A Promising Late Spring for Charter Damages:
Ward v. Vancouver

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Part one of this article provides a brief overview of the Supreme Court’s decision in Ward including not only its upholding of a $5000 damages under s. 24(1) of the Charter for an unconstitutional strip search, but its overturning of a $100 award for an unconstitutional seizure as not needed to compensate, vindicate or deter Charter violations. The second part examines threshold issues such as court of competent jurisdiction of small claims courts and statutes of limitations. The remedial purposes of compensation, vindication and deterrence of Charter violations are examined in the third part and the fourth part examines how governments may discharge their burden of establishing that Charter damage claims are not appropriate or fair to the government because of good governance concerns and the availability of alternative remedies. It suggests that Ward has largely rejected concerns about the overdeterrence of individual officials. The last part suggests that the quantum of Charter damages should be driven by consideration of the remedial purposes of compensation, vindication and deterrence and that the $5,000 award should not be seen as either a starting point or a cap on Charter damages. The interrelated issues of quantum and access to justice are likely to be the most important factors in determining whether Charter damages blossom after the late spring set off by the Court’s promising decision in Ward.

Dans la première partie de cet article, l’auteur présente un survol bref d’une décision de la Cour suprême dans l’arrêt Ward qui maintient la décision d’accorder des dommages-intérêts de 5 000 $ pour une violation de l’article 24(1) de la Charte en raison d’une fouille à nu. Toutefois, dans cette même décision, la Cour casse la décision d’accorder des dommages de 100 $ pour une saisie illégale, car les objectifs d’indemnisation et de dissuasion par rapport à une violation de la Charte n’interviennent pas à ce sujet. Dans la deuxième partie, l’auteur examine les questions préliminaires, dont les tribunaux compétents en matière de petites créances et la prescription. Les objectifs de réparation de l’indemnisation, la défense du droit et la dissuasion relativement aux violations des droits garantis par la Charte sont examinés dans la troisième partie de l’article. Dans la quatrième partie, l’auteur examine comment les gouvernements peuvent se décharger de leur

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fardeau pour démontrer que des réclamations contre eux en vertu de la Charte ne sont pas appropriées ou justes en raison de préoccupations de saine gestion publique et de la disponibilité de solutions de rechange. Cela suggère que dans l’arrêt Ward, la Cour a rejeté les préoccupations concernant l’excès de dissuasion des agents individuels. Dans la dernière partie, l’auteur suggère que le montant de dommages accordés en vertu de la Charte devrait se fonder sur la prise en compte des objectifs de réparation de l’indemnisation, la défense du droit et la dissuasion et que le montant de 5 000 $ ne devrait être considéré ni comme un point de départ ni comme une limite aux dommages accordés en vertu de la Charte. Les questions interreliées de quantum et d’accès à la justice sont probablement les facteurs les plus importants pour déterminer si les dommages accordés en vertu de la Charte prendront leur envol à la suite de cette décision très prometteuse de la Cour dans l’affaire Ward.

1. INTRODUCTION

In 1996, Professor David Mullan accurately declared that early enthusiasm for Charter damages had amounted to a “false spring.”¹ Basic issues such as whether governments should be held directly liable for damages; whether plaintiffs had to establish a level of fault beyond establishing a Charter violation; and whether and how non-pecuniary damages would be valued were still not resolved in the jurisprudence.² The Supreme Court had only decided in Guimond³ and then Mackin⁴ that damages under s. 24(1) of the Canadian Charter of Rights and Freedoms (the Charter) would not be available in conjunction with a declaration of invalidity under s.52 unless the plaintiff established some form of fault such as bad faith, abuse of power or perhaps negligence in addition to establishing a Charter violation. Academic debates revolved largely around whether and to what extent private law concepts taken from the law of torts or delict would be applied to Charter damages⁵ and whether some minimum or per se damage award was justified to recognize the violation of the Charter.⁶ Charter damages withered on the vine, even while the Court expanded the common law liability of the state and affirmed the availability of novel Charter remedies.

Much of the disappointment about Charter damages should be dispelled by

the Supreme Court’s recent decision in *Ward v. Vancouver*.7 *Ward* provides a principled and promising foundation for *Charter* damages to evolve as an important *Charter* remedy. The Court in *Ward* recognized *Charter* damages as a distinct public law remedy that is ordered against governments and not, as in the United States, against individual government officials. There is no rigid requirement under *Ward* for the plaintiff to establish some level of fault beyond the *Charter* violation as there is under the *Mackin* line of cases. *Ward* recognizes that *Charter* damages must be justified on the basis of three broad remedial purposes — compensation, vindication and deterrence of *Charter* violence — and that compensation includes non-pecuniary damages. Finally, *Ward* provides state defendants with an opportunity to demonstrate that damage awards are not appropriate for a broad range of reasons related to proper governance and the availability of more appropriate alternative remedies. In short, *Ward* does not assure that damages will invariably be awarded or rejected, but it establishes a principled framework for litigating such claims. There is a new and promising spring for *Charter* damages. It may be late, but better late than never.

In the first part of this paper, I will provide a brief overview of the *Ward* decision. Although most attention has been focused on the Court’s decision to uphold an award of $5000 damages for an unconstitutional strip search, the Court’s decision to overturn a $100 award against the city for an unconstitutional seizure of Mr. Ward’s car should not be ignored. It demonstrates the need for plaintiffs to justify damages as necessary to compensate, vindicate or deter *Charter* violations and the rejection of a theory of per se nominal damages for all *Charter* violations.

The second part of this paper will examine some threshold procedural issues that should be considered before the litigation of *Charter* damage claims. These include questions such as the availability of a court of competent jurisdiction, statutes of limitations, and the impact of cost and fee arrangements. The biggest obstacles to *Charter* damages are not doctrinal restrictions, but rather practical access to justice considerations and the interrelated question of the quantum of *Charter* damages. Given these concerns, small claims courts may be a particularly promising venue for individuals to litigate *Charter* damage claims.

The third part of this paper will examine the broad remedial purposes of compensation, vindication and deterrence of *Charter* violations that the Court has defined as the guiding purposes for *Charter* damage awards. It will be suggested that this decision, like the Court’s *Doucet-Boudreau*8 decision, appropriately establishes broad principles to guide the exercise of remedial discretion as opposed to leaving the issue to unfettered remedial discretion or binding remedial discretion by inflexible rules9 such as the requirement for proof of specified forms of fault that is still required when *Charter* damage claims are combined with declarations of invalidity under s. 52. Compensation will serve a corrective function of attempting to repair

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the harms caused by the Charter violation while the goals of vindication and deter-
rence are designed more to affirm the constitution and regulate governmental con-
duct in the future.

