Court confirmed that trial judges have the power to require that a province make its best efforts to build a French-language school, and that they also retain jurisdiction to require that the province report periodically on the progress of those efforts. Again, the decision, affirming as it did an ongoing power of Court surveillance over the execution of the judgment, provoked debate—and continues to do so as reflected by the chapters in this volume discussing the case. I have been speaking of remedial law as applied and developed in formal courts of law. But as your program reflects, the principle that the remedy must fit the rule, right or prohibition at stake applies in other legal contexts. Public bodies and administrative tribunals oversee large sectors of our economy, often with results that directly impact the lives of ordinary Canadians. It is important that the remedies accorded to them are flexible and actually fit. To take but one example, two weeks ago the Supreme Court ruled in the *Bell* cases, that the *Telecommunications Act*²² permitted the CRTC to order the rebate of monies held in deferral accounts.²³

Another area of great importance and interest—and I will stop at this—concerns remedies for violations of aboriginal rights. I am pleased to see that you have this on tomorrow’s agenda. Translating abstract aboriginal rights into the reality of the day-to-day lives of the men, women and children of our many First Nations communities is perhaps the most difficult challenge we face as Canadians. The task requires flexibility and imagination—the ability to think outside the traditional common law box to find solutions that really work. In *Delgamuukw v.*

²⁰ *Vriend v. Alberta*, [1998] 1 S.C.R. 493.

²¹ *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3.

²² S.C. 1993, c. 38, ss. 7, 47.

²³ *Bell Canada v. Bell Aliant Regional Communications*, [2009] 2 S.C.R. 764.

British Columbia, the Supreme Court held that governments were under a duty to negotiate with First Nations on land claims in a spirit of reconciliation.²⁴ The ongoing reality of co-existing and competing claims required more than sterile judgments on paper; it required an on-going consensual process; in other words, a new and innovative remedy dictated by the pre-existing right to be sure, but also by practical realities. In true remedial spirit, the judgment concluded not with a grand statement of principle, but with a simple reality: “Let us face it, we are all here to stay.” A few years later in *Haida*, the Court affirmed a supplementary duty to consult over matters such as forest resources pending final settlement of land claims.²⁵ Old rights and new remedies—both essential ingredients in achieving justice for the peoples of our First Nations and reconciliations of old grievances.

Let me leave you with this thought as you commence your deliberations. If you look up remedy in the dictionary, you will not find much. A little bit about cures, something about medical herbs and poultices, and then this big idea: remedies make things better. They heal wounds. They put things right. Remedies allow us to mend our wounds and carry on—as individuals and as a society. Legal remedies are no exception.

Thank you for your attention. May this conference be a successful one.

²⁴ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

²⁵ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511.