Prosecutorial Negligence and Negligent Police Investigation: An Analysis of recent Canadian and South African Decisions (2)

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Editor's Note:
Part 1 of this article was published in Volume 32, Issue 1 (2018) of Speculum Juris at 33-53

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5 PROSECUTORIAL MISCONDUCT[1] AND PUBLIC AUTHORITY LIABILITY IN DAMAGES IN CANADA

In Canada, there are three divergent approaches to the issue of prosecutorial discretion and liability. The first is the general principle in Canadian law that the State is not liable where in the performance of prosecutorial discretion, the prosecutor acts negligently. Thus, the prosecutor would only be liable if malice is proved. Hence, it has been established,[2] affirmed[3] and reiterated[4] in what has come to represent the malicious prosecution trilogy in Canada, that the element of malice — not mere negligence, not even gross negligence — is a prerequisite for prosecutorial liability in that jurisdiction.[5]

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1 Apart from the cases discussed in the present context, prosecutorial misconduct in Canada tends often to arise as a disciplinary matter between the individual prosecutor and the relevant Law Society. An illustration can be taken from the chain of litigation between Joseph Peter Paul Groia and the Law Society of Upper Canada: *Law Society of Upper Canada v Groia* 2012 ONLSHP 94 (CanLII)*; Law Society of Upper Canada v Groia* 2013 ONLSAP 41 (CanLII); *Law Society of Upper Canada v Groia* 2013 ONLSHP 59 (CanLII); *Law Society of Upper Canada v Groia* 2014 ONLSTA 11 (CanLII); *Groia v Law Society of Upper Canada* 2015 ONSC 1680 (CanLII) culminating ultimately in the latest Ontario Court of Appeal judgment in *Groia v Law Society of Upper Canada* 2016 ONCA 471 (CanLII). Before these, there were the earlier cases concerning this same prosecutor and the Crown: *R v Felderhof* (JB) [2002] OJ No 4103 (QL); *R v Felderhof* 2003 CanLII 41569 (ONSC) [for the subsequent case see *R v Felderhof* 2007 ONCJ 345 (CanLII)]. Indeed, the Ontario Court of Appeal upheld Campbell J's conclusion with respect to the civility of defence counsel and the defence counsel's wrong views about what constituted improper prosecutorial conduct in *R v Felderhof* 2003 CanLII 37346 (ONCA) paras 81–90. It was held that there was nothing wrong in a prosecutor seeking a conviction. A prosecutor is not duty bound to introduce all possible documents in examination of its witness and is not acting improperly in objecting to the admission of inadmissible evidence. While the defence has a right to make allegations about abuse of process and prosecutorial misconduct, these allegations must have some foundation in the record, there must be some possibility that the allegations should be made at the appropriate time in the proceedings. Defence counsel should make submissions without the rhetoric excesses or sarcasm as Mr Groia employed in the present case. Counsel must treat witnesses, counsel and the court with fairness, courtesy and respect. Submissions should be made civilly and with professionalism. This professionalism is not inconsistent with vigorous and forceful advocacy. Unfair and demeaning comments diminish the public's respect for the court and the administration of criminal justice and thereby undermine the legitimacy of the results of the adjudication. The trail judge's response to Mr Groia's rhetoric, however, did not deprive the trial judge of jurisdiction nor was the prosecution prevented from having a fair trial. The prosecutors were not prevented from fulfilling their duties by the conduct of defence counsel.

2 *Nelles v Ontario* [1989] 2 SCR 170 para 55.

3 *Proulx v Quebec (Attorney General) (*2001) 206 DLR (4th) 1 (SCC) paras 31, 35, 44–45.

4 *Miazga v Kvello Estate* [2009] SCR 339 (SCC) paras 51–52 and 80–81.

5 It was held in *Smith v The Queen* 2016 ONSC 7222 (CanLII) (19 December 2016) paras 106–110, that malicious prosecution is the sole exception to what was previously absolute immunity and that the Supreme Court have repeatedly rejected negligence as an appropriate claim by a member of the public against Crown Attorneys: *Nelles* para 55; *Miazga v Kvello Estate* para 81; the Ontario Court of Appeal: *Miguna v Ontario (Attorney General)* 2005 CanLII 46385 (ONCA) para 11; *Thompson v R* 1998 CanLII 7180 (ONCA) para 56; *Gilbert v Gilkinson* 2005 CanLII 46386 (ONCA) para 7. The plaintiff in *Smith* did not allege malice and the tort of negligent investigation is a claim in ordinary negligence with no malice requirement. So, too, neither of the other two causes of action for unlawful or false arrest and imprisonment and intentional infliction of emotional harm, have a malice component: *Kovacs v Ontario Jockey Club* (1995) 126 DLR (4th) 576 (Ont. Ct. (Gen. Div.)) para 45; *Moak v Haggerty* 2008 CanLII 65 (ONCA) para 51; *Prinzo v Baycrest Centre for Geriatric Care* 2002 CanLII 45005 (ONCA) para 48.

The second is that although the courts in that country do not recognise the tort of prosecutorial liability in negligence,[6] the Supreme Court of Canada has ushered in the tort of negligent police investigation in modern Canadian public authority liability law, in the last decade.[7] The third and latest development in the Canadian jurisdiction emanates from the Supreme Court judgment in *Henry v British Columbia (Attorney General)*[8] to the effect that Charter damages could be claimed if what was allegedly breached arose from a prosecutorial obligation ordained by the Charter and not a function clothed with prosecutorial discretion.

The principle that the State is not liable where in the performance of prosecutorial discretion, the prosecutor acts negligently is traceable to the common law immunity accorded the prosecutor whereby the law does not interfere in the exercise of prosecutorial discretion. Is there any exception to this general rule? An attempt to address this question necessarily brings Canadian courts into investigating what constitutes prosecutorial discretion — an exercise that is inevitably touched on to some extent in the present context. This assertion is supported by the recent case of *Henry SCC* which, while purporting to provide the valuable answer we seek, dwelt so much on whether what was breached was clothed with a prosecutorial discretion or a prosecutorial duty ordained by the Charter. Critically related to this is the question whether the malice threshold must be proved even when the claim is a straightforward breach of a Charter right. Mention of Charter right brings to mind the celebrated judgment of the Supreme Court in *Vancouver (City) v Ward*[9] where the court set down the guidelines on how to determine Charter damages claims in the Canadian jurisdiction. Incidentally, it turned out that the application of the full weight of *Ward* in determining the Charter issues raised was the main point of departure between the majority and minority judgments in *Henry's* case. Another closely connected question, which also arose recently, was whether prosecutorial immunity extends to the exercise by the Minister of Justice of his power to grant pardon. It is this latter issue of the Minister's discretion to grant pardon that leads the discussion in the following paragraph. Apart from the question of negligent police investigation which forms the subject matter of part three of this series, this second part of the article sets out to enquire into the issue of non-liability of the State for the performance of the prosecutor of his or her duties.

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6 Although it is early to speculate, but it appears that another in-road into the hitherto absolute immunity of the Crown in the criminal justice system is about to be made with Matheson J allowing a novel claim by the police on alleged negligent legal advice from Crown Attorneys to proceed in *Smith v The Queen* 2016 ONSC 7222 (CanLII). Since the claim did not fall within a previously recognised relationship, the court had to conduct a thorough duty of care enquiry [paras 139–173]. And having regard to the litany of cases cited by the parties in the investigation of the *Anns-Cooper [Anns v Merton LBC* [1978] AC 728 (HL) and *Cooper v Hobart* [2001] 3 SCR 537 (SCC)] two-stage test, the trial Judge observed [para 169]: "Whichever stage applied, none of the authorities provided to me squarely address this important issue: how would the availability of a tort claim for negligent legal advice interfere with the relationship between these two important parts of the criminal justice system? Why is it inconsistent with independence? The provision of competent independent legal advice to the police would, it seems to me, serve the administration of justice. How would legal responsibility for negligent advice interfere? Criminal defence counsel must also exercise independent judgment, yet they are exposed to claims for negligent legal advice. All counsel has an overarching ethical duty to the administration of justice yet their relationship with their clients ordinarily gives rise to the potential for claims for negligent legal advice. These are issues that were not fully explored before me, perhaps because the moving parties were mainly relying on an immunity defence." It was held that the submissions regarding the *Anns-Cooper* test have raised important issues of the relationship between the police and Crown Attorneys, including policy issues hence it was not plain and obvious on Rule 21(1)(b) of the Rules of Civil Procedure that there is no duty of care owed by Crown Attorneys to the police with regard to negligent legal advice in this case.

7 *Hill v Hamilton-Wentworth Police Services Board* (2008) 285 DLR (4th) 620 (SCC) (*Hamilton-Wentworth*). The police attempted to claim immunity in this case but it was rejected in the same manner as it was in *R v Campbell* [1999] 1 SCR 565 para 35. Unlike Crown Attorneys, there is no recognised immunity for the police. Thus, *Hamilton-Wentworth* and *Campbell* support a different outcome for each of these participants in the criminal justice system. In light of the precedents, Matheson J held in *Smith v The Queen* paras 128 and 130, that the plaintiff's claims against the moving parties were barred by the dispositive defence of common-law immunity from civil suits brought by persons who are or were the subject of a prosecution. In addition to the pleading that the Crown Attorneys supervised and consulted with the police, it was alleged that they approved and obtained wiretap authorisations and provided legal advice to the police. With respect to legal advice, it was held that it is settled law that a party cannot sue the opposite party's legal advisor in ordinary negligence — the opposite party's lawyer owes no duty of care to the plaintiff, although there is a potential exception for intentional torts: *Lawrence v Peel Regional Police Force* (2005) 250 DLR (4th) 287 (ONCA) para 6; *Baypark Investments Inc. v Royal Bank of Canada* 2002 CanLII 49402 (ONSC) para 33; *Shuman v Ontario New Home Warranty Program* [2001] OJ No. 4102 (SC) para 25.

8 (2015) 383 DLR (4th) 383 (SCC) (*Henry SCC*).

9 [2010] 2 SCR 28 (SCC) (*Ward*).

Without necessarily re-opening the liability of the prosecutor in the context of the malicious prosecution trilogy[10] which has been covered in the investigation into malice as an element of the law of malicious prosecution,[11] this article involves examining the distinction between a prosecutorial discretion and a constitutional duty or obligation of the prosecutor. The next stage in the enquiry is whether the breach allegedly committed by the prosecutor amounts to a breach of a right in the Charter, and if it is, whether such an action could properly be brought under the Charter within the jurisprudence enunciated in *Ward*.