The fourth part of this paper will examine how governments may discharge their burden of establishing that Charter damage claims are not appropriate or fair to the government because of good governance concerns and the availability of alternative remedies. It will be suggested that Ward implicitly rejected arguments that Charter damage claims will overdeter government officials. It also found that a declaration was not an adequate remedy in the context of an unconstitutional strip search. There is, however, a possibility that in other contexts, concerns about individual liability, overdeterrence and a preference for declaratory relief may reassert themselves as reasons not to award Charter damages. These concerns, however, should be closely evaluated in light of the findings of the Ward case.

The last part of this paper will examine the quantum of Charter damage claims. The Court has indicated that the quantum of Charter damages should be driven by consideration of the remedial purposes of compensation, vindication and deterrence. Compensatory damages will perform the corrective function of attempting to restore plaintiffs to the position they would have occupied but for the Charter violation. It is less clear how the regulatory objectives of vindication and deterrence will be quantified, but the seriousness of the Charter violation will be an important factor. The $5000 award in Ward should not be seen as either a starting point or a cap on Charter damages. It will also be suggested that the quantum of Charter damages is the most unsettled issue in Ward. Moreover, the interrelated issues of quantum and access to justice will be the most important factors in determining whether Charter damages blossom in the late spring set off by the Court’s promising decision in Ward.

2. THE WARD DECISION

Cameron Ward was arrested for breach of the peace in August, 2002 in relation to a political demonstration involving a visit of Prime Minister Chretien to Vancouver. He was taken to a holding cell where he was asked to remove his clothes. He did so, but refused to remove his underwear. He was held for about four and half hours before being released after the Prime Minister had left downtown Vancouver. His car was also seized by the police, but returned to him after his release. Without any criminal charges pending, the event may have been just another low visibility encounter between police and citizens and much less well-known than the harsh treatment of protesters at the APEC or G20 demonstrations. The case was different, however, because Mr. Ward is a civil rights lawyer. He commenced a damage action alleging not only Charter violations but a variety of common law torts against the province, Vancouver and individual officers. Even though Mr. Ward was a lawyer, he did not act as his own counsel but was repre-
ented by a Vancouver lawyer, Brian Samuels, who litigated the case all the way to the Supreme Court of Canada on a pro-bono basis.

After a six day trial, the trial judge rejected most of Mr. Ward’s tort claims and those against individual officers relating to his arrest. The trial judge did, how-
ever, award Mr. Ward $5,000 in Charter damages in relation to his strip search which he found violated s. 8 of the Charter including the restrictions on strip
searches articulated in 2001 by the Supreme Court in *Golden*.\(^\text{10}\) He also awarded $100 in *Charter* damages in relation to the seizure of Mr. Ward’s car.\(^\text{11}\) Tysoe J. rejected the government’s argument that, as under *Makin*, it was necessary to establish bad faith, abuse of power or an independent tort in addition to a *Charter* breach if damages were sought only under s. 24(1) of the *Charter* and not in conjunction with a challenge of statutory authorization under s. 52(1).

The British Columbia Court of Appeal upheld the trial judge’s ruling 2:1.\(^\text{12}\) The majority implicitly departed from authority in the Ontario Court of Appeal that had applied the *Mackin* line of cases to cases which only involved s. 24(1) and in which the government did not assert that the *Charter* violation had been authorized by valid legislation that would have to be struck down under s. 52 of the *Constitution Act*.\(^\text{13}\) The minority, however, would have applied the *Mackin* additional fault and qualified immunity requirements to s. 24(1) claims, including those made in the Ward case. On this view of the law, both damage awards would be reversed because the trial judge had found that the governmental officials had not acted in bad faith.\(^\text{14}\)

On a subsequent appeal by both the province and the city, the Supreme Court unanimously upheld a $5,000 damage award under s. 24(1) against the province for the unconstitutional strip search and overturned a $100 award against the city for an unconstitutional seizure of a car. The damages for the strip search were upheld on the basis that they were necessary to compensate and vindicate the plaintiff’s *Charter* rights and to deter future unconstitutional strip searches. The Court also found that a declaration would not be an adequate remedy and the government had not demonstrated that the damage award would harm the functioning of government. On the other hand, the Court reversed the nominal damage award for the unconstitutional seizure of the car. It held that the plaintiff “did not suffer any injury as a result of the seizure”\(^\text{15}\) and that damages were not necessary to vindicate or deter a *Charter* violation that it characterized as not serious.

From a doctrinal perspective, the Court made clear that governments would not enjoy the same immunities for damage claims made under s. 24(1) alone as they enjoyed when damages were sought in conjunction with a declaration of inval-

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\(^\text{14}\) *Ward v. Vancouver (City)*, supra note 12 at para. 90 per Saunders J.A. in dissent.

\(^\text{15}\) *Ward v. Vancouver (City)*, supra note 7 at para. 77.
Chief Justice McLachlin distinguished *Mackin* for a unanimous Court by stating:

*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. The present is not a situation of state action pursuant to a valid statute that was subsequently declared invalid. Nor is the rationale animating the *Mackin* principle — that duly enacted laws should be enforced until declared invalid — applicable in the present situation. Thus, the *Mackin* immunity does not apply to this case. 16

This ruling does not mean that good governance concerns will not be relevant when s. 24(1) damages are sought. Rather, they will be considered on a case-by-case basis with the government bearing the burden of establishing that functional good governance concerns should preclude the award of damages when they are sought under s. 24(1). The more categorical *Mackin* immunities or fault requirements will still apply when damages are sought in conjunction with a declaration of invalidity under s. 52(1).

The Court in *Ward* held that after establishing a *Charter* violation, the plaintiff will have to establish that damages are an appropriate and just remedy that is needed for compensation of pecuniary or non-pecuniary harm, vindication of *Charter* rights and/or deterrence of *Charter* violations. These remedial purposes will be examined in the third part of this article.

The Court next found that if damages were justified under any of these three remedial purposes, the government would then have an opportunity to demonstrate that damages would not be appropriate and just for an open-ended range of reasons relating to good governance including concerns about overdeterrence, diversion of funds or the availability of alternative remedies. These countervailing factors to damage awards will be examined in the fourth part of this article.

Finally, the Court addressed the appropriate quantum of damages stressing both the purposes of *Charter* damages and the seriousness of the *Charter* violation as well as the need to be fair to the government. These considerations will be evaluated in the fifth part of this article.

