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## Supreme Court of Canada Affirms Monetary Damages for a *Charter* Breach as a Viable Civil Claim: *Vancouver (City) v. Ward*

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On July 23, 2010, the Supreme Court of Canada handed down its unanimous decision in *Ward*, ruling for the first time that section 24(1) of the *Charter*<sup>3</sup> is broad enough to include the remedy of constitutional damages for breach of a claimant's *Charter* rights.

While the damages award was modest, *Ward* represents a step forward in the cause for state accountability and protection of civil liberties by recognizing a civil action against government for constitutional breach, distinct from an action for damages in tort. In this respect, it builds from and upon the Court's decision in *Hill v. Hamilton Wentworth Regional Police Services Board* (2007) where the Court held that police are not immune from civil liability for negligence in their investigations, and that innocent people harmed by sloppy investigations can sue for damages.<sup>4</sup> Unlike the tort action recognized in *Hill*, which depends on proving negligence or intentional wrong by a specific state actor resulting in a compensable loss, a civil remedy under section 24(1) is a public law action directly against the state for which the state is primarily (not vicariously) liable.

The context for the first recognition by the Supreme Court of Canada of a successful section 24(1) action was a claim brought by Mr. Ward, a Vancouver lawyer. In August of 2002, on the occasion of an opening ceremony in Vancouver's Chinatown, the police received information that a white male (30 to 35 years, 5' 9", with dark short hair, wearing a white golf shirt or T-shirt with some red on it) intended to throw a pie at Prime Minister Chrétien at the ceremony. Mr. Ward attended the event. He is a white male and, on the day, had grey, collar-length hair, was

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<sup>3</sup> Section 24(1), the general remedial provision of the Canadian Charter of Rights and Freedoms provides that "anyone whose rights or freedoms, as guaranteed by this Charter, has been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers just in the circumstances.

<sup>4</sup> The authors Allison Thornton and Shashu Clacken represented the Canadian Civil Liberties Association in its intervention in the *Hill* case

in his mid-40s and was wearing a grey T-shirt with some red on it. Mistaking Mr. Ward for their suspect, the police chased and handcuffed him. Mr. Ward created a scene in seeking to resist detention and was then arrested for breaching the peace, taken to the Vancouver lockup, strip-searched down to his underwear (without contact), clothed, and held in a small cell for roughly 4.5 hours, which was several hours after Mr. Chrétien had left Chinatown. He was released after police detectives determined they had no evidence to charge him for attempted assault.

Mr. Ward sued the City, the Province, and the individual officers. At trial, the action was dismissed against the individuals, but the Province and the City were held liable for damages under section 24(1) of the *Charter*. In particular, the trial judge held that the strip search violated Mr. Ward's section 8 right to be free from unreasonable search and seizure, and awarded Mr. Ward \$5,000 in damages under s. 24(1) as against the Province. The British Columbia Court of Appeal (Saunders J.A. dissenting) upheld the trial judge's ruling, and, in its recent decision, the Supreme Court of Canada concurred.

Writing for the Supreme Court of Canada, Chief Justice McLachlin noted that the remedial discretion given to courts under 24(1) of the *Charter* is textually broad: the court is entitled to grant any remedy it "considers appropriate and just in the circumstances." Consistent with the breadth of the text, the Court held that damages may meet the test for what constitutes an 'appropriate and just' remedy and refused to tightly prescribe where *Charter* damages will be available, stating that it will depend on the facts and circumstances of the particular case.

However, the Supreme Court of Canada's decision in *Ward* suggests that section 24(1) damages, like any good *Charter* formulation, are awarded based on a two-stage, multi-part test. First, of course, it will be for the plaintiff to establish that his or her *Charter* rights have been infringed. Second, and more substantially, the plaintiff must demonstrate that damages will fulfill one or more of the objects of s. 24(1) damages: (1) compensating the claimant for loss and suffering; (2) vindicating the right by emphasizing its importance and the gravity of the breach; and (3) deterring state agents from committing future breaches. The claimant need not show that she has exhausted all other recourses; if the plaintiff can show a breach and a *prima facie* case that damages are "appropriate and just", the burden will then shift to the state to establish countervailing factors that demonstrate that damages are inappropriate or unjust.

On the facts of *Ward*, the application of these criteria made out a compelling case for *Charter* damages. First, Mr. Ward's injury was serious as his s. 8 right was violated in an egregious fashion. Since strip searches are inherently humiliating and degrading, the strip search constituted significant injury to Mr. Ward's intangible interests. Second, the corrections officers' conduct was also serious. They failed to have even minimum sensitivity to *Charter* concerns, which would have shown the search to be unnecessary and unconstitutional, since Mr. Ward did not commit a serious offence, no weapons were involved, Mr. Ward was not known to be violent or to carry weapons, and Mr. Ward did not pose a risk of harm to himself or others. (It would have been obvious without a strip search if he had been trying to conceal the "weapon" he was suspected of wielding (a pie) on his person!)

Significantly, the Court rejected the submissions of the government parties and interveners that *Charter* damages should be reserved for cases of clear wrongful acts, bad faith or abuse of

power. Rather, the Court held that, except in cases where public officials have carried out their duties in good faith under valid statutes subsequently struck down for breach of the *Charter*, there should not be a presumption that “good governance” is promoted by granting the state immunity from actions for damages.

While the *Ward* decision should be applauded, one might temper any expectation that *Charter* damages will be routinely awarded. The Court has already intimated that, while it was not deciding this issue, the threshold for obtaining a *Charter* damages award may well be higher in cases concerning prosecutorial discretion, for example, and it left the last word on the defences available to the state to wait for another case on another day. The Chief Justice noted in passing that “[w]hile the threshold for liability under the *Charter* must be distinct and autonomous from that developed under private law, the existing causes of action against state actors embody a certain amount of “practical wisdom” concerning the type of situation in which it is or is not appropriate to make an award of damages against the state.”

The Court has also signalled that, in some cases, non-monetary s. 24(1) remedies (such as a simple declaration) would be more responsive to a particular breach of *Charter* rights than an award of damages. Further, in noting that other jurisdictions have generally been careful to avoid unduly high awards for rights violations, the Court also strongly signalled that one should not expect that *Charter* damages will often be large.

Ultimately, though, the Court has recognized in section 24(1) a mandate that an award of damages must represent a meaningful response to the seriousness of the breach and the objectives of compensation, upholding *Charter* values, and deterring future breaches. It has recognized a cause of action for violation of the *Charter* for which the state is directly answerable. In appropriate cases, this might be able to overcome some of the limitations of traditional tort law (such as concerns about causation and the proof of damages) to create a remedy where justice demands one. It was notable that the parties granted leave to intervene in the *Ward* case included Aboriginal Legal Services of Toronto, the Association in Defence of the Wrongly Convicted, and of course the Canadian Civil Liberties Association, representing a broad cross-section of persons and interests for whom the newly-recognized action for damages under section 24(1) of the *Charter* may well represent new possibilities.

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