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Robert E. Charney

Josh Hunter

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Tort Lite? — *Vancouver (City) v. Ward* and the Availability of Damages for Charter Infringements

Robert E. Charney and Josh Hunter*

I. INTRODUCTION

Tort cases are all about damages. Historically at least, constitutional cases have been about declarations, not damages. This is not to say that vast sums of money have not been at stake in constitutional cases. Constitutional cases relating to the validity of fees and taxes have put in issue millions and potentially billions of dollars.¹ Similarly, *Canadian Charter of Rights and Freedoms*² section 15 cases seeking the expansion of government funded benefit programs such as education,³ health care,⁴ and social assistance⁵ usually involve many millions of dollars of annual government funding.

Governments have, since the abolition of Crown immunity from tort by the *Proceedings Against the Crown Acts*,⁶ been subject to damages for

* General Counsel and Counsel, respectively, Constitutional Law Branch, Ministry of the Attorney General of Ontario. The authors were counsel for the Attorney General of Ontario in *Vancouver v. Ward* in the Supreme Court of Canada. The views expressed herein are solely those of the authors and do not represent the position of the Ministry of the Attorney General of Ontario. The authors would like to thank Jessica Eisen and Rochelle Fox for their contributions to the legal analysis advanced in this paper. This paper was originally presented at the Osgoode Professional Development 7th Annual Conference on Crown Liability, February 18, 2011.

¹ *Re Eurig Estate*, [1998] S.C.J. No. 72, [1998] 2 S.C.R. 565 (S.C.C.); *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, [2007] S.C.J. No. 1, [2007] 1 S.C.R. 3, 2007 SCC 1 (S.C.C.) [hereinafter “*Eurig*”].

² Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter “*Charter*”].

³ *Adler v. Ontario*, [1996] S.C.J. No. 110, [1996] 3 S.C.R. 609 (S.C.C.).

⁴ *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] S.C.J. No. 71, [2004] 3 S.C.R. 657, 2004 SCC 78 (S.C.C.).

⁵ *Masse v. Ontario (Ministry of Community and Social Services)*, [1996] O.J. No. 363, 134 D.L.R. (4th) 20 (Ont. Div. Ct.); *Gosselin v. Québec (Attorney General)*, [2002] S.C.J. No. 85, [2002] 4 S.C.R. 429, 2002 SCC 84 (S.C.C.) [hereinafter “*Gosselin v. Québec*”].

⁶ These Acts which have been passed by all of the common law Canadian jurisdictions are modelled on the *Crown Proceedings Act, 1947* (U.K.), 10 & 11 Geo. VI, c. 44. In Ontario, Crown

torts committed by their servants and agents. Thus, the ability of courts to order the government to pay damages was hardly a new issue when the question of Charter damages finally reached the Supreme Court of Canada in the case of *Vancouver (City) v. Ward*.⁷ Indeed, it was already common practice for plaintiffs suing governments for the alleged tortious conduct of their servants and agents to plead that the conduct complained of was both a common-law tort and a violation of the Charter and to claim damages on both grounds. The fact that tort law and section 7 of the Charter are both designed to protect “life, liberty, and security of the person” meant that much tortious conduct committed by government officials would also constitute an infringement of the Charter.⁸ In most such cases, the ability to prove the tort claim rendered the Charter claim redundant; the corollary was that the inability to prove the tort claim meant that the Charter claim would also fail.

There never has been any doubt that section 24(1) of the Charter authorizes the courts to order the government to pay damages in cases in which damages are an “appropriate and just” remedy.⁹ The real question has always been whether damages might be a just and appropriate remedy for a Charter violation even if the conduct complained of does not also qualify as a tort.

Mr. Ward alleged that his Charter rights were infringed by the police unlawfully detaining and arresting him and seizing his property and by provincial correctional officers unlawfully strip searching him and imprisoning him. These are all claims which, if pursued as the comparable torts of false arrest, false imprisonment, assault, battery and conversion, would require proof of the appropriate level of fault for each tort. The issue in the *Ward* case was whether the same level of fault should have been required when they were pursued as alleged breaches of the Charter.

immunity for torts committed by Crown servants and agents was abolished as of September 1, 1963 by the *Proceedings Against the Crown Act, 1962-63*, S.O. 1962-63, c. 109, now the *Proceedings Against the Crown Act*, R.S.O. 1990, c. P.27. Before the passing of these Acts, the Crown could only be sued in tort with its consent, obtained through a petition of right. See Peter W. Hogg & Patrick J. Monahan, *Liability of the Crown*, 3d ed. (Scarborough, ON: Carswell, 2000), at 108-14 [hereinafter “Hogg & Monahan”].

[2010] S.C.J. No. 27, [2010] 2 S.C.R. 28, 2010 SCC 27 (S.C.C.) [hereinafter “*Ward* (S.C.C.)”].

⁸ *Nelles v. Ontario*, [1989] S.C.J. No. 86, [1989] 2 S.C.R. 170 (S.C.C.); *Miazga v. Kvello Estate*, [2009] S.C.J. No. 51, [2009] 3 S.C.R. 339, 2009 SCC 51 (S.C.C.) [hereinafter “*Miazga*”].

⁹ *Schachter v. Canada*, [1992] S.C.J. No. 68, [1992] 2 S.C.R. 679, at 725 (S.C.C.) [hereinafter “*Schachter*”].

Ward was the first case in the Supreme Court of Canada where the lower courts had dismissed the tort claim but allowed damages under the Charter, thus transforming Charter damages into a “consolation prize” for plaintiffs whose claims, as a result of the law, the evidence or the pleadings, did not meet the applicable tort law standard. While the unanimous decision of the Supreme Court appears to uphold this approach, we believe that a closer reading of the decision indicates that the Court did not stray very far from basic tort law principles. The lower court decisions appear to adopt a “strict liability” approach to certain Charter claims, but the Supreme Court’s reasons indicate that something more than mere causation will have to be proven before Charter damages will be considered “appropriate and just”.

II. THE EVENTS OF AUGUST 1, 2002 THAT LED TO MR. WARD SUING VANCOUVER AND BRITISH COLUMBIA

On August 16, 2000, a protester in Charlottetown threw a pie in the face of Prime Minister Jean Chrétien.¹⁰ Two years later, police officers responsible for ensuring the Prime Minister’s safety as he opened the Millennium Gate in Vancouver’s Chinatown received reports that another attempt would be made to “pie” the Prime Minister during the ceremony.¹¹

A. Cameron Ward is a well-known Vancouver lawyer who, according to his biography on his firm’s website, “has a particular interest in social justice issues and has represented a number of activists who have become involved in legal proceedings”.¹² Mr. Ward decided to attend the Millennium Gate opening ceremony. He parked his car near the ceremony, listened to the beginning of the Prime Minister’s speech, and then began to head south on nearby Taylor Street.¹³

Shortly before he did so, a Vancouver police officer assigned to liaise with the R.C.M.P. announced over the police radio that a white male had been overheard planning to throw a pie at the Prime Minister. A description was given that, although it did contain certain elements similar to Mr. Ward’s appearance, generally did not match his appearance. A

¹⁰ Online: <<http://www.cbc.ca/news/story/2000/08/16/peiChretienPie16aug00.html>>

¹¹ *Ward v. Vancouver (City)*, [2007] B.C.J. No. 9, 63 B.C.L.R. (4th) 361, 2007 BCSC 3, at para. 1 (B.C.S.C.) [hereinafter “*Ward* (B.C.S.C.)”].

¹² Online: <<http://www.cameronward.com/biographies/>>

¹³ *Ward* (B.C.S.C.), *supra*, note 11, at para. 5.

second broadcast from an unidentified officer followed stating that a male matching the description was running southward on Taylor Street. Mr. Ward was arrested on Taylor Street a few minutes after this broadcast was made but his and the officers' versions of what occurred before his arrest differ significantly.¹⁴

Mr. Ward testified that he was heading down Taylor Street to gain a better vantage point of a protester holding a sign behind the Prime Minister because he wanted to see how the man would be treated by police. He was stopped by a police officer who asked him for identification but told the officer that he did not have to provide any identification. After the officer called for back-up, several more officers arrived and handcuffed him. The officers would not tell him whether he was under arrest or allow him to call a lawyer using his cell phone despite his repeated requests to do so. He denies ever raising his voice until after he was arrested.¹⁵

The officers testified that Mr. Ward was stopped because he was running down Tyson Street like the man described in the second broadcast. When stopped, he started screaming hysterically and spitting at the officers as they tried to investigate whether he had been involved in a "pieing" attempt. A crowd, including media representatives, had gathered and Mr. Ward directed his yelling at them. Mr. Ward was handcuffed because the arresting officer was concerned he would escape or assault the officer. Mr. Ward was escorted to a nearby "paddy wagon" and transported to jail.¹⁶ The police had Mr. Ward's car towed to a police compound for the purpose of searching it once a warrant had been obtained but later decided they did not have grounds to obtain a warrant.¹⁷

The jail was a jointly run facility staffed by provincial correctional officers and one city police officer. When Mr. Ward first arrived at the jail, he was put in a holding cell. A few minutes later, he was taken to a room by two correctional officers who told him to remove his clothes in accordance with the jail's policy that all new entrants would be strip searched with the exception of by-law offenders and drunken persons. Mr. Ward removed all of his clothes except for his underwear. When he objected to removing them, he was not forced to do so. Mr. Ward was then placed in a small cell by himself where he stayed for the next

¹⁴ *Id.*, at paras. 5-6.

