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# Charter Damages: Private Law in the Unique Public Law Remedy

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CHARTER DAMAGES:  
PRIVATE LAW IN THE “UNIQUE PUBLIC LAW REMEDY”

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## ABSTRACT

In 2010, the Supreme Court of Canada's decision in *Vancouver (City) v Ward* created a framework for a *Charter* damages claim. In two subsequent decisions, the Court deviated from *Ward* by relying extensively on private law principles to award public law damages. In doing so, the Court has created increasingly troubling results. I review the history of *Charter* damages and the Court's relevant *Charter* and private law damages jurisprudence, with a particular focus on factors like fault thresholds, immunities, and direct liability of government. I find that *Ward* provides an appropriate and just remedy in accordance with a purposive approach to *Charter* remedies, the interest-balancing approach in the *Charter* text and jurisprudence, and the well-established objectives of *Charter* remedies. Understanding *Charter* damages in this way limits the role for private law principles. The future development of *Charter* damages doctrine ought to be guided by *Charter* principles first.

*for my dad, who should retire and write that lawyer joke book*

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## I. INTRODUCTION

In 2010, the Supreme Court of Canada’s unanimous decision in *Vancouver (City) v Ward*<sup>1</sup> set out a framework for a constitutional damages claim under section 24(1) of the *Canadian Charter of Rights and Freedoms*.<sup>2</sup> In subsequent decisions, the Court has disagreed sharply over how to apply *Ward* – first with a 4-2 decision in *Henry v British Columbia*,<sup>3</sup> then a 4-4-1 decision in *Ernst v Alberta Energy Regulator*.<sup>4</sup> The disagreement, it seems, is not simply over how to apply *Ward*, but to what extent private law principles should prevail in a claim for damages arising from a *Charter* infringement.

In my view, *Henry* and *Ernst* are disappointments. Both cases fall short in adequately distinguishing a cause of action for damages under the *Charter* and similar causes of action based on private law against government. This thesis attempts to explain the importance of that distinction for *Charter* damages.

*Ward* contains a sequential four-step framework for determining whether *Charter* damages are, in the language of section 24(1), “appropriate and just in the circumstances.”<sup>5</sup> The claimant must, at step one, prove a breach of her *Charter* rights and, at step two, prove that damages would fulfill the function of compensation, vindication, or deterrence. At step three, the government has the burden of raising countervailing factors to prove that damages are not appropriate and just in the circumstances. At step four, the court will determine the quantum of damages.<sup>6</sup>

The *Ward* framework produces *Charter* damages – a “unique public law remedy.”<sup>7</sup> The Court developed the *Ward* framework from the text of the *Charter* and the purposive approach to remedies described in *Doucet-Boudreau v Nova Scotia (Minister of Education)*.<sup>8</sup> *Charter* damages are available to remedy the infringement of any substantive right or freedom in the *Charter*.<sup>9</sup> In line with section 32 of the *Charter*, the *Ward* Court confirms that government is directly liable for *Charter* damages.<sup>10</sup>

<sup>1</sup> *Vancouver (City) v Ward*, 2010 SCC 27 [*Ward*].

<sup>2</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, s 24(1), being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

<sup>3</sup> *Henry v British Columbia (Attorney General)*, 2015 SCC 24 [*Henry*].

<sup>4</sup> *Ernst v Alberta Energy Regulator*, 2017 SCC 1 [*Ernst*].

<sup>5</sup> *Charter*, supra note 2, s 24(1).

<sup>6</sup> *Ward*, supra note 1 at para 4.

<sup>7</sup> *Ibid* at para 31.

<sup>8</sup> *Ibid* at paras 16-21; *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 [*Doucet-Boudreau*].

<sup>9</sup> See *Ward*, supra note 1 at para 23.

<sup>10</sup> *Ibid* at para 22.

Consistent with other *Charter* remedies, the *Ward* framework balances the interests of the injured claimant against the interests of the government. The crux of the *Ward* framework is the balance of interests at steps 2 and 3. The claimant is not entitled to *Charter* damages by merely proving a *Charter* infringement at step 1, but must prove that *Charter* damages will fulfill the function of compensation, vindication, and deterrence at step 2.<sup>11</sup> Even if the claimant is successful, the government may raise countervailing factors to negate a damages award at step 3.<sup>12</sup> In other words, determining entitlement to *Charter* damages is not based on a *Charter* infringement alone, but on whether the function of *Charter* damages outweighs the policy factors against it.

The *Ward* Court regularly used the phrases ‘public law’ and ‘private law’ to distinguish the cause of action for damages described in *Ward* from the causes of action for damages existing outside the *Charter*.<sup>13</sup> In *Ward*, ‘public law damages’ either refers to foreign constitutional damages doctrine or is shorthand for *Charter* damages.<sup>14</sup> Similarly, the phrase ‘private law damages’ in *Ward* either refers to foreign private law generally or specific tort-based causes of action recognized in Canada.<sup>15</sup> The Court also used the phrase ‘tort law’ as a subset of private law, and always contrasted with public law.<sup>16</sup> The Court never used the phrase ‘constitutional tort’ to describe *Charter* damages in *Ward*, *Henry*, or *Ernst*, and neither do I.<sup>17</sup>

The Court’s use of the phrase “private law” in *Ward* requires further definition. Private law is the general law which applies to both private and public persons. In Canada, the government and its agents are liable for all intentional torts as ordinary persons, as well as intentional torts that only apply to the state, such as the tort of malicious prosecution and the tort of misfeasance in a public office.<sup>18</sup> The government and its agents are also liable for damages in the tort of negligence.<sup>19</sup> These tort claims are diverse and separate, each occupying its own body of jurisprudence distinct from each other and the *Charter* case. Nothing in

<sup>11</sup> *Ward*, supra note 1 at paras 25, 35.

<sup>12</sup> *Ibid* at para 33.

<sup>13</sup> See *Ibid* at para 22 (for public/private law damages) and para 43 (for public/private law defences).

<sup>14</sup> See *Ibid* at paras 22, 27, 29 (references to international law) and paras 31, 41, 44, 56, 66, 69 (for *Charter* damages).

<sup>15</sup> *Ibid* at paras 22 and 53.

<sup>16</sup> *Ibid* at para 36 (“Tort law and the *Charter* are distinct legal avenues”) and at paras 50-51.

<sup>17</sup> This phrase is commonly used in the United States. It is derived from the Supreme Court of the United States’ holding in *Monroe v Pape*, which describes the cause of action for constitutional damage through 42 USC 1983 as “read against the background of tort liability”. See *Monroe v Pape*, 365 US 167 (1961) at 187; 42 USC § 1983 (1871).

<sup>18</sup> See Peter W Hogg, Patrick J Monahan & Wade K Wright, *Liability of the Crown*, 4th ed (Toronto: Carswell, 2011), 194-201 [Hogg et al, *Liability of the Crown*]; *Miazga v Kvello Estate*, 2009 SCC 51 [*Miazga*] (malicious prosecution); and *Odhavji Estate v Woodhouse*, 2003 SCC 69 [*Odhavji*] (misfeasance in a public office).

<sup>19</sup> See generally Hogg et al, *Liability of the Crown*, supra note 18; *Cooper v Hobart*, 2001 SCC 79 [*Cooper*].



this paper is a critique of private law and tort law claims for damages. My focus is how these private law causes of action relate to the development of the *Ward* framework.

By contrast, public law can be defined as the law that applies *exclusively* and *directly* to the government. The *Charter* is a prime example. By the time *Ward* was decided in 2010, the *Charter* was a firmly entrenched, comprehensive area of Canadian constitutional law. Though drawing on several foreign cases to develop the specifics, the Court placed the *Ward* framework within the text of section 24(1) and the purposive approach to *Charter* remedies.<sup>20</sup>

However, the Court also held that private law principles may assist in the future development of the *Ward* framework. For example, at step 3 of the *Ward* framework, the Court permits the government to raise policy considerations from private law tort claims to negate the appropriateness and justness of *Charter* damages.<sup>21</sup> The ideal operation of this principle becomes a point of disagreement between the justices in both *Henry* and *Ernst*. The divide in the Court is best explained through a brief review of each case through the lens of the four-step *Ward* framework.

In *Ward*, the claimant was arrested and strip searched by police. At step 1, the claimant proved that the strip search was conducted in contravention of the section 8 right against unreasonable search and seizure. The Court found that the unreasonable strip search, which is inherently humiliating, fulfilled the requirement for compensation, vindication, and deterrence at step 2.<sup>22</sup> The Court did not accept the government's countervailing factor arguments at step 3, and therefore proceeded to step 4 to uphold the trial judge's \$5000 *Charter* damages award for the strip-search.<sup>23</sup> This is the only example of a paradigmatic application of the *Ward* framework at the Supreme Court of Canada.

*Henry* and *Ernst* both reached the Court on pre-trial motions which attacked the sufficiency of the claimants' *Charter* damages pleadings.

In *Henry*, the claimant was wrongfully convicted and spent 27 years in prison. After a whistleblower alerted Henry to exculpatory evidence that was never disclosed during his trial, he obtained an acquittal and sued the Crown prosecutor's office.<sup>24</sup> Given the compelling facts, Henry had a strong case for

<sup>20</sup> *Ward*, supra note 1 at paras 16-22.

<sup>21</sup> *Ibid* at para 43.

<sup>22</sup> *Ibid* at paras 62-66.

<sup>23</sup> *Ibid* at paras 68-73.

<sup>24</sup> *Henry*, supra note 2 at paras 3-21, Moldaver J.

proving, at step 1, that his section 7 right to make full answer and defence was infringed by the prosecution's failure to provide him with all relevant disclosure. Similarly, his pleadings raised a substantial likelihood of success at step 2 to justify damages for compensation, vindication, or deterrence.<sup>25</sup> The government brought a motion to dismiss because the pleadings did not allege that the prosecutor acted with malice – a private law principle made relevant to this case, it was argued, by operation of step 3 of the *Ward* test.

The astute reader will know that a person in Henry's position is not required to plead malice because his burden ends, according to the *Ward* framework, after proof of a *Charter* infringement at step 1 and the functional need for damages at step 2. Indeed, the concurring justices applied *Ward* in that manner and would have permitted the matter to proceed to a trial where the government could negate a *Charter* damages award at step 3 of the framework.<sup>26</sup> The majority, however, took a different approach. The majority shifted the government's burden of negating *Charter* damages with private law thresholds to the claimant's burden to plead a private law threshold at step 1.<sup>27</sup> This holding transformed *Ward*, or at least provided a precedent for how to transform *Ward*.<sup>28</sup> It changed the trigger for liability from an interest-balancing approach to a fault-based approach. In broader terms, it replaced the public law approach to *Charter* damages with a private law approach.

In *Ernst*, a similar phenomenon occurs. The claimant was engaged in an administrative proceeding before the Alberta Energy Regulator (the "Board") involving the negative effect of hydraulic fracturing (or fracking) on her drinking water.<sup>29</sup> During the course of her litigation, she publicly criticized the Board in the media.<sup>30</sup> In her *Charter* damages claim, Ernst alleged that the Board refused to respond to her claims unless she desisted from criticizing it in the media.<sup>31</sup> Ernst alleged these facts to prove, at step 1 of the *Ward* framework, that the Board infringed her section 2(b) guarantee to freedom of expression through suppressing her criticisms. This claim alleged, at step 2 of the *Ward* framework, the need for vindication of her right to engage in political speech.<sup>32</sup> The Board brought a motion to dismiss the claim.

As in *Henry*, the Court only needed to consider whether the claimant's pleadings sufficiently alleged facts that could prove step 1 and 2, and in this case, that those allegations could circumvent the statutory

<sup>25</sup> *Henry*, supra note 2 at para 81, Moldaver J; *Henry*, supra note 2 at para 138, McLachlin CJC and Karakatsanis J.

<sup>26</sup> *Henry*, supra note 2 at para 108, McLachlin CJC and Karakatsanis J.

<sup>27</sup> *Henry*, supra note 2 at para 85, Moldaver J.

<sup>28</sup> *Ibid* at 33.

<sup>29</sup> *Ernst*, supra note 4 at paras 139-140, McLachlin CJC, Moldaver and Brown JJ.

<sup>30</sup> *Ibid* at paras 141-144.

<sup>31</sup> *Ibid*.

<sup>32</sup> *Ibid* at para 158.

immunity clause.<sup>33</sup> The Court's divided opinion was fractured over the same reason in *Henry* – whether the policy considerations in step 3 of the *Ward* test were applicable on a motion against the claimant's pleadings. Four justices led by Justice Cromwell (joined in the outcome by the concurring opinion of Justice Abella) held that the policy considerations engaged at step 3, namely the quasi-judicial role of the Board as an administrative tribunal, leads to the conclusion that *Charter* damages would *never* be appropriate and just against an administrative agency, and therefore dismissed the claim.<sup>34</sup> Four dissenting justices led by Justice McLachlin would have applied *Ward* and permitted the claim to proceed.<sup>35</sup>

All three of these cases will be examined in detail below. For now, it is sufficient to observe that the Court is entirely inconsistent on how the *Ward* framework ought to function. If the *Ward* framework provides the rules of the game, so to speak, the minority opinions in *Henry* and *Ernst* which faithfully apply *Ward* would use step 3 to potentially end the game, while the prevailing opinions in *Henry* and *Ernst* use step 3 to change the rules partway through. The latter is troubling because it places substantial uncertainty in the law. The approach taken in *Henry* and *Ernst* asks *Charter* damages claimants to shadowbox against potential private law policy considerations which may or may not emerge at step 3 of the test. More importantly, the approach taken in the latter two cases does not produce “appropriate and just”<sup>36</sup> outcomes.

A substantial part of this thesis is dedicated to explaining how and why the prevailing opinions in *Henry* and *Ernst* justify their departure from the *Ward* framework. The answer, I argue, is a failure to recognize the remedy in *Ward* for what it is – a “unique public law remedy”<sup>37</sup> which awards damages against government based on well-established grounds in the *Charter*'s remedial jurisprudence.

There is an understandable temptation to emphasize the ‘damages’ in *Charter* damages, and therein characterize the *Ward* framework as an incomplete structure requiring the tutelage of time-tested private law damages claims to develop legitimacy.<sup>38</sup> But *Ward*, by its own terms, is not first and foremost a damages remedy. The *Ward* Court emphasized the ‘*Charter*’ in *Charter* damages by situating *Ward* within the purposive approach to 24(1) remedies, employing an interest-balancing approach consistent with the

<sup>33</sup> *Ibid* at para 166. The issue on appeal was whether the statutory immunity clause was constitutional. However, the Court's three opinions also addressed, to varying degrees, the question appealed to the Alberta Court of Appeal – whether the statutory immunity barred a *Charter* damages claim. See *ibid*, Cromwell J, at para 13.

<sup>34</sup> *Ernst*, supra note 4 at para 24, Cromwell J.

<sup>35</sup> *Ibid* at para 192, McLachlin CJC, Moldaver and Brown JJ.

<sup>36</sup> *Charter*, supra note 2, s 24.

<sup>37</sup> *Ward*, supra note 1 at para 31.

<sup>38</sup> I borrow this turn of phrase from an American author. See Christina Brooks Whitman, “Emphasizing the Constitutional in Constitutional Torts” (1996) 72 Chi-Kent L Rev 661.

*Charter* text and jurisprudence, and promoting the well-established objectives of *Charter* remedies: compensation, vindication, and deterrence. Understanding the relationship between *Charter* damages and other *Charter* remedies is essential to seeing the *Ward* framework as a consistent and legitimate method for awarding *Charter* damages against government.

Part I of this paper is this introduction.

In Part II, I review the *Charter* damages scholarship and jurisprudence from the enactment of the *Charter* in 1982 through to the *Ward* decision in 2010. In this time period, the Court focused on secondary questions like immunity and jurisdiction prior to the primary question: determining when damages are an “appropriate and just” remedy. I also explore several *Charter* and private law cases that reappear in the *Charter* damages jurisprudence through step 3 of the *Ward* framework.

In Part III, I break down the three Supreme Court cases about *Charter* damages to date - *Ward*, *Henry*, and *Ernst*. I begin by discussing how *Ward* addressed and resolved many of the exigent questions from the past twenty years of speculation. I then analyze how *Henry* and *Ernst* deviate from *Ward*, with particular attention paid to how and why the majority in *Henry* and plurality in *Ernst* invoke private law principles.

In Part IV, I demonstrate how the *Ward* framework is consistent with the broader *Charter* remedial jurisprudence. I review Kent Roach’s comprehensive work on constitutional remedies and extend it to argue that *Ward* ought to rely primarily on public law for its future development. *Ward* fits comfortably among other *Charter* remedies and draws its legitimacy from the textual structure of the *Charter*, commitment to a purposive approach to remedies, and its fairness to the defendant through interest-balancing.

In Part V, I focus on the *Ward* Court’s references to how private law can inform the development of *Charter* damages in future cases. In particular, I review the comprehensive work done by Jason Varuhas on how private law can define public law damages in the United Kingdom and extend it to the *Charter*. The primary question in this section is *which* area of private law is the most helpful. I conclude that the tort of negligence is inconsistent with *Charter* damages, but that intentional torts bear enough resemblance to act as a guide to the development of *Charter* damages; although, ultimately, intentional torts are not entirely consistent with an interest-balancing framework.

Part VI concludes that *Ward* is what it says it is - a “unique public law remedy.”<sup>39</sup> I return to the three primary points raised in this introduction: appreciating *Ward* as a *Charter* remedy consistent with other *Charter* remedies; understanding how private law can help and hurt *Charter* damages; and assessing the untapped significance of direct liability in developing the *Ward* framework in future cases.

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<sup>39</sup> *Ward*, supra note 1 at para 31.

## II. A HISTORY OF *CHARTER* DAMAGES: 1982 TO *WARD*

As introduced above, the Supreme Court of Canada's three decisions on *Charter* damages are fraught with disagreement. How did the Court find itself so divided?

Part of the answer is found in the 28 years between the enactment of the *Charter* and the Court's decision in *Ward*, during which time there was considerable uncertainty and disagreement over *Charter* damages. Many of these themes reappear in *Ward* and its progeny.

The text of the *Charter*, particularly the remedial clause in section 24(1), provides some basic parameters on *Charter* remedies but is essentially open-ended. The earliest scholarship interpreted the *Charter* as providing a damages remedy and filled in the details with speculation about how private law tort doctrines might provide a framework for *Charter* damages.

In the same period, the Court's *Charter* damages jurisprudence developed slowly, even reluctantly, dealing with peripheral concerns first. The primary purpose and availability of *Charter* damages is only discussed in dissents or *dicta* while secondary issues such as government immunities abound. I highlight cases I consider required reading in order to understand the conversation leading up to *Ward*.

Prior to *Ward*, the law and scholarship on *Charter* damages raised many questions but gave few answers. Indeed, there is some evidence that scholars lost interest in *Charter* damages around 1995. *Ward* is an answer that comes late in the day; what follows is an exploration of the questions from earlier in the day.

### A. The Text: Section 24(1) and the *Charter*

The primary authority for a distinct *Charter* damages remedy is found in section 24(1):

Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.<sup>40</sup>

The initial draft of 24(1) was not so broad, limiting remedial power to “a declaration of the court or by means of an injunction or similar relief, accordingly as the circumstances require” - which would have

<sup>40</sup> *Charter*, supra note 2, s 24(1).

likely precluded damages - and only “where no other remedy is available or provided for by law.”<sup>41</sup> This remedial section was first reworded, then entirely discarded, and finally, after robust Special Joint Committee investigations by Parliament, the final version was constructed and adopted.<sup>42</sup> Despite extensive hearings about judicial review and the exclusion of evidence in criminal cases, there was little attention paid to the particular personal remedies that might be available under section 24(1).<sup>43</sup>

The appetite for breadth in section 24(1) was at least partly in response to “uninspired remedial performance of the courts under the *Canadian Bill of Rights*,”<sup>44</sup> which outlined similar substantive rights but had *no* remedial mechanism.<sup>45</sup> Indeed, the *Charter* is enforced through three remedial sections. Section 52 of the *Constitution Act, 1982* contains the “Supremacy Clause,” the primary mechanism for judicial review of unconstitutional statutes, confirming that any law inconsistent with the *Charter* is “of no force or effect.”<sup>46</sup> Section 24(2) provides a specific remedy for excluding unconstitutionally obtained evidence in criminal cases.<sup>47</sup> Unlike the other remedial sections, section 24(1) is a residual clause empowering judges to award any remedy within the court’s competence that is “appropriate and just.”

At this juncture, it is customary to repeat Justice McIntyre’s classic observation in *Mills v the Queen*, that it is “difficult to imagine a language which could give the court a wider and less fettered discretion.”<sup>48</sup> Justice McIntyre expands by highlighting the importance of judicial creativity in remedying *Charter* infringements through section 24(1):

It is impossible to reduce this wide discretion to some sort of binding formula for general application in all cases ... the circumstances will be infinitely variable from case to case and the remedy will vary with the circumstances.<sup>49</sup>

Justice McIntyre’s call to the infinite should, however, consider the constraints in the text of 24(1) itself. First, The limitation to a “court of competent jurisdiction” precludes certain remedies, like damages, from

<sup>41</sup> Dale Gibson & Scott Gibson, “Enforcement of the Canadian Charter of Rights and Freedoms” in *The Canadian Charter of Rights and Freedoms*, 2nd ed (Toronto: Carswell, 1989) 781, at 784-785.

<sup>42</sup> *Ibid* at 785-786.

<sup>43</sup> Adam Dodek, *The Charter Debates* (Toronto: University of Toronto Press, 2018) at 339-340.

<sup>44</sup> Kent Roach, *Constitutional Remedies in Canada*, loose-leaf (consulted on August 17, 2018), 2nd ed (Thompson Reuters Canada, 2017), at para 2.700 [Roach, *Constitutional Remedies in Canada*].

<sup>45</sup> See A Anne McLellan & Bruce P Elman, “The Enforcement of the Canadian Charter of Rights and Freedoms: An Analysis of Section 24” (1983) 21 *Alta L Rev* 205 at 206-208 [McLellan & Elman, “Analysis of Section 24”] (provides a concise legislative history of section 24 with regard to effective enforcement).

<sup>46</sup> *Charter*, *supra* note 2, s 52.

<sup>47</sup> *Ibid*, s 24(2).

<sup>48</sup> *Mills v The Queen*, [1986] 1 SCR 863 at 965 [Mills].

<sup>49</sup> *Ibid*, 965-966.

being awarded in courts of criminal jurisdiction and certain tribunals.<sup>50</sup> Second, the words “Anyone whose rights or freedoms... have been infringed or denied” appears to preclude claimants with public interest standing from obtaining personal remedies.<sup>51</sup> Importantly, the text does not limit which rights can be remedied by section 24(1). It follows that *Charter* damages could conceivably be awarded for an infringement of any substantive *Charter* right or freedom, so long as the remedy is “appropriate and just in the circumstances.”<sup>52</sup>

A third internal constraint is that the remedy must be “appropriate and just in the circumstances.” It is tempting to argue that 24(1) should mirror the common law because judicial refinement of remedies has always aspired to be “appropriate and just”; however, it is clear from the legislative history of section 24(1) that the drafters rejected limiting the *Charter*’s remedial power to those “provided for by law.”<sup>53</sup> This position is supported by the phrase “in the circumstances,” favouring particularized considerations for each remedy, each substantive section, and each defendant against whom the remedy is sought.<sup>54</sup>

Beyond the language of 24(1), other sections of the *Charter* provide parameters on how courts ought to exercise judicial discretion over *Charter* remedies. Section 1 provides that the rights in the *Charter* are subject to “reasonable limits prescribed by law.”<sup>55</sup> Section 1 is epitomized by the test in *R v Oakes*, where the government bears the burden to prove a pressing and substantial objective, and that this objective is proportional to the infringement.<sup>56</sup> However, section 1 and *Oakes* do not necessarily apply to 24(1) remedies. For example, where the alleged infringement impugns an action taken by an executive branch of government, there may not necessarily be a prescription of law through which the defendant infringes the *Charter*. In the language of *Oakes*, when the infringement is caused by government conduct absent a statute, there is no pressing legislative objective to proportionally balance. As a result, section 1 and *Oakes* generally will not directly apply to remedies sought under section 24.<sup>57</sup>

<sup>50</sup> See *Ward*, *supra* note 1; see *R v Conway*, 2010 SCC 22 [*Conway*].

<sup>51</sup> McLellan & Elman, “Analysis of Section 24”, *supra* note 45 at 208-209.

<sup>52</sup> *Charter*, *supra* note 2, 24(1).

<sup>53</sup> See Gibson & Gibson, *supra* note 41.

<sup>54</sup> A similar point is made by David Mullan, “Damages for Violation of Constitutional Rights - A False Spring?” (1995) 6:1 NJCL 105 at 126.

<sup>55</sup> *Charter*, *supra* note 2, s 1.

<sup>56</sup> *R v Oakes*, [1986] 1 SCR 103 at 138-139 [*Oakes*].

<sup>57</sup> See *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69 at paras 140-141 [*Little Sisters*] (“Violative conduct by government officials that is not authorized by statute is not “prescribed by law” and cannot therefore be justified under s. 1.”). also see *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 at 643 (“the Charter may be infringed, not by the legislation itself, but by the actions of a delegated decision-maker in applying it. In such cases, the legislation remains valid, but a remedy for the unconstitutional action may be sought pursuant to s. 24(1) of the Charter”).



A particularly unique aspect of the *Charter* is section 33, or the “notwithstanding clause.” According to section 33, Parliament or a legislature may enact legislation declaring its validity notwithstanding a substantive *Charter* infringement. This extraordinary political measure comes with a set of rules: it only applies to sections 2 and 7 through 15, and the legislation is only effective for five years (whereupon it must be re-enacted).<sup>58</sup> For the purposes of *Charter* damages, it is important to confirm that a remedy sought under section 24(1) cannot itself be the subject of a section 33 legislative override. The notwithstanding clause must be directed at the substance of the right infringed, not its remedy.

Another important textual limitation, though not often thought of as such, is the party against which 24(1) remedies may be awarded. Section 32(1) of the *Charter* confirms that its substantive protections and remedial sections apply only to the Federal and Provincial governments.<sup>59</sup> In an early *Charter* decision, the Court confirmed that this includes the “legislative, executive, and administrative” branches of government and excludes private persons.<sup>60</sup> I characterize this as a limitation because the Court must consider its own competency to award a remedy against a co-equal branch of government, which ultimately constrains its remedial discretion.

In sum, the text of section 24(1) supports a cause of action for damages against government to remedy *Charter* violations. *Charter* damages can conceivably remedy the breach of any right or freedom in the *Charter*. The discretion to award damages is wide and is not directly affected by either justification under section 1 or the notwithstanding clause in section 33. Although the judiciary is limited both through textual limitations and its institutional capacity to award remedies against the legislative and executive, the broad objective to award remedies that are “appropriate and just in the circumstances” can guide its discretion in how to balance the interests of the injured party and the government.

## **B. The Literature: Predicting *Charter* Damages Doctrine**

The early scholarship on *Charter* damages asked important questions from historical, theoretical, doctrinal, comparative, and practical perspectives. Between 1984 to 1995, several scholars weighed in on their interpretation of an appropriate and just 24(1) damages remedy. Of this period of scholarship, three particular themes emerge: defining a purpose, identifying the proper defendant, and pinpointing the role of private law and tort doctrines for *Charter* damages. The divide over these three points is the same as the

<sup>58</sup> *Charter*, supra note 2, s 33. See also Mark Tushnet, “The Charter’s Influence around the World” (2012) 50 Osgoode Hall L J 527 at 531, 542 (Noting the *Charter* is the first constitution to have such a clause).

<sup>59</sup> *Charter*, supra note 2, s 32(1).

<sup>60</sup> *RWDSU v Dolphin Delivery Ltd.*, [1986] 2 SCR 573 at 598.

divide in the Court 20 years later – to what extent will private tort law influence the shaping of a *Charter* damages remedy?

In her 1984<sup>61</sup> and 1987<sup>62</sup> articles, Marilyn Pilkington sets out the earliest comprehensive discussions on *Charter* damages. Based on the text of the *Charter*, she finds that “section 24(1) provides a new starting point” for creating a *Charter* damages remedy.<sup>63</sup> Unlike the tests for damages and injunctions in the private law context, the remedy “must be reassessed in light of the purposes for which the remedy is given.”<sup>64</sup> For Pilkington, constitutional damages are firmly rooted in the text of the *Charter* and ought to be awarded within a *Charter* context. Pilkington identifies that “constitutional wrongs may be qualitatively different from ordinary civil wrongs” because the harm is the infringement itself.<sup>65</sup> Therefore, Pilkington argues “This loss in itself should be redressed.”<sup>66</sup> Her position reflects a relatively strong commitment to a public law approach for *Charter* damages.

By contrast, Ken Cooper-Stephenson embraces private law as his starting point. In his 1990 monograph on *Charter Damages Claims*, Cooper-Stephenson presents a “constitutional tort” model as analogous to the American tradition of construing constitutional violations by state and federal agents as tortious conduct.<sup>67</sup> While *Charter* infringements should be determined on constitutional law grounds, he suggests that remedies ought to be awarded “by reference primarily to recognized principles found within the area of civil remedial law, tailored and adapted for constitutional purposes.”<sup>68</sup> His preference is for constitutional damages claims to be guided by the tort of negligence.<sup>69</sup> A similar argument is made by David J. Mullan, who predicts that the Court’s *Charter* damages doctrine would not deviate from the established private law liability rules.<sup>70</sup>

<sup>61</sup> Marilyn L Pilkington, “Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms” (1984) 62 Can B Rev 517 [Pilkington, “Damages”]

<sup>62</sup> ML Pilkington, “Monetary Redress for Charter Infringement” in Robert Sharpe, ed, *Charter Litigation* (Toronto: Butterworth, 1987) 307. [Pilkington, “Monetary Redress”].

<sup>63</sup> Pilkington, “Damages”, supra note 61 at 519.

<sup>64</sup> *Ibid* at 519.

<sup>65</sup> *Ibid* at 536.

<sup>66</sup> *Ibid* at 538. In her subsequent article, she cites the example of section 8 search and seizure: “A person whose constitutionally guaranteed right to be free from unreasonable search and seizure has been infringed, surely has suffered damage of the most fundamental sort, regardless whether he or she can prove any tangible loss.” Pilkington, “Monetary Redress”, supra note 62, at 313-314.

<sup>67</sup> Ken Cooper-Stephenson, *Charter Damages Claims* (Toronto: Carswell, 1990) at page v [Cooper-Stephenson, *Charter Damages Claims*] (“The book suggests that damages actions based on the Charter will take the form of “constitutional torts” or “constitutional delicts” similar in form to the actions against state and federal officials in the United States”).

<sup>68</sup> *Ibid* at 20.

<sup>69</sup> *Ibid* at 211.

<sup>70</sup> Mullan, supra note 54 at 126.

Pilkington remarks that private law principles, such as the tort of negligence, may “undermine the effectiveness of damages as a means of vindicating, compensating and deterring constitutional wrongs.”<sup>71</sup> This is the first time the principles of compensation, vindication, and deterrence are identified as the purposes of *Charter* damages – an approach canonized decades later in *Ward* as the three purposes for *Charter* damages.<sup>72</sup> Cooper-Stephenson disagrees, finding that compensation, vindication, and deterrence reflect “an unstructured mixture of goals.”<sup>73</sup> In his view, *Charter* damages ought to be compensatory only.<sup>74</sup>

A year after Cooper-Stephenson’s book was published, H. Scott Fairley quipped that section 24 was becoming “legal academia’s latest and clearly most voluminous cottage industry.”<sup>75</sup> For his part, Fairley was critical of Cooper-Stephenson’s emphasis on compensation, with particular reference to the largely undesirable American experience with constitutional tort claims.<sup>76</sup> Fairley is kinder to Pilkington’s thesis - that constitutional damages ought to be available for vindication and deterrence in addition to compensation - finding that “the chief stumbling block appears to be the private law focus on the protection of *tangible* personal or proprietary interests,”<sup>77</sup> and, in contrast, “the *Charter* was meant for greater things – intangibles with respect to which most private law principles have less to say - or so we suppose.”<sup>78</sup>

The purposes of *Charter* damages are difficult to evaluate in the abstract. In a 1993 article, Lorne Sossin focuses his discussion on Crown prosecutor liability for *Charter* damages. Sossin argues that deterrence, not compensation, should be the prime purpose of *Charter* damages.<sup>79</sup> With reference to the section 24(1) remedy for the exclusion of evidence in criminal trials, Sossin argues that *Charter* damages should focus on the conduct of the government actor, not on the accused’s deservedness.<sup>80</sup> Thus, Sossin rejects Cooper-Stephenson’s suggestion to leverage principles from the tort of negligence, which Sossin says is focused

<sup>71</sup> Pilkington, “Damages”, supra note 61 at 575. The same principles are also mentioned at 538.

<sup>72</sup> *Ward*, supra note 1 at para 4.

<sup>73</sup> Cooper-Stephenson, *Charter Damages Claims*, supra note 67 at 64.

<sup>74</sup> *Ibid* at 65.

<sup>75</sup> H Scott Fairley, “Private Law Remedial Principles and the Charter: Can the Old Dog Wag this New Tail?” in Jeffrey Berryman, ed, *Remedies: Issues and Perspectives* (Toronto: Carswell, 1991) 313 at 314.

<sup>76</sup> *Ibid* at 329. (“The idea of a “constitutional tort” is distinctly American in origin, and there again, both the cases and scholarly analysis support the proposition that the application of private law principles has not generally facilitated the development of particularly efficacious remedies either from a compensatory or deterrent point of view.”)

<sup>77</sup> *Ibid* at 328.

<sup>78</sup> *Ibid* at 332.

<sup>79</sup> Lorne Sossin, “Crown Prosecutors and Constitutional Torts: The Promise and Politics of Charter Damages” (1993) 19 *Queen’s LJ* 372 at 400-401 [Sossin, “Crown Prosecutors”].

<sup>80</sup> *Ibid* at 405.

on the “distribution of loss,” and instead proposes that *Charter* damages ought to reflect a policy of *Charter* compliance.<sup>81</sup>

Sossin casts significant doubt on Cooper-Stephenson’s claim that complete compensatory damages would serve as an effective deterrent, as compensation would privilege those who have more to lose.<sup>82</sup> The point is compelling. Take for example a person who is held in pre-trial custody without a bail hearing for a week in excess of the reasonable time mandated by section 11(e) of the *Charter*. Under Cooper-Stephenson’s view, an accused with steady work would receive full compensation for any lost wages, while a person with precarious work might receive full compensation in the form of nothing. Sossin chalks up the purely corrective approach to *Charter* damages as a problematic manifestation of formal equality.<sup>83</sup>

The divide over whether public or private law principles should guide the purpose of *Charter* damages was also reflected in the debate over who should be liable for *Charter* damages.

Scholars preferring a public law approach tended to also prefer direct liability of government. For Sossin, *Charter* damages should target systemic *Charter* breaches: “the point... is not to bring the rotten apples in line, but to keep watch on the barrel.”<sup>84</sup>

In line with his preference for the purpose of deterrence and direct liability of government, Sossin is generally opposed to applying traditional private law defences, thresholds, and immunities to *Charter* damages claims. Sossin refers to the Supreme Court decision in *Nelles v Ontario*, which held that Crown prosecutors are liable in damages for malicious prosecutions.<sup>85</sup> In *Nelles*, only three of the nine justices held that the malice threshold would not apply to *Charter* damages claims.<sup>86</sup> Sossin questions why the immunity exists at all: “either it immunizes prosecutors from the consequences of legal acts, which would be redundant, or it immunizes them from the consequences of illegal acts, which would be repugnant.”<sup>87</sup> His preference is for “a standard approaching strict liability.”<sup>88</sup>

<sup>81</sup> *Ibid* at 402 (“aim to oblige public officials to protect, or at least respect, the rights of private persons”).

<sup>82</sup> *Ibid* at 397-398.

<sup>83</sup> *Ibid* at 399-400 (“compensation is a problematic basis on which to award damages for constitutional torts, at least in the administration of criminal justice”).

<sup>84</sup> *Ibid* at 405.

<sup>85</sup> *Ibid* at 384.