5 1 Prosecutorial Immunity: Does it apply to the Minister's Discretion to Grant Pardon?

The Canadian courts have been distinguishing prosecutorial negligence, for which no immunity attaches, from negligent police investigation, for which liability in damages has been established, since the Supreme Court of Canada laid down the immunity of the Crown prosecutor from liability in negligence, in *Proulx v Quebec (Attorney General),*[12] and reiterated it in the form of consolidation in *Miazga v Kvello Estate,*[13] and has since enunciated the tort of negligent police investigation in *Hill v Hamilton-Wentworth Police Services Board*.[14] The courts have equally been pre-occupied with the determination as to whether malicious prosecution, misfeasance in public office or the tort of abuse of process would be the appropriate cause of action in any given circumstance, all these torts having in common, the elements of malice, bad faith or ulterior motive.

The question whether prosecutorial immunity extends to the Minister of Justice's discretion to grant pardon to a convicted person arose in *Hinse v Canada (Attorney General)*.[15] H had brought a civil suit against the Minister for refusing to grant him pardon when he was serving a 15-year sentence for armed robbery, which was subsequently set aside by the Supreme Court because the evidence would not have allowed a reasonable and properly instructed jury to find him guilty beyond a reasonable doubt. The Superior Court of Quebec, having found that the Minister was not protected by any immunity, decided on and applied a standard of simple fault.[16] The Quebec Court of Appeal was of the view that the Minister's actions were protected by immunity, but it preferred to apply the malice standard developed in the context of the liability of the Crown for malicious prosecution. The court sought to show the similarities between the Minister's duties and those of the prosecutors. It did not make a definite finding in this regard, as it held that the appellant had not proved that a fault of any kind had been committed.[17]

The Supreme Court unanimously held that it would be inappropriate to import the malice standard applicable to the liability of Crown prosecutors for malicious prosecution into a case concerning an application for mercy. There may be similarities between these two functions but there are equally significant differences between the roles played by each one. In their joint judgment for a unanimous Supreme Court, Wagner and Gascon JJ offered a number of

10 Per Matheson J, *Smith v The Queen* 2016 ONSC 7222 (CanLII) para 55.

11 See Okpaluba, "Proof of Malice in the Law of Malicious Prosecution: A Contextual Analysis of Commonwealth Decisions" 2012 37 *JJS* 65 paras 4 and 5.1.

12 (2001) 206 DLR (4th) 1 (SCC) paras 35 and 45.

13 [2009] SCR 339 (SCC) paras 6–7 where it was held that the decision to initiate or continue with a criminal prosecution is one of the "core elements" of prosecutorial discretion which is beyond the legitimate reach of the court unless a Crown prosecutor stepped out of his or her role as "minister of justice". Canadian courts have since held the view that as much as the prosecutor's duties should be carried out firmly and fairly — *Boucher v The Queen* [1955] SCR 16 at 23–24 — it does not carry with it a notion of winning or losing neither is it the Crown's function to persuade a jury to convict other than by reason — *R v Proctor* (1992) 11 CR (4th) 200 (*Man CA*) para 59. Thus, "rhetorical techniques that distort the fact-finding process", and misleading and highly prejudicial statements, have no place in a criminal prosecution — R v Trochym [2007] 1 SCR 239 para 79. Although some of these forbidden ethical conduct on the part of a Crown prosecutor were identified in the case of an experienced prosecutor in Biladeau v Ontario 2014 ONCA 848 otherwise, the two elements of malicious prosecution in contention in the case were: the absence of reasonable and probable cause and malice. For instance, the trial judge's address to the jury in the trial of the appellant did not sit down well with Sharpe JA in setting aside the appellant's conviction — R v Biladeau (2008) 93 OR (3d) 239 paras 31 and 35. The Justice of Appeal held that the prosecutor's adverse comments on the appellant having elected not to give evidence and thus not subjected to cross-examination was an indication that he was guilty of a violation of the appellant's right under the Evidence Act and an infringement of his right to a fair trial.

14 (2008) 285 DLR (4th) 620 (SCC) (*Hamilton-Wentworth*).

15 2015 SCC 35 (SCC) (*Hinse*).

16 *Hinse v Canada* (Procureur général) 2011 QCCS 1780 (CanLII).

17 *Hinse v Canada (*Procureur général) 2013 QCCA 1513 (CanLII) paras 150–157.

explanations, which could be summarised as follows:

- Although it is possible, in rare cases, to hold Crown prosecutors liable for malicious prosecution, there are policy reasons that justify an extremely high threshold for success in such an action.[18] As a result, an action for malicious prosecution must be based on malice or on an improper purpose.[19]

- The decision to initiate or continue criminal proceedings lies at the core of the Crown prosecutor's powers, and the principle of independence of the prosecutor's office shields prosecutors from the influence of improper political factors.[20] Prosecutors must be able to act independently of any pressure from the government and must be beyond the reach of judicial review, except in cases of abuse of process. This independence is so fundamental to the integrity and efficiency of the criminal justice system that it is constitutionally entrenched.[21]

- The imposition of a high fault threshold flows from an intentional choice made to preserve a balance 'between the right of individual citizens to be free from groundless criminal prosecutions and the public interest in the effective and uninhibited prosecution of criminal wrongdoing.'[22]

- These policy reasons do not apply to the Minister's power of mercy. Although this power is a highly discretionary one, the Minister's latitude in deciding whether to exercise it is not fundamental to the integrity and efficiency of the criminal justice system. Indeed, the process of granting mercy 'begins where the law ends'.[23] Again, although prosecutorial authority must be shielded from political influence, the Minister must weigh social, political and economic factors in making his or her decision, but, the Minister's independence in the context of this decision-making process is not entrenched in the Constitution.[24]

- It must be borne in mind that the exercise of the royal prerogative, like the exercise of any other statutory power, can be reviewed by the courts. Ministerial decisions on applications for mercy are therefore subject to judicial review.[25] This is generally not the case for Crown prosecutor's decisions on whether to prosecute.[26]

- A comparison between the prosecutorial prerogative of Crown prosecutors and the evolution of the Minister's power of mercy under the Criminal Code reveals significant differences between the contents of the two prerogatives. This means that these prerogatives must be analysed from different perspectives.[27]

- What is in issue in the present case is whether the general Quebec rules of extra-contractual civil liability apply to the federal Crown, as provided in the Crown Liability and Proceedings Act 1958. Intent is not usually a prerequisite for establishing such liability. Even where gross fault is alleged, intent is not required, unlike in the case of the tort of malicious prosecution, for which intent must be proved.[28]

The Supreme Court held that to assess the Minister's conduct in the exercise of his power of mercy, it would be inappropriate to apply a standard of fault that limits bad faith to malice.[29]

18 *Miazga* para 43; *Proulx* para 4; *Nelles v Ontario* [1989] 2 SCR 170.
19 *Miazga* paras 56 and 81.
20 *Miazga* para 45.
21 *Hinse* para 40; *Miazga* para 46; *Krieger v Law Society of Alberta [*2002] 3 SCR 372 (*Krieger*) paras 30–32.
22 *Miazga* para 52; *Hinse* para 41.
23 *Bilodeau v Canada (Minister de la Justice)* 2009 QCCA 746 (CanLII) para 14. See also *Thatcher v Canada (Attorney General)* 1996 CanLII 4092 (FC) para 9.
24 *Hinse* para 42.
25 *Operation Dismantle Inc. v The Queen* [1985] 1 SCR 441. See also *Bilodeau v Canada (Minister of Justice)* 2011 FC 886 (CanLII); *Daoulov v Canada (Attorney General)* 2009 FCA 12 (CanLII); *Timm v Canada (Attorney General)* 2012 FC 505 affirmed 2012 FCA 282 (CanLII); Hogg PW, Monahan PJ and Wright WK, *Liability of the Crown* (4ed 2011) 62.
26 *Hinse* para 43.
27 *Hinse* para 44.
28 *Hinse* para 45.
29 *Hinse* para 47.

In Quebec civil law, bad faith is broader than just intentional fault or a demonstrated intent to harm another. Bad faith can be established by proving that the Minister acted deliberately with the specific intent to harm another person, or by proof of serious recklessness[30] that reveals a breakdown of the orderly exercise of authority so fundamental that absence of good faith can be deduced and bad faith presumed.[31] In light of the applicable provisions of the Criminal Code and of the fact that there was, at the relevant time, no established procedure to guide the exercise of the power of mercy, the Minister was required to conduct a meaningful review of any application that was neither frivolous nor vexatious. However, this review was not equivalent to the one that a police investigation or a commission of inquiry would yield. The duty to conduct a meaningful review entails a responsibility to make a decision in good faith based on the evidence uncovered by the review.[32]

Further, that the trial judge erred in approaching the issue of the federal Crown's civil liability from the perspective of a fault of institutional inertia or indifference. The analysis should instead have focussed on the individual conduct of each Minister acting in his or her capacity as a servant of the Crown. The trial judge also erred in considering the powers of a commissioner under the Inquiries Act 1985 as a basis for determining whether the review conducted by the Minister was a meaningful one, given that those powers were not conferred on the Minister until 2002, when Parliament reformed the procedure in respect of applications for mercy.[33] Moreover, there is no legislation establishing an obligation for the federal government or the provinces to compensate victims of miscarriage of justice, nor is there any legislation establishing a right to such compensation. Nor did the *Guidelines: Compensation for Wrongfully Convicted and Imprisoned Persons* (1988) require the federal government to compensate H, as they do not constitute binding legislation.[34]

On the facts of this case, the court held that H had failed to prove on a balance of probabilities that the Minister acted in bad faith or with serious recklessness in reviewing his applications for mercy.[35] The documentary evidence negates the trial judge's inference that there was no review whatsoever of H's initial applications for mercy. Although there are only a few documents in the record, they attest to the fact that a certain review was conducted and that certain actions were taken in this regard. By way of admissions, the parties acknowledged that certain government employees would have confirmed that, as they had understood the facts, an extensive and careful review of the case was under way at the time in question. A delay in reviewing the initial application was raised, but despite this, an analysis of the circumstances does not support the conclusion that the Minister acted in bad faith or with serious recklessness.[36] As for his three subsequent applications, it could not reasonably be argued that no meaningful review was conducted in respect of them. The relevant correspondence shows the opposite to be true.[37]

