TORT LAW AND THE CHARTER OF RIGHTS

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I. Introduction

Every lawyer knows that the complexion of public law in Canada has been changed dramatically by the *Canadian Charter of Rights and Freedoms.*[1] What is not so widely appreciated is that many aspects of private law may also have been significantly affected by the advent of the *Charter.* This paper will speculate about some of the changes to tort law that the *Charter* might demand or facilitate.

The first section of the paper will examine some general issues concerning the *Charter's* overall impact on tort law. The second section will deal with a number of general defences to tort liability in light of the *Charter.* The concluding section will contain a grab bag of randomly organized thoughts about a miscellany of torts and tort issues.

II. Some General Considerations

1. Does the *Charter* apply to Tort Law?

It is not yet settled whether the *Charter* applies only to the public sector, or whether private sector activities must also respect the constitutional rights it guarantees.[2] Whatever the outcome of that controversy, tort law will not escape the influence of the *Charter.* Firstly, the *Charter* unquestionably applies to the activities of "governments,"[3] and governments are sued in tort from time to time. Secondly, and more importantly, subsection 52(1) of the *Constitution Act, 1982* states that the Constitution, including the *Charter*, constitutes the "supreme law of Canada," and stipulates that "any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." Accordingly, tort law must be consonant with the guarantees contained in the *Charter.*

The only way the conclusion stated in the previous paragraph could be avoided would be by establishing that tort law does not fall within the meaning of the term "any law" in subsection 52(1). While the question has not yet been conclusively resolved, it is highly unlikely that tort law or any other area of chiefly judge-made law will be excluded from the ambit of subsection 52(1). It would not make sense to subject laws made by legislators to *Charter* scrutiny, but to exempt laws made by judges. The ordinary meaning of the words "law" in the English text and of "règle de droit" in

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1. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

   This article is based on a paper delivered to a Canadian Association of Law Teachers seminar at Montebello in early 1986. Its conclusions, specifically with regard to the application of the *Charter* to tort law in private disputes should be read in light of the subsequent decision of the Supreme Court of Canada in *Retail Wholesale and Department Store Union* v. *Dolphin Delivery Ltd.*, (18 December 1986) [unreported].

2. See Dale Gibson, *The Law of the Charter - General Principles*, (1986) Chapter III [hereinafter *General Principles*]. But also see the *Dolphin Delivery* case, *ibid.*, which now address the question.

3. *Charter*, s. 32(1). Although many questions remain unanswered about the meaning of "government," it appears to include municipal government, as well as provincial and federal governments: *Re McCutcheon and City of Toronto* (1983), 41 O.R. (2d) 652, 147 D.L.R. (3d) 193, 20 M.V.R. 267 (H.C.).

the French text are broad enough to embrace both legislative and judicial law.[4] The same words, used in section 1 of the Charter, have been interpreted to include common law provisions.[5] If any difference were justified between the meanings of the same language in sections 1 and 52(1), based on the different purposes of the two sections, it is the latter that would be more likely to receive the broader interpretation. It can safely be concluded, therefore, that tort law is subject to the constitutional guarantees contained in the *Charter*.[6]

2. Does the Charter Create New Torts?[7]

Many *Charter* violations constitute known torts. For example, the imposition of arbitrary detention contrary to section 9 of the *Charter* constitutes liability in tort for false imprisonment. Many forms of "unreasonable search and seizure" under section 8 involve trespass to the person or property, as do many instances of "cruel and unusual punishment or treatment" under section 12.

It is possible, however, to conceive of *Charter* violations that do not appear to fall into well-established categories of tort liability. Suppose, for example, that the authorities at a psychiatric facility denied two long-term compulsory patients the right to marry each other, and that was found to violate their "freedom of association" under section 2 of the *Charter*, or their right to "liberty" under section 7. Or suppose that a prisoner of war or a person imprisoned for sedition were subjected to persistent, non-physical, "brainwashing," and that this was held to violate the guarantee against "cruel and unusual punishment or treatment," or "freedom of thought" under section 2. Would these wrongs, or other *Charter* violations that would not constitute torts in themselves, give rise to tortious liability? I believe they would.[8]

There are, in fact, two distinct bases for tort liability in such situations: (a) subsection 24(1) of the *Charter* and (b) the inherent right of superior

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4. In support of the view that "règle de droit" includes judge- made law, see: A. Gautron, "French/English Discrepancies in the Canadian Charter of Rights and Freedoms" (1982) 12 Man. L.J. 220; H. Mark, "Entrenchment, Limitations and Non- Obstante" in W. Tarnopolsky and G. Beaudoin (eds.), *Canadian Charter of Rights and Freedoms - Commentary* (Toronto: The Carswell Company Ltd., 1982) 61 at 62 [hereinafter *Charter-Commentary*].

5. *Canadian Newspapers Co.* v. *Swail* (1984), 31 Man. R. (2d) 187, at 195-6 (Man. C.A.); *Re Ontario Film & Video Appreciation Society* (1984), 41 O.R. (2d) 583, 2 O.A.C. 388, 34 C.R. (3d) 73. The Supreme Court of Canada has not yet ruled on the matter, merely noting in passing in *R.* v. *Oakes* (1986), [1986] 1 S.C.R. at 103. 65 N.R. 87 at 124, 50 C.R. 1 at 27 [hereinafter *Oakes* cited to S.C.R.], per Dickson, C.J.C., that the question may be "contentious" with respect to s. 1. As to s. 52(1), Dickson C.J.C. commented in a dictum in *Operation Dismantle* v. *R.* (1985), [1985] 1 S.C.R. 441 at 461, 18 D.L.R. (4th) 481 at 494, 12 Admin. L.R. 16 at 36, that:

> [N]othing in these reasons should be taken as the adoption of the view that the reference to 'laws' in s.52 of the Charter is confined to statutes, regulations and the common law. It may well be that if the supremacy of the Constitution expressed in s. 52 is to be meaningful, then all acts taken pursuant to powers granted by law will fall within s. 52.