<sup>86</sup> *Ibid* at 389.

<sup>87</sup> *Ibid* at 383.

<sup>88</sup> *Ibid* at 404.

Curiously, none of the early scholarly work on *Charter* damages was entirely clear on how exactly private law thresholds and defences would apply to *Charter* damages claims. Pilkington, who was open to individual liability for *Charter* infringements, wrote that a “state of mind” requirement, or a ‘good faith’ defence, might be appropriate in some cases to avoid the ‘chilling effect’ that might be caused by strict liability.<sup>89</sup> Cooper-Stephenson would likewise reject strict liability and permit several defences from the tort of negligence to negate a *Charter* damages remedy.<sup>90</sup> However, neither are clear on whether these private law principles would be required to find a *Charter* breach or if they will only be considered at a later remedial stage.<sup>91</sup>

Mullan’s article characterizing *Charter* damages as “A False Spring” concludes that the multidimensional questions raised by the early scholarship on *Charter* damages were still unanswered by courts.<sup>92</sup> Indeed, Mullan seems to have had the last word on *Charter* damages for some time. After publication of his article in 1995, the cottage industry that was *Charter* damages went into recession. From 1995 through 2010, there are only a handful of articles focused directly on a 24(1) damages remedy, supported by several others considering 24(1) more broadly.<sup>93</sup> It was only after *Ward* in 2010 that the Court, for the first time, addressed important questions such as the purpose of *Charter* damages, direct liability, the role of private law fault thresholds and defences.

In the interim, the Supreme Court occasionally released decisions resolving issues on the outermost contours of the *Charter* damages remedy. In the next section, I focus on the Court’s development of *Charter* damages prior to *Ward*.

<sup>89</sup> Pilkington, “Damages”, supra note 61 at 552-553, 555-562.

<sup>90</sup> Cooper-Stephenson, *Charter Damages Claims*, supra note 67 at 332-335.

<sup>91</sup> Pilkington, “Damages”, supra note 61 at 552 (“State of mind will be material to the issue of infringement. It may also be relevant to any defence of good faith which is available, and, ultimately, to the question whether it is appropriate to provide a remedy in damages”); Cooper-Stephenson, *Charter Damages Claims*, supra note 67 at 20-21 (identifies three steps – the substantive right, section 1, and the appropriate remedy – where the first two rely on public law defences and the last one is composed of “principled found within the area of civil remedial law”); Sossin, “Crown Prosecutors”, supra note 79 at 406 (“traditional defences to a tort claim (such as claim of right, foreseeability, consent, self-defence, defence of others, voluntary assumption of risk, and proximate cause) could all potentially play a part in the analysis of the *Charter* right alleged to have been violated, in the s. 1 analysis, and in the exercise of remedial discretion under s.24.1”).

<sup>92</sup> Mullan, supra note 54 at 114.

<sup>93</sup> See for example Raj Anand, “Damages for Unconstitutional Actions: A Rule in Search of a Rationale” (2009) 27 *National Journal of Constitutional Law*; Scarborough 159; Gary Gildin, “Allocating Damages Caused by Violation of the Charter: The Relevance of American Constitutional Remedies Jurisprudence” (2009); For general articles, see Debra M McAllister, “Charter Remedies and Jurisdiction to Grant Them: The Evolution of Section 24(1) and Section 52(1)” (2004) 77 [McAllister, “Charter Remedies”]; Kent Roach, “Principled Remedial Discretion Under the Charter” (2004) 25 *SCLR* 101 [Roach, “Principled Remedial Discretion”]; Lisa J Mrozinski, “Monetary Remedies for Administrative Law Errors” (2009) 22:2 *Canadian Journal of Administrative Law & Practice* 133.

### C. The Court: On the Margins of *Charter* Damages

From 1982 through 2009, *Charter* damages were mentioned frequently in *dicta* and dissents, and usually only in reference to how this area of the law was uncertain at best. The Court's decisions around *Charter* damages are something akin to setting up the furniture before the house is built, addressing details like specific immunities to *Charter* damages before defining its purpose and function. Many of these cases, discussed below, placed significant limits on what was still only a theoretical remedy.<sup>94</sup> I begin by looking at cases addressing the purpose of *Charter* damages and the significance of direct liability for 24(1) remedies. I then examine the limits the Court places around *Charter* damages by applying private law immunities in the *Charter* context and judicial acceptance of statutory parameters on section 24(1).

Several of the cases and ideas described in this section are referred to by the Court in *Ward* and its progeny. Exploring the details of these decisions is a step towards untangling the public and private aspects of the contemporary *Charter* damages doctrine.

#### 1. Purpose

Recall Justice McIntyre's call in *Mills* for "imagination" in crafting 24(1) remedies.<sup>95</sup> For *Charter* damages, the creativity envisioned by Justice McIntyre would not find its purposive drive until *Ward*. On the road towards *Ward*, the Court provides only a few hints in dissents and *obiter dicta* on the nature and purpose of *Charter* damages.

In 1990, Justice Wilson delivered a stirring and lengthy dissent in *McKinney v University of Guelph*, a case in which several professors challenged the mandatory retirement age set by the University as a violation of their equality rights in section 15 of the *Charter*.<sup>96</sup> The majority found that the *Charter* did not apply to the University and therefore did not reach the question of remedies; however, Justice Wilson's dissenting opinion would have found that the *Charter* did apply and would have awarded *Charter* damages.<sup>97</sup> Her opinion outlined that "the remedial scope of s. 24(1) was not intended to be limited to that available at common law," and therefore *Charter* damages should be awarded to compensate the claimants.<sup>98</sup> Importantly, she added that these compensatory damages would not necessarily be qualified

<sup>94</sup> As late as 2002, the Court refers to damages being available under the *Charter* "in theory." See *Mackin v New Brunswick (Minister of Finance)*; *Rice v New Brunswick*, 2002 SCC 13 at para 79.

<sup>95</sup> *Mills*, supra note 48 at 965-966.

<sup>96</sup> *McKinney v University of Guelph*, 1990 3 SCR 229 at 255-256, La Forest J [*McKinney*].

<sup>97</sup> *Ibid* at 408.

<sup>98</sup> *Ibid* at 408-409 ("the remedial scope of s. 24(1) was not intended to be limited to that available at common law.... I believe that different considerations respecting appropriate remedial relief should prevail when constitutional rights and freedoms as opposed to common law rights are at stake").

by good governance considerations such as “impecuniosity and good faith” of the government-defendant.<sup>99</sup> Justice Wilson’s remarks are important in that she identifies, at the very least, that *Charter* damages are a valid 24(1) remedy and that damages could be awarded based on “different considerations respecting appropriate remedial relief” than private law damages.<sup>100</sup>

In 1994, *Charter* damages were discussed indirectly in the context of *Charter* injunctions. In *RJR-MacDonald Inc v Canada (AG)*, two tobacco companies sought to invalidate a statute that restricted their ability to advertise cigarettes contrary to section 2(b) of the *Charter*.<sup>101</sup> Prior to the hearing of that claim on the merits, the tobacco companies brought a rather rare interlocutory motion for a suspension of the impugned statute until the appeal was heard on the merits, claiming that a failure to do so would result in irreparable harm.<sup>102</sup> In discussing whether irreparable harm would result absent an injunction, the Court was forced to indirectly comment on whether the harm would result in *Charter* damages. The Court makes three statements on *Charter* damages neatly summarized by W.H. Charles:

- (1) *Charter* damages are not the primary remedy in *Charter* cases.
- (2) The Court had, on several prior occasions, accepted the principle that damages may be awarded for breach of *Charter* rights.
- (3) There was a lack of developed *Charter* [damages] jurisprudence.<sup>103</sup>

In over a decade of Supreme Court decisions on the *Charter*, these three comments – which are entirely *dicta* in a case about injunctions, not damages – became the most informative precedential literature on *Charter* damages. Even the Court’s citations to its prior acceptance of *Charter* damages are to cases in which the claimant had not advanced a *Charter* damages claim.<sup>104</sup>

In its 2002 decision in *Auton (Guardian ad litem) v British Columbia (Attorney General)*, the British Columbia Court of Appeal awarded \$20,000 in *Charter* damages to parents of children with autism who established a section 15(1) infringement where an underinclusive treatment program excluded their children.<sup>105</sup> Roach commented that Justice Saunders’ majority decision provided “little guidance...

<sup>99</sup> *Ibid.*

<sup>100</sup> *Ibid.*

<sup>101</sup> *RJR – MacDonald Inc. v Canada (Attorney General)*, [1994] 1 SCR 311 at 341-342 [*RJR-MacDonald*].

<sup>102</sup> *Ibid.*

<sup>103</sup> WH Charles, *Understanding Charter Damages: The Judicial Evolution of a Charter Remedy* (Toronto: Irwin Law, 2016) at 16.

<sup>104</sup> *Mills*, supra note 48 (a *Charter* case where damages were not sought); and *Nelles v Ontario*, [1989] 2 SCR 170 [*Nelles*] (a malicious prosecution claim with no *Charter* claim advanced).

<sup>105</sup> *Auton (Guardian ad litem of) v British Columbia (Attorney General)*, 2002 BCCA 538 at 6, 93.



concerning the still underdeveloped nature of the Charter damage claim,” particularly on good faith immunities, fault thresholds, or the proper purpose and calculation of damages.<sup>106</sup> By contrast, Roach notes that Justice Lambert’s dissenting opinion provided helpful criteria for trial judges to follow.<sup>107</sup> Roach concluded, “These are difficult issues that ideally will be addressed when the Supreme Court delivers its judgment in this case.”<sup>108</sup> Famously, the Supreme Court unanimously reversed the Court of Appeal on the merits of the section 15(1) claim.<sup>109</sup> As a result, the *Charter* damages issue, as in *McKinney*, was not reached by the Court.

In 2003, the Supreme Court made a ground-breaking 5-4 decision in *Doucet-Boudreau*, spelling out in great detail the purposive approach to section 24(1) remedies. The claimants proved that the province had violated their right to minority language education in section 23 of the *Charter* when it failed to provide adequate French-language schooling.<sup>110</sup> The trial judge invoked section 24(1) to make an extraordinary order for judicial oversight of the school restructuring.<sup>111</sup> The Nova Scotia Court of Appeal - and four Supreme Court judges - would have quashed the remedy based on the common law doctrine of *functus officio*, requiring a trial judge to end their involvement in a case once judgment is rendered.<sup>112</sup> However, five Supreme Court justices reinstated the trial judge’s remedy, and in doing so spelled out a broad, purposive approach to 24(1) remedies.

Though the Court does not consider *Charter* damages in particular, the purposive approach in *Doucet-Boudreau* applies to all 24(1) remedies. In particular, the Court defines the phrase “appropriate and just” with four criteria, summarized as follows: (1) the remedy “meaningfully vindicates the rights and freedoms of the claimants”<sup>113</sup>; (2) the remedy must “employ means that are legitimate within the framework of our constitutional democracy”<sup>114</sup>; (3) the remedy must flow from the competent “function and powers of a court”<sup>115</sup>; and (4) the remedy is “fair to the party against whom the order is made.”<sup>116</sup>

<sup>106</sup> Roach, “Principled Remedial Discretion” supra note 93 at 131.

<sup>107</sup> *Ibid.*

<sup>108</sup> *Ibid* at 132.

<sup>109</sup> *Auton (Guardian ad litem of) v British Columbia (Attorney General)*, 2004 SCC 78 [*Auton*].

<sup>110</sup> *Doucet-Boudreau*, supra note 8 at paras 1-8.

<sup>111</sup> *Ibid.*

<sup>112</sup> *Ibid* at paras 9-10, 119.

<sup>113</sup> *Ibid* at para 55.

<sup>114</sup> *Ibid* at para 56.

<sup>115</sup> *Ibid* at para 57.

<sup>116</sup> *Ibid* at para 58.



In 2010, the *Ward* Court reviewed the *Doucet-Boudreau* factors and found that damages fit neatly into the purposes of 24(1) remedies.<sup>117</sup> Thus, although the purpose of *Charter* damages was elusive for several decades, the *Doucet-Boudreau* Court provided a general framework for 24(1) remedies which the *Ward* Court used to craft a specific framework for *Charter* damages.

## 2. Direct Liability and Individual Liability

The purpose of *Charter* damages is closely related to the question of liability. The Court in *Doucet-Boudreau*, for example, contemplates remedies against government directly.<sup>118</sup> With reference to section 32 of the *Charter*, *Ward* confirms that only government institutions are liable for *Charter* damages, and that they are liable directly (as opposed to vicariously or against individual government agents directly).<sup>119</sup>

This holding should be relatively noncontroversial. For example, the *Charter* does not hold police officers individually accountable for exclusion of evidence. However, there is some evidence that the history of damages suits against individual government actors appears to have a strong grip on our legal consciousness. Indeed, Roach notes that several cases initiated after *Ward* continue to name individuals as defendants for *Charter* damages.<sup>120</sup>

Illustrative of the real-world pleading problems is the Manitoba Court of Appeal decision in *Young v Ewatski*.<sup>121</sup> The trial ended prior to the Supreme Court decision in *Ward*, but judgment was rendered afterwards.<sup>122</sup>

*Young* sought *Charter* damages against several police officers on private law and *Charter* grounds for a warrantless search of her home. She also brought a statutory claim for damages against the chief of police. She did not bring a *Charter* damages claim directly against the Winnipeg Police Service. The trial judge awarded *Charter* damages against the individual officers.<sup>123</sup>

The Manitoba Court of Appeal, applying *Ward*, accepted that the police breached *Young*'s section 8 rights but denied the *Charter* damages remedy because it was sought against individuals as opposed to the police

<sup>117</sup> *Ward*, supra note 1 at 20-21.

<sup>118</sup> See *Doucet-Boudreau* at 33.

<sup>119</sup> *Ward* at 22.

<sup>120</sup> Roach, *Constitutional Remedies in Canada*, supra note 44 at para 11.470, n 99a. See for example *Carr v Ottawa Police Services Board*, 2017 ONSC 4331 (CanLII) at para 254 [*Carr*] (holding police officers and department jointly and severally liable for *Charter* damages).

<sup>121</sup> *Young v Ewatski et al*, 2012 MBCA 64 [*Young*].

<sup>122</sup> *Ibid* at 64, 77.

<sup>123</sup> *Ibid* at 5-16.

department.<sup>124</sup> Similarly, the Court found that the claim against the police chief, though sued in his “representative capacity,” was not subject to *Charter* damages because the cause of action against him was purely statutory.<sup>125</sup>

*Young* reflects an uncertainty in the law largely created by the conflation of *Charter* and private causes of action for damages. While a substantial jurisprudence exists to show that the *Charter* applies to government institutions, and not its individual representatives, that jurisprudence has not reoriented our attitudes towards damages as a *Charter* remedy distinct from private law.

Direct liability becomes a sticking point in *Henry* and *Ernst*. When applying private law policy considerations to *Charter* damages, how much emphasis should be placed on the distinction between individual liability and direct liability of government institutions? As discussed in this next section, several policy considerations against awarding damages are based on the negative effect of imposing liability on the individual that may not easily translate to institutional defendants.

### 3. Thresholds and Immunities

Keeping direct liability at the front of mind is important while looking at the Court’s decision on immunities to damages. Prior to (and after) *Ward*, individual government agents benefitted from tailored fault thresholds and special immunities to tort claims for malicious prosecution, misfeasance of public office, and negligence. However, given that *Charter* remedies are awarded against governments and not individuals, there is a question of whether the same thresholds and immunities would apply to the government directly.

As noted in the introduction, the *Ward* Court permits the government to raise private law thresholds and immunities as “good governance” factors at step 3 of the *Ward* framework to militate against a *Charter* damages award.<sup>126</sup> The *Henry* Court, however, provides a rationale for shifting the burden of proving a fault threshold on to the claimant at step 1. Given the sudden change towards how immunities factor into *Charter* damages claims, it is worth exploring the role of prosecutorial, police, and *Charter*-based thresholds and immunities in both private law and *Charter* claims. The following discussion reveals those aspects of thresholds and immunities that complement direct liability under the *Charter*, and those destined to clash.

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<sup>124</sup> *Ibid* at 68.

<sup>125</sup> *Ibid* at 71. The result seems harsh, but the Court of Appeal found that this unfavourable result could have been avoided had the plaintiffs asked for a rehearing from the trial judge to account for the new law in *Ward*.

<sup>126</sup> *Ward*, supra note 1 at para 43.

### *a. Prosecutors*

One of the stronger, entrenched threshold immunities in Canadian law is the Crown prosecutor's immunity from liability arising out of its broad discretion to prosecute. Prosecutorial discretion is protected on the theory that Crown lawyers, like judges, require a shield from liability in order to "carry out their duties with courage and independence."<sup>127</sup> Malicious prosecution is a tort action against the Crown lawyer in particular - as confirmed in *Nelles*, the Attorney General and Crown attorneys are personally liable for their own torts, but the Crown itself is not liable either directly or vicariously absent statutory consent.<sup>128</sup> The *Nelles* approach was upheld by the Court in its two subsequent decisions in *Proulx v Quebec* and *Miazga v Kvello Estate*.<sup>129</sup>

As the name suggests, malicious prosecution requires the plaintiff to prove malice as an element of the *prima facie* case. Malice is defined as an "improper purpose" and a "fraud on the process of criminal justice."<sup>130</sup> Malice is more than "recklessness, gross negligence, or poor judgment."<sup>131</sup> The bar is high, achieving the goal of protecting prosecutorial independence while permitting an action for the clearest of cases.<sup>132</sup>

Malicious prosecution is not itself a *Charter* infringement, though it could implicate one or more *Charter* rights given the circumstances. The Court acknowledged this in *Nelles*. As Sossin notes, only three of the six judges concluded that malice would be required on a *Charter* damages claim.<sup>133</sup> The *Charter* damages theory is not discussed by the Court in *Proulx* or *Miazga*.

Prior to *Ward*, there was no consensus on whether the *Charter* damages claimant would need to plead malice in order to succeed against the Crown. The *Ward* Court refers to *Miazga* in step 3 of the *Ward*

<sup>127</sup> Hogg et al, *Liability of the Crown*, supra note 18 at 292.

<sup>128</sup> *Ibid* at 169-171. Also see *ibid* at 298, n 121, citing to *Ministry of the Attorney General Act*, RSO 1990, c M 17, s 8, which provides that claims against individual prosecutors in Ontario must be brought directly against the Attorney General of Ontario.

<sup>129</sup> *Miazga*, supra note 18; *Proulx v Quebec (Attorney General)*, 2001 SCC 66. The contemporary test for malicious prosecution requires four elements: the prosecution must be (1) initiated by the defendant; (2) terminated in favour of the plaintiff; (3) undertaken without reasonable and probable cause; and (4) motivated by malice or a primary purpose other than that of carrying the law into effect. *Miazga* supra note 18 at para 3.

<sup>130</sup> *Miazga*, supra note 18 at para 8.

<sup>131</sup> *Ibid* at para 8, citing *Proulx*, supra note 129 at para 44-45.

<sup>132</sup> *Miazga*, supra note 18 at paras 45-52.

<sup>133</sup> Sossin, "Crown Prosecutors", supra note 79 at 389.

framework,<sup>134</sup> and the *Henry* Court is divided over how to apply the policy considerations from *Miazga* in the *Charter* damages context.<sup>135</sup>

### ***b. Police***

In Canadian law, the immunities enjoyed by prosecutors are not shared by the police.<sup>136</sup> At common law, police are liable for intentional torts and negligence as private persons, with some adjustments to account for their special government function.<sup>137</sup> For negligence, the test in *Cooper v Hobart*, which is used to determine whether the government owes a duty of care to the plaintiff, is used for police just as it is used for other government institutions and individuals.<sup>138</sup>

Under the *Charter*, the sections that apply directly to police, like sections 8 through 10, are qualified with well-settled law and interact with traditional policing methods. For example, unreasonable search and seizures and arbitrary arrests and detentions are largely guided by ordinary police procedures such as obtaining warrants and the formation of probable grounds.<sup>139</sup> Thus, the term “immunity” may not be the best word to describe the subject of analysis below. Rather, what I am exploring is the relationship between *Charter* liability and private law liability. I limit my analysis to two pre-*Ward* cases - *Jane Doe v Metropolitan Police of Toronto* and *Hill v Hamilton-Wentworth Regional Police Services Board* - which shed some light on how the public and private aspects of law intersect for police. Of course, the ultimate authority on police liability for *Charter* damages is *Ward* itself.

The *Jane Doe* case, though not a Supreme Court decision, is remarkable for drawing a distinction between tort claims and *Charter* claims. Jane Doe’s case arises from the police search for the “balcony rapist” targeting women in a Toronto neighbourhood. The police carried out their investigation without warning women in the neighbourhood that they were in any danger, which as Jane Doe pled, essentially turned her and other neighbourhood women into “bait” to lure out the predator. Jane Doe was attacked and sexually assaulted by the predator. Jane Doe sued the Toronto police for damages in negligence as well as a

<sup>134</sup> *Ward*, supra note 1 at para 43.

<sup>135</sup> *Henry*, supra note 3 at para 56, Moldaver J; *Henry*, supra note 3 at para 127, McLachlin CJC and Karakatsanis J.

<sup>136</sup> See Sossin, “Crown Prosecutors”, supra note 79 at 410-411. By contrast, in the United States, police officers are protected by a generous qualified immunity, which shields them from constitutional damages claims if the wrong act was not “clearly established” as unconstitutional while prosecutors have an absolute immunity. See *Harlow v Fitzgerald*, 457 US 800 (1982) (qualified immunity for police officers from constitutional tort liability); see *Imbler v Pachtman*, 424 US 409 (1976) (establishing absolute prosecutorial immunity).

<sup>137</sup> See for example *Hill v Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41 [*Hill*].

<sup>138</sup> *Cooper*, supra note 19.

<sup>139</sup> See for example *Hunter v Southam Inc.*, [1984] 2 SCR 145 at 161 [*Hunter*] (warrantless searches); *R v Grant*, 2009 SCC 32 at paras 53-56 [*Grant*] (warrantless arrests).

declaration under 24(1) for infringements of her rights to security of the person and equality in sections 7 and 15(1).<sup>140</sup>

Notably, the Divisional Court distinguished between Jane Doe’s claim in negligence and the *Charter* claim. While the negligence claim was based on identifying a duty of care, the *Charter* claim was based on her allegation that the police “chose, or at least adopted a policy not to warn her” based on stereotypes about her gender contrary to section 15(1).<sup>141</sup> This holding emphasized the difference in substance between a *Charter* claim and a claim in negligence. Just as not all negligent investigations by police or malicious prosecutions by Crown attorneys are *Charter* violations *per se*, so too can substantive *Charter* violations be distinguished from the standard applied to those torts. In other words, a tort cannot define the parameters of *Charter* liability.

Police are also liable for negligence to suspects for the tort of negligent investigation. In *Hill*, the Court confirmed that police owe a duty of care to suspects under investigation. In this case, Hill was accused of committing several robberies despite significant evidence pointing to two other suspects.<sup>142</sup> Hill was convicted for one robbery at trial, had his conviction overturned on appeal, and sued the police department and its officers for negligent investigation.<sup>143</sup>

Utilizing the test from *Cooper v Hobart* for discovering whether government owes a duty of care, the Court found that police do owe a duty to suspects under investigation and that the standard of care is a reasonable police officer in like circumstances.<sup>144</sup> The Court added that although no *Charter* claim was advanced in this case, the judicial recognition of a tort of negligent investigation “is consistent with the values and spirit underlying the *Charter*, with its emphasis on liberty and fair process.”<sup>145</sup> In this case, constitutional principles influenced an expansion of tort liability on police.

Interestingly, although *Hill* is mentioned in *Ward*, it has no bearing on the development of the *Ward* framework or on the outcome of Ward’s *Charter* damages claim.<sup>146</sup>

<sup>140</sup> *Doe v Metropolitan Toronto (Municipality) Commissioners of Police*, 1990 CanLII 6611 (ONSC) [*Doe*].

<sup>141</sup> *Ibid*.

<sup>142</sup> *Hill*, supra note 137 at para 7.

<sup>143</sup> *Ibid* at 9-12.

<sup>144</sup> *Ibid* at paras 19-20.

<sup>145</sup> *Ibid* at para 88.

<sup>146</sup> *Ward*, supra note 1 at paras 43 and 68.

### *c. Combining Legislative and Personal Charter Remedies (the Mackin rule)*

In addition to the private law immunities above, the *Ward* Court also considered the appropriateness of public law immunities created in its *Charter* jurisprudence. The most prolific of these is what is often referred to as the rule from *Mackin v New Brunswick (Minister of Finance)*: in short, *Charter* claimants cannot combine a section 52(1) remedy to strike down legislation with a section 24(1) personal remedy absent bad faith.<sup>147</sup> This rule applies to all 24(1) remedies, not just damages. The rationale for the rule is that imposing liability for enforcing a presumptively valid statute would impair the “effectiveness and efficiency of government action.”<sup>148</sup> The *Mackin* rule comes from three cases: *Schachter v Canada*, *Guimond v Quebec*, and *Mackin*. Though these three cases are often considered to hold the same rule, a closer look reveals that each of these cases are substantially different. The general rule that develops out of these cases is increasingly detached from its rationale.

The first piece of this puzzle is understanding the role sections 1 and 52(1) could play in *Charter* damages claims. Recall that the section 1 justification will only be available to government where the *Charter* infringement is “prescribed by law.” Where the *Charter* infringement is caused by the actions of government without the operation of a statute, section 1 will generally not apply.<sup>149</sup> Of course, it is conceivable that damages might be sought in cases where there is a statute impugned as well as where there is only conduct impugned.

The relationship between sections 1, 52(1), and 24(1) was addressed in *Schachter*, which held that “An individual remedy under s. 24(1) of the *Charter* will rarely be available in conjunction with action under s. 52 of the *Constitution Act, 1982*.”<sup>150</sup> In that case, the claimant successfully argued that a statute granting paternity care benefits to adoptive parents infringed his section 15 equality rights as it excluded biological fathers. He sought to both invalidate the statute and retroactively collect the money to which he was entitled absent the unconstitutional statute.<sup>151</sup>

The Court characterized *Charter* damages in strictly corrective justice language - to put the claimant in the position he would have been had there been no wrong.<sup>152</sup> However, in the same paragraph, the Court noted that, in this case, there was substantial ambiguity as to what place the claimant would be in absent the

<sup>147</sup> *Mackin*, supra note 94 at para 81.

<sup>148</sup> *Ibid* at 79.

<sup>149</sup> See note 57 above.

<sup>150</sup> *Schachter v Canada*, [1992] 2 SCR 679 at 720 [*Schachter*].

<sup>151</sup> *Ibid* at 688-690.

<sup>152</sup> *Ibid* at 725-726.

*Charter* breach. The Court held that awarding the retroactive remedy would assume that, absent the unconstitutional statute, Parliament would have included Schachter (and other biological fathers) in the group of beneficiaries. It was just as likely, wrote the Court, that “there could have been no benefit at all, for the plaintiff or the original beneficiaries.”<sup>153</sup> In other words, the Court concluded that it could not correct the harm with a personal remedy because it was impossible to determine whether a personal loss occurred.

*Schachter* presents a logical and reasonable reason why a section 52 and section 24(1) remedy might not be available concurrently. Corrective justice is stringent but straightforward, and its application is consistent with the Court’s historical aversion to involving itself in distributive justice aims that are better suited to Parliament.<sup>154</sup>

In two subsequent cases, *Schachter* was applied and expanded to provide a broad immunity from 24(1) remedies. However, these cases – *Guimond* and *Mackin* – replace the logical application of corrective justice with a “general rule” that eludes the logical rationale set forward in *Schachter*.

In the 1996 decision in *Guimond*, a class action composed of prisoners serving jail sentences for unpaid fines sought to strike down the sentencing provision under section 52(1) and obtain damages under section 24(1).<sup>155</sup> The claim for monetary compensation in *Guimond* arises out of the harm suffered from being unconstitutionally jailed. The Court, purportedly applying the rule in *Schachter*, struck down the unconstitutional sentencing provision but refused to combine it with damages under 24(1).<sup>156</sup> Justice Gonthier wrote for a unanimous court, holding that in situations where the government acted under a “claim of right” - a presumption that the statute was constitutional - they could not be retroactively held liable once the statute was declared unconstitutional.<sup>157</sup>

*Guimond* differs substantially from *Schachter*. On the corrective justice approach taken in *Schachter*, the Court correctly held that it would be impossible to compensate the claimant because, after striking down the legislation, it was not clear whether Schachter would have been a statutory beneficiary. In *Guimond*,

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<sup>153</sup> *Ibid.*

<sup>154</sup> See for example *Canada (Attorney General) v Hislop*, 2007 SCC 10 at para 117 (reading a class into the group of statutory beneficiaries “would encroach unduly on the inherently legislative domain of the distribution of government resources”).

<sup>155</sup> *Guimond v Quebec (Attorney General)*, [1996] 3 SCR 347 at 350 [*Guimond*].

<sup>156</sup> *Ibid* at 360.

<sup>157</sup> *Ibid* at 358-361.



however, it is clear that absent the unconstitutional sentencing provision, the persons with unpaid fines would certainly not have been imprisoned.

Instead of relying on *Schachter* alone, the Court pulled in several negligence cases against government not mentioned in *Schachter*. For example, the Court referred to *Welbridge Holdings Ltd v Greater Winnipeg*, where a company building on a parcel of land incurred damages when the municipal zoning law under which it was operating was found *ultra vires*. The company sued the city for damages on a theory of negligence. In that case, the Court found that the city owed no duty of care to the company, and on that basis rejected the company's bid for damages.<sup>158</sup> The Court in *Guimond* uses *Welbridge* and other negligence cases to demonstrate that lawmakers and those who enforce the law in good faith are not liable for damages.<sup>159</sup>

It is unclear, however, why a duty of care is necessary to establish a claim for 24(1) remedy in *Guimond*. The Court's reliance on *Welbridge Holdings*, a case discussing the tort of negligence, elevates the requirements for the tort of negligence to universal laws about government liability. It suggests that *Charter* damages liability will only exist where the claimant proves a tort as well as a *Charter* infringement.

To summarize, the rule in *Schachter* and the rule in *Guimond* are indeed quite different. *Schachter* is based squarely on a logical application of corrective justice and is entirely consistent with the Court's relationship to the legislature's distributive justice decisions. *Guimond* is based on a conflation of *Schachter* with the law of negligence. That the two are often spoken together, along with the rule in *Mackin*, is indicative of the entanglement between public and private law on the issue of immunities.

The Court's 2002 decision in *Mackin* affirms the *Schachter* and *Guimond* immunity, but adds a new twist: in order to pair section 52 and 24(1) remedies, the claimant must prove bad faith on the part of the government.<sup>160</sup> In *Mackin*, two provincial court judges sought to invalidate a New Brunswick statute amending the compensation for supernumerary judges. In addition, they sought damages essentially amounting to back-pay.<sup>161</sup> The Court found that the change in compensation scheme did violate section

<sup>158</sup> *Ibid* at 13, citing *Welbridge Holdings Ltd v Greater Winnipeg*, [1971] SCR 957 at 969; Also see Debra M McAllister, "Mackin: Of Sterile Rules and Real People" (2003) 21 SCLR 339 [McAllister, "Sterile Rules"] (critical of the Court's reliance on cases like *Welbridge* to determine *Charter* immunity).

<sup>159</sup> *Guimond*, supra note 155 at 357-358.

<sup>160</sup> *Mackin*, supra note 94 at para 78.

<sup>161</sup> *Ibid* at paras 1, 33.



11(d) of the *Charter* and struck it down.<sup>162</sup> As for 24(1) damages, the Court concluded that damages are not available in conjunction with a section 52(1) remedy in the absence of “conduct that is clearly wrong, in bad faith or an abuse of power.”<sup>163</sup>

*Mackin* is a peculiar case. Just as it is rare to see judges as a party to litigation, it is also rare for any claimant to seek damages where their *personal* rights were not breached. Recall that section 24(1) begins, “*Anyone* whose rights or freedoms ... have been infringed or denied,”<sup>164</sup> indicating broad standing, but only *personal* standing.<sup>165</sup> Indeed, both the trial judge and the dissenting appellate judge held that the claimants did not qualify for any 24(1) remedy because they were not *personally* deprived of the right to a fair trial in section 11(d).<sup>166</sup> This alone would seem to easily dispose of the 24(1) claim.

Instead, the Court applied *Schachter* and *Guimond*. However, the reason provided for applying these cases is detached from those cases. Rather than appealing to the Court’s institutional competency and logical application of corrective justice as in *Schachter*, or reiterating the requirement for a duty of care as in *Guimond*, the Court in *Mackin* based its ruling on the need for good governance: “creating a balance between the protection of constitutional rights and the need for effective government.”<sup>167</sup> It is unclear why constitutional rights and effective governance are at odds, both in this case and in general.

Although *Schachter*, *Guimond*, and *Mackin* superficially form a trilogy of cases affirming a public law immunity, a closer look reveals that these three cases have little in common. By the time *Mackin* is decided, the sensible rule from *Schachter* is watered down to a “general rule” forbidding a combination of remedies under 52(1) and 24(1) absent bad faith. The reasoning in *Schachter* is the strongest as it is based on a reasonable approach to the relationship between the Court and Parliament and a logical application of corrective justice. The reasoning in *Guimond* is problematic on several bases, not the least of which is that it requires proof of negligence to compensate people unconstitutionally imprisoned and ignores a logical approach to corrective justice. Meanwhile, the reasoning in *Mackin* appears to have little to do with the section 52(1) remedy and simply holds that bad faith is a requirement for *Charter* damages.

For now, it is sufficient to illustrate the problem with one more pre-*Ward* case. In *Kingstreet Investments Ltd v New Brunswick (Finance)*, the Court made an exception to the *Mackin* rule for unlawfully levied

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<sup>162</sup> *Ibid* at 88.

<sup>163</sup> *Ibid* at para 79, 80-81.

<sup>164</sup> *Charter*, supra note 2, s 24(1).

<sup>165</sup> McLellan & Elman, “Analysis of Section 24”, supra note 45 at 208-209.

<sup>166</sup> *Mackin*, supra note 94 at paras 13 and 28.

<sup>167</sup> *Ibid* at 79.

taxes. The claimants, who were taxed under an *ultra vires* statute, succeeded in invalidating the statute and recovering the tax paid under it - a section 52 remedy paired with personal retroactive section 24(1) remedy.<sup>168</sup> This is the correct application of *Schachter*. As the Court said about *Kingstreet*, an application of corrective justice principles leads to “only one possible remedy: restitution to the taxpayer.”<sup>169</sup> In other words, while cases like *Schachter* evidence some ambiguity about how to apply corrective justice, the outcome in *Kingstreet* was clear – the position the claimant would have been in absent the unconstitutional tax is undoubtedly that he would never have paid the tax.

I fail to see how *Kingstreet* might be distinguished from the facts in *Guimond*, where convicted persons were sentenced under an unconstitutional law but were not compensated for their deprivation of liberty. Neither case includes the distribution of benefits, but rather are both focused on two of the government’s most coercive powers: taxation and criminal justice. There is no doubt that absent the unconstitutional sentencing provision in *Guimond*, the claimants would absolutely not have been jailed. That only taxation is exempt from the rule is suspect.

Debra McAllister has forthrightly argued for “reconsideration of [the *Mackin*] rule, and the role section 24(1) of the Charter is to play in constitutional challenges to invalidate legislation.”<sup>170</sup> I agree, in particular, that the rule should be reconsidered in light of *Ward*.

Interestingly, the Court in *Mackin* suggests that the *Charter* damages remedy sought by the claimants is only available “in theory,” and goes about restricting the theoretical.<sup>171</sup> Now that the Court has announced a clear *Charter* damages doctrine in *Ward*, the rule in *Mackin* should either be subordinated to the *Ward* framework or reconsidered altogether.

#### 4. Statutory Parameters on 24(1)

The Supreme Court has held that section 24(1) does not create its own procedure.<sup>172</sup> Thus, several details of the *Charter* damages claim will be determined by statutes of general application. Prior to *Ward*, the Supreme Court had weighed in on at least two important areas: statutes creating remedial jurisdiction and

<sup>168</sup> *Kingstreet Investments Ltd v New Brunswick (Finance)*, 2007 SCC 1 [*Kingstreet*].

