Palpable & Enforceable: A Normative Framework for a Stronger Damages Remedy under Section 24(1) of the *Charter*

** Nancy Sarmento Barkhordari*

This paper examines the ways that victims of unlawful governmental interference with their fundamental rights and civil liberties went about redressing these intrusions before and after the Charter's advent. It is the author's contention that a private law-informed approach to the determination of damages under the Charter will better serve the objects of vindication, compensation, and deterrence and will improve access to justice by making civil claims for Charter infringements economically reasonable to pursue. The author's argument is divided into five parts: part one discusses Ward, the 2010 case that set out the object of and the test for recovery of Charter damages; part two discusses jurisprudential developments for Charter damages since Ward; part three discusses the access to justice implications of low awards in Charter damages cases; part four sets out a torts/private law-based framework for assessing damages in claims for damages under section 24(1) of the Charter; and part five puts forth a case as to why the author's damages framework is not troubled by concerns for good governance or chilling effects. Parts one-three of the author's argument highlight several inadequacies in the current state of the law of Charter damages, and parts four and five focus on how the author proposes to deal with said inadequacies. In order to remedy the shortcomings of the current state of the law of Charter damages, the author proposes that vindication-based damages be presumptive and be determined according to the severity of the Charter infringement, that the plaintiff be compensated for pecuniary and non-pecuniary losses flowing from the infringement, that there be no burden on the plaintiff to establish a systemic or ongoing problem in order to recover a deterrence-based award, and that punitive damages be awarded where they serve a useful purpose in litigation.

* JD (Osgoode), LLM (U of T), litigation lawyer at Gosai Law Professional Corporation and PHD Candidate at Osgoode Hall Law School. I am grateful to Professor Kent Roach for his guidance on this article. I am also thankful to Professor Dan Priel for his support with this article. I also thank the anonymous reviewers and the Queens LJ editorial team for their insight, reviews, and edits.

Introduction

Since at least 1947,[1] and before the advent of the *Canadian Charter of Rights and Freedoms* (*Charter*), victims of unlawful government interference with fundamental rights and civil liberties have relied on tort law and civil claims

1. Historically, the Crown enjoyed a common law and legislative immunity from civil claims and could only be sued to the extent that it consented to be sued. *The Petition of Right Act* of 1860, which allowed civil actions against municipal authorities where they acted under a statutory duty, was held to bar private actions in tort against the Crown. By the turn of the century, Crown immunity was modified by practice and Crown liability legislation. For example, before 1947, the Crown could nominate a servant to stand trial in its stead and would pay the servant's damages if found liable. In 1947, Federal Crown liability legislation made "[t]he Crown liable for damages for which if it were a person, it would be liable . . . in respect of . . . a tort committed by a servant of the Crown". *Crown Liability and Proceedings Act*, RSC 1985 c C-50, s 3. In addition, between 1951 and 1974, all provinces except Quebec passed Crown liability legislation. See Allen Linden et al, *Canadian Tort Law*, 12th ed (Toronto: LexisNexis, 2022) at 655–59. Crown liability legislation codified the Crown's consent to be sued in some cases, thereby making the process for suing government easier than

as the main protection from, and redress for, the intrusion.[2] The advent of the *Charter*, in 1982, meant that some fundamental rights and civil liberties that were previously protected by civil claims, criminal statute, and the common law were now guaranteed to be free from governmental interference, "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society"[3]—the result being government accountability for violations of *Charter* guarantees became constitutionally entrenched.[4] Under the *Charter*, the victim of an unjustified interference could avail themselves of a bundle of remedies depending on whether the interference is predicated on an unconstitutional statute, rooted in unconstitutional conduct or action of a Crown agent, or relates to collection of evidence in a criminal prosecution.[5] The more common remedies pursued by victims of non-justifiable government

---

it was before. However, leaving aside this minor convenience, some Crown liability legislation imposed restrictions to the kind of claims that a victim plaintiff could bring against the Crown. A more recent example of such a restriction is found in section 17 of the Ontario *Crown Liability and Proceedings Act, 2019*, SO 2019, c 7, s 17 (*CLPA*), which requires a plaintiff alleging misfeasance or bad faith to seek leave of the court when bringing its action. Where the plaintiff fails to seek leave and commences the action, the Crown is vested with discretion to invoke a stay of the entire action—including those parts of the claim that do not allege bad faith—in which case the plaintiff who wishes to continue their claim will be required to bring a motion to set aside the stay. The test for setting aside the stay is an onerous one requiring the plaintiff to adduce affidavit evidence, its affidavit of documents, show its action was commenced in good faith, and show that *there is a reasonable possibility that the claim . . . would be resolved in the claimant's favour*. Under these restrictions, legitimate claims for battery against the Crown are liable to be stayed if leave is not sought, in which case the plaintiff would be required to incur the time and expense of bringing a motion to set aside the stay to the court. Practically speaking, the plaintiff alleging a claim rooted in bad faith would be required to meet the onerous test and incur the time and expense of seeking leave or setting aside the stay in event. Recently, in *Poorkid Investments Inc v HMTQ*, 2022 ONSC 883 [*Poorkid*], section 17 of the *CLPA*, 2019 was found to be inconsistent with section 96 of the *Constitution Act, 1867* and declared to have no force and effect. See paras 106–07. *Poorkid* was reversed on appeal to the Court of Appeal for Ontario. See *Poorkid Investments Inc v Ontario (Solicitor General)*, 2023 ONCA 172 and *Poorkid Investments Inc, et al v Solicitor General of Ontario Sylvia Jones, et al*, 2023 CanLII 115642 (SCC).

2. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]; Schmeiser argues civil claims are the main protector of civil liberties. See Douglas Schmeiser, *Civil Liberties in Canada* (Oxford, UK: University Press, 1964) at 114.

3. *Charter*, *supra* note 2, s 1.

4. Marilyn Pilkington, "Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms" (1984) 62:4 Can Bar Rev 517 at 535.

5. *Charter*, *supra* note 2, s 52(1).

intervention with *Charter* rights, found under section 24, are defensive and include exclusion of evidence in a criminal proceeding or stay of a criminal prosecution.[6]

The landscape of *Charter* remedies was advanced, in 2010, with the Supreme Court of Canada decision in *Ward v Vancouver (City)* (*Ward*).[7] The case involved a bizarre set of facts: believing that Ward intended to throw a pie at the then Prime Minister at a public event, police detained Ward and searched him and his vehicle, only to release him hours later with no charges. Ward successfully sued the government and police service for damages under section 24(1) of the *Charter* on the basis that his rights, guaranteed under the *Charter*, had been interfered with by those agents who detained and searched him and his vehicle. In upholding the $5,000 award in *Charter* damages arising out of the detention, the Supreme Court of Canada described the object of *Charter* damages as compensation, vindication, and deterrence, but imposed a form of qualified immunity from damages in circumstances where the Crown established countervailing reasons for avoiding damages.[8]

The jurisprudence for *Charter* damages was further developed in cases after *Ward*, including *Henry v British Columbia* (*Henry*)—a complicated and lengthy case involving a wrongful conviction that resulted in twenty-seven years of incarceration.[9] The gist of the facts in *Henry* were that the Crown prosecutor, who prosecuted Henry for multiple counts of sexual offences, withheld disclosure that they possessed evidence that was critical to Henry's ability to make full answer and defence. In suing for *Charter* damages, Henry argued that the Crown prosecutor's failure to disclose evidence that was critical to his ability to raise a reasonable doubt violated his right under section 7 of the *Charter*. Following protracted litigation, Henry was able to recover over $8,000,000 in *Charter* damages, $530,000 of which were attributed to income losses over his twenty-seven-year incarceration.[10]

Since *Ward*, the development of jurisprudence regarding *Charter* damages remains wanting. This may be because claims for *Charter* damages are under-pursued, and, leaving *Henry* aside, the few claims pursued have not yielded significant awards notwithstanding the cost of litigation. The result is a feedback loop that suppresses legitimate claims for *Charter* damages by making

6. *Ibid*, s 24. Pilkington argues that the defensive remedies operate by way of nullification. See Pilkington, *supra* note 4 at 518. See also Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Reuters, 2019) (loose-leaf updated 2024) at ch 40:17.

7. 2010 SCC 27 [*Ward*].

8. *Ibid* at paras 6–9, 15, 25–45, 73.

9. *Henry v British Columbia*, 2015 SCC 24 [*Henry*, *SCC decision*]; *Henry v British Columbia*, 2016 BCSC 1038 [*Henry*, *trial decision*]; *Henry v British Columbia (Attorney General)*, 2017 BCCA 420 [*Henry*, *appeal decision*].

10. *Henry, appeal decision, supra* note 9 at paras 2–4, 7–8.

them economically unreasonable to pursue. The recent influx of class actions securing significant aggregate damage awards under section 24(1) of the *Charter* mitigates against some of the problems of high litigation costs versus low awards. However, when one takes a closer look at class sizes versus the aggregate awards and litigation costs, the result for the actual class members who experienced the unlawful interference is still meagre.[11]

The quantification of *Charter* damages for violations of *Charter* rights (a) has traditionally been too modest to serve the objectives of vindication, compensation, and deterrence required by *Ward*; (b) risks undermining the inherent value of constitutionally protected rights; and (c) allows governments to pay an occasional price for *Charter* violations.[12] I will show that a private law informed approach to the determination of damages under the *Charter* will better serve the object of vindication, compensation, and deterrence, and will improve access to justice by making civil claims for *Charter* infringements economically reasonable to pursue.

Part I of this paper will undertake a comprehensive review of *Ward* as the seminal case setting out the object, and test for recovery, of *Charter* damages. With the aim of demonstrating that, in one way or another, awards for *Charter* damages have been disappointing, Part II will review the jurisprudential developments for *Charter* damages since *Ward*, including the case of *Henry*, to the more recent practice of class actions like *Reddock v Canada (Attorney General)* (*Reddock, summary judgment decision*).[13] Part III will detail the practical issues arising out of the normalization of low damage awards in *Charter* claims. This discussion will be segmented into four topics:

a. The first section will be dedicated to discussing the role of damages as a vindicator of the right in issue;
b. The second section will show how low damage awards erode the inherent value of the right at issue, as opposed to vindicating it;
c. The third section will demonstrate how low damage awards create an economic exchange problem that undermines the object of deterrence required by *Ward*; and
d. The final section of Part III will discuss the access to justice implications of low awards in *Charter* cases.

11. See *Reddock v Canada (Attorney General)*, 2019 ONSC 5053 [*Reddock*, *summary judgment decision*]. See also *Johnson et al v Ontario*, 2023 ONSC 5250; *Brazeau v Canada (Attorney General)*, 2020 ONSC 3272. Some class actions are settled out of court and therefore there is no decision; others may yet to be certified. For class actions and proposed class actions against the Crown, see *Hamm v Canada (Attorney General)*, 2021 ABCA 374, and *Robinson v Alberta*, 2022 ABQB 497 [*Robinson*]. See also *Fournier v Canada (AG)*, 2023 QCCS 2895.

12. Kent Roach, *Remedies for Human Rights Violations: A Two-Track Approach to Supra-national and National Law*, (Cambridge, UK: Cambridge University Press, 2021) at 242 [Roach, *Remedies for Human Rights Violations*].