6. But see *Dolphin Delivery*, *supra*, note 1.

7. See Marilyn Pilkington, "Damages As a Remedy For Infringement of the Canadian Charter of Rights and Freedoms" (1984) 62 Can. Bar Rev. 517. See also C. Whitman, "Constitutional Torts" (1980) 79 Mich. L.R. 5; "Damage Awards For Constitutional Torts: A Reconsideration Hereafter" (1980) 93 Harv. L.R. 966; and comments of McDonald J. in *R.* v. *Germain* (1984), 53 A.R. 264 (Q.B.).

8. In *Lane* v. *Schmeichel* (1983) 20 A.C.W.S. (2d) 547-8 the Saskatchewan Court of Appeal seemed to take a contrary view, striking out a pleading that alleged conspiracy to deprive a plaintiff of his *Charter* rights. It should be noted, however, that the plaintiff appears to have acknowledged that the particular pleading was not intended to set up an independent cause of action; and that he was given leave to amend the statement of claim to achieve his actual purpose, which was to use the *Charter* in support of a claim for wrongful dismissal.

courts to award a remedy for violation of legal rights where no other remedy is specified.

Subsection 24(1) bestows sweeping discretionary remedial powers on the courts:

> 24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Despite its breadth, section 24(1) is subject to some limitations. The requirement that the court be one of "competent jurisdiction" requires competence as to remedy, as well as competence as to subject matter and parties.[9] This means that the remedy sought must be within the normal weaponry available to the court in question. Another possible limitation might be inferred from the use of the past tense in describing the potential applicants: "anyone whose rights or freedoms . . . *have been* infringed or denied . . ." This terminology might be interpreted to mean that persons who fear an impending breach of their *Charter* rights would not have a remedy under subsection 24(1). So far, however, the courts do not appear to be taking so narrow a view; impending violations have been held to be amenable to *Charter* remedies in a number of instances.[10] The chief limitation on one's right to obtain a remedy under subsection 24(1) is that the remedy is discretionary; a court may decline to award the remedy if it does not regard it as "appropriate and just in the circumstances."

Damages have been awarded for violation of *Charter* rights in a few cases. In *Crossman* v. *The Queen*,[11] Walsh J. of the Federal Court of Canada, Trial Division, awarded damages of $500.00 to a person who was denied the right to counsel following arrest, even though the denial did not result in any evidence being obtained by the Crown. The damages were, interestingly, described as "punitive" in nature. In *Bertram S. Miller Ltd.* v. *The Queen*[12] Dube J. of the same court awarded more than $13,000 in damages for an unconstitutional seizure of plants belonging to the plaintiff.

Relief might not always be available under subsection 24(1). A court might decide, for example, to refuse a remedy under its discretionary power to decide that no remedy is "appropriate and just in the circumstances." A plaintiff is not necessarily without a remedy in that situation, however. It would still be possible, before a superior court, to seek relief on the basis of the ancient maxim: "ubi jus, ibi remedium" (where there is a right, there is a remedy). As long ago as the eighteenth century, the House of Lords decided that denial of a person's legal right to vote could, in the absence of any statutory remedy, justify the imposition of tortious liability by a superior court.[13] The English Court of Appeal affirmed, very recently, that a public officer who causes harm by knowingly acting in an unlawful manner is

9. See *General Principles, supra*, note 2, c. VIII. See also the comments of Kopstein P.C.J. in *R.* v. *Coglan* (1983), 3 C.R.D. 425.45-01 (Man. P.C.).

10. See *General Principles, supra*, note 2, Chapter VI.

11. (1984) 9 D.L.R. (4th) 588 (F.C.T.D.).

12. (1985) 18 D.L.R. (4th) 600 (F.C.T.D.).

13. *Ashby* v. *White* (1703), 2 Ld. Raym. 938, 92 E.R. 126.

liable for damages in tort.[14] Decisions of that kind are rooted in the venerable action on the case, which was responsible for a large proportion of modern tort law, and still occasionally sends up new shoots. Although the most celebrated modern application of the action on the case, *Beaudesert Shire Council* v. *Smith*,[15] has been justifiably criticized,[16] the action on the case would seem to remain available for cases where rights have been violated and no other remedy is available.[17]

It might be argued that reliance on the "ubi jus, ibi remedium" principle or the action on the case is not appropriate for violation of *Charter* rights because subsection 24(1) establishes a remedy and should be read as being the exhaustive source of remedies for *Charter* violations. That view is not likely to receive much judicial support, however. Section 26 of the *Charter* states that the guarantee of certain rights and freedoms in the *Charter* "shall not be construed as denying the existence of any other rights and freedoms that exist in Canada." This appears to mean that a citizen's pre-*Charter* right to seek from a superior court a remedy for any violation of right that would otherwise go unremedied is preserved by section 26.