<sup>169</sup> *Hislop*, supra note 154 at para 108.

<sup>170</sup> McAllister, “Mackin”, supra note 158 at 384 (She adds that *Mackin* rule is a disincentive for individual litigants to vindicate their rights because of the restrictions on meaningful personal remedies, at 360).

<sup>171</sup> *Mackin* supra note 94 at para 79.

<sup>172</sup> *Ward*, supra note 1 at para 43 (“s. 24(1) operates concurrently with, and does not replace, the general law”).

statutes of limitation. Based on the holdings in these cases, I briefly foreshadow how statutes of ordinary application can frustrate the valid purposes of 24(1) remedies and *Charter* damages specifically.

Section 24(1) remedies, though broad, can only be granted by courts of “competent jurisdiction.”<sup>173</sup> The *Charter* itself does not create rules for jurisdiction, nor does it expand the powers of Parliament or the provinces to legislate these definitions.<sup>174</sup> Prior to *Ward*, the Court held that certain tribunals with the ability to determine questions of law and award damages would have the authority to grant 24(1) remedies<sup>175</sup> while provincial courts with criminal jurisdiction would not.<sup>176</sup> *Ward* reaffirms these holdings.<sup>177</sup>

A similar issue is raised when applying ordinary statutes of limitations on civil claims to *Charter* damages claims. The Ontario Court of Appeal had held in *Prete v Ontario* that a six-month limitation period for actions against public authorities frustrated the purposes of the *Charter*.<sup>178</sup> However, a subsequent decision by the Supreme Court of Canada in *Ravndahl v Saskatchewan* held that a statute of limitations with ordinary application can bar a cause of action under section 24(1).<sup>179</sup> Roach notes that the Supreme Court’s approach is consistent with statutes defining a “court of competent jurisdiction,” though he wonders why the Court does not mention the *Prete* decision.<sup>180</sup>

Statutes assigning remedial jurisdiction and limitations on claims are applicable to section 24(1) because they add definition to the phrase “court of competent jurisdiction.” Ordinarily, issues around jurisdiction and statutes of limitations are raised at the outset of a case and dispositive on a motion prior to a trial on the merits.

Other statutes, however, sit on the fringes of providing definition to section 24(1). Consider a statute that creates an immunity from damages suits for an administrative tribunal. On one hand, a statutory immunity to damages defines “competent jurisdiction” because it removes discretion from the judge to order damages; however, as an immunity statute it could be characterized as a common law immunity for prosecutors, judges, and Parliament, which suggest section 32 of the *Charter* might trump the application

<sup>173</sup> *Charter*, supra note 2, s 24(1).

<sup>174</sup> *Ibid*, s 31.

<sup>175</sup> *Conway*, supra note 50.

<sup>176</sup> *R v 974649 Ontario Inc.*, 2001 SCC 81 at para 56 [*Dunedin*].

<sup>177</sup> *Ward*, supra note 1 at para 58.

<sup>178</sup> *Prete v Ontario (Attorney-General)*, 1993 CanLII 3386 (ONCA), leave to appeal refused, 87 CCC (3d) vi [*Prete*].

See Roach, *Constitutional Remedies in Canada*, supra note 44 at para 11.250.

<sup>179</sup> *Ravndahl v Saskatchewan*, 2009 SCC 7 [*Ravndahl*].

<sup>180</sup> Roach, *Constitutional Remedies in Canada*, supra note 44 at para 11.250.

of the immunity state.<sup>181</sup> Similarly, a statute immunizing government from damages claims are of “general application” in that they do not restrict the *Charter* only, but are not general in that they only apply to immunizing the government.

Thus, the question of which statutes restrict or define 24(1) remedies boils down to a question of whether that statute is consistent with the text and purpose of 24(1) itself. This issue arises in *Ernst*, where the facts raised the question whether a statutory immunity clause for an administrative agency can act as a bar to *Charter* damages. In my view, a statute immunizing a branch of government from damages is contrary to the purpose of section 24(1). The Court’s future decisions in this area should be careful in distinguishing statutes that guide interpretation of 24(1) and those that hinder its effective operation.

#### **D. Summary: The Law and Scholarship Prior to *Ward***

Prior to *Ward*, the state of the law on *Charter* damages was, in a word, unclear. Section 24(1) provided a blank canvas on which the Court could print its own constitutional damages doctrine.

The disagreement within the scholarship on key points like the purpose of *Charter* damages, the proper defendant, and the immunities available to government are illustrative of fundamental disagreements over how much influence private law should have on a public law cause of action. The Court was no clearer. Despite stating in 1994 that *Charter* damages were likely an available remedy,<sup>182</sup> and in 2002 that *Charter* damages were available “in theory,”<sup>183</sup> the Court continued to raise fences around a purely theoretical lot.

It is no wonder that, in the years leading up to *Ward*, litigators expressed cynicism about the state of the law on government immunities.<sup>184</sup> One senior litigator for the Crown commented on the ability of public policy rationales to defeat even the strongest claims, noting that the decisions turn more on “the immediate strength of a public policy argument than with the alleged *Charter* violation.”<sup>185</sup> Similarly, a litigator in private practice concluded that “Courts have erected numerous obstacles” to compensation for *Charter*

<sup>181</sup> Pilkington, “Damages”, supra note 61 at 552.

<sup>182</sup> *RJR-MacDonald*, supra note 101 at 341-342.

<sup>183</sup> *Mackin*, supra note 94 at para 79.

<sup>184</sup> Anand, supra note 93 at 175 (“At the root of the majority’s distinction in *Hislop* lies an outdated distinction between positive and negative rights which has its roots in an under-appreciation of the extent of government involvement in the provision and protection of negative rights, absent which a Hobbesian state of nature is all too likely to prevail.”)

<sup>185</sup> Mrzonski, supra note 93 at 167-168.

wrongs “based on antiquated common law doctrines such as government immunity that should not apply in the constitutional context.”<sup>186</sup>

There are some additional observations to be made on the pre-*Ward* cases. The cases could be distinguished across lines relating to whether the underlying claim resembles a private law cause of action. The prosecutorial and police cases appear more like well-known torts, where a particular bad action results in harm to an individual. Cases like *Schachter* are far less like torts in that the constitutional injury was caused by the effect of legislation rather than an act of an individual, and the compensation sought is for a benefit rather than a “substitute comfort” for harm. Cases like *Guimond* and *Kingstreet* fall somewhere in the middle, where although the constitutional injury was caused by legislation, the unlawful imprisonment and taxation arguably resemble intentional torts like false imprisonment and conversion. Meanwhile, *Mackin* and *McKinney* raise facts that appear more like a contractual dispute over the terms of employment. The diversity of claims for money against government defy the simple application of one set of doctrines, public or private in origin.

Importantly, the early scholarship and cases do not advocate for a proportionality-based approach to *Charter* damages. This should be remarkable because the early years of the *Charter* were dominated by cases striking down legislation where the Court routinely balanced the infringed *Charter* right and the government’s justification. Instead, the cases and scholarship borrow liability principles from private law tort claims, like fault thresholds from malicious prosecution and duties of care from the tort of negligence, to justify and legitimize *Charter* damages.

The case that comes closest to proportional interest-balancing is *Mackin*, which intends to balance the interest of the claimant in a 24(1) remedy against the government’s good or bad faith conduct. *Mackin* is ineffective in doing so. The *Mackin* rule contrives a conflict between constitutional rights and effective governance;<sup>187</sup> but, as *Ward* ultimately stated, “Compliance with *Charter* standards is a foundational principle of good governance.”<sup>188</sup> Although *Ward* mentions *Mackin* favourably,<sup>189</sup> the rule ought to be subordinated to the *Ward* framework, and not the other way around.<sup>190</sup>

<sup>186</sup> Anand, supra note 93 at 177.

<sup>187</sup> *Mackin*, supra note 94 at para 79.

<sup>188</sup> *Ward*, supra note 1 at para 38.

<sup>189</sup> *Ibid* at 39-43.

<sup>190</sup> See for example *Conseil scolaire francophone de la Colombie-Britannique v British Columbia (Education)*, 2018 BCCA 305 at para 304 [*Conseil scolaire francophone*] (where no section 52(1) remedy was issued, British Columbia Court of Appeal overturned trial judge’s decision to not apply *Mackin* because “the Province correctly says, in our view, that the judge’s failure to issue a formal declaration of constitutional invalidity with respect to the policy does not preclude application of the *Mackin* principle.”)

Indeed, *Ward* does not specifically overrule any of the above cases.<sup>191</sup> The question becomes how do these cases, many of which are defined by private law principles, influence the “unique public law remedy.”<sup>192</sup> In the next section, I discuss how *Ward* defines an entirely new framework for *Charter* damages, and how subsequent decisions in *Henry* and *Ernst* invite the uncertainty of the pre-*Ward* cases back into *Charter* damages. The difficulties are almost entirely based on how private law principles will define *Charter* damages doctrine.

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<sup>191</sup> *Ward*, supra note 1 at para 34 (“Section 24(1) operates concurrently with, and does not replace, these areas of law.”)

<sup>192</sup> *Ibid* at 31.

### III. *CHARTER DAMAGES AT THE SUPREME COURT: WARD, HENRY, AND ERNST*

After a long wait, the Supreme Court rendered its first comprehensive decision on *Charter* damages. The Court in *Ward* created a four-step framework for determining whether *Charter* damages are “appropriate and just in the circumstances.”<sup>193</sup>

If scholarly article titles are any indication, the response to *Ward* was reserved in its praise but grateful for the clarity: “New Dawn or Mirage?”<sup>194</sup>, “Tort Lite?”<sup>195</sup> and “A Promising Late Spring.”<sup>196</sup> After *Henry* and *Ernst*, however, the criticisms rang clearer. Articles like “Backpedalling on *Charter* Damages”<sup>197</sup> on *Henry* and “Damaging the *Charter*”<sup>198</sup> on *Ernst* express scholarly disappointment in the trajectory of *Charter* damages doctrine.

These articles, and others discussed below, pick on the tension between private law principles and constitutional objectives, now cast as the intrusion of private law principles into *Ward*’s four-step framework for awarding *Charter* damages. I devote most of my analysis to interpreting how and why the prevailing opinions in *Henry* and *Ernst* prefer private law principles in awarding public law damages.

Notably, Justice McLachlin, who wrote *Ward*, also co-authored the concurring opinion in *Henry* and the dissenting opinion in *Ernst*. Her decisions remain the most consistent in applying *Ward*, whereas the majority in *Henry* and *Ernst* deviate from *Ward* by incorporating more private law principles than Justice McLachlin. Although the Court’s holdings have been problematic and the opinions divisive, the spirit of *Ward* has not been abandoned yet. There is still hope, as I argue, to revive *Ward* and apply it to *Charter* damages claims without recourse to extraneous private law guidance.

#### A. *Vancouver (City) v Ward*

<sup>193</sup> *Charter*, supra note 2, s 24(1).

<sup>194</sup> Allen M Linden, “Charter Damage Claims: New Dawn or Mirage” (2011) 39 *Advoc Q* 426.

<sup>195</sup> Robert Charney & Josh Hunter, “Tort Lite?: *Vancouver (City) v Ward* and the Availability of Damages for Charter Infringements” (2011) 54 *SCLR* (2d) 393.

<sup>196</sup> Kent Roach, “A Promising Late Spring for Charter Damages: *Ward v Vancouver*” (2011) 29 *National Journal of Constitutional Law* 135 [Roach, “Late Spring”].

<sup>197</sup> Brooke MacKenzie, “Backpedalling on Charter Damages: *Henry v British Columbia (Attorney General)*” 45 *Advoc Q* 359 (2016).

<sup>198</sup> Lorne Sossin, “Damaging the Charter: *Ernst v Alberta Energy Regulator*” (20 January 2017) online: thecourt.ca <<http://www.thecourt.ca/damaging-charter-ernst-v-alberta/>> [Sossin, “Damaging the Charter”].

In 2010, the Supreme Court of Canada announced, for the first time, the purposes for a damages award under section 24(1). A united court led by Chief Justice McLachlin described the following test for a trial judge to determine whether damages are an “appropriate and just” remedy under section 24(1):

First, the Applicant must prove a *Charter* infringement.

Second, the Applicant has the burden of demonstrating that damages are “appropriate and just” to satisfy the purposes of compensation, vindication, or deterrence.

Third, the government-defendant has the evidentiary burden to prove that damages are inappropriate or unjust by reference to “countervailing factors,” such as good governance concerns or the availability of other more appropriate remedies.

Fourth, the Court will determine the quantum of damages.<sup>199</sup>

The Court also clarified several supplementary points: provincial courts are not competent to award *Charter* damages;<sup>200</sup> the proper defendant is not the government actor, but rather the government itself directly;<sup>201</sup> and, while private law and tort provide a separate and distinct claim, tort principles may inform the development of *Charter* damages doctrine.<sup>202</sup> The Court described the test as “functional” and left the development of specific aspects to future cases.<sup>203</sup> After reviewing the facts, I will address the *Ward* framework in detail.

In August of 2002, then Prime Minister Jean Chretien was participating in an outdoor event in Downtown Vancouver. The Vancouver Police Department received a tip with a description of an individual that was planning to throw a pie at the Prime Minister. On the strength of that tip, the Police arrested Alan Cameron Ward, a local lawyer who was on hand for the outdoor event. Upon arrest, Ward caused a substantial scene and was charged with a breach of the peace. Ward was taken to the provincial police station where he was strip-searched and held in a cell for over 4 hours. His vehicle was impounded. When

<sup>199</sup> *Ward*, supra note 1, at para 4.

<sup>200</sup> *Ibid* at para 58.

<sup>201</sup> *Ibid* at para 22 (“An action for public law damages — including constitutional damages — lies against the state and not against individual actors. Actions against individual actors should be pursued in accordance with existing causes of action.”).

<sup>202</sup> *Ibid* at paras 22, 43.

<sup>203</sup> *Ibid* at paras 24, 43.



the police realized they would not have sufficient grounds on which to obtain a warrant to search the vehicle based on an attempted assault, Ward and his vehicle were released.<sup>204</sup>

Ward sued the city, the province, and each of the individual officers who participated in his arrest, detention, strip search, and seizure of his vehicle. His claim sought damages against the defendants on both common law and *Charter* grounds. At trial, the *Charter* claim for the strip search resulted in \$5000 against the province and the seizure of the car resulted in \$100 against the City of Vancouver.<sup>205</sup> The balance of the *Charter* and tort claims were dismissed. The trial court did not accept the government's position that *Charter* damages could not be awarded absent proof of bad faith. This ruling was upheld on appeal 2-1, with one justice dissenting based on the necessity of a bad faith to a *Charter* damages claim.<sup>206</sup> The Supreme Court replaced the \$100 award for the seizure of the car with a declaration. The \$5000 award for the strip search, though not a subject of this appeal, was endorsed by the Court.<sup>207</sup>

The Court's decision was well-received. Roach, who represented an intervener in *Ward*, praised the Court's opinion, "It was systematically written and laid out a clear point-by-point approach to *Charter* damages claims... Stylistically, *Ward* is a model judgment that provides clear and principled guidance."<sup>208</sup> Justice Linden, writing an extrajudicial comment on *Ward*, described it as "unanimous, comprehensive and balanced 80 paragraph reasons."<sup>209</sup> Cooper-Stephenson, in his 2013 monograph *Constitutional Damages Worldwide*, wrote that *Ward* is "an important definitive judgment... which may well be adopted internationally."<sup>210</sup>

While *Ward* was praised for its content, it was also suggested that its impact, for better or worse, would be minimal. Josh Hunter and Robert E. Charney, who represented the Attorney General of Ontario as an intervener in *Ward*, later wrote that *Charter* damages in *Ward* were a "consolation prize"<sup>211</sup> for those who cannot prove tort claims at common law. *Ward* merely created "a parallel system of 'tort lite'" which would not result in "a radical expansion of government liability beyond that already provided by the law of tort."<sup>212</sup> Linden suggested that "*Ward* is a welcome, comforting, needed, overdue, but I must say largely

<sup>204</sup> *Ibid* at paras 6-9.

<sup>205</sup> *Ibid* at paras 11, 79.

<sup>206</sup> *Ibid* at 10-13.

<sup>207</sup> *Ibid* at 79.

<sup>208</sup> Roach, "Late Spring", supra note 196 at 140.

<sup>209</sup> Linden, supra note 194 at 430.

<sup>210</sup> Ken Cooper-Stephenson, *Constitutional Damages Worldwide* (Toronto: Carswell, 2013) at 19 [Cooper-Stephenson, *Worldwide*].

<sup>211</sup> Hunter & Charney, supra note 195 at 395.

<sup>212</sup> *Ibid* at 424.

symbolic advance in our legal system, but the symbolism of Charter supremacy and its availability for damage cases do matter mightily.”<sup>213</sup> Both Roach and Gerald Chan, noting that the low \$5000 award for the strip search was well below the cost of litigation, expressed similar scepticism on whether litigants would be running to the courthouse to seek *Charter* damages.<sup>214</sup>

Nevertheless, *Ward* provided clarity to an unclear area of Canadian law. In my view, the four-step test is a principled framework that trial judges can flexibly apply to any *Charter* breach to find an appropriate and just outcome. I think the outcome for *Ward* was appropriate and just, even if the final quantum is on the lower side.

### 1. The *Ward* Framework

The four-step *Ward* framework is the method for determining whether *Charter* damages are, in the language of section 24(1), an “appropriate and just remedy in the circumstances.”<sup>215</sup> The steps are to be applied sequentially. The crux of the *Ward* framework is in steps 2 and 3, where the Court balances the interests of the claimant in a *Charter* damages remedy against the interests of the government in negating a damages award. This interest-balancing approach is what makes *Charter* damages a “unique public law remedy” distinct from several private law torts it mentions.<sup>216</sup> While the parties are invited to raise private law and tort principles to fortify their positions, *Ward* subjects these non-*Charter* principles to the balance of interests in steps 2 and 3.<sup>217</sup>

#### a. Step 1: Proof of a *Charter* Breach

In all of three sentences, the Court simply states that proving a *Charter* breach is always the first step towards earning any 24(1) remedy. The Court does not elaborate on this requirement, leaving the impression that a 24(1) damages case would be no different than establishing an infringement for any other *Charter* remedy. Applied to *Ward*’s case, the Court referenced the leading case on unconstitutional strip searches, *R v Golden*, which restricts the use of strip searches for persons being detained for a short

<sup>213</sup> Linden, supra note 194 at 439.

<sup>214</sup> Roach, “Late Spring”, supra note 196 at 156; Gerald Chan, “Remedial Minimalism under Section 24(1) of the Charter: *Bjelland, Khadr and Nasogaluak*” (2010) 51 SCLR (2d) 349 at 378-379.

<sup>215</sup> *Charter*, supra note 2 at 24(1).

<sup>216</sup> *Ward*, supra note 1 at 31.

<sup>217</sup> See *ibid* at 43, where several private law thresholds and defences are considered at step 3 as part of the government’s burden.

period of time at a police station.<sup>218</sup> Both in its description of the *Ward* framework and its application, the substantive constitutional infringement is separated from the remedial inquiry in the subsequent three steps.

Linden finds this striking: “there is no mention of any need for fault or any mental element, such as malice, bad faith or unlawful intention by the government in order to qualify the factual breach of the Charter as one which could support a damage claim.”<sup>219</sup> The reason might be a matter of procedure: in *Ward*, the government’s appeal to the Supreme Court did not challenge the trial judge’s findings that the strip search and vehicle seizure constituted breaches of section 8.<sup>220</sup> Since the trial court did not require bad faith or any other finding of fault above and beyond the ordinary constitutional inquiry, the best hint from the Court is that those findings were upheld.

Another plausible explanation is that the Court established a framework of damages liability that does not require a *Charter* claimant to plead fault, bad faith, or malice on the part of the defendant as in a tort damages claim. This explanation is supported by the Court’s numerous distinctions between the private law damages remedy and the “unique public law remedy” in the *Charter*. This position is also reaffirmed by the minority decision in *Henry*, where Justices McLachlin and Karakatsanis would have required fault to be raised by the defendant at step 3 of the test.<sup>221</sup>

### ***b. Step 2: Functional Justification of Damages***

The Court outlines three purposes for *Charter* damages: compensation, vindication, and deterrence. The functional approach to damages is strongly informed by eight cases from New Zealand, South Africa, Trinidad and Tobago, the United Kingdom, and the United States.<sup>222</sup> These cases describe what had yet to be described in Canadian law: the fundamental purposes of public law damages. Thus, rather than cobble a test from the *dicta* and dissents mentioning *Charter* damages in Canadian law, the Court took a bold step of creating a new framework based firmly in public law principles from abroad. Roach notes with

<sup>218</sup> *R v Golden*, 2001 SCC 83 at 97 [*Golden*]. The trial judge’s finding of a section 8 infringement based on *Golden* was not appealed to the Supreme Court of Canada, though the Court also mentions that the acts of the officers violated *Golden*. See *Ward*, supra note 1 at para 65; see also *Ward v City of Vancouver*, 2007 BCSC 3 at 73-86.

<sup>219</sup> Linden, supra note 194 at 431.

<sup>220</sup> *Ward*, supra note 1 at paras 62, 75.

<sup>221</sup> *Henry*, supra note 3 at para 108, McLachlin CJC and Karakatsanis J (“It is for the state to plead facts on the third step of countervailing factors, should it choose to do so.”)

<sup>222</sup> *Ward*, supra note 1 at paras 27-30.

approval that these objectives fit his “principled remedial discretion” criteria, guiding a court’s discretion without being overly formal or excessively flexible.<sup>223</sup>

Compensation is described with reference to private law, where damages must be proven by evidence and may reflect similar quantum to private law results.<sup>224</sup> However, compensatory damages in the *Charter* are broader than private law damages because they also cover intangible interests like “distress, humiliation, embarrassment, and anxiety.”<sup>225</sup> Vindication “focuses on the harm the *Charter* breach causes to the state and to society” and justifies a personal remedy in *Charter* damages so that *Charter* rights are not “whittled away by attrition.”<sup>226</sup> Deterrence in *Ward* is synonymous with “*Charter* compliance,” and thus justifies a damages remedy to “regulate government behaviour, generally, in order to achieve compliance with the Constitution.”<sup>227</sup> Compensation, vindication, and deterrence, are not novel heads of damages, but rather the “the objects of *Charter* damages” that may justify any head of damages in pursuit of these objectives.<sup>228</sup>

Prior to *Ward*, lower courts had awarded *Charter* damages using language like “symbolic damages” and “moral damages,” but these terms are now swallowed up by these three purposes.<sup>229</sup> Roach notes that this arm of the test will produce “reasonable disagreement... but litigants and judges can now agree about the terms of the debate.”<sup>230</sup>

Once the claimant has proven, a *Charter* infringement at step 1 and the functional need for compensation, vindication, or deterrence at step 2, the analysis then shifts to the government’s burden to negate damages at step 3.

### ***c. Step 3: Countervailing Factors***

As the catch-all title suggests, step 3 presents the government with an opportunity to raise policy factors against holding the government liable in damages. The Court held that two countervailing factors were immediately apparent - alternative remedies and good governance concerns - but that the category of

<sup>223</sup> Roach, “Late Spring”, supra note 196 at 144.

<sup>224</sup> *Ward*, supra note 1 at paras 48-50.

<sup>225</sup> *Ibid* at para 27; also see Charles, supra note 103 at 84 (noting that intangible loss “is unique to public law in that it covers personal emotional reactions such as humiliation, embarrassment, and anxiety, none of which would be considered legally recognized injuries in private or civil law”).

<sup>226</sup> *Ward*, supra note 1 at paras 28, 25.

<sup>227</sup> *Ibid* at para 29; also see para 38.

<sup>228</sup> *Ibid* at paras 57, 59. This idea is supported by the Court’s reference to exemplary and punitive damages, which may serve the purposes of compensation, vindication, and deterrence, at para 56.

<sup>229</sup> Charles, supra note 103 at 94.

<sup>230</sup> Roach, “Late Spring”, supra note 196 at 147.

countervailing factors was not closed to only those two.<sup>231</sup> The burden is on the government to raise these factors in an effort to prove why damages would not be appropriate and just in the circumstances, which are then balanced against the claimant's interests from step 2 in compensation, vindication, and deterrence.<sup>232</sup>

Alternative remedies are those remedies which can “adequately meet the need for compensation, vindication and/or deterrence.”<sup>233</sup> The Court identifies two possible categories of alternative remedies. The first alternative is private law damages against the individual tortfeasor, which may achieve the goals of compensation, vindication, and deterrence. An award in both private law damages and *Charter* damages is precluded based on “double compensation.”<sup>234</sup> The second alternative is a different *Charter* remedy, like a declaration, which can plausibly achieve the purposes of compensation, vindication, and deterrence in some circumstances.<sup>235</sup> Thus, alternative remedies in step 3 relate directly back to the purposes of damages put forward in step 2. For example, where only vindication is engaged, the government might counter by stating that a declaration is sufficient; however, where compensation for personal loss is at issue, money damages are more likely to adequately compensate than a declaration. The analysis for alternative remedies is not simply about whether an alternative exists, but about whether an alternative can fulfill the function of damages proven at step 2.

Good governance is not fully defined by the *Ward* Court. While the Court is open to a variety of good governance concerns to negate a *Charter* damages remedy, the fundamental statement on good governance is with regard to deterrence: “Compliance with *Charter* standards is a foundational principle of good governance.”<sup>236</sup> While the Court goes on to cite several examples of how good governance is achieved in other areas of law, including the rule from *Mackin* and private law fault thresholds in *Miazga*, these particulars fall under the umbrella of what is called the “chilling effect” rationale.

The chilling effect rationale is pervasive in litigation against government.<sup>237</sup> The essence of the chilling effect rationale is that imposing liability on a government official, like a police officer, will cause the officer to make decisions based on her potential liability instead of the public interest. A similar

<sup>231</sup> *Ward*, *supra* note 1 at para 33.

<sup>232</sup> *Ibid* at paras 35, 61.

<sup>233</sup> *Ibid* at para 34.

<sup>234</sup> *Ibid* at para 36.

<sup>235</sup> *Ibid* at para 37.

<sup>236</sup> *Ibid* at para 38.

<sup>237</sup> See for example Hogg et al, *supra* note 18 at 247 (citing several negligence cases raising the chilling effect rationale as a principle of good governance); accord *Hill*, *supra* note 137 at paras 56-59 (Court dismisses chilling effect rationale for imposing duty of care on police officers towards suspects under investigation).

proposition applies to institutional defendants – that the institution will not pursue bold and innovative policies in the public interest for fear of potential liability.

The *Ward* Court indicates that the chilling effect argument should once and for all be put on ice:

At one extreme, it may be argued that any award of s. 24(1) damages will always have a chilling effect on government conduct, and hence will impact negatively on good governance. The logical conclusion of this argument is that s. 24(1) damages would never be appropriate. Clearly, this is not what the Constitution intends.<sup>238</sup>

Roach notes that the chilling effect argument is particularly irrelevant for 24(1) claims because of the direct liability of government. While individual government agents “may be more susceptible to being overdeterred,” government departments are in a better position to make appropriate adjustments to comply with new *Charter* decisions from the Court.<sup>239</sup>

What is the right balance for the chilling effect? From my perspective, the rationale of the chilling effect should always be qualified by the broader application of good government. Not all chilling effects are contrary to good governance. Indeed, in other *Charter* contexts, the Court has created remedial frameworks to jumpstart reform where the government institution shows complacency towards *Charter* rights.<sup>240</sup> As the *Ward* Court states explicitly, the logical conclusion of the chilling effect rationale is to say *Charter* damages are never appropriate and just. The chilling effect rationale, in order to be successful, must show that imposing liability on government in this particular context will negatively affect the public interest in similar circumstances.<sup>241</sup> In other words, the chilling effect on government should be demonstrably bad for society, not just bad for government.

To conclude, Linden predicts that step 3 of the *Ward* test “will undoubtedly occupy the courts in the days ahead.”<sup>242</sup> Indeed, the Court’s next two *Charter* damages decisions prove him right. Despite the *Ward* Court’s rejection of generic chilling effect defences, the same general demur appears with renewed vigour in both *Henry* and *Ernst*.

<sup>238</sup> *Ward*, supra note 1 at para 38.

<sup>239</sup> Roach, “Late Spring”, supra note 196 at 150-151.

<sup>240</sup> See for example *R v Jordan*, 2016 SCC 27 (changing the requirements for a stay of proceedings in cases of unconstitutional delay in criminal trials contrary to section 11(b), because the Court found “a culture of complacency towards delay has emerged in the criminal justice system”, at para 40).

<sup>241</sup> See *Ward*, supra note 1 at para 53 (“In considering what is fair to the claimant and the state, the court may take into account ... the need to avoid diverting large sums of funds from public programs to private interests”).

<sup>242</sup> Linden, supra note 194 at 433.

#### *d. Step 4: Quantum*

In order to answer the “how much?” question, the *Ward* Court provided broad factors to guide the calculation of damages. The Court does not place the burden of proving quantum on either party, but rather places the task of calculation on the court.

The Court first addressed the compensatory objective of damages. Both pecuniary and non-pecuniary claims could be made. The Court notes that when a person’s *Charter* rights are breached by a prolonged detention, they may have pecuniary claims for lost earnings, and they may also have a non-pecuniary claim that, though hard to quantify, should be calculated as “providing substitute comforts and pleasures.”<sup>243</sup> When quantifying *Charter* damages, the *Ward* framework requires a “focus on the breach of *Charter* rights as an independent wrong, worthy of compensation in its own right.”<sup>244</sup>

For deterrence and vindication, the *Ward* decision suggests that an “appropriate and just” quantum can be determined with reference to the egregiousness of the infringing conduct: “the more egregious the conduct and the more serious the repercussions on the claimant, the higher the award for vindication or deterrence will be.”<sup>245</sup> The Court cites to *Golden* to highlight that strip-searches are inherently humiliating.<sup>246</sup> In analysing the egregiousness of the conduct, the Court referenced the number of officers who were involved in the strip search, whether the officers left Ward unclothed for a prolonged period of time, and whether the strip search was exacerbated by verbal abuse or threats.<sup>247</sup> The more egregious the factors, the higher the quantum of damages.

Roach cautions that the “countervailing factors” in step 3, when they are not strong enough to negate damages entirely, might act as a deductible in step 4. Roach predicts several policy arguments that could lead to unprincipled results: “The government should not be able to make casual and routine claims that damage awards will be costly and disruptive or invoke a rigid rule that damage awards should always be modest.”<sup>248</sup> There is some valid concern that *Charter* damages will be awarded with too much deference to government interests and not enough emphasis on the *Charter* injury.

<sup>243</sup> *Ward*, supra note 1 at paras 49-50.

<sup>244</sup> *Ibid* at para 55.

<sup>245</sup> *Ibid* at para 52.

<sup>246</sup> *Ibid* at para 64; *Golden*, supra note 218 at para 90.

<sup>247</sup> *Ward*, supra note 1 at 64-65. See also *Carr*, supra note 120 at para 246 (applying *Ward*, determining quantum for strip search based on egregiousness of conduct).

<sup>248</sup> Roach, “Late Spring”, supra note 196 at 153.



Roach also notes that the Court’s decision essentially rejects the notion raised by several early commentators about the prospect of minimum, maximum, or liquidated amounts of damages.<sup>249</sup> This rejection does not fully foreclose a damages *per se* theory, in that vindication might demand a *per se* amount where there is no other remedy, but it does appear to foreclose a fine-like system where government is penalized with a standard dollar amount. However, it would still be open to courts to locally determine, based on the evidence, whether a particular government department is a “repeat offender” and award increasing quantum for specific deterrence.

Little more is known about how to determine quantum. In *Henry* and *Ernst* – both cases brought on summary judgment motions – quantum was not addressed by the Court.

## 2. The Role of Private Law

*Ward* declares that *Charter* damages will be a “unique public law remedy,”<sup>250</sup> but acknowledges that the policy considerations underpinning “private law damages against state actors may be relevant when awarding public law damages against the state.”<sup>251</sup>

Private law and tort law are referenced as guiding the future development of *Charter* damages in three important areas: at step 2 for defining entitlement and calculating quantum of compensatory damages,<sup>252</sup> at step 3 for determining whether policy considerations underpinning fault thresholds and defences might apply to the circumstances of the *Charter* damages claim,<sup>253</sup> and at step 4 for calculating quantum with reference to comparable private law awards.<sup>254</sup>

Private law is not mentioned in the course of determining a breach at step 1. To the contrary, the Court implies that the failure of *Ward*’s tort claims did not effect the outcome of his *Charter* damages claim.<sup>255</sup>

*Ward* has been criticized for its overgeneralized approach to “private law” and “tort law,” which are diverse areas of law comprised of several different doctrines.<sup>256</sup> The *Ward* Court, foreseeing the breadth of substantive claims for *Charter* damages, likely resorted to general references to private law in order to avoid marrying the *Ward* framework to a particular private law doctrine. As past cases have proven,

<sup>249</sup> *Ibid* at 153.

<sup>250</sup> *Ward*, supra note 1 at para 31.

<sup>251</sup> *Ibid* at para 43.

<sup>252</sup> *Ibid* at paras 50-51.

<sup>253</sup> *Ibid* at para 43.

<sup>254</sup> *Ibid* at paras 53-55.

<sup>255</sup> *Ibid* at para 68.

<sup>256</sup> Jason N E Varuhas, *Damages and Human Rights* (Portland, Oregon: Hart Publishing, 2016) at 161.



claims for monetary remedies through section 24(1) can arise through tort-like conduct by police (as in *Ward*), claims for wages which resemble contract disputes (*Mackin* and *McKinney*), and claims for statutory benefits of a purely political nature (*Schachter*). In that sense, general references to private law are an attempt to maintain a contextual approach to remedying *Charter* infringements with the assistance of private law.

While *Ward* references the usefulness of private law in developing the *Ward* framework in future cases, it does not rely on any private law principles in its application to *Ward*'s claim. However, its overgeneralized and permissive approach to receiving “practical wisdom”<sup>257</sup> from private law becomes a point of contention in both *Henry* and *Ernst*.

### 3. Direct Liability

Based on section 32 of the *Charter*, which confirms that the *Charter* applies to government, the *Ward* Court held that *Charter* damages would only be available against government directly, and not against individual government agents.<sup>258</sup> Affirming direct liability, however, may have broader consequences than the *Ward* Court explicitly acknowledged.

Taking *Ward* as an example, consider the difference between the individual police officers who carried out the strip search and the defendant on the *Charter* claim – the Province of British Columbia. Placing too strong a focus on the conduct of the police officers could distract from the real target of *Charter* damages: the government itself. In *Ward*, for example, it was open to the Province to argue that its officers “went rogue” and departed from their training and standards when conducting the strip-search. It follows that since the conduct of the officer was detached from the Province, no *Charter* liability should apply to government. This type of foreseeable argument can be avoided by placing the focus on the defendant itself, and analyzing its internal practices, policies, and culture to determine whether *Charter* liability should attach to government.<sup>259</sup> They Court may, in future cases, wish to clarify how direct liability will account for the difference between the defendant and its employees.

<sup>257</sup> *Ward*, supra note 1 at para 43.

<sup>258</sup> *Ibid* at para 22.

<sup>259</sup> A similar approach is taken to municipal liability for constitutional damages in the United States. See *Monell v Department of Social Services*, 436 U.S. 658 (1978) (municipalities are liable for “a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that party's officers”, at 690); and *Owen v City of Independence*, 445 U.S. 622 (1980) (good faith not a defence for municipal corporations).

Direct liability of government for *Charter* damages is possibly the most significant differentiator from private law torts. The *Ward* Court concedes that these are “complex matters... [for] future cases,”<sup>260</sup> but that is an understatement. In *Henry* and *Ernst*, there is substantial disagreement over the implications of direct liability on elaborating *Charter* damages doctrine, resulting in confusing holdings about the bases for liability in *Charter* damages claims.

#### 4. Fault Thresholds and Immunities

The *Ward* framework does not require the *Charter* damages claimant to plead a fault threshold as part of the burden in steps 1 and 2. Instead, the burden is on the defendant to raise private law fault thresholds through step 3, but only as a reason for why damages are not appropriate and just in these circumstances.<sup>261</sup> Immunities to damages are ordinarily dealt with on a pre-trial motion, though the *Ward* Court seems to place immunities like the rule from *Mackin* under step 3 as well.