13. *Reddock*, *summary judgment decision*, *supra* note 11.

Part IV will propose a conception based in tort and private law for assessing damages in claims for damages under section 24(1) of the *Charter*. Part IV will be segmented into three sections:

a. The first section will propose the tort law theory that best justifies *Charter* damages;
b. The second section will explore the works of Douglas Schmeiser and Jason Varuhas, both of which look at the relationship between tort law and fundamental rights.[14] Relying on Varuhas, Ken Cooper-Stephenson, and the case of *Hill v Church of Scientology of Toronto* (*Hill*),[15] this section will propose the Canadian tort law principles that best lend themselves to claims for *Charter* damages; and
c. Finally, turning to Peter Hogg, I make a case against the *Mackin v British Columbia* (*Minister of Finance*)(*Mackin*)[16] rule that provides *Charter* damages cannot be married to a declaration of invalidity. With these lessons, the third section will set out how damages under section 24(1) of the *Charter* should be assessed;

Part V will explain why the torts and private law based conception is effective in combatting the problems raised by low damage awards and is not overcome by concerns for good governance or the "chilling effect".

I: A-*Ward*-Ing Damages under the *Charter*

Since at least 1947, and before the advent of the *Charter* in 1982, individuals relied on civil claims for damages as the primary protection from unlawful government incursions into their fundamental rights and interests.[17] For the most part, claims for damages arising out of unlawful government incursion into a fundamental right were framed under traditional tort law, involving intentional torts, such as assault, trespass, false arrest or imprisonment, or misfeasance in public office. By way of example, government interference with freedom of thought and religion was at the heart of three civil matters in the 1950s that were redressed by way of civil actions.[18] In *Chaput v Romain* (*Chaput*),[19] three members of the provincial police attended Chaput's home where they broke up a peaceful religious assembly of Jehovah's Witnesses, escorted adherents out of

14. Jason Varuhas, *Damages and Human Rights* (Oxford and Portland: Hart Publishing, 2016).

15. 1995 CanLII 59 (SCC) [*Hill*].

16. 2002 SCC 13 at para 80 [*Mackin*].

17. Linden, *supra* note 1 at 659; Schmeiser, *supra* note 2 at 114.

18. Schmeiser, *supra* note 2 at 111–17. Referring to the three cases of *Chaput*, *Lamb*, and *Roncarelli* as examples, Schmeiser argues that civil liberties were previously protected by way of civil action.

19. 1955 CanLII 74 (SCC).

the home, and seized religious material. In their defence, the police officers alleged they were immune from civil liability, under *The Magistrate's Privilege Act*, for their acts were done in good faith.[20] Noting that adherents of the Jehovah's Witness faith enjoy the same degree of freedom of speech and thought as other denominations, the Supreme Court of Canada reversed the decision of the Court of Queen's Bench, Appeal Side, held that the officers who unlawfully obstructed the religious meeting of the Jehovah's Witnesses were not immune from civil liability and awarded damages of $2,000.[21] With inflation adjusted to 2022, these damages are equivalent to $21,661.[22] In *Lamb v Benoit* (*Lamb*),[23] Lamb, an adherent of the Jehovah's Witness faith, was arrested for distributing pamphlets that contained "seditious libel," was detained over a weekend, and prevented from using the phone to call anyone to inform them of her whereabouts. Following the weekend, Benoit advised Lamb that police would release her on the condition that she sign a waiver of her rights against the police for the detention, which Lamb refused to sign. Lamb's refusal to sign the waiver was met with the charge of sedition, for which she was eventually acquitted. On appeal, the Supreme Court of Canada awarded Lamb $2,500 in damages.[24] With inflation adjusted to 2022, these damages equal $24,806.

More famous than the matter of *Chaput* or *Lamb* is the case of *Roncarelli v Duplessis* (*Roncarelli*).[25] Roncarelli, a successful restauranteur and an adherent of the Jehovah's Witness faith, held a license to sell alcohol in his restaurant. In retaliation for Roncarelli posting bail on behalf of a large number of adherents of the Jehovah's Witness charged under municipal by-laws relating to the distribution of literature, Duplessis—then Premier of Quebec—unlawfully had Roncarelli's liquor license revoked. Without the ability to sell alcohol, Roncarelli's restaurant failed. Alleging misfeasance in public office, Roncarelli sued Duplessis for damages. Roncarelli sought compensation for loss of profit, property, and injury to the goodwill and reputation of his restaurant. The Supreme Court of Canada maintained the action for misfeasance in public office and increased the trial award, by $25,000, to $33,123.53.[26] With inflation adjusted to 2022, these damages equal $328,665.64.

20. *Ibid* at 845–49.

21. *Ibid* at 835, 859–60.

22. Inflation adjustments throughout this article are computed using the Bank of Canada Inflation Calculator. See "Inflation Calculator", online: <bankofcanada.ca> [perma.cc/C8JS-3HDF].

23. 1959 CanLII 59 (SCC) [*Lamb*].

24. *Ibid* at 344–47, 361.

25. 1959 CanLII 50 (SCC) [*Roncarelli*].

26. *Ibid* at 146–49, 187.

As a further example of how civil claims protected fundamental rights, interference with liberty interests were redressed by way of action for false imprisonment, and government interference with bodily integrity by way of action for battery. In *Perry et al v Fried et al*, Perry sued for false imprisonment after he was strip-searched by police and detained for over seven hours without access to a telephone.[27] He recovered $600 in general damages.[28] With inflation adjusted to 2022, these damages for false imprisonment equal $4,138. The plaintiff in *Sandison v Rybiak et al*, brought an action for battery, malicious prosecution, unlawful arrest, and imprisonment against officers who punched, beat, and detained him, without advising him why.[29] At trial, Sandison recovered $3,500 in damages: $1,000 of which was dedicated to the assault, $1,500 for malicious prosecution, and $1,000 for false imprisonment and unlawful arrest.[30] Inflation adjusted to 2022, the total award is equal to $19,863.

After the *Charter* came into force, certain rights, normally protected by way of civil claim and the common law were constitutionally entrenched, meaning citizens were guaranteed to be free from unjustified governmental interference with certain basic interests and freedoms. Early on, interferences with *Charter* protected interests occurred frequently within the ambit of criminal law, through for example, unlawful detentions, arrests, or searches. In the case of an unlawful search, courts were vested with powers and discretion under section 24(2) of the *Charter* to exclude evidence that was obtained in a way that infringed the accused's rights protected under section 8 of the *Charter*.[31] Under section 24(1), other remedies for *Charter* violations in the context of criminal law included a stay of proceedings.[32] In the civil context, individuals whose rights were implicated by unconstitutional statute were entitled to a declaration of invalidity under section 52(1). Unlike section 24(1) remedies, which can be applied in response to the person who suffered the *Charter* infringement and only under the discretion of "a court of competent jurisdiction",[33] section 52(1) can be applied by any court or tribunal with the power to decide questions of law and is available in some cases to persons whose rights have not been infringed.[34]

---

27. 1972 CanLII 1149 (NSSC). Perry brought an action against a police constable, the City of Halifax, and others for false imprisonment, following a dispute at a restaurant over a restaurant bill.

28. *Ibid* at 603.

29. 1973 CanLII 623 (ONSC).

30. *Ibid* at paras 36–37.

31. *Charter*, *supra* note 2, s 8.

32. *Ibid*, s 24(1).

33. *Ibid*.

34. Hogg, *supra* note 6 at ch 40:12.

In the meantime, tort law and intentional torts remained the default process for recovering damages in the case of government interference with important rights guaranteed by the *Charter*. For example, in *Nelles v Ontario*, Nelles, a nurse employed by the Hospital for Sick Children, had her criminal charges for the murder of four infant children discharged for want of evidence, and sued Ontario for malicious prosecution.[35] Noting the relationship between the tort and the *Charter*, Lamer J acknowledged that, "many, if not all, cases of malicious prosecution by an Attorney General or Crown Attorney, there will have been an infringement of an accused's rights guaranteed by ss. 7 and 11 of the [*Charter*]".[36] Finally, in 2002, explicitly acknowledging the potential for *Charter* damages, the Supreme Court of Canada held in *Mackin* that a declaration of invalidity under *Charter* section 52 could not be combined with a claim for damages under section 24(1).[37]

Aside from the decision in *Mackin*, the potential for *Charter* damages was discussed in other compositions starting soon after the *Charter* came into force. For example, in her 1984 seminal work, Mary Pilkington argued the language of section 24(1) was broad enough to include damages as an appropriate and just remedy that enforces constitutional values, vindicates the constitutional right in issue, and/or deters against future infringements. Under Pilkington's conception, section 24(1) of the *Charter* was unconstrained by existing remedial principles, and litigants who suffered an interference with a *Charter* right not protected under tort law—for example, an interference with an intangible right like freedom of religion, speech, or association—could recover damages.[38] Only four years later, building on Pilkington's work, Cooper-Stephenson set out his tort-informed theory behind *Charter* damages and argued punitive damages may "be used as part of the structure of remedies under section 24(1) of the *Charter*".[39] Kent Roach, too, has argued for the availability of damages under section 24(1) of the *Charter*.[40] In addition to these works, a number of cases heard

35. 1989 CanLII 77 (SCC).

36. *Ibid* at 194.

37. *Mackin*, *supra* note 16 at paras 76–82. In *Mackin*, the Supreme Court of Canada, in part, relied on Pilkington's conception that the remedial provision of the *Charter* was broad enough to include damages remedies. See also, Hogg, *supra* note 6 at ch 40:13. In his treatise, Constitutional Law of Canada, Peter Hogg asserts that in principle, there is no reason why a victim cannot recover remedies both under section 24(1) and under section 52(1), and there may be rare cases were both remedies are required to provide the victim with full relief.

38. Pilkington, *supra* note 4 at 535–37.

39. Ken Cooper-Stephenson, "Tort Theory for the Charter Damages Remedy" (1988) 52:1 Sask L Rev 1 at 83.

40. Kent Roach, *Constitutional Remedies in Canada*, 2nd ed (Aurora: Canada Law Book, 2000) at ch 11, [Roach, *Constitutional Remedies*].

before and after *Mackin* have hinted at the possibility of "*Charter* torts".[41]

Notwithstanding the works of Pilkington, Cooper-Stephenson, and Roach, the decisions of the courts, and the broad language of section 24(1), it was not until 2010—nearly thirty years after the *Charter* came into force—that the Supreme Court of Canada concluded, in *Ward*, that unjustified, unconstitutional government conduct may give rise to the remedy of damages, and set out the test for recovery.[42] *Ward* involved a bizarre set of facts: Ward, a Vancouver lawyer, attended a ceremony in which Prime Minister Chretien was to mark the opening of Vancouver's Chinatown. Believing that Ward intended to throw a pie at the Prime Minister at the ceremony, police officers at the event chased, hand-cuffed, and arrested Ward for breach of the peace. Upon arrest, police escorted Ward to police lock up, where he was detained and strip-searched. The officers also searched Ward's vehicle, only to release him a few hours later with no charges.[43] Ward successfully sued the government and police service for damages under section 24(1) of the *Charter* on the basis that his *Charter* rights had been interfered with by those agents who detained him and searched him and his vehicle. Ward succeeded at trial and was awarded $5,000 in damages under section 24(1) of the *Charter* for the strip-search and $100 for the search of his car, with the awards upheld on appeal to the Court of Appeal for British Columbia.[44] On final appeal, the Supreme Court of Canada agreed that Ward's claim arising out of the strip-search and detention gave rise to damages.[45] The Court declined to award damages arising out of the search of Ward's car, holding instead that the declaration satisfied the objectives of vindication and deterrence of future improper car seizures.[46]

In deciding that damages fell within the scope of section 24(1) remedies, the Supreme Court of Canada adopted a functional perspective,[47]

41. See *R v McGillivary*, 1990 CanLII 2344, (NBCA) at 309. The Court held that a claim for damages arising out of an infringement of section 7 could not be made in the context of a criminal case and would require an independent civil claim. See also *Rollinson v Canada*, [1994] FCJ 50, 73 FTR 16. The Court awarded $8,000 in general damages in tort to the plaintiff who suffered infringements of ss. 7, 8, 12 and 15. See also *Crossman v Canada*, 1984 CanLII 5367 (FC); Linden, *supra* note 1 at 723–24.