¹⁵ *Id.*, at paras. 7-10.

¹⁶ *Id.*, at paras. 11-23.

¹⁷ *Id.* at para. 31.

several hours, except for when he was allowed to call his lawyers.¹⁸ Approximately four-and-a-half hours after Mr. Ward was arrested (and several hours after the Prime Minister had left), Mr. Ward was released without charge.¹⁹

III. HISTORY OF PROCEEDINGS

Mr. Ward publicly demanded an apology from the Vancouver Police Department and lodged a complaint with the Police Complaint Commissioner. His complaint was dismissed and he never received an apology.²⁰

Mr. Ward therefore brought an action against the City of Vancouver (which was vicariously liable for the actions of the Vancouver police officers) and Her Majesty the Queen in Right of British Columbia (who was vicariously liable for the actions of the provincial correctional officers). He sought damages for assault, battery, false imprisonment, negligence and breaches of his sections 7, 8 and 9 Charter rights.²¹

1. The Trial Decision

Justice Tysoe, as he then was, found that Mr. Ward had been running down Tyler Street when the officers stopped him and did start yelling and creating a disturbance. He found that the officers arrested Mr. Ward for breach of the peace, but not for assault or attempted assault. He was only under investigation for those possible offences.²²

Justice Tysoe found that the police had reasonable grounds to detain Mr. Ward for investigative purposes. The initial detention was therefore lawful and not a breach of Mr. Ward's section 9 rights.²³ Similarly, the handcuffing of Mr. Ward was not an assault or battery as the officer had reasonable grounds to believe that Mr. Ward might escape or assault him.²⁴ He went on to find that the police had reasonable and probable grounds to arrest Mr. Ward without a warrant for breach of the peace

¹⁸ *Id.* at paras. 24-30.

¹⁹ *Id.*, at para. 32.

²⁰ *Id.*, at para. 34.

²¹ *Id.*, at para. 3.

²² *Id.*, at paras. 37-46.

²³ *Id.*, at paras. 52-56.

²⁴ *Id.*, at para. 56.

because he was creating a disturbance in a public place.²⁵ They would not, however, have had reasonable and probable grounds to arrest him for assault or attempted assault.²⁶ Nevertheless, as the arrest was a lawful arrest for breach of the peace, the arrest and transfer to the jail was not an assault, a battery, or a breach of Mr. Ward's section 9 rights.²⁷

The police were not, however, entitled to continue detaining Mr. Ward for a breach of the peace after the Prime Minister had left the vicinity. As they had no other grounds to continue detaining him, Tysoe J. found that he had been falsely imprisoned for three and a half to four hours which was also a breach of his section 9 Charter rights.²⁸

The trial judge concluded that it was unreasonable to strip search all new entrants (except by-law offenders and drunken individuals) as a matter of course even if, like Mr. Ward, no decision had been made to charge them and they were not going to mix with the general prison population. He determined that Mr. Ward's strip search was not conducted in accordance with the written provincial policy governing strip searches (or if it was, that the policy itself was unreasonable) and therefore breached Mr. Ward's section 8 Charter rights.²⁹

Justice Tysoe dismissed a claim that the police officer in charge of the jail assaulted Mr. Ward by threatening him and claims that he was assaulted or battered during the strip search.³⁰ Mr. Ward did not plead assault or battery by the provincial correctional officers.³¹ The trial judge also dismissed claims of negligence against the police and provincial correctional officers on the basis that any duty owed by the city or the province was a duty owed to the public at large and not a private law duty owed to Mr. Ward which could give rise to damages. As well, no evidence was presented on the applicable standard of care.³²

The trial judge did find, however, that the seizure of Mr. Ward's vehicle constituted a breach of his section 8 Charter rights as there was no reason to seize his car in connection with an arrest for breach of the

²⁵ *Id.*, at paras. 57-58.

²⁶ *Id.*, at paras. 59-65.

²⁷ *Id.*, at para. 65.

²⁸ *Id.*, at paras. 66-71.

²⁹ *Id.*, at paras. 72-86.

³⁰ *Id.*, at paras. 87-90.

³¹ *Ward v. Vancouver (City)*, [2009] B.C.J. No. 91, 89 B.C.L.R. (4th) 217, 2009 BCCA 23, at paras. 40-45 (B.C.C.A.) [hereinafter "*Ward* (B.C.C.A.)"], *per* Low J.A.

³² *Ward* (B.C.S.C.), *supra*, note 11, at paras. 94-96.

peace.³³ Although Mr. Ward had also pleaded that the seizure of the car constituted the tort of conversion, Tysoe J. did not address this issue in his reasons.³⁴

Justice Tysoe concluded that damages were an appropriate and just remedy for the section 8 breaches caused by the strip search and the seizure of the car in addition to a declaration that Mr. Ward's rights had been breached.³⁵ He awarded \$5,000 in general damages for false imprisonment (to avoid double recovery, no damages were awarded for the section 9 breach caused by the same facts), \$5,000 for the section 8 breach caused by the strip search, and \$100 for the section 8 breach caused by the seizure of Mr. Ward's car. He declined to award aggravated, exemplary or punitive damages.³⁶

2. The Court of Appeal

Mr. Ward appealed the dismissal of his claim that the arrest by city police was unlawful and the quantum of the damages awarded for false imprisonment. The City of Vancouver cross-appealed, arguing that damages should not have been awarded for the seizure of Mr. Ward's car. The province brought a separate appeal arguing that damages were not an appropriate remedy for the breach of Mr. Ward's section 8 Charter rights caused by the strip search in the absence of any showing of fault on the part of the correctional officers. Mr. Ward cross-appealed seeking greater damages including punitive damages.³⁷

The majority of the Court of Appeal (Low J.A., with Finch C.J.B.C. concurring) agreed with Tysoe J. that the police had reasonable and probable grounds to initially stop Mr. Ward and detain him briefly while they investigated him. Mr. Ward did not dispute that his subsequent behaviour constituted a breach of the peace. The majority therefore upheld Tysoe J.'s finding that the arrest for breach of the peace was lawful. It also found no error in Tysoe J.'s determination of the appropriate level of damages.³⁸

³³ *Id.*, at paras. 91-93.

³⁴ *Ward* (B.C.C.A.), *supra*, note 31, at paras. 33, *per* Low J.A., and 96, *per* Saunders J.A.

³⁵ *Ward* (B.C.S.C.), *supra*, note 11, at paras. 105-113.

³⁶ *Id.*, at paras. 114-129.

³⁷ *Ward* (B.C.C.A.), *supra*, note 31, at paras. 5-8.

³⁸ *Id.*, at paras. 13-27 and 67-70.

Turning to the awards of Charter damages, the majority held that, as no challenge had been made to the validity of any legislation, the principle set out in *Mackin* that a section 24(1) remedy such as damages cannot be combined with a declaration of invalidity under section 52 unless there is bad faith or an abuse of power did not apply.³⁹ Nor was the government policy as a whole challenged as was the case in *Wynberg*.⁴⁰ Rather, the Charter breach was caused by the conduct of the correctional officers who had unreasonably interpreted the provincial strip search policy as requiring a search of persons like Mr. Ward who had not been charged with any offence and would not be placed in the general prison population.⁴¹ The majority found that section 24(1) vested the Court with a broad remedial jurisdiction to grant “such remedy as the court considers appropriate and just in the circumstances” whether or not accompanied by a tort or bad faith.⁴² It therefore refused to interfere with Tysoe J.’s determination that damages were appropriate on the facts of the case or the quantum of damages he awarded.⁴³

Justice Saunders in dissent agreed that Mr. Ward’s appeal and cross-appeal should be dismissed but disagreed that Charter damages should have been awarded in the absence of wilful malice or bad faith.⁴⁴ He held that if the policy itself had been unreasonable, the principle in *Mackin* would have applied and damages should not have been awarded absent a showing of bad faith or abuse of power.⁴⁵ If the search was not conducted in accordance with the policy, then the question was whether state action that is not a tort or performed in bad faith should give rise to damages. Justice Saunders held that, absent a tort, there needed to be something more, such as a degree of deliberation, wilful blindness or bad faith, before Charter damages could be awarded. Otherwise, there would be strict liability for damages for a Charter breach.⁴⁶ As Tysoe J. had dismissed the negligence claim against the province and had found that

³⁹ *Id.*, at paras. 46-58; *Mackin v. New Brunswick (Minister of Finance)*, [2002] S.C.J. No. 13, [2002] 1 S.C.R. 405, 2002 SCC 13 (S.C.C.) [hereinafter “*Mackin*”].

⁴⁰ *Ward* (B.C.C.A.), *id.*, at para. 59; *Wynberg v. Ontario*, [2006] O.J. No. 2732, 82 O.R. (3d) 561 (Ont. C.A.), leave to appeal refused [2006] S.C.C.A. No. 441 (S.C.C.) [hereinafter “*Wynberg*”].

⁴¹ *Ward* (B.C.C.A.), *id.*, at paras. 62-63.

⁴² *Id.*, at para. 64.

⁴³ *Id.*, at paras. 64-65.

⁴⁴ *Id.*, at para. 72.

⁴⁵ *Id.*, at para. 81.