One last comment should be made about the Supreme Court’s decision. It was systematically written and laid out a clear point-by-point approach to *Charter* damage claims. The Court did not, however, attempt to articulate precise rules to govern *Charter* damage claims. The Court’s focus was on broad principles such as the need to compensate, vindicate and deter *Charter* violations while also being fair to the government and respecting the government’s role. The decision was also quite brief, containing only 80 paragraphs, many of them quite short. Stylistically, *Ward* is a model judgment that provides clear and principled guidance.

### 3. Threshold Procedural Matters

A threshold issue for many in Mr. Ward’s position is the question of the costs of litigation and the forum that is available to award *Charter* damages. The *Ward*
litigation was conducted in the British Columbia Supreme Court. Costs of litigation in superior courts, even under simplified procedures available in many provinces, are high. In addition, plaintiffs are faced with the possibility of adverse costs award if they lose. In the end, the Supreme Court did not award costs in Ward because the parties were able to reach an agreement about costs. This may not be possible in other cases, and litigants may seek out less expensive forums to raise Charter damage claims than the superior courts.

(a) Court of Competent Jurisdiction

In many cases, potential plaintiffs may seek to assert Charter damage claims in alternative forums. Potential alternatives include administrative tribunals, criminal courts and small claims courts. In Ward, the Court addressed the question of the appropriate forum in the following terms:

For a tribunal to grant a Charter remedy under s. 24(1), it must have the power to decide questions of law and the remedy must be one that the tribunal is authorized to grant: R. v. Conway, 2010 SCC 22. Generally, the appropriate forum for an award of damages under s. 24(1) is a court which has the power to consider Charter questions and which by statute or inherent jurisdiction has the power to award damages. Provincial criminal courts are not so empowered and thus do not have the power to award damages under s. 24(1).17

This statement affirms that the tests for court of competent jurisdiction in Conway18 will govern the availability of Charter damages. Hence, there will be a strong presumption that administrative tribunals with powers to decide questions of law may also now award s. 24(1) remedies including Charter damages.

In many cases, it may be less expensive for plaintiffs to make Charter damage claims in an administrative process where they will generally not face the prospect of an adverse cost award. At the same time, administrative tribunals may be able to order a broad range of remedies that may in some circumstances be an adequate alternative remedy to damages. Administrative tribunals will often have many remedies designed to ensure compliance with the Charter but perhaps less remedies designed to compensate individuals for past Charter violations. Compensatory damages under s. 24(1) may thus be particularly important in expanding the range of remedies that administrative tribunals can order.

The impact of Conway in making Charter remedies available in administrative tribunals can also be overstated. Consistent with prior jurisprudence19, Conway20 recognized that legislatures can deprive administrative bodies of jurisdiction to award specific Charter remedies in specific circumstances. It will be interesting to see if governmental concerns about damage awards led to reactive legislation that

17 Ibid. at para. 58
18 2010 SCC 22, 2010 CarswellOnt 3848, 2010 CarswellOnt 3847 (S.C.C.)
19 For my criticisms of this jurisdiction as positivistic, see Kent Roach Constitutional Remedies in Canada, supra note 2, ch. 6. See also Christopher Bredt and Ewa Krajewska, “R. v. Conway: Simplifying the Test for Administrative Tribunal’s Jurisdiction to Consider Charter Issues” in this volume.
20 Supra note 18 at para. 101.
deprives administrative bodies of the power to award Charter damages. Such a blunt approach would be unfortunate given the ability of governments under Ward to raise concerns that damage awards will divert funds or otherwise harm good governance on a case by case basis. Depriving administrative tribunals of the power to award Charter damages will force potential litigants to bear the costs of litigation in the superior courts.

The Court in Ward affirms that provincial criminal courts do not have statutory jurisdiction to award Charter damages, but leaves open the question of whether superior courts in criminal cases can rely on their inherent jurisdiction to award damages. Although the criminal courts have exercised their jurisdiction to award costs, it is not likely that they will be eager to take on the task of considering damage awards in a criminal trial. Although one stop shopping for the accused would be more efficient and damages in some cases might be better remedy than stays of proceedings or sentence reductions, it is unlikely that criminal courts will award Charter damages. In principle, it would also be inequitable if the small number of accused in superior criminal courts had access to damages while the vast majority of accused in provincial criminal courts did not.

Finally, the possibility of litigating Charter damage claims in small claims courts should not be ignored. In many provinces, the monetary jurisdiction of these courts has been increased well above the $5,000 in damages awarded in Ward. In addition, small claims courts are designed to allow individuals to make claims without the assistance of a lawyer and without facing the spectre of adverse cost awards if they are unsuccessful. Some might object that the litigation of Charter claims in small claims courts demeans the dignity of our supreme law and the role of the bar in vindicating the Charter. In my view, however, it reflects the reality of our expensive civil justice system and the modest quantum of Charter damage awards. Moreover, small claims litigation has the potential to allow citizens to mobilize to defend their rights. Small claims courts have the potential to make Charter remedies accessible for more people.

(b) Charter Damages as a Public Law Remedy Against Governments Authorized by Sections 24 and 32 of the Charter

Although legislatures can deprive administrative bodies of the power to award damages and other Charter remedies under the court of competent jurisdiction jurisprudence, Ward suggests that Crown immunity acts or other legislative restrictions on damages should not apply to s. 24(1) damage claims.\(^\text{21}\) The Court recognized that Charter damages under s. 24(1) should be sought against the state, and unlike in the United States,\(^\text{22}\) not against private officials. It stressed that Charter damages “require the state (or society writ large) to compensate an individual for

\(^{21}\) Vancouver v. Ward, supra note 7 at para. 22.

breaches of the individual’s constitutional rights. 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.23 Although the Court did not cite the case, its approach to Charter damages as a unique public law remedy is consistent with the Privy Council’s approach in Maharaj v. Attorney-General for Trinidad & Tobago (No. 2).24 The Court did, however, cite with approval a subsequent Privy Council case that stressed that damages under Trinidad and Tobago’s constitution should not be limited to compensation as in private law, but should also be designed to vindicate the constitution and deter constitutional violations.25

Any statutory or common law liabilities enjoyed by the state against Charter damages should not apply by virtue of s.32(1) of the Charter which makes the Charter applicable to governments.26 This means that any restraint on the award of Charter damages should be internal to s. 24(1). Countervailing factors that counsel against the award of damages are part of the s. 24(1) calculus in determining what remedy is appropriate and just in the circumstances.