5 2 Two Lower Courts' Decisions before *Henry*

5 2 1 Negligent Prosecutorial Conduct

It was not the case of the appellant in *Hyra v HM the Queen*[38] that the investigators of the offence for which he was charged were negligent but, that the state counsel who prosecuted his case, was negligent in the conduct of the prosecution of the criminal harassment charge against him, thus leading to his conviction. The defendants relied on *Miazga v Kvello Estate*[39] as authority for contending that there can be no action for negligent prosecution against the Crown attorney. In other words, apart from malicious prosecution, the Crown prosecutor is immune from liability for discharging prosecutorial duties. Malicious prosecution was already out of the question for lack of the element of the prosecution being terminated in favour of the appellant. Although "this is an unsettled issue that should be resolved with the benefit of

30 See *Finney v Barreau du Quebec* [2004] 2 SCR 17 (SCC); *Enterprises Sibeca Inc. v Frelighsburg (Municipality)* [2004] 3 SCR 304 (SCC).
31 *Hinse* para 48.
32 *Hinse* paras 51–55 and 68.
33 *Hinse* paras 79–80.
34 *Hinse* paras 85–86.
35 *Hinse* para 114.
36 *Hinse* para 114.
37 *Hinse* paras 120–121.
38 2013 MBQB 83 para 4 (*Hyra*).
39 [2009] SCR 339 (SCC) paras 51–52 and 80–81.

a full factual record", *Driskell v Dangerfield*[40] is authority for the proposition that the Crown attorney could be held liable for negligent prosecution where, as in this case, the Crown attorney allegedly failed to make full evidentiary disclosure. Greenberg J held that the duty of disclosure was a legal duty and not an exercise of prosecutorial discretion hence not protected by prosecutorial immunity. Incidentally, the Court of Appeal judgment in *Driskell v Dangerfield*[41] did not deal with this aspect of the judgment of Greenberg J.[42]

Master Berthaudin accordingly distinguished *Miazga* from *Hyra* for one thing; *Miazga* did not directly decide whether it was possible to institute an action for negligent prosecution. It had focused on the test for a claim for malicious prosecution. The other distinguishing feature is that it had involved a complaint that the prosecutors improperly initiated and/or maintained the prosecution against the accused person. In effect, the complaints in *Miazga* related to one of the core functions of the Crown attorney, which is clearly a matter of prosecutorial discretion. However, the duty of full disclosure as in *Hyra* and *Driskell* does not belong to prosecutorial discretion. Nor can it be concluded that the *Miazga* judgment overruled *Driskell* on the issue of the potential existence of a cause of action for negligent prosecution, a subject matter that it simply did not address.[43]

5 2 2 *Barton v Nova Scotia (Attorney General)*

The case from the Nova Scotia Supreme Court, *Barton v Nova Scotia (Attorney General),*[44] canvassed extensively the boundaries of negligent police investigation, prosecutorial negligence and malicious prosecution in Canadian law. The plaintiff was prosecuted, convicted and sentenced wrongfully for a serious sexual offence against a 14-year-old girl. Thirty-eight (38) years later, it was determined through DNA testing that the perpetrator of the offence and father of the child born as a result, was the oldest brother of the 14-year-old/complainant. Consequently, the plaintiff's conviction was set aside by the Nova Scotia Court of Appeal for miscarriage of justice.[45] The plaintiff thereupon brought an action pleading negligent investigation against the police and malicious prosecution against the Crown. In a summary judgment on the pleadings, the question turned on whether the defendants could show that the ingredients of the alleged torts were absent in the present action.

5 2 2 1 The Claim for Malicious Prosecution

In respect of the claim for malicious prosecution, Wright J held that the plaintiff had disregarded the principle that even if a prosecutor had failed to fulfil his or her role because of inexperience, incompetence, negligence or even gross negligence, none of such conduct was actionable in Canadian law. Rather, the plaintiff must establish malice on the part of the Crown prosecutor in advancing a claim for malicious prosecution, which presents a much higher threshold for Crown liability.[46] This was the ruling of the Supreme Court in *Miazga v Kvello Estate*[47] from which the Judge was satisfied that the law was clear that the Crown prosecutor could not be sued for negligent investigation in the performance of his or her duties. Therefore, this aspect of the plaintiff's claim was absolutely unsustainable.[48] Insofar as the four elements of the claim for malicious prosecution were concerned, it is the absence of reasonable and probable cause and malice as were in issue in *Miazga*, which appeared also to be the factors in issue in the present case. Wright J then held that malice is a question of fact that ultimately requires evidence that the prosecutor was impelled by improper purpose. The malice element will be made out when a court is satisfied, on a balance of probabilities, that the Crown prosecutor commenced or continued the impugned prosecution with a purpose inconsistent with his or her role as a minister of justice. The plaintiff must ultimately demonstrate on the totality of the evidence that the prosecutor deliberately intended to subvert or abuse the office of the Attorney General or the process of criminal justice such that he or she exceeded the boundaries

40 2007 MBQB 142 (CanLII) para 83.
41 2008 MBCA 60 (CanLII).
42 *Hyra* paras 23–26.
43 *Hyra* paras 28 and 32.
44 2013 NSSC 121 paras 31–38.
45 2011 NSCA 12 (CanLII).
46 *Barton v Nova Scotia* para 21.
47 *Miazga v Kvello Estate* paras 8 and 80.
48 *Barton v Nova Scotia* para 22.

of that office.

Reiterating the holding in *Miazga,* Wright J held that by requiring proof of improper purpose, the malice element ensures that liability will not be imposed in cases where a prosecutor, in the absence of reasonable and probable grounds, proceeds by reason of incompetence, honest mistake, negligence or even gross negligence.[49] As the Supreme Court captured it in *Miazga*,[50] an allegation of malicious prosecution against a Crown attorney constitutes an after-fact attack on the propriety of the prosecutor's decision to initiate or continue criminal proceedings against the plaintiff. In the present case, such an attack took the following three-dimensional approaches: (a) the unusual overall circumstances of the wrongful conviction of a 19-year-old mixed-race teenager charged with a serious offence, without his having pleaded guilty or having a trial and without the benefit of legal representation; (b) a charge that was laid and prosecuted on the uncorroborated statement of the 14-year-old complainant, without the plaintiff ever having been interviewed, and thereby wilfully disregarding exculpatory evidence that ought to have been available with minimal diligence; and (c) the prosecution arose from a complaint by M's father made directly to the Crown prosecutor who stood in a potential conflict of interest because of their longstanding close personal relationship.[51] It is easily discernible from the close personal relationship between the parties, that the prosecutor, acting in a potential conflict of interest and lacking objectivity, put close personal friendship with M's father ahead of his prosecutorial duties as a Crown attorney. Although the facts were yet sparsely pleaded, they were however sufficient on their face to disclose a reasonable cause of action for malicious prosecution. The trial judge was not persuaded that the defendant had discharged the heavy burden of satisfying the court that it was plain and obvious that the plaintiff's claim would not succeed or that it was absolutely unsustainable and certain to fail.[52]

5 2 2 2 The Claim for Negligent Police Investigation

On the claim for negligent police investigation in *Barton v Nova Scotia*, the Judge necessarily referred to the Supreme Court judgment in *Hill v Hamilton-Wentworth Police Services Board* where it was held that police officers, unlike Crown prosecutors, owe a duty of care to a suspect when conducting their investigations.[53] That places upon them the duty to meet the standard of care required of a reasonable police officer in similar circumstances.[54] This is coupled with the usual establishment of causation of damage that are compensable in law. Of course, the police would not necessarily be absolved from liability simply because another person, such as the prosecutor, might have contributed to the wrongful conviction of the applicant causing compensable damage.[55] In the present circumstances, the plaintiff had pleaded sufficient material facts as to how the investigating officer(s) breached the standard of care. The plaintiff had alleged that the police had conducted an inadequate investigation, which caused his losses. He had pleaded that: (a) the police charged and prosecuted him based on the words of M's father and thereby failed to investigate the crime in any meaningful way. Instead, the police simply accepted the word of M's father with whom the prosecutor had a close personal friendship; (b) the police negligently disregarded exculpatory evidence that was available at the material time through minimal diligence. In effect, the police did not conduct the interview of the plaintiff at all and disregarded the evidence that M's father had demanded and been refused the payment of the sum of $900 from the plaintiff's parents; and (c) the police failed to take any steps to properly investigate the true perpetrator of the alleged offence.[56] Given this set of facts, the judge found it difficult to be persuaded that even if the material facts pleaded were true, they were sufficient to support a claim for malicious prosecution against the police whereas it is not clear whether a finding of malicious prosecution could be made against the police.[57]

49 *Barton v Nova Scotia* para 26.
50 *Miazga v Kvello Estate* para 45.
51 *Barton v Nova Scotia* para 27.
52 *Barton v Nova Scotia* paras 28–29.
53 *Barton v Nova Scotia* para 31.
54 *Hill v Hamilton-Wentworth* para 74.
55 *Hill v Hamilton-Wentworth* para 94.
56 *Barton v Nova Scotia* para 32.
57 *Barton v Nova Scotia* para 35.

In any event, the facts pleaded were insufficient to set the basis for the absence of the reasonable and probable cause element with respect to belief in the plaintiff's guilt. Therefore, too, the pleadings were insufficient to set out any basis for the establishment of the element of malice, namely, that the police deliberately used the criminal process for an improper purpose.[58] In conclusion, Wright J held that the plaintiff would be at liberty to continue his action against the Attorney General of Nova Scotia with respect to malicious prosecution only, and against the Attorney General of Canada with respect to the tort of negligent police investigation only.[59]

5 2 2 3 Subsequent Claim for Charter Damages

In a subsequent follow-up action for wrongful conviction in *Barton v Nova Scotia (Attorney General)*,[60] Mr Barton claimed damages under the Charter and negligent investigation, an action, which ultimately reached the Nova Scotia Court of Appeal in *Barton v Nova Scotia (Attorney General)*.[61] The question was whether the trial judge, Chipman J, erred in finding that the police authorities had not breached its duty of care, and whether the trial judge erred in dismissing his claim for Charter damages. The appellant had alleged that the trial judge made a palpable error by not finding that the police authorities had breached its duty to the appellant in how they took his statement. Furthermore, the trial judge should have allowed his claim for damages as a just and appropriate remedy for the infringement of his section 7 Charter rights by the Attorney General of Nova Scotia's failure to compensate him.[62] The Court of Appeal held that a finding by an appeal court, that a conviction could not be upheld, did not equate to a finding that someone must be held liable in private law. In effect, there is no guarantee in Canada that money will be paid to compensate a person who claims to have been wronged after an acquittal.[63] In light of this reality, "many people, not the least of which, Mr Barton, might ask, how is it that a conviction from 45 years ago can be quashed as being a 'miscarriage of justice',[64] but the courts do not order damages to be paid as compensation for such a 'wrong'?" However, an acquittal determines legal innocence;[65] it is not a determination that any number of the individuals or entities that make up the criminal justice system engaged in behaviour that was malicious or they breached the appropriate standard of care, entitling the accused or the appellant to an award of damages. At the same time, an acquittal is no impediment to a victim suing the same accused in a civil action.[66] Indeed, it is unlikely that the fact of the acquittal is even admissible in a civil action.[67] The burden of proof, rules of evidence, and the parties are all different in civil proceedings. On the other hand, an accused may be precluded from challenging a conviction in subsequent civil proceedings as an abuse of process.[68]