⁴⁶ *Id.*, at paras. 82-90.

the correctional officers “were not malicious, high-handed, or oppressive”, Saunders J.A. concluded that Charter damages should not have been awarded for the strip search.⁴⁷ Similarly, as none of the torts pleaded against the city were made out, Charter damages should not have been awarded for the seizure of Mr. Ward’s car.⁴⁸

3. Supreme Court Decision

The City of Vancouver and British Columbia appealed the majority’s decision upholding the award of Charter damages in the absence of a tort or bad faith to the Supreme Court of Canada. Chief Justice McLachlin, writing for the entire Court, held that proof of a tort or bad faith was not a necessary prerequisite to the award of Charter damages. Instead, she set out a four-part test for determining when damages would be an “appropriate and just” remedy under section 24(1).

The first step is to establish that there has been a breach of a substantive Charter right for which an individual remedy under section 24(1) needs to be awarded.⁴⁹ The second step, for which the onus also lies upon the claimant, is to establish that damages would “serve a useful function or purpose”. They do so if they would promote one or more of the purposes of section 24(1): (1) compensating a claimant for a loss suffered; (2) vindicating the harm caused to the state and to society by a breach of a claimant’s Charter rights; and (3) deterring future breaches of Charter rights.⁵⁰

The third step of determining whether damages are “appropriate and just in the circumstances” requires considering not only the claimant’s interests, but also those of society as a whole. Therefore, even if the claimant demonstrates that damages are a justifiable remedy because they further one of the purposes of section 24(1), the government still has an opportunity to show that other considerations render damages inappropriate or unjust. The Court left open for future cases the determination of a complete catalogue of countervailing factors but did give two

⁴⁷ *Id.*, at paras. 82 and 89-91.

⁴⁸ *Id.*, at para. 96.

⁴⁹ *Ward* (S.C.C.), *supra*, note 7, at para. 23.

⁵⁰ *Id.*, at paras. 24-31.

examples.⁵¹ The first was the existence of an alternative adequate remedy such as an award of tort damages or a declaration of a Charter breach.⁵²

The second countervailing factor the Court discussed is the concern for effective governance. One example where effective governance generally renders damages inappropriate is when government agents enforce a law or policy that is later struck down as unconstitutional. The Court reaffirmed the *Mackin* principle that damages should not be awarded in such a case absent a showing of bad faith but found that the principle did not apply to the facts of Mr. Ward's case.⁵³ The Court went on to suggest that other situations might require heightened standards of fault when the state establishes that section 24(1) damages raise governance concerns but left the development of those standards for future cases.⁵⁴

The final step is to determine the appropriate quantum of damages. Where the objective of compensation is engaged, Charter damages, like tort damages, are intended to restore the claimant to the position he or she would have been in had the breach not engaged. Both pecuniary and non-pecuniary damages are compensable under the Charter although, by analogy with tort damages, non-pecuniary damages are generally fixed at a modest conventional rate.⁵⁵ Damages intended to vindicate Charter rights or deter future breaches will principally be determined by the seriousness of the breach and must be fair to both the claimant and the State. Although Charter damages may have a somewhat punitive effect on the government, pure exemplary or punitive damages will only rarely be awarded.⁵⁶

On the facts of the *Ward* case, the Court agreed that the strip search of Mr. Ward constituted a breach of his section 8 rights.⁵⁷ It found that his injury was serious as strip searches are inherently humiliating and degrading and that the correctional officers' conduct was serious as they ignored "the settled law that routine strip searches are inappropriate when 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

⁵¹ *Id.*, at paras. 32-33.

⁵² *Id.*, at paras. 34-37.

⁵³ *Id.*, at paras. 38-41.

⁵⁴ *Id.*, at paras. 42-43.

⁵⁵ *Id.*, at paras. 46-51.

⁵⁶ *Id.*, at paras. 52-57.

⁵⁷ *Id.*, at para. 62.

could be used to harm themselves or others.”⁵⁸ Damages therefore were required to compensate Mr. Ward, vindicate the breach of his rights and deter future breaches.⁵⁹ British Columbia did not establish countervailing factors — a declaration would not satisfy the need to compensate Mr. Ward and no good governance considerations were demonstrated.⁶⁰ Finally, the Court concluded that Tysoe J.’s award of \$5,000 in damages was reasonable.⁶¹ The Court, however, overturned the award of \$100 in damages for the seizure of Mr. Ward’s car. Compensation was not engaged as Mr. Ward did not suffer any injury as a result of the seizure. A declaration was adequate to vindicate the uncontested breach of Mr. Ward’s section 8 rights and to deter future breaches.⁶²

IV. THE PRINCIPLES OF TORT LIABILITY

In order to appreciate what was at stake in *Ward* and to understand the significance of the Court’s decision, it is necessary to first consider the principles of liability developed over the past 600 years in the common law tort system. The common law gradually developed carefully balanced standards of fault to determine when a defendant who causes harm to another should be held legally liable to compensate the plaintiff for that harm. With a few narrow exceptions, mere causation has not been sufficient to impose liability. Instead, the defendant must have intended to carry out a tortious act or at least have been negligent in so doing. When tort liability was extended to the Crown for the actions of its servants and agents, it was made clear that the Crown would only be liable if those servants and agents could have been found liable for a tort — thus a showing of the requisite level of fault was required to sue the Crown as well.⁶³

Ontario, which intervened in *Ward* at the Supreme Court, took the position that unless there are clearly articulated policy reasons to depart from the fault requirements which the common law has developed in particular circumstances, a claim for Charter damages should require at least the same level of fault as a private law tort claim in

⁵⁸ *Id.*, at para. 65.

⁵⁹ *Id.*, at paras. 64-66.

⁶⁰ *Id.*, at paras. 67-69.

⁶¹ *Id.*, at paras. 70-73.

⁶² *Id.*, at paras. 74-78.

⁶³ See, e.g., *Proceedings Against the Crown Act*, *supra*, s. 5(2) and (4).

those circumstances.⁶⁴ Otherwise, Charter damages run the risk of subsuming the entire field of tort law when a governmental actor is the defendant. Such a result, Ontario argued, would run against the Supreme Court's recent jurisprudence which has carefully delimited the scope of governmental tort liability and has often required a higher, not a lower, level of fault before a claim could be made out against a governmental defendant. The constitutional requirement of an "appropriate and just" remedy for Charter breaches can and should be read harmoniously with the principles of common law tort liability which have been developed with similar rights and policy interests in mind.

The tort system as it has developed in most common law jurisdictions is premised on the principle that causation alone is not a basis for liability. Only where a defendant is at fault should there be liability. Depending on the tort alleged, the level of fault required is usually negligence or an intention to commit the tortious conduct.⁶⁵

The courts refined and expanded the tort of negligence over several centuries. They were careful, however, not to extend it to all situations in which a defendant causes harm to another. In 1932, Lord Atkin famously held that "in order to support an action for damages for negligence the complainant has to show that he has been injured by the breach of a duty owed to him in the circumstances by the defendant to take reasonable care to avoid such injury."⁶⁶

In 1978, the House of Lords articulated a two-stage test for determining when such a duty of care was owed in *Anns v. Merton London Borough Council*.⁶⁷ The Supreme Court adopted the *Anns* standard in *Kamloops (City) v. Nielsen* and has followed it ever since:

- (1) is there a sufficiently close relationship between the parties (the local authority and the person who has suffered the damage) so

⁶⁴ This is not to suggest that claims for Charter damages should be limited to those common law causes of action that existed before the Charter, only that "fault" should continue to be the test for liability. For example, while there was no common law right to be free from discrimination and no tort of wrongful discrimination, s. 24(1) of the Charter may authorize the Court to award damages for government operational conduct that infringes s. 15 of the Charter where the appropriate level of fault has been established.

⁶⁵ The history of this development has been extensively reviewed in legal texts. See for example: J.H. Baker, *An Introduction to English Legal History*, 4th ed. (London: Butterworths, 2002), at 60-64 and 402-11 [hereinafter "Baker"].

⁶⁶ *Id.*, at 411-21; *M'Alister (or Donoghue) v. Stevenson*, [1932] A.C. 562, at 579 (H.L.).

⁶⁷ [1978] A.C. 728 (H.L.).

that, in the reasonable contemplation of the authority, carelessness on its part might cause damage to that person? If so,

- (2) are there any considerations which ought to negative or limit (a) the scope of the duty and (b) the class of persons to whom it is owed or (c) the damages to which a breach of it may give rise?⁶⁸

In addition to the existence of a duty of care toward the plaintiff, the liability of the defendant almost always depends on proof of negligence or wrongful intent. Generally, the relevant standard of care is the care a reasonable person would take in similar circumstances. As the name implies, intentional torts require an even higher level of fault — the intention to carry out a certain act or omission.⁶⁹

If negligence is alleged, the plaintiff must establish the three elements of the tort of negligence in order to be entitled to damages:

- (1) the defendant owed the plaintiff a duty of care recognized by law;
- (2) the defendant's conduct fell below the standard of care expected of it; and
- (3) the defendant's breach of duty caused (both in fact and in law) the damage allegedly suffered by the plaintiff.⁷⁰

If an intentional tort is alleged, the plaintiff must establish each of the tort's elements, including the required level of intention.⁷¹

The rare cases in which modern Canadian tort law holds defendants liable for non-negligent and unintentional harm fall within two narrow categories both of which involve the defendant having voluntarily chosen to do something which is known to create an excessive risk of harming

⁶⁸ *Kamloops (City) v. Nielsen*, [1984] S.C.J. No. 29, [1984] 2 S.C.R. 2, at 8-11 (S.C.C.), citing *Anns v. Merton London Borough Council*, *id.*, at 751-52; *Odhavji Estate v. Woodhouse*, [2003] S.C.J. No. 74, [2003] 3 S.C.R. 263, 2003 SCC 69, at paras. 45-47 and 51 (S.C.C.); *Childs v. Desormeaux*, [2006] S.C.J. No. 18, [2006] 1 S.C.R. 643, 2006 SCC 18, at paras. 9-12 (S.C.C.); *Design Services Ltd. v. Canada*, [2008] S.C.J. No. 22, [2008] 1 S.C.R. 737, 2008 SCC 22, at paras. 46-47 (S.C.C.) [hereinafter "*Design Services*"]; *R. v. Imperial Tobacco Canada Ltd.*, [2011] S.C.J. No. 42, 2011 SCC 42, at paras. 38-39 (S.C.C.) [hereinafter "*Imperial Tobacco*"].

