EDITOR'S PREFACE

PUBLIC WRONGS AND PRIVATE DUTIES: RETHINKING PUBLIC AUTHORITY LIABILITY IN CANADA

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The papers collected in this special edition of the *University of New Brunswick Law Journal* were presented at a workshop held at the University of New Brunswick in May 2006. Our interest in organizing a conference on public authority liability arose in large part out of our shared sense that individuals and groups were increasingly turning to private law, particularly the law of negligence, to amplify or even substitute for traditional public law remedies. In this regard, public authority liability may be understood as being a form of judicial review, in the sense that an action in tort offers an opportunity for judicial supervision over public decision-making and places limits on the exercise of governmental authority. In short, tort law is an avenue by which public decision-makers may be held to account.

Public authority liability, because it exists at the crossroads of public and private law, tends to track judicial attitudes regarding the legal significance of the public/private divide.[1] While using the distinction between the public and private as a basis for legal determinations is controversial, since the distinction itself is contested owing to its contingent and ideological content,[2] as a descriptive matter, the government's singular character remains at the core of public authority liability. By definition, the very idea of a separate set of rules governing liability for public actors is dependent on the identification of a public sphere.

The focal point for debates surrounding the scope of public authority liability has traditionally been the policy/operational distinction.[3] This distinction captures a key public law concern regarding the proper scope of judicial supervision over the exercise of discretionary powers. In essence, the courts must balance the idea of equality before the law, which militates against governmental immunity from tortious liability, with parliamentary supremacy and judicial deference for the policy choices of statutory decision-makers. The policy/operational distinction provides a

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1 See, for example, Melanie Randall, "Sex Discrimination, Accountability of Public Authorities and the Public/Private Divide in Tort Law: An Analysis of *Doe v. Metropolitan Toronto (Municipality) Commissioners of Police*", (2001) 26 Queen's L.J. 451.

2 Unpacking this distinction and demonstrating its impact on legal doctrine is a central theme in feminist legal scholarship. See for example, *ibid.* See also, Susan Boyd, ed., *Challenging the Public/Private Divide: Feminism, Law and Public Policy*, (Toronto: University of Toronto Press, 1997).

3 The distinction was introduced in *Anns v. Merton London Borough Council*, [1978] A.C. 728 (U.K.H.L.) [*Anns*]. In Canada, see *Kamloops (City) v. Nielsen*, [1984] 2 S.C.R. 2 [*Nielsen*].

basis for delineating those decisions that ought not be subject to judicial oversight because they involve the exercise of discretion conferred by the legislature. To disturb those decisions through a finding of negligence is to allow the court to substitute its decision for that of the legislature's chosen delegate.

Notwithstanding that the reliance on the policy/operational distinction as the touchstone for liability has been the subject of trenchant criticism from scholars,[4] and its role as a central determinant of the duty of care was subsequently deemphasized by the British courts,[5] the Supreme Court of Canada has, until quite recently, embraced the distinction, seeking to provide immunity for those decisions that involve consideration of economic, social and political factors.[6] In this regard, the review of public decision-making through negligence claims and through administrative law have followed a similar trajectory in that the law of judicial review similarly insulates the exercise of governmental discretion from judicial scrutiny.

However, since the Supreme Court of Canada's decisions in *Cooper v. Hobart*[7] and *Edwards v. Law Society of Upper Canada*,[8] Canadian courts have moved away from using the policy/operational distinction as the predominant basis for determining whether a public authority will owe a duty of care, adopting instead a more searching analysis of proximity in the first stage of the *Anns* test. Here too, the question of governmental difference bears on the courts' analysis of the relationship between the parties. For example, in *Cooper*, the Supreme Court of Canada is mindful that imposing a duty of care on a regulator (the British Columbia Registrar of Mortgage Brokers) in favour of individual regulatory beneficiaries (here investors in mortgage transactions) may not be consistent with the "Registrar's overarching duty to the public".[9] The court recognizes the desirability of coherence between the private and public duties of regulatory officials.

As social interactions become increasingly subject to complex regulatory oversight with consequential reliance by the public on regulatory officials to protect their interests, the law is under heightened pressure to provide remedies to persons who suffer harm as a result of public actions and public decisions. Consider, for example, the Ontario Court of Appeal's recent decision in *A.L. v. Ontario (Minister*

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[4] See Cohen and Smith, "Entitlement and the Body Politic: Rethinking Negligence in Public Law" (1986) 64 Can. Bar Rev. 1.

[5] *Murphy v. Brentwood District Council*, [1990] 2 All E.R. 908 (U.K.H.L.).

