

## TORT CLAIMS AGAINST PUBLIC AUTHORITIES

THE HONOURABLE JUSTICE MALCOLM ROWE AND MANISH OZA\*

*When interactions between modern states and their citizens result in harm to individuals, the legal system is called upon to provide redress. Holding public authorities liable in tort is one solution the common law has developed to compensate individuals for harm incurred through state action. This article highlights the role that tort law plays in seeking redress against public authorities, and explores the extent to which tort law has converged with, or diverged from, other avenues of redress. After providing a brief history of tort claims against public authorities, we proceed to compare torts with judicial review, looking to their respective principles of liability, the formal aspects of bringing a claim, the substantive conditions of liability, and remedies. Through this comparison, we hope to elucidate the structure of the existing legal framework governing tort claims against public authorities.*

### TABLE OF CONTENTS

I.	INTRODUCTION . . . . .	1
II.	HISTORICAL BACKDROP . . . . .	4
III.	ANALYSIS . . . . .	8
	A. PRINCIPLES OF LIABILITY . . . . .	8
	B. FORMAL ASPECTS OF BRINGING A CLAIM . . . . .	11
	C. SUBSTANTIVE CONDITIONS OF LIABILITY . . . . .	19
	D. REMEDIES . . . . .	29
IV.	CONCLUSION . . . . .	33

### I. INTRODUCTION

Modern states do a range of different things and interact with their citizens in a range of different ways. Occasionally, they cause their citizens harm, and the legal system is called upon to provide redress. This is a long-standing and complex problem to which the common law has developed several solutions, one of which is to hold public authorities liable in tort. This article is about the role that tort law plays alongside other avenues of redress against public authorities, and the extent to which tort law has converged with, or diverged from, those other avenues.

There are four major ways of challenging the actions of public authorities in Canadian law:

- (1) An application to court for judicial review. Such an application seeks to have the decision of a public authority set aside on the basis that it was made unfairly or

---

\* The Honourable Justice Malcolm Rowe was appointed to the Supreme Court of Canada in 2016. Before this, he served as a trial judge and an appellate judge in the Supreme Court of Newfoundland and Labrador; as a part-time lecturer at the Faculty of Law, University of Ottawa; as Clerk of the Executive Council and Secretary to Cabinet in the Government of Newfoundland and Labrador; as a partner at Gowling & Henderson; in the Canadian foreign service; and as Clerk Assistant in the provincial legislature. Manish Oza is an Assistant Professor at the Faculty of Law, University of Western Ontario. We would like to thank Justice Russell Brown, Maryam Shahid, and two anonymous reviewers for comments and criticism.

without legal authority, and may also involve a request for other remedies requiring or prohibiting the public authority from doing certain things.

- (2) An application to a court of competent jurisdiction for a remedy under section 24(1) of the *Canadian Charter of Rights and Freedoms*.<sup>1</sup> Section 24(1) is generally used to provide remedies for government actions that violate *Charter* rights.<sup>2</sup> It confers wide remedial discretion, including the ability to order *Charter* damages in appropriate cases.<sup>3</sup>
- (3) A private law action — typically in tort, but sometimes in contract, unjust enrichment, or another cause of action — seeking compensation for a wrong.<sup>4</sup>
- (4) A complaint to a domestic human rights tribunal, arguing that the public authority’s decision or policy violates a human rights code. While a human rights code is ordinary legislation, it has quasi-constitutional status.<sup>5</sup> A human rights complaint may seek damages, or may seek an order for the public authority to change its decision or policy.<sup>6</sup>

In addition, there are certain narrower avenues of redress, such as a complaint to an ombudsman or commissioner.<sup>7</sup>

Of all these various kinds of proceedings, the broadest in scope are judicial review applications and tort actions. Thus, we focus in this article on the roles and interrelations of these two bodies of law. On its face, it may seem puzzling that there should be multiple modes of legal redress against public authorities. Wouldn’t it be simpler to have a single form of legal proceeding to challenge their actions? In particular, as administrative law has matured, some have suggested that tort law can be abandoned in this area.<sup>8</sup> In *Paradis Honey*

<sup>1</sup> *Canadian Charter of Rights and Freedoms*, s 24(1), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

<sup>2</sup> *R v Ferguson*, 2008 SCC 6 at para 60.

<sup>3</sup> *Mills v The Queen*, [1986] 1 SCR 863 at 965; *Vancouver (City) v Ward*, 2010 SCC 27 at para 21 [*Ward*].

<sup>4</sup> In Quebec, proceedings based on the law of obligations can be brought against the state under article 1376 of the *Civil Code of Québec*, CQLR c CCQ-1991 [CCQ-1991]. However, we focus in this article on the common law.

<sup>5</sup> *Insurance Corporation of British Columbia v Heerspink*, [1982] 2 SCR 145 at 158; *Winnipeg School Division No 1 v Craton*, [1985] 2 SCR 150; *Tranchemontagne v Ontario (Director, Disability Support Program)*, 2006 SCC 14 at para 36; John Helis, *Quasi-Constitutional Laws of Canada* (Toronto: Irwin Law, 2018).

<sup>6</sup> Under the Ontario *Human Rights Code*, RSO 1990, c H.19, see e.g. *Hendershott v Ontario (Community and Social Services)*, 2011 HRTO 482; *Al-Turki v Ontario (Transportation)*, 2020 HRTO 392. The remedy must flow from the claim before the tribunal: *Moore v British Columbia (Education)*, 2012 SCC 61 at para 64.

<sup>7</sup> Each province has an ombudsman (see e.g. the *Ombudsman Act*, RSO 1990, c O.6). Federally, there are specific subject matter ombudsmen (for example, the Procurement Ombudsman under the *Department of Public Works and Government Services Act*, SC 1996, c 16, s 22.1(1)). On the role and jurisdiction of ombudsmen, see *British Columbia Development Corporation v Friedmann (Ombudsman)*, [1984] 2 SCR 447; *Re Ombudsman of Ontario and Ontario Labour Relations Board* (1986), 58 OR (2d) 225 (CA), leave to appeal to SCC refused 20329 (25 June 1987); *Nova Scotia (Office of the Ombudsman) v Nova Scotia (Attorney General)*, 2019 NSCA 51. There are also commissioners, such as the Information Commissioner under the *Access to Information Act*, RSC 1985, c A-1, s 54(1) or the Commissioner for Official Languages under the *Official Languages Act*, RSC 1985, c 31 (4th Supp), s 49(1).

<sup>8</sup> “The development of other forms of accountability for the use of public power may have led to a view that accountability through the law of obligations is largely an irrelevance”: Sian Elias, “Public Actors and Private Obligations: A Judicial Perspective” in Andrew Robertson & Michael Tilbury, eds, *The Common Law of Obligations: Divergence and Unity* (Oxford: Hart, 2016) 135 at 137. Elias is not

*Ltd., Honeybee Enterprises Ltd. and Rocklake Apiaries Ltd. v. Her Majesty the Queen, The Minister of Agriculture and Agri-Food and the Canadian Food Inspection Agency* the Federal Court of Appeal stated bluntly that it “makes no sense” to use “private law tools to solve public law problems,” and that “[t]he law of liability for public authorities should be governed by principles on the public law side of the divide, not the private law side.”<sup>9</sup>

This article makes no attempt to address normative questions about what the law ought to be. Our goal is more limited: to elucidate the structure of the existing legal framework. This, it seems to us, may be valuable regardless of one’s attitude to tort law as a way of holding public authorities to account. In this article, we trace some of the convergences (or “bridges”) and divergences (or “walls”) between tort law and administrative law. While both bodies of law have their internal complexities, a pattern emerges when they are placed next to each other. There is a rough symmetry between the scope of tort claims against public authorities and the scope of judicial review, reflecting two major roles played by the state.

On the one hand, tort law is most apt when applied to the “operational” activities of the state. These are tasks carried out by public authorities, but which are not particularly governmental in nature. In the words of Justice McIntyre:

Public authorities, in addition to their administrative and regulatory functions, must perform many tasks. They enter into a wide variety of contracts covering business, commercial and industrial enterprises, and public works. They enter the market place and operate as do private corporations and private individuals. In these circumstances there would seem to be no reason why a public authority should not be liable for its own acts of negligence and vicariously liable for the negligence of its servants in the performance of their duties of employment.<sup>10</sup>

For example, both a public authority and a private company might operate a fleet of trucks, and both might incur tort liability for accidents. From the perspective of the victim of the accident, it is irrelevant whether the driver at fault was employed by a public authority or a private company. Thus, the rules of tort applicable to such government activities are much the same as those for private persons. By contrast, when public authorities are doing things that have no precise private analogue, it can become much harder to determine whether the elements of a tort exist.<sup>11</sup> This is not to say that tort law never applies in such situations, but only that applying it becomes more difficult and, arguably, uncertain.

---

endorsing the view. See also TT Arvind, “Obligations, Governance and Society: Bringing the State Back In” in Robertson & Tilbury, *ibid*, 259, referring at 259 to tort law’s “retreat in the face of other, more recently formed areas of law,” and at 260 to its “displacement . . . by new forms of administrative redress” provided by regulatory bodies rather than courts; Tom Cornford, *Towards a Public Law of Tort* (Aldershot: Ashgate, 2008).

<sup>9</sup> 2015 FCA 89 at paras 127, 130 [*Paradis Honey*]. See also *The Catalyst Capital Group Inc v Dundee Kilmer Developments Limited Partnership*, 2020 ONCA 272 at paras 94–107. The proposal was rejected in *Nelson (City) v Marchi*, 2021 SCC 41 at para 41 [*Marchi*].

<sup>10</sup> *Kamloops v Nielsen*, [1984] 2 SCR 2 at 56 [*Kamloops*], McIntyre J, dissenting (but not on this point).  
<sup>11</sup> Paul Lordon, *Crown Law* (Toronto: Butterworths, 1991) at 382, 395. But see Daniel Cohen, “Not Fully Discretionary: Incorporating a Factor-Based Standard into the FTCA’s Discretionary Function Exception” (2018) 112:4 Nw UL Rev 879 at 886. For examples of this difficulty, see *Just v British Columbia*, [1989] 2 SCR 1228 [*Just*]; *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 [*Imperial Tobacco*].

On the other hand, judicial review is most apt when applied to distinctively governmental activities that involve state authority. In *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, the Supreme Court held that judicial review is available only where there is "an exercise of state authority and where that exercise is of a sufficiently public character."<sup>12</sup> This is because judicial review aims to ensure that state authority is exercised lawfully and fairly. Where a public authority is merely exercising private powers, it may not be exercising state authority.<sup>13</sup> As the Federal Court of Appeal has explained:

Every significant federal tribunal has public powers of decision-making. But alongside these are express or implied powers to act in certain private ways, such as renting and managing premises, hiring support staff, and so on.... For example, suppose that a well-known federal tribunal terminates its contract with a company to supply janitorial services for its premises. In doing so, it is not exercising a power central to the administrative mandate given to it by Parliament. Rather, it is acting like any other business. The tribunal's power in that case is best characterized as a private power, not a public power. Absent some exceptional circumstance, the janitorial company's recourse lies in an action for breach of contract, not an application for judicial review of the tribunal's decision to terminate the contract.<sup>14</sup>

Thus, when a public authority chooses to hire an employee or rent office space, it is difficult to see why this decision should be subject to judicial review. This is not to say that judicial review never applies to such "operational" decisions, but that applying it becomes much more problematic.

Of course, this is only a rough symmetry. There are situations in which both tort law and judicial review are available. There are also situations in which neither is so, often for reasons rooted in the separation of powers between courts and the other institutions of the state. However, the symmetry we have sketched appears at a number of points in the legal doctrines which we will discuss.

We begin with a brief history of tort claims against public authorities. Next, we compare torts with judicial review, looking to their respective principles of liability, the formal aspects of bringing a claim, the substantive conditions of liability, and remedies.

## II. HISTORICAL BACKDROP

To understand why tort law is applicable to public authorities at all, and the extent to which it is applicable, it is necessary to take a historical perspective.

Francis Bacon said that the common law had woven "a garland of prerogatives" around lawsuits involving the Crown.<sup>15</sup> One such prerogative of some importance was that the monarch could not be sued in the royal courts. This was an instance of the feudal notion that a lord could not be sued in his own court, but only in the court of a superior lord. Given that

---

<sup>12</sup> 2018 SCC 26 at para 14 [*Wall*].

<sup>13</sup> *Ibid*; *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 81 [*Dunsmuir*].

<sup>14</sup> *Air Canada v Toronto Port Authority and Porter Airlines Inc*, 2011 FCA 347 at para 52.

<sup>15</sup> Francis Bacon, "Case de Non Proccedendo Rege Inconsulto" in James Spedding, Robert Leslie Ellis & Douglas Denon Heath, eds, *The Works of Francis Bacon* (London, UK: Longman, 1859) vol 7 681 ("what a garland of prerogatives doth the law put upon them" at 693). See also WS Holdsworth, *A History of English Law* (Boston: Little, Brown, 1926) vol 9 at 7.

there was no superior lord to the monarch, the result was that the monarch could not be sued before any court.