⁶⁹ *Hill v. Hamilton-Wentworth Regional Police Services Board*, [2007] S.C.J. No. 41, [2007] 3 S.C.R. 129, 2007 SCC 41, at paras. 68-73 (S.C.C.); *Queen v. Cognos Inc.*, [1993] S.C.J. No. 3, [1993] 1 S.C.R. 87, at 121 (S.C.C.); Lewis N. Klar, *Tort Law*, 4th ed. (Toronto: Thomson Carswell, 2008), at 32-34 [hereinafter "*Klar*"].

⁷⁰ Although they may be treated within the foregoing broader categories or as separate elements, the concepts of reasonable foreseeability, proximity and remoteness are also part of any ultimate determination of liability.

⁷¹ *Cooper v. Hobart*, [2001] S.C.J. No. 76, [2001] 3 S.C.R. 537, 2001 SCC 79, at paras. 21-24 (S.C.C.) [hereinafter "*Cooper*"].

others. The first category consists of cases falling within the principle in *Rylands v. Fletcher*⁷² (making a non-natural use of land which involves bringing something onto the land known to do mischief if it escapes) while the second involves cases where the plaintiff has been harmed by the defendant's dangerous animal (*i.e.*, an animal of a type known to be dangerous or an animal that has actually been dangerous in the past).⁷³ These two categories are historical holdovers which the Canadian courts have been unwilling to expand further.

Outside of these two narrow categories, Canadian tort law has consistently required either negligence or an intent to commit a tortious act before an act or omission that *causes* damage can result in *liability*. In the *Ward* case, Ontario argued that the carefully balanced fault-based rules for determining when harm should result in legal liability which have been incrementally developed over the past six centuries should not be lightly discarded simply because the harm complained of may also be a breach of the plaintiff's Charter rights.

V. DEVELOPMENT OF PRINCIPLES OF CHARTER LIABILITY

The Charter only applies to governments and governmental actors. Allowing Charter damages to be awarded without proof of fault would therefore impose a *lower* fault requirement when the defendant is a governmental actor subject to the Charter than when the defendant is a private actor.

In developing the principles of liability that apply with regard to particular Charter claims (claims relating to policy decisions, claims for malicious prosecution and claims against the judiciary), the courts in cases prior to *Ward* adopted the tort law fault principles that apply to the same causes of action, recognizing that the public policy reasons why a given degree of fault is required in tort law apply with equal force to Charter-based claims.

1. Immunity from Liability for Policy Decisions

Even where there is sufficient proximity between a government action and an individual citizen to create a *prima facie* duty of care, the

⁷² (1868), 330 L.R. 3 H.L. 330 (H.L.).

⁷³ *Id.*, at 339-40; Baker, *supra*, note 65, at 408 and 411; Klar, *supra*, note 69, at 619-20.

courts have created a broad exception for policy decisions: “It is established that government actors are not liable in negligence for policy decisions, but only operational decisions. The basis of this immunity is that policy is the prerogative of the elected Legislature. It is inappropriate for courts to impose liability for the consequence of a particular policy decision.”⁷⁴ Policy decisions are decisions based upon “financial, economic, social or political factors or constraints”.⁷⁵ Making governments liable for policy decisions risks interfering with effective governance by deterring governments from creating new programs: “the Crown is not a person and must be free to govern and make true policy decisions without becoming subject to tort liability as a result of those decisions.”⁷⁶

The courts have applied this principle to claims for damages in tort cases and Charter cases, emphasizing fault as an integral element of liability: “government policy by itself does not create a legally actionable wrong. For that, the law requires specific wrongful acts causally connected to damage suffered.”⁷⁷ Policy immunity is thus grounded in the acknowledgment that liability for damages is neither just nor appropriate in the absence of fault: “objective standards are notably lacking when the question is not negligence but social wisdom, not due care but political practicability, not reasonableness but economic expediency. Tort law simply furnishes an inadequate crucible for testing the merits of social, political or economic decisions.”⁷⁸

One of the policy concerns giving rise to this principle is the potentially vast scale of liability that a government would face if it were liable for damages to all persons affected by a policy decision subsequently declared to be invalid or constitutionally inadequate. As recognized by the Supreme Court in *Ward*, exposing government to this level of financial burden could have the effect of redirecting the expenditure of public funds away from the restructuring and development of public

⁷⁴ *Cooper, supra*, note 71, at para. 38.

⁷⁵ *Just v. British Columbia*, [1989] S.C.J. No. 121, [1989] 2 S.C.R. 1228, at 1239-45 (S.C.C.) [hereinafter “*Just*”].

⁷⁶ *Cooper, supra*, note 71; *Just, id.*; *Brown v. British Columbia (Minister of Transportation and Highways)*, [1994] 1 S.C.R. 420, at 432-37 and 441 (S.C.C.); *Edwards v. Law Society of Upper Canada*, [2001] S.C.J. No. 77, [2001] 3 S.C.R. 562, 2001 SCC 80, at paras. 14 and 19 (S.C.C.); *Mackin, supra*, note 39, at para. 79; *Welbridge Holdings Ltd. v. Greater Winnipeg (Metropolitan Corporation)*, [1970] S.C.J. No. 102, [1971] S.C.R. 957, at 969 (S.C.C.).

⁷⁷ *Blackwater v. Plint*, [2005] S.C.J. No. 59, [2005] 3 S.C.R. 3, 2005 SCC 58, at para. 9 (S.C.C.).

⁷⁸ *Just, supra*, note 75, at 1240, citing *Blessing v. United States*, 447 F.Supp. 1160, at 1170 (E.D. Penn. 1978).

programs and institutions toward private individual redress for past acts of government.⁷⁹ It would expose government to “liability in an indeterminate amount for an indeterminate time to an indeterminate class”.⁸⁰ As Hogg and Monahan state:

If a decision at the planning level was made in breach of procedural requirements, or in bad faith, or for an improper purpose, such a decision would be held to be invalid by a Court. But it does not follow that damages should be available to a person injured by the decision. An award of damages would involve the court moving beyond the infirmity of the actual decision and deciding what the “correct” decision should have been. As well, an award of damages at the planning level would often expose the public authority to a multiplicity of lawsuits and intolerable financial burdens. These seem to be the reasons why no common law duty of care arises at the planning level: even an invalid decision at the planning level does not provide a cause of action in negligence.⁸¹

Another reason for restricting the availability of compensatory damages for invalid government action is the impossibility of accurately quantifying such damages. This is because assessing the loss attributable to government action subsequently declared to be constitutionally inadequate involves speculation as to what the government would have done had it known that it could not proceed in the way it did. The Supreme Court has recognized that it is not the function of the courts to make *ad hoc* policy choices from a variety of constitutionally valid options.⁸²

The Courts have affirmed that governmental immunity from liability for policy decisions applies regardless of whether the challenge to the policy is based on tort or the Charter and have thus established a general principle that declaratory relief should not be combined with pecuniary damages in Charter claims. Where a government policy decision is at

⁷⁹ *Ward* (S.C.C.), *supra*, note 7, at para. 53.

⁸⁰ *Fulowka v. Pinkerton's of Canada Ltd.*, [2010] S.C.J. No. 5, [2010] 1 S.C.R. 132, 2010 SCC 5, at para. 70 (S.C.C.), quoting Cardozo C.J.C. in *Ultramares Corp. v. Touche*, 174 N.E. 441, at 444 (N.Y. 1931); *Imperial Tobacco*, *supra*, note 68, at paras. 97-101.

⁸¹ Hogg & Monahan, *supra*, note 6, at 165; see also *Gosselin v. Québec*, *supra*, note 5, at para. 296, Bastarache J. dissenting; *Design Services*, *supra*, note 68, at paras. 59-66; *Wynberg*, *supra*, note 40, at paras. 196-201.