The appellant did not allege that the trial judge erred in law as to how he dealt with the claim against the police authorities for negligent investigation. His sole complaint was that the trial judge had committed a palpable and overriding error[69] in finding that the police authority had not breached its duty of care in the taking of the appellant's statement. Findings of fact

58 *Barton v Nova Scotia* para 37.
59 *Barton v Nova Scotia* para 39.
60 2014 NSSC 192 (CanLII) (*Barton 2*).
61 2015 NSCA 34 (CanLII) (*Barton CA*).
62 *Barton CA* paras 122.
63 *Barton CA* paras 1, 13 and 116.
64 As explained by Beveridge JA, delivering the unanimous judgment of the NSCA in *Barton CA* para 16, the court assumes jurisdiction on a "miscarriage of justice" premise if it is established that something occurred during the trial process that raises doubt about the fairness or appearance of fairness of the trial. Without delving into the intricacies of the concept, examples would include: (a) improprieties in the jury selection process — *R v Barrow* [1987] 2 SCR 694; *R v Latimer* [1997] 1 SCR 217; *R v Hobb* 2010 ONCA 62 (CanLII); (b) improper contact with juries during deliberations — *R v Cameron* 1991 CanLII 7182 (ONCA); (c) failure to provide relevant information — *R v Dixon* [1998] 1 SCR 244; *R v Taillefer* 2003 SCC 70 (CanLII); (d) misapprehension of evidence by a trial judge that played an essential role in the reasoning process that led to conviction — *R v Morrissey* 1995 CanLII 3498 (ONCA); *R v Lohrer* 2004 SCC 80 (CanLII); (e) incompetence of counsel — *R v GBD* 2000 SCC 22 (CanLII); *R v Fraser* 2011 ONCA 70 (CanLII). The usual remedy is an order for a new trial, but the court may direct an acquittal.
65 *R v Grant* [1991] 3 SCR 139; *Gredic v The Queen* [1985] 1 SCR 810; *R v Carlson* [1970] 3 OR 213 (HC).
66 *Polgrain Estate v Toronto East General Hospital* 2008 ONCA 427 (CanLII).
67 *Rizzo v Hanover Insurance Co* 1993 14 OR (3d) 98 (Ont. CA).
68 *Barton CA* paras 35–38. See also *Toronto (City) v Canadian Union of Public Employees (CUPE), Local 79* 2003 SCC 63 (CanLII).
69 *Barton CA* para 100.

including drawing, or refusing to draw particular inferences, are within the purview of trial judges. The trial judge committed no reviewable error in his findings that the statement was not falsified or that the police otherwise breached its duty of care. The appellant's Charter claim was based on alleged refusal by the Attorneys General to compensate him for his wrongful conviction and that this violated his rights under sections 7 and 12 of the Charter. Instead, they forced the appellant to engage in stressful litigation and made him to live with the knowledge that neither the Province nor the police authorities took any responsibility for his ordeals. This conduct, it was argued, inflicted mental and emotional stress that should be compensated with an award of $100 000.[70] The claim that this amounted to cruel and unusual treatment under section 12 was dismissed at trial and the appellant advanced no further claim against the Attorney General of Canada for any alleged breach of his Charter rights. The trial judge was right in dismissing this novel section 7 claim as factually not made out and there was no reason for the Court of Appeal to find otherwise.[71]

6 CHARTER DAMAGES FOR PROSECUTORIAL MISCONDUCT IN CRIMINAL PROCEEDINGS

It will be recalled that the Supreme Court of Canada laid down the guidelines for Charter damages claims in *Vancouver (City) v Ward*,[72] which had involved a strip search of the claimant; and seizure of his car by the police. His claim for breach of his section 8 Charter right was upheld. It was held that section 24(1) of the Charter was broad enough to include the remedy of constitutional damages for breach of a claimant's Charter rights if such remedy was found to be appropriate and just in the circumstances of the case. It was also held that there are four steps in the inquiry: (i) to establish whether a Charter right has been breached; (ii) to show why damages are a just and appropriate remedy, having regard to whether they would fulfil one or more of the related functions of compensation, vindication of the right, and/or deterrence of future breaches; (iii) once the claimant has established that damages are functionally justified, the State has the opportunity to demonstrate that the countervailing factors defeat the functional considerations that support a damage award and render damages inappropriate or unjust; (iv) if the State fails to negate that the award is appropriate and just, the fourth and last step is the quantification of damages.

6 1 Between *Ward* and *Henry*

Since the Supreme Court judgment was delivered in *Ward*, several Charter damages claims have been canvassed in Canadian courts. Suffice it, however, to illustrate with the following four cases.[73] First, it was held in *Biladeau v Ontario (Attorney General)*[74] that although authority on awarding Charter damages is relatively recent, it seems clear that when it comes to malicious prosecution, there is a high degree of overlap between the elements of the tort and a corresponding claim for Charter damages. The precise extent of the overlap is unclear; however, malice appears to be an integral component of both actions. Accordingly, the facts alleged by the appellant regarding the tort of malicious prosecution appear to be equally applicable to the appellant's corresponding claim for Charter damages.[75] Therefore, the bar the appellant will have to overcome for his Charter damages claim is at least as high as the bar he must surmount for a private law action for malicious prosecution. However, as with his claim for malicious prosecution, the appellant is merely at the pleadings stage and is only required to plead facts sufficient to show that it is not plain and obvious that no reasonable cause of action is disclosed. LaForme JA's reasons for allowing the appeal with regard to the malice requirement of malicious prosecution apply equally to the Charter damages claim.

Second, in the latest of the various case law generated from the *Khadr v Canada*[76] saga,

70 *Barton CA* para 105.
71 *Barton CA* para 109–112.
72 [2010] 2 SCR 28 (SCC) (*Ward*). See Okpaluba, "The Development of Charter Damages Jurisprudence in Canada: Guidelines from the Supreme Court" 2012 23 *Stellenbosch Law Review* 55, where this case was extensively discussed.
73 See also *R v Sel* 2012 ABQB 377 (CanLII); *Spidel v Canada* 2011 FC 1448 (CanLII) (12 December 2011); *R v Reinhart* 2012 SKQB 95 (CanLII); *AK v R* 2014 CanLII 30066 (NLPC); *Young v Ewatski et al* 2012 MBCA 64 (CanLII).
74 2014 ONCA 848 paras 41–44.
75 *Forrest v Kirkland* 2012 ONSC 429 (CanLII) para 62; *Henry v British Columbia* 2014 BCCA 15 (CanLII).
76 2014 FC 1001 (4 November 2014).

where the Canadian minor who was held prisoner at Guantanamo Bay had initially alleged breaches of various Charter rights has sought to greatly expand the scope of his claim. He sought leave to amend the Statement of Claim so as to seek $20 000 000 in compensatory damages alleging negligence, negligent investigation, conspiracy with the United States in the arbitrary detention, torture, cruel, inhuman and degrading treatment, false imprisonment, intentional infliction of mental distress and assault and battery of the plaintiff, failure to comply with domestic and international obligations with regard to treatment while confined, and misfeasance in public office. In the alternative, he sought an award of damages pursuant to section 24(1) of the Charter and a declaration that the defendant violated his sections 7, 8, 9, 10, 12 and 15 Charter rights.[77] As the motion's Judge put it, the plaintiff

> seeks leave to make refined amendments and to file a proposed Amended Statement of Claim. Therein he seeks $20 000 000 in damages including compensatory damages for negligent investigation, conspiracy and misfeasance in public office; Charter damages pursuant to s 24(1) for breaches of sections 7, 10*(a)*, 10*(b)*, and 12 of the Charter; punitive and aggravated damages; and special damages.[78]

The motion judge found it unnecessary to delve into the details of the law governing the sections of the Charter invoked by the plaintiff to understand that it differs fundamentally from the law governing the tort of conspiracy. This is because a civil wrong does not have the same meaning as a constitutional violation. Courts assess State conduct through different legal tests in Charter and private law cases.[79] However, it was held that after the plaintiff might have succeeded in his action for negligent investigation, conspiracy and misfeasance in public office, the claim for Charter damages under section 24(1) would add no further liability against the defendant that is not already covered by the alleged misfeasance and negligent investigation.[80]

Third, the FCA confirmed the limited availability of damages under the Charter in *Mancuso v Canada (National Health and Welfare).*[81] It was held that as a general rule, damages are not available from harm arising from the application of a law which is subsequently found to be unconstitutional, without more. The plaintiffs pleaded that the respondents' conduct was "clearly wrong, in bad faith or an abuse of power" — one of the elements typically required in order to claim under section 24(1) of the Charter — but failed to supply material facts on the question of how the impugned Regulations and their enforcement constituted serious error, bad faith or abuse so as to trigger an entitlement to Charter damages. They also failed to give any particulars of any conduct that would support a damages claim.[82]

Fourth, in *Meigs v Canada*,[83] eight prisoners alleged, *inter alia*, breaches of their sections 7, 8, 12 and 15(1) Charter rights and claimed damages arising from various personal harms allegedly suffered while they were inmates in a public prison. In dismissing their claims for lack of any material facts to support the plea of each of the alleged breaches and holding that the allegations were vague and deficient, Manson J elicited five clear reasons for so concluding. They failed: (i) to establish the elements necessary for an award of damages for a Charter breach;[84] (ii) to plead the material facts necessary to support a section 7 breach, in failing to identify the principles of fundamental justice alleged to have been breached;[85] (iii) to plead material facts to support a section 12 breach.

77 *Khadr v Canada* para 3.
78 *Khadr v Canada* para 5.
79 *Khadr v Canada* para 18.
80 *Cf* the conclusion earlier arrived at by the Constitutional Court of South Africa in *Fose v Minister of Safety and Security* 1997 3 SA 938 (CC) paras 60 and 67, to the effect that damages would be awarded as one of the potential remedies available as "appropriate relief" if it will effectively vindicate the wrong. But that, where there is a delictual or statutory mechanism for the claimant to receive compensation for a right's violation, no separate or additional award of constitutional damages would be made.
81 2015 FCA 227 para 29. See also *Canada (Royal Mounted Police v Canada (Attorney General)* 2015 FC 1372 (9 December 2015) para 37; *McMaster v Canada (Attorney General)* 2017 FC 25 (CanLII) para 45.
82 See also *Ward*; *Henry SCC*; *Mackin v New Brunswick (Minister of Finance)* [2002] 1 SCR 405.
83 2013 FC 389 (17 April 2013) paras 17–18.
84 *Ward* para 4.
85 *Prentice v Canada (Royal Canadian Mounted Police)* 2005 FCA 395 (CanLII) para 45.

