CASE COMMENT

NELLES v. HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO ET AL.

John M. Law*

The recent judgment of the Supreme Court of Canada in Nelles v. The Queen in Right of Ontario et al.[1] defies easy categorization. On one hand, it is a decision falling squarely within the realm of tort law, concerned with the tort of malicious prosecution and the statutory and common law immunities available to defendants. On the other hand, it is a decision very much concerned with public law issues: the lawful exercise of public power; the damage remedy as a means of compensation for a citizen as a consequence of the abusive or erroneous misuse of that power; and the nature and scope of immunities accorded, in the public interest, to the State and its officers in the discharge of their responsibilities. In truth, the decision falls squarely at the intersection of private and public law principles used, crudely at times, to fashion a remedy in damages for a citizen complaining of loss as a consequence of official action.[2] I propose to focus my remarks on two of the public law issues: Crown immunity and public prosecutorial immunity.

FACTS

Given the publicity surrounding the events that gave rise to this case, no more than a thumbnail sketch of the facts is necessary. In 1981, the plaintiff, Susan Nelles, a nurse employed at Toronto's Hospital for Sick Children, was charged with four counts of murder in connection with a number of mysterious deaths of infant patients. In 1982, after a lengthy preliminary inquiry, she was discharged on all four counts as the evidence adduced by the Crown was insufficient to warrant putting her on trial. Subsequently, she brought an action in damages against the Province of Ontario, the Attorney General and his agents, Crown Attorneys,[3] and the police framed in negligence, malicious prosecution, false imprisonment, and the infringement of her rights under ss. 7 and 11(c) and (d) of the Charter. In response, the Crown and the Attorney General brought a preliminary motion to strike out the plaintiff's statement of claim, dismissing her action. The Crown asserted its statutory immunity under ss. 5(6) of the Ontario Proceedings Against the Crown Act,[4] and the Attorney General and his agents claimed, at common law, an absolute immunity from suit.[5]

CROWN IMMUNITY

At common law, the Crown is immune from liability in tort. This anachronistic situation has only been partially alleviated through the Crown's consent to suit contained in Crown proceedings legislation at both the federal[6] and provincial levels.[7] I say partially, as the legislation limits the vicarious liability of the Crown in respect of certain functions and activities. One of these involves the discharge of responsibilities of a "judicial" nature. The Ontario Crown argued that the actions of its servants, the Attorney General and the Crown Attorneys, fell within this exemption from liability.

Fitzgerald J. of the High Court agreed with the Crown's submissions, holding that a claim for damages resting on the alleged infringement of the plaintiff's Charter rights did not abrogate the common law and statutory immunities asserted by the Crown and the Attorney General.[8] On appeal, the Ontario Court of Appeal characterized the prosecutorial functions of the Attorney General and Crown Attorneys as "quasi-judicial" in nature.[9] This characterization was sufficient to engage the Crown's immunity under ss. 5(6) of the Act. Further, it was pointed out that as the Crown's liability was vicarious, the Crown could claim the benefit of any immunity accorded to its servants.

The Supreme Court of Canada upheld the judgments of the lower courts on the issue of the Crown's immunity from suit in this action. Surprisingly, in light of the Court's later comments on the inadequacy of the functional approach to the issue of prosecutorial immunity, the Court characterized the functions of the Attorney General and Crown Attorneys as "judicial"[10] for the purpose of determining the Crown's immunity under the Act. While the conclusion of the Court on this issue was probably correct, it again serves to remind us of the inadequate nature of current Crown liability regimes. The legislation extant in most Canadian provinces is dated[11] and, in its current form, precludes any rational approach to the issue of State liability and damages for tortious or constitutional wrongs. Criminal prosecutions are conducted in Canada by the State, and where the system of public prosecutions malfunctions, why should the State escape liability? Surely, the State is a more responsible defendant than a Crown Attorney or public prosecutor. Equally, why should the Crown be entitled to claim the benefit of a personal immunity fashioned to protect a public officer, in the public interest, from the harsh consequences of liability? A statutory scheme that shifts the burden to the officer or permits the Crown to claim the benefit of a personal immunity is surely flawed.