⁸² *Schachter*, *supra*, note 9, at 707 and 726; Hogg & Monahan, *id.*, at 165; *M. v. H.*, [1999] S.C.J. No. 23, [1999] 2 S.C.R. 3, at para. 142 (S.C.C.); *Gosselin v. Québec*, *id.*, at paras. 291, 295 and 298, Bastarache J. dissenting; *Eldridge v. British Columbia (Attorney General)*, [1997] S.C.J. No. 86, [1997] 3 S.C.R. 624, at paras. 95-96 (S.C.C.).

issue, the Courts have confirmed that “absent conduct that is clearly wrong, in bad faith or an abuse of power, the courts will not award damages ...”.⁸³ The Court applies the same legal principles of liability to both tort and Charter claims because the public policy reasons for these principles apply regardless of how the claim is pleaded. The fact that a claim in damages arises from an alleged rights violation:

... does not oust those fundamental rules which serve to safeguard the free and effective discharge of the legislative function. ... By analogy, in the law of Crown liability, if upon judicial review an administrative decision is found to be unlawful, it does not necessarily follow that there is a fault giving rise to recourse in civil liability [citations omitted].⁸⁴

2. Malicious Prosecution

In certain cases, public policy has led the courts to require a standard of fault considerably higher than mere negligence before a plaintiff can bring a private law action against a state actor. For example, in the tort of malicious prosecution, the courts have, “in light of the unique role played by Crown prosecutors in our modern system of public prosecution”, concluded that “inexperience, incompetence, negligence, or even gross negligence” are insufficient to impose liability on a Crown prosecutor.⁸⁵ A Crown prosecutor can only be held liable for being malicious which “requires a plaintiff to prove that the prosecutor *wilfully* perverted or abused the office of the Attorney General or the process of criminal justice”.⁸⁶ The same standard applies regardless of whether the claim is pleaded as the tort of malicious prosecution or as a claim that the prosecution infringed the plaintiff’s section 7 rights as the Courts have recognized that the same public policy concerns apply to both the tort and the Charter claim. To require a lower standard of fault for the Charter

⁸³ *Mackin*, *supra*, note 39, at para. 78

⁸⁴ *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*, [2004] S.C.J. No. 25, [2004] 1 S.C.R. 789, at paras. 19 and 22-23 (S.C.C.) (citations omitted); *Schachter*, *supra*, note 9, at 720; *Mackin*, *id.*, at paras. 78-83; *Wynberg*, *supra*, note 40, at paras. 191-202; *R. v. Demers*, [2004] S.C.J. No. 43, [2004] 2 S.C.R. 489, 2004 SCC 46, at para. 62 (S.C.C.).

⁸⁵ *Miazga*, *supra*, note 8, at paras. 4 and 80; See also *Osborne v. Ontario (Attorney General)*, [1996] O.J. No. 2678, at para. 14 (Ont. C.J.), *affd* [1998] O.J. No. 4457, at para. 2 (Ont. C.A.).

⁸⁶ *Miazga*, *id.*, at para. 80 (emphasis in original).

claim would undermine the policy that requires a heightened degree of fault for the tort.⁸⁷

In *Nelles*,⁸⁸ the majority held that prosecutorial immunity “ultimately boils down to a question of policy” and emphasized the need “to ensure that the Attorney General and Crown Attorneys will not be hindered in the proper execution of their important public duties” in determining the appropriate standard for liability.⁸⁹ In her dissenting reasons, Justice L’Heureux-Dubé cited a passage from American Justice Learned Hand, warning that imposing liability on public officials whose mistakes caused someone harm would:

... dampen the ardour of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors.⁹⁰

In *Miazga*, the Supreme Court reaffirmed that “the public good is clearly served by the maintenance of a sphere of unfettered discretion within which Crown attorneys can properly pursue their professional goals.”⁹¹ Justice Charron, writing for a unanimous Court, spoke of the need to protect prosecutorial independence:

Its fundamental importance lies, not in protecting the interests of individual Crown attorneys, but in advancing the public interest by enabling prosecutors to make discretionary decisions in fulfilment of their professional obligations without fear of judicial or political interference, thus fulfilling their *quasi*-judicial role as “ministers of justice” [citations omitted]. In *R. v. Power*, [citations omitted], L’Heureux-Dubé J. acknowledged the importance of limiting judicial oversight of Crown decisions in furtherance of the public interest:

⁸⁷ *Nelles v. Ontario*, [1989] S.C.J. No. 86, [1989] 2 S.C.R. 170 (S.C.C.) [hereinafter “*Nelles*”].

⁸⁸ *Id.*

⁸⁹ *Id.*, at 199.

⁹⁰ *Id.*, at 222, citing *Gregoire v. Biddle*, 177 F.2d 579, at 581 (2d Cir. 1949).

⁹¹ *Miazga*, *supra*, note 8, at para. 47.

[T]he Attorney General is a member of the executive and as such reflects, *through his or her prosecutorial function, the interest of the community to see that justice is properly done.* The Attorney General's role in this regard is not only to protect the public, but also to honour and express the community's sense of justice. Accordingly, *courts should be careful before they attempt to "second-guess" the prosecutor's motives when he or she makes a decision.*⁹²

Justice Charron pointed out that "the 'inherent difficulty' in proving a case of malicious prosecution was an intentional choice by the Court."⁹³ The Court in *Ward* recognized that the availability of Charter damages should not undermine the "careful balancing" the Court "established in *Nelles* and *Proulx* between the right of individual citizens ... and the public interest."⁹⁴ Otherwise, the high threshold for success in a malicious prosecution action could be avoided by framing it as a Charter claim.

In *Nelles*, Lamer J. made it clear that a claim for malicious prosecution is, and should be, difficult to maintain and that if it could be established the same facts could well support claims for a *Charter* breach, just as the facts in the *Doe* case (*supra*) established a claim for negligence and supported a corresponding claim for a *Charter* breach. To suggest that where, in an action for malicious prosecution the facts did not support the claim, a plea of breach of *Charter* Rights based upon the same facts would act as a sort of fall-back position, would, in my view, render the tort of malicious prosecution meaningless and deny the defendants the protection implicit in the very high standards established by the Court in *Nelles*.⁹⁵

3. Judicial Immunity

In other cases, even a heightened fault requirement is insufficient to protect public policy interests and complete immunity is required. For example, members of the judiciary enjoy complete immunity from a claim of damages in relation to the performance of their judicial

⁹² *Id.* (emphasis in original).

⁹³ *Id.*, at para. 52.

⁹⁴ *Id.*; *Ward* (S.C.C.), *supra*, note 7, at para. 43.

⁹⁵ *Oniel v. Toronto (Metropolitan) Police Force*, [1998] O.J. No. 3840, at para. 51 (Ont. Gen. Div.), *rev'd on other grounds* [2001] O.J. No. 90, 195 D.L.R. (4th) 59 (Ont. C.A.).

functions. The courts at common law have understood judicial independence to be the cornerstone of an impartial judiciary, and it is this policy concern that has informed the preservation of judicial immunity:

[T]he most serious consequence of permitting judges to be sued for their decisions is that judicial independence would be severely compromised. If judges recognized that they could be brought to account for their decisions, their decisions might not be based on a dispassionate appreciation of the facts and law related to the dispute. Rather, they might be tempered by thoughts of which party would be more likely to bring an action if they were disappointed by the result, or by thoughts of whether a ground-breaking but just approach to a difficult legal problem might be later impugned in an action for damages against that judge, all of which would be raised by the mere threat of litigation. In Lord Denning's words, a judge would "turn the pages of his books with trembling fingers, asking himself: 'If I do this, shall I be liable in damages?'"⁹⁶

The public policy interest that gives rise to the need for judges to be immune from damages in relation to the performance of their judicial functions applies regardless of whether the cause of action is pleaded as a tort or as a violation of the Charter. In fact, the Charter provides explicit support for this "policy" interest in judicial independence, which is itself entrenched as a Charter right:

Far from being inconsistent with the Constitution, the immunity rule has, for several centuries, been considered an essential ingredient of the constitutional principle of judicial independence. That principle, inherited from the United Kingdom Constitution, was reflected in the preamble of the *Constitution Act, 1867*, and it has been enshrined in the *Charter* in the guarantee, under s. 11(d), of "a hearing before an independent and impartial tribunal." ... *The immunity rule, having as its "raison d'être" the preservation of this important constitutional principle, can hardly be characterized as inconsistent with the Constitution.*⁹⁷

⁹⁶ *Taylor v. Canada (Attorney General)*, [2000] F.C.J. No. 268, [2000] 3 F.C.R. 298, at para. 28 (F.C.A.), leave to appeal refused [2007] S.C.C.A. No. 213 (S.C.C.); *Morier v. Rivard*, [1985] S.C.J. No. 81, [1985] 2 S.C.R. 716, at 739 (S.C.C.); *Sirros v. Moore*, [1975] 1 Q.B. 118, at 136 (C.A.).

⁹⁷ *Royer v. Mignault*, [1989] J.Q. no 407, 50 D.L.R. (4th) 345, at 359 (Que. C.A.), leave to appeal refused [1988] 1 S.C.R. xiii (emphasis added). See, e.g., *Atty-Gen. v. Chapman*, [2011] NZSC 110, where the majority of the New Zealand Supreme Court recently held that judicial immunity and the separation of powers precluded an award of damages against either the individual

If judicial immunity did not apply to claims for damages under the Charter, judges might well find themselves liable to Charter damages, particularly in criminal cases where trial judges must navigate the complex and evolving jurisprudence relating to the legal rights and protections guaranteed to accused persons by sections 7 to 14 of the Charter. While incorrect judicial decisions may result in an infringement of the accused's Charter rights, the consistent remedy for such an error has been a successful appeal, not the elimination of the doctrine of judicial immunity or an entitlement to sue a judge for damages under section 24(1) of the Charter.