The standard to be applied in determining whether treatment or punishment is cruel and unusual within the meaning of section 12 of the Charter is relatively high. As stated in *Pinche v Canada (Solicitor General)*,[86] the court should determine "whether the treatment or punishment is so excessive as to outrage standards of decency and surpass all rational bounds of treatment or punishment"; (iv) to establish material facts explaining why and to what extent they allege a reasonable expectation of privacy under section 8 of the Charter. The penitentiary context, by its very nature, creates a diminished expectation of privacy[87] and prisoners do not have an unfettered right to unopened mail;[88] and (v) that there were no facts in support of any discrimination that falls within section 15(1) of the Charter. To prove a violation of equality rights under section 15 of the Charter, a claimant must demonstrate that: (i) the law or government action treated the claimant differently than others, by purpose or effect; (ii) the differential treatment was based on an enumerated or analogous ground of discrimination; and (iii) that the differential treatment was discriminatory in a substantive sense, considering such factors as pre-existing group disadvantage and the nature of the interest affected.[89]

6 2 The *Henry* Judgment

The main concern of the Supreme Court of Canada in *Henry v British Columbia (SCC)* was the claim against the Attorney General of British Columbia for damages under section 24(1) of the Canadian Charter of Rights and Freedoms for its failure — before, during and after the criminal trial — to meet its disclosure obligations under the Charter. The question turned on the level of fault the plaintiff had to establish to sustain a cause of action against the Attorney General in the circumstances.[90] H's original claim included actions in negligence, malicious prosecution and breaches of the Charter rights in sections 7 and 11*(d)*. The Supreme Court of British Columbia[91] struck the negligence action as inconsistent with the ruling of the SCC in *Nelles v Ontario*,[92] but allowed the Charter claim to proceed because it was founded on allegations of malicious conduct. In allowing the appeal from the ruling of the BCCA[93] that H was not entitled to seek Charter damages for the non-malicious acts and omissions of the Crown Counsel, the Supreme Court of Canada unanimously held that section 24(1) of the Charter authorises the court to award damages against the Crown for prosecutorial misconduct without proof of malice. However, as it is evident from the discussion below, the court was split in advancing their reasons in support of that conclusion.

6 2 1 The Majority Reasoning in *Henry*

In the majority judgment of the Supreme Court delivered by Moldaver J, with whom Abella, Wagner and Gascon JJ concurred, a pertinent observation was made about Charter damages being a powerful tool that can provide a meaningful response to rights violations. Charter damages also represent an evolving area of the law that must be allowed to "develop incrementally".[94] Thus, when defining the circumstances in which a Charter damages award would be appropriate and just, courts must be careful not to stifle the emergence and development of this important remedy.[95] This, in effect, equates with the saying that courts must exercise caution not to be too quick in striking a claim for not disclosing a reasonable cause of action where the relief sought includes a remedy pursuant to section 24(1) of the Charter for the alleged violation of constitutional rights by the State.[96] It was held in *Henry* that where a claimant, as in this case, seeks Charter damages based on allegations that the Crown's failure to disclose relevant evidence to the accused violated his or her Charter rights, proof of malice is not required. Instead, a cause of action will lie where the Crown, in breach of its constitutional obligations, causes harm to the accused by intentionally withholding information

86 [1984] FCJ No 1008 affirmed [1989] FCJ No 204 (CA).
87 *Weatherall v Canada (Attorney General)* [1993] 2 SCR 872.
88 *Henry v Canada* [1987] FCJ No 307; *Canada v Solosky* [1980] 1 SCR 821.
89 *Andrews v Law Society of British Columbia* [1989] 1 SCR 143.
90 *Henry SCC* para 2.
91 *Henry v British Columbia* 2014 BCSC 1018 (CanLII).
92 [1989] 2 SCR 170 (SCC).
93 *Henry v British Columbia* 2014 BCCA 15 (CanLII).
94 See *Ward v Vancouver (City)* [2010] 2 SCR 28 (SCC) (*Ward)* para 21.
95 *Henry SCC* para 35.
96 Per Mainella J, *Grant v Winnipeg Regional Health Authority et al* 2015 MBCA 44 (CanLII) para 38.

when it knows, or would reasonably be expected to know, that the information is material to the defence and that the failure to disclose will likely impinge on the accused person's ability to make full answer and defence. This represents a high threshold for a successful Charter damages claim, albeit one that is lower than malice.[97] It is only by keeping within the strict bounds that a reasonable balance can be struck between remedying serious rights violations and maintaining the efficient operation of the public prosecution system.

The law of Charter damages and the guidelines thereof were established in *Vancouver (City) v Ward* where the Supreme Court recognised that section 24(1) of the Charter authorises damages claims directed against the State for violations of the claimant's constitutional rights. McLachlin CJC enunciated "a four-step construct for the determination of the question: when are damages under section 24(1) of the Charter available?"[98] In the first instance, the claimant must show that the State had breached a right(s) entrenched in the Charter and, second, that an award of damages would serve a compensation, vindication, or deterrence function. After the claimant might have discharged this onus, the burden will shift to the state to attempt to rebut the plaintiff's case by demonstrating that there were countervailing considerations that outweighed the claim.[99] According to the majority in *Henry,* the countervailing consideration arising in this case, relates to concerns over good governance. It was held that *Ward* had established that policy factors may justify restricting the State's exposure to civil liability by establishing a minimum threshold of gravity. If the threshold of gravity is set too low for a Charter damages claim alleging Crown misconduct, the ability of prosecutors to discharge their important public duties will be undermined, with adverse consequences for the administration of justice. Specifically, the spectre of liability may influence the decision-making of prosecutors and make them more "defensive" in their approach. A low threshold will also open up the floodgates of civil liability and force prosecutors to spend undue amounts of time and energy defending their conduct in court.[100]

6 2 1 1 Must Crown Conduct Rise to the Level of "Malice"?

The main thrust of the Attorney General's argument is that to attract liability for Charter damages, the Crown's conduct must rise to the level of "malice". The court rejected this submission[101] and held that the malice standard has been extensively canvassed in the malicious prosecution jurisprudence of the court — *Nelles, Proulx* and *Miazga*.[102] Under the tort of malicious prosecution, a prosecutor will be liable for the decision to initiate or continue a prosecution against an individual without reasonable and probable cause, provided that such decision was characterised by malice. Malice requires more than recklessness or gross negligence. Rather, the plaintiff must demonstrate wilful and intentional effort on the Crown's part to abuse or distort its proper role within the criminal justice system. The malice standard will only be met in exceptional cases where the plaintiff can prove that a prosecutor's decision was driven by an improper purpose or motive, wholly inconsistent with Crown counsel's role as minister of justice.[103]

The majority proceeded to advance the reasons why malice does not provide a useful liability threshold for Charter damages' claims alleging wrongful non-disclosure by prosecutors:

- The malice standard is firmly rooted in the tort of malicious prosecution, which has a distinctive history and purpose.[104]

- Malice requires an inquiry into whether the prosecutor was motivated by an improper purpose. Such an inquiry is apt when the impugned conduct is a highly discretionary decision such as the decision to initiate or continue a prosecution, because discretionary decision-making can best be evaluated by reference to the decision-maker's motives. However, the decision to disclose relevant information is

97 *Henry SCC* para 31.
98 See Okpaluba 2012 *Stellenbosch LR* 66.
99 *Henry SCC* paras 34–37; *Ward* paras 4, 21 and 33. See also Okpaluba 2012 *Stellenbosch LR* paras 4.1–4.3.
100 *Henry SCC* paras 39–40; *Ward* paras 38–39.
101 *Henry SCC* paras 44 and 66.
102 See Okpaluba 2012 37 2 *JJS* 65, 76–78.
103 *Henry SCC* paras 45–46.
104 *Henry SCC* para 57; *Miazga* paras 42 and 44.

not discretionary. It is a constitutional obligation which must be properly discharged by the Crown in accordance with an accused person's Charter right to make full answer and defence, guaranteed under sections 7 and 11(d) of the Charter.[105] As such, the motives of the prosecutor in withholding information are immaterial.[106]

- Unlike the decision to initiate or continue a prosecution, disclosure decisions do not fall within the core of prosecutorial discretion, and therefore, do not warrant such an onerous threshold to insulate them from judicial scrutiny.[107]

- A purposive approach to section 24(1) militates against the malice standard. Restricting the availability of Charter damages for wrongful non-disclosure to cases where the Crown acted with malice would offer neither a responsive nor effective remedy to claimants. A malice standard grounded in 'improper purpose' sets too high a bar, and fails to respond adequately to the State conduct in issue. It is also not well suited to the disclosure context.[108]

6 2 1 2 The Good Governance Concern

While the malice standard is not directly applicable in these circumstances, the compelling good governance concerns raised in the malicious prosecution jurisprudence must be taken into account in determining the appropriate liability threshold for cases of wrongful non-disclosure. The liability threshold must ensure that Crown counsel will not be diverted from their important public duties by having to defend against a litany of civil claims. Moreover, a widespread "chilling effect" on the behaviour of prosecutors must be avoided. Therefore, the threshold must allow for strong claims to be heard on their merits, while guarding against a proliferation of marginal cases.[109] Good governance concerns mandate a threshold that substantially limits the scope of liability for wrongful non-disclosure. The gross-negligence standard approach adopted by the application judge does not provide sufficient limits. In any event, a negligence-type standard poses considerable problems, and must be rejected.[110] H's submission that an even lower threshold — a simple breach of the Charter without any additional element of fault — should apply in this context, fails to address the compelling policy and practical concerns that justify limiting prosecutorial liability. H alleges very serious instances of wrongful non-disclosure that demonstrate a shocking disregard for his Charter rights. As pleaded, his claim meets the liability threshold established here although, as the court cautioned, his exceptional case should not be used to justify a substantial expansion of prosecutorial liability.[111]

Whether considered at the pleadings stage or at trial, the same formulation of the test applies. At trial, a claimant must convince the fact-finder on a balance of probabilities that:

- The prosecutor intentionally withheld information;
- The prosecutor knew or ought to reasonably have known that the information was material to the defence and that the failure to disclose would likely impinge on his or her ability to make full answer and defence;
- That withholding the information violated his or her rights; and
- That he or she suffered harm as a result.[112]

105 *R v Stinchombe* [1991] 3 SCR 326 at 336; *R v Mills* [1999] 3 SCR 668 para 5.
106 *Henry SCC* paras 58–61.
107 *Henry SCC* paras 62–63; *Krieger* paras 43, 45 and 54; *Anderson* para 45.
108 *Henry SCC* paras 64–65; *Doucet-Boudreau v Nova Scotia (Minister of Education* [2003] 3 SCR 3 para 25.
109 *Henry SCC* paras 71–73.
110 *Henry SCC* para 74.
111 *Henry SCC* para 81.
112 *Henry SCC* para 85.