Still, it was accepted that the Crown had a moral obligation to correct wrongs done to its subjects, just as those subjects were obliged to correct wrongs they did to each other.<sup>16</sup> A cumbersome procedure gradually evolved to give effect to this obligation. In order to bring a claim against the Crown, the plaintiff would first submit a petition of right, seeking redress for their grievance. If the monarch consented to its adjudication by endorsing the petition with the words *fiat justitia* (let justice be done), then the claim could be adjudicated in court.<sup>17</sup>

This procedure had various limitations. The claim could not proceed without the royal fiat. And while a petition of right could be used to seek recovery of property or contract remedies, it could not be used to seek remedies in tort.<sup>18</sup> Given that there was no other procedural vehicle to bring a tort claim against the Crown, the practical result was that, at common law, the Crown was immune from claims in tort.<sup>19</sup>

The Crown's tort immunity was sometimes expressed using the maxim, *the King can do no wrong*.<sup>20</sup> The Crown could not commit a tort; and nor could it be held vicariously liable for the torts of its servants based on the fiction that the wrong of the servant was the wrong of the master.<sup>21</sup> But the maxim also meant that Crown servants could not justify their tortious actions by arguing that they had been ordered so to act by the Crown: "[F]rom the maxim that the King cannot do wrong it follows, as a necessary consequence, that the King cannot authorize wrong."<sup>22</sup>

So while the Crown was immune from tort liability, Crown servants — government officials — were not.<sup>23</sup> In *Feather v. The Queen*, Chief Justice Cockburn stated:

[I]n our opinion no authority is needed to establish that a servant of the Crown is responsible in law for a tortious act done to a fellow subject, though done by the authority of the Crown — a position which appears to us to rest on principles which are too well settled to admit of question, and which are alike essential to uphold the dignity of the Crown on the one hand, and the rights and liberties of the subject on the other.<sup>24</sup>

Tort claims could be brought against even the highest officials. In *Entick v. Carrington*, four of the King's messengers were found liable in trespass for searching the plaintiff's house

<sup>16</sup> Holdsworth, *ibid* at 10.

<sup>17</sup> See Peter W Hogg, Patrick J Monahan & Wade K Wright, *Liability of the Crown*, 4th ed (Toronto: Carswell, 2011) at 4–8; Holdsworth, *ibid* at 7–9.

<sup>18</sup> However, the law of property covered a greater area than it does now, including actions that would now be brought in tort: see Holdsworth, *ibid* at 18–19.

<sup>19</sup> *Canada (Attorney General) v Thouin*, 2017 SCC 46 at para 16; *The King v Paradis & Farley Inc* (1941), [1942] SCR 10 at 13 [*Paradis & Farley*]; *Conseil des Ports Nationaux v Langelier* (1968), [1969] SCR 60 at 71 [*Langelier*].

<sup>20</sup> *Tobin v The Queen* (1864), 143 ER 1148 [*Tobin*].

<sup>21</sup> *McArthur v The King*, [1943] 3 DLR 225 (Ex Ct) at 229.

<sup>22</sup> *Johnstone v Pedlar*, [1921] 2 AC 262 (HL (Eng)) at 275, citing *Tobin*, *supra* note 20. See also Holdsworth, *supra* note 15 at 42.

<sup>23</sup> *Langelier*, *supra* note 19 at 65; *Bank of British Columbia v Canadian Broadcasting Corp* (1992), 64 BCLR (2d) 166 (CA).

<sup>24</sup> (1865), 122 ER 1191 (QB (Eng)) at 1205–206, cited in *Langelier*, *ibid*.

without legal authority, despite acting on the orders of a secretary of state.<sup>25</sup> In *Phillips v. Eyre*, the colonial governor of Jamaica was sued for having had a local activist executed in suppressing a local rebellion.<sup>26</sup> A.V. Dicey later referred to this as equality before the law. It meant “the equal subjection of all classes to the ordinary law of the land administered by the ordinary courts,” excluding “any exemption of officials or others from the duty of obedience to the law which governs other citizens.”<sup>27</sup>

In *Langelier*, the Supreme Court of Canada summarized the common law in four propositions:

First is the proposition that the Crown itself could not be sued in tort.

Second is the proposition that Crown assets could not be reached, indirectly, by suing in tort, a department of government, or an official of the Crown.

...

Third is the proposition that a servant of the Crown cannot be made liable vicariously for a tort committed by a subordinate. The subordinate is not his servant but is, like himself, a servant of the Crown which, itself, cannot be made liable.

Fourth is the proposition that a servant of the Crown, who commits a wrong, is personally liable to the person injured.<sup>28</sup>

It was recognized that these rules were somewhat unsatisfactory in colonial conditions. Colonial governments took a more active role in local enterprise than they did in England, and consequently, there was more need for redress against them.<sup>29</sup> Nor was the tort liability of public officials a complete substitute for Crown liability. Even though the Crown often used public funds to pay the damages awarded against its officials, there might not have been an official who was personally liable for the wrong.<sup>30</sup> Despite these defects, the common law position remained the same in most of Canada until the 1950s.<sup>31</sup>

Eventually, total Crown immunity from tort liability became “intolerable.”<sup>32</sup> The United Kingdom embarked on major reforms to Crown liability in 1947.<sup>33</sup> Following the UK, each

<sup>25</sup> [1765] EWHC KB J98.

<sup>26</sup> (1869), LR 4 QB 225 (Eng). See also RW Kostal, *A Jurisprudence of Power: Victorian Empire and the Rule of Law* (Oxford: Oxford University Press, 2005). The governor ultimately escaped liability on the basis that his actions had been justifiable under the law of Jamaica, but at common law, merely being the governor did not confer on him an immunity.

<sup>27</sup> *Attorney General of Canada v Lavell*, [1974] SCR 1349 at 1366 [Lavell], quoting AV Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed (London, UK: Macmillan, 1915). See also *R v Burnshine*, [1975] 1 SCR 693; *R v Campbell*, [1999] 1 SCR 565 at para 18.

<sup>28</sup> *Langelier*, *supra* note 19 at 71–72.

<sup>29</sup> *Farnell v Bowman* (1887), 12 App Cas 643 (PC Austl) at 649.

<sup>30</sup> *Adams v Naylor*, [1946] AC 543 (HL (Eng)).

<sup>31</sup> The exceptions are Quebec, where it had been held that the *Code of Civil Procedure*, CQLR c C-25.01 imposed delictual and quasi-delictual liability on the Crown (*The King v Cliche*, [1935] SCR 561; *Martineau v The King*, [1944] SCR 194) and federally, where the *Exchequer Court Act*, RSC 1927, c 34 as amended by SC 1938, c 28 imposed liability on the Crown for the negligence of Crown servants acting within the scope of their duties or employment.

<sup>32</sup> *Just*, *supra* note 11 at 1239.

<sup>33</sup> *Crown Proceedings Act 1947* (UK), 10 & 11 Geo VI, c 44.

Canadian province and the federal government passed legislation subjecting the Crown to liability in tort, abolishing the requirement of a royal fiat and eventually eliminating the need to file a petition of right.<sup>34</sup>

The Crown liability statutes, which remain in force today, subject the Crown to those tort claims to which it would be liable if it were a person. However, most of them go on to limit this to certain categories of claim: vicarious liability; liability to employees; liability as an owner, occupier, or possessor; and liability under statute. Eight provincial statutes subject the Crown to liability in roughly the following terms:

The Crown is subject to all those liabilities in tort to which, if it were a person of full age and capacity, it would be subject,

- (a) in respect of a tort committed by any of its officers or agents;
- (b) in respect of any breach of those duties that a person owes to that person's servants or agents by reason of being their employer;
- (c) in respect of any breach of the duties attaching to the ownership, occupation, possession, or control of property; and
- (d) under any statute or under any regulation or bylaw made or passed under the authority of any statute.<sup>35</sup>

The federal *Crown Liability and Proceedings Act* makes the Crown, in provinces other than Quebec, liable in respect of

- (i) a tort committed by a servant of the Crown, or
- (ii) a breach of duty attaching to the ownership, occupation, possession or control of property.<sup>36</sup>

Finally, the British Columbia statute simply provides that “the government is subject to all the liabilities to which it would be liable if it were a person.”<sup>37</sup>

<sup>34</sup> The current statutes are: *Crown Liability and Proceedings Act*, RSC 1985, c C-50 [*CLPA* (Can)]; *Crown Proceeding Act*, RSBC 1996, c 89 [*CPA* (BC)]; *Proceedings Against the Crown Act*, RSA 2000, c P-25; *The Proceedings Against the Crown Act, 2019*, SS 2019, c P-27.01; *The Proceedings Against the Crown Act*, CCSM, c P140; *Crown Liability and Proceedings Act, 2019*, SO 2019, c 7, Schedule 17 [*CLPA* (Ont)]; CCQ-1991, *supra* note 4, s 1376; *Proceedings Against the Crown Act*, RSNB 1973, c P-18 [*PACA* (NB)]; *Proceedings Against the Crown Act*, RSNS 1989, c 360; *Crown Proceedings Act*, RSPEI 1988, c C-32; *Proceedings Against the Crown Act*, RSNL 1990, c P-26.

<sup>35</sup> Language like this is found in the Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick, Nova Scotia, Prince Edward Island, and Newfoundland & Labrador statutes, in some cases subject to certain additional provisions or with minor variations of language. The Ontario statute replaces subsection (b) with “breach of an employment-related obligation owed to an officer or employee of the Crown” (*CLPA* (Ont), *ibid*, s 8(1)(c)). The New Brunswick statute limits subsection (a) to torts “to real or personal property, or causing bodily injury” (*PACA* (NB), *ibid*, s 4(1)(a)).

<sup>36</sup> *CLPA* (Can), *supra* note 34, s 3(b).

<sup>37</sup> *CPA* (BC), *supra* note 34, s 2(c). Similarly, CCQ-1991, *supra* note 4, s 1376 provides that the rules of the law of obligations “apply to the State and its bodies, and to all other legal persons established in the public interest, subject to any other rules of law which may be applicable to them.”

The upshot of this history is that, for most purposes, and subject to the limitations of certain statutes, the Crown and its agents and servants can be sued in tort where the elements of a tort claim are made out in the ordinary way. Over time, the garland of prerogatives has been in part unwoven, both by legislation and by case law, such that tort claims against public authorities can proceed in much the same way as tort claims against private parties. This fits with an observation made by Justice Dickson: “The more active government becomes in activities that had once been considered the preserve of private persons, the less easy it is to understand why the Crown need be, or ought to be, in a position different from the subject.”<sup>38</sup> That said, it remains true that, in principle, the Crown is liable in tort only to the extent provided for in statute.<sup>39</sup> Legislatures may, if they choose, expand, limit, or clarify the extent of this liability, as Ontario has recently done in the *Crown Liability and Proceedings Act, 2019*.<sup>40</sup>

### III. ANALYSIS

In this section, we will compare tort law and judicial review in four different respects: (A) principles of liability; (B) the formal aspects of bringing a claim; (C) the substantive conditions for liability; and (D) the available remedies.

#### A. PRINCIPLES OF LIABILITY

What are the basic principles that justify holding public authorities liable in administrative law and in tort? Are these principles the same or different?

These questions were considered in *Canada (Attorney General) v. TeleZone Inc.*, where the Supreme Court had to decide whether it was necessary to seek judicial review before bringing a tort claim, if that tort claim involved an allegation that a public authority had acted invalidly. While this was a procedural question, in answering it, the Supreme Court noted an important difference between judicial review and tort claims:

Judicial review is directed at the legality, reasonableness, and fairness of the procedures employed and actions taken by government decision makers. It is designed to enforce the rule of law and adherence to the Constitution. Its overall objective is good governance. These public purposes are fundamentally different from those underlying contract and tort cases or causes of action under the *Civil Code of Québec*, R.S.Q., c. C-1991, and their adjunct remedies, which are primarily designed to right private wrongs with compensation or other relief.<sup>41</sup>

These different objectives are reflected in the procedural differences between applications for judicial review and tort actions. The Supreme Court in *TeleZone* therefore held that judicial review was not a prerequisite for bringing a tort claim: even where it involves an

<sup>38</sup> *R v Eldorado Nuclear Ltd; R v Uranium Canada Ltd*, [1983] 2 SCR 551 at 558 [*Eldorado Nuclear*]; *Quebec (Attorney General) v Canada (Human Resources and Social Development)*, 2011 SCC 60 at para 15.

<sup>39</sup> *Paradis & Farley*, *supra* note 19 at 13; *Magda v The Queen* (1963), [1964] SCR 72 at 76.

<sup>40</sup> *CLPA (Ont)*, *supra* note 34. For discussion, see *Francis v Ontario*, 2021 ONCA 197. Legislatures can also designate the courts in which the Crown may be sued: *Rudolf Wolff & Co v Canada*, [1990] 1 SCR 695 [*Rudolf Wolff*].

<sup>41</sup> 2010 SCC 62 at para 24 [*TeleZone*].



allegation that a public authority has acted invalidly, a tort action has a different objective from a judicial review application, so there is no reason to force tort litigants to first seek judicial review. Let us spend some time unpacking the difference relied on by the Supreme Court.<sup>42</sup>

Administrative law holds public authorities to standards that are appropriate to public authorities. These are standards of legality and procedural fairness, whose purpose is to ensure that public power is exercised fairly and only as authorized by law. Procedural fairness may be seen as a requirement of legality, in a broad sense; a decision may be “procedurally unfair, and therefore unlawful.”<sup>43</sup> As the Supreme Court wrote in *Dunsmuir*,

all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution.... The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes.<sup>44</sup>

As this makes clear, these standards of legality and fairness do not apply to private persons. They are rooted in the source of the authority in statute or in the royal prerogative.<sup>45</sup> As a general rule, any exercise of powers conferred by statute or under the royal prerogative can be subject to judicial review, provided that the question is justiciable.<sup>46</sup> As with constitutional law, public authorities are subject to the standards of administrative law precisely because they are exercising *public* authority.<sup>47</sup>

In line with this focus on legality and fairness, not every action of a public authority is subject to judicial review. As a general principle, judicial review is available only where there is “an exercise of state authority and where that exercise is of a sufficiently public character.”<sup>48</sup> Judicial review is also constitutionally entrenched. In *Crevier v. A.G. (Quebec)*, the Supreme Court held that provincial legislatures did not have the authority to completely immunize a statutory tribunal from judicial review on questions of jurisdiction.<sup>49</sup> While the legislature can usually modify the standard of review by statute — for example, by creating,

---

<sup>42</sup> A valuable theoretical discussion can be found in Peter Cane, “Tort Law and Public Functions” in John Oberdiek, ed, *Philosophical Foundations of the Law of Torts* (Oxford: Oxford University Press, 2014) 148.