Placing the burden of proving the relevance of an immunity or fault threshold at step 3 can be confusing.<sup>262</sup> Immunities are traditionally decided prior to a trial in the matter. Similarly, fault thresholds are traditionally pled by the plaintiff in order to demonstrate moral entitlement to damages.<sup>263</sup> However, by placing private law immunities and thresholds as part of the defendant’s burden in step 3, the Court suggests that these policy factors should not be applied at the outset of a case; instead, the policy factors underlying their ordinary operation are a part of the balancing act between steps 2 and 3.

Linden rightly notes that “The issue of immunity from civil liability of governments has been debated for centuries.”<sup>264</sup> The responses to the *Ward* decision relitigate that discussion and arrive at no consensus.

##### a. Private Law Fault Thresholds

Hunter and Charney express the position taken by Ontario as intervener in *Ward*, which was that fault-based thresholds and immunities must be same or higher in the *Charter* than in private law; otherwise, “Charter damages run the risk of subsuming the entire field of tort law when a governmental actor is the

<sup>260</sup> *Ward*, supra note 1 at para 43.

<sup>261</sup> *Ibid* at para 35.

<sup>262</sup> Chris D L Hunt, “Constitutional Damages in the Supreme Court of Canada Case Note” (2011) 7 Cambridge Student L Rev 115 at 19 (arguing that the countervailing factors are “hopelessly vague”, at 119).

<sup>263</sup> See for example Philip H Osborne, *The Law of Torts*, 5th ed (Toronto: Irwin Law Inc., 2015) at 27 (describing the “moral imperative” behind loss-shifting in the tort of negligence).

<sup>264</sup> Linden, supra note 194 at 438.

defendant.”<sup>265</sup> Of course, the opposite argument might also be true: that adopting the tort principles into the *Charter* would serve no purpose but to constitutionalize torts against public officials.

Charles finds that while some level of immunity may be appropriate, the distinctness of public law damages contemplated in *Ward* creates “the unspoken caveat is that such policies [about immunities] should not be determinative of the *Charter* remedy decision.”<sup>266</sup> This perspective accords with *Ward*’s restriction of immunities to step 3 of the framework.

Roach argues that the exclusion of formal immunities in *Ward* seems to be a more straightforward path to compensation from a government entity as opposed to an individual government employee.<sup>267</sup> Containing immunities and private law thresholds to step 3 ensures a relatively quick resolution to *Charter* damages claims.

By confining the relevance of immunities and private law thresholds to step 3, the *Ward* Court ensures a more streamlined approach to *Charter* damages claims while still providing government with the tools to negate a damages remedy when appropriate and just.

### ***b. Mackin as a Countervailing Factor***

At the Supreme Court, the defendants argued that *Ward* should not be able to recover *Charter* damages unless he could prove bad faith on the part of the defendants.<sup>268</sup> The defendants relied on the principle from *Mackin*, which the Court summarized as follows:

*Mackin* stands for the principle that state action taken under a statute which is subsequently declared invalid will not give rise to public law damages because good governance requires that public officials carry out their duties under valid statutes without fear of liability in the event that the statute is later struck down.<sup>269</sup>

The Court declined to apply *Mackin* in *Ward* because the police officers did not conduct the strip search under a valid statute.<sup>270</sup> However, the Court permitted future defendants to raise the rule in *Mackin* as a good government defence in step 3 of the *Ward* framework.<sup>271</sup>

<sup>265</sup> Hunter & Charney, supra note 195 at 404.

<sup>266</sup> Charles, supra note 103 at 91.

<sup>267</sup> Roach, “Late Spring”, supra note 196 at 143.

<sup>268</sup> *Ward*, supra note 1 at para 41.

<sup>269</sup> *Ibid.*

<sup>270</sup> *Ibid* at paras 41, 68.

Were it not for this statement, it would seem that *Mackin* would continue to apply as a bar to combining section 52(1) remedies with section 24(1) remedies from outside the *Ward* framework. The process would look something like this: once a 52(1) remedy is awarded, the court would apply *Mackin* and require proof of bad faith to get to determine whether *any* section 24(1) remedy is appropriate and just. Assuming bad faith was proven, the court would then turn to *Ward* to determine whether *Charter* damages are appropriate and just.

However, since *Ward* places *Mackin* under the purview of step 3, it seems that the *Ward* Court intended to limit the operation of *Mackin* to step 3 only. Thus, once a section 52(1) remedy is awarded, the court should move directly to applying *Ward* and only consider whether *Mackin* negates a damages award at step 3.

A third option: that by placing *Mackin* in step 3, the *Ward* Court suggested that bad faith is *presumed* unless the government can prove (1) that bad faith is required for damages in the circumstances and (2) prove the absence of bad faith to negate a damages award.

None of these three approaches are entirely satisfactory or consistent and, I think, reflects the increasing irrelevance of *Mackin*.<sup>271</sup> Consider the result of removing *Mackin* from the equation entirely. Once a section 52(1) remedy is awarded, the court can apply *Ward* and, at step 3, can consider whether the *alternative remedy* of section 52(1) adequately serves the purposes of compensation, vindication, and deterrence. If so, then no 24(1) remedy is needed. If not, then the court can determine whether damages (or another remedy) can compliment the section 52(1) remedy to fully compensate, vindicate, and deter in the circumstances.

As I foreshadowed in Part II of this thesis, there is substantial reason to reconsider *Mackin* both because of its internal inconsistencies and in particular because of its irrelevance in light of *Ward*. Its operation either before or within the *Ward* framework is redundant. However, since the *Ward* Court includes *Mackin* as a potential defence at step 3, the best policy would be to require government to first prove the relevance of *Mackin* and then prove the absence of bad faith. For clarity, the *Charter* damages claimant should *not* need to plead bad faith, since proving *Mackin* at step 3 is part of the defendant's burden. A similar approach can be taken to the holding in *Schachter*, which at step 3 could negate a compensatory damages

<sup>271</sup> *Ibid* at 43.

<sup>272</sup> *C.f.* McAllister, "Sterile Rules", *supra* note 158 at 374 (suggesting *Mackin* is based on dated and increasingly irrelevant foundation).

award based on the impossibility of determining whether a claimant would have been entitled to statutory benefits absent an infringement.

In conclusion, confining private law thresholds and the *Mackin* immunity to step 3 of the *Ward* framework is consistent with the allocation of burdens in steps 1 and 2. Step 3 is not an opportunity for the government to change the rules of the game in the middle of trial, requiring a *Charter* claimant to prove more than their burden in steps 1 and 2; rather, step 3 is an opportunity for government to negate the appropriateness and justness of damages in the circumstances by reference to how the claim might shake out in the non-*Charter* context. The *Mackin* immunity to combining 24(1) and 52(1) remedies may be raised by government in the same way; however, it is unclear why *Mackin* remains relevant given that the government can raise section 52(1) as an adequate alternative remedy to *Charter* damages.

### 5. The Role of Statutes on 24(1) - Court of Competent Jurisdiction

Both Roach and Linden note that the 2010 decision in *R v Conway* signals that several tribunals will have jurisdiction to award *Charter* damages.<sup>273</sup> Roach points out, however, that this jurisdiction to award *Charter* damages could be limited by legislation.<sup>274</sup>

Provincial courts remain on the outside of *Charter* damages. While this, too, could be amended by legislation, any chance for accused persons to obtain a damages remedy in criminal court – what Roach has called “one stop shopping” – is currently forbidden.<sup>275</sup> Although this restriction is inconvenient, the underlying rationale holds water: provincial courts are not procedurally equipped to handle damages claims of any sort, and damages may often be sought against a party that is not part of the proceeding. Long before *Ward*, Sossin and others raised concerns over this barrier for access to justice and Crown accountability.<sup>276</sup>

However, those same concerns may be assuaged by the prospect of *Charter* damages in Small Claims Courts. Roach notes that in Ontario, Small Claims Courts are a division of the Superior Court and would have jurisdiction to award *Charter* damages. The Small Claims route presents several appealing options:

<sup>273</sup> Roach, “Late Spring”, supra note 196 at 141-142; Linden, supra note 194 at 434.

<sup>274</sup> Roach, “Late Spring”, supra note 196 at 141-142.

<sup>275</sup> *Ibid* at 142.

<sup>276</sup> Sossin, “Crown Prosecutors”, supra note 79 at 398-400; Mullan, supra note 54 at 112.

litigants can come before the court without a lawyer, can raise claims without the fear of severe costs awards, and a higher number of individuals will have access to personal *Charter* remedies.<sup>277</sup>

Thus, while Superior Courts with civil jurisdiction remain the ideal forum for civil litigation through 24(1), *Ward* makes space for other quicker, less expensive options for enforcement of *Charter* rights.

## 6. Summary: A Unique Public Law Remedy

The *Ward* framework is the first comprehensive statement by the Court on how to award *Charter* damages. The four-step, sequential framework seeks to balance the interests of the *Charter* claimant and the government-defendant in order to determine a fair and functional remedy. The *Ward* framework is a principled method of determining whether *Charter* damages are “appropriate and just in the circumstances.”<sup>278</sup>

*Ward* presented the Court with a straightforward set of facts. The section 8 search and seizure infringement was well-established in *Golden*. Remedying this infringement with *Charter* damages is not a far stretch from remedying comparable intentional torts like assault or battery with damages. *Ward* does not raise the same policy issues as *Nelles*, where the defendants benefited from an historic Crown immunity, or *Schachter*, where the *Charter* infringement impugned a statute and sought both a section 52 and 24(1) remedy.<sup>279</sup> The straightforward facts led to a straightforward test for *Charter* damages which remains flexible enough to apply to any *Charter* infringement.

The Court made several firm doctrinal conclusions on direct liability, the statutory definition of a court of competent jurisdiction, and the functional purposes of *Charter* damages. The *Ward* Court was cognizant of its role within the 24(1) remedial menu by fitting the *Charter* damages remedy squarely within the purposive approach to remedies described in *Doucet-Boudreau*.<sup>280</sup> As I argue in Part IV of this paper, the *Ward* framework is entirely consistent with the *Charter* approach to personal remedies.

Despite the purely public law thrust of *Ward*, the Court believed that the *Ward* framework could require assistance from “private law” and “tort law” as it developed in future cases. The Court does not provide details on *which* private law causes of action or *which* torts are the most helpful in furthering the

<sup>277</sup> Roach, “Late Spring”, supra note 196 at 142.

<sup>278</sup> *Charter*, supra note 2, s 24(1).

<sup>279</sup> *Nelles*, supra note 104; *Schachter*, supra note 150.

<sup>280</sup> See *Ward*, supra note 1 at paras 20-21.

objectives of the *Charter* and *Ward*. The Court considered that private law thresholds and defences to individual liability may potentially be relevant to *Charter* damages cases; however, *Ward* clearly confined private law fault thresholds and immunities as countervailing *factors* rather than outcome-determinative hurdles.<sup>281</sup>

This holding becomes the central point of controversy in *Henry* and *Ernst*. Both cases reach the Court on preliminary motions prior to a trial which assess the sufficiency of the claimant's pleadings. Curiously, although step 3 of the *Ward* framework places the burden of raising immunities and private law fault thresholds on the government, the prevailing decisions in *Henry* and *Ernst* are entirely focused on whether the claimant's pleadings support a particular requirement at step 3.

As a sign of things to come, I will add that the *Ward* court uses the term "public law damages" nine times to distinguish damages under 24(1) from private law damages.<sup>282</sup> Tellingly, *Henry* and *Ernst* drop that terminology *entirely*.

## **B. *Henry v British Columbia***

In a 2013 reflection, Myles Frederick McLellan considers whether *Ward* may have opened a new path to compensation for the wrongfully convicted and a new form of accountability for police and Crown lawyers.<sup>283</sup> At the time of McLellan's writing, Ivan Henry was on his way to the Supreme Court of Canada seeking *Charter* damages against British Columbia.

In 1983, Henry was wrongfully convicted of 10 sexual offences. He spent 27 years in a penitentiary until a whistleblower from the Crown office brought forward exculpatory evidence that had never been disclosed to Henry at trial. The Crown's trial lawyer, who had since died, had withheld evidence that the police had twice arrested another suspect for the same crimes – a fact critical to Henry's defence.<sup>284</sup> In light of this new evidence, Henry was acquitted (though not an exonerated).<sup>285</sup> In 2011, Henry brought a *Charter*

<sup>281</sup> *Ibid* at para 43.

<sup>282</sup> *Ibid* at paras 22, 27, 29, 41, 56, 66, 69.

<sup>283</sup> Myles Frederik McLellan, "Innocence compensation: the private, public and prerogative remedies" (2013) 45 Ottawa L Rev 59 at 78-85 ("It is exceptionally likely that an exoneree who has been imprisoned wrongly has been subjected to any number of *Charter* breaches," at 90).

<sup>284</sup> *Henry*, supra note 3 at paras 9, 12, 122.

<sup>285</sup> *Ibid* at para 19, Moldaver J.

damages claim for the denial of his *Charter* right to make full answer and defence based on sections 7 and 11(d) of the *Charter*. British Columbia moved to strike the pleadings.<sup>286</sup>

The issue on appeal to the Supreme Court was whether a *Charter* damages claim against the Crown required an allegation of malice on the part of the prosecutor. Henry relied on the *Ward* framework to argue that the claimant is not required to plead malice in a *Charter* damages claim. British Columbia argued that Henry must plead malice in order to succeed on a *Charter* damages claim for the same policy reasons as those underpinning the *Nelles* and *Miazga* line of malicious prosecution cases.

The majority of four justices led by Justice Moldaver agreed in part, stating that malice is too high; instead, they articulated the threshold as “intentional.”<sup>287</sup> Justice Moldaver describes the “intentional” standard as a high standard, though lower than malice.<sup>288</sup> Requiring the claimant to prove that the Crown lawyer acted intentionally, the majority reasoned, would bar “marginal claims” from distracting prosecutors from their important roles and will counteract a chilling effect while still providing a remedy for the clearest cases.<sup>289</sup>

In doing so, the majority holding redefines the claimant’s burden at step 1 of the *Ward* test by defining a breach of the right to a fair trial through non-disclosure with four elements:

- (1) the prosecutor intentionally withheld information;
- (2) the prosecutor knew or ought reasonably to 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;
- (3) withholding the information violated his or her *Charter* rights; and
- (4) he or she suffered harm as a result.<sup>290</sup>

The test can be summarized as requiring a *Charter* infringement plus intentional action, reasonable foreseeability, as well as causation and harm.

<sup>286</sup> *Ibid* at para 22-24, Moldaver J.

<sup>287</sup> *Ibid* at para 31, Moldaver J.

<sup>288</sup> *Ibid* at para 31, Moldaver J.

<sup>289</sup> *Ibid* at paras 72, 78, Moldaver J.

<sup>290</sup> *Ibid* at para 85, Moldaver J.



This holding deviates from *Ward* in two important respects. First, it shifts the burden to prove private law fault from the defendant's burden in step 3 of the test to the claimant's burden at step 1. Second, elements 1, 2, and 4 mutate the *Ward* test by introducing over-generalized tort law doctrines that do not fit within the *Ward* framework. I will discuss these two deviations from *Ward* in detail below.

The concurring opinion, written by Chief Justice McLachlin and Justice Karakatsanis, strongly rejects the majority's new test. They would have applied *Ward* without modification. The concurring opinion identified that step 3 of the *Ward* test places the burden on the government to raise the applicability of private law policy rationales, and thus Henry should not have to plead facts sufficient to prove the defendant's case.<sup>291</sup>

The concurring judges distinguished the policy considerations for malicious prosecutions from *Charter* damages. Malicious prosecutions implicate individual liability and address the wide discretion to initiate and continue a prosecution, whereas this particular *Charter* claim is about direct liability of government and addresses the non-discretionary duty to disclose.<sup>292</sup> Based on these significant differences, the concurring justices declined to apply the same policy considerations informing the malice standard to Henry's *Charter* damages claim for non-disclosure. Thus, their opinion would have applied *Ward* without shifting any burdens or importing tort law into the *Charter* analysis. While their analysis fundamentally disagrees with the majority's, they concurred in the outcome of the application – denying the defendant's motion and sending the matter to trial.

McLennan's hope that *Ward* would create a new path to vindication and accountability for wrongful convictions was set back in *Henry*. The majority opinion drew substantial criticism. Brooke MacKenzie expresses her preference for the concurring reasons, arguing that "the Supreme Court's majority decision in *Henry* is an unfortunate step backward for the law of *Charter* damages, and has once again introduced uncertainty into an area that was only recently clarified."<sup>293</sup> Sossin, writing about *Henry* as part of an overview of constitutional cases in 2015, expresses a similar view: "notwithstanding the principled stand taken by the concurring minority, *Henry* calls into question the Court's resolve under the *Charter* to ensure against rights without remedies."<sup>294</sup> Hart Schwartz and Anthony Robert Sangiuliano, who represented

<sup>291</sup> *Ibid* at para 108, McLachlin CJC and Karakatsanis J.

<sup>292</sup> *Ibid* at para 128, McLachlin CJC and Karakatsanis J.

<sup>293</sup> MacKenzie, *supra* note 197 at 360.

<sup>294</sup> Lorne Sossin, "Constitutional Cases 2015: An Overview" (2016) 76 SCLR (2d) 1 (Lexis) at para 55 [Sossin, "Overview"].

Ontario as intervener in this case, appreciated that the Court “recalibrated” *Ward* into a “pragmatic, realistic, and practical approach” for government liability.<sup>295</sup>

The balance of the literature on *Henry* is focused on his wrongful conviction, not on 24(1) remedies.<sup>296</sup> My focus here is on how the majority of the Court applied over-generalized tort doctrines within the *Ward* framework to answer a constitutional question, with due acknowledgement that the issues raised by this case go far beyond what *Charter* damages alone can fix.<sup>297</sup>

### 1. Who Proves What?

In *Henry*, the majority decision makes significant changes to step 1 of the *Ward* test. Although the majority attempts to limit their decision to cases of wrongful non-disclosure only, their decision sets a precedent for how to import over-generalized tort law into the *Charter* damages framework.

The concurring opinion would have applied *Ward* without modification. At step 1, *Ward* requires the claimant to prove a *Charter* infringement. In this case, the concurring justices had no problem finding that the undisclosed exculpatory evidence undoubtedly constituted a *Charter* violation.<sup>298</sup> Note, however, that the concurring justices did not refer to the leading cases on constitutional disclosure obligations, *R v Stinchcombe* and *R v McNeil*, presumably because the events in *Henry*’s case took place in the *Charter* era but before either of those landmark decisions.<sup>299</sup>

At step 2, the concurring justices asked whether *Henry*’s claim engaged the purposes of compensation, vindication, or deterrence, and found that the egregious circumstances surrounding his wrongful

<sup>295</sup> Hart Schwartz & Anthony Sangiuliano, “The Pragmatic Limits of Access to Justice” (2016) 76 SCLR (2d) 193 at 193.

<sup>296</sup> See for example Ryan Elias, “Unlikable and Before the Jury: Does Non-Probative Character Evidence Increase the Risk of Wrongful Conviction?” 2016 63 CLQ 567; Bruce A MacFarlane, Wrongful Convictions: Drilling Down to Understand Distorted Decision-Making by Prosecutors, 2016 63 CLQ 439; Emma Cunliffe and Gary Edmond, “Reviewing Wrongful Convictions in Canada”, 2017 64 CLQ 473; Emma Cunliffe, “Henry v British Columbia: still seeking a just approach to damages for wrongful conviction”, (2016) 76 SCLR (2d) 143 [Cunliffe, “Still Seeking”]; The journey of Ivan Henry has also spawned a book, Joan McEwen, *Innocence on Trial: The Framing of Ivan Henry* (Toronto: Heritage House Publishing, 2015).

<sup>297</sup> As beat journalist Ian Mulgrew opined, “Seven years after being freed from 27 years of wrongful imprisonment and still squabbling over compensation? Who’s kidding whom? It looks to me like incessant “process” passing itself off as “justice” and mocking our belief in timely fairness. Or maybe, as the 70-year-old Henry fears, the provincial government and legal elite embarrassed at how they treated him are hoping he’ll to die before they have to cut a cheque.” Ian Mulgrew, “Ivan Henry’s ‘justice’ still denied by B.C. government, legal system”, *Vancouver Sun* (24 November 2016), online: <<http://vancouver.sun.com/news/national/ian-mulgrew-ivan-henrys-justice-still-denied-by-b-c-government-legal-system>>.

<sup>298</sup> *Henry*, supra note 3 at paras 109-111, McLachlin CJC and Karakatsanis J.

<sup>299</sup> *R v Stinchcombe*, [1991] 3 SCR 326 [*Stinchcombe*]; *R v McNeil* 2009 SCC 3 [*McNeil*].

conviction engaged all three purposes: compensation for “for the hardships Mr. Henry has endured”,<sup>300</sup> vindication to “recognize the state’s responsibility for the miscarriage of justice”,<sup>301</sup> and deterrence so that “the state [will] remain vigilant in meeting its constitutional obligations.”<sup>302</sup>

The concurring opinion would have ended its analysis there. They determined that the claimant had pled facts sufficient to discharge its burden under *Ward*. They did not proceed to step 3 as, on this motion challenging the pleadings, it was not necessary to look at the defendant’s burden to raise countervailing factors. The motion would have been dismissed, the case would have proceeded to trial for proof of those elements and, if proven, the defendant could attempt to prove that damages are not the “appropriate and just” remedy for this particular case at step 3 of the *Ward* framework.

I must stress that the concurring justices’ approach is the correct application of the *Ward* framework; however, the government’s motion capitalized on an ambiguity in *Ward*. In its discussion of step 3, *Ward* permits the government to raise policy considerations drawn from comparable private law claims, including malicious prosecution actions, as an argument against awarding *Charter* damages.<sup>303</sup>

One reading is that step 3 can negate the claimant’s argument in favour of the damages remedy at step 2, but would not change the determination of whether the *Charter* breach could be remedied by a different remedy. This is the concurring justices’ view. The majority, however, holds that private law policy rationales raised at step 3 can justify changing the claimant’s burden at step 1. This is the sticking point in *Henry*.

The majority decision makes two holdings with wide-ranging implications. The first is that it shifts the burden of proving fault to the claimant. This is a private law paradigm that is inconsistent with the *Ward* framework’s commitment to finding a *Charter* breach then balancing the reasons for and against awarding damages. The private law paradigm, appearing in *Henry* as an over-generalized approach to negligence and intentional torts, requires the *Charter* claimant to prove that the prosecutor’s conduct was, essentially, blameworthy.

The second is that this holding appears to create two standards of enforcing the *Charter* right to make full answer and defence depending on the process. *Henry* is explicit that in the civil process, brought through

<sup>300</sup> *Henry*, supra note 3 at para 14, Moldaver J.

<sup>301</sup> *Ibid* at para 115, McLachlin CJC and Karakatsanis J.

<sup>302</sup> *Ibid* at para 116, McLachlin CJC and Karakatsanis J.

<sup>303</sup> *Ward*, supra note 1 at para 43.

the *Ward* framework, the claimant at step 1 must prove intent, reasonable foreseeability, a *Charter* infringement (ostensibly through a *Stinchcombe* or *McNeil* violation), and harm and causation.<sup>304</sup> Meanwhile, in the criminal process, an accused need only prove a *Stinchcombe* violation - that all relevant evidence was not disclosed and the Crown could not fit that disclosure into an exception – without reference to intent, reasonable foreseeability, harm or causation. In other words, the right to a fair trial for the wrongfully convicted – a live issue in Canada – is harder to remedy once the damage is done. The Court’s holding on this point approaches tone-deafness. When determining the requirements for a *Charter* remedy, more attention should be paid to the social circumstances in which these infringements tend to occur.<sup>305</sup> There is no principled reason why remedying a *Stinchcombe* breach should be more difficult after a conviction than before, particularly given that failures to disclose often require, as in *Henry*’s case, the good-will of an internal whistleblower to even be discovered.<sup>306</sup>

Indeed, the majority’s four-step test requiring intention, reasonable foreseeability, a *Charter* breach, and causation and harm, looks much less like an application of *Ward* to *Stinchcombe* violations and more like an entirely new tort. The *Charter* infringement is minimized by piling overgeneralized tort principles into step 1 of the *Ward* framework.

Despite its attempt to limit it to disclosure issues only, the majority’s decision provides a roadmap for how to warp the *Ward* framework with private law paradigms. It permits defendants in future cases to bring motions against pleadings that shift the focus away from *Charter* rights and towards the government’s conduct. Sossin made a similar observation in his comment on the *Nelles* decision in 1993. The Supreme Court’s decisions on malicious prosecution were made on preliminary motions in an “evidentiary vacuum,” leading Justice Lamer to state that the prosecutorial immunity “ultimately boils down to a question of policy.”<sup>307</sup> The same problem reoccurs in *Henry*,<sup>308</sup> where the majority makes substantial changes to the *Ward* framework based entirely on policy arguments.

In sum, shifting the burden of proving fault to the claimant at step 1 of the *Ward* framework only serves to obscure the balancing of interests in steps 2 and 3. The results are far-reaching, and I spend the balance of my discussion of *Henry* explaining how this error led to several problematic holdings.

<sup>304</sup> *Henry*, supra note 3 at para 85, Moldaver J.

<sup>305</sup> *Ibid* at para 132, McLachlin CJC and Karakatsanis J. (noting that most *Charter* breaches of this nature are dealt with within the criminal process and only rarely are raised after conviction).

<sup>306</sup> *Ibid* at para 18, Moldaver J.

<sup>307</sup> Sossin, “Crown Prosecutors”, supra note 79 at 383, citing *Nelles*, supra note 104 at 199, Lamer J.

<sup>308</sup> MacKenzie, supra note 197 at 380-381 (“the threshold requirement... was imposed by the majority in the context of a pleadings motion, without working through the framework to assess the claim on the merits”).

## 2. Step 3: Fear of Hypothermia

The Court's basis for shifting the burden of proving fault to the claimant is based on the Court's concern for Crown lawyers catching hypothermia - the combined effect of being cold in the chilling of their responsibilities and wet from the flood of litigation. Of course, on this theory, *both* are not possible - either they will be chilled and there will be less litigation, or they will not be chilled and be flooded with litigation. The Attorney General of British Columbia presented both rhetorical arguments without evidence.<sup>309</sup> The Court accepted both arguments, considering these policy concerns to be "very real."<sup>310</sup>

The majority's deferential approach to good governance defences is problematic.<sup>311</sup> While the Court accepted that the chilling effect and floodgates rationales will have a negative impact on government, it did not make the connection to how these rationales would negatively affect the public interest. Good governance is for the good of the governed. The majority's decision shows more concern for the *status quo* of government operations, a particularly unconvincing concern given the claimant's proven *Charter* breach for a wrongful conviction.

### *a. Is it Cold in Here? The Chilling Effect Rationale*

Justice Moldaver summarized the chilling effect rationale as a phenomenon where Crown counsel are "motivated by fear of civil liability" rather than the public interest.<sup>312</sup> According to Justice Moldaver, disclosure decisions should be based on "legal principle" rather than "the spectre of liability."<sup>313</sup>

Disclosure decisions, some have argued, are not straightforward because the *Stinchcombe* standard of "relevant evidence" is a shifting bar that changes with the stage of the criminal proceeding.<sup>314</sup> However, it seems the worst result of the ghoulish consequence of erring on the side of more disclosure is simply more fairness to the accused.<sup>315</sup>

<sup>309</sup> *Ibid* at 373.

<sup>310</sup> *Henry*, supra note 3 at para 41, Moldaver J.

<sup>311</sup> Justin Safayeni, "Improving the Effectiveness of the Constitutional Damages Remedy: Vancouver (City) v Ward" (2017) 47 *Advocates' Quarterly* 121, at 125-126, (arguing for a higher level of scrutiny to these rationales).

<sup>312</sup> *Henry*, supra note 3 at para 40, Moldaver J.

<sup>313</sup> *Ibid* at para 73, Moldaver J.

<sup>314</sup> Schwartz & Sangiuliano, supra note 295 at 212. This argument can be disturbingly extended so far as to declare that "Absent defence disclosure, the prosecutor cannot know the defence's theory of the case", at 211 - the implication being that disclosure providing a defence to the accused is not relevant until the accused raises that defence.

<sup>315</sup> MacKenzie, supra note 197 at 374.

Sossin is likewise unconvinced by the chilling effect arguments, finding it “as unsavoury as it is unpersuasive.”<sup>316</sup> He questions why prosecutors are treated “as a vulnerable group who need protection,”<sup>317</sup> and in any event, why the prosecutor’s vulnerabilities would be relevant in the context of direct liability of government.<sup>318</sup> To Sossin, “private law perspectives simply are unsuited to the test of identifying and enforcing public and constitutional duties.”<sup>319</sup>

The chilling effect rationale skates by scrutiny on very thin ice. The *Ward* decision had ostensibly ended the reflexive use of the chilling effect rationale, but *Henry* affirmed its central role in the 24(1) remedies milieu.

### ***b. Is it Wet in Here? The Floodgates Rationale***

The Floodgates Rationale is best explained by its namesake. The purpose of a floodgate is to divert the flow of water and avoid flooding. Where the water is legal claims and the gates are a filter for merit, the flood is too much meritless litigation in courthouses. The floodgates can be opened and closed, for example, through creative implementation of administrative bodies or mandatory out-of-court mediation.

A flood of litigation can be a strain on judicial resources. In *Henry*, the Court was concerned that a low threshold for constitutional liability arising from disclosure breaches would “force prosecutors to spend undue amounts of time and energy defending their conduct in court instead of performing their duties.”<sup>320</sup> The Court clarifies that without a liability threshold, a claim alleging “a relatively minor breach with minimal harm” could lead to “opening the floodgates to scores of marginal claims.”<sup>321</sup>

Of course, there can only be scores of marginal claims if there are scores of disclosure breaches. Though some have praised Justice Moldaver’s decision for properly reflecting on the “everyday, real-life work of an Assistant Crown Attorney,”<sup>322</sup> one would think that scores of *Charter* breaches should not be a part of the job description. Indeed, if there are scores of casual disclosure breaches, it might even be called a complacent attitude towards *Charter* obligations.

<sup>316</sup> Sossin, “Overview”, supra note 294 at para 52.

<sup>317</sup> *Ibid.*

<sup>318</sup> *Ibid.*

<sup>319</sup> *Ibid.*

<sup>320</sup> *Henry*, supra note 3 at para 40, Moldaver J.

<sup>321</sup> *Ibid* at para 78, Moldaver J.

<sup>322</sup> Schwartz & Sanguiliano, supra note 295 at 208.

The concurring judges point out that most disclosure issues are resolved within the criminal process and only rarely after a conviction at trial.<sup>323</sup> From that perspective, there are no marginal claims – only wrongful convictions carrying varying degrees of prejudice and harm. Indeed, after *Ward*, a case involving police misconduct at a relatively low end of fault, the statistics indicate no rush to the court filing office.<sup>324</sup> Is there much more to the fear of being swamped by *Charter* damages litigation than legal antipathy?

Roach points out that the *Ward* Court dismissed the general demurring from government about chilling effects and floodgates because “compliance with *Charter* standards is a foundational principle of good governance.”<sup>325</sup> In *Henry*, the majority seems to suggest that *Charter* compliance is only important in big cases. This holding should be resisted.

Even assuming that *Henry* is correct in focusing its concern on serious infringements only, why would the *Ward* framework not be up to the challenge?<sup>326</sup> For example, where a serious and intentional failure to disclose resolves in an acquittal, one would wonder if the claimant could satisfy their burden, at step 2 of *Ward*, to prove their need for compensation or vindication. Deterrence may be engaged, but several alternative remedies and procedures could satisfy that purpose, including costs, a declaration, or potentially through complaints through the law society or Ministry of the Attorney General. In other words, *Ward* is equipped with adequate tools for dealing with so-called marginal claims.

The majority was clear in its acceptance of the rote, abstract application of the chilling effect rationale and floodgates rationale. In order to protect Crown lawyers from hypothermia, the Court wrapped them in a blanket of immunity for *Charter* infringements that fall below the level of intentional fault.

### 3. Intentional Negligence

<sup>323</sup> *Henry*, supra note 3 at para 132, McLachlin CJC and Karakatsanis J.

<sup>324</sup> MacKenzie, supra note 197 at 373 (“Following its development in *Ward*, the framework for assessing *Charter* damages claims has been applied in only a handful of reported decisions – it certainly does not appear to have resulted in a litany of claims. Although some claims for *Charter* damages have made it through the pleadings stage, it would not be fair to say that *Ward* opened the floodgates.”)

<sup>325</sup> *Ward*, supra note 1 at para 38; Roach, “Late Spring”, supra note 196 at 150 (He further notes, “It is especially significant that s. 24(1) damage claims will be levied against governments and not against individual officials who may be more susceptible to being overdeterred”, at 150-151).

<sup>326</sup> MacKenzie, supra note 197 at 376.



The majority decision in *Henry* relies on private law tort rationales to create its “intentional” standard – lower than malice, but high enough to exclude marginal claims.<sup>327</sup> What is unclear is which specific area of tort law the majority believes is best suited to guide a *Charter* damages claim. As I explain here, the Court relies on an over-generalized approach to tort principles. In the majority’s attempt to describe a standard lower than malice but higher than gross negligence, it creates an innominate chimera.

Recall that the four-part test to be applied at step 1 of the *Ward* framework for unconstitutional disclosure obligation requires intent, reasonable foreseeability, a *Charter* violation, and that the violation caused harm.<sup>328</sup>

The element of intentional withholding of disclosure conjures intentional torts, or something similar to the deliberate action necessary to establish misfeasance of public office.<sup>329</sup> Justice Moldaver’s use of the reasonable foreseeability element seems to call on the tort of negligence.<sup>330</sup> Likewise, the requirement for causation and harm could be with respect to their definition in the tort of negligence, or their broader application in private law torts.

Justice Moldaver takes great pains to explain that he rejects malice as the appropriate standard for nondisclosure cases.<sup>331</sup> Likewise, he firmly rejects the tort of negligence, arguing that “a negligence-type standard poses considerable problems, and ought to be rejected.”<sup>332</sup> He insists that pairing the intention element with reasonable foreseeability establishes a standard that will “rise above a purely objective ‘reasonableness’ or ‘marked departure’ standard grounded in a duty of care paradigm.”<sup>333</sup>

Despite Justice Moldaver’s insistence that this standard rejects malice, Sossin reads the four-part test and does not see a meaningful difference between it and malice.<sup>334</sup> Indeed, it does appear that way. Likewise, despite Justice Moldaver’s insistence that this standard is not based on the tort of negligence, Schwartz and Sangiuliano focus on the words *would know, or would reasonably be expected to know*, and see the standard of care from the tort of negligence.<sup>335</sup> Indeed, it does appear that way, too.

<sup>327</sup> *Henry*, supra note 3 at para 41, Moldaver J.

<sup>328</sup> *Ibid* at para 85, Moldaver J.

<sup>329</sup> See for example *Odhavji*, supra note 18 at para 30.

<sup>330</sup> See for example *Cooper*, supra note 19 at para 41.

<sup>331</sup> *Henry*, supra note 3 at paras 52-66, Moldaver J.

<sup>332</sup> *Ibid* at para 74, Moldaver J.

<sup>333</sup> *Ibid* at para 88.

<sup>334</sup> Sossin, “Overview,” supra note 294 at para 55.

<sup>335</sup> Schwartz & Sangiuliano, supra note 295 at 211.



The standard set out in *Henry* must be more than a Rorschach test; or, there must be an explanation as to how Justice Moldaver can explicitly reject both malice and negligence but create a test that looks like both malice and negligence.