The liability threshold focuses on two key elements: the prosecutor's intent, and his or her actual or imputed knowledge.[113] The purpose of these elements is not to shield prosecutors from liability by placing undue burden on claimants to prove subjective mental states. Rather, they are designed to set a sufficiently high threshold to address good governance concerns while preserving a cause of action for serious instances of wrongful non-disclosure.[114] The consequences of setting a lower threshold in this context — simple negligence, or even the gross-negligence standard adopted by the application judge — would be serious. This type of threshold implicates a duty of care paradigm that ignores the basic realities of conducting criminal prosecution.[115] A duty of care paradigm risks opening up

> a Pandora's box of potential liability theories. For example, if prosecutors were subject to a duty of care, a claimant could allege that they failed to probe the police forcefully enough that relevant information was not being suppressed. Such an approach would effectively impose an obligation on prosecutors to 'police' the police. In my view, widening the Crown's exposure to liability in this way would be unwarranted. If police act improperly, then a civil claim can and should lie against them.[116]

The problems with a negligence-based standard are even more apparent when considering how this low threshold would operate at the pleadings stage. It would be far too easy for a claimant with a weak claim to plead facts disclosing a cause of action for negligence and thus drive prosecutors into civil court. Bringing a Charter damages claim for prosecutorial misconduct should not be a mere exercise in artful pleading.[117]

6 2 1 3 The Causation Angle to the Claim

In addition to establishing a Charter breach and the requisite intent and knowledge, a plaintiff must prove that, as a result of the wrongful non-disclosure, he or she suffered a legally cognisable harm. Liability attaches to the Crown only upon a finding of causation.[118] Regardless of the nature of the harm suffered, a plaintiff would need to prove, on a balance of probabilities, that "but for" the wrongful non-disclosure, he or she would not have suffered that harm.[119] The "but for" causation test may, however be modified in situations involving multiple wrongdoers.[120] However, as a general rule, a plaintiff cannot succeed unless she shows as a matter of fact she would not have suffered the loss "but for" the negligent act or acts of the defendant, since proof by an injured plaintiff that a defendant was negligent does not make that defendant liable for the loss.[121] Allowing the appeal and holding that proof of malice was not necessary in a cause of action for Charter damages against the Crown, the court ordered that H may seek to amend his pleadings to include Charter damages against the Attorney General of British Columbia. The court found that the Crown, in breach of its constitutional obligations, caused him harm by intentionally withholding information when it knew, or ought to have reasonably known that the information was material to the defence and that the failure to disclose would likely impinge on his or her ability to make full answer and defence.[122] The minority would have left the causation aspect out of the court's judgment since the issue was neither addressed in the courts below nor before the Supreme Court, but nonetheless, hastened to say that "we are not convinced that the 'but for' test proposed by Moldaver J is appropriate here."[123]

113 *Henry SCC* para 84.
114 *Henry SCC* paras 88–89. See also *Henry v British Columbia* 2016 BCSC 1038 (CanLII) (*Henry 2)* paras 252–276; *JP v BC (Children and Family Development)* 2015 BCSC 1216 (CanLII) para 1025. See also *Williams v Bermuda* [2016] UKPC 4; *Oppelt v Department of Health* 2016 (1) SA 325 (CC); *Za v Smith* [2015] ZASCA 75; *Prinsloo v RAF* 2015 (5) SA 91 (WCC).
115 *Henry SCC* para 92.
116 Per Moldaver J, *Henry SCC* para 93.
117 *Henry SCC* para 94.
118 *Henry SCC* para 95.
119 *Henry SCC* para 97.
120 *Henry SCC* para 98.
121 *Clements v Clements* 2012 SCC 32 (CanLII) paras 6–15.
122 *Henry SCC* para 99.
123 *Henry SCC* para 118.

6 2 2 The Minority Judgment

In their joint judgment, McLachlin CJC and Karakatsanis J concurred with the majority and held that H should be allowed to amend his pleadings to include a claim for Charter damages based on a breach by the Crown of its constitutional obligation to disclose relevant information. On the facts pleaded, Charter damages would be an appropriate and just remedy, serving one or more of the functions of compensation, vindication and deterrence.[124] H need not allege that the Crown breached its constitutional obligation intentionally or with malice in order to access Charter damages.[125] H must plead facts, if true, that will establish a breach of his Charter right(s) and further that Charter damages would constitute an appropriate and just remedy to fit into the first and second of the four-step construct of *Ward*. If proven at trial, the facts alleged by him would indisputably establish a breach of his disclosure rights under section 7 of the Charter, which had a direct and serious impact on the fairness of his trial.[126] In these circumstances, an award of Charter damages under section 24(1) may provide some compensation for the hardships he had endured in the 27 years of incarceration and may also help publicly vindicate such a serious violation of the Charter rights the Crown was alleged to have breached.[127] The objective of deterrence may also be served by an award of damages that highlights the need for the state to remain vigilant in meeting its constitutional obligations.[128]

Having held that the first two of the *Ward* criteria has been met, the minority judgment moved to the third stage, the so-called countervailing considerations: whether the government has shown that damages are inappropriate or unjust in the circumstances of the case. They held that at step three of the *Ward* analysis, the government has an opportunity to advance any countervailing considerations that would make it inappropriate or unjust to award damages in terms of section 24(1) of the Charter. At the current stage of the proceedings in this case, it is far from clear that there is an alternative remedy that will fulfil the functional objectives of Charter damages.[129] As to good governance concerns, the second set of the countervailing considerations discussed in *Ward*, those raised by the Attorney General of British Columbia, are misplaced in this case.[130] H's case does not involve the exercise of prosecutorial discretion in the usual sense of the term or as was discussed in *Nelles* and *Miazga*. The discretion to commence and pursue a prosecution is vital to the effective prosecution of criminal cases and claims can only be brought against prosecutors' misuse of this discretion if malice can be shown. The legal duty on the Crown to disclose relevant evidence, however, is not a discretionary function but a legal obligation.[131] The obligation is absolute. The only discretion left to the prosecutor is a limited operational discretion relating to timing, relevance in borderline cases, privilege and protection of witness identity.[132] An action for failure to disclose relevant evidence to the defence is different from an action for misuse of prosecutorial discretion in bringing or pursuing

124 These expressions were defined in *Ward* paras 25, 28 and 29: compensation is about remedying personal loss; vindication is about remedying the harm the infringement caused society; while deterrence is forward-looking and serves a preventive function. It "seeks to regulate government behaviour, generally, in order to achieve compliance with the Constitution." Thus, an award of Charter damages might also serve the objective of "influencing government behaviour in order to secure state compliance with the Charter in the future."

125 *Henry SCC* paras 108 and 138.

126 *Henry SCC* paras 109 and 111.

127 *Henry SCC* para 115. The Judges could find no better "scenario that can shake the public confidence in the justice system more deeply than those alleged by Mr Henry. According to the allegations, State action in breach of the Charter seriously undermined the fairness of Mr Henry's trial and the State subsequently imprisoned him for nearly three decades."

128 *Henry SCC* para 116.

129 *Henry SCC* paras 119 and 122.

130 *Henry SCC* para 127.

131 See also *R v Stinchcombe* [1991] 3 SCR 326 at 333; *R v McNeil* [2009] 1 SCR 66 paras 17–18, but the two-some relied more on *Stinchcombe* to emphasise their view that prosecutorial discretion with respect to the disclosure of evidence is limited in scope and duration. Further, in a passage in that judgment (335–336 and 340) where it was said that: "The prosecutor must retain a degree of discretion in respect of these matters. The discretion, which will be subject to review, should extend to such matters as excluding what is clearly irrelevant, withholding the identity of persons to protect them from harassment or injury, or to enforce the privilege relating to informers. The discretion would also extend to the timing of disclosure in order to complete an investigation … The discretion of Crown counsel is … reviewable by the trial judge. Counsel for the defence can initiate a review when an issue arises with respect to the exercise of the Crown's discretion. On a review the Crown must justify its refusal to disclose. Inasmuch as disclosure of all relevant information is the general rule, the Crown must bring itself within an exception to that rule."

132 *Henry SCC* para 128.

a prosecution. It is not an action for abuse of discretion, but an action for breach of a legal duty imposed on the state by the Charter.[133] Recognising H's claim will not chill the exercise of prosecutorial discretion, nor will it change the high standard of malice for tort actions of misuse of prosecutorial discretion, or divert prosecutors from their day-to-day work.[134] In this regard also, the minority found no principled basis for imposing any threshold of fault as the majority would.[135]

6 2 3 The Points of Disagreement

The points of disagreement between the majority and minority reasoning in *Henry* may be sketched. First, according to Moldaver J, the minority opinion that Charter damages based on any allegation that the Crown breached its disclosure obligations can be pursued by a claimant whether the breach was intentional, negligent, or accidental was casting "too wide a net". This would expose "prosecutors to an unprecedented scope of liability that would affect the exercise of their vital public function".[136] Such an "approach runs the risk of opening the floodgates to the scores of marginal claims".[137] Second, the majority disagreed with the minority finding that in the scheme of things as they conjecture it, the involvement of prosecutors will be limited. Further, since the prosecutor is under a legal duty to disclose all relevant documents, the focus would be on the existence and relevance of the documents, not on the more complex questions of how discretion should or could have been exercised. The majority reasoned that a detailed examination of prosecutor's conduct would be inevitable as such an examination would be necessary, for example, to determine whether case-by-case considerations militate against an award of damages or to set the appropriate quantum of damages for a successful claim.[138] Third, as to the minority view that their approach will have no chilling effect and that it is not the individual prosecutor but the state who faces liability,[139] the majority countered that while the obligation to disclose is non-discretionary, there are invariably difficult judgments that call to be made. Those difficult decisions should be motivated by legal principle, not the fear for incurring civil liability. Furthermore, the fact that damages claims lie against the state and not individual prosecutors does not mitigate this concern.[140] Finally, although the majority agrees with the minority that H alleges very serious instances of wrongful non-disclosure that demonstrate a shocking disregard of his Charter rights, his claim as pleaded meets the threshold established by the majority, but the court should be wary of using this exceptional case to justify a "substantial expansion of prosecutorial liability. It is only by keeping within strict bounds that we can ensure a reasonable balance between remedying serious rights violations and maintaining the efficient operation of our public prosecution system".[141]