42. *Ward*, *supra* note 7.

43. *Ward*, *supra* note 7 at paras 10–12.

44. *Ibid*.

45. *Ibid* at para 73.

46. *Ibid* at paras 74–78.

47. The functional conception in tort law considers several proposed functions of tort law, including *inter alia* compensation as the dominant function of tort law, and deterrence which views the purpose of tort law as similar to criminal law. For tort law to be an effective deterrent, "the potential wrongdoer must have a good idea about both the severity of and likelihood of the sanction". See Linden, *supra* note 1 at 9.

and set out the test for the recovery of damages for claims where the plaintiff has established that a *Charter* right has been breached in a way that satisfies a minimum threshold of gravity.[48] Where a breach is shown to have occurred, at the first stage of the analysis the claimant must establish that damages are appropriate and just in that they fulfill one or more of the objectives of compensation, vindication, and/or deterrence.[49] The goal of compensation is akin to that of damages, in that the compensation must generally have a functional purpose in restoring the plaintiff, considering its psychological and physical injuries, as well as its pecuniary losses.[50] The object of vindication is focused on preserving the significance of the right against the seriousness of the interference and redressing the harm of the infringement on society.[51] The willingness of the conduct giving rise to the interference is a relevant consideration in determining the appropriateness and justness of damages.[52] Finally, the object of deterrence goes to avoiding future breaches, by regulating government behavior to ensure compliance with the *Charter*. While the harm to the plaintiff (physical, psychological, and/or economic injury) is a consideration in the compensation analysis, a plaintiff who suffers no harm is not precluded from recovering damages under the vindication and deterrence scheme.[53] Although determination of whether damages are appropriate and just is a case-specific analysis, "prior cases may offer guidance on what is appropriate and just in the particular situation".[54]

At the first stage, the plaintiff must show their *Charter* right is breached, and at the second stage, that damages are appropriate and just. Once damages are justified under the second stage, the onus shifts, requiring the Crown to defeat the functional considerations of damages and show why damages are inappropriate or unjust.[55] In rebutting the appropriateness or justness of damages, the Crown may point to certain countervailing factors, such as the existence of alternative remedies, concerns for good governance, and the chilling effect of significant awards. The rationale behind the chilling effect argument is that imposing liability on government officials will influence their decision making: rather than making decisions in the public interest, officials will make decisions based on their potential liability.[56]

48. *Ward*, *supra* note 7 at para 39.

49. *Ibid* at para 4, 32.

50. *Ibid* at para 24.

51. *Ibid* at para 28.

52. *Ibid* at para 72. See also *Boily v Canada*, 2022 FC 1243 at para 210 [*Boily*].

53. *Ward*, *supra* note 7 at para 30.

54. *Ibid* at para 19.

55. *Ibid* at paras 4, 32.

56. Peter Krikor Adourian, *Charter Damages: Private Law in the Unique Public Law Remedy*, (LLM Thesis, York University Osgoode Hall Law School, 2018) at 39.

Assuming damages are found to be appropriate and just, the court must ensure that the quantum of damages is fair to both sides, taking into account (a) the public interest, (b) good governance, (c) the chilling effect of damages on new policies and programs, (d) whether the damage award diverts large sums from public to private interests, and (e) whether the provision of damages under section 24(1) would duplicate awards under a private law cause of action.[57]

II: Developments since *Ward v Vancouver (City)*

While *Ward* set out the groundwork and basis upon which litigants can recover damages under the *Charter*, the limited jurisprudence since *Ward* suggests that individual claims for *Charter* damages may be under pursued and yield disappointing returns. By way of review of some of the jurisprudence since *Ward*, this section will show that individual claims for *Charter* damages arising out of a transient detention, an unlawful search, or arrest typically yield low awards, ranging between $2,000 and $7,500 for vindication, with claims engaging sections 15 and 7 of the *Charter* yielding higher awards.[58] The latter part of this section will demonstrate that the issue of meagre awards also plagues class members in class actions for *Charter* damages.

A. Individual Actions

Like in *Ward*, claims for *Charter* damages arising out of transient detention, an unlawful arrest, or search yield modest awards. Leaving compensation aside, the jurisprudence shows that awards for claims involving state conduct that contravenes sections 8 and/or 9 of the *Charter* will generally yield vindication-based damages between $2,000 and $7,500.[59] In *Taylor v PC Kok* (*Taylor*), Taylor was awarded $32,500 in *Charter* damages for his unlawful arrest of Taylor, in his home without a warrant.[60] Noting that the impugned conduct was "wilful, deliberate and bad faith",[61] and caused Taylor to develop a mood disorder,[62] the court found damages were appropriate and just, and awarded $25,000 in compensation-based damages and combined damages of

57. *Ward*, *supra* note 7 at paras 38–43, 53–55.

58. *Charter*, *supra* note 2, ss 7, 15.

59. *Ibid*, ss 8–9.

60. 2016 ONSC 5839 at para 144 [*Taylor*].

61. *Ibid* at para 75.

62. *Ibid* at para 143.

$7,500 for vindication and deterrence.[63] With inflation adjusted to 2022, these vindication and deterrence-based damages are approximately $8,934.

In *Joseph v Meier* (*Joseph*), the Supreme Court of British Columbia awarded *Charter* damages in the amount of $5,000 for the unlawful detention and arrest of Joseph, a sixty-one-year-old plaintiff who relied on a walker for mobility.[64] Joseph was arrested outside of a store where she had been in the company of someone who had been suspected of theft. Upon her leaving the shop, police officers stopped Joseph, handcuffed her, pushed her to the ground, and searched her. Finding no stolen goods, the police released Joseph.[65] In making its award, the Court did not specify whether the award was based in compensation, vindication, or deterrence. With inflation adjusted to 2022, these *Charter* damages equal $5,592.

In line with the low awards for search and detention articulated in *Ward*, *Taylor*, and *Joseph*, the Ontario Superior Court, in *Elmardy v Toronto Police Services Board* (*Elmardy trial decision*), awarded $4,000 in *Charter* damages arising out of police officers' interference with Elmardy's rights protected under sections 8, 9, and 10(a), and 10(b) of the *Charter*.[66] Police officers arbitrarily detained Elmardy, a black man, punched him twice in the face, emptied his pockets without his consent, handcuffed him, and left him lying on the floor, upon his handcuffed hands for twenty to twenty-five minutes. The trial judge concluded that the police conduct infringed Elmardy's rights under sections 8, 9, 10(a), and 10(b) of the *Charter*, but declined to find that the officers' conduct was racially motivated.[67] On appeal to the Divisional Court, the panel found that the police officers' conduct was racially motivated, thereby engaging section 15 of the *Charter*.[68] The Divisional Court increased damages under section 24(1) of the *Charter* to $50,000 and increased punitive damages from $18,000 to $25,000.[69] With inflation adjusted to 2022, these *Charter* damages equal $58,747, with punitive damages equal to $29,373.

A notable development since *Ward* includes the case of *Henry*—a novel claim for *Charter* damages at the time it was heard. Henry was wrongfully convicted of ten sexual offences in 1983, and served twenty-seven years in prison. He brought a claim for *Charter* damages arising out of the conviction, which he alleged was partly due to the Crown prosecutor withholding disclosure evidence they possessed that was relevant to his criminal defence. Henry

63. *Ibid* at paras 116, 143–44.

64. 2020 BCSC 778 at paras 9, 84, 89 [*Joseph*].

65. *Ibid* at paras 1, 9–12.

66. 2015 ONSC 2952 at paras 103–14 [*Elmardy trial decision*]; *Charter*, *supra* note 2, s 10.

67. *Elmardy trial decision*, *supra* note 66 at paras 100, 103–07, 111–14, 116.

68. *Elmardy v Toronto Police Services Board*, 2017 ONSC 2074 [*Elmardy appellate decision*].

69. *Ibid* at paras 1–3, 37–39.

alleged that the Crown's failure to provide the disclosure, before or during trial, impaired his ability to make full answer and defence and contravened his rights protected under section 7 of the *Charter*.[70] Henry, whose claims resulted in protracted litigation including two trials and two appeals to the Supreme Court of Canada, was eventually awarded approximately $8 million in *Charter* damages, $7.5 million of which were dedicated to vindication of Henry's constitutional right, and $530,000 of which were dedicated to pecuniary losses, such as loss of income, flowing from Henry's twenty-seven year incarceration.[71] Leaving aside the vindication-based award, damages for Henry's pecuniary losses are meagre, considering the amount of the award, spread over the twenty-seven-year term, assumes an income loss of less than $20,000 per year that Henry was wrongfully incarcerated.

Since *Henry*, the Federal Court of Canada, in *Boily v Canada* (*Boily*), awarded a total of $500,000 in *Charter* damages against Canada for its extradition of Boily to Mexico where he was tortured.[72] After more than twelve years of litigation, numerous motions to the Federal Court, and two appeals of those motions to the Federal Court of Appeal, Boily finally had his day in court where he showed that Canada delivered him to Mexican authorities, notwithstanding its knowledge that there was a substantial risk that he would be tortured there.[73] Relying on the Supreme Court of Canada's endorsement of the functional approach in *Ward*, and noting that Boily did not have pecuniary losses, the Federal Court awarded compensation-based damages for Boily's psychological injuries, arising from the extradition and four days of torture, at $360,000, close to the upper threshold for non-pecuniary damage awards under *Andrews v Grand and Toy* (*Andrews*)[74], which it held applied to claims for *Charter* damages.[75] In awarding vindication-based damages at $140,000, the Federal Court found that Canada had full knowledge that the extradition of Boily would result in the substantial risk that he would be tortured, yet it extradited him anyway. The Federal Court declined to award damages for deterrence, observing that awards under that rubric are reserved for cases involving repetitive conduct or conduct representing a manifestation of a systemic issue.[76]

Notwithstanding the significant size of Boily's award, *Boily* is disappointing because the Federal Court of Canada explicitly applied the *Andrews* cap to limit recovery of damages in claims arising

70. *Henry*, *SCC decision*, *supra* note 9 at paras 1, 2, 21. See also, *Henry*, *trial decision*, *supra* note 9 at paras 47, 245.