[6] *Just v. British Columbia*, [1989] 2 S.C.R. 1228; *Brown v. British Columbia (Minister of Transportation & Highways)*, [1994] 1 S.C.R. 420 [*Brown*]; and *Swinamer v. Nova Scotia (Attorney General)*, [1994] 1 S.C.R. 445.

[7] *Cooper v. Hobart*, [2001] 3 S.C.R. 537 [*Cooper*].

[8] *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562.

[9] *Cooper*, *supra* note 7 at para. 44.

of Community and Social Services.[10] Here, the plaintiffs, a mother and her disabled child, sought to challenge the Minister's failure to enter into special needs agreements with parents of severely disabled children, in the absence of which parents were placed in the difficult position of either paying for expensive services out of their own pocket or temporarily surrendering custody of their disabled children in order to secure the necessary services. The complaint has many of the hallmarks of a traditional public law action, in that the plaintiffs are principally concerned with what they perceive to be an unreasonable and irrational government decision. However, the plaintiffs decided to pursue their complaint as a tort claim. Moreover, the plaintiffs also sought to have the proceedings certified as a class action, where the class was parents of similarly affected parents of disabled children.

The *A.L.* case demonstrates the difficulty that some lower courts have had with the Supreme Court's new approach and the place of the policy/operational dichotomy within that framework, as illustrated by the divergent approaches of the Court of Appeal and the Divisional Court on the issue. The Court of Appeal refused to find a private law duty of care, finding that such a duty would belie the public law duty created by the *Child and Family Services Act*.[11] Invoking the policy/operational dichotomy, the Court had little difficulty finding that the plaintiffs were complaining of quintessential policy matters. To the Divisional Court, by contrast, the statutory language and the *parens patriae* jurisdiction suggested that the decision respecting special needs agreements was operational in nature since it related to the implementation of a broader policy to provide services. The limitations of the policy/operational distinction as an analytical device are plain enough to see.

What is interesting about this case is not only the novel nature of the claim itself, but also that the public/private distinction finds expression in a number of entry points within the litigation process, such as certification procedures for class action proceedings, and the form and availability of certain remedies, in addition to its impact on substantive liability determinations. In this regard, we were particularly pleased that the contributors to this volume have approached the topic of public authority liability from both a private law and public law perspective, and have considered the implications of governmental difference for a wide range of procedural and substantive issues. Despite the varied perspectives presented, a number of important common questions are raised by the collection as a whole.

Firstly, each of these papers considers the question of the salience of governmental difference in determinations of liability. As noted, the unique nature of governmental defendants is relevant to a number of critical junctures within the litigation process. The papers by Lorne Sossin, on one hand, and Craig Jones and Angela Baxter, on the other, consider how the government differs from private defendants in the context of class action proceedings. Both papers note that

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[10] *A.L. v. Ontario (Minister of Community and Social Services)*,[2006] 218 O.A.C. 150, rev'g (2005), 197 O.A.C. 287, 77 O.R. (3d) 422, (Ont. Div. Ct.) [*A.L.*].

[11] R.S.O. 1990, c. C.11.

government defendants may be less vulnerable to the threat of large damages awards than private defendants. Moreover, Sossin argues, governments can legislate immunity for themselves, and in some cases, may direct such a statutory exemption toward particular proceedings, in effect undoing a successful liability claim. Jones and Baxter consider how the deterrent effect of tort liability impacts the justification for allowing actions to proceed by way of class actions, arguing that government actors may not adhere to the rational actor model that underpins the behavioral modification objective of class actions. In addition, they note that specific deterrence cannot be a serious concern with respect to historical wrongs and that general deterrence has little application unless the impugned governmental activity has a private law counterpart. By contrast, class actions, they argue, may be particularly appropriate where the wrong complained of is ongoing.

Sossin suggests that class actions frequently operate as a substitute for judicial review, noting the growing numbers of cases in which plaintiffs opt to challenge regulatory and other discretionary decisions through mass damage awards, rather than use administrative remedies to challenge the legality of the decision. The presence of an alternative set of public law remedies again distinguishes governmental defendants from their private counterparts, leading Sossin to conclude that courts must take greater cognizance of the presence of public law alternatives to maintain coherence between public and private law. This latter point finds expression in the *A.L.* case, where the Ontario Court of Appeal finds that the presence of an alternative public law remedy militated against finding that a private duty of care existed.[12]

The nature of governmental functions also stands at the centre of Elizabeth Adjin-Tettey's paper describing the application of the rules relating to vicarious liability and non-delegable duties to public authorities. Adjin-Tettey cautions against a rigid application of rules formulated in relation to private companies to government actors, particularly in light of a trend towards increased delegation of protective activities, such as child-welfare, to non-governmental actors. Adjin-Tettey suggests that governmental actors may have a special obligation arising, for example, from plaintiff reliance and vulnerability, which militate in favour of a more contextualized application of the rules of vicarious liability and non-delegable duties; which is to say that courts must be alive to the unique relationship between society's most vulnerable citizens and the government. She concludes that the law must eschew outmoded notions of "control" and "close relationship" in favor of case-by-case determinations that are sensitive to social context if tort law is to provide effective compensation to victims.