3. Usefulness of interprovincial Comparisons

Tort law varies considerably from one province to another in Canada, even among the common law provinces. A lawyer acting for a client who is detrimentally affected by some aspect of provincial tort law that appears to be less satisfactory than the equivalent law in other provinces might be tempted to invoke the equality rights section of the *Charter*—subsection 15(1)—and attempt to argue that the client is being discriminated against on geographic grounds by being treated less fairly than he or she would be treated in other provinces. In a province that retains spousal immunity, for instance, it might be contended that equality demands the judicial abolition of such immunity in order to conform to the situation in other provinces where it has been legislatively abolished. Or the right of a civil jury trial in tort litigation, which exists in some provinces, might be sought in all. Such arguments are unlikely to succeed, however.

In the first place, "equal" does not mean "the same." True equality demands only that everyone be treated with equal fairness and equal respect—including respect for their differences.[18] Equality on the basis of sex does not imply unisex washrooms; in that context it means only that the separate and somewhat different washroom needs of men and women be equally provided for. Similarly, equality does not mean that every Canadian should be subjected to the same laws as every other Canadian; it means only that Canadians in one part of the country should not be treated in a

14. *Bourgoin S.A* v. *Ministry of Agriculture, Fisheries & Food* (1985), [1985] 3 W.L.R. 1027, 3 All E.R. 585 (C.A.).

15. (1966), 120 C.L.R. 145, 40 A.L.J.R. 211, [1966] A.L.R. 1175 (H.C.).

16. G. Dworkin and A. Harari, "The Beaudesert Decision—Raising the Ghost of the Action Upon the Case" (1967) 40 A.L.J.R. 296; *Lourko Ltd.* v. *Shell Petroleum Co.* (1981), [1982] A.C. 173, [1981] 3 W.L.R. 33, [1981] 2 All E.R. 456 (H.L.).

17. See T.G. Watkin, "The Significance of 'In Consimili Casu' " (1979) 23 Am. J. Legal Hist. 283; D. Gibson, "The New Tort Discrimination: A Blessed Event for the Great-Grandmother of Torts" (1980) 11 C.C.L.T. 141.

18. See, generally A. Bayefsky and M. Eberts (eds.), *Equality Rights and the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1985).

manner that is unreasonably more detrimental than the way other Canadians are treated. The *Constitution Act, 1867*, recites a desire to be "federally united," and federalism is as much a part of the Canadian constitutional fabric as are the fundamental rights entrenched in the *Charter*. That means that every province has the right to seek its own legislative solutions within its area of jurisdiction. Differences in tort law between provinces will likely be immune from *Charter* attack unless the peculiar law of a particular province offends a *Charter* right and fails to be recognized by the courts as a "reasonable limit in a free and democratic society" under section 1 of the *Charter*.

This does not mean that inter-provincial comparisons are altogether useless. When determining whether a particular provincial aberration is a "reasonable limit" under section 1, it is entirely appropriate to examine the equivalent law of other provinces.

Consider, for example, Manitoba's *The Nuisance Act*.[19] That statute, enacted as a direct result of a nuisance ruling with which the provincial minister in charge of environmental matters disagreed, abolishes the right to sue in nuisance for any odour emanating from a business, if no statutory or regulatory provisions have been violated. Assuming, for the sake of argument, that the statutory abolition of the right to sue with respect to noxious odours would constitute a violation of the right to "security of the person" under section 7 of the *Charter*, a court faced with a *Charter* attack on *The Nuisance Act* would have to determine whether it is a "reasonable limit in a free and democratic society." The fact that similar legislation does not exist anywhere else in the country, would add weight to the argument that it is not.

III. General Defences

1. Consent

It has occasionally been suggested that the consent defence to a tort claim could not be relied upon in a situation where the effect of the consent would be to waive a fundamental human right or freedom. For example, in *R.* v. *White*[20] the British Columbia Court of Appeal ruled that an individual may not validly consent to imprisonment. The case concerned the power of the Royal Canadian Mounted Police to imprison members of the Force for service offences. In the course of considering whether such a power could have a contractual basis Sloan C.J.B.C. stated, on behalf of the Court: ". . . I do not think it has ever been suggested that a party to an ordinary contract could give an irrevocable license to invade his personal liberty by the imposition of sentences of imprisonment, . . ."[21] Although the Supreme Court of Canada declined to rule on that issue in the *White* case, more

19. *The Nuisance Act*, S.M. 1976, c. 53, C.C.S.M. N120.

20. [1954] 4 D.L.R. 714, *(sub nom. Re White)* 12 W.W.R. (N.S.) 314, 109 C.C.C. 247 (B.C.C.A.) [hereinafter *White* cited to [1954] 4 D.L.R.], rev'd on other grounds (1956), [1956] S.C.R. 154, 1 D.L.R. (2d) 305, 114 C.C.C. 77.

21. *Ibid.*, at 719. See also *Horwood* v. *Millar's Timber and Trading Co.* (1916), [1917] 1 K.B. 305, [1916] W.N. 403 (C.A.), in which the English Court of Appeal struck down a money-lending agreement, which placed heavy restraints on the borrower, on the grounds that public policy would not countenance such fetters on the borrower's "freedom of action." And see K.F. Tan, "A Misconceived Issue in the Tort of False Imprisonment" (1981) 44 Mod.L.Rev. 166.

recent decisions by that court suggest that it might now agree with Sloan C.J.B.C.