The Ward litigation featured both tort and Charter damage claims which is understandable given the unsettled nature of the jurisprudence at the time. After Ward, plaintiffs may chose to focus on Charter damage claims as a simpler and more direct remedy as opposed to private law actions that might be restricted by legislation and might be influenced by policy concerns especially those relating to the possible over deterrence of individual officials that may not be relevant to determining an appropriate and just remedy. The Court has indicated that it “it is not essential that the claimant exhaust her remedies in private law before bringing a s. 24(1) claim.”27 The fact that the Court in Ward warns about the dangers of double counting common law and Charter damage claims also takes away an incentive that plaintiffs may have to join private law and Charter damage claims. Finally, joining private law claims with Charter damage claims may encourage courts to apply restrictions taken from private law to the distinct Charter claim.28

(c) Statutes of Limitations

Statute of limitations will apply to s. 24(1) damages claims as a result of

23 Ward, supra note 7 at para. 22.
25 Attorney General of Trinidad and Tobago v. Ramanoo (2005), [2006] 1 A.C. 328
(Trinidad & Tobago P.C.) at para. 20 cited in Ward, supra note 7 at para. 29.
26 See also Doucet-Boudreau v. Nova Scotia (Department of Education), [2003] 3 S.C.R. 3, 2003 CarswellNS 376, 2003 CarswellNS 375 (S.C.C.) at para. 70 (per majority) and at para. 105 (per minority recognizing that ss. 24(1) and ss. 32(1) displaces common law and statutory immunities.
27 Ward v. Vancouver (City), supra note 7 at para. 59.
28 This process is partially encouraged by the Court when it stated that “when appropriate, private law thresholds and defences may offer guidance in determining whether s. 24(1) damages would be “appropriate and just” as well as “the procedural requirements of alternative remedies”. Ibid. at para. 43.
In some cases, short statutes of limitations designed to protect public authorities may preclude s. 24(1) claims. The Ontario Court of Appeal was alive to this danger when it held in Prete v. Ontario that a short 6 month statute of limitation would not apply to a s. 24(1) claim. The approach in Prete is also superior in recognizing the supremacy of constitutional damages under both ss. 24(1) and 32 of the Charter. Nevertheless, it seems to have been implicitly overruled by the Supreme Court’s 2009 decision in Ravndahl.

4. THE PURPOSES OF CHARTER DAMAGES

One of the most important features of Ward is its articulation of a range of legitimate purposes for Charter damage awards. As suggested above, the purposes recognized in Ward are compensation, vindication and deterrence of Charter violations. Compensation looks backwards and attempts to correct or repair the effects of a Charter violation on the particular person. Vindication and deterrence are more concerned with ensuring that the Charter is upheld and respected in the future.

The broad purposes or remedial goals of compensation, vindication and deterrence are not self-executing or precise. The Court articulated broad principles that will in subsequent cases be subject to interpretation and application. The Court’s principled based approach can be contrasted to a more specific rule based approach in Mackin which attempts to outline certain factual circumstances (i.e., abuse of process, bad faith) when damages would be appropriate and just. The principled approach in Ward can also be contrasted with a more discretionary approach taken by the Nova Scotia Court of Appeal which essentially left the question of whether damages were appropriate and just and how they should be determined to the discretion of the judge or jury. As I have argued elsewhere, a principled approach to remedial discretion provides a foundation for continued interpretation and debate and is in many ways preferable to either a less flexible rules-based approach or one that simply empowers individual trial judges to exercise remedial discretion as they see fit.

(a) Compensation for Pecuniary and Non-Pecuniary Harm and Loss

The Supreme Court has defined the compensatory purposes of Charter damages very broadly to include “physical, psychological and pecuniary” loss, as well as harm to “intangible interests” including “distress, humiliation, embarrassment, and anxiety” and “pain and suffering.” The Court has explicitly ruled that it is...
an error to restrict damages to pecuniary losses, and this holding effectively reverses many early Charter cases that implicitly or explicitly limited Charter damages in such a manner. The Court’s approach is appropriate because the Charter is designed to protect many important non-pecuniary values including fairness, privacy, security of the person, liberty and equality.

Although “non-pecuniary damages are harder to measure” than pecuniary losses and require a “fairly modest conventional rate, subject to variation for the degree of suffering in the particular case”, the Court clearly requires that they be measured and compensated. As will be seen, compensation also emerges as a dominant force in calculating the quantum of damages. The Court has stressed that when calculating damages “the concern is to restore the claimant to the position she would have been in had the breach not been committed.” At the same time, it would be a mistake to restrict damages only to harm caused if the resulting damage award will not sufficiently satisfy the remaining remedial purposes of vindication of Charter rights and deterrence of Charter violations. A Charter damage should satisfy all three remedial purposes recognized by the Court.

(b) Vindication of the Charter Right

A second functional justification for awarding Charter damages is the need to provide vindication of Charter rights. Compensation focuses on the particular individual whose Charter rights have been violated, while the need to vindicate Charter rights “focuses on the harm the infringement causes society.” This recognizes that public confidence in the Charter may be adversely impaired even if a particular Charter violation does not cause compensable harm to the plaintiff and even if the Charter violation is not particularly egregious. Chief Justice McLachlin stressed the social interest in ensuring tangible remedies for Charter violations when she stated that “[w]hile one may speak of vindication as underlining the seriousness of the harm done to the claimant, vindication as an object of constitutional damages focuses on the harm the Charter breach causes to the state and to society.” The need to vindicate the Charter may, like the need to compensate or deter Charter violations, vary with the particular circumstances of the violation, but there may be a relatively constant requirement that the Charter generally be vindicated by some meaningful remedy.

(c) Deterrence of Future Charter Violations

The third functional consideration that can justify the award of Charter damages is the need to deter future Charter violations. Before Ward, the Court was

\[\text{\textsuperscript{36}}\text{Ibid. at para. 50}\]
\[\text{\textsuperscript{37}}\text{Ibid. at para. 48}\]
\[\text{\textsuperscript{38}}\text{Ibid. at para. 28}\]
\[\text{\textsuperscript{39}}\text{Ibid. at para. 28}\]
reluctant to recognize deterrence or the regulation of governmental conduct as a legitimate goal for constitutional remedies. In the 2009 s. 24(2) case of Grant, for example, the Court recognized deterrence, but saw it more as a happy by-product of responding to the seriousness of the violation. In addition, deterrence was not one of the four considerations of vindication, legitimate, judicial and fair remedies that were recognized in Doucet-Boudreau as the guiding principles for crafting remedies under s. 24(1). In Ward, however, deterrence and the regulation of governmental conduct is recognized as a legitimate remedial purpose. Chief Justice McLachlin states that “deterrence seeks to regulate government behaviour, generally, in order to achieve compliance with the Constitution.” This part of Ward should have an influence not only in shaping damage remedies, but also other remedies such as declarations and injunctions, stays of proceedings and the exclusion of evidence under s. 24(2).