<sup>43</sup> *Mission Institution v Khela*, 2014 SCC 24 at paras 5, 80 [*Khela*].

<sup>44</sup> *Dunsmuir*, *supra* note 13 at para 28. See also *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]; *R v Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606.

<sup>45</sup> It is sometimes noted that the Crown also has the powers of a natural person at common law: *R (on the application of New London College Ltd) v Secretary of State for the Home Department*, [2013] UKSC 51; *R v Secretary of State for Health, ex parte C*, [2000] EWCA Civ 49; *Shrewsbury and Atcham Borough Council v Secretary of State for Communities and Local Government*, [2008] EWCA Civ 148. There is dispute as to whether these powers should be classified as part of the royal prerogative or as a “third source” of government authority. For discussion, see *Canadian Federation of Students v Ontario (Colleges and Universities)*, 2021 ONCA 553 at paras 26–27; BV Harris, “The ‘Third Source’ of Authority for Government Action” (1992) 109 Law Q Rev 626; Adam Perry, “The Crown’s Administrative Powers” (2015) 131 Law Q Rev 652; Stephen Sedley, *Lions Under the Throne: Essays on the History of English Public Law* (Cambridge: Cambridge University Press, 2015) ch 6; Hogg, Monahan & Wright, *supra* note 17 at 19–20.

<sup>46</sup> *Canada (Auditor General) v Canada (Minister of Energy, Mines and Resources)*, [1989] 2 SCR 49 [*Can (AG) v Can (MEMR)*]; *Black v Canada (Prime Minister)* (2001), 54 OR (3d) 215 (CA).

<sup>47</sup> *Air Canada v British Columbia (Attorney General)*, [1986] 2 SCR 539 at 544–45 [*Air Canada*].

<sup>48</sup> *Wall*, *supra* note 12 at para 14.

<sup>49</sup> [1981] 2 SCR 220.

or choosing not to create, a statutory right of appeal — it cannot oust judicial review altogether.<sup>50</sup>

Tort law, in contrast with judicial review, holds public authorities to universal standards. The standards are not particular to public authorities, but apply to all persons in the legal system.<sup>51</sup> The aim, as with a tort claim against a private person, is to compel the tortfeasor to compensate the person they wronged. As explained earlier, the underlying principle is Diceyan: that “the same law applies to the highest official of government as to any other ordinary citizen.”<sup>52</sup> This principle also underlies the gradual erosion of limits on Crown liability.<sup>53</sup> Of course, “the Crown cannot be equated with an individual,” so some modifications are required to make tort law fit.<sup>54</sup> But, as Peter Hogg writes, “the overwhelming tendency of the common law is to look for the private analogy, and to apply the private law, with only those adaptations that are regarded as absolutely necessary.”<sup>55</sup>

In line with the universality of tort law, such claims against public authorities are not limited to exercises of state authority of a public character. In *Welbridge Holdings Ltd. v. Metropolitan Corporation of Greater Winnipeg*, Justice Laskin wrote that a municipality has:

a variety of functions, some legislative, some with also a quasi-judicial component ... and some administrative or ministerial, or perhaps better categorized as business powers. In exercising the latter, the defendant may undoubtedly (subject to statutory qualification) incur liabilities in contract and in tort, including liability in negligence.<sup>56</sup>

Public authorities are liable for the exercise of their operational powers. By contrast, decisions about “a course or principle of action that are based on public policy considerations, such as economic, social and political factors” cannot, as a general rule, form the basis of a tort claim.<sup>57</sup>

The fact that public authorities can be subject to these two different normative principles reflects the point made earlier about the two roles that the state plays. Public authorities have both governmental and operational powers. Thus, they are subject both to bodies of law designed to regulate public actions and to bodies of law designed to regulate private actions. As a result, in some situations, both judicial review and tort claims may be available to a litigant. In other situations, one claim is available and the other is not.

<sup>50</sup> *Vavilov*, *supra* note 44 at para 39.

<sup>51</sup> Donal Nolan, “Tort and Public Law: Overlapping Categories?” (2019) 135 Law Q Rev 272 at 280. One exception are the torts specific to public authorities: misfeasance in public office (*Odhavji Estate v Woodhouse*, 2003 SCC 69 [*Odhavji*]) and malicious prosecution (*Miazga v Kvello Estate*, 2009 SCC 51). In the UK, it has been held that the latter tort can also apply to private persons (*Willers v Joyce and another (in substitution for and in their capacity as executors of Albert Gubay (deceased))*, [2016] UKSC 43).

<sup>52</sup> *Lavell*, *supra* note 27 at 1366. See also *Reference as to Whether Members of the Military or Naval Forces of the United States of America are Exempt from Criminal Proceedings in Canadian Criminal Courts*, [1943] SCR 483. For discussion, see Hogg, Monahan & Wright, *supra* note 17 at 2–4, 219; John Gardner, “Criminals in Uniform” in RA Duff et al, eds, *The Constitution of the Criminal Law* (Oxford: Oxford University Press, 2013) 97.

<sup>53</sup> Holdsworth, *supra* note 15 at 45.

<sup>54</sup> *Rudolf Wolff*, *supra* note 40 at 701. See also *Marchi*, *supra* note 9 at para 39.

<sup>55</sup> Peter W Hogg, “Government Liability: Assimilating Crown and Subject” (1994) 16:3 Adv Q 366 at 368. [1971] SCR 957 at 968 [*Welbridge*]. See also *Nettleton v The Municipal Corporation of the Town of Prescott* (1908), 16 OLR 538 (Div Ct), aff’d *Nettleton v Town of Prescott* (1910), 21 OLR 561 (CA).

<sup>57</sup> *Imperial Tobacco*, *supra* note 11 at para 90.

## B. FORMAL ASPECTS OF BRINGING A CLAIM

In this section, we compare the formal aspects of bringing a tort claim and bringing an application for judicial review. We focus on who can bring a claim and who can be subject to a claim, finding both “bridges” and “walls.”

### 1. WHO CAN SUE

Any legal system needs some way of determining who can bring a claim. The work of public authorities would grind to a halt if anybody could summon them into court any time they disagreed with the authority’s decisions or actions. Both judicial review and tort accordingly impose limits on who can claim against a public authority, but they do so in different ways.

To bring an application for judicial review, the applicant needs standing.<sup>58</sup> Generally, this requires being directly affected by the decision at issue. For example, the *Federal Courts Act* states that an application for judicial review can be made by the Attorney General of Canada or by “anyone directly affected by the matter in respect of which relief is sought.”<sup>59</sup> A litigant whose own rights are not at stake can seek public interest standing, which depends on three factors: (1) whether there is a serious justiciable issue raised; (2) whether the litigant has a real stake or genuine interest in the justiciable issue; and (3) whether the proposed suit is a reasonable and effective way to bring the issue before the courts.<sup>60</sup> The decision whether to grant public interest standing is an exercise of discretion, conducted purposively and flexibly.<sup>61</sup>

By contrast, anyone who has been wronged can bring a tort claim. For most tort claims, the only “standing” requirement flows from the bilateral structure of tort law; the focus is on the substantive question whether the plaintiff has suffered a tort. In negligence, for example, the plaintiff must have been owed a duty of care, which requires reasonable foreseeability of harm and proximity between the plaintiff and the public authority.<sup>62</sup>

Despite this difference between judicial review and most tort claims, the law of standing in judicial review in fact emerged out of the requirements of the tort of public nuisance. This is a distinctive tort action with a public dimension; it allows a private litigant to sue in response to a public nuisance — for example, interference with a public right of way.<sup>63</sup> To bring such an action, there is a requirement that the plaintiff has suffered special damage from the breach of a public right; without this, the plaintiff can sue only with the consent of the Attorney General.<sup>64</sup> While this rule originated in the tort of public nuisance, it was

<sup>58</sup> *Finlay v Canada (Minister of Finance)*, [1986] 2 SCR 607 [Finlay].

<sup>59</sup> RSC 1985, c F-7, s 18.1(1).

<sup>60</sup> *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 at para 37 [Downtown Eastside]. See also *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342.

<sup>61</sup> *Downtown Eastside*, *ibid*.

<sup>62</sup> *Fullowka v Pinkerton’s of Canada Ltd*, 2010 SCC 5 at para 37 [Fullowka]; *Imperial Tobacco*, *supra* note 11 at paras 41–42. On proximity generally, see *1688782 Ontario Inc v Maple Leaf Foods Inc*, 2020 SCC 35.

<sup>63</sup> *Ryan v Victoria (City)*, [1999] 1 SCR 201 at para 52 [Ryan].

<sup>64</sup> *Boyce v Paddington Borough Council* (1902), [1903] 1 Ch 109 (Eng); *Finlay*, *supra* note 58 at 617–18. See also Jeffrey Berryman, *The Law of Equitable Remedies*, 2nd ed (Toronto: Irwin Law, 2013) at 230.

subsequently “applied in a variety of public law contexts where an issue of public right or interest has been raised,” and developed into the law of standing.<sup>65</sup>

Given these limits on who can bring a claim, someone whose rights were affected by a decision of a public authority, and who alleges that the decision was tortious, might be in a position to bring either a judicial review application or a tort action. In other circumstances, only one form of proceeding is available.

## 2. WHO CAN BE SUED

There are significant overlaps, but also significant gaps, between those who can be subject to judicial review and those who can be sued in tort. We will consider three points of comparison.

### a. Legal Personality

Legal personality is fundamental to tort liability.<sup>66</sup> As a general rule, only entities with legal personality can be sued in tort, except where statute provides otherwise.<sup>67</sup> In *Westlake v. The Queen in right of the Province of Ontario*, the Court considered how this proposition applies to claims against public authorities.<sup>68</sup> It distinguished six categories of public authority created by statute, which can be more simply presented as two:

- (1) Bodies corporate — entities granted legal personality by statute. Such entities are suable in tort, unless statute provides that they are not; and
- (2) Non-corporate bodies — entities not granted legal personality by statute. Such entities are not suable in tort, unless statute provides that they are.

Thus, before bringing a tort claim, one needs to consider the status of the public authority in question. It might be subject to judicial review proceedings, but not suable in tort, because the legislature has not granted it legal personality or otherwise directed that it can be sued. In *Hollinger Bus Lines Limited v. Ontario Labour Relations Board*, it was held that the Ontario Labour Relations Board came within this class.<sup>69</sup> The same has been held of various other boards and commissions.<sup>70</sup> Many of these are “regulatory board[s], operating in a quasi-judicial sense to determine issues assigned to [them] by a statute manifesting the broad policies of the Legislature” rather than boards with “operative functions.”<sup>71</sup>

<sup>65</sup> *Finlay, ibid* at 618.

<sup>66</sup> See Ernest J Weinrib, “Correlativity and Personality” in *Corrective Justice* (Oxford: Oxford University Press, 2012) 9.

<sup>67</sup> *Ethiopian Orthodox Tewahedo Church of Canada St Mary Cathedral v Aga*, 2021 SCC 22 at para 45 [*Ethiopian Orthodox Church*]; *Doe v Canada*, 2001 ABCA 216.

<sup>68</sup> [1971] 3 OR 533 (SC), aff’d [1972] 2 OR 605 (CA), aff’d 33 DLR (3d) 256 [*Westlake*]. See also *Northern Pipeline Agency v Pehinec*, [1983] 2 SCR 513 at 527–28 [*Northern Pipeline Agency*].

<sup>69</sup> [1952] OR 366 (CA).

<sup>70</sup> See also *Westlake, supra* note 68; *Smith v Human Rights Commission (NB)* (1997), 185 NBR (2d) 301 (CA); *Whalley v Royal Canadian Mounted Police Public Complaints Commission*, 2009 NSCA 122; *Gratton-Masuy Environmental Technologies Inc v Ontario*, 2010 ONCA 501 [*Gratton-Masuy*].

<sup>71</sup> *Northern Pipeline Agency, supra* note 68 at 526.

Often, a legislature expressly grants legal personality to a public authority.<sup>72</sup> However, it is also possible for a legislature to grant legal personality by implication. The Supreme Court held in *Berry v. Pulley* that legislatures had granted legal personality to trade unions by implication by conferring on them significant statutory rights and powers.<sup>73</sup> This may mean that a legislature could do the same with a public authority, for example, by conferring on it the right to hold property and enter into contracts.<sup>74</sup>

In *Northern Pipeline Agency*, the Supreme Court considered whether the Northern Pipeline Agency was “a separate legal entity which may be made the subject of an action at law,” or whether employment contracts nominally entered into by the Agency were really entered into on behalf of the Crown.<sup>75</sup> The Agency was created by statute and was not explicitly granted legal personality. Despite this, the Supreme Court held that the Agency was a legal entity that could be sued in its own right:

[W]hether or not the statute had expressly made the Agency a body corporate, there can be no doubt that in the world of realities the plaintiff-respondent entered into a hiring arrangement with the Agency and not with the Crown... [I]t is a necessary concomitant that the Agency would thereby be empowered to enforce those hiring arrangements and that the other party to the agreement would be able to enforce the arrangement as against the Agency. Even though this Agency is not by explicit language in the statute creating it made expressly liable to suit, it is by necessary implication an entity which can be sued in an action for damages.<sup>76</sup>

One notes that the Supreme Court linked the legal personality of the Agency to the reality of its “operational” role alongside other private employers, stating that it “must be seen as the employer of its staff” and that it “is as much an entity within its own sphere of operations as is a trade union.”<sup>77</sup> Thus, the requirement of legal personality fits within the general pattern we have described. Insofar as public authorities engage in operational activities, they tend to be found to have legal personality; insofar as they play a regulatory role, they tend to be found to lack it.<sup>78</sup>

Where the public authority cannot be sued in tort, a plaintiff may be able to seek redress by another route. One option is to bring a claim against the Crown rather than the particular public authority that made the decision or undertook the actions in question. In many provinces, however, suing the Crown requires that the claim come within circumstances set out in the Crown liability statute. For example, the statute may require a viable claim against a Crown servant or agent for which the Crown is vicariously liable.<sup>79</sup> Where the public authority lacks legal personality, it may not be possible to hold the Crown vicariously liable

<sup>72</sup> For example, the *Ontario Food Terminal Act*, RSO 1990, c O.15, s 2(1) expressly states that the Ontario Food Terminal Board is a body corporate.