In *Re Winnipeg School Division No. 1 and Craton*[22] the Supreme Court of Canada ruled that a school teacher could rely upon the prohibition against age discrimination in provincial human rights legislation to resist retirement at age 65, as required by other provincial legislation. The human rights legislation was found to take precedence over other statutes. The School Division argued that the teacher had contracted out of her rights under the human rights legislation because the collective agreement, to which she was bound, recognized mandatory retirement at 65. McIntyre J. held that: "*The Human Rights Act* is legislation declaring public policy and may not be avoided by private contract."[23] While the decision did not deal directly with the question of contracting out of *Charter* rights, its rationale would appear to be even more applicable to the *Charter* than to ordinary human rights legislation.

The explanation provided by McIntyre J.—that the legislation in question declared "public policy"—was not very helpful in explaining the circumstances under which contracting out is or is not permitted. If, however, the case is examined in light of the authorities upon which it drew for support, it would appear that it is contrary to public policy, and therefore impermissible, to contract out of one's "fundamental rights."[24] Since it would be difficult to imagine a law containing rights more "fundamental" than those contained in the *Charter* the implication appears to be that one may not contract out of *Charter* rights. To the extent, therefore, that tortious behaviour involves a violation of *Charter* rights, the consent defence may be less applicable than it was before the *Charter* came into force.

It is by no means clear, however, that the protection against contracting out of fundamental rights is absolute. While there is no suggestion in the *Craton* case, or the others upon which it relies, that the right to contract out of the *Charter* is restricted, it would not be surprising if future decisions produced refinements and qualifications. It must be remembered that any prohibition on contracting out is itself a denial of a fundamental right: the liberty of personal choice.

The Ontario Court of Appeal has held, in *R.* v. *Heaslip*,[25] that an accused person can contract out of procedural, as opposed to substantive, fundamental rights. The case was decided before *Craton*, however, and is therefore open to question in light of that later decision. It is also open to question on the grounds that the "procedural" rights referred to—the right to be tried within a reasonable time—was of a more "fundamental" nature than the right involved in an earlier Supreme Court of Canada case, which

22. (1985), [1985] 2 S.C.R. 150, [1985] 6 W.W.R. 166, 38 Man. R. (2d) 1.

23. *Ibid.* at 154

24. See *General Principles, supra*, note 2, c. V. Contrast *Re Energy & Chemical Workers' Union* (1985), 24 D.L.R. (4th) 675 (F.C.A.), in which the *Craton* case was not mentioned. The decision might be distinguished on the ground that it involved a merely procedural right. See below.

25. (1983), 1 O.A.C. 81 at 88, 9 C.C.C. (3d) 480 at 491, 3 C.R. (3d) 309 at 319 (C.A.). See also *Bowen* v. *Minister of Employment & Immigration* (1984), [1984] 2 F.C. 507, 58 N.R. 223 (C.A.).

recognized a distinction between procedural and substantive provisions of the purpose of waiver.[26]

Whether or not the procedural/substantive distinction continues to be employed in this regard, there are other possible limitations on the prohibition against contracting out of *Charter* rights that might be recognized. Prior independent advice could be a basis for permitting contracting out. A distinction might be drawn between revocable and irrevocable consent. Contracting out might be permitted on a selective ("retail") basis rather than a total ("wholesale") basis. It is possible that the courts may eventually fall back on some general standard analogous to that set out in section 1 of the *Charter* itself: is the waiver, in light of all the surrounding circumstances, a reasonable one to permit in a free and democratic society?

2. Illegality

In the opinion of the author, and of others who have written on the subject, the maxim "ex turpi causa non oritur actio" (no right of action arises from a base cause) should have no application to the law of tort.[27] The courts continue to flirt with the idea, however, occasionally denying recovery in tort to plaintiffs who are tortiously injured in the course of illegal conduct.[28]

There is a good chance that the *Charter* will change the situation, so far as Canada is concerned. To apply the *ex turpi causa* principle in tort cases can be said to offend the *Charter* in at least three respects. First, there is a right under subsection 11(8) of the *Charter* not to be subjected to double jeopardy: ". . . if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again." If the plaintiff who is denied compensation for tortiously caused injuries on the basis of the *ex turpi* principle has already been tried on the criminal charge, it is submitted that the additional civil penalty would violate subsection 11(h). Secondly, if, as is commonly the case where the *ex turpi* defence is applied, the plaintiff has not been tried for, or perhaps not even charged with, the offence in question, his or her rights under section 7 of the *Charter* not to be deprived of ". . . security of the person . . . except in accordance with the principles of fundamental justice" would seem to be violated; a civil process, requiring proof by only a preponderance of probability rather than beyond reasonable doubt, is applied in place of the criminal process, with its traditional protections for the accused. Thirdly, there would also be a possible violation of the right to equality under subsection 15(1) of the *Charter*, in that those wrongdoers who fortuitously happened to suffer tortious injuries would be made to bear more severe legal consequences for their wrongdoing than those who happened not to have been injured.

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26. *Korponey v. A.G. Canada* (1982), [1982] 1 S.C.R. 41, 132 D.L.R. (3d) 354, 26 C.R. (3d) 343.

27. G. Williams, *Joint Torts and Contributory Negligence* (London: Stevens & Sons Ltd., 1951) 333; D. Gibson, "Torts—Illegality of Plaintiffs' Conduct As a Defence" (1969) 47 Can. Bar Rev. 89; E.J. Weinrib, "Illegality as a Tort Defence" (1976) 26 U.T.L.J. 28.