Finally, the model of Crown proceedings legislation extant in most Canadian jurisdictions seems strongly out of place in a constitutional regime represented by the Charter. While, on one hand, the Charter recognizes the obligation of the State to act in a manner consistent with a citizen's constitutionally guaranteed rights and freedoms, Crown proceedings legislation, on the other hand, handicaps the citizen in litigation with the State. While the Charter seeks to protect the citizen from the unconstitutional actions of the State, to balance the relationship between the citizen and the State,

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Crown proceedings legislation seeks to protect the State from the legal demands of the citizen; to perpetuate a relationship of inequality. It is submitted that the current form of State liability is an ill fit in a constitutional democracy and ought to be reformed before it is dismantled section by section in constitutional litigation.[12] Indeed, in Nelles, Lamer J. appears to suggest a first step in this regard with respect s. 5(6) of the Ontario Act.[13]

PROSECUTORIAL IMMUNITY

The chief significance of the judgment of the Supreme Court in Nelles concerns the nature and scope of the common law immunity from civil suit asserted by the Attorney General and his agents in answer to the plaintiff's claim. In holding that they were not entitled to an absolute immunity from civil suit but only a qualified or lesser immunity, the Supreme Court broke sharply with what had been the emerging trend on the standard of immunity attaching to the office of public prosecutor. Faced with a paucity of English[14] and Commonwealth[15] authority on the question, Canadian courts, in a number of recent cases,[16] have embraced American precedent in according public prosecutors an absolute immunity. In the leading American authority, Imbler v. Pachtman,[17] the Supreme Court of the United States had recognized an absolute immunity in respect of the prosecutor's "quasi-judicial or advocatory"[18] functions. However, the scope of the immunity was apparently limited as the question of whether an absolute immunity attached to a prosecutor's administrative or investigative functions was left open. The policy rationales supporting such an immunity were much the same as those supporting the absolute immunity of a judge from liability in tort; that is, " ... harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust."[19] This standard of immunity would serve to protect the prosecutor even if he acted out of malice or for some other reason not connected with the public good.[20]

The Supreme Court of Canada declined to follow the leading American authority for a number of reasons, most of them policy based. To begin with, the Court expressly disapproved of the functional approach utilized in Imbler. Describing it as "unprincipled" and "arbitrary," the Court did not find it to be of help in determining the issue of prosecutorial immunity.[21] This opinion is to be applauded as characterization of function has long hindered a rational consideration of many public law issues. By way of example, one need only point to the "judicial, administrative" distinction utilized in determining the scope of judicial review in administrative law. As the threshold issue in the imposition of liability, characterization of an officer's function tends to obscure the underlying policy issues. It encourages mechanistic decision-making. It tends to focus attention on the nature of the public prosecutor's office, at the expense of a consideration of the officer's conduct or the injury suffered by the plaintiff.

The Supreme Court's rejection of the functional approach may have consequences beyond the immediate case. The functional approach has been used in a number of cases concerning the liability of public officers in tort.[22] By analogy to the courts of law, an immunity from suit has been accorded to public officers in the exercise of their discretionary authority on the basis that they are exercising a "judicial" or "quasi-judicial" function.[23] The usefulness of these decisions, as precedents in future cases, may be called into question.

Further, the Court questioned the existence of an absolute immunity on constitutional grounds.[24] In Imbler v. Pachtman,[25] the Supreme Court of the United States held that the policy reasons supporting an absolute immunity for prosecutors, at common law, applied with equal force in an action alleging an infringement of the plaintiff's civil rights. In other words, the fact that the action was framed in constitutional terms did not compel a lesser or qualified standard of immunity. Three members of the Supreme Court of Canada apparently took issue with this, reasoning that the existence of an absolute immunity may preclude a court from granting a just and appropriate remedy under s. 24(1) of the Charter where the action is framed in constitutional rather than common law terms. This is an "undesirable" result[26] in a situation, such as this, where a prosecutor's alleged misconduct will not only support a common law action for malicious prosecution, but also an action in damages under the Charter for the infringement of an accused's rights under ss. 7 and 11.

