

Henry v British Columbia (Attorney General): A New Constitutional Tort Standard?

Cheryl Milne

The Supreme Court of Canada rendered its decision in *Henry v. British Columbia (Attorney General)* on May 1, 2015, a case in which the David Asper Centre for Constitutional Rights and the British Columbia Civil Liberties Association jointly intervened. Among the issues the Court considered was whether an individual who was wrongfully convicted following the Crown's unconstitutional failure to disclose relevant information can seek money damages under the *Canadian Charter of Rights and Freedoms*.

Mr. Henry was imprisoned from 1983 to 2009 following convictions for several sexual assaults. During his trial, the prosecution failed to disclose a number of key facts, including the discovery of DNA evidence, the existence of an alternative suspect, and the occurrence of similar sexual assaults after Mr. Henry's arrest. The police re-investigated those unsolved sexual assaults in 2002 and obtained DNA matches for the alternative suspect, who then pleaded guilty to several of the assaults. In 2010, the British Columbia Court of Appeal overturned Mr. Henry's convictions and entered acquittals on all counts. Mr. Henry sought damages against the provincial government for its failures to disclose relevant information. The Crown argued that his claim should not proceed as Mr. Henry was unable to show that Crown prosecutors acted maliciously.

Justice Moldaver for the majority of the Court held that the malice requirement was not applicable but instead has established a new threshold for such claims against the Crown. The decision reinterprets the test for *Charter* damages in *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28, by limiting Crown liability for failing to disclose relevant information in a criminal prosecution to only those situations where the claimant can prove that the Crown intentionally withheld information when it knows, or would be reasonably expected to know, that the information is material to the defence. This new threshold for a claim for *Charter* damages is limited to the situation of non-disclosure, but establishes a new approach to s.24(1) damages since the test was established in *Ward* that looks an awful lot like a new constitutional tort. While removing the requirement of malice that applies to lawsuits for wrongful prosecutions, it still sets the bar quite high in situations where the Crown has breached its *Charter* obligations to fully disclose information necessary for full answer and defence.

Ward established the following framework for *Charter* damages,

The first step in the inquiry is to establish that a *Charter* right has been breached. The second step is to show why damages are a just and appropriate remedy, having regard to whether they would fulfill one or more of the related functions of compensation, vindication of the right, and/or deterrence of future breaches. At the third step, the state has the opportunity to demonstrate, if it can, that countervailing factors defeat the functional considerations that support a damage award and render damages

inappropriate or unjust. The final step is to assess the quantum of the damages. [para. 4]

The majority's reasons focus on what has been termed the "good governance" factors in the third step of the test and appear to place the onus on the claimant to show an intentionality not thought to be required to establish a *Charter* breach as a way to prevent "the floodgates of civil liability" that would "force prosecutors to spend undue amounts of time and energy defending their conduct in court"[para.40]. While the decision quite rightly disposes of the malice requirement in the claim against the Crown, the new threshold is arguably not far off that mark. Justice Moldaver, in rejecting the applicability of malice which can only be met in an exceptional case, he quotes Charron who noted in *Miazga v. Kvello Estate*, 2009 SCC 51, [2009] 3 S.C.R. 339, that conduct merely reflecting "incompetence, inexperience, poor judgment, lack of professionalism, laziness, recklessness, honest mistake, negligence, or even gross negligence" will necessarily fall short (para. 81; emphasis added)" [para.51]. In rejecting gross negligence as too low a bar in the context of *Henry*, one can only see this new standard of intentionally withholding information as itself a very difficult threshold to meet. Why should a defendant who is wrongfully convicted due to the lazy or reckless behaviour of a Crown that breaches the *Charter* not be able to claim damages under s.24(1)? The reasoning of the majority places the burden on the plaintiff to show intent whereas the burden under *Ward* was on the Crown to demonstrate the good governance factors. It appears to impose a *Mackin* type *per se* qualification that must be pleaded whereas the victory in *Ward* was the unanimous rejection of *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 S.C.R. 405, for *Charter* damages claims except in the circumstances of the good faith enforcement of laws later deemed invalid.

Should we be concerned about future s.24(1) claims for *Charter damages*? While Justice Moldaver ostensibly limits the new threshold to wrongful non-disclosure cases, his majority decision hints that this standard may be applicable to other claims against the Crown:

It would be unwise to speculate about other types of prosecutorial misconduct that might violate the *Charter*, or to fix a blanket threshold that governs all such claims against the Crown. The threshold established in this case may well offer guidance in setting the applicable threshold for other types of misconduct, but the prudent course of action is to address new situations in future cases as they arise, with the benefit of a factual record and submissions. [para. 33]

The Asper Centre and BCCLA argued that an individual prosecutor's state of mind is irrelevant to the availability of damages under section 24(1) of the *Charter* as *Charter* violations occur absent fault on the part of the state, as was acknowledged in *Ward*. Our submissions focused on the application of the *Ward* principles as being the appropriate approach to the claimed damages and to the importance of compensation, vindication and deterrence in a monetary award. Much of our argument is reflected in the concurring minority opinion of Chief Justice McLachlin and Justice Karakatsanis.

McLachlin C.J. and Karakatsanis J. simply apply the *Ward* factors and clearly state that there should be no required fault element in the establishment of the *Charter* breach giving rise to the damages claim:

Imposing a fault requirement for *Charter* damages, where the Crown has breached its duty to disclose, is inconsistent with the purpose of s. 24(1) and with the principled framework established in *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28, for assessing whether an award of damages would be appropriate and just in the circumstances of a particular case. [para. 104]

They take issue with the arguments of the Attorney General that Mr. Henry's claim will interfere with prosecutorial discretion, inappropriately lower the standard for prosecutorial liability, and divert prosecutors from their work [para. 125], noting that the claim is "an action for the breach of a legal duty imposed by the *Charter*" [para. 129]. In particular they state that the focus is not on the fault of any individual but on the failure to disclose that results in a *Charter* breach of fair disclosure. Quoting Professor Kent Roach on the importance of deterrence and compliance with the *Charter* as a "foundation of the principle of good governance" [para. 129], they state that good governance is strengthened by holding the state to account.

What does this mean for future *Charter* damages claims? For Mr. Henry, he must now prove that the non-disclosure was intentional – a possibly difficult task given that the prosecutor is now dead, despite Justice Moldaver's statement that the level of proof is not onerous [para. *]. As his case, as pleaded, represents one of the most egregious examples of non-disclosure leading to a wrongful conviction, his claim remains quite strong. For other, the test may prove too difficult to meet especially with the passage of time. It adds complexity and uncertainty with the introduction of various state of mind requirements depending upon the particular *Charter* right. A significant concern for all potential claimants is the possibility that the thresholds established in this case will apply to other contexts, creating further barriers to *Charter* damages claims and shielding the state from responsibility for the harm caused by *Charter* breaches and diminishing the deterrent effects of such claims.

The Asper Centre and BCCLA were represented by Marlys Edwardh and Frances Mahon of Sack Goldblatt Mitchell LLP in their intervention in the case.