The Court’s recognition of deterrence does not mean that deterrence is the only rationale for constitutional remedies and the Court’s approach should not run afoul those who criticize the American use of deterrence as the sole rationale for exclusion of evidence on the basis that there is little empirical evidence that the remedy actually deters violations. The deterrent effect of damage awards may not be great especially if damages are paid out of general revenues and are not internalized to the department that violated the Charter. This does not necessarily mean that courts should not try to deter Charter violations, especially in circumstances where there is a history of lack of full and prompt compliance with known Charter standards, as arguably was the case in Ward and continues to be the case with frequent use of strip searches.

At the end of the day, the constitutional purpose of any remedy is to provide a response that is appropriate and just in the particular circumstances. Compensation may often be the dominant purpose and be supported by vindication and deterrence concerns. Nevertheless, the court has recognized that there is a range of social interests including vindication of the right and deterrence that are also relevant in determining the appropriate and just remedy. Specifically, this means that “the fact that the claimant has not suffered personal loss does not preclude damages where the objectives of vindication or deterrence clearly call for an award.”

40 *R. v. Grant*, [2009] 2 S.C.R. 353, 2009 CarswellOnt 4104, 2009 CarswellOnt 4105 (S.C.C.), at para. 73 noting that the concern of the inquiry into the seriousness of the *Charter* violation “is not to punish the police or to deter *Charter* breaches, although deterrence of *Charter* breaches may be a happy consequence.”


42 *Ward v. Vancouver (City)*, supra note 7 at para. 29

43 For an interesting argument that damage awards against governments as opposed to individuals can be both an effective and efficient means of deterrence as they allow states to decide what, if any, actions should be taken to prevent future violations by its officials see Peter Schuck, *Suing Government* (New Haven: Yale University Press, 1983).

44 *Ward*, supra note 7 at para. 30.
poses. Conversely, a court should only find that damages are not justified if it finds that none of the three purposes would be served by a damage award.

(d) Summary: Remedial Purposes and Principles Applied

The importance of the principles of compensation, vindication and deterrence are demonstrated by the Court’s rulings on the merits. The $5000 damage award for the unconstitutional strip search was upheld by stressing that compensation was required because strip searches are “inherently humiliating and degrading” and that there was a need to vindicate and deter Charter violations because “it is not too much to expect that police would be familiar with the settled law that routine strip searches are inappropriate where the individual is being held for a short time in police cells, is not mingling with the general prison population, and where the police have no legitimate concerns that the individual is concealing weapons that could be used to harm themselves or others.” At the same time, the $100 damage award for the unconstitutional seizure of the car could not be justified because Mr. Ward suffered no pecuniary or non-pecuniary harm from the seizure and a declaration would serve the remaining purposes of vindication and deterrence. It is noteworthy that damages were found not to be justified because they would serve none of the three remedial purposes in relation to the seizure of the car.

It is, of course, possible to take issues with some of the Court’s conclusions. Perhaps Mr. Ward deserved compensation for the inconvenience of retrieving his car. Perhaps a declaration was insufficient to deter and vindicate the Charter given that the police’s rationale in seizing the car seems murky. Nevertheless the broad principles endorsed as the remedial goals for Charter damages provide a structured framework for debate about whether damages are appropriate and just in a particular case. The remedial purposes avoid the extremes of a checklist approach that requires some specific factual circumstance such as proof of fault or the opposite extreme of simply leaving the question of whether damages are appropriate and just to the unguided discretion of the trial judge. The result is consistent with the Court’s admonition that the exercise of remedial discretion should be driven by the purposes of the Charter. There will be reasonable disagreement about whether damages are required to compensate, vindicate or deter Charter violations in particular cases, but litigants and judges can now agree about the terms of the debate.

45 Ibid. at para. 64.
46 Ibid. at para. 65.
47 Ibid. at para. 78.
48 The Court did, however, note that the police drove Mr. Ward to where his car had been impounded after he was released. Ibid. at para. 77.
5. COUNTERVAILING FACTORS TO THE AWARD OF DAMAGES

The Supreme Court in *Ward*\(^{50}\) decided that there should be an open-ended category of countervailing factors that may justify not awarding damages even in cases where the *Charter* has been violated and damages would serve compensatory, vindicatory or deterrence purposes. In a functional sense, these countervailing factors serve a purpose similar to those served by prior cases that imposed a fault requirement such as negligence or bad faith\(^{51}\) in addition to the *Charter* violation as well as cases that recognized qualified or good faith immunities that prevented the award of *Charter* damages.\(^{52}\) The Supreme Court’s approach, however, is less rule-based than the previous jurisprudence. It allows contextual and open-ended balancing of the factors for and against damages in any particular case. This approach may make damage awards less predictable for both plaintiffs and defendants, but it also allows both sides to make full arguments on the advantages and disadvantages of damages in the particular case without having to fit their arguments into narrow categories. It also requires the government to bear the burden of justifying restrictions on *Charter* remedies because of the collective interest in good governance. This approach is consistent with the overall structure of the *Charter* which provides individuals with rights, but allows governments to demonstrate that reasonable restrictions are required on those rights. It recognizes the superior ability and resources of governments to demonstrate any harms that might result from the award of damages.

(a) Alternative Remedies

Once the plaintiff has established a *Charter* violation and the functional need for damages, the state will have an opportunity to establish that an alternative remedy will be equally as effective. The alternative remedies available include not only other *Charter* remedies such as declarations, but also private law actions and statutory actions against the government such as human rights legislation.\(^{53}\) This is a factor that may encourage plaintiffs to join common law actions with *Charter* damages and could be at odds with the Court’s statements elsewhere in *Ward* that a plaintiff does not have to exist administrative or common law remedies before seeking *Charter* damages.\(^{54}\)

The government must establish that the alternative remedy adequately fulfills all of the purposes of the *Charter* damage remedy. For example, a tort remedy may serve compensation, but not necessarily the purposes of vindicating and recognizing that a *Charter* right has been violated or deterring future *Charter* violations.

\(^{50}\) The Chief Justice stated: “A complete catalogue of countervailing considerations remains to be developed as the law in this area matures. At this point, however, two considerations are apparent: the existence of alternative remedies and concerns for good governance.” *Ward v. Vancouver (City)*, *supra* note 7 at para. 33.


\(^{52}\) *Mackin v. New Brunswick (Minister of Justice)*, *supra* note 4.

\(^{53}\) *Ibid.* at para. 34.

The Court, however, warns that “double compensation” under civil law and s. 24(1) is not appropriate. In some cases, a nominal damage award or a declaration in addition to a private law award may serve the purposes of vindicating Charter rights and deterring Charter violations. In most cases, private law remedies will not address the need to vindicate or deter Charter violations. In such cases, much will depend on whether a declaration of a Charter violation without a damage award is sufficient to vindicate and deter Charter violations.

