Constitutional Law FOCUS

Conflicting decisions create confusion over Charter damages

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You must prove bad faith or wilful conduct to get damages for a Charter breach in Ontario — but in B.C., proof of just the breach is enough. The issue is now before the Supreme Court — and if the B.C. position prevails, more Charter litigation and awards of "Charter damages" can be expected.

In *Ferri v. Ontario*, [2007] O.J. No. 397, the Ontario Court of Appeal held that proof of "simple negligence" is not sufficient for an award of damages under the Charter. Rather, "wilfulness or *mala fides*" must be shown. This was re-affirmed the same year in *Hawley v. Bapoo*, [2007] O.J. No. 2695, where the court reversed a trial judgment awarding Charter damages in the absence of any finding of bad faith or wilful conduct.

In *Ward v. Vancouver (City)*, [2009] B.C.J. No. 91, the issue came squarely before the B.C. Court of Appeal. Significantly, the court referred only to the trial judgment in *Hawley*, which was subsequently reversed. The appeal decisions in *Hawley* and *Ferri* were not mentioned by the B.C. Court of Appeal — a majority of which concluded that neither bad faith, nor even a tort, are required for an award of Charter damages. The dissent, however, held that such damages are not warranted where "the individuals in question, without *mala fides*, simply made a mistake as to the proper course of action." Notably, the dissent cited the very decision which was the basis for the Ontario Court of Appeal's analysis of the issue: *McGillivary v. New Brunswick* [1994] N.B.J. No. 265 (N.B.C.A.).

Although the Supreme Court refused leave to appeal in *McGillivary*, it granted leave in *Ward*. The appeal was heard on Jan. 18, and the decision is expected this summer. While the court wrestles with the issue, the rest of the country is at loggerheads.

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What is the appropriate threshold for an award of Charter damages? Some guidance may be found in one of the Supreme Court's early Charter decisions. In *Mills v. The Queen*, [1986] 1 S.C.R. 863, Justice William McIntyre wrote that "the *Charter* was not intended to turn the Canadian legal system upside down." Rather, it was to be "fitted into the existing scheme of Canadian legal procedure." This suggests that claims for Charter damages should be approached in a manner analogous to common law claims.

However, if the B.C. position ultimately carries the day, a litigant claiming Charter damages need not prove that any tort was committed, let alone bad faith. On this approach, litigants may

See **Damages** Page 11

Plaintiffs may attempt to overcome deficiencies by raising Charter breaches

Damages

Continued From Page 10

sue for — and be awarded — Charter damages despite having no independent cause of action in law. Plaintiffs might also attempt to overcome deficiencies in their causes of action by raising alleged Charter breaches. For example, in an action alleging malicious prosecution, the breach of a specific Charter right might be pleaded in an attempt to overcome the failure to prove malice.

The Supreme Court, however, recently reaffirmed that malice in this context means an "improper purpose" in *Miazga v. Kvello Estate*, [2009] S.C.J. No. 51. Similarly, for at least some alleged Charter violations, it would be unworkable to do away with a requirement for proof of "intentional" conduct. A breach of the s. 9 right against "arbitrary" detention, for example, would seem to require more that just a neutral factual finding as to a particular occurrence.

Ultimately, as was neatly framed by the dissent in *Ward*, should Charter damages be available where state actors "simply made a mistake" in the otherwise good faith exercise of their duties? The balance of current authority seems to say "no," on the basis that the justice system cannot function properly if so little is required to establish a constitutional tort.

It remains to be seen whether the Supreme Court will turn the analysis upside down and fit the legal system into a new and broadened category of constitutional liability. ■

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