<sup>73</sup> 2002 SCC 40; *Taff Vale Railway Co v Amalgamated Society of Railway Servants*, [1901] AC 426 (HL) (Eng). See also *Ahenakew v MacKay* (2004), 71 OR (3d) 130 (CA); *Ethiopian Orthodox Church*, *supra* note 67 at para 47.

<sup>74</sup> See e.g. *Bank of Montreal v Bole*, [1931] 1 WWR 203 (Sask QB); *Public Service Alliance of Canada v Francis*, [1982] 2 SCR 72; *Northern Pipeline Agency*, *supra* note 68.

<sup>75</sup> *Northern Pipeline Agency*, *ibid* at 523.

<sup>76</sup> *Ibid* at 537–38.

<sup>77</sup> *Ibid* at 539.

<sup>78</sup> See *Canada Labour Relations Board v Yellowknife*, [1977] 2 SCR 729; *House of Commons v Canada Labour Relations Board*, [1986] 2 FC 372 (FCA), Hugessen J, concurring. Cf *John Doe v Bennett*, 2004 SCC 17 at para 11 (compare the role of corporations sole).

<sup>79</sup> See e.g. *Gratton-Masuy*, *supra* note 70 at para 79.

for the public authority's actions.<sup>80</sup> It may, however, be possible to bring a claim against individual Crown servants personally, and against the Crown vicariously for their actions. Of course, such claims are subject to any applicable tort immunity.<sup>81</sup>

In contrast with tort law, judicial review is not limited to entities with legal personality, but can also apply to other organizations exercising statutory power. This is often explicitly provided for in statute. For example, Ontario's *Judicial Review Procedure Act* provides that, for purposes of judicial review proceedings, "any two or more persons who, acting together, may exercise a statutory power, whether styled a board or commission or by any other collective title, shall be deemed to be a person under such collective title" and thus "may be a party" to an application.<sup>82</sup> The *Federal Courts Act* confers jurisdiction on the federal court to grant remedies rooted in the prerogative writs against a "federal board, commission or other tribunal," which is defined as "any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown," aside from provincially created bodies and judges.<sup>83</sup> Even if the legislature has not provided that a given collective is liable in tort, if the collective exercises statutory power, its decisions are subject to judicial review.

#### b. Vicarious Liability

As noted earlier, most Crown liability statutes limit the Crown's liability to certain categories, of which the most significant is vicarious liability for the acts of Crown servants.<sup>84</sup> The law of Crown liability thus interacts with the law of vicarious liability. In older cases, employers were held liable for the acts of their employees based either on the fiction that they had authorized the employee's acts or simply on their status as the employee's superior.<sup>85</sup> Modern cases have rejected these justifications, holding instead that vicarious liability is rooted in policy considerations, such as compensation, deterrence, and loss internalization.<sup>86</sup> Thus, the Crown will be liable if the wrongful action of its employee was sufficiently connected to the employee's tasks that the tort "can be regarded as a materialization of the risks created by the enterprise."<sup>87</sup> There is some authority to the effect that the Crown may be vicariously liable even if its servant did not have legal authority to do what they did.<sup>88</sup>

<sup>80</sup> *Aviation Portneuf Ltée v The Queen*, [1984] 1 FC 764, aff'd [1988] ACF No 165, leave to appeal to SCC refused, [1988] CSCR No 171.

<sup>81</sup> See e.g. *Ontario (Attorney General) v Clark*, 2021 SCC 18.

<sup>82</sup> RSO 1990, c J.1, ss 9(2)–9(3).

<sup>83</sup> *Federal Courts Act*, supra note 59, ss 2, 18(1)(a).

<sup>84</sup> Another significant category is Crown agency: see e.g. *Nova Scotia Power Inc v Canada*, 2004 SCC 51; *Eldorado Nuclear*, supra note 38.

<sup>85</sup> *London Drugs Ltd v Kuehne & Nagel International Ltd*, [1992] 3 SCR 299 at 335, La Forest J, dissenting (but not on this point).

<sup>86</sup> *Bazley v Curry*, [1999] 2 SCR 534 at paras 26, 34 [*Bazley*]; *Jacobi v Griffiths*, [1999] 2 SCR 570 at para 29; *671122 Ontario Ltd v Sagaz Industries Canada Inc*, 2001 SCC 59 at para 29. That said, the explanatory value of these policy considerations has been questioned: JW Neyers, "A Theory of Vicarious Liability" (2005) 43:2 *Alta L Rev* 287; Russell Brown, Book Review of *Vicarious Liability in Tort: A Comparative Perspective* by Paula Giliker, (2012) 52:3 *Can Bus LJ* 456 at 460. Cf *Thiessen v Clarica Life Insurance Co*, 2002 BCCA 501; *Wilson v Clarica Life Insurance Co*, 2002 BCCA 502.

<sup>87</sup> *KLB v British Columbia*, 2003 SCC 51 at para 19.

<sup>88</sup> *James v The Commonwealth* (1939), 62 CLR 339 (HC Aust); *Long v Province of New Brunswick* (1959), 19 DLR (2d) 437 (NBSC (AD)).

The effect of the statutory limitation to vicarious liability has varied over time. Initially, one needed to identify an individual Crown servant who had committed a tort in the course of their duties or employment. For example, in *The King v. Anthony; The King v. Thompson*, a soldier purloined some ammunition and fired at a barn.<sup>89</sup> The barn burned down, and its owner sued the Crown in tort. The Crown was held not liable, as there was no tortfeasor for whose acts the Crown could be held vicariously liable. The soldier had acted outside the scope of his duties, so his acts could not be imputed to the Crown. The supervising officers, who should have prevented the soldier from acting as he did, owed no duty of care to the barn's owner. It is interesting to observe that this case may have been decided differently under the "enterprise liability" rule from *Bazley*, as the wrong may be seen as a materialization of the risks created by the enterprise.

Interpreted in this way, the limitation to vicarious liability is a significant restriction. As Geoffrey Lester explains, "[i]f the plaintiff cannot establish this personal liability on the part of the Crown servant and his or its capacity to be sued, then he necessarily fails at the threshold. The Crown is only liable if an individual Crown servant is liable to the plaintiff."<sup>90</sup> This restriction makes it difficult to hold the Crown liable for collective failures, in which no particular Crown servant or agent committed a tort, although a government organization may have caused the loss. Other decisions have downplayed the importance of the limitation to vicarious liability. In *The Queen v. Levy Brothers Company Limited and The Western Assurance Company*, a parcel of diamonds was lost while in the possession of the post office.<sup>91</sup> No particular employee could be identified who had committed a tort. Yet the Crown was held liable on the basis that some unidentified employee must have stolen the diamonds.

A more significant departure from the principle of vicarious liability occurred in *Swinamer v. Nova Scotia (Attorney General)*, where a large tree fell on the plaintiff's truck as he drove along a provincial highway.<sup>92</sup> The plaintiff argued that the province had failed to rely on trained personnel to inspect the trees next to the highway. Justice Cory dismissed the Crown's argument that there could be no vicarious liability here:

Obviously the Crown can only be liable as a result of the tortious acts committed by its servants or agents since it can only act through its servants or agents. Let us assume, for the purposes of resolving this issue, that the actions complained of by the appellant were indeed negligent. That is to say the failure of the Crown to rely on trained personnel to inspect the trees and the failure of those persons or this personnel to identify the tree in question as a hazard constituted negligence. Yet those very actions or failure to act were those of the Crown's servants undertaken in the course of the performance of their work. If those were indeed acts of negligence then the Crown would be liable. The arguments of the Crown are regressive and to accept them would severely restrict the ability of injured persons to claim against the Crown.<sup>93</sup>

The reasoning appears to be that the failure to hire trained personnel could itself be negligence attributable to some unidentified official. It is not clear how far this view extends,

<sup>89</sup> [1946] SCR 569. See also *MacLean v R*, [1973] SCR 2.

<sup>90</sup> Geoffrey S Lester, "Suing the Federal Crown in Tort: Some Practical Points to Remember" (2000) 23:4 Adv Q 444 at 452.

<sup>91</sup> [1961] SCR 189.

<sup>92</sup> [1994] 1 SCR 445 [*Swinamer*].

<sup>93</sup> *Ibid* at 461.

but *Swinamer* has, on occasion, been taken to mean that there is no practical difference between direct and vicarious liability when it comes to the Crown.<sup>94</sup>

Still, the limitation to vicarious liability continues to have some effect. In *Anglin v. Resler*, the plaintiff ran unsuccessfully for reelection to the Alberta legislature.<sup>95</sup> He sued the Chief Electoral Officer directly and the Crown vicariously. The Crown could be vicariously liable only if the Chief Electoral Officer was its agent or employee. The Court of Appeal of Alberta emphasized that the “Crown” generally refers to the executive branch of government. It held that the Chief Electoral Officer, being an officer of the legislature, was not an agent or employee of the Crown.<sup>96</sup> Therefore, the plaintiff had no cause of action against the Crown.

### c. Exercising Public Authority

As referred to earlier, not every decision or action of a public authority is subject to judicial review. It is available only where there is “an exercise of state authority and where that exercise is of a sufficiently public character.”<sup>97</sup> Determining whether something is an exercise of state authority is not always straightforward. Difficulties arise, for example, in distinguishing between state authority and authority conferred by private consent. In *Roberval Express v. Transport Drivers Union*, the Supreme Court considered whether the decision of an arbitrator under the *Canada Labour Code* could be subject to judicial review (a writ of evocation).<sup>98</sup> It was accepted that if a statute required the parties to resort to a particular tribunal, that would be sufficient to make the tribunal a statutory one, and therefore, subject to judicial review.<sup>99</sup> However, the parties in *Roberval* were not required to submit their dispute to the arbitrator. The Supreme Court held that even if the parties are not required to resort to a tribunal, the tribunal may be subject to judicial review if its duties and powers are conferred by statute.<sup>100</sup> Given that the *Canada Labour Code* arbitrator was exercising powers conferred by statute, judicial review was available.

Another difficulty arises in deciding which entities are viewed as part of the state. In *Knox v. Conservative Party of Canada*, the Court of Appeal of Alberta considered whether decisions by political parties are subject to judicial review, after certain party members sought review of the process by which a candidate had been nominated.<sup>101</sup> The Court wrote:

The tribunals which are subject to judicial review are, for the most part, those which are court-like in their nature, or administer a function for the benefit of the public on behalf of a level of government. Those which are empowered by legislation to supervise and regulate a trade, profession, industry or employment, those which are empowered by legislation to supervise an element of commerce, business, finance, property or legal

<sup>94</sup> *White v Attorney General of Canada*, 2004 BCSC 99 at para 76, cited in *Williams v Canada (Attorney General)* (2005), 76 OR (3d) 763 (SC) at para 36. But see *Hinse v Canada (Attorney General)*, 2015 SCC 35 at para 92, where the Supreme Court insisted that “the federal Crown cannot be held liable for its own actions, but is only liable in respect of the fault of its servants.”

<sup>95</sup> 2020 ABCA 184, leave to appeal to SCC refused, 39271 (10 December 2020).

<sup>96</sup> See also *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 at paras 28–29.

<sup>97</sup> *Wall*, *supra* note 12 at para 14. See also *Martineau v Matsqui Disciplinary Bd*, [1980] 1 SCR 602 at 619.

<sup>98</sup> [1982] 2 SCR 888 [*Roberval*]; *Canada Labour Code*, RSC 1970, c L-1.

<sup>99</sup> *Roberval*, *ibid* at 899. See also *Port Arthur Shipbuilding Co v Arthurs* (1968), [1969] SCR 85; *Re The International Nickel Company of Canada Limited and Rivando*, [1956] OR 379 (CA).

<sup>100</sup> *Roberval*, *ibid* at 900. See also *R v National Joint Council for the Craft of Dental Technicians (Disputes Committee)*, *Ex parte Neate*, [1953] 1 QB 704 (Eng).

<sup>101</sup> 2007 ABCA 295.



rights for the benefit of the public generally, or which set standards for the benefit of the public may also be subject to judicial review. Issues of contractual or property rights as between individuals or as between individuals and organizations, are generally addressed through ordinary court processes at common law, or by statute or through arbitration or alternative dispute resolution as agreed by the parties.<sup>102</sup>

The Court held that the activities of political parties and their local associations were not subject to judicial review, being private rather than public in nature.