28. For example, *Rondos v. Wawrin* (1967), 66 D.L.R. (2d) 272, 64 W.W.R. 690 (Man. C.A.); *Tallow v. Tailfeathers* (1973), 44 D.L.R. (3d) 55, [1973] 6 W.W.R. 732 (Alta. C.A.); *Smith v. Jenkins* (1970), 119 C.L.R. 397, 44 A.L.J.R. 78, A.L.R. 519 (H.C.); *Ashton v. Turner* (1980), [1980] 3 W.L.R. 736, 3 All E.R. 870 (Q.B.). In the *Jenkins* decision the majority of the Australian High Court took a novel approach: denying a direct application of the *ex turpi* principle, but finding for the same policy reasons that are said to underlie that principle that no duty of care existed.

3. Special Immunities[29]

Governments, and those who act on behalf of governments, or otherwise carry out governmental responsibilities, have in the past been granted certain immunities from legal liability. The earliest, and at one time the most sweeping, of these special immunities was the rule that the Crown was absolutely immune from legal liability to which it did not voluntarily submit: "The King can do no wrong."[30] Although this rule has been legislatively eroded over the years, vestiges of it persist.

The most extreme immunity principle recognized by the courts at the advent of the *Charter* was the rule that governments and those who act on their behalf are not liable for the harmful consequences of their *policies*, but are only liable for the negligent or otherwise wrongful *implementation* of the policies.[31] Other forms of immunity include the absolute exemption of judges[32] and prosecutors[33] from personal liability for their official acts, and a multitude of statutory immunities, sometimes absolute and sometimes qualified, covering particular circumstances.[34]

Although these immunities would apply, where appropriate, to claims based upon the *Charter*, it is important to bear in mind that they are themselves subject to *Charter* norms.[35]

The immunity from liability for governmental policies has probably been abolished altogether, so far as policies that violate the *Charter* are concerned, by the explicit reference in subsection 32(1) to "all matters" within the authority of legislative bodies and their respective governments. As Dickson J. (as he then was) said, for a majority of the Supreme Court of Canada, in *Operation Dismantle Inc.* v. *The Queen*: "I have no doubt that the executive branch of the Canadian Government is bound to act in accordance with the dictates of the *Charter*."[36]

Common law and statutory rules bestowing absolute or qualified immunity to judges,[37] administrators[38] or others are well challengeable under the equality guarantee found in section 15. For example, the rule that

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29. This section is drawn chiefly from *General Principles, supra*, note 2, c. V.

30. See P.W. Hogg, *Constitutional Law of Canada*, 2d ed. (Toronto: The Carswells Ltd., 1985) at 215-240 [hereinafter *Constitutional Law*]; and P.W. Hogg, *Liability of the Crown in Australia, New Zealand and the United Kingdom* (Melbourne: The Law Book Co.: 1971).

31. *Barratt* v. *North Vancouver*, (1980), [1980] 2 S.C.R. 418, 114 D.L.R. (3d) 577, 33 N.R. 293.

32. See *Constitutional Law, supra*, note 29 at 672. See also *Morier and Boily* v. *Rivard* (1985), [1985] 2 S.C.R. 716, 64 N.R. 46, 17 Admin. L.R. 230, where the immunity was discussed without reference to the *Charter*, but in a case that arose before the *Charter* was in force.

33. *Richman* v. *McMurtry* (1983), 147 D.L.R. (3d) 748, 25 C.C.L.T. 152 (Ont. H.C.). See also *Levesque* v. *Picard* (1985), 66 N.B.R. (2d) 87, 169 A.P.R. 87, 34 C.C.L.T. 276 (C.A.)and *Nelles* v. *R.* (1985), 51 O.R. (2d) 513, 21 D.L.R. (4th) 103, 10 O.A.C. 161 (C.A.). These cases were all based on conduct that preceded the coming into force of section 15 of the *Charter*.

34. *Crown Liability Act*, R.S.C. 1970, c. C-38, s. 3(6); *Customs Act*, R.S.C. 1970, c. C-40, ss. 141(6), 151; *The Mental Health Act*, R.S.M. 1970, c. M110, ss. 94 and 95, C.C.S.M. M110, ss. 94 and 95.

35. See M. Pilkington, "Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms" (1984) 62 Can. Bar Rev. 517 at 534 and 556.

36. *Operation Dismantle, supra*, note 5 at 455.

37. See D. Brillinger, "Suit May Proceed Against Judge, N.B. Court Decides" *The Lawyers Weekly* (26 Sept. 86)1.

38. A Minister of the Crown was held to be exempt from the *Charter's* equality provisions in *Kurolak* v. *Minister of Highways and Transportation* (1986), 28 D.L.R. (4th) 273 (Sask. Q.B.), but only on the clearly erroneous basis that he was not an "individual" within the meaning of section 15.

Attorneys-General and their prosecuting staffs are immune from liability for malicious prosecution in circumstances where a private citizen would be liable clearly denies equality before or under the law.[39] Such immunities will survive *Charter* attack only to the extent that particular immunities can be demonstrated to be "reasonable limits . . . demonstrably justified in a free and democratic society."

4. Necessity

Two decades of Canadian law students have been made to debate the propriety of granting a defendant absolute immunity with respect to harm deliberately caused to another person in order to save the defendant or the defendant's property from a greater harm. In *Manor Ltd.* v. *The Crosbie*[40], the Exchequer Court of Canada decided that the necessity defence should be applied absolutely in such circumstances, without any attendant duty to compensate. This decision has attracted considerable academic criticism.[41] The consensus among law students and law professors seems to be that the defendant should be required in those circumstances to at least share the cost of the damage inflicted with the plaintiff.