71. *Henry*, *trial decision*, *supra* note 9 at paras 404–06, 467, 469, 472–73.

72. *Boily*, *supra* note 52.

73. *Ibid* at paras 38, 41.

74. 1978 CanLII 1 (SCC).

75. *Boily*, *supra* note 52 at para 248

76. *Ibid* at para 222.

out of *Charter* infringements, and because it denied Boily a deterrence award, on the basis that Boily did not show a systemic or ongoing issue.

B. Class Actions

Claims for *Charter* damages have also come about in the form of class actions. Recent *Charter*-based class actions include a number of actions brought on behalf of inmate class members who have been deprived of timely medical care, or subjected to overcrowding, excessive lockdowns, or unlawful segregation practices.[77] Examples of recent class actions that have generated significant aggregate awards include *Reddock and Brazeau v Canada (Attorney General)* (*Brazeau*), both of which yielded a $20 million aggregate award at summary judgment.[78] This is substantially more than what any of the individual litigants have been able to recover, and carries with it the benefits of spreading the cost of litigation over a class who would otherwise be unable to fund litigation, providing a strong incentive for behavior modification.

Leaving aside deterrence and access to justice benefits of class actions, like their individual counterparts, class actions for *Charter* damages will still yield an improvident result for the actual class member who suffered the interference with their *Charter* rights. While the aggregate in class actions may look or be objectively high, that award is subject to costs and fees of class counsel and the fund, with the residual amount to be distributed amongst the class. To illustrate how this process could yield meagre recovery for interference with *Charter* rights, let us examine *Reddock*, a class action claiming damages under section 24(1) of the *Charter* for the practice of administrative segregation of inmates in federal prison institutions. The action comprised of at least 8,934 class members and yielded a $20 million aggregate damage award.[79] Before the deduction of class counsel's fee, the claim of the class proceedings fund, and disbursements, the gross award to be distributed amongst the class was approximately $2,200 per class member.[80] Considering the class counsel fee was approved at approximately $8 million, the net amount to be distributed could be

77. In addition to other class actions named in this paper, see *Raymond Lapple and Jerome Cambell v His Majesty the King in the Right of Ontario*, CV-16-558633-00CP, a proposed class action relating to lockdown practices within Ontario prisons; *Robinson*, *supra* note 11, where action seeking damages for segregation practices in Alberta prisons was certified as a class action.

78. *Reddock*, *summary judgment decision*, *supra* note 11 at para 340; *Brazeau v Canada (Attorney General)*, 2020 ONCA 184 [*Brazeau*]. The summary judgment decision in both cases was appealed to the Court of Appeal for Ontario. Both decisions were upheld, and while the Court of Appeal held that the result in *Brazeau* was correct, it nonetheless concluded that the learned motion judge erred in his analysis for *Charter* damages.

79. *Reddock*, *summary judgment decision*, *supra* note 11 at para 35.

80. *Ibid* at para 493.

less than $1,320 to each class member who suffered the deprivation of their residual liberty via the unconstitutional practice of administrative segregation.[81] In addition to the aggregate award to be distributed amongst class members, *Reddock* provided some class members with an option of pursuing an additional award via an individual issues trial under the Individual Issues Protocol regime. However, class members who availed themselves of the opportunity to pursue an individual issues trial would bear the costs of their individual issues claim on a reduced contingency basis.[82]

The preceding cases demonstrate, that in individual litigation, *Charter* damage awards beyond a few thousand dollars are outliers in the jurisprudence. Class actions for *Charter* damages will generally yield a significantly higher aggregate award. However, once the aggregate award is divided amongst the class, class members will probably not fare much better than individual litigants in terms of quantum of recovery.[83]

III: Critical Impacts of Low Awards under Section 24(1) of the *Charter*

This section will discuss the issues flowing from the low damage awards normalized in the limited jurisprudence for *Charter* damages. As a preliminary, the discussion begins by looking at the role of remedies as the vindicator of legal rights, as well as the general consequences of weak remedies. Following this, the discussion turns to the ways in which low damage awards under the *Charter* fail to fulfill the vindicator role and perpetuate problems for victims of unconstitutional interference with *Charter* rights.

"Remedies give substance to legal rights and obligations by making them 'palpable and enforceable'".[84] Strong remedies are proportionate to an infringement or harm, indicate the extent to which a right may be protected and vindicated, and communicate to potential wrongdoers both

81. Professor Roach quantifies the individual class members' recovery to a low $500, undervaluing the rights and violations in question. See Roach, *Remedies for Human Rights Violations*, *supra* note 12 at 285.

82. *Reddock*, *summary judgment decision*, *supra* note 11 at paras 500–05.

83. Further, while the costs of litigating the class action are spread amongst the class thereby making the litigation more accessible to class members, individual plaintiffs may recover only some of their costs of the litigation at trial, as did the plaintiff in *Thibodeau v St. John's International Airport Authority*, 2022 FC 563 at para 104 [*Thibodeau*].

84. Peter Schuck, *Suing Government: Citizen Remedies for Official Wrongs* (New Haven, Conn: Yale University Press, 1983) at 29.

the severity and likelihood of sanction.[85] Weak remedies, on the other hand, trivialize important rights by signaling to the state, and citizens, the low value of the right and the extent to which the right may not be adequately protected and will not be vindicated. Weak remedies leave potential wrongdoers unafraid of the nominal or improbable sanction.

Low damage awards under the *Charter* in individual litigation are a weak remedy, resulting in three major intersecting problems that undermine the objects of vindication, compensation, and deterrence in *Charter* damages. First, low damage awards for unjustified government interference with a fundamental right may undermine the inherent value of that right vis-a-vis the individual and to the public. Second, low damage awards allow governments to pay an occasional, and nominal, price for their violation of *Charter* rights.[86] Third, rather than deterring governments from unlawful interference in *Charter* rights, low damage awards deter individual litigants and lawyers, who are focused on recovering damages, from bringing forth costly litigation against the government. This is an issue of access to justice. Together, these three problems make vindication, compensation, and deterrence unlikely to be achieved in cases where *Charter* damages are low.

The object of vindication inherent in damages is concerned with communicating, affirming, and reinforcing the inherent value and importance of a particular interest that has been interfered with, and restoring the plaintiff to the position they were entitled to be in, had there been no unlawful interference with their right in the first place.[87] While some measure of vindication is inherent in the object of compensation, the object of compensation is primarily focused on restoring the plaintiff for the harm they have suffered or what they have lost.[88] Vindication proper, on the other hand, is not concerned with demonstrating that the plaintiff suffered an actual harm, aside from the intrusion.[89] In theory, a plaintiff who suffered no damages at all, aside from the unlawful interference with their *Charter* right, may recover a vindication-based award under section 24(1) of the *Charter*. In this way, vindication can serve as a standalone basis upon which damages may be awarded under section 24(1) of the *Charter*.

Rather than affirm or vindicate the right in issue, low damage awards erode the inherent value of the *Charter* right and rule of law by signaling that

85. Linden, *supra* note 1 at 9.

86. Roach, *Remedies for Human Rights Violations*, *supra* note 12 at 242.

87. Varuhas, *supra* note 14 at 17, 22, 50.

88. Compensation Deterrence theorists imagine that some measure of vindication is baked into the object of compensation in tort law. See John Goldberg, "Twentieth-Century Tort Theory" (2003) 91:3 Geo LJ 513 at 521–26.

89. *Ibid* at 517.

certain rights may be unimportant or of limited value.[90] For litigants who have suffered a legitimate and unauthorized intrusion with a *Charter*-protected right, the low award trivializes the importance of the right and the experience of the plaintiff. Save in cases where the litigant has funded the litigation with the ulterior view of securing a systemic victory, for litigants who undertook the time and expense of bringing forward a claim against a well-resourced government, the low damage award is punishing to their efforts to personally recover damages.[91]

Low damage awards that undermine the inherent value of a particular right in issue also signal the extent to which that right may not be protected by our courts. Low damage awards may be an insignificant deterrent to a well-resourced government who can afford to vigorously defend the litigation by complicating and lengthening the proceedings (*Ward* and *Boily*), against a less-resourced opponent, to obtain and uphold a nominal award, or pay the nominal award, thereby availing themselves of a meagrely protected right. The result of the low damage award being a meagrely protected right causes an economic-exchange problem akin to Calabresi's concept that one can be tortious where one is willing to accept the liability consequences tied to the act.[92] In the case of a claim for *Charter* damages, Calabresi's tort-feasor is replaced by the well-resourced government that can, in exchange for a small fee,[93] exercise its powers in bad faith, arbitrarily, or unlawfully to infringe constitutionally protected rights.[94]

Lastly, low damage awards create a challenge to access to justice by making *Charter* claims economically unreasonable to pursue. For litigants whose primary interest is damages, low damage awards signal that their claims are only worth so much and, thereby, are not worth bringing forward because the cost of the litigation outweighs the damage award that they may recover, and they may be liable for costs of the Crown if they lose. Moreover, some claims

90. Kent Roach, "Introduction: A Symposium Examining Remedies for Violations of Human Rights" (2019) UTLJ (Supplement, December) 1 at 5.

91. Roach, *Remedies for Human Rights Violations*, *supra* note 12 at 255.

92. Guido Calabresi & Douglas Melamed, "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral" (1972) 85:6 Harv L Rev 1089 at 1092, 1095. Specifically note, "Taney's willingness to pay for the right to make noise may depend on how rich he is; Marshall's willingness to pay for silence may depend on his wealth".

93. Professor Roach argues that low awards allow governments to pay an occasional price for violations. See Roach, *Remedies for Human Rights Violations*, *supra* note 12 at 242.

94. Professor Roach argues that a public law conception is better than a private law conception where liability rules can be violated for a price. See Roach, *Remedies for Human Rights Violations*, *supra* note 12 at 271.

for *Charter* damages, such as *Johnson v Ontario* (*Johnson*)[95] and *Reddock*,[96] can result in protracted and expensive litigation on side issues that may have nothing to do with damages, thereby making the cost and time of litigating a claim for *Charter* damages even more prohibitive. Even if successful litigants can recover costs of the litigation, by way of cost awards, the general rule is that costs are awarded on a partial indemnity basis, being less than what the litigant has actually spent. In practice, some recoveries yield even less than that, and provide a nominal amount for disbursements, thereby leaving a successful litigant substantially out of pocket for bringing forward a legitimate claim.[97]

Lawyers, too, are going to think twice about whether the time and expense of pursuing litigation for *Charter* damages on behalf of their clients is reasonable, considering that the jurisprudence indicates low awards. Further, lawyers will be bound to advise their clients about the prospects for *Charter* awards against the costs of bringing the lawsuit, the result being that litigants who cannot afford to lose money funding litigation will be deterred from bringing their matters forward. Further, contingency-type retainers, ordinarily

95. *Johnson v Ontario*, 2022 ONCA 725; *Johnson v Ontario*, 2022 ONCA 162; *Johnson v Ontario*, 2021 ONCA 443; *Johnson v Ontario*, 2021 ONCA 650 [*Johnson*], matters to which the author was involved as counsel. The issue in *Johnson*, was whether Mr. Parker would be allowed to opt out of the Johnson class action after the opt-out deadline so that he could continue with his individual claim for damages arising out of treatment at a provincial prison, which an individual sought *Charter* damages. The motion judge dismissed Mr. Parker's motion to opt out of the class action after the opt-out deadline and ordered Mr. Parker to pay Ontario's costs of the motion on a partial indemnity basis, being $20,850. Mr. Parker appealed both Orders to the Court of Appeal for Ontario, arguing that the motion judge erred in various ways, and that the impugned order was a final one because it implicated his right to continue with his individual claim. The appeal culminated in a series of motions, including Mr. Parker's motions for directions and motions to extend the time to perfect the appeal, and Ontario's motion to quash, and an intervener's motion. Mr. Parker's motions for direction and to extend the time to appeal were vigorously opposed; Mr. Parker successfully resisted the quash motion and succeeded in his appeal. Leaving aside the costs of the motions, Mr. Parker's partial indemnity costs of the appeal proper—more than $200,000—was settled for $70,000.