While the Court declined to address the constitutional validity of common law and statutory immunities which may have the effect of precluding a damage remedy under the Charter, these comments do raise serious questions in this regard. To date, the Supreme Court has not had to address the issue of the damage remedy under the Charter, in terms of a separate regime of liability for unconstitutional action.[27] When it does, it will undoubtedly have to address the issue of officer immunity. The right of a citizen, whose constitutional rights have been infringed, to a "just" and "appropriate" remedy in damages under the Charter may compel a different approach to the issue of officer immunity[28]--an approach that places more emphasis on the citizen's constitutional right to a remedy than on the officer's need for immunity. As a general rule, a lesser standard of immunity may ensue which, in turn, may cause the courts to question the prevailing standards of immunity in common law actions.

In the end result, the Supreme Court saw the issue of a public prosecutor's immunity from suit to be " ... ultimately ... a question of policy."[29] One of the traditional policy rationales advanced in support of an absolute immunity is

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the argument that it "... encourages public trust and confidence in the impartiality of prosecutors."[30] However, as the Court points out, the public trust in the office of the prosecutor is severely undermined when a prosecutor abuses his office with impunity. An absolute immunity results in a general lack of accountability to the public, and a specific lack of accountability to an injured party. Such a result is disturbing in a legal system which values equality under the law.

Closely allied is the concern that the prospect of suit and liability will have a "chilling effect" on the prosecutor in the fearless discharge of his duties; i.e., in order to avoid a suit, he will compromise the proper performance of his official responsibilities. In response, the Court pointed out that a lesser or qualified standard of immunity will adequately meet this concern. It will serve to protect a prosecutor in the proper, good faith discharge of his responsibilities. Only where a prosecutor has abused his office by acting with malice and without reasonable and probable cause will he be exposed to liability. This has a beneficial deterrence effect which will augment deterrents already in place, such as prosecution under the Criminal Code, and internal or professional discipline.

The Supreme Court is clearly right in refusing to be swayed by the potentially chilling effects of liability. In a regime of public tort liability where immunity has, more often than not, been the norm, the potentially detrimental effects of liability are purely speculative.[31] Little hard evidence exists for the proposition that the possibility of a suit for malicious prosecution will compromise the proper performance of an Attorney General's or Crown Attorney's prosecutorial functions. Concerns about the deterrent effect of liability should be alleviated by the fact that a malicious prosecution action casts a heavy onus on a plaintiff, and by the further fact that the Courts are able, on preliminary motion, to strike out frivolous or vexatious actions.[32] Any fears about a flood of litigation impairing the public prosecutorial system should be calmed by the Court's restriction of its judgment to the tort of malicious prosecution. Good-faith errors in judgment will not give rise to an action in negligence against a prosecutor.[33] And, should the fears about liability come to pass, they can be largely alleviated by a statutory scheme of state liability in place of a common law scheme of officer liability.[34]

In conclusion, the judgment of the Supreme Court of Canada in Nelles v. The Queen is appropriate. In a rational and reasoned fashion, it has struck a suitable balance between the interests of an injured plaintiff, the interests of the Crown and its public prosecutors, and the interests of the public at large.