It is possible that the *Charter* provides a basis for attacking decisions like the one in *Manor Ltd.* v. *The Crosbie*. It is at least arguable that making the plaintiff bear the full brunt of the cost in such circumstances involves inequality between the plaintiff and the defendant, as well as inequality between the plaintiff and another plaintiff who might choose in the same situation to retaliate with necessitous measures of his or her own.

A more successful argument might be based on section 7. It could be contended that to deprive the plaintiff of the right to compensation for injuries deliberately inflicted would constitute a deprivation of the right to "security of person" in a manner that does not satisfy "principles of fundamental justice." Where the injury in question relates to property, as in the *Manor* case, rather than the person, section 7 might not be applicable, because it is widely regarded as not applying to property rights.[42] Much remains unclear, however, about the scope of section 7. It is still possible that the phrase "security of the person" will ultimately be interpreted to include the security provided by the law against tortious invasions of important personal interests, including property rights.

IV. Miscellaneous Issues

1. Defamation

The law of defamation probably raises more obvious *Charter* issues than any other area of tort law. This is because defamation involves a constant tug-of-war between the plaintiffs' right to be protected from unjustified assaults upon their reputations and the defendants' fundamental right,

39. See *supra*, note 32. Section 15 arguments were not considered, though U.S. cases were considered in *Richman*. It has been suggested that even the interjurisdictional immunity that the Crown is said to have with respect to the laws of another order of government may be inconsistent with the equality guarantee: Law Reform Commission of Canada, *The Legal Status of the Federal Administration* (Working Paper No. 40, 1985) at 15.

40. (1965), 52 D.L.R. (2d) 48 (Ex.Ct), aff'd (*sub nom. Munn & Co.* v. *The Crosbie* (1967), [1967] 1 Ex. C.R. 94 (Ex.Ct).

41. See, for example: "Editorial Note" in *Manor Ltd.* v. *The Crosbie* (1965), 52 D.L.R. (2d) 48 (Ex. Ct); J.G. Fleming, *Law of Torts*, 6th ed. (London: The Law Book Company Ltd., 1983) at 90.

42. See *Manicom* v. *County of Oxford* (1985), 21 D.L.R. (4th) 611 (Ont. Div. Ct). But see dictum of Morse J. in *Re Air Canada and City of Winnipeg* (1984), 9 D.L.R. (4th) 234 (Man. Q.B.).

now entrenched in section 2 of the *Charter*, to freedom of expression. Although these two values have always been in apposition in defamation law, and they might well be found to be satisfactorily balanced under existing law, the fact that subsection 52(1) of the *Constitution Act, 1982* gives *Charter* norms the status of "supreme law" leaves room to argue that some aspects of defamation law require a readjustment of the balance.

The defence of fair comment springs most readily to mind. At common law, the right to make a defamatory statement of opinion upon a matter of public importance has been restricted to statements that do not convey any erroneous facts.[43] This places an onerous burden on those who venture to exercise their freedom of expression about matters of public significance, since it is very difficult to restrict one's comments to pure opinion, particularly in light of the uncertain boundary between fact and opinion. In the United States, it has been held that the constitutional guarantee of free speech overrides the common law of defamation in this regard. The guarantee permits even factually erroneous statements to be made in comments about matters of public importance, unless the comments were made with knowledge of the falsity of the statements, or with reckless disregard for whether or not they were true.[44] Although the case in which that ruling was made involved a public official as plaintiff and a media professional as defendant, it has been suggested that the same principle would also apply in some circumstances involving private plaintiffs and defendants.[45] The *Charter* has now created an opportunity for Canadian courts to examine the desirability of modifying the fair comment defense in a similar manner.

Another possibility is the creation of a new category of qualified privilege for the media.[46] The Supreme Court of Canada denied the existence of such a privilege in *Banks* v. *Globe & Mail Ltd.*,[47] but it is now possible to argue that the specific reference to "freedom of the press and other media of communication" in subsection 2(b) of the *Charter* bestows a sufficient interest on the media to justify a change in the law. On the other hand, of course, the fact that this reference to freedom of the press is not listed as a distinct freedom, but is merely included as part of the general freedom of expression under subsection 2(b), might be taken to indicate that the drafters of the *Charter* did not wish to recognize a special legal status for members of the media.

Another Supreme Court of Canada ruling that might call for re-examination in light of the *Charter* is *Cherneskey* v. *Armadale Publishers Ltd.*[48] There the Court held that in order to take advantage of a fair comment defence with respect to a letter to the editor published in a newspaper, the

43. *Murphy* v. *La Marsh* (1971), 18 D.L.R. (3d) 208, [1971] 2 W.W.R. 196 (B.C.C.A.).

44. *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964).

45. "Mediaocracy and Mistrust: Extending New York Times Defamation Protection to Non-Media Defendants" (1982) 95 Harv. L.R. 1876.

46. See M.R. Doody, "Freedom of the Press, the Canadian Charter of Rights and Freedoms, and a New Category of Qualified Privilege" (1983) 61 Can. Bar Rev. 124; see also C. Beckton, "Freedom of Expression" in *Charter-Commentary, supra*, note 4, 75 at 93.

47. (1961), [1961] S.C.R. 474, 28 D.L.R. (2d) 343.