96. *Reddock v Canada (Attorney General)*, 2021 ONSC 6013. A decision of the Ontario Superior Court arising out of Mohamud and Heath's motion for costs of numerous case conferences and a motion (that was rendered moot) responding to Canada's assertion that their individual claims were *res judicata* as they were class members to the *Reddock* class action. Over the course of nearly one year, Mohamud and Heath alleged that they were a) not class members in *Reddock*, as they were segregated after the opt out deadline, and b) if they were class members, they should be allowed to opt out. Rather than restoring Mohamud and Heath for their costs incurred from the exercise, the court awarded costs in the cause.

97. *Thibodeau*, *supra* note 83 at para 104, the Federal Court used the language of "modest" in rendering its decision for a costs award.

thought to improve access to justice for litigants who cannot afford to pay a lawyer to prosecute a claim on their behalf—will not remedy the access to justice problem posed by the low damage awards for *Charter* damages. Lawyers will be unwilling to take on claims for *Charter* damages on a contingency basis, as the time and expense of the litigation is more than the award that the litigation may yield.

The result of the low damage awards for litigants is that litigants who cannot afford to lose money funding litigation will altogether avoid their claims, and lawyers who ordinarily pursue claims on a contingency basis will be unable to mitigate litigants' access to justice problems by taking these kinds of claims on a contingency basis—the consequence being that, in at least some cases, unconstitutional interferences by governments will go altogether unchecked.[98] Only litigants who can afford to finance the time and expense of the litigation in exchange for a meagre award will be redressed by having their infringement recognized and right vindicated.[99] Under this conception, *Charter* rights will have a nominal meaning for those who can afford to fund the cost of the litigation out of their own pocket, in exchange for a meagre recovery, but will be meaningless to others who do not have the resources to protect and enforce those rights against a well-resourced government. This makes more patent the inequality between (a) those who can afford to protect their interests from state incursion against those who cannot, and (b) those who cannot afford to protect their interests from state incursion against a well-resourced government.

IV: Quantifying Damages under Section 24(1) of the *Charter*

Having set out the test and object of damages under section 24(1) of the *Charter* and the problems caused by the low damage awards normalized in the jurisprudence, this section will propose the manner by which *Charter* damages should be assessed. To give full effect to the objects of vindication, compensation, and deterrence I argue that, while the test set out in *Ward* falls within the ambit of public law, the theory behind, and the yardstick for,

98. Making a similar argument, Pilkington asserts that the enforcement of constitutional rights depends on private action; damages incentivize the aggrieved to act as private prosecutors in bringing forth legitimate actions that may be an effective means of making government responsible for its constitutional infringements. See Pilkington, *supra* note 4 at 538–39.

99. Realistically, many legitimate claims under section 24(1) fall on disenfranchised people and communities who cannot afford to raise the issue in pursuit of a systemic victory as opposed to meaningful monetary awards.

assessing quantum in claims for *Charter* damages, should look to tort law.[100] The theory section of the discussion will focus on the functional approach to tort law, in part adopted by the Supreme Court of Canada in *Ward*. On this point, I will show how the deterrence function enshrined in the functional approach mandates a strong remedy, and argue that, because the objectives of damages in *Ward* are rooted in the functional approach conception, other purposes for tort law, enshrined within the functional approach theory, may have a role in *Charter* damages, too.

At the second stage, relying on four works and the case of *Hill*, I argue that, like intentional torts actional per se (TAPS), damages for *Charter* infringements should be at large and not bound by the *Andrews* cap.[101] This argument looks briefly to Schmeiser's position that civil claims have traditionally protected civil liberties from government interference and grows on Varuhas' theory that intentional torts and interference with human rights engage some of the same fundamental interests, and should thereby be motivated by the same vindicatory approach to damages. Looking to Cooper-Stephenson, I assert the compensatory function of *Charter* damages may be achieved with regard to traditional tort principles like mitigation and lost opportunity, but that such principles may have no role in the vindication or deterrence function of the damage assessment. Finally—in line with Hogg—I assert that *Charter* damages should be available in combination with a declaration in those rare cases where both remedies are necessary to vindicate the victim.

At the third stage, relying on lessons adopted from Pilkington, the functional approach, Schmeiser, Varuhas, Cooper-Stephenson, Hogg, and *Hill*, I set out my framework for quantifying damages under section 24(1) of the *Charter*. These segments set the stage for Part V, where I show how my framework may yield higher damage awards that better preserves the inherent value of *Charter* rights, better deters governments from future unlawful and unjustified intrusions with *Charter* rights, and facilitates access to justice for litigants who have suffered an unjustified intrusion, by making claims for *Charter* damages more economically feasible to pursue.

A. The Functional Approach

In *Ward*, the Supreme Court of Canada explicitly adopted a functional approach to the justification for damages under section 24(1) of the *Charter*.[102]

100. Unlike Pilkington's conception, which provides that *Charter* remedies should not be constrained by existing remedial principles, I argue that in the case of *Charter* damages, tort law theory, practice, and cases provide an important role in fashioning damage awards that serve the objectives of vindication and deterrence. See Pilkington, *supra* note 4 at 534.

101. *Hill*, *supra* note 15.

102. *Ward*, *supra* note 7 at para 24.

Leaving aside the Supreme Court of Canada's specific endorsement of the functional approach in this context, there are other reasons why the functional approach is the preferred tort law theory for justifying damages under the *Charter*. First, unlike corrective justice theory, which imagines tort law as a non-instrumentalist proprietary activity that is between the parties and is unconcerned with public interest, Glanville William's functional theory posits that tort law and damages serve particular and broad public interests, like deterrence.[103] Because constitutional rights fall within the ambit of public law and are a matter of public concern, the social interest feature of the functional approach in tort law and damages lends itself an excellent informant to the justification for damages arising out of constitutional infringements.

The functional approach theory specifically acknowledges the object of deterrence as coercive intended to prevent certain conduct in the future. In order for tort law and damages to work their deterrence functions, the potential wrongdoer must have a good idea about both the severity and the likelihood of sanction.[104] This communicative and coercive function of damages mandates a strong remedy that ensures potential wrongdoers are not left unafraid of a nominal or occasional sanction, thereby effectuating their behavior modification. Taking this objective to heart, as the Supreme Court of Canada supposedly did in *Ward*, *Charter* damages cannot act as a slap on the wrist—they must be significant enough to signal to all the extent to which the right in issue is protected and will be vindicated, and to effectuate behavior modification on the part of government to be more careful with individuals' constitutional rights.

Finally, aside from the deterrence and restorative functions of the tort law, the functional approach identifies other aims that would lend themselves just as well to the justification for *Charter* damages. For example, like litigants in tort, victims of an unjustified incursion into *Charter* rights want to be appeased by damages for their suffering.[105] Also, like tort law, claims for *Charter* damages act as an "*ombudsman*" by applying pressure on those who wield political power and claims for *Charter* damages should empower the injured.[106] As a sect of the *ombudsman* function, publicity in both tort and *Charter* claims may cast a spotlight on the defendant's unlawful behavior, the side effects of which may include deterrence or interference from higher-ups. In the context of constitutional infringements, a public made aware of its government's interference with the constitutional rights of its people, can express disapproval for the violation by way of the democratic process.

103. Linden, *supra* note 1 at 3–4. See also, Allan Beever, *Rediscovering the Law of Negligence* (Oxford, UK: Hart Publishing, 2007) at 46; Glanville Williams, "The Aims of the Law of Tort" (1951) Current Leg Probs 137.

104. Linden, *supra* note 1 at 9.

105. Williams, *supra* note 103 at 138.

106. Linden, *supra* note 1 at 22.

B. Turning to Intentional Torts

Having shown the functional approach as an appropriate theory upon which to justify *Charter* damages, the next issue involves how *Charter* damages should be assessed, where appropriate and just. Inspired by the works of Schmeiser and Varuhas and relying on *Hill*, I propose that, like certain intentional torts, damages under section 24(1) of the *Charter* are at large and are not bound by the *Andrews* cap.[107] Looking at *Charter* damages as mirroring TAPS generates a higher damage award that better satisfies the objectives of compensation, vindication, and deterrence, and avoids some of the problems associated with low damage awards. Further, relying on Cooper-Stephenson, I assert that tort principles, like lost opportunity and causation, are relevant in determining *Charter* damages under the compensatory function, but may play no role in the quantification of damages for vindication or deterrent purposes. Finally, relying on Hogg, I assert that there is no principled reason why a *Charter* damage award should not be combined with a declaration of invalidity, in rare cases where both are required to vindicate the victim.

(i) Schmeiser

The starting point for a tort-informed conception rests on Schmeiser's observation that people already relied on tort law, and, in particular, intentional torts like battery and false imprisonment, to protect them from unauthorized government intrusion into their civil liberties.[108] While there is nothing new to the idea that government interference with fundamental rights could be redressed by way of tort law, Schmeiser provides examples of three cases: *Chaput*, *Lamb*, and *Roncarelli*—where tort law redressed interferences with freedom of religion.

While I agree with Schmeiser's general idea that intentional torts, such as assault or trespass, have offered some level of protection for what would be today classified as a *Charter* infringement, I do not view the cases cited by Schmeiser as demonstrating tort law as a strong protector of civil liberties or as an ideal yardstick by which *Charter* damages could be assessed. To illustrate, *Roncarelli* is a claim framed in misfeasance in public office—a cause of action that is not "at large",[109] is notoriously difficult to succeed, and if

107. *Andrews*, *supra* note 74 at 265.

108. Schmeiser, *supra* note 2 at 114. Referring to *Chaput*, *Lamb*, and *Roncarelli*, already discussed herein, Schmeiser shows that issues concerning religious freedoms that were a significant issue affecting Jehovah's Witnesses in traditional Quebec were redressed by way of civil actions framed in misfeasance of public office.