Even where the decision-maker is clearly a public authority, not all its decisions are subject to judicial review: they must be of a sufficiently public character. One area in which the law may require further clarification is the exercise by the state of powers that are not conferred by statute, but rather by common law. For example, to what extent is the Crown's exercise of its common law powers (such as its powers to exercise property rights or enter into contracts) subject to judicial review?<sup>103</sup>

A related issue arises as to whether public employees have a right to procedural fairness in dismissal. Procedural fairness is typically a feature of public law, not private law. Before *Dunsmuir*, courts had distinguished between office holders and contractual employees, holding that the former were entitled to procedural fairness in dismissal and to public law remedies for its breach.<sup>104</sup> In *Dunsmuir*, however, the Supreme Court held that “[w]here the employment relationship is contractual, it becomes difficult to see how a public employer is acting any differently in dismissing a public office holder and a contractual employee. In both cases, it would seem that the public employer is merely exercising its private law rights as an employer.”<sup>105</sup> In situations where public authorities are “acting as any other private actor would,” there is “no reason that they should be treated differently than private sector employers.”<sup>106</sup> In most circumstances, the Supreme Court held, the dismissed employee's remedy lies in private law, not public law.

As these cases make clear, judicial review and its associated remedies require an exercise of public authority of a sufficiently public character. This requirement reflects the underlying purpose of judicial review — to control the exercise of public authority. By contrast, most tort law applies universally. As a general rule, there is no corresponding requirement to show

---

<sup>102</sup> *Ibid* at para 14.

<sup>103</sup> The House of Lords has held that they are subject to judicial review: *Council of Civil Service Unions v Minister for the Civil Service*, [1985] 1 AC 374 (HL (UK)) at 411. In Canada, relevant discussions include: *Canada (Prime Minister) v Khadr*, 2010 SCC 3 at para 37 [*Khadr*]; *Valley Rubber Resources Inc v British Columbia (Minister of Environment, Lands and Parks)*, 2002 BCCA 524; *Eagleridge Bluffs & Wetlands Preservation Society v HMTQ*, 2006 BCCA 334; *Shell Canada Products Ltd v Vancouver (City)*, [1994] 1 SCR 231. It is clear that the exercise of some of these powers is subject to the *Charter*: *Greater Vancouver Transportation Authority v Canadian Federation of Students — British Columbia Component*, 2009 SCC 31 at paras 14–16; *Committee for the Commonwealth of Canada v Canada*, [1991] 1 SCR 139; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*; *Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 SCR 3 at para 144, citing *Lavigne v Ontario Public Service Employees Union*, [1991] 2 SCR 211; *RWDSU v Dolphin Delivery Ltd*, [1986] 2 SCR 573 (the *Charter* “will apply to the common law ... in so far as the common law is the basis of some governmental action which, it is alleged, infringes a guaranteed right or freedom” at 599).

<sup>104</sup> *Nicholson v Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 SCR 311; *Knight v Indian Head School Division No 19*, [1990] 1 SCR 653.

<sup>105</sup> *Dunsmuir*, *supra* note 13 at para 103.

<sup>106</sup> *Ibid* at paras 103, 105. That said, in *Canada (Attorney General) v Mavi*, 2011 SCC 30 at paras 48–50, the Supreme Court held that a contract which was “closely controlled by statute” did import requirements of procedural fairness.

that the defendant is truly a public authority, or that it was acting in a sufficiently public way. For example, in bringing a negligence claim there is, of course, no requirement that the defendant be a public authority or that its actions had a public dimension.

There is at least one exception to this general rule. The tort of misfeasance in public office, which we discuss below, can only be brought against public officers. Its goal — somewhat like administrative law — is to provide remedies for misuse of public authority. Misfeasance in public office has, therefore, developed requirements similar to the administrative law requirements of an “exercise of state authority” of a “sufficiently public character.” As to the first requirement, Erika Chamberlain explains that while the precise ambit of the misfeasance tort remains unclear, courts have held that “public employment is not the same as public office,” such that, say, office clerks, firefighters, or teachers would not count as public officers.<sup>107</sup> There is some suggestion in the case law that being a public officer and being susceptible to judicial review go together.<sup>108</sup>

As to the second requirement, some cases have held that misfeasance in public office is available only in respect of “public functions” and not in respect of private ones.<sup>109</sup> In *Elliott v. Canadian Broadcasting Corp.*, a group of WWII Bomber Command veterans sued the CBC for broadcasting a film about the nighttime bombing of Germany which, they said, portrayed them as war criminals. Among their claims was one for “abuse of power.” The trial judge struck the claim:

The power said to be misused must be abuse of a statutory power. Different rights and power flow from whether the body is acting in its public or private capacity. The CBC has a public and a private aspect. When acting as a broadcaster, CBC is acting in its private aspect. Its rights, obligations, powers and liabilities are the same as a private broadcaster and not those of a public body.<sup>110</sup>

In other words, the tort was inapplicable to situations where the CBC was acting like a private organization rather than exercising a public function. Chamberlain thus suggests that “even if the defendant is a public officer, he or she may not necessarily be liable in misfeasance for claims related to contract formation, management of property, or human resources.”<sup>111</sup> However, as she notes, the jurisprudence is not unequivocal on this point.<sup>112</sup>

The upshot of all of this is, as noted above, a partial but not complete overlap in who can be the subject of proceedings in judicial review and in tort. A board or commission which lacks legal personality may be the subject of judicial review, but cannot be the subject of a tort claim unless this option is provided for by statute. On the other hand, when a public authority is exercising private powers, it will still be subject to tort claims, but it may not be subject to judicial review.

<sup>107</sup> Erika Chamberlain, *Misfeasance in a Public Office* (Toronto: Thomson Reuters, 2016) at 87–88.

<sup>108</sup> *Ibid* at 95–97, citing *Freeman-Maloy v Marsden* (2006), 79 OR (3d) 401 (CA); *Society of Lloyd’s v Henderson*, [2005] EWHC 850 (QB (Eng)), aff’d [2007] EWCA Civ 930 (CA (Eng)).

<sup>109</sup> See *Odhavji*, *supra* note 51 at para 17.

<sup>110</sup> (1993), 16 OR (3d) 677 (Ct J (Gen Div)) at para 64, aff’d (1995), 25 OR (3d) 302 (CA), leave to appeal to SCC refused, [1995] SCCA No 393.

<sup>111</sup> Chamberlain, *supra* note 107 at 101.

<sup>112</sup> *Jones v Swansea City Council* (1989), [1990] 1 WLR 54 (CA (Eng)), rev’d on other grounds [1990] 1 WLR 1453 (HL (Eng)).

### C. SUBSTANTIVE CONDITIONS OF LIABILITY

In this section, we consider the substantive requirements for a public authority to be liable in tort. The starting point is the Supreme Court's decision in *The Queen (Can.) v. Saskatchewan Wheat Pool*.<sup>113</sup> The Supreme Court held that breach of statute is not an independent basis for tort liability. In other words, there is no tort of breach of statute.

This proposition applies equally to public authorities. Without more, the fact that an authority has acted in breach of its statutory obligations does not give rise to tort liability. One should avoid “confusing review of the legality of a public body’s decisions with the rules that determine that body’s civil liability.”<sup>114</sup> In *Holland v. Saskatchewan*, a group of farmers sued the provincial government, arguing that it had unlawfully downgraded the certification of their herds, causing them financial loss.<sup>115</sup> The Supreme Court upheld the striking of their claim in negligence, writing that:

The law to date has not recognized an action for negligent breach of statutory duty. It is well established that mere breach of a statutory duty does not constitute negligence.... The proper remedy for breach of statutory duty by a public authority, traditionally viewed, is judicial review for invalidity.... No parallel action lies in tort.<sup>116</sup>

This proposition extends even to government action based on an invalid or inapplicable law. As Justice Laskin held in *Welbridge*, while a municipality might go beyond its jurisdiction in enacting a bylaw, “[i]nvalidity is not the test of fault and it should not be the test of liability.”<sup>117</sup> It is a “general rule of public law” that “absent conduct that is clearly wrong, in bad faith or an abuse of power, the courts will not award damages for the harm suffered as a result of the mere enactment or application of a law that is subsequently declared to be unconstitutional.”<sup>118</sup>

In *118143 Ontario Inc. (Canamex Promotions) v. Mississauga (City)*, the City of Mississauga, purporting to act under a new bylaw, confiscated mobile advertising signs belonging to a private business.<sup>119</sup> The signs were in fact exempt from the bylaw. The business argued that the City had been negligent in relying on an inapplicable bylaw. The Court of Appeal dismissed the claim, holding that the absence of legal authority to remove the signs, standing alone, could not support a finding of negligence.<sup>120</sup> For a successful tort claim against a public authority, it is not enough to show that the government action was unlawful: the ordinary elements of a tort also have to exist.

<sup>113</sup> [1983] 1 SCR 205 [*Saskatchewan Wheat Pool*]. See also *Seneca College v Bhadauria*, [1981] 2 SCR 181.

<sup>114</sup> *Finney v Barreau du Québec*, 2004 SCC 36 at para 31.

<sup>115</sup> 2008 SCC 42.

<sup>116</sup> *Ibid* at para 9 [citation omitted].

<sup>117</sup> *Welbridge*, *supra* note 56 at 969, quoting Kenneth Culp Davis, *Administrative Law Treatise* (St Paul: West, 1958) vol 3 at 487.

<sup>118</sup> *Mackin v New Brunswick (Minister of Finance)*; *Rice v New Brunswick*, 2002 SCC 13 at para 78 [*Mackin*]. See also *Central Canada Potash Co Ltd v Government of Saskatchewan*, [1979] 1 SCR 42; *Guimond v Quebec (Attorney General)*, [1996] 3 SCR 347.

<sup>119</sup> 2016 ONCA 620.

<sup>120</sup> *Ibid* at para 33.

What does this require? Generally speaking, torts can be divided into the intentional and the non-intentional. The intentional torts play a limited, though important role as against public authorities. For example, public officials may be held liable for misfeasance in a public office. Misfeasance in a public office requires that a public officer engage in deliberate and unlawful conduct in their capacity as a public officer, aware that the conduct is unlawful and that it is likely to harm the plaintiff.<sup>121</sup> The requisite unlawful conduct typically consists of an act in excess of the official's powers, an exercise of power for an improper purpose, or breach of a statutory duty.<sup>122</sup> Famously, in *Roncarelli v. Duplessis*, Premier Maurice Duplessis was held liable for revoking the liquor licence of a restaurateur because of his activities as a Jehovah's Witness.<sup>123</sup> Authorities may also be held liable for the tort of false imprisonment, such as when police officers hold someone in custody without authority to do so.<sup>124</sup> Plaintiffs seeking compensation in such situations may prefer to bring a claim for *Charter* damages, which may be available as long as there is no double recovery.<sup>125</sup>

The most common kind of tort claim against public authorities, however, is the non-intentional tort of negligence. Thus, in this section, we focus for the most part on the requirements of negligence claims against public authorities. In line with the principle that, in such circumstances, ordinary private law be applied to public authorities, a negligence claim against a public authority is available only where the ordinary elements of negligence exist. The public authority must have owed a duty of care to the plaintiff, and breached the relevant standard of care; this breach must have caused the plaintiff's injury in a way that was not too remote. We will discuss duty and standard of care in turn.

## 1. DUTY OF CARE

Under the two-stage test for duty of care set out in *Cooper v. Hobart*, a court is to ask first whether a prima facie duty of care exists, and second, whether there are policy reasons outside of the relationship between the parties why a duty of care should not be imposed.<sup>126</sup> At the first stage, a prima facie duty of care requires that the harm that occurred was the reasonably foreseeable consequence of the defendant's act, and that there was proximity between the plaintiff and the defendant. Proximity is about the relationship between the parties, including the "expectations, representations, reliance, and the property or other interests involved."<sup>127</sup>

Given the differences between public authorities and private persons, on occasion, courts have expressed doubt as to the circumstances in which public authorities should be subject to a duty of care. For example, in *Patrong v. Banks*, Justice Myers wrote:

We expect government officials generally to carry out their public duties in the public interest.... Sometimes, the public interest deliberately favours one person over another. To choose a simple example, at every traffic

<sup>121</sup> *Odhavji*, *supra* note 51 at para 23.

<sup>122</sup> *Ontario (Attorney General) v. Clark*, 2021 SCC 18 at para 23.

<sup>123</sup> [1959] SCR 121 [*Roncarelli*].

<sup>124</sup> *Lamb v. Benoit*, [1959] SCR 321.

<sup>125</sup> *Ward*, *supra* note 3 at para 36. See also *Brazeau v. Canada (Attorney General)*, 2020 ONCA 184 at para 44; *Stewart v. Toronto (Police Services Board)*, 2020 ONCA 255 at para 120.

<sup>126</sup> 2001 SCC 79 at para 30 [*Cooper*]. See also *Marchi*, *supra* note 9 at paras 16–19.

<sup>127</sup> *Cooper*, *ibid* at para 34.

light, someone is stopped while someone else is allowed to go. We do not let people who have been stopped at a red light sue the government for losses suffered by being late for a meeting or late with a payment. We do not let parents sue doctors who in good faith report to the Childrens' Aid Society children who are feared to have suffered neglect. Even in making an arrest, the police have to respect the criminals' rights as much as those of others who may be affected by, for example, the time that passes for the police to obtain a warrant. The fact that someone is hurt or suffers loss may not mean that the government official has violated any public or private law duty of care. The official may in fact have acted exactly as Parliament, the Legislature, and society expects and indeed wishes the official to have acted.<sup>128</sup>

In recent cases, proximity has become “the primary analytical tool used to control the negligence liability of public authorities.”<sup>129</sup>

When the public authority operates under a statutory scheme, courts consider the scheme in assessing proximity. If a private law duty of care would conflict with the authority's statutory duties, this may be a reason for refusing to find proximity.<sup>130</sup> Even if there is no conflict, statutory duties “do not generally, in and of themselves, give rise to private law duties of care.”<sup>131</sup> Lewis Klar has argued that a statutory scheme alone can never give rise to a duty of care (unless it does so expressly): to find that a statutory scheme on its own is sufficient to give rise to a duty of care would, Klar argues, conflict with the proposition in *Saskatchewan Wheat Pool*, that there is no tort of breach of statutory duty.<sup>132</sup> That said, courts have not fully closed the door on this possibility.<sup>133</sup>

The statutory scheme is not the only feature of the context that courts can consider in deciding whether there is proximity. Interactions between the public authority and the plaintiff often create proximity.<sup>134</sup> In *Hill v. Hamilton-Wentworth Regional Police Services Board*, the relationship between a police officer and a suspect being investigated was sufficient to ground proximity.<sup>135</sup> In *Fullocka*, interactions between mine inspectors and miners, together with statutory duties to determine whether the mine was safe, were sufficient to ground proximity.<sup>136</sup>

There are two important “bridges” where the duty of care analysis in tort law aligns with the law of judicial review, reflecting common features of claims against public authorities. These are the treatment of acts and omissions and the immunity of public authorities for policy decisions.