The answer to this question may be found in a broader trend in tort law in Canada and abroad. Varuhas describes “the imperialism of negligence-type thinking,”<sup>336</sup> a phenomenon in which the phrase “tort law” has become synonymous with the tort of negligence.<sup>337</sup> The dominance of the tort of negligence has been observed in Canada as well, exemplified by “the intrusion of fault concepts into other areas of tort law,” including “strict liability torts... diluted by fault concepts.”<sup>338</sup> Tort law broadly has “drifted incrementally and erratically towards greater generalization and integration” focused around negligence concepts.<sup>339</sup>

This trend throughout the world and in Canada could explain the apparent paradox in the *Henry* majority’s decision. In the context of *Charter* damages, the Court should resist the temptation to use over-generalized private law tort doctrines within the *Ward* framework. Any reference to private law within *Ward* ought to be particularly identified and specifically grounded in *Doucet-Boudreau*’s purposive approach to *Charter* remedies.

#### 4. Causation and Harm

The over-generalization of tort law is problematic not only because it lacks purposive grounding, but also because it is simply incompatible with the rest of the *Ward* test. In particular, Justice Moldaver’s requirement that the victim of the *Charter* infringement “suffered harm as a result”<sup>340</sup> imports causation and harm from the tort of negligence into step 1 of the *Ward* framework as part of the claimant’s *prima facie* case.

As the concurring justices point out, requiring the claimant to prove causation and harm at step 1 has serious consequences for step 2. Vindication and deterrence, as defined by *Ward*, are not guided by harm to the individual, but rather are intended to promote *Charter* rights and *Charter* compliance.<sup>341</sup> In practical terms, the majority holding in *Henry* limits *Charter* damages in nondisclosure cases to compensation only.<sup>342</sup> Limiting damages to material harm is entirely inconsistent with the purposes of

<sup>336</sup> Varuhas, supra note 256 at 66.

<sup>337</sup> *Ibid* at 74.

<sup>338</sup> Osborne, supra note 263 at 467.

<sup>339</sup> *Ibid* at 470.

<sup>340</sup> *Henry*, supra note 3 at para 85, Moldaver J.

<sup>341</sup> *Ward*, supra note 1 paras 28-29.

<sup>342</sup> *Henry*, supra note 3 at paras 117-118, McLachlin CJC and Karakatsanis J.

vindication and deterrence outlined in *Ward*. Similarly, only permitting vindication and deterrence damages to flow alongside compensation is likewise inconsistent with step 2 of *Ward*, which permits *Charter* damages for *any* of the three purposes.

The majority lists several examples of how harm and causation can be proven. Beginning with the most obvious – an historical wrongful conviction – the majority would also approve of *Charter* damages where a failure to disclose resulted in an acquittal if the claimant can show “that the charges would have been dismissed or withdrawn at an earlier stage of proceedings had proper disclosure been made.”<sup>343</sup> Frankly, I do not understand how that is possible, since withdrawal of charges is part of the prosecutor’s core discretion protected by the malice standard in *Miazga*.<sup>344</sup> Indeed, being prosecuted is not in itself a “legally cognizable harm” – only *malicious* prosecution rises to that level.<sup>345</sup> This suggests to me that the *Charter* damages claim in *Henry* shares more in common with malicious prosecution than the majority is willing to admit.

Furthermore, causation and harm carry with them other negligence doctrines that the majority does not mention. For example, factual causation on the “but for” standard carries with it the notions of joint causation or alternative causes. Thus, where a peaceful protest is broken up by police in riot gear just as a rainstorm begins, would the police escape liability for their unconstitutional act because the weather was another factual cause of the protest dispersing? Would the Court engage in analysis of whether the police in riot gear were a “substantial factor” on the interference of the right? Would only those with umbrellas qualify for compensatory damages? Notice that none of these questions about causation address the real issue: whether the police infringed the protesters’ section 2 rights. Requiring elements of harm and causation shifts the focus from the constitutional injury to meandering inquiries about compensable harm.

## 5. Direct Liability: A Problem

In *Henry*, Justices McLachlin and Karakatsanis repeated the importance of the distinction between *Charter* damages and private law damages: “*Charter* liability flows from the constitutionally entrenched mechanisms that permit individuals to hold the state to account. This is distinct from tort liability, which imposes conduct-based thresholds to regulate tortious conduct as between individuals.”<sup>346</sup>

<sup>343</sup> *Ibid* at para 96, Moldaver J.

<sup>344</sup> *Miazga*, supra note 18 at para 45.

<sup>345</sup> *Henry*, supra note 3 at para 96, Moldaver J.

<sup>346</sup> *Ibid* at para 129, McLachlin CJC and Karakatsanis J.

This passage highlights two important distinctions between *Charter* damages and private law cases against prosecutors: the defendant in a *Charter* damages claim is the institution, not the individual, and the *Charter* imposes obligations on the government itself, not necessarily on the individual's private conduct.

Sossin comments on these distinctions, noting that the *Henry* majority's focus on the blameworthiness of the individual Crown lawyer is disconnected from the government's *Charter* obligations.<sup>347</sup> Sossin argues that the focus should not be on individual conduct, but on "unjustified harm imposed on those subject to state authority flowing from breaches of their rights under the Charter."<sup>348</sup> The key word is 'unjustified', recalling that *Charter* rights are limited by the government's ability to justify its infringing conduct.

Justice Moldaver dismisses the significance of direct liability. For example, in discussing the chilling effect, he argues that civil liability of government affects the individual Crown lawyers because "Like all lawyers, Crown counsel are professionals who jealously guard their reputations and whose actions are motivated by more than personal financial consequences."<sup>349</sup> The difficulty is that when a Crown lawyer's motives are implicated in a *Charter* case, they do not have the right to defend themselves. The reputation they guard so jealously might not be so jealously guarded by the defendant in *Charter* cases – their employer, the Ministry of the Attorney General.

Indeed, based on the circumstances of a particular case, the Attorney General's office, as the defendant in a *Charter* damages claim, might have an interest in distancing itself from its employee. The non-party Crown lawyer does not have the right to testify and certainly does not have the right to marshal evidence in defence of her reputation. It could take as little as an agreed statement of facts for a Crown lawyer's reputation to be tarnished without due process. If the same Crown lawyer later faced a disciplinary hearing through the law society – or, in other circumstances, a police officer in a disciplinary hearing – then the tribunal might be bound, or at least significantly influenced, by the holding of the Superior Court that this individual government actor was at fault in the *Charter* claim; potentially worse, the evidence raised by the individual government actor at the later hearing would call into question the evidence heard in the *Charter* damages case, resulting in inconsistent and incomplete holdings. The reputation of individual government employees should be a concern for *Charter* damages doctrine.

Surely this is an unintended consequence of the *Henry* holding. It is, however, symptomatic of the majority's conflation of private law principles and the *Ward* framework.

<sup>347</sup> Sossin, "Overview", supra note 294 at para 53.

<sup>348</sup> *Ibid.*

<sup>349</sup> *Henry*, supra note 3 at para 80, Moldaver J.

Instead of using step 3 of the *Ward* framework to consider the fault of individuals, it could be used to consider the fault of the institution. Rather than focus on the chilling effect of individual government agents, a better question would be whether imposing liability on the Attorney General's office will have a chilling effect on prosecutions in that local courthouse, province-wide, or nation-wide. Indeed, framing the step 3 discussion in this context sounds far more like a "good governance" concern about Ministry resources, local policies and practices, and serving the public interest. Clearly, these systemic concerns are more relevant to good governance than a single person's conduct.

Direct liability should be a driving force in sharpening *Charter* damages doctrine in future cases. As it stands, ignoring the significance of direct liability, as the majority in *Henry* did, can lead to troubling unintended outcomes.

## 6. New Trial, Settlement, and Appeal

After the Supreme Court's decision, Henry amended his pleadings, settled out of court with the City of Vancouver and the federal government, and proceeded to trial against the province only.

A brief review of the trial shows that the infiltration of private law principles reached a peak. Justice Hinkson's decision is replete with tort language, including determining that Henry was a "thin skull" plaintiff because he was "mentally destabilized at the time he was making important decisions about trial matters."<sup>350</sup> Rather perversely, Justice Hinkson reduced part of the overall damages award on the grounds of causation, because "had Mr. Henry not been convicted in 1982, it is probable that he would have continued to offend with some frequency as a relatively petty criminal, and found himself incarcerated at various intervals for approximately one-third of the time that he did spend in custody between 1982 and 2009."<sup>351</sup> In other words, despite being imprisoned for crimes he did not commit, his compensation was reduced for crimes he did not commit. This application of private law tort doctrines in the constitutional context is unsettling. The remedy for a due process infringement by the Crown was reduced for what can only be described as a further lack of due process by presuming Henry would have committed crimes if he only had the chance.

<sup>350</sup> *Henry v British Columbia*, 2016 BCSC 1038 (CanLII) at para 71 [*Henry* trial]; see Cunliffe, "Still Seeking", supra note 296 at 145.

<sup>351</sup> *Henry* trial, supra note 350 at para 392.

In a decision to exclude the Vancouver Rape Relief as interveners, Justice Hinkson explicitly referred to the case as “Private litigation between the two remaining parties, albeit one a government actor.”<sup>352</sup> Emma Cunliffe observes that neglecting the public aspect of the case had a detrimental effect on *Charter* rights: “Reconstructed as private litigation, the *Henry* trial ultimately denied the complex and multidimensional approach to Charter rights.”<sup>353</sup>

Private law resurfaced once more in *Henry*, this time after the completion of his trial. Justice Hinkson awarded Henry an astounding total of \$8,086,691.80 in damages against the province.<sup>354</sup> British Columbia argued, successfully, that the damages amount should be reduced by the amounts of the settlements with the City of Vancouver and the federal government, which totalled approximately 5 million dollars.<sup>355</sup> Henry argued that applying the principle of double-recovery mechanically would frustrate the purposes of deterrence and vindication identified in *Ward*.<sup>356</sup> The British Columbia Court of Appeal rejected that argument and ordered that the province’s damages be reduced by the total amounts of the settlements.<sup>357</sup>

The net result might be correct by the numbers, but it seems to frustrate the function of *Charter* damages in vindicating the particular *Charter* wrong of each defendant and deterring each defendant’s bad conduct.

These subsequent decisions obliterate the “uniquely public law” remedy described in *Ward*.

## 7. Summary: A Uniquely Troubled Public Law Remedy

The *Henry* decision does significant disservice to the “uniquely public law remedy” described in *Ward*. Whereas *Ward* frequently used the term “public law damages” to distinguish the 24(1) remedy for its tortious cousin, that phrase is never used in *Henry*.

The shift in language is apparent in the substance of the *Henry* majority’s decision. Based on a comparison between malicious prosecution and a *Charter* claim for nondisclosure, the majority imports overly-generalized tort law doctrines to create an unclear doctrine for *Charter* damages claims for failures

<sup>352</sup> Cunliffe, “Still Seeking”, supra note 296 at 166, quoting *Henry* trial, supra note 350 at para 24. Justice Hinkson also applied the concepts of contributory negligence and failure to mitigate damages, concluding that the total award would not be reduced on either ground, at para 472.

<sup>353</sup> Cunliffe, “Still Seeking, supra note 296 at 167.

<sup>354</sup> *Henry* trial, supra note 350 at para 473.

<sup>355</sup> *Henry v British Columbia (Attorney General)*, 2017 BCCA 420 (CanLII) at para 5 [*Henry* BCCA].

<sup>356</sup> *Ibid* at para 68.

<sup>357</sup> *Ibid* at para 72.

to disclose. The majority attempts to confine their holding to these narrow factual circumstances,<sup>358</sup> but its reasoning is too easily adaptable to other *Charter* damages scenarios.

The majority's decision mutates *Ward* by shifting the burden of raising fault from the defendant's burden in step 3 to the claimant's burden at step 1. The result is that courts will focus on whether the conduct of the Crown lawyer is worth punishing, rather than ask the important question: whether imposing liability on the Ministry of the Attorney General has a negative effect on good governance. This is a disappointing change to the *Ward* framework which reappears in *Ernst*.

The private law rationales come into the *Ward* framework from what I have called the concern for hypothermia based on the chilling effect and floodgates rationales. Adopting these rationales without evidence, the majority dismissed of the importance of direct liability of government in *Charter* damages claims, creating the unintended consequence of placing a Crown lawyer's conduct as the centre of a case to which the lawyer is not a party. Direct liability should mean that inquiries into fault should be focused directly on the actual defendant, not the defendant's arms-length employee. Not only do individual government agents stand to suffer without due process, but the entire inquiry misses the point of achieving good government through *Charter* compliance.

Among the more confusing aspects of the holding is the majority's test requiring the claimant prove that the prosecutor was acting both intentionally, unreasonably, and also resulting in a *Charter* breach. The over-generalized tort principles used crafting the majority's holding are disconnected from the *Doucet-Boudreau* definition of purposive remedies. Indeed, other tort law principles that the majority invites into step 1 of the *Ward* framework, like causation and harm, are incompatible with the purposes of deterrence and vindication in step 2. The net result is an unprincipled *Charter* damages doctrine.

The trial after the Supreme Court decision highlights precisely how the *Henry* decision took a "uniquely public law remedy" and turned it into a novel tort action. Henry's *Charter* claim was resolved on purely private law grounds.

Henry's odyssey to vindication reflects an extreme reliance on private law in awarding *Charter* damages. In this next section, I argue that the over-generalized private law principles in *Henry* directly influenced the troubling decision by the plurality in *Ernst*. Public law damages in *Ward* are now encumbered by a host of invasive private law elements.

<sup>358</sup> *Henry*, supra note 3 at para 33, Moldaver J.

### ***C. Ernst v Alberta Energy Regulator***

Prior to the Supreme Court's decision in *Ernst v Alberta Energy Regulator*, law student Julia Kindrachuk wrote a case comment on the Alberta Court of Appeal decision suggesting the Supreme Court dutifully apply the *Ward* framework and “protect the constitutionally-entrenched judicial discretion” to award 24(1) damages.<sup>359</sup> I suspect Kindrachuk was disappointed to learn that the *Ernst* decision instead came to the rather unwarranted conclusion that *Charter* damages would *never* be appropriate and just against a tribunal in any circumstance.<sup>360</sup> The Court's three opinions are divided along similar lines as the *Henry* Court, namely over how private law tort principles ought to guide the *Ward* framework for *Charter* damages.

*Ernst*'s claim began with a complaint about local hydraulic fracturing (or fracking) contaminating her drinking water.<sup>361</sup> After a series of complaints to the Alberta Energy Regulator (the “Board”), she was informed that the Board would no longer accept her correspondence unless she refrained from criticizing it in the media.<sup>362</sup> *Ernst* alleged in her statement of claim that the provincial tribunal infringed her *Charter* guarantee to freedom of expression when, in essence, it punished her for publicly criticizing the Board.<sup>363</sup> She also made a claim in negligence against the Board for the harm caused by its negligent enforcement of their environmental protection mandate. The Board countered by arguing that a statutory immunity contained in the *Energy Resources Conservation Act* (“*ERCA*”) was an absolute bar to both her claim in negligence and her *Charter* damages claim. As in *Henry*, the Supreme Court received the appeal on summary judgment.

The immunity clause relied upon by the Board reads:

No action or proceeding may be brought against the Board or a member of the Board ... in respect of any act or thing done purportedly in pursuance of this Act, or any Act that the Board

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<sup>359</sup> Julia Kindrachuk, “Statutory Immunity from Charter Damages: *Ernst v Alberta Energy Regulator*” (2015) 78 Sask L Rev 379 at 395.

<sup>360</sup> *Ernst*, supra note 4 at para 24, Cromwell J.

<sup>361</sup> “Jessica Ernst's fracking case to be heard by Supreme Court of Canada”, *Canadian Press* (30 April 2015) online: CBC News <<http://www.cbc.ca/news/canada/calgary/jessica-ernst-s-fracking-case-to-be-heard-by-supreme-court-of-canada-1.3055627>>

<sup>362</sup> *Ernst*, supra note 3 at paras 136-144, McLachlin CJC, Moldaver and Brown JJ.

<sup>363</sup> *Ibid* at para 144, McLachlin CJC, Moldaver and Brown JJ.

administers, the regulations under any of those Acts or a decision, order or direction of the Board.<sup>364</sup>

Justice Cromwell, writing for four justices in the majority on the disposition of the case, made two holdings. The first is that it is plain and obvious that the statutory immunity bars the *Charter* damages claim.<sup>365</sup> Justice Cromwell points out that Ernst herself argued that the statutory immunity clause barred her *Charter* damages claim – indeed, it was the basis of her appeal to challenge the constitutionality of the statutory immunity.<sup>366</sup> The second is that the statutory bar is not unconstitutional.<sup>367</sup> The reason for this holding is perplexing: Justice Cromwell held that *Charter* damages would *never* be appropriate and just against a tribunal on the basis of common law quasi-judicial immunities to damages, and therefore the statutory immunity does not unconstitutionally bar access to a 24(1) remedy.<sup>368</sup> The plurality found in favour of the Board and struck the pleadings.<sup>369</sup>

Justice Abella, writing for herself but joining Justice Cromwell in the outcome, agreed that the statutory immunity bars Ernst's *Charter* damages claim, but emphasized that the record on the constitutional question was deficient.<sup>370</sup> Her separate opinion was written to indicate that she would have disposed of the appeal on procedural grounds: Ernst had not notified the Attorney General of her constitutional claim, and therefore her appeal should fail.<sup>371</sup>

Justices McLachlin, Brown, and Moldaver, writing for themselves and Justice Cote, dissented on the outcome, primarily because they did not believe that the statutory immunity plainly and obviously barred Ernst's *Charter* damages claim. The dissenters would have applied *Ward* sequentially and then determined whether the facts pled were sufficient to overcome to the statutory immunity. The dissent found that the punitive conduct pled by Ernst was not immunized by the *ERCA* and therefore would have permitted the *Charter* damages claim to proceed to trial.<sup>372</sup>

As the dissenters concede, the *Ernst* case raises difficult and novel issues that defy the straightforward application of any legal framework.<sup>373</sup>

<sup>364</sup> *Energy Resources Conservation Act*, RSA 2000, c E-10, s 43 [*ERCA*].

<sup>365</sup> *Ernst*, supra note 4 at para 15, Cromwell J.

<sup>366</sup> *Ibid* at para 12, Cromwell J.

<sup>367</sup> *Ibid* at para 20, Cromwell J.

<sup>368</sup> *Ibid* at para 24, Cromwell J.

<sup>369</sup> *Ibid* at para 58, Cromwell J.

<sup>370</sup> *Ibid* at para 126, Abella J.

<sup>371</sup> *Ibid* at para 66, Abella J.

<sup>372</sup> *Ibid* at para 180, McLachlin CJC, Moldaver and Brown JJ.

<sup>373</sup> *Ibid* at para 135, McLachlin CJC, Moldaver and Brown JJ.



Academic responses to *Ernst* strike a similar tone. In a compelling comparison between *Ernst* and *Roncarelli v Duplessis*, the infamous pre-*Charter* case where the Quebec Premier was liable in damages for religious discrimination, Matthew Lewans expresses his hope that “*Ernst* will be a case of passing interest.”<sup>374</sup> Lorne Sossin would second Lewans by pointing to the worst-case scenario of *Ernst*: “In my view, by upholding the validity of a statute to bar a *Charter* remedy, this first judgment of 2017 has damaging potential to erode the enforcement of *Charter* rights.”<sup>375</sup> In line with his comments on *Nelles* and *Henry*, Sossin continues to advocate for a purely public law approach to *Charter* damages. In a similar vein, Jennifer Koshan writes, “The *Ernst* decision is challenging to read. It comes across as largely technical and devoid of the substance of *Ernst*’s *Charter* claim, except for the dissenting decision of Chief Justice McLachlin.”<sup>376</sup>

Where *Ward* was widely hailed as a “model judgment”<sup>377</sup>, *Ernst* is the opposite. Though twice the length of *Ward*, it tells us much less about *Charter* damages. The *Ernst* decision continues the trend from *Henry*, where the justices sharply disagree over the role of private law tort principles in deciding *Charter* damages claims.

## 1. Finding the Bottom Line

Part of the difficulty in analysing *Ernst* is distinguishing between the essential parts of each opinion and the *obiter dicta*. The three opinions answer entirely different questions. However, each opinion also addresses the arguments of the others. The result is a set of conflicting opinions that are difficult to understand and analyse.

In order to sort through this difficult case, it is helpful to consider the question on appeal. The question put before the motions judge and the Alberta Court of Appeal was whether the *Charter* damages claim was barred by the statutory immunity in the *ERCA*. Both the motions judge and unanimous Court of Appeal held that the immunity clause barred the *Charter* damages claim.<sup>378</sup> *Ernst*’s appeal to the Supreme Court,

<sup>374</sup> Matthew Lewans, “Damages for Unconstitutional Administrative Action? A Comment on *Ernst v Alberta Energy Regulator*” (2017) 30 Can J Admin L & Prac 379 at 379.

<sup>375</sup> Sossin, “Damaging the Charter”, supra note 198.

<sup>376</sup> Jennifer Koshan, “Die Another Day: The Supreme Court’s Decision in *Ernst v Alberta Energy Regulator* and the Future of Statutory Immunity Clauses for Charter Damages”, online: (2017) ABlawg.ca <<https://ablawg.ca/2017/01/16/die-another-day-the-supreme-courts-decision-in-ernst-v-alberta-energy-regulator-and-the-future-of-statutory-immunity-clauses-for-charter-damages/>>

<sup>377</sup> Roach, “Late Spring”, supra note 196 at 140.

<sup>378</sup> *Ernst*, supra note 4 at paras 146-147, McLachlin CJC, Moldaver and Brown JJ.

for the first time, challenged the constitutionality of the statutory immunity.<sup>379</sup> In order to do so, however, she had to place the statutory immunity into controversy by acknowledging that it barred her claim.<sup>380</sup> Thus, the issue formally before the Supreme Court was the constitutionality of the statutory bar, not its applicability.

On this narrow issue, all three of the Court's opinions differ. Justice Cromwell answers this question by stating that the statutory immunity is not unconstitutional because *Charter* damages would never be available against a tribunal.<sup>381</sup> This is a curious response to the question. In essence, his position is that *Charter* damages are never appropriate and just against a tribunal, and therefore the constitutionality of the statutory immunity is moot.

Justice Abella would dismiss the appeal because of Ernst's failure to notify the Attorney General of the constitutional question, thereby providing the Court with an insufficient record.<sup>382</sup>

Justice McLachlin simply declined to answer the constitutional question.<sup>383</sup> Instead, the dissenters answered the question posed at the Court of Appeal as to whether the statutory immunity applied to Ernst's *Charter* damages claim. They found that Ernst's pleadings made allegations of punitive and arbitrary conduct not covered by the statutory immunity, and therefore should be permitted to go to trial.

Based on the above, the real tension in the decision is about the best question on appeal, not necessarily about the right application of the *Ward* framework. However, Justice Cromwell's holding that *Charter* damages, regardless of the statutory immunity, would never be appropriate and just gets the attention of the dissenting judges.<sup>384</sup>

## 2. Step 3: Never Appropriate and Just?

The most extraordinary aspect of Justice Cromwell's analysis is the suggestion that *Charter* damages against a tribunal would *never* be "appropriate and just."<sup>385</sup> This extreme conclusion is not supported by

<sup>379</sup> *Ibid* at paras 12-14, Cromwell J.

<sup>380</sup> *Ibid*.

<sup>381</sup> *Ibid* at para 24, Cromwell J.

<sup>382</sup> *Ibid* at para 66, Abella J.

<sup>383</sup> *Ibid* at para 189, McLachlin CJC, Moldaver and Brown JJ.

<sup>384</sup> *Ibid* at para 177, McLachlin CJC, Moldaver and Brown JJ.

<sup>385</sup> *Ibid* at para 24, Cromwell J; at para 177, McLachlin CJC, Moldaver and Brown JJ.

its reasons. This holding has the potential to eviscerate the *Ward* framework and creates a shockingly large safe-zone for *Charter* violations by administrative agencies.

Recall that the earliest jurisprudence on *Charter* remedies considered section 24(1) as unimaginably broad, that “It is impossible to reduce this wide discretion to some sort of binding formula for general application in all cases.”<sup>386</sup> In defining the term “appropriate and just,” the Court in *Doucet-Boudreau* listed four criteria: that remedies meaningfully vindicate rights, employ legitimate means, flow from the powers of the court, and that the remedy be fair to the party against whom it is ordered.<sup>387</sup> These guiding principles about the breadth and purposive approach to *Charter* remedies is in direct conflict with Justice Cromwell’s assertion that tribunals have an absolute immunity from *Charter* damages in all circumstances.

Justice Cromwell identifies *Ward* as the leading case for *Charter* damages; however, he does not address either step 1 or step 2 in any detail.<sup>388</sup> Following the majority of the Court in *Henry*, Justice Cromwell focuses almost all of his analysis on step 3 of the *Ward* framework, which puts the burden on the government to raise evidence as to why *Charter* damages would not be an appropriate and just remedy. The plurality’s justification returns to familiar territory explored by the majority in *Henry*:

- excessive demands on resources, [a stand-in for the floodgates rationale]
- the potential chilling effect on the behaviour of the state actor, and
- protection of quasi-judicial decision making.<sup>389</sup>

Most concerning is that Justice Cromwell lists these factors as “capable of negating a *prima facie* duty of care”<sup>390</sup> – a concept from the tort of negligence implicitly rejected by *Ward*<sup>391</sup> and explicitly rejected by *Henry*.<sup>392</sup>

<sup>386</sup> *Mills*, supra note 48 at para 278.

<sup>387</sup> *Doucet-Boudreau*, supra note 8 at paras 55-58.

<sup>388</sup> *Ernst*, supra note 4 at para 26, Cromwell J. It appears the plurality does not address step 1 and 2 of the *Ward* framework at all; however, the dissenting opinion considers this an acceptance that Ernst satisfied her burden in those steps. At para 164, McLachlin CJC, Moldaver and Brown JJ.

<sup>389</sup> *Ibid* at para 45, Cromwell J.

<sup>390</sup> *Ibid*, emphasis added.

<sup>391</sup> *Ward*, supra note 1 at para 68 (“Mr. Ward sued the officers for assault, as well as the City and the Province for negligence. These claims were dismissed... While this defeated Mr. Ward’s claim in tort, it did not change the fact that his right under s. 8 of the Charter to be secure against unreasonable search and seizure was violated.”)

<sup>392</sup> *Henry*, supra note 3 at para 93, (“A duty of care paradigm risks opening up a Pandora’s box of potential liability theories.”)

In addition to these three reasons, discussed in detail below, Justice Cromwell also identified an alternative remedy for Ernst – judicial review. Justice Cromwell notes that judicial review would have provided Ernst with “prompt vindication” and “effective relief” of her *Charter* breach.<sup>393</sup> Justice Cromwell justifies his decision based on his interpretation of *Henry*, which requires a court to consider “general principles of liability.”<sup>394</sup>

This holding is troubling. As I stated in my discussion of *Henry*, there is reason to be suspicious of rote arguments about chilling effects and floodgates. However, Justice Cromwell’s decision extended those arguments beyond the policy rationales for Crown immunity. The justification provided by the plurality is a cocktail of quasi-judicial immunity, elements from the law of negligence, and “countervailing factors... of a more generalized nature.”<sup>395</sup> These loose justifications are at odds with the purposive approach to *Charter* remedies broadly and with *Ward* specifically.

#### ***a. Chilling Effect, Floodgates, and Quasi-Judicial Immunity:***

In *Ward*, Justice McLachlin raises and dismisses the chilling effect as hyperbole. She writes that “the logical conclusion of this argument is that s. 24(1) damages would never be appropriate. Clearly, this is not what the Constitution intends.”<sup>396</sup>

What seemed so clearly right in *Ward* seemed so clearly wrong in *Ernst*. Justice Cromwell, who was himself on the *Ward* Court, flips the script on the chilling effect.

I provide a thorough critique of the chilling effect and floodgates rationales in section III-B-2 of this paper where I discuss the *Henry* majority’s reliance on these generalized demurs to government liability. In short, the Court’s application of the chilling effect and floodgates rationales to *Charter* damages cases obscured the direct liability of government by placing the individual government actor front and centre in the analysis.

In *Ernst*, the most pressing concern about these common law rationales is their stated connection to the law of negligence. Justice Cromwell’s decision implies that all damages claims against government require a duty of care in order for liability to attach, yet the duty of care analysis in Canadian law is only

<sup>393</sup> *Ernst*, supra note 4 at para 37, Cromwell J.

<sup>394</sup> *Ibid* at para 39, Cromwell J.

<sup>395</sup> *Ibid* at para 29, Cromwell J.

<sup>396</sup> *Ward*, supra note 1 at para 38.

required for the tort of negligence.<sup>397</sup> For *Charter* damages, the only connection to negligence is the remedy – money. That single factor seems to drive the analysis in *Ernst* further and further towards conflation between *Charter* damages and over-generalized private law damages, particularly from the tort of negligence.

The floodgates argument, here described as an “excessive demand on resources,” has some compelling features. Justice Cromwell describes the statutory immunity in the *ERCA* as legislative assent to the common law immunities enjoyed by judges extended to this tribunal. The purpose of that immunity for discretionary decision-makers is, as the plurality describes, to avoid case-by-case decisions where the defendant is plagued by litigation threatening its independence and impartiality.<sup>398</sup> The *Henry* decision supported a qualified immunity for prosecutors to weed out “marginal cases”<sup>399</sup> – but the plurality in *Ernst* goes a step further when it states that “Even qualified immunity undermines the decision-maker’s ability to act impartially and independently, as the mere threat of litigation, achieved by artful pleadings, will require the decision-maker to engage with claims brought against him or her.”<sup>400</sup> Where the *Henry* majority raised the floodgate to only permit the most serious claims to flow to court, the plurality in *Ernst* dammed the flow completely.

This extreme holding elicited a dissent in kind. The four dissenting justices saw “no compelling policy rationale to immunize state actors in *all* cases,” adding, “we see no basis for our colleague’s characterization.”<sup>401</sup> In particular, they reject the plurality’s application of the duty of care in negligence law as dispositive against *Charter* damages.<sup>402</sup>

I strongly agree; an absolute immunity is not justifiable on public law or private law grounds. On private law grounds, a special immunity for government is in itself contrary to the Rule of Law.<sup>403</sup> On public law grounds, there is room for a limited immunity from damages based on the supremacy of Parliament and, as *Ward* notes, a concern for good governance by immunizing purely discretionary decisions and political choices; but outside that narrow band of protection, what benefit comes from complete immunity to the

<sup>397</sup> See Osborne, *supra* note 263 at 69-70; See also *Donoghue v Stevenson*, [1932] AC 562 (HL) [*Donoghue*] (expanding the duty of care to any relationship of reasonable foreseeability and proximity).

<sup>398</sup> *Ernst*, *supra* note 4 at paras 56-57, Cromwell J.

<sup>399</sup> *Henry*, *supra* note 3 at para 72, Moldaver J.

<sup>400</sup> *Ernst*, *supra* note 4 at para 57, Cromwell J.

<sup>401</sup> *Ibid* at para 172, McLachlin CJC, Moldaver and Brown JJ. Emphasis in original.

<sup>402</sup> *Ibid* at para 173, McLachlin CJC, Moldaver and Brown JJ.

<sup>403</sup> A V Dicey, *The Law of the Constitution*, 10th ed (London: Macmillan, 1958) at 193; see also Hogg et al, *Liability of the Crown*, *supra* note 18 at 2, (“the government is denied the special exemptions and privileges that could lead to tyranny”).

*Charter*? If the chilling effect and floodgates rationales are the only basis for carving out exceptions to the Rule of Law, we can hardly expect to see more government accountability on either public law or private law grounds.

### ***b. Alternative Remedies***

At step 3 of *Ward*, the government may argue that the claimant has alternative remedies that are less invasive on government than damages.

Justice Cromwell accepted the defendant’s argument that judicial review was an alternative, and less invasive, remedy than *Charter* damages in the circumstances.<sup>404</sup> I would tend to agree that damages are not the *only* remedy for these allegations. *Ward* considers alternative remedies to include both public law remedies, like a declaration, or private law remedies, like damages in tort.<sup>405</sup> However, *Ward* is also clear that the claimant is not required to exhaust all her remedies before asking for 24(1) damages.<sup>406</sup> In this case, it may be that the claimant’s pleading, which stresses punitive and arbitrary conduct, may prove egregious to the point of justifying damages, or may be proven minor enough to be adequately vindicated and deterred with judicial review or a declaration.

Lewans persuasively argues that the plurality’s decision implies *Charter* damages should be “regarded as a remedy of last resort.”<sup>407</sup> In his comparison to *Roncarelli*, Lewans notes that judicial review of Roncarelli’s business operating licence would have provided “cold comfort” to Roncarelli, whose entire business had essentially been destroyed by Duplessis’ malicious exercise of his political office.<sup>408</sup> In that case, Roncarelli was permitted to seek damages “despite various statutory provisions which limited the civil liability of public officials.”<sup>409</sup>

Similarly, Sossin picks on the plurality’s “puzzling” holding that although judicial review cannot be barred by statute, *Charter* damages can.<sup>410</sup> Why would one be subject to immunity while the other would not be? There is no answer to this question in *Ernst*.

<sup>404</sup> *Ernst*, supra note 4 at para 32.

<sup>405</sup> *Ward*, supra note 1 at para 34.

<sup>406</sup> *Ibid* at para 35.

<sup>407</sup> Lewans, supra note 374 at 382.

<sup>408</sup> *Ibid* at 379.

<sup>409</sup> *Ibid* at 380.

<sup>410</sup> Sossin, “Damaging the Charter”, supra note 198.

The combined effect of Lewans' assertion that *Charter* damages have become a remedy of last resort and Sossin's assertion that a statute can bar a constitutional remedy is that section 24(1) remedies are, contrary to *Ward*, being clothed "in a straight-jacket of judicially prescribed conditions."<sup>411</sup>

### 3. Direct Liability and Good Governance: A Failure

As I argue throughout this paper, *Ward*'s holding that *Charter* damages apply to government directly, and not to individuals, should be an integral part of developing the future of *Charter* damages doctrine. Where the defendant is an administrative agency, direct liability should focus the good governance arm of the *Ward* test on the particular function that agency purports to execute. Treating government as a monolith is unproductive for achieving a *Charter*-compliant society.

In *Ward*, the direct liability of government was an implicit but integral part of the Court's choice to not apply a duty of care analysis to the section 8 search and seizure claim against the province. *Ward* did not have to prove that the officers who conducted the strip search and seized his vehicle did so contrary to what a reasonable officer in the same circumstances would have done in order to succeed on his *Charter* damages claims against the province.<sup>412</sup>

In *Henry*, the direct liability of government is explicitly considered irrelevant by the majority, who instead treat the actual defendant – the Ministry of the Attorney General – and its employees as an indivisible entity. As I noted in my discussion on *Henry*, one of the tragic consequences of this holding is that individual government agents may find that their reputation is the subject of litigation to which they are not an actual party. *Charter* breaches have a multiplicity of causes, and to only remedy those caused by an individual's intentional action is to leave many systemic causes of *Charter* breaches outside of the *Charter* damages purview.

*Ernst* raises another problem, which is the distinction between the judicial and executive functions of a particular administrative agency. Unlike traditional judges, who have no political or executive functions, administrations often have several functions in addition to the decision to pursue prosecutions and render judgments. *Ernst* argued that the alleged breach of freedom of expression was done by the Board's Compliance Branch, which was carrying on an executive function that would not attract the immunities

<sup>411</sup> *Ward*, supra note 1 at para 18; quoted in *Henry*, supra note 3 at para 23, Moldaver J; quoted in *Ernst*, supra note 4 at para 27, Cromwell J.

<sup>412</sup> To the contrary, his *Charter* claim succeeded despite the failure of his tort claim. See *Ward*, supra note 1 at para 68.

ascribed to a judicial function.<sup>413</sup> However, Justice Abella agrees with the plurality when she writes that the Court’s precedent suggests a reviewing Court ought to avoid “artificial binary distinctions between adjudicative and other administrative decisions.”<sup>414</sup>

The immunity clause in the *ERCA* would likely bar a private law damages claim against *any* branch of the Board, regardless of its function. However, the *Ward* framework demands specificity. In its countervailing arguments at step 3, the administrative agency can show that “good governance” militates against a damages award. However, the term “good governance” itself, I suggest, demands an inquiry into the governmental function being exercised by the agency. Unlike the inquiry into a duty of care, which looks at the administration’s statutory duties and relationship of proximity to the plaintiff, the good governance factor asks specifically whether the government’s *Charter* infringement – already proven – should not be remedied by damages because of the effect liability would have on the ongoing functioning of the agency.