Norman Siebrasse also considers the unique role of public authorities in preventing harm caused by third parties and the legal consequences that arise when those attempts fail. Drawing an analogy between the established rules respecting private duties of affirmative action, Siebrasse makes the case for the establishment of

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[12] *A.L., supra* note 10 at para. 32.

a distinct category called regulatory liability with rules of recovery that would limit recovery to situations where there is reasonable reliance on the regulatory activity. Picking up on the recognition in *Cooper* that public and private duties may conflict, Siebrasse's aim is to create a set of more predictable rules to assist courts in distinguishing cases where a duty of care is owed to harmed individuals as opposed to the public as a whole. While Siebrasse downplays the significance of the public/private divide by drawing an analogy between regulatory duties and private duties of affirmative action, the feature common to both categories is the difficulty inherent in imposing liability for socially beneficial activities.

The same difficulties are underscored in Craig Forcese's paper which considers the legal obligations of the Canadian government to extend diplomatic protection to its nationals abroad. In the wake of the Arar affair, the death of Zahra Kazemi while in detention in Iran, and the detention and torture of William Sampson, the stakes surrounding this issue are unquestionably high. Diplomatic protection is, of course, a uniquely governmental function, and is tied to both constitutional and international legal obligations. It is, however, a discretionary activity and, as Forcese points out, one that courts are unlikely to interfere with in the absence of bad faith or some other demonstrable abuse of discretion, notwithstanding the potential harm that arises from the government's failure to extend diplomatic protection.

Continuing the inquiry into the question of government accountability, Laverne Jacobs explores the difficulties in holding the state accountable through civil litigation for past policy and legislative actions, even where these actions offend current human rights standards. Jacobs' paper, perhaps more than any other in the collection, shows the disjuncture between the law of tort and governmental responsibility for activities and decisions that are morally wrong, but legally valid. Jacobs criticizes what she characterizes as a formalistic approach to governmental immunity for past policy decisions. As an alternative, Jacobs points to arguments in favour of a more consciously ethical consideration of governmental immunity, even for decisions of high policy. At the same time, because using negligence and breach of fiduciary duty to address historic wrongs has not met with success, Jacobs urges the consideration of administrative means to determine the scope of accountability in addition to more traditional avenues such as litigation. Exploring the role of compensation schemes as vehicles to provide meaningful redress, Jacobs explains how administrative law concepts can be contextually deployed to tackle some of the difficult issues of process and damage quantification.

Both the Jacobs and Forcese papers query whether there are substantive limits to immunity based on governmental difference. They also point to a second set of unifying questions concerning the proper role of public law doctrine in negligence cases. Because a separation of powers concern is central to governmental difference arguments, policy decisions that amount to an abuse of discretion or otherwise exceed the decision-makers' competence should not attract the same level of immunity from judicial oversight. This form of argument is suggested in *Nielsen v. Kamloops,* where the Supreme Court of Canada notes that the defendant's decision

not to take further compliance steps in relation to a building inspection could not be immune as a legitimate policy decision:

> In my view, inaction for no reason or inaction for an improper reason cannot be a policy decision taken in the *bona fide* exercise of discretion. Where the question whether the requisite action should be taken has not even been considered by the public authority, or at least has not been considered in good faith, it seems clear that for that very reason the authority has not acted with reasonable care.[13]

This same line of reasoning is picked up in *Brown v. British Columbia (Minister of Transportation & Highways)*, but in keeping with public law approaches to deference, the Supreme Court of Canada notes that only "true" policy decisions are immune, yet restricts the class of non *bona fide* decisions to those that are "so irrational or unreasonable as to constitute an improper exercise of governmental discretion".[14] As noted, this approach is sound insofar as it recognizes the institutional superiority and democratic credentials of governmental branches to make policy decisions.