In Ward, the Court rejected the government’s argument that a declaration that Mr. Ward’s s. 8 Charter rights had been violated would be an adequate alternative to the $5000 award of Charter damages for the unconstitutional strip search. The Court concluded “no tort action was available for that violation and a declaration will not satisfy the need for compensation. Mr. Ward’s only recourse is a claim for damages under s. 24(1) of the Charter.”

It might be added that a declaration would also fail to deter what the Court found was a serious Charter violation that ignored settled law restricting strip searches. The uncertain experience about how the government will implement declarations should make courts think twice before relying on the idea that a declaration will automatically vindicate Charter rights and deter future Charter violations. This is particularly so in cases like Ward where the officials did not follow the Court’s 2001 Golden decision stressing the need for specific reasonable grounds to justify a strip search. Sometimes a damage award will be more meaningful and forceful remedy than a declaration.

In overturning a $100 award for a four hour unconstitutional seizure of Mr. Ward’s car, the Court concluded that a declaration would be sufficient. The Court found there was no need for compensation because no tangible or intangible loss flowed from this Charter violation. In addition, the Charter violation was not serious in large part because the police did not search the car while it was unconstitutionally seized. In general, declarations will only be an adequate alternative remedy in situations where there is no compensable tangible or intangible loss and no need to deter future Charter violations.

(b) Effective Governance Concerns

Another factor that “may negat the appropriateness of s. 24(1) damages is
concern for effective governance.”\(^{61}\) The Court in *Ward* recognized that the *Mackin* line of cases holds that *Charter* damages will not be appropriate in a case where the state relies on legislative authorization of the violation unless there is proof of misconduct (in addition to the *Charter* violation) in the form of conduct that its clearly wrong, in bad faith or an abuse of process. As discussed above, the Court distinguished *Mackin* on the basis that the unconstitutional strip search in this case was not conducted under a valid statute and thus "the rationale animating the *Mackin* principle — that duly enacted laws should be enforced until declared invalid "\(^{62}\) was not applicable. The government will have an incentive to argue that the *Charter* violation was authorized by some valid law in an attempt to win the benefit of the *Mackin* immunity or fault requirements. In this sense, the basic issue in *Ward* — whether the *Mackin* immunity or fault requirements apply — will be re-litigated in future cases with governments arguing that any *Charter* violation was authorized by legislation and plaintiffs arguing that the violation was not authorized by legislation and that damages can be awarded under s. 24(1) of the *Charter* without any resort to s. 52(1) and with it the *Mackin* immunity and fault requirements. There is a danger that the litigation of such issues about whether s. 24(1) applies alone or in conjunction with s. 52(1) will be fact-specific and quite divorced from the functional questions of whether damages are justified both in relation to their purposes and competing concerns about good governance. The litigation of such issues could be avoided and the law would be consistent if the rule-based *Mackin* requirements were replaced by the more flexible good governance factors stressed in *Ward*. In all cases then the focus could be on the functional case for damages and the case that damages could harm good governance.

In *Ward*, the Court left the door open for the state to establish the need for good governance immunities outside of the *Mackin* context involving parallel actions under ss. 24(1) and 52(1). At the same time, however, the Court rejected extensive arguments by the governments that damage awards in this case would chill the exercise of law enforcement discretion and open the floodgates to potentially harmful claims against the public purse. The Court did not rehearse these arguments which were made at length by the governmental appellants and an intervenor representing the Chiefs of Police, but tersely concluded that the state had not “established that an award of s. 24(1) damages is negated by good governance considerations, such as those raised in *Mackin*. “\(^{63}\)

If concerns about chilling law enforcement discretion and draining the public purse in *Ward* are not sufficient to negate the award of damages, it is difficult to see that many violations of the *Charter* rights of a single *Charter* applicant should be defeated on such grounds. As the Court recognized, routine arguments that *Charter* damage awards adversely affect good governance discount the fact both deterrence and compliance with the *Charter* “is a foundation principle of good governance.”\(^{64}\) 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

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\(^{62}\) *Ibid.* at para. 44.

\(^{63}\) *Ibid.* at para. 68.

\(^{64}\) *Ibid.* at para. 38.
overdeterred.

The Court did hint that governance concerns taken from the private law context may still be applicable to Charter damage claims. The main concern seems to be the tort of malicious prosecution where the Court has maintained the malice requirement because of concerns about not chilling the exercise of prosecutorial discretion. Even in that context, however, there is an argument that prosecutorial discretion will be less chilled in cases where governments would be sued and pay any damage awards as opposed to individual prosecutors.

Although the Court suggests that substantive and procedural restrictions on private law damage claims can be a source of “practical wisdom”, any such restrictions should be closely evaluated before being imported into s. 24(1). In many cases, the “practical wisdom” of the common law will be more relevant in determining whether there is a violation of s. 7 of the Charter or perhaps a justified limitation under s.1 than in determining the availability of the remedy. For example in the prosecutorial context, the difficult issue will generally be to establish that prosecutorial practices violated s. 7 of the Charter. If the prosecutor has violated s. 7, however, it may not be consistent with the purposes of the Charter and overly restrictive to only award damages if the plaintiff can demonstrate the individual prosecutors acted with the subjective fault of malice. The “practical wisdom” of the common law may also relate to the fear of holding individuals liable for performing difficult public duties. Under Ward, however, s. 24(1) damages are awarded against governments and not against individual public servants.

(c) Fairness to the Government

Although the Court in Ward stressed on several occasions the need for damages awards to be “fair” to government, the focus on fairness taken from Doucet-Boudreau is arguably misplaced. The concern in Doucet-Boudreau was that the government might not have fair notice and that overly specific or unrealistic remedies may impose “substantial hardships” on governments. In damage cases, however, governments will know what is expected of them. Moreover, they will have the capacity to absorb and redistribute damages and to decide what, if any, remedial steps to take to prevent future violations. The focus on fairness to governments seems to conceive of the government as an individual with claims to dignity and fairness. In reality, government is the collective embodiment of all of us and for that reasons has special duties and obligations that are not imposed on individuals.

Arguments about the need to be fair to government and not to impose large amounts of damages will likely be made in cases like Hislop where damages are claimed on behalf of a class. Speculative notions that Charter damage awards to potentially large classes will disrupt the finances of the government are difficult if not impossible to reconcile with the Court’s insistence that governments should repay unconstitutional taxes to ensure that the division of powers is vindicated and

66 Ibid. at paras 20, 21, 53, 70.
68 Schuck, Suiting Government, supra note 43.
that taxpayers should not be forced to absorb the costs of the government’s unconstitutional conduct. The requirement to prove an unjustified Charter violation and to demonstrate the need for damages should ensure that the successful plaintiff class is at least prima facie worthy of receiving damages. Governments should have to justify restrictions on remedies and not simply rely on the fact that the damages in the aggregate can no longer be characterized as modest.