Under this particularized approach, at step 3 of the *Ward* framework, the Board would have to point to its own mandate, policies, and functions to show why damages are not appropriate and just to remedy the infringement of Ernst’s freedom of expression. The inquiry is not so different from the section 1 inquiry into the pressing and substantial objective, except it focuses on the narrower question of whether liability in damages would interfere with the Board’s ability to carry on its particular function.<sup>415</sup> It is impossible to answer that question without a trial, and I would not answer it here. My intention is to show that good governance, conceived as it has been by the Court to date, is too broad an inquiry. Indeed, it is no wonder Justice Cromwell, defining good governance so broadly, finds that damages would *never* be appropriate and just against an administrative body.

Whereas in *Henry* the Court focused too narrowly on the individual instead of the government, in *Ernst* the plurality focused too broadly on the administrative agency as a whole rather than particularize the government function being defended as ‘good government’. Their results are the same: permitting defendants to escape *Charter* damages liability because of the Court’s refusal to carefully scrutinize the actual defendant’s conduct.

#### 4. Statutory Immunity, Not Notwithstanding

<sup>413</sup> *Ernst*, supra note 4 at para 119, Abella J.

<sup>414</sup> *Ibid* at para 119, Abella J.

<sup>415</sup> Roach, *Constitutional Remedies in Canada*, supra note 44 at para 3.1040.



Sossin and Lewans both express their concern over the most interesting issue in the case: whether a statute can ever limit a particular type of 24(1) remedy.<sup>416</sup> Justice Cromwell's decision simply accepted the claimant's argument that the statute barred her own claim, but did not elaborate.<sup>417</sup> The dissenting judges held that Ernst pled facts about punitive conduct that could get around the statutory immunity.<sup>418</sup> None of the opinions directly addressed what Sossin and Lewans saw unfold: that a legislature may have successfully circumvented the notwithstanding clause.

Sossin's view prioritizes constitutional supremacy. He argues that *Charter* damages cannot be precluded by statute unless the notwithstanding clause is used to "immunize public bodies from *Charter* scrutiny, and therefore, from *Charter* remedies."<sup>419</sup>

Sossin's statement here is carefully crafted to remind us that the notwithstanding clause does not apply to remedies directly. By its own wording, the notwithstanding clause can only be used to narrow the scope of rights in sections 2 and 7 to 15.<sup>420</sup> The notwithstanding mechanism cannot narrow the discretion of a court on the appropriate and just remedy. Why an ordinary statute can so limit the *Charter* in a way that the *Charter* itself would not permit is perplexing.

Roach made a similar point in response to *Ward* on how statutes can define section 24(1)'s phrase "court of competent jurisdiction" - if the competency of the court can be changed by legislation, there is little to stop the government from removing remedial competency from all decision-makers but Superior Courts with inherent civil jurisdiction.<sup>421</sup> There is some danger in leaving too much power over 24(1) remedies in the hands of the defendants.

Despite none of the Court's decisions actually holding so, the *Ernst* decision as a whole creates the impression that a statute could potentially bar a section 24(1) remedy outright, mimicking the effect of the notwithstanding clause without any of the qualifications on substance and time limits. In a future case,

<sup>416</sup> Sossin, "Damaging the Charter", supra note 198 ("The issue in the appeal to the Supreme Court is on the scope of the statutory immunity clause, not the strength of the claim to Charter damages."); Lewans, supra note 374 at 385 ("whether a statutory immunity clause should be read down to the extent it purports to immunize administrative action which infringes someone's *Charter* rights").

<sup>417</sup> *Ernst*, supra note 4 at para 15, Cromwell J.; Also see *Ernst*, supra note 4 at para 72, Abella J (concurring with the plurality).

<sup>418</sup> *Ibid* at para 180, McLachlin CJC, Moldaver and Brown JJ.

<sup>419</sup> Sossin, "Damaging the Charter", supra note 198. Parenthesis omitted.

<sup>420</sup> *Charter*, supra note 2, s 33.

<sup>421</sup> Roach, "Late Spring", supra note 196 at 141-142.

with a evidentiary record and no procedural hiccups, this dangerous principle should be clarified and rejected.

### 5. Section 1 and the *Mackin* Rule in *Ernst*

Justice Abella’s opinion in *Ernst* considers that the constitutionality of an immunity statute and the policy reasons justifying its enforcement could be raised, in a future case, on a full evidentiary record during the section 1 analysis stage.<sup>422</sup>

Koshan notes that *Ernst* provides little guidance on how the immunity clause might violate a substantive part of the *Charter*.<sup>423</sup> A statutory immunity clause might be inconsistent with section 24(1) itself, though only if the latter is held to have a substantive quality. A statutory immunity might be inconsistent (or maybe irrelevant) given the waiver of immunity in section 32 of the *Charter*, or that the statutory immunity is inconsistent with the preamble of the *Charter* as it effectively acts as a higher law than the constitution.

In any event, what is most disturbing is that, even if a future litigant could be - or *Ernst* had been - successful in striking down or reading down a statutory immunity clause under section 52(1), the rule in *Mackin* could preclude a 24(1) damages remedy anyway. Recall that the *Mackin* line of cases contains a general rule that the claimant cannot pair a 52(1) remedy with a 24(1) remedy absent some bad faith on the defendant.<sup>424</sup> Thus, an unconstitutional immunity clause could be struck down but a remedy would be denied by a potentially identical immunity in *Mackin*.

Absent serious reconsideration of the *Mackin* rule, the weight of precedent suggests a potentially tautological outcome.

### 6. Summary: A Uniquely Purposeless Public Law Remedy

*Ernst* is a difficult case. The three opinions by the Court disagree on which aspect of the case should be outcome-determinative. Separating law from dicta demands much from the reader. For *Charter* damages

<sup>422</sup> *Ernst*, supra note 4 at para 120, Abella J.

<sup>423</sup> Koshan, supra note 376, (“But what is the *Charter* breach that section 1 might “save”? Is the idea here that the violation of the underlying *Charter* right or freedom requires a remedy that cannot be immunized against without justification – i.e. a right to a remedy?”)

<sup>424</sup> *Mackin*, supra note 94 at para 79.

in particular, none of the three decisions are particularly helpful in understanding how the *Ward* test ought to be applied going forward.

The dissenting opinion comes closest to applying *Ward* to the facts. Based on the pleadings, the dissenters would have concluded that Ernst pled sufficient facts to survive a motion against her pleadings. However, even the dissenting judges are pulled into an extended discussion on step 3 of the *Ward* test, which is explicitly the defendant's burden and thus unnecessary to discuss on a pleadings motion.

In accepting the Board's arguments about the potential chilling effect and floodgates, Justice Cromwell indulged the defendants in raising generic countervailing arguments of a purely general nature. I argue that *Ward* requires the good governance branch of the test to be specific to the particular defendant and its actual government functions. Instead, the *Ernst* plurality does exactly what the *Ward* Court had forewarned: it used the chilling effect to ensure that *Charter* damages are *never* appropriate and just.<sup>425</sup>

*Ernst* creates a blind spot in the Court's *Charter* remedies jurisprudence by tacitly permitting (though not actually holding) that an immunity clause can restrict the type of remedies available through section 24(1). If unaddressed, this minor oversight could permit legislation to limit the *Charter*'s remedial strength without resort to the notwithstanding clause.

Furthermore, in the event that a statutory immunity like the one in *Ernst* is successfully challenged, the defendant may still benefit from the *Mackin* immunity, turning *Charter* damages litigation into a hamster wheel of government immunities.

While Lewans expresses concern that *Ernst* might undo more principled decisions like *Roncarelli*, there is some hope: In the first year of reported decisions since *Ernst*, it appears that *Ernst* has mostly been applied on pleadings motions and only once after a trial.<sup>426</sup> In those cases, however, the dissenting opinion from *Ernst* is never applied. In addition, there appears to be a separate body of cases that apply *Ward* (and

<sup>425</sup> *Ward*, supra note 1 at para 38.

<sup>426</sup> See for example *Whaling v Canada (Attorney General)*, 2017 FC 121 (CanLII) (noting "profound" disagreement in *Ernst*, and applying "uncertain boundaries that surround legislative immunity" to the instant case, at paras 23, 29); *LC v Alberta*, 2017 ABCA 284 (CanLII) (distinguishing *Ernst*, at para 19); *Ouellette v Law Society of Alberta*, 2018 ABQB 52 (CanLII) ("Several cases say that a claim in damages does not lie against a regulator such as the Law Society when doing its job. One is *Ernst v Alberta Energy Regulator*", at para 49); *Tremblay c. Magher*, 2017 QCCQ 9803 (CanLII) (*Charter* damages claim against police in small claims court, citing *Ernst* as the test for *Charter* damages and requiring "négligence flagrante", at paras 46-48).

sometimes *Henry*) with no reference to *Ernst*.<sup>427</sup> Both Koshan and Lewans note the limited precedential value of this decision.<sup>428</sup> For now, it appears that their predictions are holding true.

The lasting impact of *Ernst* may not be in its holding or even in its reasoning, but simply in its unexamined use of private law principles as outcome-determinative markers for constitutional cases. The logic of its central holding – *Charter* damages would never be appropriate and just against a tribunal, and therefore the statutory immunity is not unconstitutional – is difficult to justify. The result is that it turns *Ward* from a “uniquely public law remedy” into a purposeless application of general tort principles to constitutional claims.

I spend the balance of this paper examining the public-private divide and asking whether *Ward* should be given a chance to determine *Charter* damages cases without reference to private law.

#### D. Summary and Conclusions

*Ward* affirmed that *Charter* damages are indeed a different remedy than private law damages. The *Ward* framework provides a flexible mechanism for balancing the claimant’s *Charter* injury and proven purposes for damages against the government’s countervailing factors. Ever since that determination, though, the Court has insisted on cramming the *Ward* framework full of private law doctrines. *Henry* and *Ernst* have led the Court’s *Charter* damages doctrine “down a problematic path.”<sup>429</sup>

The primary problem is the Court’s unexamined and overgeneralized use of private law tort doctrines to manipulate the *Ward* framework. The root of the problem is dormant in *Ward*, where the Court makes overgeneralized statements about “tort law” without specifying *which* tort law. The *Ward* framework is intended to balance the individual’s interest in obtaining damages in step 2 against the defendant’s

<sup>427</sup> See for example *Ogiamien v Ontario (Community Safety and Correctional Services)*, 2017 ONCA 667 (CanLII) [*Ogiamien*] (applying *Ward* sequentially, overturning trial court award of *Charter* damages based on finding no proof of *Charter* infringement at step 1); *Umlauf v Halton Healthcare Services et al.*, 2017 ONSC 4240 (CanLII) (no proof of *Charter* infringement at step 1); *Carr*, *supra* note 126 (applying *Ward* sequentially, although holds police officers and department jointly and severally liable for *Charter* damages, at para 254); *Naqvi v Canada*, 2017 FC 1092 (CanLII) (applying *Ward* and *Henry*, striking the claim based on failure to plead fault threshold adapted from *Henry*); *Price v Kelday*, 2017 ONSC 6494 (CanLII) (Applying *Ward*, but also holding “To obtain damages for a *Charter* breach, the plaintiff must demonstrate bad faith or some improper purpose on the part of the police”, at para 280).

<sup>428</sup> Lewans, *supra* note 374 at 387; Koshan, *supra* note 376.

<sup>429</sup> Sossin, “Damaging the Charter”, *supra* note 198.

countervailing factors in step 3. At step 3, the government may raise policy factors from private law claims against government, like malicious prosecution and the tort of negligence.<sup>430</sup>

*Henry* undercuts the *Ward* framework's interest-balancing approach. The majority in *Henry* switches the burden to plead private law policy factors onto the claimant, essentially changing the interest-balancing framework in *Ward* into a tort paradigm, where the injured party must prove a particular level of bad faith on the part of the defendant. *Ernst* takes the "qualified immunity" in *Henry* to its logical extreme: that, against administrative tribunals, *Charter* damages will never be appropriate.

These latter two decisions should be concerning. The government immunities in *Henry* and *Ernst* are based almost entirely on two policy rationales: the chilling effect and floodgates rationales. The majority in *Henry* and plurality in *Ernst* accept these rationales as truisms about government behaviour. In the *Charter* damages context, these rationales have completely dominated the scope of liability. It raises the question: if these rationales can limit *Charter* damages, should they not limit all *Charter* remedies? Certainly not. That the Court treats the monetary remedy differently than other remedies is suspect. *Henry* is an excellent example: an infringement of the right to make full answer and defence based on nondisclosure is an entirely different right in *Henry* where the remedy is damages than in *Stinchcombe* where the remedy is not damages. The *Charter* infringement is the same – a failure to provide an accused with the right to full answer and defence – but *Henry* insists on awarding damages through a private law tort-based paradigm.

In that regard, the *Henry* and *Ernst* decisions are irreconcilable with the *Ward* framework. As I note, the requirement for causation and harm at step 1 in *Henry* is entirely inconsistent with the purposes of vindication and deterrence at step 2. The *Henry* majority's misuse of overgeneralized private law tort doctrines is out of touch with the purposive approach to *Charter* remedies. Similarly in *Ernst*, Justice Cromwell's reliance on precedent from the tort of negligence imposes a negligence-based duty of care analysis on a *Charter* claim. In no other *Charter* cases does an injured party need to establish a duty of care in order to prove a *Charter* infringement. Placing these burdens on the *Charter* damages claimant is inconsistent with *Ward* and upends the interest-balancing approach.

The combined effect of *Henry* and *Ernst* is that over-generalized private law tort doctrines can be routinely used to defeat *Charter* damages claims contrary to *Ward*.

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<sup>430</sup> *Ward*, supra note 1 at para 43.

However, *Ward* is not completely written out of the Court's jurisprudence. The two concurring judges in *Henry* and the four dissenting judges in *Ernst* remain faithful to *Ward*, providing some hope that the Court will return to *Ward* and undo some of the ambiguity and damage caused by *Henry* and *Ernst*.

All three cases were decided within a seven-year period, where the composition of the Court changed significantly. Of the nine judges deciding *Ward* in 2010, only three were still on the Court for *Henry* in 2015 and in *Ernst* in 2017: Justices McLachlin, Abella, and Cromwell. Chief Justice McLachlin is consistent in her approval of *Ward* through all three cases. After *Ward*, Justice Abella consistently sides against the minority opinions by joining the majority in *Henry* and writing for herself in *Ernst* (joining the plurality in the outcome). Justice Cromwell does not take part in the six-justice panel in *Henry* and leads the group against *Ward* in *Ernst*. When considering *Henry* and *Ernst* on their own, Justices Gascon and Wagner are consistently in the anti-*Ward* groups. Meanwhile, Justices Karakatsanis and Moldaver switch spots: Justice Karakatsanis sided with the pro-*Ward* concurring group in *Henry* switches to the anti-*Ward* group in *Ernst*, and Justice Moldaver who wrote the majority decision in *Henry* transfers to the dissenters in *Ernst*. Thus, while there is some consistency in how each Justice votes in *Charter* damages cases, the voting patterns provide no clear clues as to how the next chapter of *Charter* damages will be written.

The next two sections of this thesis address the divide between the proponents of *Ward* and the proponents of private law principles. In Part IV, I look specifically at the public law aspects of *Ward* and how *Charter* damages fit alongside other *Charter* remedies. In Part V, I look at the private law aspects of *Ward* and ask which particular aspects of private law are helpful in placing *Charter* damages back on the right path.

## IV. PUBLIC LAW IN WARD

In the previous section, I explored how *Ward* created a framework for awarding public law damages, and how *Henry* and *Ernst* encumbered the *Ward* framework with overgeneralized private law tort principles. In this section, I want to return to *Ward* and explore the extent to which *Ward* is a public law remedy. How does the *Ward* framework for *Charter* damages fit into the broader *Charter* remedial framework?

A starting point is returning to the text and structure of the *Charter*. Recall that the *Charter* not only outlines substantive rights and freedoms, but also provides mechanisms for enforcement, application, and interpretation.<sup>431</sup> The *Ward* framework fits snugly within the structure of the *Charter*, leveraging its most important features by adopting direct liability of government, aligning the purposes of the *Charter* damages award with the purposes of other *Charter* remedies, and defining an interest-balancing test in accordance with the limitations on rights and remedies present within the *Charter*.

The tendency to view *Ward* as a species of tort law is caused, at least in part, by overlooking the commonalities between *Charter* damages and other 24(1) remedies. In particular, the purposes of compensation, vindication, and deterrence ground the *Ward* framework within well-known constitutional remedial purposes. The *Ward* remedy's purposes both accord with a purposive approach to other 24(1) remedies and complement the existing remedial menu. This point has been heavily understated in the literature, and I hope to highlight how *Ward* was written as a "uniquely public law remedy." Along with the final section of this paper on the private law aspects of *Ward*, I demonstrate that the *Ward* Court's references to the assistance of private law in the *Charter* remedy were perhaps overstated.

### A. The Structure of the *Charter* and *Ward*

The basic structure of the *Charter* is well-known but worth reviewing with an eye to seeing how *Ward* fits into the text's purposes. Sections 2 through 23 of the *Charter* contain substantive rights ranging from the broadly conceived freedom of expression<sup>432</sup> and right to life, liberty, and security of the person,<sup>433</sup> to specific rights like the right to bail hearing for a criminal accused<sup>434</sup> and particularized minority language rights.<sup>435</sup> An infringement of any of these rights could result in a section 24(1) remedy, including damages.

<sup>431</sup> *Charter*, supra note 2 (Enforcement in ss 24 and 52; Application in ss 32 and 33; interpretation in ss 25 through 31).

<sup>432</sup> *Ibid*, s 2(b).

<sup>433</sup> *Ibid*, s 7.

<sup>434</sup> *Ibid*, s 11(e).

<sup>435</sup> *Ibid*, ss 16-23.

The substantive rights in the *Charter* may have some relationship to private law. Recall that the equality claim in *McKinney* and the right to a fair trial in *Mackin* both raised, in their own way, issues about job security and wages.<sup>436</sup> These claims superficially resemble employment contract disputes in the same way that the right to a fair trial in the *Henry* case resembled a malicious prosecution. Other substantive rights, like those regarding minority languages, voting rights, and mobility rights, are less likely to have a private law analog. By not wedding itself to any particular private law doctrines, the *Ward* framework is flexible enough to address any of these distinctive and diverse substantive claims.

Section 32 of the *Charter* confirms that only the Federal and provincial governments are bound by the *Charter*. The word “government” has been interpreted to include legislatures, government departments, administrative bodies, and cabinet ministers. It has not been interpreted to apply directly against individual government actors personally.<sup>437</sup> *Ward* precludes damages against individuals on the same basis.<sup>438</sup> Direct liability of government is not a policy decision by the Court, but a textually faithful approach to the *Charter*.

Section 1 contains a limitation on rights. The text guarantees the rights and freedoms subject to limits “prescribed by law” and justifiable in a free and democratic society. Thus, section 1 justification is only available to government for unconstitutional legislation, not necessarily for unconstitutional actions.<sup>439</sup> The test for justification in *Oakes* places the burden on the government to prove that its legislation addresses a “pressing and substantial objective” and does so proportionally.<sup>440</sup> Where the government fails to meet its burden, a law interfering with *Charter* rights will be struck down to the extent that it is unconstitutional in accordance with section 52(1) of the *Constitution Act*. Thus, in the context of unconstitutional legislation, the framework of the *Charter* is inherently a balancing act between the rights of individuals and the objectives of government.

Where a substantive right is infringed by government and is not prescribed by law, there is no legislation to strike down. Thus, the only remedies available are in section 24. Section 24(1) does not in and of itself require a balance of interests; however, its wide remedial discretion requires that the remedy be

<sup>436</sup> *McKinney*, supra note 96; *Mackin*, supra note 94.

<sup>437</sup> By contrast, the United States’ system does hold individual government agents individually liable. See note 136 above.

<sup>438</sup> *Ward*, supra note 1 at para 22 (“In accordance with s. 32 of the Charter, [direct liability] is equally so in the Canadian constitutional context”).

<sup>439</sup> See note 57 above, referencing *Little Sisters* and *Eldridge*.

<sup>440</sup> *Oakes* supra note 56 at 138-139.



“appropriate and just.”<sup>441</sup> The 2004 decision *Doucet-Boudreau*, described in detail below, defines the phrase “appropriate and just” in terms of fairness and balance.<sup>442</sup>

Several tests for remedies include a balancing analysis. For example, the test for the exclusion of evidence under section 24(2) described in *R v Grant* balances the seriousness of the breach against the interests of the accused and the interests of society in an adjudication on the merits.<sup>443</sup>

Balancing is also observed in cases where no specific test is outlined. In *PHS Community v Canada*, the Court remedied a section 7 breach of the right to life, liberty, and security of the person by awarding mandamus against the federal Minister of Health, effectively reversing a discretionary decision to close a safe drug injection site in Vancouver.<sup>444</sup> While the Court did not outline a formal test for mandamus, it provided a full analysis of alternative remedies. A declaration, the Court said, would not go far enough as it would not adequately account for the human lives at stake. At the other extreme, a constitutional exemption would go too far as it would remove discretion from the minister in future applications for safe injection sites. The Court preferred mandamus because it adequately balanced the need for a swift and lasting remedy for the applicants while also permitting the Minister to retain broad discretion in future cases.<sup>445</sup>

However, there are examples of tests for 24(1) remedies that do not include balancing. For example, the test for costs against the Crown for a violation of the *Charter* right to disclosure in a criminal proceeding is a “marked and unacceptable departure” from the substantive constitutional standard in *Stinchcombe*.<sup>446</sup> If the plaintiff can prove a marked and unacceptable departure, then she is entitled to costs. No balancing is necessary for this “expedient remedy.”<sup>447</sup>

Sections 25 through 31 contain clauses to guide interpretation of the *Charter*, including a provision in section 26 which ensures that the *Charter*’s enactment does not deny “the existence of any other rights or freedoms that exist in Canada.”<sup>448</sup> While the main thrust of this section is to ensure the continued

<sup>441</sup> *Charter*, supra note 2, s 24(1).

<sup>442</sup> *Doucet-Boudreau*, supra note 8, at paras 54-59.

<sup>443</sup> *Grant*, supra note 139 at para 71.

<sup>444</sup> *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 [*Insite*] In that case, the claimant had to overcome the hurdle of proving that the decision was not in accordance with the “principles of fundamental justice,” a high threshold which in itself might suggest a strong remedy like mandamus.

<sup>445</sup> *Ibid* at para 142-151.

<sup>446</sup> *Dunedin*, supra note 176 at para 87.

<sup>447</sup> *Ibid* at para 87.

<sup>448</sup> *Charter*, supra note 2, s 26.

existence of rights and freedoms not enshrined in the *Charter*, it also implies that there may be some tension between the rights in the *Charter* and the rights at common law.

The Court's section 26 jurisprudence raises several interesting relationships between *Charter* claims and private law claims, though none are a precise fit for the difference between *Ward* and the private law damages claims against government. In *Young v Young*, for example, the Supreme Court remarks that the right to freedom of religion in the *Charter* can conflict with common law parental rights.<sup>449</sup> In *Singh v. Minister of Employment and Immigration*, section 26 was raised in the context of parallel rights existing in both the Canadian *Bill of Rights* and the *Charter*, leading 3 judges to find in favour of the applicants on *Charter* grounds and 3 judges to find in favour of the applicants on *Canadian Bill of Rights* grounds.<sup>450</sup> In *Mills*, which contains Justice McIntyre's quotable snippet about the breadth of discretion in section 24(1), the dissenting judges led by Justice Lamer wrestled with whether a *Charter*-based claim for *certiorari* can swallow up a common law claim through a prerogative writ. In this case, the Court found harmonization of the two claims was the preferred course of action based on the reasoning that "access should be enhanced not restricted, let alone denied."<sup>451</sup>

For *Charter* damages, it is not two rights that conflict - as in *Young* - but two paradigms for awarding damages, the public and private. The *Charter* and private law torts are not necessarily parallel roads to the same remedy - as in *Singh* - because the defendant (and therefore the defendant against whom the remedy is awarded) are not always the same, and the substantive foundation for *Charter* damages is not the same as those at private law. For the same reason, *Charter* damages and private law damages claims against government elude harmonization on the *Mills* principle because the two claims are not similar enough. The *Henry* majority makes this much clear in its rejection of the malice standard for *Charter* claims against the Crown.<sup>452</sup> Thus, the balancing act in *Ward*, for section 26 purposes, is charting a new path in the relationship between *Charter* rights and private law rights.

The final section of the *Charter* to address is section 33 and its notwithstanding clause. A unique addition in the *Charter*, this clause permits the government to override constitutional rights in sections 2 and 7 through 15 through explicit legislation for five years at a time.<sup>453</sup> This clause does not apply to section

<sup>449</sup> *Young v Young*, [1993] 4 SCR 3 at 32.

<sup>450</sup> *Singh v Minister of Employment and Immigration*, [1985] 1 SCR 177.

<sup>451</sup> *Mills*, supra note 48 at 902-903.

<sup>452</sup> *Henry*, supra note 3 at para 44.

<sup>453</sup> *Charter*, supra note 2, s 33.

24(1). It follows that the notwithstanding clause must be directed at the substance of the right, not its remedy.

As mentioned in my discussion of *Ernst*, the potential effect of the statutory immunity clause in the tribunal's governing statute was to override the constitution without resort to section 33. There is some concern that this decision frustrates the purpose of the notwithstanding clause.<sup>454</sup> The better approach is to consider whether statutory immunities, like the one in *Ernst*, are a compelling countervailing factor that would outweigh the need for damages. If, for instance, there were no alternative remedies other than damages, the balance would tip towards declining to apply the statutory immunity. If, as the case was in *Ernst*, an alternative remedy like judicial review exists, then that might tip the balance towards applying the statutory immunity to damages. This balancing approach in step 3 of the *Ward* framework, when applied faithfully, would not frustrate the purposes of section 33.

Having reviewed the broad structure of the *Charter*, and the *Ward* framework's place within it, several points become clear: section 24(1) creates a cause of action for wrongs that are entirely distinct from private law causes of action; section 32 clarifies that direct liability of government is not a policy choice, but textual fidelity; section 1 and the Court's jurisprudence on section 24 remedies support an interest-balancing approach to remedies in most circumstances; section 26 and its jurisprudence provides some insight into how the *Charter* damages claims and private law damages claims can co-exist without one driving the other; and section 33, which outlines the only method for overriding the constitution, should help identify which statutes of general application should inform 24(1) procedures and those which tend to frustrate constitutional remedies.

As I intend to show in the balance of this section, the *Ward* framework's stated purposes for damages at step 2 of the test – compensation, vindication, and deterrence – fit neatly within the purposive approach to remedies, and that the *Charter* damages remedy in fact supplements the remedial efficacy of the court in *Charter* cases.

## **B. *Charter* Remedies and the Purposive Approach**

In its earliest *Charter* jurisprudence, the Court identified the *Charter* as a “purposive document,” and its overall purpose is to protect rights and freedoms by constraining government action.<sup>455</sup> The purposive approach to the *Charter* as a whole also applies to remedies specifically.

<sup>454</sup> Sossin, “Damaging the Charter”, supra note 198.

<sup>455</sup> *Hunter*, supra note 139 at 156.

In *R v Gamble*, the Court considered a habeas corpus application brought alongside a section 24(1) *Charter* application for a prisoner's relief from an unconstitutional sentence.<sup>456</sup> The Court acknowledged that the *habeas corpus* application was distinct from the section 24(1) application. In particular, it reviewed the *habeas corpus* case law and found that "considerable uncertainty has clouded the scope of review."<sup>457</sup> The Court then reviewed several trial court decisions using sections 7 and 24(1) of the *Charter* to effect a *habeas corpus* remedy, affirming the general proposition that "*Charter* relief should not be denied or 'displaced by overly rigid rules.'"<sup>458</sup> In *Gamble*, as in *Ward*, the Court provided access to a well-known common law remedy through section 24(1), but did so in accordance with the unique purposes of the *Charter*.

Roach, who has written the most comprehensive work on *Charter* remedies, believes that "Canada's constitutional remedial jurisprudence has now matured so that the principles that govern remedial decision-making are relatively well known."<sup>459</sup> The landmark decision in this regard is *Doucet-Boudreau*, which provides a detailed examination of the purposive approach to remedies.<sup>460</sup>

Roach defines the purposive approach as one that "seeks to integrate Charter remedies with the purposes of the particular Charter right being remedied, the general purposes and values of the Charter and the methodology that is applied to the interpretation of all Charter rights and the justification of limits on rights."<sup>461</sup>

Elsewhere, Roach has described the purposive approach to constitutional remedies as "principled remedial discretion," defining it in terms of establishing the house rules of litigation: "The key to principled remedial decision-making is not that a right answer will magically appear, but that the judges and parties can reach some tentative agreement on the relevant principles and then debate the scope and relative weight of each principle in the particular context."<sup>462</sup> A lack of clear principles creates unwieldy discretion, and too many strict principles is a recipe for formalism.<sup>463</sup>

<sup>456</sup> *R v Gamble*, [1988] 2 SCR 595.

<sup>457</sup> *Ibid* at para 64.

<sup>458</sup> *Ibid* at para 66. Citing *Swan v Attorney General of British Columbia* (1983), 35 CR (3d) 135 (BCSC) at 148.

<sup>459</sup> Roach, *Constitutional Remedies in Canada*, supra note 44 at 3.1100.

<sup>460</sup> *Doucet-Boudreau*, supra note 8.

<sup>461</sup> Roach, *Constitutional Remedies in Canada*, supra note 44 at 3.380.

<sup>462</sup> Roach, "Principled Remedial Discretion", supra note 93 at 149.

<sup>463</sup> *Ibid* at 144.

## 1. Responsive and Effective Remedies

The Court's elaboration of the purposive approach is summed up in *Doucet-Boudreau*, where it defines the purposive approach in principled terms. It recites the maxim *ubi jus, ibi remedium* - "where there is a right, there must be a remedy" - and determines that the contemporary application of the maxim to the *Charter* means that remedies must be "responsive" and "effective."<sup>464</sup>

Responsive remedies, as defined in *Doucet-Boudreau*, are those that promote "the purpose of the right being protected."<sup>465</sup> By the time the Court penned *Ward*, a wealth of *Charter* jurisprudence that defined the substantive content of each *Charter* right existed. What *Doucet-Boudreau* asked is for courts to connect the substantive content of rights to their remedies. Rights can be infringed at their core, or at the periphery. Infringements can be completed, ongoing, or prospective. Courts can expect novel infringements arising from the evolving relationship between the state and its subjects, and should adjust their remedial discretion accordingly. All of these factors are, in my view, critical to creating responsive remedies.

The *Ward* framework addresses the need for responsive remedies. Consider, for example, the facts in *Ernst*. At step 1, the claimant would establish at least the following facts: The infringed right in section 2(b), freedom of expression; the suppressed expression is political, which is arguably close to the core purpose of the right;<sup>466</sup> the infringement is complete, and therefore the remedy sought is for retrospective harm. Each of these facts then relates to the justification for damages at step 2. These facts about the nature of the breach do not make out a claim for compensation, as the infringement is unrelated to physical, psychological, pecuniary, or intangible personal loss.<sup>467</sup> However, at a minimum, the facts make out an interest in vindicating the right to people to freely criticize government institutions, and deterring government institutions from silencing political speech. At step 3, the government might point to alternative remedies that could adequately respond to the breach and address the proven need for vindication and deterrence. Where a declaration might be appropriate to vindicate and deter the suppression of speech, depending on the egregiousness of the facts proven at trial, judicial review of the Board's decision is less responsive to the actual right. Just as an alternative remedy can negate the

<sup>464</sup> *Doucet-Boudreau*, *supra* note 8 at para 25, citing *Dunedin*, *supra* note 176 at paras 19-20. Emphasis in original. See also Roach, *Constitutional Remedies in Canada*, *supra* note 44 at para 3.450. ("Roach notes that although *Doucet-Boudreau* was a 5-4 decision, it was cited with approval of the complete Court in *Incite*); *Incite*, *supra* note 444 at para 142 ("what is required is a remedy that vindicates the respondent's Charter rights in a responsive and effective manner").

<sup>465</sup> *Doucet-Boudreau*, *supra* note 8 at para 25.

<sup>466</sup> *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927 at 976 ("participation in social and political decision-making is to be fostered and encouraged").

<sup>467</sup> *Ward*, *supra* note 1 at para 27.

damages award, the government can raise evidence about the negative effect of liability on the tribunal, including the policy reasons underpinning the statutory immunity and the tribunal's quasi-judicial role. Should the claim pass step 3, the court can determine quantum at step 4 based on what is "appropriate and just *in the circumstances*,"<sup>468</sup> including the egregiousness of the breach and fairness to this particular defendant.<sup>469</sup> The flexibility of the *Ward* framework is intended to provide a responsive remedy that serves a functional purpose related to the *Charter*, whether or not that remedy is damages.

Effective remedies refers to the remedial mechanism used to vindicate the right.<sup>470</sup> The bottom line for effective *Charter* damages remedy is quantum. The only Supreme Court decision to touch on quantum is *Ward*, which provides only the most basic guidance on how to determine public law damages. The principal guide is the egregiousness of the breach, but the quantum must also be fair to the defendant, and recovery rates will likely be modest.<sup>471</sup> While the Court highlights the public law focus of remedying the *Charter* breach "as an independent wrong, worthy of compensation in its own right", it also permits a court to rely on "the private law measure of damages for similar wrongs."<sup>472</sup> While compensatory damages must be proven,<sup>473</sup> determining the quantum of vindication and deterrence damages "is an exercise in rationality and proportionality."<sup>474</sup>

The effectiveness of damages will be judged almost entirely on whether the quantum strikes the right balance. The inherent flexibility of damages is, in that regard, both a blessing and a curse: while damages avoid the all-or-nothing proposition of most 24(1) remedies, it is unlikely that courts will be able to reliably quantify the damages amount down to the penny, dollar, or even the nearest thousandth dollar. Consider the trial judge's \$5000 award for the unconstitutional strip search in *Ward*. Intuitively, \$5,000 seems low, particularly compared to the cost of litigation;<sup>475</sup> however, double the amount to \$10,000 and the award does not intuitively appear patently irrational or disproportionate. Halve the original amount— is \$2,500 unquestionably inappropriate and unjust? In *Ward*, had the trial judge's \$5,000 award been appealed, the discretion for determining this number appears so broad as to defy review. Anticipating this problem, the *Ward* Court entrusted the task of calculating principled quantum to trial judges, stating that

<sup>468</sup> *Charter*, *supra* note 2, s 24(1). Emphasis added.

<sup>469</sup> *Ward*, *supra* note 1 at paras 52-53.

<sup>470</sup> *Doucet-Boudreau*, *supra* note 8 at para 25.

<sup>471</sup> *Ward*, *supra* note 1 at paras 52-55.

<sup>472</sup> *Ibid* at paras 55, 54.

<sup>473</sup> *Ibid* at para 48,

<sup>474</sup> *Ibid* at para 51.

<sup>475</sup> Roach, "Late Spring", *supra* note 196 at 156; Gerald Chan, *supra* note 214, at 378-379.

quantum determinations “will ultimately be guided by precedent as this important chapter of *Charter* jurisprudence is written by Canada’s courts.”<sup>476</sup>

As these decisions unfold, courts might consider developing a standard of reviewing damages quantum with reference to other standards where numbers are at issue. For example, courts applying *Ward* could borrow the standard from courts applying *R v Nur*, the case which sets the standard for determining whether a mandatory minimum sentence is cruel and unusual punishment contrary to section 12 of the *Charter*.<sup>477</sup> *Nur* set out a two-step approach, requiring the sentencing judge to determine an appropriate sentence based on the principles of sentencing (and ultimately the available sentencing precedents), then determine whether the mandatory minimum is grossly disproportionate to the otherwise appropriate sentence.<sup>478</sup> This test could potentially provide a workable approach to appellate review of quantum, where a reviewing court could determine an appropriate quantum based on the principles in *Ward* (and any available precedent), then determine whether the trial judge’s award is grossly disproportionate. This standard, or one like it, could help the Court develop effective remedies. It would also provide the parties with a calculation method they can compute at the office before filing an appeal.