VI. THE PRACTICAL SIGNIFICANCE OF *WARD* IN CLAIMS AGAINST THE GOVERNMENT

In order to understand the practical significance of the *Ward* decision, we must first examine why plaintiffs seeking damages against government often plead that the same allegations give rise to causes of action both in tort and under the Charter. *Ward* is only significant to the extent that the Charter claim is somehow different than the tort claim arising from the same set of facts. There appear to be four reasons for this strategy, only one of which remains an arguable proposition after *Ward*.

The first rationale for the practice of pleading both a tort and a Charter infringement is the hope that, if the plaintiff cannot prove all of the elements of the tort claim, some of these elements (for example, negligence) will not be necessary to obtain damages under the Charter. On its face, this seems to be the result in *Ward*, since the trial judge dismissed the plaintiff's negligence claim and the Supreme Court, without disturbing the trial judge's finding on negligence, still awarded damages. Justice Tysoe concluded that Mr. Ward had not proven two of the three elements of the tort of negligence: "First, any duty owed by the City of Vancouver and the Provincial Government was a duty owed to the general public and was not a private law duty owed to Mr. Ward for the purposes of the tort of negligence ... Second, there was no evidence on the applicable standard of care."⁹⁸ Mr. Ward did not appeal these findings and the Supreme Court did not address them directly.

judge or the Crown where a judge's actions had resulted in a breach of the claimant's rights under the New Zealand Bill of Rights.

⁹⁸ *Ward* (B.C.S.C.), *supra*, note 11, at para. 96.

On closer examination, however, it is clear that, while the Supreme Court does not conclude that the principles of tort liability will always be applied to section 24(1) Charter claims, it is not prepared to abandon these principles altogether. This ambivalence is most obvious at paragraph 43 of the decision, which states:

When appropriate, private law thresholds and defences may offer guidance in determining whether s. 24(1) damages would be “appropriate and just”. While 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.⁹⁹

Indeed, it appears that the Supreme Court did not agree with the findings of the trial judge with regard to either the duty of care or the standard of care as the Supreme Court’s award of damages was premised on an implied conclusion that there was both a private law duty of care and conduct on the part of the jail guards that fell below the reasonable standard of care. On the first point (the existence of a private law duty of care), the trial judge’s decision was based on case law that was overruled by the Supreme Court just a few months after his decision. In *Hill v. Hamilton-Wentworth Regional Police Services Board*,¹⁰⁰ the Supreme Court held that investigating police officers do owe a private law duty of care to suspects. Their conduct during an investigation should be measured against the standard of how a reasonable officer in like circumstances would have acted. Police officers may be accountable for harm resulting to a suspect if they fail to meet this standard. The majority described the standard of care as follows:

I conclude that the appropriate standard of care is the overarching standard of a reasonable police officer in similar circumstances. This standard should be applied in a manner that gives due recognition to the discretion inherent in police investigation. Like other professionals, police officers are entitled to exercise their discretion as they see fit,

⁹⁹ *Ward* (S.C.C.), *supra*, note 7, at para. 43. Similar sentiments about the relevance of private law policy considerations are expressed at para. 22 of the decision: “However, the underlying policy considerations that are engaged when awarding private law damages against state actors may be relevant when awarding public law damages directly against the state. Such considerations may be appropriately kept in mind.”

¹⁰⁰ [2007] S.C.J. No. 41, [2007] 3 S.C.R.129, 2007 SCC 41 (S.C.C.) [hereinafter “*Hill*”].

provided that they stay within the bounds of reasonableness. The standard of care is not breached because a police officer exercises his or her discretion in a manner other than that deemed optimal by the reviewing court. A number of choices may be open to a police officer investigating a crime, all of which may fall within the range of reasonableness. So long as discretion is exercised within this range, the standard of care is not breached. The standard is not perfection, or even the optimum, judged from the vantage of hindsight. It is that of a reasonable officer, judged in the circumstances prevailing at the time the decision was made — circumstances that may include urgency and deficiencies of information. The law of negligence does not require perfection of professionals; nor does it guarantee desired results ... Rather, it accepts that police officers, like other professionals, may make minor errors or errors in judgment which cause unfortunate results, without breaching the standard of care. The law distinguishes between unreasonable mistakes breaching the standard of care and mere “errors in judgment” which any reasonable professional might have made and therefore, which do not breach the standard of care.¹⁰¹

While the trial judge in *Ward* found no evidence had been led regarding the applicable standard of care, the Supreme Court decision clearly indicates that the Supreme Court concluded that the conduct of the corrections officers did fall below the appropriate standard of care. The Court stated:

The corrections officers’ conduct which caused the breach of Mr. Ward’s *Charter* rights was also serious. Minimum sensitivity to *Charter* concerns within the context of the particular situation would have shown the search to be unnecessary and violative. Mr. Ward did not commit a serious offence, he was not charged with an offence 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. *In these circumstances, a reasonable person would understand that the indignity resulting from the search was disproportionate to any benefit which the search could have provided. In addition, without asking officers to be conversant with the details of court rulings, 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*

¹⁰¹ *Id.*, at para. 73.

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.¹⁰²

The italicized words in this paragraph look very much like the standard of care analysis set out in the *Hill* case, indicating that the Supreme Court would have likely come to the same conclusion had the issue before it been one of damages for negligence rather than under the Charter. These were important factors in the Court's decision, and it is, in our view, unlikely that Charter damages would have been awarded had the Court not found that the conduct of the corrections officers was serious and fell below that of a "reasonable person" and, more specifically, below that of a reasonable corrections officer who would be "familiar with the settled law".

In addition, the Court in *Ward* reaffirmed its recent decision in *Miazga* that held that a claim of malicious prosecution against a Crown Attorney requires proof of malice regardless of whether the claim is brought in tort or under the Charter.¹⁰³ Accordingly, *Ward* does not support the proposition that claims for damages under section 24(1) of the Charter will be easier to prove than the equivalent tort claims arising from the same conduct.

The second reason for pleading both a tort and a Charter infringement is an effort to circumvent the government's qualified immunity from negligence claims for policy decisions.¹⁰⁴ Plaintiffs hoped that by adding a Charter claim to their allegation of negligence, the courts would consider an award of damages in circumstances where the tort claim would be dismissed. This strategy is particularly prevalent in proposed class actions which are funded by contingency fees based on a percentage of the damages recovered. While there has been an increase in the number of class actions brought against the government in the past few years, many of these proposed actions have foundered on the well-established principle that government policy decisions are, in the absence of bad faith or an abuse of power, immune from tort liability. Courts have struck out several proposed class actions seeking damages for government policy decisions regarding funding for, for example, disabled

¹⁰² *Ward* (S.C.C.), *supra*, note 7, at para. 65 (emphasis added).

¹⁰³ See notes 90-93, *supra*.

¹⁰⁴ See 406-409, *supra*.

children and health care.¹⁰⁵ While the Crown has qualified immunity from tort liability for policy decisions, such policy decisions are not immune from Charter challenges. If plaintiffs could combine a Charter challenge to government policy with a claim for damages, perhaps a viable class action proceeding would be created.

As indicated above, the Supreme Court of Canada has consistently affirmed that the principle of qualified immunity for policy decisions applies in the Charter context. While the validity of government policy decisions are subject to judicial review under the Charter, the Court has indicated that if the policy is found to infringe the Charter, the appropriate remedy is a declaration under section 52 of the *Constitution Act, 1982* and not an individual remedy like damages under section 24(1) of the Charter.¹⁰⁶ This principle was confirmed again in the *Ward* case, although the Court held that it did not apply to Mr. Ward's claim because the impugned conduct was not a "policy" or taken under a statute or policy that was subsequently declared invalid.¹⁰⁷ Accordingly, *Ward* did not expand the scope for claiming damages in challenges to government policy decisions or state conduct pursuant to a valid statute which is later determined to be invalid and the qualified immunity applies regardless of whether the claim is pleaded as negligence or a Charter violation.

The third reason for pleading both a tort and a Charter infringement is the hope that damages might be multiplied by the addition of another cause of action. Plaintiffs often claim damages for the tort claim and additional damages for the alleged Charter breach. The Court in *Ward* makes clear that double recovery will not be available in these cases:

¹⁰⁵ *Laroza Estate v. Ontario*, [2009] O.J. No. 1820, 95 O.R. (3d) 764 (Ont. C.A.); *Abarquez v. Ontario*, [2009] O.J. No. 1814, 95 O.R. (3d) 414 (Ont. C.A.), leave to appeal refused [2009] S.C.C.A. No. 297 (S.C.C.); *Williams v. Canada (Attorney General)*, [2009] O.J. No. 1819, 95 O.R. (3d) 401 (Ont. C.A.), leave to appeal refused [2009] S.C.C.A. No. 298 (S.C.C.); *Eliopoulos v. Ontario (Minister of Health and Long-Term Care)*, [2006] O.J. No. 4400, 82 O.R. (3d) 321 (Ont. C.A.), leave to appeal refused [2006] S.C.C.A. No. 514 (S.C.C.); *L. (A.) v. Ontario (Minister of Community and Social Services)*, [2006] O.J. No. 4673 (Ont. C.A.), leave to appeal refused [2007] S.C.C.A. No. 36 (S.C.C.); *Sagharian (Litigation guardian of) v. Ontario (Minister of Education)*, [2008] O.J. No. 2009, 172 C.R.R. (2d) 105 (Ont. C.A.), leave to appeal refused [2008] S.C.C.A. No. 350 (S.C.C.) [hereinafter "*Sagharian*"]; *Cilinger c. Québec (Procureur général)*, [2004] J.Q. no 11627 (Que. C.A.), leave to appeal refused [2004] C.S.C.R. No. 582 (S.C.C.).