---

<sup>128</sup> 2015 ONSC 3078 at para 24.

<sup>129</sup> Hogg, Monahan & Wright, *supra* note 17 at 232. See also Lewis Klar, “The Proximity Hurdle in Negligence Actions Against Public Authorities” (2018) 84 SCLR (2d) 3.

<sup>130</sup> *Syl Apps Secure Treatment Centre v BD*, 2007 SCC 38 at paras 27–28.

<sup>131</sup> *Reference re Broome v Prince Edward Island*, 2010 SCC 11 at para 13 [Broome].

<sup>132</sup> Lewis Klar, “The Tort Liability of the Crown: Back to *Canada v Saskatchewan Wheat Pool*” (2007) 32:3 Adv Q 293 at 296, 306; *Saskatchewan Wheat Pool*, *supra* note 113.

<sup>133</sup> See Hogg, Monahan & Wright, *supra* note 17 at 243, citing *Broome*, *supra* note 131 and *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24 (both of which held that the particular statutory schemes at issue did not create proximity, but left open the possibility that other statutory schemes might).

<sup>134</sup> *Doe v Metropolitan Toronto (Municipality) Commissioners of Police* (1998), 39 OR (3d) 487 (Ct J (Gen Div)); *Imperial Tobacco*, *supra* note 11 at 114–15.

<sup>135</sup> 2007 SCC 41 at para 39.

<sup>136</sup> *Fullocka*, *supra* note 62 at para 51.

a. Acts and Omissions

The first “bridge” is that both tort law and judicial review seem to place little weight on the difference between acts and omissions by public authorities.

The distinction between nonfeasance (typically understood as inaction, or failing to confer some benefit or prevent some harm) and misfeasance (wrongful action, or causing harm) has been described as “foundational to the law of negligence, and indeed to the law of torts more generally.”<sup>137</sup> As explained by Peter Hogg, Patrick Monahan and Wade Wright, courts have traditionally been “reluctant to impose negligence liability for nonfeasance,” absent special circumstances, as such liability would interfere with individual autonomy and seem to be visited on a defendant arbitrarily.<sup>138</sup> However, the distinction has turned out to be difficult to apply to public authorities, which — unlike private persons — are typically not free to exercise their powers however they like, but must exercise them in the public interest. As Dame Sian Elias writes:

Because wide discretions are conferred on officials and public bodies to act in the public interest (a responsibility not shared by those acting in their own interests), their failure to use powers that might have protected others from harm raises in acute form questions of liability based on omission, which the common law has always found more difficult than liability based on positive action.<sup>139</sup>

When a public authority is given the authority to regulate a particular domain, should it always be able to escape liability simply by taking no action?

In some older cases, courts refused to hold public authorities liable in tort for nonfeasance on the basis that liability could attach only to misfeasance. Where the public authority had a discretionary authority to act but chose not to exercise it, the failure to act was often treated as nonfeasance rather than misfeasance. In *Stevens-Willson v. City of Chatham*, a mill caught fire when lightning struck its electrical wires.<sup>140</sup> Firefighters arrived, but when confronted by a sputtering, hissing electrical fire, they “quailed,” “milling around in helpless confusion” until it was too late to save the mill.<sup>141</sup> Although the mill could have been saved by promptly cutting the wires, the Supreme Court held that the municipality could not be liable “for mere inactivity on the part of its servants.”<sup>142</sup> Similarly, courts refused to hold public authorities liable for the failure to repair sidewalks, the failure to provide adequate water pressure for putting out fires, and the failure to cut overhanging branches which posed a risk to drivers.<sup>143</sup>

However, other cases have whittled away the distinction between nonfeasance and misfeasance when it comes to public authorities, often by expanding the definition of

---

<sup>137</sup> Donal Nolan, “Negligence and Human Rights Law: The Case for Separate Development” (2013) 76:2 Mod L Rev 286 at 304.

<sup>138</sup> Hogg, Monahan & Wright, *supra* note 17 at 256.

<sup>139</sup> Elias, *supra* note 8 at 136.

<sup>140</sup> [1934] SCR 353.

<sup>141</sup> *Ibid* at 364–65.

<sup>142</sup> *Ibid* at 365, Lamont J. See also *ibid* at 363, Rinfret J.

<sup>143</sup> *Mainwaring v Nanaimo*, [1951] 4 DLR 519 (BCCA); *Seguin v The Town of Hawkesbury*, [1955] OR 956 (CA); *Miller & Brown Ltd v City of Vancouver* (1966), 59 DLR (2d) 640 (BCCA). See also *East Suffolk Rivers Catchment Board v Kent* (1940), [1941] AC 74 (HL (Eng)).

misfeasance.<sup>144</sup> In *The King v. Hochelaga Shipping & Towing Co. Ltd.*, the government had constructed a jetty and when its upper portion broke off in a storm, the lower portion was left submerged. A ship struck the submerged portion and sank.<sup>145</sup> Justice Crocket held that this was “not a case of mere non-repair or non-feasance, but of the actual creation of a hidden menace to navigation.”<sup>146</sup> In other cases, public authorities were held vicariously liable for failing to mark out a ditch across an airport runway, and for failing to signpost an excavation across a highway.<sup>147</sup>

Some resolution of this issue was achieved in *Kamloops*, where Justice Wilson held that the key question is whether the public authority (or its employee) had a duty to act in the way that it failed to do.<sup>148</sup> If it did have such a duty, then it can be liable for inaction. If it did not have such a duty, then it cannot. Either way, she wrote, the distinction between nonfeasance and misfeasance “becomes irrelevant.”<sup>149</sup> Alternatively, one might suggest that where the defendant owes a duty of care, their failure to act when required to do so is misfeasance; where the defendant does not owe a duty of care, their failure to act can only be nonfeasance.<sup>150</sup> Later, in *Childs v. Desormeaux*, Chief Justice McLachlin reiterated the importance of the distinction as a way of protecting personal autonomy.<sup>151</sup> But she listed, among the factors that could justify imposing liability for nonfeasance, defendants who “exercise a public function” that includes “attendant responsibilities to act with special care to reduce risk.”<sup>152</sup>

As a result of these cases, the distinction between acts and omissions no longer seems to have much application to public authorities.<sup>153</sup> In this respect, tort law has arrived at the same place as the law of judicial review. If a public authority is granted a discretionary power by statute, the failure to exercise that power can be the subject of judicial review proceedings. Just like a positive exercise of the power, the failure to exercise the power may be found unreasonable (for example, if it frustrates the intention of the legislature).<sup>154</sup> As explained by René Dussault and Louis Borgeat, an “inferior tribunal, administrative agency or public officer acts illegally if there is refusal or neglect to decide a matter that is squarely within the jurisdiction assigned by statute.”<sup>155</sup> Courts have granted orders of mandamus to oblige the public authority to exercise its discretion.<sup>156</sup>

---

<sup>144</sup> See *Kwong Estate v Alberta* (1978), 14 AR 120 (CA), aff’d [1979] 2 SCR 1010 (for discussion).

<sup>145</sup> [1940] SCR 153.

<sup>146</sup> *Ibid* at 163.

<sup>147</sup> *Grossman v The King*, [1952] 1 SCR 571; *O’Rourke v Schacht*, [1976] 1 SCR 53.

<sup>148</sup> *Kamloops*, *supra* note 10.

<sup>149</sup> *Ibid* at 22.

<sup>150</sup> See Peter Benson, “Misfeasance as an Organizing Normative Idea in Private Law” (2010) 60:3 UTJL 731.

<sup>151</sup> 2006 SCC 18 at para 31.

<sup>152</sup> *Ibid* at para 37.

<sup>153</sup> See Paul M Perell, “Negligence Claims Against Public Authorities” (1994) 16:1 Adv Q 48 at 52.

<sup>154</sup> *RM (AP) v The Scottish Ministers (Scotland)*, [2012] UKSC 58 at para 47; *Gana v Minister of Manpower and Immigration*, [1970] SCR 699; *Association Internationale des Commis du Détail FAT-CIO-CTC, Local 486 (Union des Commis du détail) v Commission des Relations de Travail du Québec*, [1971] SCR 1043. Cf *Regina v Ontario Milk Marketing Board and Milk Commission of Ontario, Ex parte Channel Islands Breeds Milk Producers Association*, [1969] 2 OR 121 (CA).

<sup>155</sup> René Dussault & Louis Borgeat, *Administrative Law: A Treatise*, 2nd ed (Toronto: Carswell, 1986) vol 4 at 206.

<sup>156</sup> *Commission des Relations de Travail du Québec c L’Association Unie des Compagnons et des Apprentis de l’Industrie de la Plomberie et Tuyauterie des États-Unis et du Canada*, [1969] RCS 466; *Air Canada*, *supra* note 47.

Courts in the UK have suggested that the situation is similar in the tort of misfeasance in a public office. In *Three Rivers District Council and others v. Bank of England (No. 3)*, the House of Lords considered whether omissions could give rise to liability.<sup>157</sup> Lord Hobhouse wrote: “[T]he position is the same as in the law of judicial review. If there is an actual decision to act or not to act, the decision is amenable to judicial review and capable of providing the basis for the commission of the tort.”<sup>158</sup> In *Odhavji*, the Supreme Court commented that “in the United Kingdom, a failure to act can constitute misfeasance in a public office, but only if the failure to act constitutes a deliberate breach of official duty.”<sup>159</sup>

While public authorities do not have an interest in personal autonomy, and are not free to exercise their powers as they like, one might still be concerned, were courts to order them to exercise their powers in specific ways. Should not the decision as to how to exercise such powers be for the legislative and executive branches rather than the courts? This concern is addressed by a separate set of doctrines, which we consider next.

## b. Immunity for Policy Functions

The second “bridge” is that both negligence and judicial review, as well as the law relating to *Charter* damages, recognize an immunity to protect core policy-making functions of the state from judicial oversight. While these different immunities need not coincide in their exact scope, they have a common root in the separation of powers.

In negligence, a prima facie duty of care can be negated if the decision in question is one of policy, made rationally and in good faith.<sup>160</sup> Public authorities are not liable for policy decisions, while they can be liable for operational decisions. This distinction was explained in the following terms in *Anns v. Merton London Borough Council*:

Most, indeed probably all, statutes relating to public authorities or public bodies, contain in them a large area of policy.... Many statutes, also, prescribe or at least presuppose the practical execution of policy decisions: a convenient description of this is to say that in addition to the area of policy or discretion, there is an operational area. Although this distinction between the policy area and the operational area is convenient, and illuminating, it is probably a distinction of degree.... It can safely be said that the more “operational” a power or duty may be, the easier it is to superimpose on it a common law duty of care.<sup>161</sup>

Similar rules exist in other areas of tort law. Quebec civil law recognizes a “public law relative immunity,” which applies to the exercise of the state’s regulatory power.<sup>162</sup> And in claims for misfeasance in public office, decisions based on budgetary constraints or political beliefs generally do not constitute deliberate unlawfulness sufficient to ground liability.<sup>163</sup>

<sup>157</sup> [2000] 3 All ER 1 (HL (UK)).

<sup>158</sup> *Ibid* at 44, Lord Hobhouse.

<sup>159</sup> *Odhavji*, *supra* note 51 at para 24. See also *Grand River Enterprises Six Nations Ltd v Attorney General (Canada)*, 2017 ONCA 526 at para 81.

<sup>160</sup> *Kamloops*, *supra* note 10 at 23; *Just*, *supra* note 11; *Brown v British Columbia (Minister of Transportation and Highways)*, [1994] 1 SCR 420 at 441.

<sup>161</sup> [1977] UKHL 4 at 5.

<sup>162</sup> *Entreprises Sibeca Inc v Frelighsburg (Municipality)*, 2004 SCC 61; *Kosoian v Société de transport de Montréal*, 2019 SCC 59; *Maltais c Procureur général du Québec*, 2020 QCCA 715.

<sup>163</sup> *Odhavji*, *supra* note 51 at para 26; *L(A) v Ontario (Minister of Community and Social Services)* (2006), 83 OR (3d) 512 (CA) at para 37; *First National Properties Ltd v McMinn*, 2001 BCCA 305 at para 45.