48. (1978), [1979] 1 S.C.R. 1067, 24 N.R. 271, 90 D.L.R. (3d) 321.

management of the newspaper would have to hold an honest belief in the opinions expressed by the letter writer, or prove that the writer of the letter held such a belief. The decision, upon which the Court was divided, aroused considerable criticism,[49] and led to legislative reform in some jurisdictions.[50] Since the effect of the decision, in practical terms, was to suppress a very significant outlet for the expression of opinion by members of the public, a strong argument can be made that it will not stand *Charter* scrutiny. In any jurisdiction that has not altered its law to counteract the *Cherneskey* decision, a *Charter* attack on it would probably stand a reasonable chance of success.

What about politicians' privilege? The Supreme Court of Canada held in *Jones* v. *Bennett*[51] that a provincial Premier, speaking at a constituency meeting at which the press was present, could not claim the protection of privilege for a statement made concerning the reasons for dismissing a civil servant. Although the Premier's duty to report on public matters to the constituency may have been a basis for privilege, Cartwright C.J.C., who wrote the Court's reasons, regarded the presence of the press as destroying the privilege because it ensured that the Premier's words would be published not just to the constituency but "to the public generally." That decision, and others like it, call for re-examination in light of the fact that the *Charter* has now given the status of "supreme law" to both freedom of expression in general and freedom of the press in particular.

B. Privacy

The *Charter* could have both an expanding and a contracting influence on liability for violations of privacy.

On the one hand, the constitutionalization of free expression could have the effect of softening the obligation to respect professional or other legally protected confidences in some circumstances. For example, it will now be easier for Canadian courts to adopt the approach taken (without benefit of a constitutionally entrenched freedom of expression) by Lord Widgery C.J. in *Attorney General* v. *Jonathan Cape Ltd.*[52] that the confidentiality of the cabinet room must yield to the demands of public disclosures of public matters after a reasonable lapse of time. A similar approach might be justified on the basis of freedom of expression with respect to lawyers' files in cases of historical significance, at least after the death of the clients.

On the other hand, it is possible to argue that in certain other respects the *Charter* has expanded the possibilities of civil liability for violations of privacy. Section 8, which prohibits "unreasonable searches and seizures," certainly protects privacy interests,[53] and although the appropriate remedy will often be simply an acquittal or exclusion of evidence from a criminal

49. See, for example, M.R. Doody, "Commentary" (1980) 58 Can. Bar Rev. 174.

50. For example, *The Defamation Act*, R.S.M. 1970, c. D20 as am. S.M. 1980, c. 30, s.3, C.C.S.M. D20, s. 9.1(1).

51. (1968), [1969] S.C.R. 277 at 285, 2 D.L.R. (3d) 291 at 297, 66 W.W.R. 419 at 426. See also the critical analysis in D. Weiler, *In the Last Resort* (Toronto: Carswell/Methuen, 1974) c. 3 at 79-86.

52. (1975), [1976] Q.B. 752, [1975] 2 W.L.R. 606, [1975] 3 All E.R. 484.

53. In *Hunter* v. *Southam Inc.* (1984), 11 D.L.R. (4th) 641 at 652 Dickson J. (as he then was) said, for a unanimous Court, that section 8 establishes "an entitlement to a 'reasonable' expectation of privacy."

proceeding, there are circumstances in which a civil remedy would be more "appropriate and just" within the meaning ofsubsection 24(1).[54]

Other provisions of the *Charter* might also form the basis of a claim for civil relief for violations of privacy. The term "security of the person" in section 7 might well include security from unreasonable intrusions into one's private world or unreasonable revelations about it. Freedom of conscience and freedom of thought, guaranteed by subsections 2(a) and 2(b), respectively, would clearly provide protection against "brainwashing" types of intrusion. Moreover, some students of the *Charter* believe that the section 2 freedoms include the right *not to do* the thing in question. For example, "freedom of association" includes the right not to associate with anyone, and "freedom of expression" includes the freedom to say nothing. If this is the case, the right to be "let alone" derives considerable support from section 2.

C. Strict Liability for Government Programs

In *Lapierre* v. *Attorney General of Quebec*[55] the Supreme Court of Canada denied compensation to a child who developed viral encephalitis as a result of a measles vaccine program administered to children by the government of Quebec. There was no evidence of negligence in the preparation or the administering of the vaccine, but there was a known risk that one person out of every million vaccinated would contract encephalitis. Given the size of the population vaccinated (about 85,000) this program involved the risk of something less than 1 in 10 that one of the children treated would develop the disease. The risk materialized for Nathale Lapierre.

The plaintiff's action against the government of Quebec sought compensation on a no-fault basis. The Supreme Court of Canada agreed with the Quebec Court of Appeal that no known legal principles supported such a right to compensation, though the reasons for judgement concluded by quoting McCarthy J.A. who had stated that liability in such circumstances "would be an excellent thing."

The *Lapierre* case was based on facts that occurred in 1982, long before the *Charter* was in force. It is possible that if similar facts arose again in the future the decision might be re-examined from a *Charter* perspective. Although the Court distinguished this situation from one of necessity, the questions to be examined would be similar to those that arise in the context of the necessity defence: a) does such a program threaten the plaintiff's "security of person"?; b) is it contrary to principles of "fundamental justice" to subject the plaintiff to the risk without an accompanying right to compensation?; and c) if section 7 is violated, does the program nevertheless constitute a "reasonable limit" under section 1 of the *Charter*?