1. The Supreme Court of Canada, unreported judgment, August 14, 1989.
2. Hogg, Peter W., "Liability of the Crown," (2nd ed.), (Toronto: Carswells, 1989).
3. Throughout all of the proceedings, the Courts did not draw a distinction between the position of the Attorney General or his agents, Crown Attorneys. If the Attorney General was absolutely immune from civil suit in respect of his prosecutorial functions, so were his agents, the Crown Attorneys involved.
4. R.S.O., 1980, c. 393.
5. See: Hogg, Peter W., supra, note 2, pp. 151-153; Richman v. McMurtry, (1983) 41 O.R. (2d) 559 (H.C.); Bosada v. Pinos, (1984) 44 O.R. (2d) 789 (H.C.); Owsley v. The Queen (1983) 34 C.P.C. 96 (Ont. H.C.); Nelles v. The Queen, (1985) 51 O.R. (2d) 513, (C.A.).
6. R.S.C. 1985, c. C-50.
7. In 1950, the Conference of Commissioners on Uniformity of Legislation in Canada adopted a model statute. This statute has been adopted by the legislatures of Alberta, Manitoba, New Brunswick, Nova Scotia, Ontario, Saskatchewan, and, to a lesser degree, British Columbia.
8. The order of Fitzgerald J. was reported in its entirety by Thorson J.A. in his judgment in Nelles v. The Queen, (1985) 21 D.L.R. (4th) 103 at 107. (Ont. C.A.).
9. Nelles v. The Queen, ibid., at 112-113.
10. Nelles v. The Queen, supra, footnote 1, (S.C.C.).
11. Eight provinces and the federal government have a Crown proceedings legislation modelled after the English legislation, Crown Proceedings Act, (1947) 10 & 11 Geo. VI, c. 44, and based on the model act adopted the Uniformity Commissioners in 1950.
12. One of the chief avenues of attack to the Crown's immunities and privileges in litigation with a subject would be on the basis of s. 15 of the Charter. In a number of recent cases, questions have been raised about the equality of the individual in litigation with the Crown and the viability of this avenue of approach; Leighton v. The Queen, [1989] 1 F.C. 75 (F.C.T.D.); Wright v. Attorney General of Canada, (1987) 36 C.R.R. 361; R. v. Stoddart, (1987), 59 C.R. (3d) 134 (Ont. C.A.).
13. Nelles v. The Queen, supra, footnote 1 (S.C.C.).
14. Riches v. D.P.P., [1973] 1 W.L.R. 1019 (C.A.); Hester v. MacDonald, [1961] S.C. 370.
15. As Lamer J. points out in his judgment in Nelles v. The Queen (S.C.C., 1989), there does not appear to be any Australian or New Zealand reported cases on the issue of immunity for public prosecutors.
16. Richman v. McMurtry, supra, footnote 5; Bosada v. Pinos, supra, footnote 5; Owsley v. The Queen, supra, footnote 5; Nelles v. The Queen,supra, footnote 5. Contra: Curry v. Dargie, (1984) 28 C.C.L.T. 93 (N.S.C.A.); German v. Major, (1985), 39 Alta. L.R. (2d) 270 (Alta. C.A.).
17. 96 S. Ct. 984, (1976), (U.S.S.C.).
18. Nelles v. The Queen, supra, footnote 1, per Lamer J.
19. Imbler v. Pachtman, 96 S. Ct. 984, at 991 per Powell J.
20. Hogg, Peter W., supra, footnote 2, p. 151.
21. Nelles v. The Queen, supra, footnote 1, per Lamer J.
22. E.g. Everett v. Griffiths, [1921] A.C. 631 (H.L.).
23. See: generally, Rubinstein, A., "Liability in Tort of Judicial Officers," (1963-64) 15 U.T.L.J. 317.
24. In this respect, LaForest J. limited his agreement with the judgment of Lamer J. to the common law position, preferring to leave the constitutional implications to another day.
25. 96 S. Ct. 984 (1976) (U.S.S.C.).
26. Nelles v. The Queen, supra, footnote 1, per Lamer J.
27. Pilkington, Marilyn L., "Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms," (1984) 62 Can. Bar Rev. 517; Cooper-Stephenson, "Tort Theory for the Charter Damages Remedy," (1988) 52 Sask. L. Rev. 1.
28. Pilkington, ibid., pp. 558-561.
29. Nelles v. The Queen, supra, footnote 1, per Lamer J.
30. Ibid.
31. Ibid.
32. Although in Nelles v. The Queen, supra, footnote 1, MacIntyre J. was of the opinion that it would be dangerous to rule on the existence of an immunity for public prosecutors on a preliminary motion in the absence of evidence.
33. Nelles v. The Queen, supra, footnote 1, per Lamer J.: " ... errors in the exercise of discretion and judgment are not actionable."
34. See: generally, Shuck, P., Suing Government, (New Haven: Yale University Press, 1983).

* **John M. Law**, Associate Professor of Law, University of Alberta.