One possible way to discipline governmental claims that damages will be burdensome is to require them to demonstrate reliance interests such as those recognized in Hislop v. Canada. Hislop starts from the rebuttable presumption of full retroactive relief whereas the “practical wisdom” of the common law could provide the government with absolute immunity for policy decisions taken in breach of the Charter. Hislop then requires that the case in which damages are sought substantially changes the law and that the government has reasonably relied upon the pre-existing law. It also requires that not awarding damages would still be fair to all the parties including the plaintiffs. These factors at least ensure that the government goes beyond general claims of good governance and they also have the virtue of directing the court’s attention to the vital question of whether not awarding damages would still treat the successful plaintiff fairly. That said, it may not be appropriate to rely on Hislop factors justifying departures from full retroactive relief in cases where the Charter violation was not clearly authorized by statute and as in Ward, damages are only sought under s. 24(1) of the Charter.

(d) Double-counting Good Governance Concerns

There is a question about how effective governance concerns will be divided between the distinct tasks of 1) determining if damages should be awarded and 2) determining the appropriate quantum of damages. In discussing the appropriate quantum of damage, the Court made generous allowance for governance interests when it states that “in considering what is fair to the claimant and the state, the court may take into account the public interest in good governance, the danger of deterring governments from undertaking beneficial new policies and programs, and the need to avoid diverting large sums of funds from public programs to private interests.” It thus appears that the state can argue good governance both as a reason not to award damages and as a reason to reduce the quantum of damages. This approach may present a danger of double counting.

If double counting is not to be encouraged when the plaintiff seeks both private law and Charter damages, it also should not be allowed when the government argues that good governance will be harmed by the award of damage and in the alternative will be harmed by a higher quantum of damages. Governments that do
not succeed in having damages denied on good governance grounds may nevertheless see the same arguments have some success as a reason for reducing the quantum of the damage awards. It should be remembered that the plaintiff will have to justify the quantum of damages for legitimate reasons related to compensation, vindication and deterrence. Given this burden, 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. Even if double counting is allowed, the government should have the burden of demonstrating precise harms that may be caused by damage awards in general and by particular quantum of damages as requested and justified by the plaintiff as needed for compensation, vindication and deterrence.

6. QUANTUM OF CHARTER DAMAGES

The decision in Ward provides the least guidance when it comes to determining the quantum of damages. The Court upheld the $5000 award for the unconstitutional strip search, but it did not hear a specific appeal on whether that quantum was either too high or too low. Litigants and judges will pay attention to Ward to the extent that it suggests that $5000 was justified in the particular case. Nevertheless, it would be a mistake to place too much emphasis on the particular quantum awarded in this case or to use it as either a starting point or a cap when calculating damages in subsequent cases.

(a) Rejection of Minimum or Maximum or Per se Awards

In Ward, the Supreme Court did not establish minimum or maximum awards for Charter violations. Consistent with a purposive approach to remedies, it stressed that damages should depend on what was required to fulfill the purposes of the award, namely compensation, vindication and deterrence of Charter violations. At the same time, the Court also stressed a number of good governance factors that counseled against the award of high damages. It warned that damage awards must be appropriate, just and fair to both the government and the plaintiff.

The Court has implicitly rejected the idea that there should be some amount of damage award that is a conventional, per se or minimum award for all Charter violations. This follows from the holding that in order to establish damages, a plaintiff must not only establish a Charter violation, but also a functional need for damages in terms of compensation, vindication or deterrence of Charter violations. The fact that there is no per se entitlement to damages is underlined by the Court’s decision to overturn the $100 damage award for the unconstitutional seizure of a car. The Court decided that such an award was not required to compensate the plaintiff or to vindicate or deter Charter violations.

(b) Compensatory Awards

The Court indicated that “[g]enerally, compensation will be the most important object, and vindication and deterrence will play supporting roles” when calcu-
lating damage awards. The *Ward* case represents a context where the demands for compensation were particularly compelling because of the unconstitutional strip search. The search of Mr. Ward revealed nothing incriminating and factually innocent persons subject to *Charter* violations can only seek compensation and vindication of their *Charter* rights through damage claims either in the courts or before police complaints or human rights tribunals. In this all too common context of *Charter* violations followed by no criminal charge, damages are the only way that *Charter* violations will be remedied.

The concern with compensation is “is to restore the claimant to the position she would have been in had the breach not been committed.” The Court alluded to the need to prove a causal connection between the violation and the harm to be remedied when it stated that “as in a tort action, any claim for compensatory damages must be supported by evidence of the loss suffered.” This requirement means that the plaintiff should establish the full costs of repairing an injury caused by the *Charter* violation whether the injury was to pecuniary interests or intangible interests. Loss of earnings caused by prolonged detention is specifically mentioned and this may prompt the wrongfully convicted to bring *Charter* damage claims.

The Court also made clear that courts must undertake the difficult task of attempting to compensate for non-pecuniary loss and damage to intangible values. It suggested that “[a]bsent exceptional circumstances, compensation is fixed at a fairly modest conventional rate, subject to variation for the degree of suffering in the particular case. In extreme cases of catastrophic injury, a higher but still conventionally determined award is given on the basis that it serves the function purpose of providing substitute comforts and pleasures: *Andrews v. Grand & Toy*,.”

The Court approved the $5000 award for the unconstitutional strip search in *Ward* concluding that the search “was relatively brief and not extremely disrespectful, as strip searches go. It did not involve the removal of Mr. Ward’s underwear or the exposure of his genitals. Mr. Ward was never touched during the search and there is no indication that he suffered any resulting physical or psychological injury. While Mr. Ward’s injury was serious, it cannot be said to be at the high end of the spectrum. This suggests a moderate damages award.” These particular facts should be considered when attempts are made to use *Ward* as a precedent on quantum.

It would be unfortunate if the quantum of $5000 became a standard award for s. 24(1) damages because of *Ward*. Such an award would not make litigation in the superior courts economically rationale given the costs of litigation and the threat of adverse costs awards. It would also produce *Charter* damage claims that lag well

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74 Ibid. at para. 47.
76 *Ward*, supra note 7 at para. 48.
77 Ibid. at para. 48.
78 Ibid. at para. 49.
79 Ibid. at para. 50.
80 Ibid. at para. 71.
beyond increasing damage awards that are being awarded under human rights codes. By categorizing the $5000 quantum as moderate, the Supreme Court contemplated that some higher (and some lower) awards will be within the range of what is appropriate and just.