54. See remarks of Huband J.A. in *R.* v. *Esau* (1983), 142 D.L.R. (3d) 561, 20 Man. R. (2d) 230, 4 C.C.C. (3d) 530.

55. (1985), [1985] 1 S.C.R. 241, *(sub nom. Lapierre v. Quebec)* 58 N.R. 161, 16 D.L.R. (4th) 554.

D. Quickies

1. Picketing

Is it possible that the dissenting judgement of Laskin C.J.C. in *Harrison* v. *Carswell*,[56] to the effect that a right to picket peacefully on quasi-public property such as the common spaces at shopping centres cannot be removed by the occupier of the property, could become the law now that the *Charter* has entrenched the freedoms of expression and peaceful assembly? Are Canadian courts now less likely to follow the ruling of the English Court of Appeal in *Hubbard* v. *Pitt*[57] that peaceful picketing can constitute the tort of nuisance? Has the advent of the *Charter* increased the reasons for doubting the ruling of the Ontario Court of Appeal in *Hersees* v. *Goldstein*[58] that peaceful secondary picketing constitutes wrongful interference with contract and conspiracy?

2. Fatal Accidents Legislation

Do the survivorship claim statutes that restrict the category of claimants to those who are formally related to the deceased (by benefitting spouses but not unmarried cohabitants, for example) offend the prohibition against discrimination in subsection 15(1) of the *Charter*?

3. Damages

Does the award of punitive damages in a civil proceeding violate the *Charter* right to be proved guilty beyond reasonable doubt where an "offence" is involved, the right to be protected from double jeopardy, or the right to equality of treatment under section 15? Would a ruling, like that in *Arnold* v. *Teno*[59] that the loss of future earnings suffered by a young injured girl should be estimated on the basis of her mother's (rather poorly paid) career path, without regard to the father's situation, now run afoul of the equality guarantee in section 15?

4. Loss of Consortium

Does the discrimination between men and women evident in decisions like *Best* v. *Samuel Fox & Co.*,[60] in which wives were denied the right to sue for the loss of their husband's consortium, though husbands could recover in similar circumstances, contravene the *Charter's* guarantee of equality? Two courts have held that it does, but have disagreed as to what to do about it. In *Shkwarchuk* v. *Hansen and Tillman*,[61] McLeod J., of the Saskatchewan Court of Queen's Bench, denied the husband's action. In *Power and Power* v. *Moss*,[62] Aylward J., of the Newfoundland Supreme Court, held

56. (1976), [1976] 2 S.C.R. 200, 58 N.R. 523, 62 D.L.R. (3d) 68.
57. (1975), [1976] Q.B. 142, [1975] 3 W.L.R. 201, [1975] 3 All E.R. 1 (C. A.).
58. (1963), [1963] 2 O.R. 81, 38 D.L.R. (2d) 449 (C.A.). See also H. Arthurs, "Commentary" (1963) 41 Can. Bar Rev. 573.
59. (1978), [1978] 2 S.C.R. 287, 19 N.R. 1, 83 D.L.R. (3d) 609.
60. (1952), [1952] A.C. 716, [1952] 2 T.L.R. 246, [1952] 2 All E.R. 394 (H.L.).
61. (1984), 34 Sask. R. 211, 30 C.C.L.T. 121, 12 C.R.R. 369 (Q.B.).
62. June 13, 1986, unreported.

that a better solution would be to extend the right to wives and leave to the legislators any decision to abolish liability. The latter decision is, it is submitted, more consistent with the stipulation in section 26 of the *Charter* that its provisions should not be construed as denying existing rights.

IV. Conclusion

Whenever a *Charter* challenge is made to some aspect of the law itself, as in most of the above questions, it is open to the court to conclude that even if a *prima facie* breach of the *Charter* has been established, the law in question constitutes a "reasonable limit in a free and democratic society" within the meaning of section 1 of the *Charter*.[63] Many features of existing tort law will undoubtedly be upheld as reasonable limits despite their interference with certain *Charter* rights.

It would be a mistake to assume that the status quo will be found to be reasonable in its entirety, however. It should be noted that the onus of proving that a restriction on a *Charter* right is "reasonable" lies on those who support the restriction. They must persuade the court (normally by evidence, although it is open for a court to take judicial notice of obvious justification[64]) that the goal sought to be obtained by the restriction is justifiable and that the means employed are reasonable. Although the standard of proof required is the civil one—proof by preponderance of probabilities—the *degree* of probability required will rise in proportion to the seriousness of the restriction. This means that tort law is now called upon to demonstrate the virtues of its longstanding assumptions wherever those assumptions significantly affect rights or freedoms that have been constitutionalized by the *Charter*.

While it would be unreasonable to expect wholesale radical changes in tort law to result from this process, the possibilities should not be underestimated. The *Charter* has provided the courts with an opportunity to carry out some of the essential reforms to tort law that the legislators seldom find the time or interest to get around to. It is to be hoped that the courts will avail themselves of the opportunity.

63. See *General Principles*, *supra*, note 2, c. IV; see also *R.* v. *Oakes*, *supra*, note 5.

64. *Oakes*, *ibid.*, at 136-7: "The onus of proving that a limit on a right or freedom guaranteed by the Charter is reasonable and demonstrably justified in a free and democratic society, rests upon the party seeking to uphold the limitation." *Ibid.* at 138: "Where evidence is required in order to prove the constitutional elements of a s. 1 inquiry, and this will generally be the case, it should be cogent and persuasive . . . I should add, however, that there may be cases where certain elements of the s. 1 analysis are obvious or self-evident."