6 3 Post-*Henry* Developments

6 3 1 *Hyra v Manitoba* at the Court of Appeal

Ironically, between the time argument was concluded but before judgment was delivered by the Court of Appeal in *Hyra v Manitoba et al*,[142] the Supreme Court of Canada delivered the judgment in *Henry* which had implication to the outcome in that case. The Court of Appeal took into account the *Henry* judgment in determining the issues raised in the present case, where the claimant was well aware that he could not meet one of the essential ingredients in an action for malicious prosecution since his conviction for criminal harassment stood.[143] His appeal raised the question whether or not a cause of action in negligence, based on an allegation of non-disclosure during criminal proceedings, may lie against an individual Crown prosecutor. Mainella JA had no hesitation in answering that question in the negative because:

133 *Henry SCC* para 129.
134 *Henry SCC* paras 130 and 132–133.
135 *Henry SCC* para 133.
136 *Henry SCC* para 77.
137 *Henry SCC* para 78.
138 *Henry SCC* para 79.
139 *Henry SCC* para 129.
140 *Henry SCC* para 80.
141 Per Moldaver J, *Henry SCC* para 81.
142 2015 MBCA 55 (CanLII).
143 *Hyra CA* para 8. See also *Nelles v Ontario* [1989] 2 SCR 170 at 192–193.

(a) a well-established feature of the civil justice system is that liability arising from prosecutorial misconduct is "carefully circumscribed" to "ensure a reasonable balance between remedying serious rights violations and maintaining the efficient operation of [a] public prosecution system";[144] and (b) while a plaintiff may advance a claim against the state for constitutional damages based on an allegation of wrongful non-disclosure during criminal proceedings, or private law damages for a tort requiring proof of malice or improper motive, the decision of the majority of the SCC in *Henry* confirms that the threshold for liability for wrongful non-disclosure is heightened from that of simple, or even gross, negligence.[145] On the question whether *Driskell* was correctly decided, the Justice of Appeal held that that decision stands in relation to the parties to it but that the *Henry* judgment has removed any lingering doubt as to the law for a motion to strike a civil claim based on an allegation of non-disclosure by a Crown prosecutor.[146]

The potential civil liability that may arise from wrongful non-disclosure by a Crown prosecutor in a criminal proceeding is two-fold. The first is that the individual Crown prosecutor, the Attorney General and possibly the Crown, subject to any immunity it may enjoy, may be sued for a nominate tort where the prerequisite for a successful claim requires the plaintiff to demonstrate that the Crown prosecutor's conduct was actuated by malice or other improper motive.[147] The classic example is that of a suit for malicious prosecution. The second is that the State, as opposed to a particular individual, may be sued for a violation of an accused person's section 7 Charter rights relating to disclosure.[148] In such an action, proof of malice is not necessary. The Crown prosecutor's motive for non-disclosure of material that was required to be disclosed is "immaterial".[149] Mainella JA held that the differing views of the majority and minority in *Henry* made it plain and obvious that, for the purposes of a motion to strike, a breach of the Crown's constitutionally mandated disclosure obligations is not actionable in a situation of simple negligence or even gross negligence; more is required for a plaintiff to have a reasonable cause of action.[150] For the majority, Moldaver J explained that "the duty paradigm"[151] was ill-suited to the realities of the criminal prosecutions given policy concerns, the spectrum of possible instances of non-disclosure and the differing roles of the police and Crown in the criminal process.[152] The Justice of Appeal went further to hold that:[153]

> In my view, the approach taken by the majority in *Henry* conforms to the underlying principles of the law of negligence. The scope of liability for negligence as discussed in *Anns v Merton London Borough Council*[154] and subsequently refined in *Cooper v Hobart*;[155] and *Edwards v Law Society of Upper Canada*[156] (the *Anns* test), is not based simply on whether a particular relationship, taking into account policy considerations specific to it, has sufficient foreseeability and proximity that a duty of care should be recognised either by analogy to like relationships where a duty of care has been previously recognised, or because a duty of care should be recognised in the given context. At the second stage of the *Anns* test, a prima facie duty of care may be negated altogether, or limited, due to residual policy considerations arising outside the relationship of the parties. Relevant is 'the effect of recognising a duty of care on other legal obligations, the legal system and society more generally.'[157]

In contrast to the approach of the Supreme Court in *Hill v Hamilton-Wentworth Police Services Board*,[158] in each of the decisions in *Nelles, Proulx, Miazga* and *Henry*, a majority of

144 *Henry SCC* paras 76 and 81.
145 *Hyra CA* paras 1–3.
146 *Hyra CA* paras 21–23.
147 *Nelles; Proulx; Miazga; Milgaard* 1994 CanLII 4592 (SKCA) para 27; *Gilbert v Gilkinson* 2005 CanLII 46386 (ONCA) paras 5–7; *Miguna v Ontario (Attorney General)* 2005 CanLII 46385 (ONCA) para 11. See also *Folland v Ontario* 2003 CanLII 52139 (ONCA).
148 *Ward* para 22.
149 *Hyra CA* paras 24–26; *Henry SCC* paras 31–32, 45–66.
150 *Henry SCC* paras 74–94.
151 *Henry SCC* para 88.
152 *Hyra CA* para 27; *Henry SCC* paras 91–94.
153 *Hyra CA* para 28.
154 [1978] AC 728 (HL) 751–752
155 [2001] 3 SCR 537 para 30.
156 [2001] 3 SCR 562 paras 10–11.
157 *Cooper* para 37.
158 (2008) 285 DLR (4th) 620 (SCC) para 65.

the Supreme Court of Canada took the opposite view with respect to Crown prosecutors. It has been repeatedly accepted that for reasons of public policy, or per Moldaver J, "good governance concerns underscores the need for a high threshold of liability",[159] and the limits on prosecutorial liability are justified for fear of the potential chilling effects civil claims may have on prosecutorial decision-making and the harassment prosecutors would face by marginal claims if the scope of prosecutorial liability is too broad.[160]

In considering the application of the *Henry* principles to the facts of *Hyra*, it was held that the appellant's action over alleged non-disclosure by the Crown prosecutor was fatally flawed for three reasons.[161] First, an action for negligent prosecution is not a reasonable cause of action in that the appellant's argument that he can sue the Crown and the Crown prosecutor in negligence for violation of his section 7 Charter right, due to non-disclosure during criminal proceedings, was clearly inconsistent with the majority judgment in *Henry*, which categorically rejected the idea of prosecutorial liability based on the duty of care paradigm. Accordingly, when *Henry* is read along *Nelles, Proulx, Miazga,* it is beyond doubt that there is no cause of action in negligence based on an allegation of non-disclosure by a Crown prosecutor in a criminal proceeding. There is no way the appellant's pleadings could have supported his claim for constitutional damages under section 24(1) of the Charter given the requirements of *Henry*.[162]

Second, the claim did not meet the liability threshold established in *Henry.* To begin with, the majority judgment in *Henry* concluded that, while the constitutional obligation on the Crown regarding disclosure as set out in *Stinchcombe* and subsequent decisions, is stringent and demanding, a breach of that duty alone is not sufficient to support a Charter claim for damages. Instead, "good governance concerns mandate a threshold that substantially limits the scope of liability for wrongful non-disclosure".[163] After citing the said heightened civil liability for wrongful non-disclosure, which has already been identified as part of the good governance concerns,[164] the Court of Appeal unanimously held that the deficiency with the appellant's statement of claim is that even when generously read, it fails to plead any facts which, taken to be true, could support the liability threshold set out in *Henry.*[165] This characteristic of the appellant's pleading is "fatal to the claim".[166] Third, the court found no basis to interfere with the motion Judge's conclusion that the claim was an abuse of process. No complaint about non-disclosure was made during the trial despite counsel having actual or imputed knowledge of the existence of the information. The civil claim is therefore no more than a collateral attack on a criminal conviction that stands.[167]

6 3 2 Liability for Non-disclosure of Information: The Case of the So-called "Rip-off Rapist"

The Supreme Court of Canada having unanimously held that section 24(1) of the Charter authorises the court to award damages against the Crown for prosecutorial misconduct absent proof of malice, the Supreme Court of British Columbia got down to the business of determining the Crown's liability in the subsequent litigation in *Henry v British Columbia.*[168] It will be recalled that the plaintiff who represented himself at the trial involving sexual offences was convicted and sentenced to an indefinite incarceration as a dangerous offender in 1983. In 2010, the British Columbia Court of Appeal quashed his convictions and acquitted him of all the offences.[169] In the present action, he sought damages from the Province for breaches of his rights under the Canadian Charter resulting in his wrongful incarceration and ensuing

159 *Henry SCC* paras 71–74.
160 *Hyra CA* para 31. *Cf* similar approach as in *Henry SCC* taken by the Court of Appeal in England in *Elguzouli-Daf v COP of the Metropolis* [1995] QB 335 (CA) 349, where Lord Steyn said that "compelling considerations, rooted in the welfare of the whole community" negate a general duty of care, for purposes of negligence, being owed by the Crown Prosecution Service to those it prosecutes. See also *Gray v Crown Prosecution Service* [2010] EWHC 2144 (QB) (BAILII) paras 33–34.
161 *Hyra CA* para 34.
162 *Hyra CA* paras 35–36.
163 *Hyra CA* para 37; *Henry SCC* para 74.
164 *Henry (SCC)* paras 71-74.
165 *Hyra CA* para 39. See also *Grant v Winnipeg Regional Health Authority et al* 2015 MBCA 44 (CanLII) paras 37–38.
166 *Henry SCC* para 43.
167 *Hyra CA* para 47. See also *Toronto (City) v CUPE, Local 79* [2003] 3 SCR 77 para 33.
168 2016 BCSC 1038 (CanLII) (8 June 2016) (*Henry 2).*
169 *R v Henry* 2010 BCCA 462 (CanLII).