(c) Vindicatory Awards

Although compensation will be the dominant factor in determining the quantum of Charter damages, the Court recognized that “cases may arise where vindication or deterrence play a major and even exclusive role.” With respect to these purposes, “a principal guide to the determination of quantum is the seriousness of the breach, having regard to the objects of s. 24(1) damages. 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.” In Ward, the breach was serious because the officials ignored settled law restricting strip searches. At the same time, however, the Court also concluded that the conduct “was not intentional, in that it was not malicious, high-handed or oppressive. In these circumstances, the objects of vindication and deterrence do not require an award of substantial damages against the state.” This later observation focused on the specific deterrence of the specific officers, but the Court also recognized that the general deterrence of other violations and the regulation of governmental conduct were legitimate objectives of Charter damage claims. If damages are a public law remedy that is imposed on governments and not individuals, the focus should be more on whether the government as opposed to individual officials was at fault. In any event, Ward suggests that while fault is not a prerequisite for Charter damages, it may be an aggravating factor that will increase the quantum of damages.

(d) Deterrent Awards

As suggested above, the Court’s recognition of the deterrence of Charter violations as a legitimate purpose for Charter damages is novel and significant. That said, the Court has provided little guidance about how a concern about deterrence will be actualized in the quantum of damages. As with the vindication of Charter rights, the main concern will be with the seriousness of the Charter violation with an emphasis on whether the state was justified in violating the Charter right.

The unconstitutional strip search in Ward was an unjustifiable one that cried out for deterrence of similar violations. It was a routine strip search of a person arrested for a minor offence that was not “associated with evidence being hidden on the body, no weapons were involved and he was not known to be violent or to carry weapons. Mr. Ward did not pose a risk of harm to himself or others, nor was there any suggestion that any of the officers believed that he did.” Moreover, the government should have made the officers “familiar with the settled law that routine strip

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82 Ward, supra note 7 at para. 47.
83 Ibid. at para. 52.
84 Ibid. at para. 72.
searches are inappropriate where the individual is being held for a short time in police cells, is not mingling with the general prison population, and where the police have no legitimate concerns that the individual is concealing weapons that could be used to harm themselves or others: *Golden*, at para. 97. 85 Even if the officers themselves did not act, as the trial judge found, in bad faith, deterrence speaks to the need for general deterrence of others in similar positions not to commit similar violations of the *Charter*. In *Ward*, the Court by analogy with the sentencing purpose of general deterrence stressed that “deterrence as an object of *Charter* damages is not aimed at deterring the specific wrongdoer, but rather at influencing government behaviour in order to secure state compliance with the *Charter* in the future.”86 As suggested above, the focus on general deterrence of the government as a whole also follows from the nature of damages under s. 24(1) as a public law remedy to be ordered against governments and not individual officials.

This understanding of general deterrence could have laid the basis for an award of damages that was much greater than the $5000 awarded in the case. The quantum of damage was, however, not appealed to the Supreme Court. Nevertheless, the Supreme Court appeared to approve of the $5000 quantum which it characterized as a “moderate damages award”87 by stressing that the individual officers who conducted the search were not at fault. This disregards what the Court noted elsewhere was the “general deterrence” concern of ensuring that damages were significant enough to ensure that other officers would not commit similar *Charter* violations in the future. The focus should not be on whether the individual officers who conducted the search were at fault or acted maliciously or in bad faith, but whether the government as a whole had taken reasonable steps to comply with *Charter* restrictions on strip searches.

Although the Court did not rule out the availability of punitive damages, it hinted that they may not be necessary when it noted “that public law damages, in serving the objects of vindication and deterrence, may assume a punitive aspect.”88 As a result of *Ward*, courts will be reluctant to award explicitly punitive awards. Nevertheless, courts should not hesitate, especially in the face of a serious and unjustifiable violation that shows that the state has taken a negligent approach to *Charter* compliance, to award higher damage awards in order to vindicate and deter future *Charter* violations. Although fault is not a requisite for *Charter* damage awards under s. 24(1), it can, in appropriate cases, increase the quantum of the award.

Any concerns about a *Charter* plaintiff receiving an unjustified windfall will often be meet by the fact that the low quantum of damages awarded under s. 24(1), including the $5000 in *Ward*, will not normally compensate for the full cost of litigation in the superior courts even considering costs awards in favour of the plaintiff. Moreover, the Court clearly recognizes the deterrence of *Charter* violations as a legitimate purpose of *Charter* damages. In this sense, plaintiffs seeking s. 24(1) *Charter* damages can act as private Attorney Generals vindicating the public

interest in Charter compliance.

7. CONCLUSION

The Supreme Court’s landmark decision in Vancouver v. Ward should encourage Charter damage claims against governments by recognizing broad interests in compensation, vindication and deterrence of Charter violations as legitimate factors in justifying damages. The Court has recognized that the state can rebut these factors with countervailing considerations such as the adequacy of other remedies and good governance concerns. The Court’s own decision in this case, however, suggests that declarations will often be an inadequate remedy and that courts should not accept on face value claims that damage awards will overdeter officials employed by the state in the exercise of their duties.

On the facts, the Court found that a declaration would not be a sufficient remedy for an unconstitutional strip search and rejected the government’s argument that the $5000 award would overdeter officials and open the floodgates. The Court did, however, overturn a $100 award for an unconstitutional seizure of a car on the basis that there was no need for compensation, the violation was not serious and that a declaration of the violation would be an adequate remedy. The quantum of the $5,000 award was not appealed. It could have been much higher if, consistent with the public law nature of the s. 24(1) damage remedy, the focus was on general deterrence of the government’s future conduct with regards to strip searches as opposed to the specific deterrence of the individual officers who were found by the trial judge not to have acted in bad faith when they conducted the unconstitutional strip search.

The Court took a principled approach that stressed broad remedial purposes and countervailing factors that speak to whether damages are appropriate and just in a particular case. The Court did not fetter remedial discretion to award damages by requiring specific levels of fault or imposing specific forms of qualified immunity rules such as those found in the Mackin line of cases. The Court’s approach is a considerable advance over the previous jurisprudence because it emphasizes the purposes and principles of Charter remedies. Ward provides a solid framework for both individuals and governments to contest whether damages are an appropriate and just remedy. As such Ward provides a late spring for Charter damages that has replaced the false spring that came before it. Just how much Charter damages will blossom in the future may depend on the interrelated issues of access to justice including the availability of damages in administrative tribunals and small claims courts and the quantum of future Charter damage awards.