

Charter damages: do rights require remedies?

The British Columbia Court of Appeal recently weighed in on whether damages are available for breach of a Charter right where no bad faith or accompanying tort is proven.

In *Ward v. British Columbia*, [2009] B.C.J. No. 91, the plaintiff brought an action arising out of his arrest. He was mistaken for someone else, detained, taken to police lockup and subjected to a strip search. The strip search was done under a policy found to be ambiguous. The trial judge concluded that the plaintiff's Charter right under s. 8 to be secure against unreasonable search was infringed, either because the strip search was not in accordance with the policy or the policy was unreasonable. While the plaintiff did not prove that the corrections officers acted in bad faith or committed an accompanying tort, the trial judge awarded the plaintiff damages under the Charter.

On appeal, Justice Richard Low, for the majority of the court, held that when the breach of a Charter right results in a law being struck



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down, declaratory relief is an effective remedy because it affects future rights and liabilities, but where the breach is a past wrong committed by government agents, a declaration is only a finding of fact that may not effectively redress it. In such cases, he recognized that requiring a tort or bad faith to justify damages for a Charter breach may deprive the victim of a true remedy. An award of damages may not always be warranted where a person's Charter rights have been breached, but an appropriate and just remedy pursuant to subs. 24(1) must be determined in each case. Justice Low upheld the trial judge's award of damages.

Justice Mary Saunders, writing in dissent, considered the reasons that damages awards are generally given. Since the objective of damages is compensation for loss, she

struggled with the fact that the strip search did not cause pecuniary loss. She reasoned that a damages award was unnecessary to correct the behaviour of those who caused the Charter infringement if they acted without malice or bad faith. She also noted that awarding even nominal Charter damages in recognition of the breach amounts to a form of strict liability. Thus, Justice Saunders concluded that, absent a tort, something like bad faith or wilful blindness is required to award damages under subs. 24(1).

Justice Saunders' conclusion is supported by a 1994 decision of the New Brunswick Court of Appeal. In *McGillivray v. New Brunswick*, [1994] N.B.J. No. 265, the plaintiff had been charged, refused bail and then granted bail and committed to stand trial at her preliminary hearing. Before trial, the charge against her was withdrawn. She claimed damages under subs. 24(1) of the Charter, arguing that her rights were infringed.

In rejecting her claim, the New Brunswick Court of Appeal unanimously concluded that the enforce-

ment of criminal law is one of the most important aspects of maintaining law and order. Without *mala fides* on the part of those charged with carrying out investigations and prosecutions, there can be no recovery. Otherwise, the criminal justice system would cease to function effectively.

McGillivray was cited with approval by the Court of Appeal for Ontario in *Mammoliti v. Niagara Regional Police Service*, [2007] O.J. No. 397, although without significant analysis. In *Mammoliti*, the plaintiff sought a remedy for malicious prosecution and breaches of the Charter. In *Mammoliti*, as in *McGillivray*, the proper functioning of the criminal justice system was squarely engaged. In both cases, unfairness to the accuseds, against whom charges were subsequently withdrawn, could be addressed though the tort of malicious prosecution, if it could be proven.

Perhaps Justice Low was not far off the mark in suggesting that different types of Charter breaches justify different remedies. One can see how the honest, but mistaken, pur-

suit of a criminal investigation ought to be immune from damage awards if malicious prosecution cannot be made out. On the other hand, cases such as *Ward* do not deal with the proper functioning of the justice system, but focus on isolated injustices that arguably warrant some kind of consequence if all rights are to have effective remedies.

In her dissent in *Ward*, Justice Saunders bemoaned the lack of a framework of principles for liability and quantum of damages under subs. 24(1) of the *Charter*. The Supreme Court of Canada will have an opportunity to offer some guidance in *Ward* should it decide to grant the leave application pending before it.

Until some clarity comes from the Supreme Court, counsel will be advised to plead accompanying torts and bad faith in any claim for Charter damages to hedge their bets against the current uncertainty in the law. ■

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