109. Meaning damages are presumed from the interference. See *Hill*, *supra* note 15 at para 167.

previous cases are any indicator, is vulnerable to be struck at the early stage of pleadings, making it a potentially ineffective tort that is expensive to pursue.[110] Moreover, notwithstanding *Roncarelli* yielded a significant award—$339,629, accounting for inflation—those damages were inextricably intertwined with the loss of reputation and profits of the failed restaurant, as opposed to vindicating Roncarelli's personal experience. The fact that Roncarelli's recovery is entirely compensation-based makes it an ill-suited yardstick for assessing *Charter* damages in other claims involving intangible rights. As for *Chaput* and *Lamb*, while both cases involve direct interference by Crown agents with religious activity and liberty rights of adherents of the Jehovah's Witness faith—making them more instructive than *Roncarelli* on the point of damages—once inflation adjusted, the damage awards in *Chaput* and *Lamb* are still meagre and attract some of the problems discussed in the case of low damage awards in *Charter* claims.[111] Nevertheless, Schmeiser's notion about the relationship between intentional torts and civil liberties is a reminder of the strong body of law that pre-existed the *Charter* in redressing unlawful government interference with fundamental rights. From there, we can decipher which torts offer strong protection of fundamental interests and why and how those cases may be instructive on the issue of damages.

(ii) Varuhas

Separately, Jason Varuhas argues that, to ensure basic human rights interests are afforded a strong protection from government interference, damages for human rights violations should be assessed in a way similar to TAPS being torts arising out of intentional conduct, such as battery or false imprisonment that privilege the object of vindication when assessing damages.[112] Varuhas explains that TAPS are the best yardstick for assessing damages for human rights infringements because (a) like human rights, TAPS are concerned with freedom and protection from unjustified intrusions with fundamental interests like bodily integrity and liberty,[113] and (b) because the interests in TAPS and human rights are similar, damages for human rights violations should engage the same primary function of protection and vindication of those fundamental

110. The plaintiff's statement of claim pleading misfeasance in public office was struck in *Clarke v Ontario (Attorney General)*, 2021 SCC 18; *Merchant Law Group v Canada Revenue Agency*, 2010 FCA 184; and *Moses v Lower Nicola Indian Band*, 2015 BCCA 61.

111. Inflation adjusted to 2022, damages in *Chaput* are $21,661; damages in *Lamb* are $24,806.

112. Varuhas, *supra* note 14 at 76–77.

113. *Ibid* at 25.

interests.[114] Under Varuhas' conception, like damages in TAPS, claims arising out of human rights violations ought to privilege the object of vindication.

Varuhas explains that the vindication object of damages in TAPS is distinguished from the object of vindication that is baked into non-pecuniary damages, generally speaking. First, the object of vindication in TAPS is about protecting the interest that was interfered with on a strict liability standard, meaning the plaintiff does not need to establish harm or loss to recover a vindication-based award. On the other hand, normative vindication baked into compensation-type damages is contingent on, and considerate of, the harm the plaintiff may have experienced as a result of the interference, whether that harm is pecuniary or not. The distinction between Varuhas' imagination for vindication and normative vindication baked into compensation is illustrated by the fact that plaintiffs seeking damages in TAPS can recover vindication-based damages in addition to compensatory damages.[115] Under Varuhas' conception, just as damages for TAPS are recoverable notwithstanding that there may be no harm to the plaintiff, damages for human rights interferences are payable upon the plaintiff showing a slight interference, even if it does not leave them worse off.[116]

Varuhas' conception for damages in human rights cases is an attractive guidepost for how we should look at damages in claims involving *Charter* violations for four primary reasons. First, the conception takes us back to Schmeiser's pre-*Charter* era; when government interference with fundamental or natural rights were redressed by way of civil action framed in tort law, the result being that, in claims for *Charter* damages where there is a corresponding class of TAPS, such as false imprisonment or battery, there exists a body of cases and principles upon which the damage assessment can be informed. Second, Varuhas' imagination for damages is consistent with the conception for damages set out in *Ward*, which distinguishes the object of compensation, vindication, and deterrence as separate yet simultaneous bases upon which plaintiffs can recover damages. According to Varuhas' imagination, plaintiffs should recover at least a vindication-based award in response to the interference, irrespective of harm suffered by the plaintiff, which may be supplemented by awards for compensation that consider pecuniary or non-pecuniary harm, and a deterrence-based award. Relatedly, and third, Varuhas' conception provides plaintiffs, whose claims are novel, involve intangible rights, or do not have a corresponding tort that can inform the quantum analysis, some assurance of a base level award to vindicate their experience, thereby easing some of the economic risk of pursuing a test claim. Finally, and most importantly, because damage awards for some intentional torts are not bound by the *Andrews* cap in

114. *Ibid* at 76.

115. *Ibid* at 48.

116. *Ibid* at 26.

Canada, treating *Charter* damages like TAPS can yield higher damage awards for plaintiffs, thereby easing prospects for litigation and mitigating the critical problems flowing from meagre awards that were discussed in Part III.[117]

(iii) *Hill v Church of Scientology of Toronto*

Building on the benefits of Varuhas' philosophy for damages in matters involving human rights, I propose that damages under section 24(1) of the *Charter* should be assessed in a manner that is consistent with the intentional tort of defamation, a tort that, like Varuhas' examples of battery and false imprisonment, is actionable per se and aims to vindicate the plaintiff's experience by way of damages at large. My conception builds on principles iterated in the seminal case for defamation in Canada: *Hill*.

The facts in *Hill* are complicated. The simplified version is that the Church alleged that Hill, a Crown prosecutor, misled a judge of the "Supreme Court of Ontario and had breached orders sealing certain documents belonging to Scientology".[118] Agents for the Church planned for a contempt prosecution against Hill. Days before the prosecution against Hill was commenced, lawyers for the Church stood gowned before news reporters on the steps of Osgoode Hall and commented upon allegations contained in a Notice of Motion by which the Church intended to commence criminal contempt proceedings against Hill. "At the contempt proceedings, the allegations against Hill were found to be untrue and without foundation",[119] leading Hill to commence a civil suit for libel against the lawyers involved and the Church. Hill succeeded at trial, recovering $300,000 in general damages, $500,000 in aggravated damages, and $800,000 in punitive damages. The awards were upheld on appeal to both the Court of Appeal for Ontario and to the Supreme Court of Canada. The decision from the majority of the Supreme Court being particularly notable with respect to (a) the importance of reputation as a reflection of innate dignity, "a concept which underlies all Charter rights",[120] (b) the question of malice, as well as, (c) the purpose and parameters of general, and punitive damages in defamation claims.[121] Only (a) and (c) are of importance to my framework.

On the point of damages, the majority of the Supreme Court of Canada explained that damages for defamation must clearly demonstrate to the community the vindication of the plaintiff's

117. *DS v Quesnelle*, 2019 ONSC 3230 at paras 27–31, 41.

118. *Hill*, *supra* note 15 at paras 1–2.

119. *Ibid* at para 2.

120. *Ibid* at para 120.

121. *Ibid* at paras 164, 168, 196–99.

reputation and are therefore presumed.[122] Further, the majority explained that, because injuries flowing from defamatory statements are distinguished from the kinds suffered in cases involving personal injury, general damages for defamation are not bound by the *Andrews* cap.[123] To bolster its position that *Andrews* should not apply, the majority pointed out that some of the underlying problems giving rise to *Andrews*—such as increasing costs of driving, massive influx of claims, and ever-increasing damage awards—were not in issue in the case of defamation. In particular, on this point, the majority noted few judgments for defamation and noted the average award to range between only $20,000 and $30,000, between 1987 and 1995.[124] In addition, the majority noted that if it were known in advance what amount the defamer would be required to pay in damages (being the *Andrews* cap), "a defendant might look upon that sum as the maximum cost of a licence to defame".[125]

As to punitive damages, the majority explained that unlike general damages, punitive damages are penal and not at large. As to where punitive damages may be appropriate, the majority explained that punitive damages should serve a useful purpose and may be justified in cases where the combination of general damages and aggravated damages are insufficient to achieve the objective of deterrence.[126]

The majority reasoning to support the high damage award in *Hill* can easily be applied to justify an even stronger remedy in cases of *Charter* damages. First, more than engaging concepts that underlie all *Charter* rights, claims for *Charter* damages engage *Charter* rights proper. If the strength of the remedy in *Hill* hinged in any way on values underlying the *Charter*, then claims engaging *Charter* rights properly demand *at least* the equal remedy of damages at large prescribed in *Hill*. Second, like in claims for defamation, the rights at issue in *Charter* cases should be vindicated before the community. Third, like defamation, claims for *Charter* damages are not widely pursued, and do not generally yield very large awards. This means that like *Hill*, claims for *Charter* damages do not engage some of the problems noted to give rise to *Andrews*, and they should therefore not be bound by the *Andrews* cap. Moreover, like in *Hill*, the *Andrews* cap in *Charter* cases may perpetuate the earlier discussed economic exchange problem where constitutional values may be violated for a maximum price. Lastly, punitive damages in claims for damages under the *Charter*, should be, of course, in matters where the plaintiff shows punitive damages serve a useful purpose that cannot be adequately met under the compensation, vindication, or deterrence heads of damages.

122. *Ibid* at para 166.

123. *Ibid* at paras 168–72.

124. *Ibid* at para 169.

125. *Ibid* at para 170.

126. *Ibid* at 196.

(iv) Cooper-Stephenson (Cooper)

Having established the theory for a tort-informed approach to the provision of awards under section 24(1) of the *Charter*, this section will discuss some of the tort principles that may inform quantification of damages under the compensatory function. Relying on Cooper-Stephenson, I assert that principles such as lost opportunity and mitigation can play into the quantification of *Charter* damages under the compensatory function but may have no role in the vindicatory or deterrent function of damages under the *Charter* where damages are, as I have argued, at large.[127]

In his work, *Constitutional Damages Worldwide*, Cooper-Stephenson makes a compelling case for incorporating tort and negligence principles into the ambit of *Charter* damages claims.[128] For example, Cooper-Stephenson indicates that factual causation and remoteness of damage are components of a claim for *Charter* damages. In Cooper-Stephenson's eyes, causation implies that there must be cause and effect relationship between the damage claimed and the government conduct, whereas the remoteness of damage aspect is concerned with whether the loss, suffered by the victim of the violation, was foreseeable by the perpetrator. Cooper-Stephenson alludes to the availability of defensive arguments, such as, *inter alia,* the victim's obligation to mitigate losses caused by the violation.[129] As I will discuss, while compelling, many of the principles discussed by Cooper-Stephenson that lend themselves well to negligence law are not malleable to *Charter* damages claims and should be avoided. These are—for the most part—liability principles that are not consistent with *Ward*. However, those principles discussed by Cooper-Stephenson that go to the heart of identifying damage and loss *caused* by the breach are relevant to determining damages under the compensatory function in *Ward*.

Foreseeability and remoteness have no role in grounding liability of the government for *Charter* violations. According to the framework set out in *Ward*, to find liability, the litigant seeking damages for a *Charter* violation must merely establish the violation and that damages are appropriate and just, having regard to the functions of damages.[130] Although it might help the plaintiff's case, under *Ward*, the plaintiff is not categorically required to establish that the damage they suffered was foreseeable by the government to show that damages are appropriate and just, having regard to the compensatory, vindicatory, or deterrent function of damages. Moreover, the role of mitigation discussed by Cooper-Stephenson should be invoked only in rare cases where the victim of the *Charter* breach suffered losses that they themselves had the power to minimize

127. Ken Cooper-Stephenson, *Constitutional Damages Worldwide* (Toronto, ON: Carswell, 2013).

128. *Ibid* at 155.

129. *Ibid* at 155–57.