The guidelines in *Ward* for determining quantum, particularly in novel instances with no parallel in private law, will certainly be controversial. As the *Ward* court suggests, the future of quantum determinations will be determined as precedent begins to unfold,<sup>479</sup> but until then, one can expect substantial controversy over whether dollar amounts are ‘effective’ as defined by *Doucet-Boudreau*.

Thus, the *Ward* framework is equipped to provide responsive remedies and, over time, may become better at providing effective remedies.

## 2. Compensation

Just as the overall structure of *Ward* fits in with the purposive approach in *Charter* remedies, so too do the purposes of *Charter* damages - compensation, vindication, and deterrence. The Court described the interplay between these roles as follows:

Generally, compensation will be the most important object, and vindication and deterrence will play supporting roles. This is all the more so because other *Charter* remedies may not provide compensation for the claimant’s personal injury resulting from the violation of his *Charter* rights.

<sup>476</sup> *Ward*, supra note 1 at para 51.

<sup>477</sup> *R v Nur*, 2015 SCC 15.

<sup>478</sup> *Ibid* at para 46.

<sup>479</sup> *Ward*, supra note 1 at para 51.



However, as discussed earlier, cases may arise where vindication or deterrence play a major and even exclusive role.<sup>480</sup>

This paragraph isolates the role of compensation from vindication and deterrence. It also distinguishes compensation from other *Charter* remedies which might vindicate and deter, but not compensate. What makes compensation different than vindication and deterrence?

Compensation is described in explicitly corrective justice terms. The Court defines it in English as “to restore the claimant to the position she would have been in had the breach not been committed,”<sup>481</sup> and, for good measure, in Latin as “*restitutio in integrum*.”<sup>482</sup> Roach articulates an additional goal, which is to deprive the government of “the advantage of the violation.”<sup>483</sup>

Corrective justice is not peculiar to private law. In *Kingstreet*, a case about taxes collected under an *ultra vires* law, Roach notes that the Court relied on the “rule of law and constitutional limits” to arrive at a corrective justice approach to a remedy. Roach states that “This is an important reminder that private law principles will often be inappropriate in determining constitutional remedies,”<sup>484</sup> even where corrective justice - an ostensibly private principle, is invoked. In other words, corrective justice serves an important public function in the *Charter* irrespective of its importance in private law.

Just as corrective justice is not peculiar to private law, it is also not peculiar to monetary remedies. The 24(2) remedy for the exclusion of evidence is corrective in that the remedy places the accused in the position he would have been in had the trial proceeded without the illegally obtained evidence.<sup>485</sup> Even an adjournment can be a corrective remedy, and the Court has permitted adjournments to correct *Charter* infringements on the section 7 right to full answer and defence in criminal trials (even though an adjournment does not vindicate or deter the potential underlying moral or bureaucratic failures of government).<sup>486</sup> In a case like *Ward*, where an unconstitutional strip search resulted in obtaining no evidence, and no prosecution was ever pursued, the exclusion of evidence and adjournments cannot be

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<sup>480</sup> *Ibid* at para 47.

<sup>481</sup> *Ibid*.

<sup>482</sup> *Ibid* at para 48

<sup>483</sup> Roach, *Constitutional Remedies in Canada*, supra note 44 at para 3.520.

<sup>484</sup> *Ibid* at 3.570.

<sup>485</sup> See Chan, supra note 214 at 358; *Contra* David M Paciocco, “Section 24 (2): Lottery or Law-The Appreciable Limits of Purposive Reasoning” (2011) 58 Crim LQ 15 (arguing that *Grant* is regulatory in its application, not corrective, at 44-45).

<sup>486</sup> See Chan, supra note 214 at 357, (Chan notes his disappointment with a remedy because “an adjournment may be the only *Charter* remedy that can actually increase prejudice to an accused by adding further delay to the proceedings... within the meaning of section 11(b) of the *Charter*).



responsive or effective remedies. However, *Charter* damages can correct the constitutional wrong in a meaningful way.

The compensatory purpose of *Charter* damages fits within the broader corrective scheme of *Charter* remedies. As such, corrective justice is not a sufficient reason to import private law tort principles into the *Ward* analysis. A fault threshold, for example, is not a prerequisite for other corrective *Charter* remedies; neither should it be an element in *Charter* damages claims. Instead, courts applying *Ward* can look to other 24(1) remedies to see how corrective justice is applied in the constitutional context.

### 3. Vindication

Despite the legitimacy and power that corrective justice provides to judges, Roach notes that restoring the *status quo ante* “both empowers and constrains the judiciary in its remedial activities.”<sup>487</sup> It constrains the judiciary where, for example, an obvious *Charter* breach produces no compensable personal loss to an individual. Recall that this was the case in *Ernst*, where the *Charter* damages claim was advanced on vindication and deterrence purposes only. In that case, the alleged *Charter* infringement was the harm in and of itself – the unjustified restriction on free expression should be vindicated.

Vindication is a non-corrective remedy defined in *Ward* as “enforcing constitutional values” by focusing “on the harm the *Charter* breach causes to the state and to society.”<sup>488</sup> The Court in *Ward* does not refer to any Canadian authorities in defining vindication; however, it does note that determining a quantum for vindication should follow a similar analytical approach to that in *Grant* for the exclusion of evidence: “the seriousness of the breach must be evaluated with regard to the impact of the breach on the claimant and the seriousness of the state misconduct.”<sup>489</sup> By contrast to compensation, the Court described vindication with a focus on the importance of rights in and of themselves: “the function of *vindication* recognizes that *Charter* rights must be maintained, and cannot be allowed to be whittled away by attrition.”<sup>490</sup>

Although vindication is a pliable term, it fits nicely within the *Doucet-Boudreau* paradigm for responsive remedies, which demands that “the purpose of the right being protected must be promoted.”<sup>491</sup> Like a declaration, damages that vindicate are only nominally instrumental - although arguably an instrument to

<sup>487</sup> Roach, *Constitutional Remedies in Canada*, supra note 44 at para 3.520.

<sup>488</sup> *Ward*, supra note 1 at para 28.

<sup>489</sup> *Ibid* at para 52.

<sup>490</sup> *Ibid* at para 25. Emphasis in original. (“In assessing s. 24(1) damages, the court must focus on the breach of *Charter* rights as an independent wrong, worthy of compensation in its own right”, at para 55).

<sup>491</sup> *Doucet-Boudreau*, supra note 8 at para 25.

promote the value of the infringed right, it is also an acknowledgement that the legal wrong established by a *Charter* breach in step 1 of the *Ward* test is worth remedying. In laymen's terms, it seeks to remedy situations where a person has been "done wrong" by the state, even if righting the wrong does not qualify for corrective justice.

Although the Court references *Grant* in its description of vindication, there appears to be a subtle distinction between vindication in *Ward* and the repute of the administration of justice in *Grant*.<sup>492</sup> Writing extrajudicially, Justice Paciocco has called the latter the "condonation theory" and has distinguished it from vindication in *Ward* as protecting different interests: condonation as protecting the court's integrity, and vindication as focused on the victim's right itself.<sup>493</sup> For example, the exclusion of an involuntary statement from an accused obtained through a section 9, 10, or 12 breach could, in the right circumstances, prevent the administration of justice from falling into disrepute; but damages should not be awarded against the police for that reason. Damages for vindication should be awarded to promote the purpose of lawful arrests, detentions, rights to counsel, or the right against cruel and unusual punishment.

Paciocco has argued that the lack of definition around vindication and condonation are more harmful than helpful, stating that "these principles, standing alone, do not guide outcomes so much as they indulge disagreement."<sup>494</sup> With respect, I think vindication is best understood as remedying, in the words of *Ward*, "the breach of *Charter* rights as an independent wrong, worthy of compensation in its own right."<sup>495</sup> When a right is stepped on, a declaration may be appropriate; where a right is stomped on, a stay, mandamus, or a constitutional exemption may be appropriate. Damages for vindication can address *Charter* infringements at *all* levels of egregiousness, and may be superior in that a tailored dollar amount can address the finer points of the defendant's conduct. Indeed, in several cases where a declaration is not enough but a stay or other coercive remedy is too much, damages may be preferable to the government.<sup>496</sup>

#### 4. Deterrence and Future Compliance

Deterrence as a purpose for *Charter* damages is a sort of instrumental cousin to vindication. Through non-corrective measures, deterrence is aimed at achieving the government's future compliance with the *Charter*. The Court in *Ward* describes the purpose of deterrence damages to "secure state *compliance*" and

<sup>492</sup> *Ward*, supra note 1 at para 52.

<sup>493</sup> Paciocco, supra note 485 at 24.

<sup>494</sup> *Ibid* at 61.

<sup>495</sup> *Ward*, supra note 1 at para 51.

<sup>496</sup> See also Pilkington, "Damages", at 540, referencing *R v Germain*, (1984), 53 AR 264 (Alta QB). ("damages may be more appropriate in the circumstances because they vindicate the constitutional right without interfering disproportionately with the implementation of legitimate government policy.")

to “achieve *compliance*” with the constitution.<sup>497</sup> The Court also refers to deterrence as a principle informing the definition of the “good governance” factor against awarding damages: “insofar as s. 24(1) damages deter *Charter* breaches, they promote good governance. Compliance with *Charter* standards is a foundational principle of good governance.”<sup>498</sup> In other words, good governance is a reason to comply with the *Charter*, not an excuse to breach it.

Roach’s review of the jurisprudence reveals that the “the court has been more forthright about the need to deter constitutional violations with respect to Charter damages than other remedies, but it has made clear that courts must be concerned with constitutional compliance in the future as well as the past.”<sup>499</sup> Deterrence as a form of obtaining future compliance appears in several cases where Courts attempt to manage particular outcomes from the executive and the legislature. Roach points to *Eldridge v British Columbia*, where the Court ordered a declaration in favour of the plaintiffs but provided the government with six months “to select the precise means to comply with the equality rights, and the need for interpreters, in the future.”<sup>500</sup> In *Doucet-Boudreau*, Roach notes that the Court went to an intrusive extreme by ordering an injunction which would keep the court involved in ensuring government compliance with the order to respect minority language rights.<sup>501</sup> Roach saves the most famous case for last - *Reference re: Language Rights under the Manitoba Act, 1870* - where the Court suspended invalidity of all of Manitoba’s unilingual statutes and maintained jurisdiction over the translation process for seven years.<sup>502</sup> Each of these cases illustrates a situation where a remedy was used achieve future compliance with the constitution in that case and generally. Furthermore, as Roach notes, each of these cases involves the enforcement of language and equality rights - an area where future compliance is central to the right itself.<sup>503</sup>

Famously, the Canadian exclusion of evidence rule is *not* predicated on deterrence of individual police officers. The Court in *Grant* notes that the 24(2) remedy is “not to punish the police or to deter *Charter* breaches, although deterrence of *Charter* breaches may be a happy consequence.”<sup>504</sup> Similarly, damages through *Ward* are not a deterrent against individual police officers, but against the state directly.

<sup>497</sup> *Ward*, supra note 1 at para 29. Emphasis added.

<sup>498</sup> *Ibid* at para 38.

<sup>499</sup> Roach, *Constitutional Remedies in Canada*, supra note 44 at para 3.1100

<sup>500</sup> *Ibid* at 3.590; *Eldridge*, supra note 57 at 691-692.

<sup>501</sup> Roach, *Constitutional Remedies in Canada*, supra note 44 at para 3.600; *Doucet-Boudreau*, supra note 8 at paras 60-86.

<sup>502</sup> Roach, *Constitutional Remedies in Canada*, supra note 44 at para 3.610; *Re Manitoba Language Rights*, [1985] 1 SCR 721.

<sup>503</sup> Roach, *Constitutional Remedies in Canada*, supra note 44 at para 3.620.

<sup>504</sup> *Grant*, supra note 139 at para 73.

Unfortunately, the direct liability of the state for *Charter* damages is frequently minimized in discussions on deterrence for *Charter* damages. In the *Charter* damages context, deterrence and future compliance with the *Charter* should focus on the government institutions directly. In *Henry*, the majority of the Court focused on the fault of individual prosecutors and how liability could potentially chill – or over-deter – individual prosecutors.<sup>505</sup> In future cases, the Court could instead focus on the hiring practices, training programs, and institutional attitudes that led to the *Charter* breach. In *Henry*, that would include serious consideration of the well-known systemic reasons for wrongful convictions. In *Ernst*, it means looking at the executive responsibilities of the particular branch of the Board and asking whether imposing liability for this particular breach would over-deter the Board or interfere with its quasi-judicial role. *Charter* compliance and good governance should be focused on these systemic questions, and not narrowly on the “rotten apples” within government.<sup>506</sup>

Direct liability of government for *Charter* violations can also act as a limit on the court’s remedial discretion. The dynamic between the courts and government institutions under the *Charter* is quite different than the dynamic between courts and individual government actors at common law, particularly in the context of deterrence. While an order of damages against individual tortfeasors is uncontroversial, courts can be limited in ordering monetary remedies against government directly.

Consider, for example, the creative approach taken in *R v Rowbotham*.<sup>507</sup> In that case, the Ontario Court of Appeal determined that denial of legal aid funds for an accused to retain a lawyer for trial may, when certain conditions are met, be a violation of the accused’s section 7 *Charter* right to a fair trial.<sup>508</sup> The remedy in these cases, one would think, should be an order compelling the government to provide legal aid funding to the individual; however, courts have not taken that route. Instead, on *Rowbotham* applications, the remedy is a stay of proceedings conditioned upon the government providing legal aid funding for trial.<sup>509</sup>

Roach notes that “the stay of proceedings is in effect used as an indirect means to influence governmental behaviour in granting legal aid certificates.”<sup>510</sup> However, the stay of proceedings, in this context, is *less*

<sup>505</sup> *Henry*, supra note 3 at para 73.

<sup>506</sup> Sossin, “Crown Prosecutors”, supra note 79 at 405 (expressing preference against focusing not on “rotten apples” in government but “rather Crown prosecutorial system that should be called to account for such breaches.”)

<sup>507</sup> *R v Rowbotham*, 1988 CanLII 147 (ONCA) [*Rowbotham*].

<sup>508</sup> *Ibid* at para 170.

<sup>509</sup> *Ibid*.

<sup>510</sup> Roach, *Constitutional Remedies in Canada*, supra note 44 at para 9.790.

intrusive than damages, because it permits the government to choose whether to fund the litigation or live with the termination of the prosecution.<sup>511</sup> Roach describes the stay as a “blunt remedy” to achieve *Charter* compliance,<sup>512</sup> but the *Rowbotham* remedy is nonetheless a creative response to the complexities of enforcing *Charter* compliance.

The Court has a history of achieving *Charter* compliance through creative and responsive remedies. *Charter* damages fit in well beside cases like *Eldridge*, *Doucet-Boudreau*, and *Reference Re Language Rights*, where creative remedies were used to achieve *Charter* compliance. For monetary remedies in particular, the *Ward* framework is a more direct route to monetary remedies than *Rowbotham* applications, which indirectly provides what *Ward* provides directly. Focusing the analysis of deterrence on the actual systemic functions of government instead of its individual agents will bring the *Ward* remedy in line with the *Charter*'s broader purpose of achieving good governance through *Charter* compliance.

### C. *Charter* Limitations and Interest-Balancing

Recall that the *Charter* provides two methods of limiting *Charter* rights. The first is through section 1, whereby government can justify its unconstitutional legislation,<sup>513</sup> and the second is through section 33, where the government can constitutionalize its otherwise unconstitutional laws and actions through special legislation.<sup>514</sup> The only other limits within the text of the *Charter* are in the language of 24(1). The leading case on interpreting section 24(1) remains *Doucet-Boudreau*, which outlines a purposive approach to determining whether a remedy is appropriate and just for that particular case.

The *Ward* framework incorporates these limitations and interest-balancing approaches in all four steps. Roach has referred to steps 2 and 3 of the *Ward* test as a “mini s.1 exercise” where the claimant must “establish the violation and functional remedial need for damages” and the government “should bear the burden of justification especially with respect to good governance factors.”<sup>515</sup> Furthermore, the *Ward* framework is developed with reference to the *Doucet-Boudreau* requirements for meaningful vindication

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<sup>511</sup> *Ibid.*

<sup>512</sup> *Ibid* at 9.840

<sup>513</sup> See *Charter*, *supra* note 2, s 1; See *Oakes*, *supra* note 56.

<sup>514</sup> See *Charter*, *supra* note 2, s 33. To a narrower extent, the *Charter* also restrict rights through sections 15(2) and 6(3).

<sup>515</sup> Roach, *Constitutional Remedies in Canada*, *supra* note 44 at para 3.1040

(step 2),<sup>516</sup> legitimate means (step 3),<sup>517</sup> and being fair against the party to whom the order is being made (step 4).<sup>518</sup> The *Ward* framework is in step with the Court's broader preference for interest balancing.<sup>519</sup>

Interest-balancing and proportionality can be controversial. In a comprehensive work on damages under England's quasi-constitutional *Human Rights Act 1998*, Varuhas rejects interest-balancing as an adequate methodology. His primary concern with interest-balancing is its propensity for the government's interest to be given too much weight contrary to Dicey's equality theory, which prefers to treat government and private persons as equal under the law, with limited exceptions.<sup>520</sup> Where interest-balancing is used, Varuhas would prefer a formal structure, like the four-step *Ward* framework; however, he finds these structures tend to be "collapsed into unstructured balancing."<sup>521</sup> He specifically refers to *Henry* as a cautionary tale. While *Ward* set out a formal structure for interest-balancing, he criticizes the majority of the *Henry* Court as a "stark illustration of the dangers" in neglecting to follow a "structured, step-by-step" approach mandated by *Ward*.<sup>522</sup> Varuhas would likely prefer, as I do, Justice McLachlin's concurring opinion in *Henry* and her dissent in *Ernst*, which apply the *Ward* framework sequentially.

However, as Chan points out, this problem is not unique to damages. There is a trend at the Supreme Court of Canada towards "shifting of emphasis away from the efficacy of the Charter remedy toward a minimization of the burdens imposed on government."<sup>523</sup> He references the Court's decision in *R v Bjelland*, which considers the exclusion of evidence under section 24(1) for late disclosure of evidence.<sup>524</sup> The Court in that case held that evidence in late disclosure can only be excluded in two limited cases: where the late disclosure makes the trial unfair and an adjournment or disclosure order will not remedy the unfairness, or where exclusion is necessary to "maintain the integrity of the justice system."<sup>525</sup> Chan argues that the Court's decision "would place the burden on the accused to demonstrate that exclusion is the least intrusive remedy. They would engage in a sort of "minimal impairment" analysis in reverse."<sup>526</sup> Shifting the government's burden to the applicant was precisely the decision in *Henry*, where the majority of the Court interpreted step 3 of the *Ward* test to impose a pleading requirement on the plaintiff to prove

<sup>516</sup> *Doucet-Boudreau*, supra note 8 at para 55-58; See *Ward*, supra note 1 at para 28.

<sup>517</sup> *Doucet-Boudreau*, supra note 8 at para 55-58; See *Ward*, supra note 1 at para 33.

<sup>518</sup> *Doucet-Boudreau*, supra note 8 at para 55-58; See *Ward*, supra note 1 at paras 20, 53, 70.

<sup>519</sup> Roach, *Constitutional Remedies in Canada*, supra note 44 at para 3.840 ("The Supreme Court has quite consistently favoured an interest balancing approach to remedies with a few exceptions").

<sup>520</sup> Varuhas, supra note 256 at 340-341; See also Hogg et al, *Liability of the Crown*, supra note 18 at para 2.

<sup>521</sup> Varuhas, supra note 256 at 422.

<sup>522</sup> *Ibid* at 422-423.

<sup>523</sup> Chan, supra note 214 at 350-351.

<sup>524</sup> *R v Bjelland*, 2009 SCC 38.

<sup>525</sup> *Ibid* at para 24.

<sup>526</sup> Chan, supra note 214 at 358.

intentional, reasonable foreseeability, as well as causation and harm.<sup>527</sup> Justice McLachlin's concurring opinion in *Henry*, in the same vein as Chan's argument, questioned why the applicant should plead the defendant's case.<sup>528</sup>

Varuhas concedes, however, that if interest balancing is to be used, then "courts should consider not only countervailing public interests but also public interests which favour awards."<sup>529</sup> Support for that position can be found throughout this paper, as well as in Roach's admonition to make case-specific decisions.<sup>530</sup> The bottom line for Roach's argument is that countervailing factors "should not include objectives that are really objections to the existence of a right or remedy".<sup>531</sup>

A complete denial of a remedy will generally not strike an overall balance between providing and limiting a remedy even in cases where it is both rationally connected to a governmental object and the least restrictive means of achieving that objective... Remedies are not privileges and successful litigants have a strong presumptive right to a remedy, albeit that a remedy that can justifiably be limited when necessary to achieve an important governmental objective.<sup>532</sup>

In other words, Roach, like Varuhas,<sup>533</sup> would argue for a presumption of a remedy for the infringement. Only after that basis for that presumption is established at steps 1 and 2 of the *Ward* framework can it be undermined by countervailing factors at step 3. A structured application of interest-balancing in *Ward*, taken by the minority opinions in *Henry* and *Ernst*, is consistent with the *Charter*'s approach overall and with the best practices in interest-balancing normatively.

#### **D. Conclusions: Damages as a *Charter* remedy *qua* *Charter* remedies**

The *Ward* framework is consistent with the broader 24(1) jurisprudence. *Ward* can provide a responsive and effective remedy in many circumstances, but requires a deeper exploration of the purposive approach to calculating quantum and the significance of direct liability on vindicating and deterring rights infringements.

<sup>527</sup> *Henry*, supra note 3 at para 85, Moldaver J.

<sup>528</sup> *Ibid* at para 108, McLachlin CJC and Karakatsanis J.

<sup>529</sup> Varuhas, supra note 256 at 424.

<sup>530</sup> Roach, *Constitutional Remedies in Canada*, supra note 44 at para 3.900 ("The exact role that these competing factors should play will depend on the particular context. Too much deference to competing interests can overwhelm concerns about correcting violations and achieving compliance with the Constitution.")

<sup>531</sup> *Ibid* at para 3.1130.

<sup>532</sup> *Ibid* at para 3.1080.

<sup>533</sup> Varuhas, supra note 256 at 472, ("Preferably, there would be a presumption in favour of relief, coupled with a set of narrow defences reserved for exceptional cases, which consequentialist arguments for denial of relief must be thoroughly scrutinised and substantiated by evidence.")



The purposes for *Charter* damages - compensation, vindication, and deterrence - all coincide with other *Charter* remedies. Compensation as a corrective justice remedy is commonly used to deprive government of the benefits of a *Charter* infringement and return the injured person to the *status quo ante*. Vindication recognizes the importance of responding to infringements as a good in itself. Deterrence focuses on government as the subject and prioritizes *Charter* compliance as a broader goal of the *Charter*.

Although the *Ward* Court suggests that *Charter* damages could benefit from analogizing to private law damages claims, it overstates the need for reliance on private law. *Charter* damages claims should develop primarily by reference to other *Charter* remedies.

Interest-balancing has become a hallmark of *Charter* litigation both for judicial review of legislation and for individual remedies. The *Ward* framework is consistent with the overall approach taken in the *Charter* jurisprudence and withstands Varuhas' normative criticism – indeed, both implicate *Henry* directly as a problematic outcome. Like the *Henry* majority, the *Ernst* plurality decision similarly collapses *Ward*'s balancing act into “a sea of countervailing policy factors.”<sup>534</sup>

*Ward* is a “unique public law remedy.”<sup>535</sup> It is not the quasi-tort described by Justice Moldaver in *Henry* or the antithesis of public policy described by Justice Cromwell in *Ernst*. Understanding *Ward* as such should assist courts in applying its four-step framework with confidence that the outcomes will be legitimate and purposive.

<sup>534</sup> *Ibid* at 423. Note: Varuhas' book was published prior to the release of the *Ernst* decision.

<sup>535</sup> *Ward*, *supra* note 1 at para 31.



## V. PRIVATE LAW IN WARD

In *Ward*, the Supreme Court of Canada unanimously crafted a “unique public law remedy” which “operates concurrently with, and does not replace” private law damages claims against government.<sup>536</sup> The decision refers to “private law” generally and “tort law” specifically as guides in the future development of the *Ward* framework.<sup>537</sup> In this section, I discuss which aspects of private law and tort law in particular can assist *Ward*’s goal to “further the general objects of the *Charter*.”<sup>538</sup>

Contemporary Canadian tort liability for government generally follows A.V. Dicey’s equality theory. In short, Canada holds its government institutions and individuals to the same law as private persons, applies the same legal standard (with limited special defences for government), and adjudicates claims in the same court.<sup>539</sup> In the spirit of equality under the law, government institutions and individuals are liable for the tort of negligence, intentional torts, and specific torts developed especially for government that require malice or knowledge, like malicious prosecutions and misfeasance of public office. These higher thresholds and defences are exceptions to the general rule in order to account for the government’s role in governing.<sup>540</sup>

The *Ward* framework, when compared to private law (and torts in particular), is an entirely different paradigm. The *Ward* framework permits recovery in damages for *any* of the *Charter*’s substantive sections, employs an interest-balancing mechanism to determine liability, and applies a purposive approach to remedies. There are no private law causes of action that directly apply. As I have described throughout this thesis, all three of the Court’s *Charter* damages decisions are guilty, to varying extents, of relying on private law principles without much consideration for their original purpose or whether that purpose comports with the *Charter*.

The purpose of this section is to assess whether *Ward*’s references to private law were necessary, and if so, which particular area of private law ought to apply. I limit my analysis to the two areas of private law most referenced by the Court’s *Charter* damages jurisprudence to date: the tort of negligence and the ‘malice’ torts.<sup>541</sup> I also consider Varuhas’ compelling normative argument for using intentional torts as a

<sup>536</sup> *Ibid* at paras 31, 34.

<sup>537</sup> See for example *Ibid* at paras 43, 54.

<sup>538</sup> *Ibid* at para 25.

<sup>539</sup> Dicey, *supra* note 403; Hogg et al, *Liability of the Crown*, *supra* note 18 at 2.

<sup>540</sup> Hogg et al, *Liability of the Crown*, *supra* note 18 at 4.

<sup>541</sup> There are several important areas of Canadian law which I do not discuss, including various statutory causes of action in provincial human rights codes and civil law delicts. In addition to areas of Canadian law, I also do not

model for human rights damages, and extend his work by focusing on how intentional torts can assist the development of *Charter* damages going forward. Returning to the *Ward* framework, I address the specific instances where *Ward* identifies potential benefits from relying on private law. I conclude that *Ward* may have overstated its need for private law tort concepts.

## A. Which Private Law?

Private law is not a monolith.<sup>542</sup> Varuhas notes that while many jurisdictions agree that constitutional damages doctrine should reflect tort doctrine, torts are “a diverse field, comprised of disparate actions which have different functions.”<sup>543</sup> Despite this fact, Varuhas identifies a phenomenon wherein references to tort law are merely a reductive shorthand for “one tort, negligence - a not uncommon mistake given the dominance of negligence.”<sup>544</sup> Amid his review of international cases, Varuhas criticizes *Ward* for making this error.<sup>545</sup>

In Canada, there are several separate tort and contract based claims that could inform *Charter* damages.<sup>546</sup> In addressing the two most commonly referenced claims in the *Charter* damages jurisprudence – the tort of negligence and the ‘malice’ claims – I find that neither are appropriate guides for the development of *Charter* damages doctrine. Varuhas’ approach to intentional tort doctrine can be helpful to a point, but is ultimately incongruous with the interest-balancing approach in *Ward* and throughout the *Charter*.

### 1. Rejecting Negligence

Peter Hogg, Patrick Monahan, and Wade Wright define negligence in the public context: “if an invalid decision causing damage is made negligently (that is, in breach of a common law duty of care owed to the

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discuss several normative approaches to government liability which have had some level of traction in Canada from time to time. See for example, David Cohen & J C Smith, “Entitlement and the Body Politic: Rethinking Negligence in Public Law” (1986) 64 Can B Rev 1 (suggesting a rejection of negligence in favour of viewing public law rights as “New Property” entitlements); Tom Cornford, *Towards a Public Law of Tort* (Aldershot: Ashgate, 2008) (constitutional liability based on invalidity); Peter W Hogg, “Compensation for Damage Caused by Government” (1995) 6:1 NJCL 7 (the possibilities for special compensation schemes set up by legislatures).

<sup>542</sup> Varuhas uses the word monolith. VARUHAS, 159-160: “Such approach is founded on the erroneous assumption that the law of torts is monolithic and this beast is concerned principally or solely with provision of compensation for factual losses. Such approach should be rejected.”

<sup>543</sup> Varuhas, supra note 256 at 161.

<sup>544</sup> *Ibid.*

<sup>545</sup> *Ibid* at 74. However, it is just as likely that Justice McLachlin’s use of the term “tort law” refers to the entire body of tort law as opposed to negligence only.

<sup>546</sup> Contract-based claims can have a similar impact on *Charter* litigation. See for example *McKinney*, supra note 96, where Justice Wilson would have not applied common law contract principles to the *Charter* claim; and *Mackin*, supra note 94, which raised questions relating to statutory wages for judges.

injured plaintiff), the decision-maker will be liable in damages for the tort of negligence.”<sup>547</sup> The tort of negligence generally requires proof of a duty of care, a breach of that duty, causation, and damages.<sup>548</sup>

In Canada, the government and its servants are liable for damages in the tort of negligence. The contemporary test is derived from an English case, *Anns v Merton London Borough Council*, adopted by the Supreme Court of Canada in 1984<sup>549</sup> and refined in *Cooper v Hobart* in 2001.<sup>550</sup> The test begins by searching for a duty of care owed by government based on foreseeability and proximity, often determined by reference to the statute under which the defendant is operating.<sup>551</sup> The second part of the test asks whether there are any policy reasons to not impose liability.<sup>552</sup> The test has its critics, but has “proven itself to be highly flexible” and retains similar characteristics to private law negligence.<sup>553</sup>

One of the great strengths of the tort of negligence is that its substance is defined by the duties government owes to individuals. The tort is flexible enough to shift loss in a variety of situations and define how “wrongdoers should be individually liable for the damage they cause.”<sup>554</sup>

This strength of negligence, however, is the reason why it is unfit to guide the development of *Charter* damages liability. Varuhas puts it this way: “the tort’s primary function is to afford compensation for fault-based material losses, rather than to afford strong protection to basic interests in themselves and affirm their inherent importance.”<sup>555</sup> Based on Varuhas’ position, the search for a duty of care to avoid causing harm is irrelevant to protecting constitutional interests.

Varuhas contrasts the search for a duty of care with an approach grounded in the right itself, where “if the tort were organized around protection of a defined set of basic interests or rights, those interests or rights would delineate the tort’s scope.”<sup>556</sup> Recall that the *Charter* clearly outlines rights (sections 2 to 23), those responsible for not infringing rights (section 32), the limits on rights (sections 1 and 33), and guidelines for remedying infringed rights with personal remedies (section 24). Where the protected interests are

<sup>547</sup> Hogg et al, *Liability of the Crown*, supra note 18 at 196.

<sup>548</sup> The elements for negligence are frequently described with three or four elements, though these four concepts – duty, breach, causation, damages – appear regularly in cases and commentary. See *ibid* at 221; see Osborne, supra note 263 at 25.

<sup>549</sup> *Anns v Merton London Borough Council*, [1977] UKHL 4; *Kamloops (City of) v Nielsen*, [1984] 2 SCR 2.

<sup>550</sup> *Cooper*, supra note 19.

<sup>551</sup> *Ibid*; see Hogg et al, *Liability of the Crown*, supra note 44 at 226-227, 231-237.

<sup>552</sup> *Cooper*, supra note 19; see Hogg et al, *Liability of the Crown*, supra note 44 at 246-248.

<sup>553</sup> Hogg et al, *Liability of the Crown*, supra note 44 at 273.

<sup>554</sup> Osborne, supra note 263 at 27.

<sup>555</sup> Varuhas, supra note 256 at 32.

<sup>556</sup> *Ibid* at 40.

narrowly defined, there is no need to search for a duty of care. Thus, the first part of the *Cooper* test which searches for a duty of care is fundamentally unsuited to developing the future of *Charter* damages doctrine.

A similar criticism applies to negligence's creation of fault-based liability to constitutional claims. Fault-based liability is not peculiar to the tort of negligence, but is a prominent feature in the standard of care. Ordinarily, the standard of care is that of a reasonable person. The standard of care is often adjusted for government, as in *Hill*, where the standard of care applied to suspects under investigation is "the reasonable police officer in like circumstances."<sup>557</sup>

Varuhas is critical of imposing such "defendant-oriented" analysis on constitutional damages claims. The standard of care asks whether the defendant should be liable for the plaintiff's losses, but says little about the claimant's fundamental constitutional interests.<sup>558</sup> Recall that in both *Henry* and *Ernst*, the analysis in the prevailing opinions focuses almost exclusively on the defendant's conduct, whereas *Ward* was clear that "the court must focus on the breach of *Charter* rights as an independent wrong, worthy of compensation in its own right."<sup>559</sup> The tort of negligence's focus on the conduct of the defendant may be appropriate in the context of *Hill* and other cases, but is not appropriate to protecting *Charter* rights.

The same problem reappears with causation. Negligence claims will only provide damages with proof of personal loss actually caused by the defendant. Varuhas contrasts the "but-for" causation pervasive in negligence to the causation requirement for false imprisonment in English law. The difference is that a person who causes another's false imprisonment - an intentional tort - can be liable even if the plaintiff "would invariably have been detained lawfully in exactly the same way and for the same period."<sup>560</sup> Consider how "but-for" causation would apply in *Henry*. The focus of the analysis would turn to whether Henry would have been convicted regardless of the *Charter* breach. The very analysis of the *Charter* infringement proceeds by pretending the *Charter* infringement did not occur. Instead, the analysis should focus on remedying the infringement itself - the infringement of the right to fair trial in which he was not able to make full answer and defence - and how his rights can be compensated and vindicated while the infringement by the government is deterred.

<sup>557</sup> *Hill*, supra note 137 at para 67.

<sup>558</sup> Varuhas, supra note 256 at 35.

<sup>559</sup> *Ward*, supra note 1 at para 55.

<sup>560</sup> Varuhas, supra note 256 at 37, citing to *R (Lumba) v SOSHD* [2012] 1 AC 245.

Furthermore, there are strong policy reasons *not* to adopt a negligence view. The basic tenets of negligence are supplemented by defences like contributory negligence and illegality.<sup>561</sup> Consider how these defences would operate in the *Charter* context. Cooper-Stephenson suggests that *Charter* damages awards could be reduced based on contributory negligence. He cites a scenario where an unconstitutional search and seizure produces a damages claim for the invasion of privacy and distress, where the injured person may have contributed to the unreasonable search through his own criminal behaviour.<sup>562</sup>

This analysis is severely problematic. First, the *Charter* only constrains government, and therefore individuals cannot contravene the *Charter* even on a contributory basis. Since the *Charter* does not apply to individuals, it follows that it is impossible for individuals to infringe their own right. Second, a similar problematic outcome arises with the defence of illegality. The *Charter* protects the rights of every person whether or not he is involved in illegality. Taking the example above, if a constitutional search of a person produces an illegal drugs but an unconstitutional search of the same person produces a gun, the unconstitutionality of the latter search is not negated by the illegality of the former crime. These defences to negligence are unhelpful, even contrary, to advancing the objects of the *Charter*.

The reasons against using the tort of negligence to develop the future of *Charter* damages are primarily based in the difference between the interests each is designed to protect. All the other inconsistencies flow from that critical distinction. Developing *Charter* damages with the guidance of negligence principles will inevitably lead to strange results.

## 2. Intentional Torts

Intentional torts are often overshadowed by the modern prevalence of negligence.<sup>563</sup> Varuhas recounts the principles from this area of tort law and argued for their application to constitutional damages doctrines. Within Canada, intentional torts apply to government but are seldom used. Intentional torts could serve as a model to informing the development of *Ward*, but, only to a point.