¹⁰⁶ *Schachter*, *supra*, note 9, at para. 102; *Guimond v. Québec (Attorney General)*, [1996] S.C.J. No. 91, [1996] 3 S.C.R. 347 (S.C.C.); *Mackin*, *supra*, note 39; *Wynberg*, *supra*, note 40; *Sagharian*, *id.*

¹⁰⁷ *Ward* (S.C.C.), *supra*, note 7, at paras. 38-41.

“[A] concurrent action in tort, or other private law claim, bars s. 24(1) damages if the result would be double compensation.”¹⁰⁸

The final reason for pleading both tort and Charter infringements was an attempt to avoid the effect of limitation periods or notice requirements. Prior to the reform of limitation periods under the *Limitations Act, 2002*,¹⁰⁹ tort actions against the Crown were subject to a six-month limitation period under the *Public Authorities Protection Act*.¹¹⁰ While the validity of the six-month limitation period was upheld in its application to tort claims, the Ontario Court of Appeal in *Prete v. Ontario*¹¹¹ concluded that it was invalid in its application to Charter claims.¹¹² Indeed, the Court appeared to go further and hold that *no* limitation period could apply to claims brought under section 24(1) of the Charter. Accordingly, while a tort action for malicious prosecution had to be commenced within the six-month period, a claim against the same conduct based on section 7 of the Charter was apparently not subject to any limitation period but only to the doctrine of *laches*.

While other courts in Canada accepted the principle that the government should not be permitted to immunize itself against Charter damages claims by imposing special shorter limitation periods that were uniquely favourable to the government, they held that statutory limitation periods of general application did apply to claims for damages pursuant to section 24(1) of the Charter.¹¹³ In *Kingstreet Investments Ltd. v. New Brunswick (Finance)*,¹¹⁴ the Supreme Court of Canada recognized that general limitation periods are applicable to restitutionary claims based on the return of moneys collected under constitutionally invalid legislation

¹⁰⁸ *Id.*, at para. 36. See also para. 59: “It may be useful to consider the tort claim first, since if it meets the objects of *Charter* damages, recourse to s. 24(1) will be unnecessary.”

¹⁰⁹ S.O. 2002, c. 24, Sch. B, s. 25.

¹¹⁰ R.S.O. 1990, c. P.38, s. 7.

¹¹¹ [1993] O.J. No. 2794, 110 D.L.R. (4th) 94 (Ont. C.A.) [hereinafter “*Prete*”].

¹¹² See also *Ayangma v. Prince Edward Island Eastern School Board*, [2000] P.E.I.J. No. 50, 187 D.L.R. (4th) 304, at para. 10 (P.E.I.C.A.).

¹¹³ *McGillivray v. New Brunswick*, [1994] N.B.J. No. 34, 111 D.L.R. (4th) 483 (N.B.C.A.); *Nagy v. Phillips*, [1996] A.J. No. 709, 137 D.L.R. (4th) 715 (Alta. C.A.); *Gauthier v. Lambert*, [1988] J.Q. no 56 (Que. C.A.), leave to appeal refused [1988] C.S.C.R. No. 138 (S.C.C.); *St-Onge v. Canada*, [2000] F.C.J. No. 1523 (F.C.A.); *Pearson v. Canada*, [2006] F.C.J. No. 1175 (F.C.T.D.), affd [2007] F.C.J. No. 1598 (F.C.A.) (although the limitations issue was not dealt with by the F.C.A.); *Zadworny v. Manitoba (Attorney General)*, [2007] M.J. No. 413, at paras. 11-13 (Man. C.A.); *Garry v. Canada*, [2007] A.J. No. 761, at para. 21 (Alta. C.A.), leave to appeal refused [2007] S.C.C.A. No. 546 (S.C.C.); *Hamm v. Canada*, [2007] F.C.J. No. 801, at paras. 55 and 63 (F.C.T.D.), affd [2008] F.C.J. No. 609 (F.C.A.).

¹¹⁴ [2007] S.C.J. No. 1, [2007] 1 S.C.R. 3, 2007 SCC 1 (S.C.C.) [hereinafter “*Kingstreet*”].

and that the application of the limitation period did not constitute an impermissible attempt by government to immunize itself.¹¹⁵

In *Ravndahl v. Saskatchewan*,¹¹⁶ the Supreme Court extended this principle to an action for damages under section 24(1) of the Charter. The Court stated:

The argument that *The Limitation of Actions Act* does not apply to personal claims was abandoned before us, counsel for the appellant conceding that *The Limitations of Actions Act* applies to such claims. This is consistent with this Court's decision in *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3, which held that limitation periods apply to claims for personal remedies that flow from the striking down of an unconstitutional statute.¹¹⁷

While limitation periods of general application apply to personal damage claims made pursuant to section 24(1) of the Charter, they do not apply to actions for declarations under s. 52 of the *Constitution Act, 1982*.¹¹⁸ Actions for declarations may be commenced so long as the statute is extant. If the statute is repealed its constitutional validity will generally be moot regardless of how much time has passed. The issue of whether an *in rem* declaration will have any retroactive effect is a matter to be determined by the Court in a manner consistent with the principles set out in the Supreme Court's decision in *Hislop*¹¹⁹ and may be subject

¹¹⁵ *Id.*, at paras. 13 and 59-61. The issue in *Kingstreet* related to a taxing statute that was found to infringe s. 53 of the *Constitution Act, 1867*, 30 & 31 Vict., c. 3 because it was a tax disguised as a licence fee. See *Eurig*, *supra*, note 1.

¹¹⁶ [2009] S.C.J. No. 7, [2009] 1 S.C.R. 181, 2009 SCC 7 (S.C.C.).

¹¹⁷ *Id.*, at para. 17.

¹¹⁸ *Id.*, at para. 27: It is important to distinguish the appellant's personal, or *in personam*, remedies, brought by her as an individual, from an *in rem* remedy flowing from s. 52 that may extend a benefit to the appellant and all similarly affected persons. As stated in the factum of the intervener the Attorney General of Ontario:

Where legislation is found to be unconstitutionally underinclusive, the prospective remedial option chosen by the court might extend the benefit at issue through severance or reading in, or it might suspend the operation of the declaration of invalidity to allow the government to determine whether to cancel, modify, or extend the benefit at issue. If the unconstitutional underinclusive benefit is extended to include the [appellant's] *Charter* claimant[s] group, whether through the court's s. 52(1) declaration or through government's response to the court's s. 52(1) declaration, the [appellant], like any otherwise eligible person [in the claimant group], reaps the benefit of the s. 52(1) declaration, even if the claimant does not obtain a personalized remedy from the court.

¹¹⁹ *Canada (Attorney General) v. Hislop*, [2007] S.C.J. No. 10, [2007] 1 S.C.R. 429, 2007 SCC 10 (S.C.C.) [hereinafter "*Hislop*"].

to statutory rules limiting the period for which retroactive payment of benefits may be made or refunds collected.¹²⁰

Following *Ravndahl*, the Ontario Court of Appeal in *Alexis v. Darnley*¹²¹ acknowledged that *Prete's obiter* comments regarding general limitation periods could not stand.¹²² The Court concluded: "In my view, therefore, the Supreme Court's reasons clearly signal that limitation periods of general application will apply to claims made under section 24(1) of the Charter that are, 'brought as an individual for personal remedy.'"¹²³

Accordingly, since most short limitation periods applicable only to the government, including the six-month limitation period in the *Public Authorities Protection Act*, were repealed in 2002 and replaced with the general two-year limitation period in the *Limitations Act, 2002*, the decision in *Prete* has now been virtually eclipsed, and claims for section 24(1) damages brought in Ontario will be subject to the same limitation period as tort claims arising for the same conduct.

VII. THE DIFFERENCES BETWEEN DAMAGES AND DECLARATIONS

This last point — the distinction between monetary payments resulting from declarations of invalidity and damages — often causes some analytical confusion and merits further discussion. It is sometimes suggested that monetary payments resulting from declarations of invalidity are the equivalent of damages, and are awarded without a showing of fault. Yet while money is money, and the monetary payments resulting from declarations of invalidity may far exceed any money ordered in damages, such monetary payments are analytically distinct from money paid as damages.

Damages are amounts calculated and awarded by a court to compensate an individual for an injury or other wrong.¹²⁴ A claim for damages is a claim for a personal remedy and only the plaintiffs to the action are entitled to that remedy. While declarations of invalidity may result in the

¹²⁰ *Kingsstreet*, *supra*, note 114, at paras. 13 and 59-61.

¹²¹ [2009] O.J. No. 5170, 100 O.R. (3d) 232 (Ont. C.A.), leave to appeal refused [2010] S.C.C.A. No. 44 (S.C.C.).

¹²² *Id.*, at paras. 14-17.

¹²³ *Id.*, at para. 17. See also *Baltrusaitis v. Ontario*, [2011] O.J. No. 351, 2011 ONSC 532, at para. 52 (Ont. S.C.J.) [hereinafter "*Baltrusaitis*"].