It is noteworthy that the Supreme Court of Canada has not referred to administrative law jurisprudence in arriving at this conclusion. That said, as public law rules respecting judicial review evolve, there may be some value in making these linkages more explicit. This line of reasoning is more evident in some British cases where public law unlawfulness has been viewed as a necessary precondition to the justiciability of negligence claims against public authorities.[15] In a similar vein, Lorne Sossin argues in this volume that successful judicial review should be a precondition to certification of class actions against public authorities arising from their discretionary activities. Sossin's concern here is that in the absence of a legality threshold, class action certification itself, with its attendant pressures on defendants, may have a distorting impact on governmental decision-making. A similar, and more deliberate, overlapping of tort law liability and public law legality undergirds the tort of misfeasance in office. As Sharpe J.A. recognized in *A.L.*, public office holders "are subject to the law and must not abuse their powers to the detriment of ordinary citizens".[16] While officials necessarily retain the discretion to make decisions that adversely affect individual interests, they cannot knowingly engage in conduct that is "inconsistent with the obligations of the office".[17] Illegality is a necessary, but not sufficient condition for the intentional tort of misfeasance in public office. The precise relationship between public law requirements and liability in negligence remains in need of further clarification.

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[13] *Nielsen, supra* note 3 at para. 68.

[14] *Brown, supra* note 6 at para. 23.

[15] *X v. Bedfordshire County Council*, [1995] 2 AC 633 at 734-36.

[16] *A.L., supra* note 10 at para. 35.

[17] *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263 at para. 28.

While public authority liability has generally focused on the application of private law doctrines and remedies to public actors, any discussion of public liability in the Canadian context invites consideration of the interplay between private law regimes and the explicit public liability framework provided by the *Charter of Rights and Freedoms*.[18] In particular, there is continued debate about the feasibility of combining tort law and *Charter* guarantees to produce a species of "constitutional tort". Two contributions to this volume consider public authority liability in this context more explicitly. In "Patents, the *Charter*, & A Healthy Dose of Rights in Wrongs", Bita Amani argues that the 2004 decision in *Chaoulli v. Quebec*[19] provides an opportunity to press for increased state liability in the area of gene patents, a regime which currently provides little space to consider the greater public interest. Amani recognizes that the *Chaoulli* decision, which ruled that some aspects of the public health care system could raise fundamental rights concerns, is deeply controversial.[20] Provocatively, however, she argues that *Chaoulli*'s progressive potential has been underplayed, and that recognizing individual rights in the context of public health care may produce significant benefits to patients and the entire regulatory scheme surrounding gene patents. As Amani demonstrates, patents can create barriers to patients obtaining access to life-saving drugs. Where such a result can be shown, Amani claims, it is appropriate to frame the issue as one involving a breach of a public duty, in this case, the duty to respect section 7 of the *Charter*.

Moving from a recent to a much older *Charter* case, Michael Plaxton considers the possibilities of a private law approach to what is currently seen as a wholly public law problem. In "Actions for Trespass and *Hunter v. Southam*",[21] Plaxton goes behind the well known decision to uncover the surprising history of search warrants, now regarded as a necessary safeguard against unreasonable police actions, but originally conceived as a way to further empower the state. Through this example, Plaxton demonstrates how a judicial propensity to cast constitutional decisions as the "last word", rather than one of a number of possible constitutional outcomes, unduly limits the legislature's ability to devise best practices to govern and influence officials' behaviour. Plaxton shows how the constitutional tort – in this case an action for trespass in the context of an illegal search – has been usurped by the *Hunter* Court's (prematurely) narrow reading of section 8 of the *Charter*. While not disputing the benefit derived from a system of prior judicial authorization for police searches, Plaxton argues that other means – including constitutional torts – might have provided equal or greater disincentive against unconstitutional state conduct.

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

[19] *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791 [*Chaoulli*].

[20] See Colleen Flood, Kent Roach and Lorne Sossin, *Access to Care, Access to Justice: The Legal Debate over Private Health Care Insurance in Canada*, (Toronto: University of Toronto Press, 2005).

[21] *Hunter v. Southam*, [1984] 2 S.C.R. 145 [*Hunter*].

Finally, the papers in this volume suggest that the law of public authority liability may be animated by a distinct justification relating to the potential for tort law to be used as a basis for holding public actors to account. Democratic accountability is the foundation of Canadian public law, but has not traditionally been an expressed objective of public authority liability. We leave it to the reader to come to a conclusion about the usefulness of using public authority liability as an avenue to protect citizens against abuses of state authority. We hope, however, that this volume will provide a contribution to the dialogue between public and private law scholars on the evolving nature and role of public authority liability in Canada.