imprisonment. He contended that his wrongful conviction was due to Crown Counsel's intentional breach of his rights under sections 7 and 11*(d)* of the Canadian Charter, specifically, by failing to discharge its duty of disclosure; failing to bring to the attention of the trial judge all the information bearing on the reliability of the identification made by complainants; and making statements to the court and eliciting testimony from complainants on the issue of identification that was materially inconsistent with the information contained in materials that had not been disclosed to him. It was also alleged that the Crown Counsel with carriage of his various post-trial applications, appeals and other matters breached the plaintiff's sections 7 and 11*(d)* rights by, *inter alia*, even after his conviction on 15 March 1983 until the appointment of the special prosecutor in November 2006, continuing to fail to bring matters to the attention of the courts that heard his subsequent post-trial proceedings.[170]

Although the judgment of Hinkson CJ in this case is meticulously thorough, exhaustive and lengthy, with a good chunk of it dealing with the evidence of the information withheld from the plaintiff, the ensuing discussion is nonetheless guided, in the first place, by the Chief Justice's methodical application of the four-way test established in *Ward* to determine whether damages would avail under section 24(1) of the Charter. Second, it is guided by the four-part test for establishing wrongful prosecutorial non-disclosure enunciated in *Henry SCC* if the plaintiff must prove liability under the Charter. This is coupled with the helpful summary of the holdings provided by the Chief Justice.[171] The court found that the Crown Counsel withheld information despite repeated requests by the plaintiff and his counsel for full disclosure.[172] That the Crown Counsel knew or ought reasonably to have known that the information it intentionally withheld from the plaintiff was material to the defence, and that the failure to disclose it would likely impinge on his ability to make full answer and defence.[173] This finding is based on the premise that knowledge of the information and the consequences of a failure to disclose can be imputed based on what a reasonable prosecutor would know in the circumstances. Once it is found that information was intentionally withheld which any prosecutor, acting reasonably, should have disclosed, there can be no reason why an accused who suffered harm should be denied a cause of action. The Chief Justice, however, stressed that

> by incorporating a reasonableness aspect into the knowledge element,[174] I am not endorsing a negligence-based standard as the applicable liability threshold.

Because, when taken together, the two elements, intent, and actual or imputed knowledge,

> rise above a purely objective'*reasonableness' or 'marked departure'* standard grounded in a duty of care paradigm. The purpose of *the* intent and knowledge elements is not to shield prosecutors from liability by placing an undue burden on claimants to prove subjective mental states. Rather, these elements are designed to set a sufficiently high threshold to address good governance concerns, while preserving a cause of action for serious instances of wrongful non-disclosure. As pleaded, the facts of Mr Henry's case would meet this threshold.[175]

Much of the evidence that the Crown wrongfully withheld was damaging to its case against the accused person. Crown Counsel's decisions to withhold material information from the plaintiff were not validated by judicial *imprimatur*.[176] This issue arose from the statement in *Henry SCC*

170 *Henry 2* paras 47–48.
171 *Henry 2* para 472.
172 In respect of the duty to disclose, Hinkson CJ para 117, held that the disclosure made to Henry and his counsel before and at his preliminary hearing, and before and during his trial, failed to comply with Crown Counsel's duty of disclosure as articulated in *Boucher v The Queen* [1955] SCR 16, and expanded in subsequent cases which set the standard of the Provincial Crown Counsel's office at the relevant times in this case. That duty was to make timely disclosure to the accused or his counsel (or the court if the accused was not represented) of all relevant facts and witnesses known to him, whether tending towards guilt or innocence as described in *Cunliffe v Law Society of British Columbia* 1984 CanLII 537 (BCCA) para 35.
173 *Henry 2* paras 191, 193 and 229.
174 It was held in *Henry SCC* para 87, that to be material, the information must be relevant and "directed at a matter in issue in the case" — *R v B(L)* 1997 CanLII 3187 (ONCA). The court, however, hastened to caution that the mere fact that information is material to the defence does not necessarily mean that the failure to disclose it will likely impinge on the accused's ability to make full answer and defence. While related, the two concepts are distinct, and each must be established.
175 *Henry 2* paras 88–89.
176 *Henry 2* paras 239–241 and 244.

to the effect that if a court rules that certain information sought by the defence need not be disclosed, then the Crown's failure to disclose has the benefit of a judicial *imprimatur.* It would not be accurate in such a circumstance to say that the Crown intentionally withheld information from the accused.[177] The court found no evidence of judicial *imprimatur* where in one instance, before the trial judge's refusal to order the production of the names of the doctors who treated the complainants, Crown Counsel did not advise the trial judge that he was in possession of any medical information. This failure caused the trial judge to consider the plaintiff's request in the abstract, rather than with the benefit of knowing what information Crown Counsel possessed. In another instance, the trial judge's refusal to order further disclosure of the plaintiff's request was similarly informed by the Crown Counsel (Mr Luchensko's) advice that the plaintiff had "not requested anything further that had not been provided to him". Such refusal by the trial judge could not be considered to be a judicial determination of the lawfulness of the Crown withholding information from the plaintiff.[178]

More especially, Crown Counsel's wrongful non-disclosure of material information and evidence was intentionally withheld from the plaintiff and that the withholding of information jeopardised his ability to make full answer and defence to the serious allegations against him. These breaches seriously infringed the plaintiff's right to a fair trial, and demonstrated a shocking disregard for his rights under sections 7 and 11*(d)* of the Canadian Charter.[179] Had the plaintiff received the disclosure to which he was entitled, the likely result would have been his acquittal at his 1983 trial, and certainly the avoidance of his sentencing as a dangerous offender. The Province is therefore liable for his wrongful conviction and subsequent lengthy period of incarceration.[180] The Province had contended that the plaintiff's conduct at trial and in the Court of Appeal in 1984 amounted to either contributory negligence, failure to mitigate, or both, relying on *R v Critchton*[181] to the effect that if a person did not receive a trial because he or she chose to represent him or herself, even when counsel was available, then the fault lies with the accused and no remedy will be available. The Chief Justice was unable to accept that an unrepresented accused who was not provided with appropriate disclosure could then be faulted for not advancing the arguments that would open to him or her, or enhanced if appropriate disclosure had been provided, or for advancing defences that might not have been advanced if appropriate disclosure had been provided. In other words, in a case where there has not been appropriate disclosure and a conviction resulted in consequence, the Crown would be unable to avoid liability by simply disparaging the defences that were advanced.[182] In the opinion of the CJ:

> The Province's claims that Mr. Henry was contributorily negligent would require a finding by this Court that contributory negligence principles apply to claims for Charter breaches. While causation principles are to be applied to a claim for damages stemming from a breach of Charter rights, there is no authority for the proposition that contributory negligence should apply to such a claim. The application of contributory negligence principles do not fit with Charter considerations generally, or the framework of constitutional tort analysis established by the Court in *Ward*. The focus in judicial examinations of Charter breaches generally, and in the test set out in *Ward*, is on the actions of the state that may impede on rights, and on public policy considerations.[183]

The court ruled it untenable, the contention that the plaintiff contributed to the breach of his Charter rights. He, like every other accused person in Canada, was entitled to the presumption of innocence. He had no obligation to prove that he was not guilty of the charges for which he was ultimately acquitted by the Court of Appeal. He was entitled to his liberty unless deprived thereof in accordance with the principles of fundamental justice. The submission that he must share in the liability for breach of that right "encourages the impoverishment of the values enshrined in the Charter and cannot be supported". The Province bore the burden of

177 *Henry SCC* para 91.
178 *Henry 2* paras 242–243.
179 *Henry 2* paras 245–246.
180 *Henry 2* para 287.
181 2015 BCCA 138 (CanLII) para 26.
182 *Henry 2* paras 297–298.
183 *Henry 2* para 299.

proving that the plaintiff had failed to mitigate his losses on a balance of probabilities.[184] The plaintiff was, therefore, not responsible in whole or in part for his losses based on contributory negligence or failure to mitigate his loss. Crown Counsel's failure to disclose the information to which the plaintiff was entitled negates any fault on the part of the VPD for any failings that might be attributed to them in their investigation of the offences at issue and in their treatment of the plaintiff.[185] The Province has failed to discharge its burden of establishing fault on the part of the Federal Crown. The evidence before court falls short of establishing that the Federal Crown failed to conduct a meaningful review of the plaintiff's applications for mercy or that the Federal Crown behaved recklessly or in bad faith nor could the court infer lack of a meaningful review.[186]

On the question whether damages were a just and appropriate remedy in the circumstances of this case, the Province contended that it was not. The Crown Counsel did not engage in the degree of blameworthy conduct that warranted an award of damages, other than a nominal one, as the actions of the Crown Counsel were not motivated by any ill-will toward the plaintiff, and Crown Counsel did not treat him differently than any other accused.[187] The court noted the three functional purposes of damages as laid down in *Ward*[188] — compensation, vindication and deterrence — and proceeded to proffer the opinion that even if a claimant establishes that damages are functionally justified, the state may still establish that other considerations render section 24(1) damages inappropriate or unjust. At this juncture, the State has to establish that there are countervailing factors that militate against such an award,[189] for instance, the existence of other alternative remedies and good governance concerns.[190] The Province argued that vindication was an irrelevant consideration as the Court of Appeal entered acquittals on each of the ten charges of which the plaintiff was convicted in 1983. "Such a submission", held the CJ, "if accepted, would impoverish the aspirations of the Charter expressed in *Ward.* Mr Henry spent almost 27 years in prison as a convicted serial rapist, enduring the wrath and scorn of fellow inmates, and living without real privacy or dignity. His 2010 acquittals do not vindicate that reality, and it is what he endured for 27 years that must be the subject of vindication."[191] Similarly, dismissing the argument that deterrence was unnecessary, the CJ held that the plaintiff had succeeded in establishing that damages would be a just and appropriate remedy in these circumstances having satisfied the objectives of compliance, vindication and deterrence, and having not been persuaded of the existence of countervailing factors that would justify a refusal to award damages in this case, it was held that an award of damages under section 24(1) of the Charter was a just and appropriate remedy in this case.[192] Finally, the court got down to assessing the quantum of damages that would compensate the so-called "rip-off rapist" for the 27 years he spent in unlawful incarceration[193] — an assignment outside the scope of this discussion.

Part (3) of this series which concludes the presentation deals with the modern law of negligent police investigation in Canada.

184 *Henry 2* paras 304–305. See also *Southcott Estates Inc. v Toronto Catholic District School Board* 2012 SCC 51 (CanLII).
185 *Henry 2* para 342.
186 *Henry 2* paras 354–356.
187 *Henry 2* para 365.
188 *Ward* para 29.
189 *Ward* paras 33, 35–36, 38–39 and 42–43.
190 *Henry 2* paras 366–367.
191 Per Hinkson CJ, *Henry 2* para 370.
192 *Henry 2* paras 371–373.
193 *Henry 2* paras 374–469.