An example may help to illustrate the rule in the negligence context. In *Imperial Tobacco*, tobacco companies sued Canada for designing low-tar tobacco strains that turned out to be just as harmful as regular strains.<sup>164</sup> The Supreme Court held that Canada's interactions with the tobacco companies had created proximity, as it was arguable that Canada had been "acting in a commercial capacity."<sup>165</sup> However, the decision to design low-tar tobacco strains was one of policy, based on social and economic factors, and therefore, could not ground a claim in negligence.<sup>166</sup>

The precise ambit of policy immunity has been the subject of debate. In *Marchi*, the Supreme Court distilled four factors from the case law to help in assessing whether a decision is policy or operational: (1) the level and responsibilities of the decision-maker, in particular how closely related they are to a democratically accountable official; (2) the process by which the decision was made, including whether it was deliberative and prospective; (3) the nature and extent of budgetary considerations involved in the decision; and (4) the extent to which the decision was based on objective criteria of the sort courts can review.<sup>167</sup>

For present purposes, on the point of greatest interest is the reason for policy immunity. As explained in *Kamloops*, the policy immunity "prevents the courts from usurping the proper authority of elected representatives and their officials."<sup>168</sup> In other words, it is a manifestation of the basic principle of the separation of powers. It serves to keep courts from making decisions (through the imposition of tort liability) that are properly to be taken by the legislature or the executive.<sup>169</sup> One case characterizes it as "a rule of public law" which serves to "determine when the private law will apply to public authorities."<sup>170</sup>

This doctrine has a parallel in the law of judicial review, where "[t]he concern about the proper role of the courts and their constitutional relationship to the other branches of government is addressed by the requirement of justiciability."<sup>171</sup>

An issue may be non-justiciable when it involves "moral and political considerations which it is not within the province of the courts to assess."<sup>172</sup> By contrast, it may be justiciable where "it has a sufficient legal component to warrant the intervention of the judicial branch."<sup>173</sup> The effect of this doctrine is to immunize certain policy decisions from judicial oversight, where such oversight would be outside the proper role of the courts. For example, "it is hard to conceive of a court reviewing in wartime a general's strategic decision to deploy military forces in a particular way."<sup>174</sup>

---

<sup>164</sup> *Imperial Tobacco*, *supra* note 11.

<sup>165</sup> *Ibid* at para 115.

<sup>166</sup> *Ibid* at para 116.

<sup>167</sup> *Marchi*, *supra* note 9 at paras 56, 62–65.

<sup>168</sup> *Kamloops*, *supra* note 10 at 25.

<sup>169</sup> *Marchi*, *supra* note 9 at para 42. See also *Rowling v Takaro Properties Ltd*, [1988] AC 473 (PC) at 501.

<sup>170</sup> *Laurentide Motels Ltd v Beauport (City)*, [1989] 1 SCR 705 at 723.

<sup>171</sup> *Finlay*, *supra* note 58 at 632; *Can (AG) v Can (MEMR)*, *supra* note 46; Sara Blake, *Administrative Law in Canada*, 6th ed (Toronto: LexisNexis Canada, 2017) s 8.47.

<sup>172</sup> *Operation Dismantle Inc v The Queen*, [1985] 1 SCR 441 at 465.

<sup>173</sup> *Reference Re Canada Assistance Plan (BC)*, [1991] 2 SCR 525 at 545.

<sup>174</sup> *Hupacasath First Nation v The Minister of Foreign Affairs Canada and the Attorney General of Canada*, 2015 FCA 4 at para 66.

A parallel immunity exists in proceedings for *Charter* damages. Under the “good governance” doctrine, the state can argue that “an award of *Charter* damages would interfere with good governance such that damages should not be awarded unless the state conduct meets a minimum threshold of gravity.”<sup>175</sup> This doctrine “recognizes that the state must be afforded some immunity from liability in damages resulting from the conduct of certain functions that only the state can perform. Legislative and policy-making functions are one such area of state activity.”<sup>176</sup> In *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, the Supreme Court explained that “[t]he enactment of laws is the fundamental role of legislatures, and the courts must not act so as to have a chilling effect on the legislatures’ actions in this regard”; however, the government “does not have immunity in relation to government policies that infringe fundamental rights.”<sup>177</sup>

## 2. STANDARD OF CARE

Once a duty of care is found, the next question is whether the public authority has breached the relevant standard of care. In this area of the law, we find two significant “walls” between torts and judicial review, reflecting the purposes of judicial review and tort law: different roles played by statute and different treatments of reasonableness.

### a. The Role of Statute

Where the actions of a public authority are challenged, the public authority will often respond by claiming that its actions were permitted or required by statute. However, the role of statute is different in judicial review and in tort claims.

In judicial review, the state’s actions are either authorized (by statute or by the royal prerogative) or they are made without lawful authority and can be set aside.<sup>178</sup> In the words of an English court, “any action to be taken must be justified by positive law.”<sup>179</sup> While public authorities are often granted wide discretion by statute, “there is no such thing as absolute and untrammelled ‘discretion,’” and courts will ensure that the discretion is exercised within its limits.<sup>180</sup> The absence of legal authority to act in a given way is both necessary and sufficient for a successful judicial review application.

Neither of these is true of a tort claim. The fact that absence of legal authority is not sufficient for a tort follows from *Saskatchewan Wheat Pool*, where the Supreme Court held that acting in breach of statute — and thus, for a public authority, without legal authority — is not enough to ground a tort claim. It also has to be shown that the ordinary elements of a tort exist. That said, the Supreme Court in *Saskatchewan Wheat Pool* also held that breach of a statute, where the breach causes damage to the plaintiff, is a factor that can be considered in determining whether the public authority breached the standard of care.<sup>181</sup>

<sup>175</sup> *Ward*, *supra* note 3 at para 39. See also *Mackin*, *supra* note 118.

<sup>176</sup> *Ward*, *ibid* at para 40.

<sup>177</sup> 2020 SCC 13 at paras 177, 179.

<sup>178</sup> François du Bois, “Human Rights and the Tort Liability of Public Authorities” (2011) 127:4 Law Q Rev 589.

<sup>179</sup> *R v Somerset County Council, Ex parte Fewings*, [1995] 1 WLR 1037 (CA (Eng)) at 1042.

<sup>180</sup> *Roncarelli*, *supra* note 123 at 140. See also *Vavilov*, *supra* note 44 at para 108; *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v Lafontaine (Village)*, 2004 SCC 48 at para 7.

<sup>181</sup> *Saskatchewan Wheat Pool*, *supra* note 113 at 226, 228.

Nor is absence of legal authority necessary for a tort claim: state action within legal authority can still be tortious. It is certainly true that, if the public authority can show that a statute *required* the tortious act, then this is a defence to liability. Where a statute “strictly defines the manner of performance and the precautions to be taken,” compliance with these requirements will likely exhaust the standard of care.<sup>182</sup> But the mere existence of statutory authority may not exclude liability for all actions that are taken within such authority. This point comes out most clearly in cases of nuisance. In *Tock v. St. John’s Metropolitan Area Board*, Justice Sopinka wrote that “if the legislature expressly or implicitly says that a work can be carried out which can only be done by causing a nuisance, then the legislation has authorized an infringement of private rights.”<sup>183</sup> It has to be shown that the work could *only* be done by causing the nuisance, and “[t]he burden of proof with respect to the defence of statutory authority is on the party advancing the defence.”<sup>184</sup>

The limits of this defence became clear in *Ryan*, where a motorcyclist was injured while crossing railway tracks in Victoria.<sup>185</sup> The fact that the design of the tracks was within statutory authority did not preclude liability, because the tracks could have been designed in a way that conformed to the applicable regulations without creating the danger. In the UK, the House of Lords has held that “statutory authority only provides a defence to a claim based on a common law cause of action where the loss suffered by the plaintiff is the inevitable consequence of the proper exercise of the statutory power or duty.”<sup>186</sup>

This difference between tort and judicial review reflects their underlying purposes. Because judicial review aims to hold the state to standards of legality, it follows that it would be sufficient, for a successful judicial review application, to show that the public authority breached its statutory duty. By contrast, tort law aims to hold public authorities to standards which also apply to private persons — in negligence, a standard of reasonable care. Breaching a statute does not automatically mean that the public authority committed a private wrong; and where the statute confers a discretion, conforming to the statute may not mean that the public authority acted with reasonable care.

#### b. Reasonableness Standards

Both judicial review and tort law may be concerned with the reasonableness of the actions of a public authority. But the meaning of “reasonableness” differs in the law relating to judicial review and the law of tort.

In judicial review, violations of procedural fairness, internal irrationality, or disproportionate infringements of *Charter* rights, *inter alia*, can cause a decision to be

<sup>182</sup> *Ryan*, *supra* note 63 at paras 39–40. Also, under federal Crown liability legislation, the Crown is not made liable “in respect of anything done or omitted in the exercise of any power or authority that ... would have been exercisable by virtue of the prerogative of the Crown, or any power or authority conferred on the Crown by any statute”: *CLPA* (Can), *supra* note 34, s 8. However, other Crown liability statutes do not contain the same rule.

<sup>183</sup> [1989] 2 SCR 1181 at 1225 [*Tock*].

<sup>184</sup> *Ibid* at 1226. While other judges in *Tock* attempted to depart from the inevitable result rule, this attempt was declared unsuccessful, and the rule was reaffirmed in *Ryan*, *supra* note 63 at paras 54–55.

<sup>185</sup> *Ryan*, *ibid*.

<sup>186</sup> *X (minors) v Bedfordshire CC*, [1995] 3 All ER 353 (HL (UK)) at 365–66 [*X (minors)*], Lord Browne-Wilkinson. See also *Allen v Gulf Oil Refining Ltd*, [1980] UKHL 9.

unreasonable.<sup>187</sup> The focus is on “the decision actually made by the decision maker, including both the decision maker’s reasoning process and the outcome.”<sup>188</sup> A reasonable decision is “based on an internally coherent and rational chain of analysis and ... justified in relation to the facts and law that constrain the decision maker.”<sup>189</sup> When a statute creates a discretion, it thereby defines “the scope of the discretion and the principles governing the exercise of the discretion.”<sup>190</sup> Thus, a reasonable decision must conform to the “rationale and purview of the statutory scheme under which it is adopted.”<sup>191</sup> It is fair to say that reasonableness in the judicial review context reflects requirements appropriate to public authorities: to justify decisions and to exercise statutory powers for the purposes for which they were conferred.

“Reasonableness” in tort law is different. As with a tort claim against a private person, the court looks to whether the defendant created an unreasonable risk of harm to the plaintiff which the defendant ought to have had in mind. Reasonableness depends on factors such as the likelihood and gravity of the harm, the cost of preventing it, and custom, industry practice and statutory or regulatory standards.<sup>192</sup> It is true that if a public official has been advised by legal counsel that a certain action would be beyond their authority, it will rarely be negligent for them to refrain from taking the action.<sup>193</sup> But, as explained in connection with *Ryan*, acting within statutory authority will not always constitute reasonable care.

In short, reasonableness in tort law is a standard applicable both to private persons and public authorities. This is not to say that the defendant being a public authority is always irrelevant. In *Just*, the question was whether the Crown had met its standard of care in relation to road maintenance. Justice Cory commented:

It is apparent that although the *Crown Proceeding Act* imposes the liability of a person upon the Crown, it is not in the same position as an individual. To repeat, the respondent is responsible not for the maintenance of a single private road or driveway but for the maintenance of many hundreds of miles of highway running through difficult mountainous terrain, all of it to be undertaken within budgetary restraints. As noted earlier, decisions reached as to budgetary allotment for departments or government agencies will in the usual course of events be policy decisions that cannot be the basis for imposing liability in tort even though these political policy decisions will have an effect upon the frequency of inspections and the manner in which they may be carried out. All of these factors should be taken into account in determining whether the system was adopted in *bona fide* exercise of discretion and whether within that system the frequency, quality and manner of inspection were reasonable.<sup>194</sup>

Similarly, in *Swinamer*, the Supreme Court observed that the public authority was “responsible for the maintenance of some 800 kilometres of roads,” and held that its actions had been reasonable when measured against perceived risks and budgetary constraints.<sup>195</sup>

<sup>187</sup> *Vavilov*, *supra* note 44; *Doré v Barreau du Québec*, 2012 SCC 12.

<sup>188</sup> *Vavilov*, *ibid* at para 83.

<sup>189</sup> *Ibid* at para 85.

<sup>190</sup> *Montréal (City) v Montreal Port Authority*, 2010 SCC 14 at para 33.

<sup>191</sup> *Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2 at para 15.

<sup>192</sup> *Ryan*, *supra* note 63 at para 28.

<sup>193</sup> *Fullowka*, *supra* note 62 at para 89.

<sup>194</sup> *Just*, *supra* note 11 at 1246–47.

<sup>195</sup> *Swinamer*, *supra* note 92 at 466.

Given these differences between reasonableness in the two bodies of law, it appears that a decision might be unreasonable in the judicial review sense without being unreasonable in the negligence sense, or vice versa. Thus, as was held in *TeleZone*, a successful tort claim does not require that the claimant first bring an application for judicial review to show that the decision was unreasonable in a public law sense.<sup>196</sup>

## D. REMEDIES

Remedies are an area in which we find many “walls” and few “bridges” between tort law and judicial review.

### 1. DAMAGES

Damages are the standard remedy in tort. The basic principle is that tort damages seek to make the plaintiff whole, reflecting tort law’s goal of correcting wrongs. This principle applies no differently where the tortfeasor is a public authority. By contrast, damages are not available in judicial review. The focus is on quashing a decision made unlawfully or unfairly, such that it can be replaced with a decision made lawfully and fairly.<sup>197</sup>

While the basic principle of tort damages applies across the board, there may be additional rules in tort damages that apply differently where the tortfeasor is a public authority. Let us consider two examples.

Damages can be sought in tort for non-pecuniary losses — those which cannot be compensated by money. As held in *Andrews v. Grand & Toy Alberta Ltd.*, the evaluation of non-pecuniary losses is “a philosophical and policy exercise more than a legal or logical one,” as “there is no objective yardstick for translating non-pecuniary losses, such as pain and suffering and loss of amenities, into monetary terms.”<sup>198</sup> Courts therefore take a functional approach to such damages: “Money is awarded because it will serve a useful function in making up for what has been lost in the only way possible, accepting that what has been lost is incapable of being replaced in any direct way.”<sup>199</sup> In *Ward*, the Supreme Court adapted this approach to *Charter* damages, holding that “damages [are] appropriate and just to the extent that they serve a useful function or purpose.”<sup>200</sup> The three purposes that *Charter* damages might serve are: “(1) compensating the claimant for loss and suffering caused by the breach; (2) vindicating the right by emphasizing its importance and the gravity of the breach; and (3) deterring state agents from committing future breaches.”<sup>201</sup> One can pose the question whether such an approach should also apply in tort cases against public authorities where damages are sought for non-pecuniary losses.