130. *Ward*, *supra* note 7.

after the violation occurred. For example, where the *Charter* breach caused the plaintiff to lose their job, the duty to mitigate would require the plaintiff to seek out other and comparable employment to reduce their income loss. However, these are unlikely facts. In most cases, like *Ward*, *Taylor*, *Joseph*, and *Elmardy*, the duty to mitigate is an impossible task for a plaintiff who has no practical way of lessening the wrongs that the government has already done to them.

Leaving aside that foreseeability, remoteness, and the duty to mitigate do not lend to claims for *Charter* damages, some of the principles discussed by Cooper-Stephenson could have an important role in the determination of compensation-based *Charter* damages. For example, a plaintiff who alleges the *Charter* breach caused an identifiable injury, such as a broken hip or a loss of income, is required to prove the cause-and-effect relationship. Yet another example, in a case where the duty to mitigate can be practically invoked, the plaintiff's failure to mitigate their losses can result in a set-off for damages in favour of the government. To illustrate, take the hypothetical plaintiff who, as a result of a *Charter* breach, loses their employment but despite being able, neglects to apply for other work throughout the litigation. In such case, the offending government can credibly assert that the plaintiff's failure to look for alternate work was unreasonable and unjustifiably increased the government's exposure for the plaintiff's pecuniary damages.

Another example, explicitly discussed by Cooper-Stephenson, is that of lost opportunity and the standard upon which damages for lost opportunity should be proven.[131] Standard aside, the plaintiff who suffered a loss of chance or opportunity as a result of the intrusion should be allowed to recover for that loss as they would in a tort claim—there is no principled reason why a plaintiff who suffered such loss should be barred from such recovery.

While foreseeability has no role in grounding government liability for *Charter* damages, tort principles like causation, mitigation, or loss of opportunity can inform a compensation-based assessment of damages under the *Charter*. These tort principles cannot, however, dictate limits on vindication-based or deterrence-based damages that are, as I have argued, presumed and at large. Indeed, this is like what was done in the damage assessment in *Henry*, where the trial court awarded a meagre compensation-based award for Henry's loss of income and a significant vindication-based award.[132]

(v) Hogg and Rare Cases

As detailed in Hogg's treatise, remedies available under section 24(1) of the *Charter* are unlike those available under section 52(1) and cannot be

131. *Ibid* at 156.

132. *Henry*, *trial decision*, *supra* note 9.

combined.[133] The general rule that damages awarded under the *Charter* cannot be married to another remedy under section 52(1) poses a risk that some litigants, in rare cases, will not achieve a full and meaningful relief. In line with Hogg's observations, I assert that there will be rare cases where both a remedy under sections 24(1) and 52(1) will, together, be better at providing victims with proper redress.

The remedies under section 52(1) are distinguished from those available under section 24(1). First, unlike remedies available under section 24(1), which are broad and discretionary, the remedies under section 52(1) are prescribed as including, *inter alia*, nullification, or constitutional exemption.[134] Remedies under section 52(1) can be applied by any tribunal or court with the power to decide questions of law and are not subject to the statute of limitations.[135] Further, section 52(1) remedies may be available in rare cases to litigants whose rights were not infringed.[136]

On the other hand, remedies under section 24(1) are broad and discretionary, can be crafted in response to a violation, and can be applied only by "a court of competent jurisdiction".[137] In the case of a claim for *Charter* damages, a court of competent jurisdiction includes, for example, the Superior Court but not the Ontario Court of Justice. Unlike in the case of section 52(1) remedies, claims for *Charter* damages are bound by statutes of limitation. Moreover, unlike section 52(1), which may be available in rare cases to litigants whose rights were not infringed, *Charter* damages are awardable only to persons whose *Charter* rights have been unjustifiably violated.

An important feature of the relationship between section 52(1) and the damages remedy under section 24(1) of the *Charter* is that they cannot be married. As discussed in *Mackin*, a litigant cannot recover a combination of both *Charter* damages and a declaration of invalidity.[138] This leaves some victim litigants in the situation of having to choose, at the outset and as a matter of personal strategy, which recourse to take to the exclusion of others and risks leaving some litigants with inadequate relief.

As observed by Hogg, there is no principled reason why both remedies under section 52(1) and section 24(1) should not be available in rare cases where both are necessary to provide the victim litigant with full relief.[139] Although Hogg does not provide examples of "rare cases" the matter of *Sauvé v Canada (Chief Electoral Officer)* is one case where—in theory (but for the *Mackin*

133. Hogg, *supra* note 6 at ch 40:13.

134. *Ibid* at ch 40:1.

135. *Ibid* at chs 40:2 and 40:10.

136. *Ibid* at ch 40:2.

137. *Charter*, *supra* note 2, s 24(1)

138. *Mackin*, *supra* note 16.

139. Hogg, *supra* note 6 at ch 40:13.

rule)—litigant inmates statutorily deprived of voting rights, contrary to section 3 of the *Charter*, may have sought damages under the *Charter* in addition to other remedies, and arguably should have been able to recover damages as vindication for the violation.[140]

The idea here is the absolute bar discussed in *Mackin* is—according to Hogg—unprincipled, and it may result in the rights of some victims not being fully vindicated.[141] In rare cases where a combination of remedies under section 24(1) and section 52(1) are necessary to vindicate the violation of the victim's right, the court should have the discretion to award both.

C. The Tort-Informed Framework

This section will show how damages under section 24(1) of the *Charter* should be assessed in a manner aligning with Varuhas and *Hill*, and with a primary focus on vindication-informed reparation. Under this conception, assessment of vindication-based damages is considered at large at the outset of the assessment. Once vindication-based damages are determined, the assessment turns to compensating the plaintiff for actual damages, if any. At the final stage of the preliminary evaluation, the determination of damages will consider whether a further award is necessary to deter the impugned conduct. Finally, I briefly discuss the role of punitive damages and costs awards under my rubric.

(i) Vindication-Based Damages

Once the plaintiff shows an unjustified *Charter* violation for which damages are appropriate and just, the quantum assessment for damages under section 24(1) should kick off with a determination of damages that vindicates the right in issue as a standalone basis for recovery. Under this primary step, the plaintiff need only show that the Crown (or Crown agent) interfered with their *Charter*-protected right to trigger the presumption that vindication-based damages are payable. In determining quantum under this stage, the sole consideration is the nature or severity of the Crown's or Crown agent's interference with the plaintiff's right against the importance of the *Charter* right interfered with. First, this consideration may assume *Charter* rights can be hierarchal, or that certain infringements being more egregious than others should yield a more significant award. For example, the intentional withholding of disclosure contrary to section 7, as in *Henry*, involves both a severe interference (in that it was intentional) and an important *Charter* right, and will thereby yield a higher vindication-based award than a less egregious

140. 2002 SCC 68.

141. *Mackin*, *supra* note 16.

or transient interference via frisk search, contrary to *Charter* section 8. Second, save in cases where the harm suffered by the plaintiff is inextricably intertwined with the severity of the interference and importance of the right in issue, as in *Henry*, the assessment of vindication-based damages is not focused on harms flowing from the violation, if any. Indeed, under this stage of the quantum assessment, a plaintiff who has sustained no injury or loss may recover a vindication-based award. However, where the vindication-based award is the only mode of recovery, meaning there is no claim for compensation and there is no other corresponding tort, the vindication-based damage award must be significant enough to protect the constitutional values of the *Charter* right in issue.[142]

(ii) Compensation

The second stage of the quantum assessment should focus on compensating the plaintiff for the harms flowing from the *Charter* violation, if any. Under this compensation stage, the analysis first considers whether non-pecuniary damages are payable in compensation of the harm caused by the infringement and suffered by the plaintiff. Following this, the damages question turns to compensating the plaintiff for actual, pecuniary losses flowing from the impugned conduct.

Traditionally, non-pecuniary damages are focused on restoring the plaintiff—as best money can—for pain and suffering and loss of enjoyment of life that they suffered as a result of the wrongful act. Non-pecuniary damages are payable where the plaintiff establishes that the impugned conduct caused them an identifiable harm, as discussed by Cooper-Stephenson. For example, a plaintiff who establishes the wrongful act caused them to suffer post-traumatic stress disorder, can recover damages for the PTSD and its consequences under the non-pecuniary damage framework. In personal injury cases arising out of negligence-based conduct, non-pecuniary damages are typically bound by the *Andrews* cap, which is inflation adjusted each year and currently hovers around $400,000.[143] Conversely, in some intentional torts, such as the case of libel, the object of non-pecuniary damages goes beyond identifiable harms and considers presumed harm to the plaintiff for losses that are difficult to

142. For example, in a case involving freedom of religion, where there are no pecuniary or non-pecuniary losses, the plaintiff's only remedy may be the vindication-based award, in which case the award should be significant enough to protect the constitutional values enshrined in section 2 of the *Charter*. This argument flows from Pilkington's assertion that constitutional litigation is about enforcing constitutional values. See Pilkington, *supra* note 4 at 536.

143. *Andrews*, *supra* note 74. Inflation adjusted per *supra* note 24. $100,000 cap in *Andrews*, inflation adjusted to 2022 is $409,502.

quantify—such as embarrassment or humiliation. Also, different from negligence-based torts, non-pecuniary damage awards in intentional torts are not bound by *Andrews*, meaning those awards can be more than the inflation-adjusted cap in *Andrews*.

Having established that claims for *Charter* damages engage some of the same motives as do intentional torts, I propose that the assessment of non-pecuniary damages under the compensation scheme may be presumed for those cases for where losses, like embarrassment and humiliation, are hard to quantify. Where non-pecuniary damages are identifiable, such as in the case of PTSD or injury, the assessment of non-pecuniary damages may look to existing jurisprudence, including the private law and private law principles as discussed by Cooper-Stephenson, for guidance on what damages should look like. As a caveat, the assessment should be guided by two additional considerations. First, constitutional litigation—being different from traditional litigation—is about enforcing constitutional values, and non-pecuniary damages may be increased to reflect that notion.[144] Second, because claims for *Charter* damages engage some of the same principles and motives as intentional torts—like defamation—and do not engage the *Andrews* problems raised in *Hill*, non-pecuniary damage awards should not be bound by the *Andrews* cap. This makes damage awards in intentional tort claims a better yardstick for assessing non-pecuniary losses. On the other hand, claims for pecuniary losses flowing from a *Charter* violation should be treated in the same manner as they are in all tort cases generally: loss of income should be established by way of evidence—preferably from an expert—against a balance of probabilities, and loss of future income or competitive advantage should be assessed against the standard of "real and substantial risk".[145] As proposed by Cooper-Stephenson, tort principles such as mitigation and lost opportunity are relevant for determining quantum under this rubric.

(iii) Deterrence

Class actions aside, many of the individual claims for damages under the *Charter* have not yielded deterrence-based damages under the *Charter*. This may be because courts do not see the impugned conduct as a systemic, ongoing, or a repeatedly litigated issue giving rise to a deterrence-type sanction.[146] Such reasoning overlooks the reality that *Charter* claims are not so widely pursued that they would support the inference that there is an ongoing systemic issue giving

144. Pilkington, *supra* note 4 at 536.

145. *Schrump et al v Koot et al*, 1977 CanLII 1332 (ONCA); *Graham v Rourke*, 1990 CanLII 2596 (ONCA); *Lytle v Toronto (City)*, 2004 ONSC 647 at paras 49 and 58.