¹²⁴ Hogg & Monahan, *supra*, note 6, at 25.

return of money (when the statutory authorization to collect a tax or fee is declared invalid) or result in the retroactive or prospective payment of money (when the declaration expands the statutory entitlement or eligibility to receive a government payment or other benefit), the amount of money paid or refunded is based on the operation of the statute as it reads subsequent to the declaration. The commencement or duration of the payment will depend on whether the declaration is suspended or given retroactive effect, but the quantum is based on the statute.

A declaration that a statutory provision is invalid is an *in rem* remedy and not a personal remedy. While the effect of such a declaration of invalidity may be that the plaintiff (and all others subject to the same law) gains a statutory entitlement to a particular benefit, this is not a personal remedy, but is the consequence of a change in the legislation affected by the declaration. Where a declaration is granted which, for example, extends a statutory benefit, the natural operation of the law as declared renders it unnecessary and redundant to also order a personal remedy.¹²⁵

Another important difference between damages and a declaration is that the damage order is determinative of the amount of money that the plaintiff will receive, whereas the monetary value of a declaration is almost always subject to subsequent legislative amendments. If, for example, the Court awards a plaintiff \$100,000 in damages under section 24(1) of the Charter, there may be no unilateral action that the government can take to reduce or eliminate that entitlement. Legislation purporting to nullify or reduce a section 24(1) damages award, for example, would likely infringe the Charter.

Where the Court issues a declaration under section 52 of the *Constitution Act, 1982*, the precise contours of the declaration will be determined by the Court using the principles developed in *Schachter* and *Hislop*, with reference to the nature of the violation and the context of the specific legislative provisions under consideration. Where legislation is found to be unconstitutionally underinclusive, the prospective remedial option chosen by the Court might extend the benefit at issue through severance or reading in.¹²⁶ If the benefit is extended by declaration, the

¹²⁵ See notes 39, 45, 53, *supra*.

¹²⁶ The Court might also suspend the operation of the declaration of invalidity to allow the government to cancel, modify or extend the benefit at issue. The prospective value of the benefit will then depend on the option chosen by the Legislature to comply with the principles set out in the Court's decision.

Charter claimant, like any otherwise eligible person, reaps the benefit of that declaration. But the declaration is not necessarily the final word, because the legislature retains the power to subsequently cancel, modify or extend the benefit at issue. The future value of any statutory benefit is always subject to the power of the Legislature (or the Executive in the case of a regulation) to decrease, increase or eliminate the benefit, so long as the changes are themselves consistent with the Charter. The courts have no authority to immunize any plaintiff from subsequent legislative amendments.

Under certain circumstances, unconstitutional legislation can even be replaced by constitutional legislation, which, if made retroactive, will negate any refund that would have otherwise flowed from the declaration. For example, where a statutory fee is declared to be unconstitutional on the basis that it is actually a tax, the fee/taxpayer would generally be entitled to a refund since the fee/tax was taken without statutory authority.¹²⁷ The Supreme Court of Canada has, however, confirmed the power of the Legislature to impose retroactive taxes to correct any deficiency in the previous statute and a properly drafted retroactive tax would enable the government to retain the money previously collected.¹²⁸

VIII. FORUM AND PROCEDURE

Just as *Ward* will likely not lead to substantively different results in Charter damage claims than those obtained in tort claims, it also will likely not lead to the creation of new procedures for seeking damages from the government. The Supreme Court made it clear that the “procedural requirements associated with existing remedies are crafted to achieve a proper balance between public and private interests, and the underlying policy considerations of these requirements should not be negated by recourse to s. 24(1) of the Charter. As stated earlier, s. 24(1) operates concurrently with, and does not replace, the general law.”¹²⁹ Thus the rules of civil procedure, including, for example, the filing of a statement of claim and rules regarding discovery, as well as the notice

¹²⁷ *Kingstreet*, *supra*, note 114, at para. 13.

¹²⁸ *Id.*, at paras. 12 and 2; *Eurig*, *supra*, note 1, at para. 44.

¹²⁹ *Ward* (S.C.C.), *supra*, note 7, at para. 43.

requirements of the *Proceedings Against the Crown Act*,¹³⁰ will continue to apply to Charter damage claims.

Many findings of a Charter breach are made in criminal proceedings, most of which are heard in provincial courts. To date, the remedy awarded for such a breach has usually been a procedural remedy such as the exclusion of evidence or a stay of proceedings. The *Ward* case indicates that where such remedies are available, they will generally suffice to vindicate the Charter right, and damages will not be appropriate under the third step of the *Ward* analysis.¹³¹ Assuming that a claim for Charter damages is made, however, does *Ward* authorize criminal courts to consider awarding Charter damages under section 24(1)? In *Ward*, the Supreme Court indicated its intention that a claim for damages should follow the existing rules of civil procedure and should be commenced in the court “which by statute or inherent jurisdiction has the power to award damages”.¹³² Provincial criminal courts “are not so empowered and thus do not have the power to award damages under s. 24(1)”.¹³³ This echoes earlier cases in which the Supreme Court held that criminal courts do not have jurisdiction to award Charter damages in a criminal proceeding.¹³⁴ Criminal proceedings are designed to determine whether

¹³⁰ R.S.O. 1990, c. P.27, s. 7(1). A notice is required whether the action is a common law action or an action based on breach of Charter rights: *Deep v. Park*, [2001] O.J. No. 6122 (Ont. S.C.J.); *R. v. Reisher*, [2002] O.J. No. 1793, at para. 7 (Ont. S.C.J.); *Singh v. Ontario*, [2002] O.J. No. 5371 (Ont. S.C.J.); *Toronto (City) v. Longbranch Child Care*, [2011] O.J. No. 738, 2011 ONSC 548, at para. 35 (Ont. S.C.J.); *Baltrusaitis*, *supra*, note 123, at paras. 39-53.

¹³¹ *Ward* (S.C.C.), *supra*, note 7, at para. 34: “A functional approach to damages under s. 24(1) means that if other remedies adequately meet the need for compensation, vindication and/or deterrence, a further award of damages under s. 24(1) would serve no function and would not be ‘appropriate and just’.”

¹³² *Id.*, at para. 58.

¹³³ *Id.* See, however, *R. v. Wetzel*, [2011] S.J. No. 8, 2011 SKPC 9, at paras. 73-89 (Sask. Prov. Ct.), for a provincial court that decided it could award Charter damages in a criminal case where an accused had been arbitrarily detained in breach of s. 9. The Court based its finding on the fact that, acting as a Small Claims Court, it had a statutory power to award damages. Although it held that there was no reason to require the accused to bring a separate civil claim for damages, it did not fully consider the disadvantages of assessing whether damages are an appropriate remedy in a criminal proceeding.

¹³⁴ *R. v. Mills*, [1986] S.C.J. No. 39, [1986] 1 S.C.R. 863, at paras. 43, 266 and 293 (S.C.C.), and *R. v. 974649 Ontario Inc.*, [2001] S.C.J. No. 79, [2001] 3 S.C.R. 575 at paras. 52, 53 and 57 (S.C.C.). See also: *R. v. Reisher*, [2002] O.J. No.1793, at paras. 18-19 (Ont. S.C.J.):

It is clear from *Mills* and the case of *R. v. Dunedin Construction* that courts exercising a criminal function are not to mix and match criminal and civil jurisdictions when resolving *Charter* issues. This approach, it is said:
... heeds the structural limits of the criminal trial process by confining the courts’ remedial powers to the criminal sphere.

an accused is guilty of a crime and accordingly have a higher standard of proof and greater procedural protections for the accused (for example, the right not to testify). Whether damages are an appropriate remedy for a Charter breach is more appropriately determined in civil proceedings where the state has the right to test the claimant's case by disclosure of documents, examinations for discovery and the power to compel the claimant to answer questions even if they would have incriminated the claimant in criminal proceedings.¹³⁵ Civil courts will therefore likely remain the forum for determining whether Charter damages should be awarded as a section 24(1) remedy.

IX. CONCLUSION

At first glance, *Ward* seems to have created a parallel system of “tort lite” — a means for tort claimants who have somehow been unable to prove all aspects of their claim to have another chance under the Charter. In practice, however, we do not believe that *Ward* will result in a radical expansion of governmental liability beyond that already provided by the law of tort.

In the vast majority of cases, claimants will likely bring a concurrent tort action as well, whether because they want to sue individuals involved directly¹³⁶ or because they do not want to risk putting all of their eggs in one Charter basket. In most of those cases, it will be unnecessary to even consider whether Charter damages should be awarded. If the tort claim is made out, the principle against double recovery will preclude a separate award of Charter damages. And in many of the cases where the facts do not show a tort has occurred, they also will not disclose a breach of the claimant's Charter rights that could give rise to a remedy under section 24(1).

Those who hoped that *Ward* would turn the Charter into a font of public law damages will be disappointed by the Court's analysis. While the principles for awarding public law damages against the state may one

It is the jurisdictional function that the respective court is discharging that governs this principle, not whether it is capable of discharging another at some other time under its mandate. It is the mix of criminal functions and remedies with those of civil that is discouraged to the point of being prevented.

¹³⁵ *R. v. McGillivray*, [1990] N.B.J. No. 324 (N.B.C.A.).

¹³⁶ *Ward* (S.C.C.), *supra*, note 7, at para. 22: “Actions against individual actors should be pursued in accordance with existing causes of action.”

day diverge from the principles for awarding private law damages against state actors, this has not happened yet.