<sup>196</sup> *TeleZone*, *supra* note 41. See also *X (minors)*, *supra* note 186, Lord Browne-Wilkinson.

<sup>197</sup> See Peter Cane, “Damages in Public Law” (1999) 9:3 *Otago L Rev* 489. That said, the majority in *Paradis Honey*, *supra* note 9 in *obiter* remarks, approved in principle of ordering damages as a remedy in judicial review.

<sup>198</sup> [1978] 2 SCR 229 at 261.

<sup>199</sup> *Ibid* at 262.

<sup>200</sup> *Ward*, *supra* note 3 at para 24.

<sup>201</sup> *Ibid* at para 31.

Another question is whether and in what circumstances punitive damages are available for “oppressive, arbitrary or unconstitutional action by the servants of the government,” as held by Lord Devlin in *Rookes v. Barnard*.<sup>202</sup> In *McElroy*, Justice Spence suggested that in Canadian law, the ability to award punitive damages was not limited to the categories set out in *Rookes*.<sup>203</sup> This might be taken to suggest that punitive damages are available within those categories. Some courts have concluded on this basis that punitive damages are available for oppressive, arbitrary, or unconstitutional government action.<sup>204</sup> For example, in *LeBar v. Canada*, an inmate had been held in jail past the time at which his sentence had ended, despite clear notice to correctional authorities that he should be released.<sup>205</sup> The Federal Court of Appeal upheld an award of punitive damages under *Rookes*.

## 2. REMEDIES ROOTED IN THE PREROGATIVE WRITS

In judicial review, unlike in tort, the typical remedy is to quash the impugned decision (a remedy traditionally called certiorari) and remit the matter to the administrative decision-maker.<sup>206</sup> In limited circumstances, reviewing courts have rendered the decision that the administrative decision-maker ought to have rendered, rather than remitting the matter.<sup>207</sup> Other remedies include orders of prohibition, preventing the decision-maker from continuing some unlawful action; mandamus, requiring the decision-maker to do something it is lawfully obliged to do; and (somewhat rarely) quo warranto, contesting a person’s right to hold a public office.<sup>208</sup>

These remedial options, all rooted in the prerogative writs developed in English law, reflect the focus in judicial review on the legality of the decision at issue. They serve to quash unlawful decisions, interdict unlawful actions, and require lawful duties to be performed. Traditionally, administrative law tended to frame errors by administrative decision-makers as a matter of *vires* or jurisdiction, which resulted in decisions that did not constitute exercises of statutory authority at all. While Canadian administrative law has moved away from this approach, the goal is still to ensure that administrative decisions are made in accordance with law. Where a decision is not, it is set aside.

By contrast, in tort law, an administrative decision cannot be set aside or quashed. Like any other tortious act, a decision by a public authority is taken as an event that has already occurred; tort law cannot undo the decision any more than it can undo a car accident or the collapse of a bridge. Rather, the tort law approach is to make the plaintiff whole, to the extent that is possible, through damages. As Justice Binnie put it in *TeleZone*, “no amount of artful

<sup>202</sup> [1964] UKHL 1 at 37 [*Rookes*], cited in *McElroy v Cowper-Smith and Woodman*, [1967] SCR 425 [*McElroy*]. See also Jamie Cassels & Elizabeth Adjin-Tetty, *Remedies: The Law of Damages*, 3rd ed (Toronto: Irwin Law, 2014) at 335.

<sup>203</sup> *McElroy*, *ibid* at 432, Spence J, dissenting (but not on this point).

<sup>204</sup> *Tymkin v Ewatski*, 2009 MBCA 77 at para 27; *Health Care Developers Inc v Newfoundland* (1996), 141 Nfld & PEIR 34 (Nfld SC (CA)) at para 91; *Gershman v Manitoba Vegetable Producers’ Marketing Board* (1976), 69 DLR (3d) 114 (Man CA); *Her Majesty the Queen in Right of Canada v Joseph Peeters*, [1994] 1 FC 562 (FCA); *Uni-Jet Industrial Pipe Ltd v Canada (Attorney General)*, 2001 MBCA 40. But see *CivicLife Inc v Canada (Attorney General)* (2006), 215 OAC 43 (Ont CA).

<sup>205</sup> (1988), [1989] 1 FC 603.

<sup>206</sup> *Oakwood Development Ltd v St-François Xavier*, [1985] 2 SCR 164.

<sup>207</sup> *Renaud v Quebec (Commission des affaires sociales)*, [1999] 3 SCR 855.

<sup>208</sup> *The Queen v Wheeler*, [1979] 2 SCR 650; *Claudia Jock v The Queen*, [1991] 2 FC 355 (TD); Blake, *supra* note 171 at 564–65.

pleading in a damages case will succeed in setting aside the order said to have harmed the claimant or enjoin its enforcement.... The claimant must ... be content to take its money (if successful) and walk away leaving the order standing.”<sup>209</sup>

In some circumstances, this approach makes practical sense for plaintiffs. In *Parrish & Heimbecker Ltd. v. Canada (Agriculture and Agri-Food)*, a company imported wheat via the port of Halifax, but when its ship arrived, Canada revoked the permit for the importation and granted a new permit with different conditions.<sup>210</sup> The company complied with the new permit, but the new conditions rendered the wheat unacceptable to the buyer. Because the company had complied with the new permit, “[b]ringing an application for judicial review to invalidate the licensing decisions would serve no practical purpose.”<sup>211</sup> However, an action in tort would allow the company to “recover the additional costs of complying.”<sup>212</sup> In other circumstances — say, a prisoner who is being held unlawfully — the prospect of release through judicial review might well be more attractive than damages in tort.<sup>213</sup>

### 3. DECLARATIONS AND INJUNCTIONS

Declaratory and injunctive relief originated in private law, and are available both in tort and in judicial review.

However, there are special constraints on the use of declaratory and injunctive relief as against public authorities in private law actions. First, at common law an injunction could not be issued against the Crown.<sup>214</sup> Crown liability statutes also contain provisions stating that courts will not grant injunctions against the Crown, but instead will make an order declaratory of the rights of the parties; the statutes also provide that courts will not grant injunctions against Crown servants if this would have the effect of granting relief that could not be obtained in proceedings against the Crown.<sup>215</sup> As Justice Sharpe has commented, “[t]he effect of these provisions is unclear.”<sup>216</sup> As a practical matter, the bar on obtaining a *permanent* injunction against the Crown poses no problem, as it can be assumed that the Crown and its officers will obey the law as declared by the court.<sup>217</sup> However, courts do not as a general rule issue *interim* declarations. Thus, the rule poses an obstacle to obtaining interim or interlocutory relief against the Crown.<sup>218</sup>

There is much dispute about the extent to which the Crown’s immunity against injunctive relief extends to Crown servants and agents. Some courts have suggested that an injunction

<sup>209</sup> *TeleZone*, *supra* note 41 at para 75.

<sup>210</sup> 2010 SCC 64.

<sup>211</sup> *Ibid* at para 19.

<sup>212</sup> *Ibid*.

<sup>213</sup> See *TeleZone*, *supra* note 41 at para 26; *May v Ferndale Institution*, 2005 SCC 82 at para 44. Of course, a habeas corpus application to provincial superior court is another option: *Khela*, *supra* note 43.

<sup>214</sup> *The Queen v Leong Ba Chai*, [1954] SCR 10 at para 13; *The Grand Council of The Crees v Her Majesty The Queen in Right of Canada*, [1982] 1 FC 599 (FCA).

<sup>215</sup> See e.g. *CLPA (Can)*, *supra* note 34, s 22(1); *CLPA (Ont)*, *supra* note 34, s 22; *Centre d’information & d’animation communautaire c R*, [1984] 2 FC 866 (FCA).

<sup>216</sup> The Honourable Mr Justice Robert J Sharpe, *Injunctions and Specific Performance* (Toronto: Thomson Reuters Canada, 2021), ch 3 (VII) at § 3:27.

<sup>217</sup> Janice J Tokar, “Administrative Law: Injunctive Relief Against the Crown” (1985) 15:1 *Man LJ* 97 at 98.

<sup>218</sup> *Loomis v Ontario (Ministry of Agriculture & Food)* (1993), 16 OR (3d) 188 (Div Ct). But see 407 *ETR Concession Co v Ontario (Minister of Transportation)* (2005), 199 OAC 221 (Ont CA).

may issue to restrain a Crown servant from exceeding their authority or acting without authority in a way that would violate the plaintiff's right, as such an injunction is not really an injunction against the Crown.<sup>219</sup> There have also been suggestions that the immunity does not extend to Crown agents — particularly agents carrying out a commercial function, such as a Crown corporation — when acting outside the scope of their authority.<sup>220</sup>

It has been questioned whether the rule applies in judicial review proceedings, given that these were traditionally understood not as proceedings *against* the Crown, but rather as proceedings *by* the Crown against its administrators.<sup>221</sup> It is clear that an injunction can issue against the Crown under section 24(1) of the *Charter*, although there is continuing dispute about the circumstances under which mandatory, rather than declaratory relief, is appropriate in constitutional matters.<sup>222</sup> The Court of Appeal of Alberta has upheld the refusal to strike a claim seeking injunctive relief based on section 35 of the *Constitution Act, 1982*.<sup>223</sup> In *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, the Supreme Court stated that injunctive relief “may be available” in relation to Aboriginal rights and title claims.<sup>224</sup>

The second distinctive rule applies to private law actions generally. As stated in *Manuge v. Canada*, “there is a residual discretion to stay an action that is essentially a veiled application for judicial review.”<sup>225</sup> This will be so if “it is premised on public law considerations to such a degree that ... ‘in its essential character, it is a claim for judicial review with only a thin pretence to a private wrong.’”<sup>226</sup>

In general, seeking a declaration or an injunction solely to challenge the decision of an administrative body, or to render the decision unenforceable, would be an attempt to circumvent judicial review. If the plaintiff is not “content to let the order stand,”<sup>227</sup> but is attempting to “set aside the order or deprive it of its effects,” then, depending on the circumstances, it may be held to be a collateral attack.<sup>228</sup> In *Shuswap Lake Utilities Ltd. v. Mattison*, the plaintiff utility company brought an action against the British Columbia Comptroller of Water Rights, seeking declarations that he did not have the authority to make

<sup>219</sup> *Rattenbury v Land Settlement Board* (1928), [1929] SCR 52; *Langelier*, *supra* note 19 at 72–75; *Smith v Attorney General (NS)*, 2004 NSCA 106; Sharpe, *supra* note 216.

<sup>220</sup> *Baton Broadcasting Ltd v Canadian Broadcasting Corp.*, [1966] 2 OR 169 (H Ct J); *Wittal v Saskatchewan Government Insurance* (1988), 67 Sask R 14 (CA); *Canada (Attorney General) v Saskatchewan Water Corp* (1993), 109 Sask R 264 (CA).

<sup>221</sup> *Lang v British Columbia (Superintendent of Motor Vehicles)*, 2005 BCCA 244 at paras 22–25; *Northburn Prescriptions Ltd v British Columbia*, 2014 BCSC 2124; *Mundle v R* (1994), 85 FTR 258 (FC); *Musqueam Indian Band v Governor in Council of Canada*, 2004 FC 579.

<sup>222</sup> *Charter*, *supra* note 1, s 24(1); *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 at para 70. See also *Mahe v Alberta*, [1990] 1 SCR 342; *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311; *United States v Burns*, 2001 SCC 7; *Khadr*, *supra* note 103; *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 at para 150; Kent Roach, *Constitutional Remedies in Canada*, 2nd ed (Toronto: Thomson Reuters, 2021), ch 13. Justice Binnie has held that the Supreme Court has the power to grant a stay with the effect of an injunction, as provincial legislation could not control the Supreme Court's remedial powers: *M & D Farm Ltd v Manitoba Agricultural Credit Corp.*, [1998] 1 SCR 1074.

<sup>223</sup> *Constitution Act, 1982*, s 35, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11; *Lameman v Alberta*, 2013 ABCA 148 at paras 40–43. But see *Her Majesty the Queen v Long Plain First Nation*, 2015 FCA 177 at paras 140–56.

<sup>224</sup> 2017 SCC 54 at para 86.

<sup>225</sup> 2010 SCC 67 at para 2.

<sup>226</sup> *Ibid* at para 18, quoting *TeleZone*, *supra* note 41 at para 78.

<sup>227</sup> *TeleZone*, *ibid* at para 19.

<sup>228</sup> *Attorney General of Canada v Aéroport de Québec inc*, 2011 FC 195 at para 46.



certain orders.<sup>229</sup> The Court dismissed the action as an abuse of process. That said, in exceptional circumstances, this rule has been departed from. For example, in *Ewert v. Canada*, the Supreme Court granted a declaration that the Correctional Service of Canada had violated a provision of its governing legislation.<sup>230</sup>

#### IV. CONCLUSION

As this discussion makes clear, adapting tort law to public authorities is a complex and ongoing project. It involves both “bridges,” where tort law has converged with judicial review, and “walls,” where the two areas of law have remained separate for principled reasons. The public law of tort will doubtless continue to develop, as does the common law more generally, through experience.

---

<sup>229</sup> 2008 BCCA 176.

<sup>230</sup> 2018 SCC 30 at para 83.

*[this page is intentionally blank]*