146. *Boily*, *supra* note 52 at para 222.

rise to repeated litigation for *Charter* damages. Moreover, this kind of reasoning puts the very onerous and expensive task of establishing a systemic or repeated problem, arising from government conduct, on the individual plaintiff. For example, many of the records that the plaintiff needs to make out the repeated conduct or systemic issue, giving rise to deterrence, may be in the hands of the Crown and will not be easily forked over, without expensive litigation. Further, as per Glanville Williams, the deterrence function of damages communicates, to the *future* wrongdoer, the likelihood and severity of sanction and is thereby forward-looking; this is different from an approach that, like punitive damages, looks backward and requires the plaintiff to make out a pattern of bad behavior, to recover a deterrence-based award.[147] Lastly, the failure to award deterrence-based damages, together with low vindication and compensation-based awards under the *Charter*, perpetuates some of the issues discussed under Part III of this paper.

Under my framework, there is a more active role for deterrence-based damages that still honours principles in *Ward*. Under *Ward*, the determination of a deterrence-based award considers the seriousness and impact of the breach against the seriousness of the state misconduct. Notwithstanding that the considerations for vindication and deterrence are similar and grouped together in *Ward*, I argue that, unlike in *Joseph*, the quantum for deterrence-based damages should be distinct from vindication-based damages, which are at large. This means, that where the court decides it will order a deterrence-based award, that award is separate and apart from the vindication-based or compensation-based award. Lastly, acknowledging some of the practical challenges for litigants in establishing a systemic or ongoing problem justifying a deterrence-based award, the court deciding whether the conduct at issue gives rise to a deterrence-based award should adopt a forward-looking approach, in order that a deterrence award (or lack thereof) be communicative of the likelihood and severity of sanction. Under this framework, a plaintiff who cannot show a systemic problem notwithstanding a serious and careless breach—like *Boily*[148]—will not be precluded from recovering a deterrence-based award. However, plaintiffs who demonstrate a systemic or ongoing issue should recover a higher deterrence-based award.

(iv) Punitive Damages

Incorporating the principles of intentional TAPS into claims for *Charter* damages necessarily includes a look at punitive damages. Notwithstanding the general reluctance of the Supreme Court of Canada,

147. Linden, *supra* note 1 at 9; Williams, *supra* note 106 at 138.

148. *Boily*, *supra* note 52 at para 222.

in *Ward*, "to award purely punitive damages",[149] punitive damages have been awarded in subsequent cases involving *Charter* damages, such as *Elmardy*, and should continue to be awarded in the manner prescribed by *Hill*. Punitive damages, in claims for damages under the *Charter*, should be of course in matters where the plaintiff shows punitive damages serve a useful purpose that cannot be adequately met under the compensation, vindication, or deterrence heads of damages.

V: A Strengthened Damages Remedy

My framework for the determination of damages under the *Charter* yields a stronger remedy that better protects the objects of vindication, compensation, and deterrence. Adopting principles inherent in torts and intentional torts, such as defamation, into the determination of damages under the *Charter* will result in higher damage awards under the vindication and compensation heads of damage, and will simplify recovery for deterrence-based damages. Damages under the vindication stream are at large, meaning that a plaintiff is not required to show harm to recover an award for the *Charter* violation. As an example, under this rubric, a plaintiff who has established government interference with an intangible right protected under the *Charter*——like freedom of religion——resulting in no injury, will be able to recover damages. For the plaintiff who has suffered an actual loss, vindication-based damages may be puffed up by compensation-based damages, which considers principles discussed by Cooper-Stephenson for quantifying pecuniary and non-pecuniary damages. Because non-pecuniary losses in *Charter* damages do not engage the *Andrews* problems noted in *Hill*, non-pecuniary damages under the compensation stream of section 24(1) are not bound by the *Andrews* cap. The result is that plaintiffs who have suffered an actual, non-pecuniary loss, arising from a *Charter* violation, will be better compensated for their loss. In addition, the possibility for compensation arising from non-pecuniary loss is increased generally by the removal of the cap.[150] Recovery under the deterrence head of damages is also made easier under my framework because plaintiffs will not be required to go through the onerous and costly task of showing that the government conduct in issue is a systemic or ongoing problem.

By improving the prospects for higher awards, my framework for *Charter* damages mitigates against some of the critical problems that have been perpetuated by the meagre awards normalized in *Charter* jurisprudence. First, higher awards act as a strong remedy that appeases the plaintiff and vindicates

149. *Ward*, *supra* note 7 at para 56.

150. Had this reasoning been adopted in *Boily*, perhaps the non-pecuniary award could have been higher.

their experience. Second, higher awards, or at least improved prospects for higher awards, makes claims for *Charter* damages more accessible. For example, litigants may be more willing to fund the litigation in pursuit of a large award. Alternatively, lawyers may be more inclined to assume the risks of representing plaintiffs pursuing *Charter* damages on a contingency basis. Incentivizing litigants in this way may mitigate against possibilities that an unconstitutional interference goes on unchecked. Finally, making claims for *Charter* damages more accessible to victims of a *Charter* breach will mitigate against the inequalities between the parties by giving substance to their legal rights and obligations.

Finally, improving the prospects for higher damages awards in a way that incentivizes victim litigants and deters government non-compliance with the *Charter* does not per se result in a chilling effect on government conduct. As the *Ward* court indicated, the logical conclusion of the chilling effect rationale is to say *Charter* damages are never appropriate and just.[151] To properly establish a chilling effect, the Crown must show that, "imposing liability on the government in this particular context will negatively affect the public interest in similar circumstances. In other words, the chilling effect on government should be demonstrably bad for society, not just bad for government".[152]

This is a high standard for the government resisting a meritorious claim to meet because a meaningful damages remedy that makes citizens' rights palpable and enforceable against their government is good for society; in addition to all of the reasons I have discussed throughout this article, a meaningful damages remedy can protect against tyranny and can help level the playing field between state and citizen, and those who have resources and those who do not. Most importantly, a meaningful damages remedy protects against a complacent attitude by state and citizen towards *Charter* obligations.[153]

Finally, and as observed by Roach, the chilling effect may be irrelevant for damages claims because, while individual government agents "may be more susceptible to being over-deterred"[154] government departments are well-positioned to adjust their policies to comply with *Charter* decisions from the Court.[155]

151. *Ward*, *supra* note 7 at para 38.

152. Adourian, *supra* note 56.

153. *Ibid* at 56.

154. Kent Roach, "A Promising Late Spring for *Charter* Damages: *Ward v Vancouver*" (2011) 29 NJCL 135 at 150–51.

155. *Ibid*; Adourian, *supra* note 56 at 40.

Conclusion

Before the *Charter*, unjustified government interference with important fundamental rights was redressed by way of tort law. Even after the *Charter* came into force in 1982, tort claims remained the default for redressing government conduct that also interfered with *Charter* rights. It was not until 2010, nearly thirty years after the *Charter* came into force and after numerous cases and works had hinted at the prospects for *Charter* damages, that the Supreme Court of Canada finally concluded in *Ward* that damages were an appropriate and just remedy under section 24(1) of the *Charter*.

The jurisprudence for *Charter* damages since *Ward* is both limited and—for the most part—disappointing; for example, leaving aside the vindication-based award in *Henry*, pecuniary losses were an improvident $530,000, which amounts to less than $20,000 per annum in income losses for the twenty-seven years that Henry was incarcerated. *Boily*, too, was disappointing because the Federal Court of Canada capped non-pecuniary damages as per *Andrews* under the compensation function of *Charter* damages. Aside from these two cases where vindication-based damages were significant, individual cases since *Ward* have yielded low vindication awards under section 24(1) of the *Charter*. Class actions have their own problems in that, once the aggregate award is offset by fund and counsel fees, the remnants that are to be distributed amongst the class will also yield an improvident return per class member who suffered the interference with their *Charter* right.

The result of the low awards, normalized in the jurisprudence, undermines the objectives of vindication, compensation, and deterrence, and creates three sets of problems. First, rather than vindicate the litigant's experience, low awards undermine the *Charter* right in issue. Second, rather than deterring unconstitutional behavior, low awards signal the extent to which a *Charter* right may not be protected, resulting in an economic exchange problem that allows governments to violate *Charter* rights for a nominal or occasional price. Third, low awards make claims for *Charter* damages economically unreasonable to pursue, thereby posing an issue of access to justice for individuals who have suffered a *Charter* breach.

The problems flowing from low awards call for a stronger damages remedy under section 24(1) of the *Charter*. In my view, the answer lies in turning back to tort law. From a theoretical perspective, the functional approach to tort law provides an excellent basis for damages under the *Charter*. Leaving aside the vindication, compensation, and deterrence functions, already adopted by the Supreme Court of Canada in *Ward*, the functional theory poses other justifications for tort law that are equally relevant in claims for *Charter* damages. For example, like in tort claims, damages under the *Charter* appease the plaintiff and cast a spotlight upon the government's illegal behavior.

On a more practical note, the yardstick for assessing and quantifying damages in claims for *Charter* damages should mirror the approach taken in TAPS which privilege the object of vindication. The assessment of *Charter* damages should look to the tort of defamation—and the case of *Hill*—where damages were motivated by concepts that underlie *Charter* rights. Taking from the reasoning in *Hill*, damages under section 24(1) of the *Charter* should be at large and not bound by the *Andrews* cap. Moreover, like in *Hill*, claims for *Charter* damages should not be precluded from recovering punitive damages, where such an award would serve a useful purpose in the litigation. In rare cases, litigants who recover a declaration should not be precluded from recovering damages under the *Charter*, where both remedies are necessary to vindicate the litigant's rights.

Under my tort-informed rubric for *Charter* damages, vindication-based damages are presumptive and determined at the outset of the analysis, considering the nature or severity of the Crown's (or Crown agent's) interference with the plaintiff's right against the importance of the *Charter* right interfered with. Assuming there are actual losses, the analysis then turns to compensation, which considers non-pecuniary losses, which are not bound by *Andrews* and pecuniary losses quantified in line with certain principles discussed by Cooper, and with tort law in general. Third, it is no longer necessary for a plaintiff to establish a systemic or ongoing problem in order to recover a deterrence-based award. Finally, assuming the reasoning in *Hill*, punitive damages may be awarded where they serve a useful purpose in the litigation.

My tort-informed conception for *Charter* damages increases prospects for higher awards in at least four ways:

1. First, because vindication-based damages are presumptive, novel claims involving intangible rights are more likely to recover *at least* a base award.
2. Second, for litigants who suffer actual losses, compensation may puff up a vindication-based award. Moreover, because plaintiffs may recover beyond the *Andrews* cap, plaintiffs may be better compensated for their non-pecuniary losses.
3. Third, victims of a *Charter* breach will no longer have to endure the arduous task of showing a systemic or ongoing problem, thereby easing prospections for a deterrence-based award.
4. Finally, punitive damages are where the plaintiff shows that punitive damages would serve a useful function in the litigation.

Increasing the prospects for damage awards will combat the issues caused by meagre damage awards in *Charter* claims. In particular, the prospects for a higher award should increase the accessibility of claims for *Charter* damages, thereby making *Charter* rights more palpable and enforceable, and mitigating against the risk that *Charter* breaches go on unchecked.