### a. Government Liability for Intentional Torts

<sup>561</sup> Osborne, *supra* note 263 at 26. He also lists ‘voluntary assumption of risk’ and ‘inevitable accident’ as the other two defences to the tort of negligence.

<sup>562</sup> Cooper-Stephenson, *Charter Damages Claims*, *supra* note 67 at 334. (Adding, “however, criminal have rights too, and care must be taken not to dismantle those rights by the back door in such circumstances.”)

<sup>563</sup> Osborne, *supra* note 263 at 262-264; Varuhas, *supra* note 256 at 66.

Government agents are liable for the same intentional torts as private persons.<sup>564</sup> A trite example is that of a Canada Post mail deliverer. If this particular government actor trespasses onto private property, they can defend themselves by stating their statutory authority to do so - but only if they are actually delivering mail. Otherwise, the mail deliverer, the public utilities inspector, and the Prime Minister are subject to the tort of trespass. Other intentional torts include defamation, battery, nuisance, conversion, and false imprisonment. Though the particular elements of each tort are distinct, Varuhas argues that the overall purpose of each is the same: protecting narrow interests and vindicating intrusions upon those interests with damages.<sup>565</sup>

In addition, government agents can be liable for misfeasance of public office if they deliberately make invalid decisions constituting an abuse of power.<sup>566</sup> Hogg, Monahan, and Wright point out that although the tort has five elements, the most important is the fault requirement. Misfeasance only attracts liability for malice or knowledge.<sup>567</sup> Similar to the *Nelles* and *Miazga* line of cases for malicious prosecution, misfeasance of public office is an intentional tort that requires something *more* than mere intent, but an “actual intent to inflict injury... or reckless indifference to the fact that the conduct is unlawful, and that injury will likely result.”<sup>568</sup> Hogg, Monahan and Wright point to *Roncarelli v Duplessis* as “one of the few reported examples” of malice being found, and point to *Odhavji Estate v Woodhouse* as the leading case for the slightly lower knowledge threshold.<sup>569</sup> Misfeasance and malicious prosecution are considered intentional torts, despite the higher malice threshold, and are unique in that they specifically apply to government.<sup>570</sup>

*Ward* predicts that policy considerations justifying malice in *Miazga* could be relevant in a *Charter* damages claim; and in *Henry*, the majority rejected malice but found that the policy considerations from malicious prosecution justified a “heightened *per se* liability threshold.”<sup>571</sup>

Recall that Justice Moldaver distinguishes the *Charter* claim for disclosure defects from malicious prosecutions and held that the malice standard was inappropriate for disclosure.<sup>572</sup> However, Justice Moldaver did draw on the policy considerations underlying malice in order to justify a standard of

<sup>564</sup> Hogg et al, *Liability of the Crown*, supra note 18 at 194-195.

<sup>565</sup> Varuhas, supra note 256 at 14-21.

<sup>566</sup> Hogg et al, *Liability of the Crown*, supra note 18 at 197.

<sup>567</sup> *Ibid* at 198.

<sup>568</sup> *Ibid* at 198.

<sup>569</sup> *Ibid* at 199-200.

<sup>570</sup> *Ibid* at 194-196.

<sup>571</sup> *Henry*, supra note 3 at para 83, Moldaver J.

<sup>572</sup> *Ibid* at para 33, Moldaver J.

intentional conduct, mixing in a reasonableness requirement for good measure.<sup>573</sup> Notably, none of the judgments mention that the government is responsible for its ordinary intentional torts.

***b. An Argument for Drawing on Intentional Torts***

Varuhas provides a detailed argument in favour of using the model of intentional torts as a method determining constitutional liability. Drawing on cases from the United Kingdom and commonwealth, including Canada, he develops a normative argument predicated on the role of intentional torts in vindicating narrow rights. He is critical of the *Ward* and *Henry* decisions – *Ward* for relying too heavily on an interest-balancing framework, and *Henry* for collapsing that framework into “a sea of countervailing policy factors.”<sup>574</sup>

Varuhas’ argument is that intentional torts, unlike negligence, have their starting point in protecting a narrow and identifiable legal interest.<sup>575</sup> These torts are “vindicatory” in that they are actionable absent any harm, “including where the wrong leaves them factually no worse off.”<sup>576</sup> This extremely low threshold for actionability is meant to promote “the fundamental importance of those interests as well as their inherent value independent of any harm which may flow from the interference.”<sup>577</sup>

Likewise, *Ward* held that “the court must focus on the breach of Charter rights as an independent wrong, worthy of compensation in its own right.”<sup>578</sup> At step 1, the claimant must prove a *Charter* breach. In *Ward*, the breach was an unreasonable search contrary to section 8, in this case a strip-search, as defined in *Golden*. In *Henry*, the infringement was a failure to provide all relevant disclosure as described in *Stinchcombe* and contrary to section 7. In *Ernst*, the section 2(b) claim was considered novel, but alleged a suppression of political speech protected by the *Charter* and defined in law.<sup>579</sup> Each of these interests - a right against a strip-search, a right to a free trial, and the freedom to express political opinions - is inherently valuable. For that reason, *Ward* held that an injury to those interests could, in some circumstances, be actionable for vindication or deterrence only, absent proof of any compensatory damages.<sup>580</sup> The vindicatory aspect of intentional torts is in line with the *Ward* framework’s protection of rights.

<sup>573</sup> *Ibid* at para 85, Moldaver J.

<sup>574</sup> Varuhas, *supra* note 256 at 423.

<sup>575</sup> *Ibid* at 25.

<sup>576</sup> *Ibid* at 26.

<sup>577</sup> *Ibid*.

<sup>578</sup> *Ward*, *supra* note 1 at para 55.

<sup>579</sup> *Ernst*, *supra* note 4 at para 169, McLachlin CJC, Moldaver and Brown JJ.

<sup>580</sup> *Ward*, *supra* note 1 at para 30.



Varuhas goes on to describe liability for intentional torts as strict liability, where the defendant's responsibility for damages is not predicated on proof of fault.<sup>581</sup> Using trespass as an example, he writes that the tort technically only requires that the person be on the property even if the defendant is there "innocently" and even if the defendant does not know he is on private property.<sup>582</sup> In *Ward*, the threshold is *not* strict liability – after proving a *Charter* infringement, the damages remedy is not automatic. Nevertheless, the *Henry* majority expressed concerns about "scores of marginal claims" flooding the court.<sup>583</sup> However, just as it is unlikely that a property owner will go through the trouble to sue an innocent trespasser where he suffers no damages, it is unlikely that a person will initiate *Charter* litigation for innocent or *de minimus* intrusions on his rights.

What the *Henry* Court did not count on is whether *Ward* could stop marginal claims without a fault threshold. An important difference between intentional torts and *Ward* highlights the point. Whereas intentional tort claims can be brought for minor infringements of rights, a *Charter* damages claim can only be brought for infringements that, at step 2, result in the need for compensation, vindication, or deterrence. Indeed, several measures embedded in civil litigation generally also remove marginal claims. For example, the Rules of Civil Procedure in Ontario provide adverse cost consequences denying a favourable settlement in advance of trial.<sup>584</sup> If a litigant with an axe to grind brings a marginal *Charter* damages claim, he may leave a trial with a declaration, his own legal fees, and the costs of the other party. Fault is not necessary for a marginal claim, particularly where the *per se* protection of rights still requires functional justification of damages as a remedy.

Varuhas writes that for intentional torts the onus is on the defendant to prove legal justification.<sup>585</sup> In *Charter* damages, it is for the government to show countervailing factors; though not for why the substantive breach was justifiable, but why the purpose put forward for damages should be denied.<sup>586</sup> Varuhas highlights that placing the onus on the defendant to justify its conduct reflects the importance placed upon the impugned interest.<sup>587</sup> The same should be true for claimant's *Charter* interests, and is reflected in step 3 of the *Ward* framework which places the burden on the government to show why damages are not appropriate and just.

<sup>581</sup> Varuhas, *supra* note 256 at 27-28.

<sup>582</sup> *Ibid* at 28.

<sup>583</sup> *Henry*, *supra* note 3 at para 78.

<sup>584</sup> See *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71 at para 26 (costs "act as a disincentive to those who might be tempted to harass others with meritless claims"); In Ontario, see *Rules of Civil Procedure*, RRO 1990, Reg 194, s 49.10 (outlining cost consequences for rejecting reasonable offers to settle).

<sup>585</sup> Varuhas, *supra* note 256 at 30.

<sup>586</sup> *Ward*, *supra* note 1 at para 35.

<sup>587</sup> Varuhas, *supra* note 256 at 30.



On defences, Varuhas stresses that “defences are subject to careful scrutiny and narrowly constructed.”<sup>588</sup> This characterization of defences deviates from *Ward*. Step 3 of *Ward* is open-ended by design<sup>589</sup> and the level of scrutiny applied to general demurs about chilling effects, floodgates, and alternative remedies in *Henry* and *Ernst* has been minimal.<sup>590</sup> Decisions have been made without evidence and where irrelevant to the disposition. I am not alone in arguing that the countervailing factors ought to be more narrowly tailored to this *specific* defendant and this *specific* context.<sup>591</sup> It is unhelpful for every *Charter* damages claimant to hear that their case is upsetting the government’s *status quo* operation. *Charter* damages doctrine could benefit by analogy to the narrow defences to intentional torts as the *Ward* framework develops.

Varuhas describes the broad range of damages available for intentional torts. Whereas negligence only compensates for harms caused by the breach - a very narrow range - intentional torts can “redress a damage that is ‘normative’ in nature” and claimants can be awarded damages “for the mere invasion of their rights.”<sup>592</sup> At one end, nominal damages are available for “fleeting and miniscule” interference; but damages can be awarded for compensation (or not) with additional damages for the degree of the intrusiveness on the right and to express punishment or disapproval.<sup>593</sup> As in *Ward*, the bottom line is that damages can be available for more than just compensating harm. These vindicatory torts present an example of how to reinforce “the importance of particular interests” without limiting recovery to compensation alone.<sup>594</sup>

Varuhas’ depiction of the normative aspects of intentional torts seems like an ideal guide for the future development of *Charter* damages. Similarly, the narrowing of defences may be necessary to achieve more contextual, principled outcomes. The best reason to apply intentional torts to *Charter* damages, however, is because they are adept at protecting important personal interests. That central goal is most suited to protecting *Charter* rights and freedoms.

## **B. Tort Theory in *Ward* and its Progeny**

<sup>588</sup> *Ibid* at 31.

<sup>589</sup> *Ward*, supra note 1 at para 43, (“I therefore leave the exact parameters of future defences to future cases.”)

<sup>590</sup> *Henry*, supra note 3 at para 41, Moldaver J; *Ernst*, supra note 4 at para 38, Cromwell J.

<sup>591</sup> Roach, “Late Spring”, supra note 196 at 150-151.

<sup>592</sup> Varuhas, supra note 256 at 47.

<sup>593</sup> *Ibid* at 48.

<sup>594</sup> *Ibid* at 50-51.

The *Ward* Court noted particular aspects of the *Charter* damages remedy that, over time, would benefit by reference to private law and tort claims. I highlight four points, one for each step of the *Ward* framework: at step 1, private law and torts are not mentioned and therefore should be avoided; at step 2, that tort law is more helpful for compensation than vindication and deterrence; at step 3, that private law and torts can inform thresholds and defences to *Charter* damages; and, at step 4, that private law and tort quantum can inform the quantum for comparable *Charter* damages claims. On each of these four points, I offer examples of how negligence is harmful and how intentional torts offer a far more principled guideline for the future development of *Charter* damages.

*Ward* refers to the “practical wisdom” of private law claims; but, as the analysis shows, even private law claims do not share the same approach.

### 1. Step 1: Finding a *Charter* Breach

*Ward* describes step 1 in three sentences. Simply, proof of a *Charter* breach is required before 24(1) can be engaged.<sup>595</sup> *Ward* does not mention the need for private law principles to assist in determining a breach of *Charter* rights at any point.

*Henry* disturbs this holding by reversing the burden of proving fault from the defendant to the claimant. The majority crafts a test specific to the right to relevant disclosure in criminal cases, requiring three elements in addition to a *Charter* breach: intention, reasonable foreseeability, as well as causation and harm.<sup>596</sup> *Henry* explicitly rejects both malice and negligence, stating of the latter that “a duty of care paradigm risks opening up a Pandora’s box of potential liability theories.”<sup>597</sup>

The *Ernst* plurality disagrees with *Henry* and invokes a duty of care paradigm, particularly relying on several cases like *Cooper* to show why an administrative agency does not owe a duty of care to the public.<sup>598</sup>

The Court has shown no consistency on step 1. Based on the foregoing, I would agree with the *Henry* majority that the negligence paradigm is inappropriate for *Charter* damages, but would therefore not require any fault, reasonable foreseeability, or harm and causation at step 1. The intentional tort paradigm

<sup>595</sup> *Ward*, *supra* note 1 at para 23.

<sup>596</sup> *Henry*, *supra* note 3 at para 85, Moldaver J.

<sup>597</sup> *Ibid* at 93.

<sup>598</sup> *Ernst*, *supra* note 4 at paras 48-49, Cromwell J.

advanced by Varuhas is consistent with the *Ward* framework, which would make the infringement actionable at steps 1 and 2 without proof of more than the infringement and the functional justification for damages. This is the best way for private law to inform step 1 – by simply proving the wrong to be remedied.

Note that taking this approach does not mean opening government to a flood of *per se* liability for damages. At step 2, the claimant must prove that damages serve a function of *Charter* damages, and even if successful, the government can negate damages by identifying an alternative remedy. Nothing in step 1 entitles the claimant to damages. Liability for *Charter* damages, in that sense, is never strict liability.

## 2. Step 2: Functional Justification of Damages

*Ward* describes the second step as the search for a functional justification for *Charter* damages. The functional approach to damages is itself derived from the private law approach to personal injury damages.<sup>599</sup> The three functions for *Charter* damages are compensation, vindication, and deterrence – three independent functions establishing a pluralist approach to remedying *Charter* infringements with damages.

*Ward* equates compensation with tort law; but, for vindication in deterrence, “tort law is less useful.”<sup>600</sup> Varuhas takes exception to this. He believes that this comment reflects a “a mistaken conception of tort... as only being concerned with affording compensation for actual loss.”<sup>601</sup> In his view, intentional torts are primarily intended to vindicate rights.<sup>602</sup>

In this context, the majority holding in *Henry* is contrary to the intentional tort paradigm. The majority required that the claimant prove causation and harm – principles which relate to compensation in negligence, but are not necessarily relevant to intentional torts. Varuhas notes that causation and foreseeability are not normally *elements* for intentional torts, though may be relevant for the scope of recoverable damages.<sup>603</sup> The holding in *Henry* essentially limits *Charter* damages recovery within a negligence framework. Varuhas notes the peculiar implications of the negligence framework as applied to constitutional rights: “It makes little sense for the law to afford compensation for consequential losses,

<sup>599</sup> *Ward* at 24 and 50, in both instances referencing *Andrews v Grand & Toy Alberta Ltd.*, [1978] 2 SCR 229.

<sup>600</sup> *Ward*, supra note 1 at para 51.

<sup>601</sup> Varuhas, supra note 256 at 74.

<sup>602</sup> *Ibid* at 14-15.

<sup>603</sup> *Ibid* at 18-19.

which are ‘parasitic’ on the rights-violation, but not for damage to the interest that is the very object of legal protection.”<sup>604</sup> *Henry*, unfortunately, falls into that very category.

As I explain in Part IV of this paper, compensation is not necessarily unique to private law - there are several examples of how *Charter* remedies perform a corrective justice function, albeit without a monetary remedy. Placing the injured person in the position they would have been absent the breach is a fundamental aspect of compensation.<sup>605</sup> Requiring fault, causation, and harm are hallmarks of the tort of negligence which need not apply to *Charter* remedies.

### 3. Step 3: Countervailing Factors

*Ward* identifies two countervailing factors: alternative remedies and good governance.<sup>606</sup> Both implicate private law considerations. Alternative remedies to *Charter* damages include damages in private law, which should not be awarded “if the result would be double compensation.”<sup>607</sup> Good governance can rely on private law claims to create thresholds and defences for *Charter* damages claims where the defendant can prove its relevance.<sup>608</sup>

For good governance in particular, an interesting paradox emerges. Several private law and tort claims against government contain special thresholds and defences that only government may rely upon. Recall, for example, the requirement for malice in prosecutions,<sup>609</sup> and the special test for negligence from *Cooper* requiring the plaintiff to establish proximity and foreseeability and negate any policy considerations against awarding damages against government.<sup>610</sup> However, these are not the norm, but *an exception* to government liability. As Hogg, Monahan, and Wright point out, Dicey’s equality theory, which is historically accepted in Canada, would hold the government to the same standard as ordinary persons with no “special exemptions and privileges that could lead to tyranny.”<sup>611</sup> While some special exceptions are appropriate, these are not the norm; and in fact, the trajectory of special government exceptions “is uniformly in the direction of subjecting the Crown of the ordinary law of the land.”<sup>612</sup> Thus, the private law reason for supporting an immunity is just an exception to the rule of law generally.

<sup>604</sup> *Ibid* at 91.

<sup>605</sup> *Ward*, supra note 1 at paras 27, 48.

<sup>606</sup> *Ibid* at para 33.

<sup>607</sup> *Ibid* at para 36.

<sup>608</sup> *Ibid* at para 43.

<sup>609</sup> *Miazga*, supra note 18.

<sup>610</sup> *Cooper*, supra note 19.

<sup>611</sup> Hogg et al, *Liability of the Crown*, supra note 18 at 2.

<sup>612</sup> *Ibid* at 11.

Furthermore, unlike the private law, which applies to private and public persons, the *Charter* only applies to government.<sup>613</sup> For the government to require special exemptions from ordinary law is reasonable; but why does government require special exemptions from the law that applies only to it? Rather than rely on dubious private law principles for creating exemptions to *Charter* damages liability, defendants should rely on the good governance defences that exist in the *Charter* – interest-balancing, justification, and other internal limits on rights.

In this sense, *Ward* is potentially too open to permitting good governance defences from private law to influence a *Charter* damages claim. *Henry* is particularly problematic in how it changes the rules of the game – shifting the burden of fault from step 3 to step 1 and adding new elements – and *Ernst* is likewise troubling in its reliance on private law principles to turn step 3 into an absolute bar on *Charter* damages against tribunals. These types of holdings can be avoided if both courts and litigants are alive to the diversity of doctrine within tort law.

#### 4. Step 4: Quantum

In determining the quantum of damages, the Court made some room for practical aspects of private law damages quantification to assist *Charter* damages. *Ward* holds that “private law measure of damages for similar wrongs will often be a useful guide.”<sup>614</sup> While the private law measure is a starting point, *Charter* damages must account for “the consequent diversion of public funds.”<sup>615</sup>

When a court reviews comparable private law damages quantum, it should be sensitive to the types of damages that were available based on the cause of action. As noted, the tort of negligence is restricted to personal loss, and the final amount might take into consideration several cost-shifting mechanisms like contributory negligence. Statutory damages claims may likewise be restricted, capped, or adjusted based on the circumstances. Remaining aware of these differences is critical to landing on a comparable number for *Charter* damages, which provides broader compensatory options than most private law damages actions.

Similarly, when applying private law doctrines to *Charter* damages awards, courts should take care that these awards do not frustrate the purposes of vindication and deterrence. For example, after *Henry*’s trial against British Columbia, his 8-million dollar trial award was reduced by the settlement amount he

<sup>613</sup> *Ward*, supra note 1 at para 22.

<sup>614</sup> *Ibid* at para 54.

<sup>615</sup> *Ibid* at para 53.

obtained from the City of Vancouver and federal government.<sup>616</sup> While the rule against double-recovery is solid in principle, applying these rules can potentially frustrate the object of deterrence and vindication, particularly since those damages are not necessarily calculated based on the deservedness of the claimant but based on the conduct of the defendants. This is an example of an area in which the functional approach to damages can be frustrated by application of doctrines that do not necessarily account for the purposive approach to *Charter* remedies.

The purposive approach to *Charter* damages also raises other concerns that may not be relevant at private law. For example, the identity of the defendant may be an important factor in determining the quantum of deterrence damages. Consider an identical breach by a small police force like the Summerside Police Department in Prince Edward Island – a force of 35 officers<sup>617</sup> – compared to a large regional force like the Ontario Provincial Police. Conventional awards also fail to address the “the unique cultural circumstances and exceptional challenges in delivering justice” that exist in remote communities across Canada, where judicial decision making takes on a different complexion due to cultural differences and special institutional challenges.<sup>618</sup> In these circumstances, conventionalising awards can run counter to *Doucet-Boudreau*’s admonition to consider fairness to the defendant.<sup>619</sup>

Thus, even though the Court suggests that 24(1) damages quantum may be calculated according to private law calculations,<sup>620</sup> the purposive approach to 24(1) remedies in *Doucet-Boudreau* and the functional approach in *Ward* itself prefer an *ad hoc* determination of the appropriate and just remedy - and if that remedy is damages, then the appropriate and just quantum.

### **C. Conclusion: The Best Role for Private Law in *Ward***

“For me,” wrote Linden, “after all these years still a hopeless “tortaholic”, I am intrigued by *Ward*, but I hesitate to yield this new territory totally to public law.”<sup>621</sup> Linden believes that tort law can provide “stability and guidance to judges” on 24(1) damages cases.

<sup>616</sup> See *Henry* BCCA, supra note 355 and accompanying text.

<sup>617</sup> Summerside Police Department, online: Wikipedia <[https://en.wikipedia.org/wiki/Summerside\\_Police\\_Department](https://en.wikipedia.org/wiki/Summerside_Police_Department)>

<sup>618</sup> *R v Anugaa*, 2018 NUCJ 2 (CanLII) at para 47. (Quotation made in the context of applying Supreme Court of Canada decisions while also accounting for “Inuit culture and experience” and other factors of local importance).

<sup>619</sup> *Doucet-Boudreau*, supra note 8 at para 58.

<sup>620</sup> *Ward*, supra note 1 at para 50.

<sup>621</sup> Linden, supra note 194 at 430.

With respect to Justice Linden, the contributions of private law to *Ward* so far have been disastrous. The majority decisions in *Henry* and *Ernst* apply private law in ways it was not intended to operate. There may be a good way, as both Justice Linden and *Ward* suggest, to incorporate private law to *Charter* damages, but the Court is still searching for it.

In the ongoing development of *Charter* damages claims, the tort of negligence is not the ideal source of help. This tort focuses narrowly on harm, causation, and the search for a duty of care - all good concepts which have nothing to do with the *Charter*. Intentional torts are far more helpful in that they have experience protecting important interests, qualify for remedies without a showing of fault, and place the burden of raising defences on the defendant - all good concepts familiar to the *Charter*. However, intentional torts may not be able to cover all aspects of *Charter* damages, especially where the facts are dissimilar to intentional torts.

The *Ward* decision sets out a framework for public law damages, but indicates its needs for reliance on private law as this relatively new remedy grows into itself. In *Ward*, almost no private law principles were leveraged to achieve the outcome of the case; however, the Court acknowledged the potential need for the “practical wisdom” of private law to help determine future cases. The Court’s future decisions in *Charter* damages cases will hopefully provide some guidance on how to distinguish between private law principles that are wise for *Charter* damages, and which are folly.

I have presented Varuhas’ argument for rejecting negligence and instead relying on intentional torts as a guide for constitutional damages. The rejection of negligence is absolutely necessary going forward. This tort is simply incompatible with the *Charter* and with *Ward* specifically. Intentional torts are more helpful, though they do not account for the *Ward* framework’s dedication to interest-balancing.

Ultimately, I have not abandoned my position in part IV - that the *Charter* is essentially capable of dealing with public law damages without the assistance of private law principles. However, if any branch of tort law is relied upon in crafting *Charter* damages doctrine, it is clear that intentional torts are the strongest body of tort law to help achieve the *Charter*’s broader objectives of protecting rights and freedoms. In future cases, the relevance of other private law doctrines from human rights acts, civil law delicts, and law reformers may spark new discussions on how private law can help *Ward* achieve the objects of the *Charter*. I welcome those discussions.

## VI. CONCLUSION

After almost three decades of uncertainty around *Charter* damages, the Supreme Court of Canada created a principled test for awarding a “unique public law remedy.”<sup>622</sup> In two subsequent cases, the Court returned this area of law to its former state of uncertainty by denying the uniquely public aspects of *Charter* damages. This thesis explains the history of these developments and suggests a return to awarding *Charter* damages with an emphasis on its legitimacy as a public law remedy.

In particular, I argue for a return to a faithful application of the *Ward* framework. Emphasizing the ‘*Charter*’ in *Charter* damages will clarify how *Ward* is a legitimate method of arriving at “appropriate and just”<sup>623</sup> results. *Charter* damages through the *Ward* framework should compensate claimants in the same way other 24(1) remedies compensate, should vindicate the same way 24(1) remedies vindicate, and deter the same way 24(1) remedies deter. Compensation is a valid object of the *Charter*, not just of damages, and ought to apply a corrective justice function in the same way the exclusion of evidence, for example, places the claimant in the *status quo ante*. Vindication and deterrence ought to uphold *Charter* rights and achieve future compliance through the same means that other 24(1) remedies have done for decades. The *Charter* damages remedy is a *Charter* remedy, and understanding its consistency with the *Charter* overall provides it with the same legitimacy as other *Charter* remedies.

*Ward* mirrors the *Charter* approach to remedying constitutional infringements. *Ward* reflects a commitment to interest-balancing through what Roach refers to as a “mini s. 1 analysis” where courts are instructed to balance the interest of the claimant in *Charter* damages against the countervailing interests of the government.<sup>624</sup> Consider it another way: Step 2 and step 3 could easily be renamed “appropriate” and “just.” Step 2 asks whether damages appropriately fulfil any of the three objectives of the *Charter*. Step 3 asks whether damages against government are justifiable. Where a court is satisfied that the claimant can prove the appropriateness of damages and the government cannot negate its justness, damages can be calculated against the same standard: “appropriate and just.”<sup>625</sup> This approach to awarding damages is precisely what makes *Ward* a “unique public law remedy.”<sup>626</sup>

The Court has struggled with how to apply step 3 of the *Ward* framework. Based on my analysis, there are three guidelines to highlight.

<sup>622</sup> *Ward*, supra note 1 at para 31.

<sup>623</sup> *Charter*, supra note 2, s 24(1).

<sup>624</sup> Roach, *Constitutional Remedies in Canada*, 3.1040.

<sup>625</sup> *Charter*, supra note 2, s 24(1).

<sup>626</sup> *Ward*, supra note 1 at para 31.



First, *limit* the use of step 3 policy factors to negate the damages remedy, not to redefine the test for a *Charter* infringement. Like section 1, step 3 balances interests; however, unlike section 1, step 3 balances interests in a remedy only, *not* in whether a breach has occurred. Limiting its application to its intended use will produce more principled results.

Second, *specify* why each policy factor negates each functional purpose of damages. Consider, for example, the facts in a case like *Schachter*, where statutory benefits are denied to a class by an underinclusive statute. The government has a good argument against providing compensation since a strict application of corrective justice will make it impossible to determine whether the claimant's class would have been included absent the infringing statute; however, if the claimant can prove their class was excluded based on prejudice or harmful stereotypes, they may be entitled to damages in vindication or deterrence. This approach is superior to applying the "general rule" from *Mackin* against combining section 52(1) and 24(1) remedies.

Third, *connect* good governance to a good society. Arguments about chilling effects and floodgates should only be accepted by the court if the government can prove that those phenomena are not just bad for government but bad for society. If the policy factor raised is simply bad for the *status quo* operation of government, then it should be discarded. Good governance ought to connect to the good of the governed.

On government motions against the claimant's pleadings, step 3 need not be applied. In particular, step 3 should not be used to change the rules of the game. Where a non-*Charter* policy consideration is relevant, it should certainly not be used to mutate the *Ward* framework. This was the result in *Henry*, where the majority relied on the chilling effect and floodgates rationales to stack pleading requirements over and above the claimant's proof of a *Charter* infringement.<sup>627</sup> In a future case, it may be that the Court will require a fault threshold to award *Charter* damages. In accordance with the *Ward* framework, the burden to a) raise the relevance of that threshold and b) to prove that the plaintiff has not met that threshold should be on the defendant *at trial*. This is the most rational explanation for how step 3 ought to operate.

Similarly, the rule from *Mackin* ought to be subjected to step 3 or be discarded entirely. The *Ward* framework strikes the appropriate balance to determining whether section 52(1) remedies can be combined with section 24(1) remedies. The government is free to argue at step 3 that the alternative remedy through 52(1) has achieved the purposes of compensation, vindication, and deterrence, and that

<sup>627</sup> *Henry*, supra note 3 at paras 40-41, Moldaver J.

therefore no 24(1) remedy need apply. In those cases, the most likely outcome will be that the 52(1) remedy will adequately remedy all three principles unless the government's conduct is so egregious or the harm so obvious as to merit an add-on remedy for compensation, vindication, or deterrence.

Consider how this conclusion might affect a future case like *Guimond*. Striking down an unconstitutional sentencing statute may vindicate society's interest in enforcing the right against cruel and unusual punishment; however, being jailed under an unconstitutional statute (even if presumptively constitutional) is a serious affront to a person's liberty and dignity that ought to be compensated in and of itself. Deterrence may be unnecessary since the government should not be deterred from enforcing presumptively constitutional statutes; however, this type of 'claim of right' defence should not automatically negate all the step 2 purposes by a general application of restricting the combination of remedies. McAllister raised several reasons to reconsider or overrule *Mackin*. In the post-*Ward* era, there are several more.

There is no paradigmatic *Charter* damages case. Those that resemble private law torts, like *Ward* and *Henry*, only happen to resemble torts. The Court can expect to hear more cases raising issues like the suppression of political expression in *Ernst*, where there is no private law analog. Cases in appellate courts since *Ward* have raised *Charter* damages claims for minority language education rights in section 23<sup>628</sup> and cruel and unusual punishment in section 12.<sup>629</sup> Any section of the *Charter* can be remedied by damages, so long as it raises the need for compensation, vindication, or deterrence.

For this reason, there is no private law paradigm that adequately fits as a proper guide for the future development of the *Ward* framework. However, based on my analysis in this thesis, there are several conclusions to draw on how the relationship between *Ward* and private law principles ought to proceed.

First, since *Ward* is a "unique public law remedy," a court should only supplement *Ward* with private law after it has exhausted its inquiry into analogous public law principles. For example, when compensation is at issue, a court should first ask whether the answer lies in other compensatory 24(1) remedies before searching for answers in any area of private law. If there is no clear answer from within the *Charter* remedial jurisprudence, only then should it be necessary to venture into private law. One area where this will be common in the early years of *Charter* damages is in quantum determinations, where private law amounts will have to suffice until a substantial *Charter* jurisprudence builds up.

<sup>628</sup> *Conseil scolaire francophone*, supra note 190.

<sup>629</sup> *Ogiamien*, supra note 437.

Second, where private law principles are used in *Ward*, the court should be clear on why this principle was chosen to apply to the circumstances and how it fits in with the purposive approach to *Charter* remedies. Identifying the source of the principle is ideal. If a claimant or defendant raises a principle from the tort of negligence, there will be strong reasons to argue against its use. As discussed, the core purpose of the tort of negligence is to shift loss, not to protect important rights. Intentional torts protect important rights and may find purposive application in future *Charter* damages cases, but their application should never obstruct the interest-balancing mechanisms of *Ward*. Overgeneralization of tort principles will inherently be contrary to a purposive approach. When fitting a private law principle into the *Ward* framework, care should be taken to describe how this principle will further the objects of compensation, vindication, and deterrence, or will limit them through a purposive approach to being fair to government.

Third, although the calculation of quantum at step 4 will rely on private law damages awards until a substantial *Charter* damages jurisprudence builds up, courts should be cautious with respect to adopting calculations uncritically. The calculation of private law damages amounts may reflect private law policies that would not apply in the *Charter*. For example, courts should be aware that the final damages amount in negligence cases, for example, may reflect a subtraction of damages for contributory negligence – a doctrine that should absolutely not apply in the *Charter* damages context. Courts should be critical of the final numbers and make necessary adjustments relating to the purposes of compensation, vindication, and deterrence. Since courts lack the ability to translate *Charter* rights infringements into precise dollar amounts, wide discretion should be given to trial judges. Review of that discretion on appeal should, if possible, should follow a *Charter*-based approach to review of 24(1) discretion. I raised the *Nur* test regarding sentencing as a potential guide to determining review since, like *Ward*, the *Nur* test is concerned with determining appropriateness and justness of numbers. A test like the one in *Nur*, adapted for review on appeal, could provide much needed legitimacy to the final dollar amounts awarded by courts against the government.

Fourth, the Court must eventually decide whether a statutory immunity, like the one in *Ernst*, will apply to limiting either 24(1) remedies broadly or *Charter* damages specifically. I suggest it would be bad policy to permit a statute to immunize government from any 24(1) remedy. The drafters of the *Charter* specifically rejected limiting remedies to those provided for by law.<sup>630</sup> Similarly, the Court should be careful to provide such a substantial limitation on enforcing *Charter* rights that is not circumscribed by section 33. Given the variety of statutes in purpose and construction, I suspect finding a place to draw the line will

<sup>630</sup> See text accompanying note 41.

result is more split decisions like *Ernst*. My conclusion on this point is for courts to guide their approach by determining which statutes of ordinary application can assist the definition of “court of competent jurisdiction” and which statutes only immunize government or otherwise frustrate the broad discretion of 24(1).

Finally, there are several points of conclusion on how direct liability of government ought to guide the development of the *Ward* framework in future cases.

First, direct liability is *not* a policy choice by the Court. It is the textual application of section 32.<sup>631</sup> Thus, Courts should keep in mind that although all *Charter* infringements can inevitably be traced to human error or misconduct, the aim of the *Charter* is to hold government accountable. The approach to awarding *Charter* damages should thus focus on the government directly.

Second, direct liability should have a more important role in guiding the analysis of good governance at step 3. In *Henry*, for example, the majority’s focus on the fault of individual Crown lawyers led to the unintentional result of leaving the reputation of those lawyers in the balance of litigation to which they are not a party. The focus should instead be on the culture, policies, and practices of the local Crown attorney’s office and the provincial Ministry. In *Ernst*, the focus of the Justice Cromwell and Abella’s opinions were too broadly focused on the entire administrative agency. The allegations pointed to the executive branch, not the tribunal itself; yet, both opinions refused to distinguish between the two departments based on principles drawn from negligence cases.<sup>632</sup> The dissenting opinion would have focused on the branch of the agency which caused the infringement. Because *Charter* liability implicates *Charter* compliance and good government, the target of compliance ought to be singled out specifically. This analysis may not have changed the outcome in *Ernst*, but it would have been a more solid foundation for determining whether deterrence was appropriate or whether good government concerns negate the justifications for *Charter* damages.

Third, direct liability of government implies that liability should depend on the government’s shortcomings, not those of its individual agents. Fault of the individual person will rarely account for bureaucratic, practical, and cultural failures of government. In *Henry*, for example, the wealth of information about how systemic shortcoming cause wrongful convictions should have provided context to the development of how *Ward* applies to *Stinchcombe* issues. In future cases, particularly those involving

<sup>631</sup> *Ward*, supra note 1 at para 22.

<sup>632</sup> *Henry*, supra note 3 at para 80, Moldaver J; *Ernst*, supra note 4 at para 48, Cromwell J.

equality rights, religion, or police brutality, the *Charter* infringement should be connected to the broader well-known systemic issues about stereotyping marginalized groups. It would be a tragedy if, in those cases, government was only liable if the claimant could prove that the officer who assaulted him was a racist; or conversely, that the government could avoid liability by arguing that the officer's racism should negate *Charter* damages in favour of tort liability only.

After 36 years of the *Charter* and three Supreme Court of Canada decisions, *Charter* damages remain in their infancy. As more appellate decisions define the parameters and purposes of *Charter* damages, it will be interesting to see whether *Ward* will retain its distinctly constitutional features or devolve into a hybrid of constitutional torts. If the minority opinions in *Henry* and *Ernst* prevail, there is some hope for the *Ward* framework to grow into a "unique public law remedy."<sup>633</sup>

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<sup>633</sup> *Ward*, supra note 1 at para 31.

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