

**“Charter” Damages
– What Future in Personal Injury
Litigation?
The Basics – So Far**

by

Eugene Meehan, Q.C.*

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*LL.B., LL.M., LL.B., D.C.L.
SUPREME ADVOCACY LLP
emeehan@supremeadvocacy.ca
www.supremeadvocacy.ca

Practising member of: Ontario, Alberta, N.W.T., Yukon, Nunavut, Arizona, &
Supreme Court of United States Bar, Saskatchewan (Hon.)

TABLE OF CONTENTS

1. S. 24(1); <i>Ward</i>	1
2. Methodology from <i>Ward</i>	1
3. Important Considerations that Flow from <i>Ward</i>	1
4. Post- <i>Ward Charter</i> Damages Awards.....	2
5. <i>Khadr</i> Settlement.....	3
6. Feasibility of Claiming <i>Charter</i> Damages while Concurrently Suing for Personal Injury.....	3
7. Including a <i>Charter</i> Damages Claim in a Personal Injury Lawsuit—A Recent Example.....	4

1. S. 24(1); *Ward*

S.24(1) of the *Charter*:

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

Vancouver (City) v. Ward (Ward) opened the door for damages to be viewed as an appropriate and just remedy for *Charter* breaches. The Court determined that Ward’s *Charter* rights were infringed when he was unnecessarily detained and strip-searched by police. The S.C.C. upheld the lower court’s decision to award \$5,000 in damages for the strip search, thereby setting the foundation for future cases. The \$5,000 *Charter* damages award for wrongful imprisonment was not appealed.

2. Methodology from *Ward*

1. Establish a *Charter* breach.
2. Determine if damages are appropriate and just. Would damages:
 - a. **Compensate** for personal loss;
 - b. **Vindicate** by maintaining the function of *Charter* rights; and/or
 - c. **Deter** future breaches by state actors?

Determining if damages serve a useful purpose is similar to assessing non-pecuniary damages in personal injury cases.¹

3. The state may establish that damages are inappropriate or unjust due to the availability of alternate remedies.
4. Assess the quantum of damages.²

3. Important Considerations that Flow from *Ward*

1. Jurisdiction

In order to grant remedies, the court must have the power to decide *Charter* questions and award damages; thus provincial criminal courts do not have jurisdiction;³

2. Quantum

\$5,000 was viewed as a moderate damages award;

- Although the circumstances were serious, Ward did not appear to suffer physical or psychological injury. “[I]t cannot be said to be at the high end of the spectrum.”⁴

¹ *Vancouver (City) v. Ward*, [2010] 2 SCR 28, 2010 SCC 27 at para. 24, see *Andrews v Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229.

² *Ibid* at para. 4.

³ *Ibid* at para. 58.

- The officers' actions were not determined to be "malicious, high-handed or oppressive."⁵

3. Test Case

Ward is a test case in *Charter* damages; more decisions will be needed before *Charter* damages awards can be contextualized;

- "[G]ranting damages under the *Charter* is a new endeavour, and an approach to when damages are appropriate and just should develop incrementally."⁶

4. Double Compensation

A claim in tort does not preclude a claim for *Charter* damages; however double compensation must not occur.⁷

4. Post-Ward *Charter* Damages Awards

1. [*Carr v. Ottawa Police Services Board, 2017 ONSC 4331*](#)

- Carr claimed she was unlawfully arrested, strip-searched, detained, and injured at the hands of the police. The indignity and humiliation of being locked in a cell naked for two hours warranted *Charter* damages. Deterrence of similar conduct was a main consideration of the court.⁸
- Awarded \$90,000 general damages, \$120,000 loss of earnings, \$37,226.84 incurred and future expenses, and \$7,500 in *Charter* damages (s.7). No punitive damages.
- Note: Although a goal of punitive damages is deterrence, *Charter* damages satisfactorily addressed the need for deterrence in this matter.⁹

2. [*Elmardy v Toronto Police Services Board, 2017 ONSC 2074*](#)

- Elmardy was unlawfully punched, searched, and unnecessarily detained by police. Breach of *Charter* rights, namely ss.7, 8, 9, 10, 12, and 15 were at issue.
- Awarded \$5,000 for battery, \$25,000 for punitives, and \$50,000 for *Charter* damages.
- The Court held that the conduct of the police was violent, high-handed and oppressive. Declaratory statements in the past intended to deter serious police misconduct had not been effective, thus *Charter* damages were needed.

3. [*Oqiamien v. Ontario 2016 ONSC 3080*](#)

⁴ *Ibid* at para. 71.

⁵ *Ibid* at para. 72.

⁶ *Ibid* at para. 21.

⁷ *Ibid* at para. 36.

⁸ *Carr v. Ottawa Police Services Board, 2017 ONSC 4331* at para. 246.

⁹ *Ibid* at para. 250.

- Ogamien was detained in a maximum-security facility pending a decision from immigration authorities. Nguyen was detained in the same facility awaiting trial. Due to understaffing, the facility routinely used restrictive measures to manage inmates. These measures were found to be in breach of *Charter* rights (s.12).
- Awarded *Charter* damages of \$60,000 to Ogamien and \$25,000 to Nguyen.
- Note: This decision was successfully appealed on the basis that the restrictive measures breached *Charter* rights (cruel and unusual punishment). The quantum of damages was not at issue.

4. [Henry v. British Columbia, 2016 BCSC 1038](#)

- Henry was imprisoned for almost 27 years after being convicted of 10 sexual offences. Henry alleged that relevant material that would have cast doubt on his guilt was never fully disclosed, depriving him of a fair trial. The court held Henry's s.7 and 11(d) *Charter* rights were breached.
- Awarded *Charter* damages of \$8,030,000 (the breakdown included \$530,000 compensatory and \$7,500,000 to serve both the vindication and deterrence functions) and special damages of \$56,691.80.

5. *Khadr* Settlement

Khadr's claims, inter alia, included breach of ss. 7, 8, 9, 10, 12, and 15. In its [2010 decision](#), the S.C.C. made a finding that Khadr's s. 7 rights had been infringed.¹⁰ The matter was settled for \$10,500,000 before a court could decide on *Charter* damages. The strength of Khadr's case and quantum of *Charter* damages continue to be strongly debated topics in the legal community.¹¹ The S.C.C.'s acknowledgment of the breach, the length of time detained since the breach, and the high-handed, oppressive, and malicious conduct of state actors suggested that this case would have been groundbreaking in assessing quantum in *Charter* damages cases.

6. Feasibility of Claiming *Charter* Damages while Concurrently Suing for Personal Injury

1. Double Compensation
 - Actions in tort and *Charter* damages can coexist, however double compensation must not arise (*Ward*);
2. Conduct
 - Malicious, high-handed, and oppressive conduct by state actors will warrant a higher quantum of *Charter* damages (*Elmardy*);
3. Deterrence
 - Deterrence is an overlapping consideration between punitive and *Charter* damages. Since punitive damages are often only awarded in extreme

¹⁰ *Canada (Prime Minister) v. Khadr*, [2010] 1 SCR 44, 2010 SCC 3.

¹¹ [CBC News Article](#)

matters, proving *Charter* damages may have a lower threshold, and thus easier to attain (*Carr*);

4. Time Period

- *Charter* breaches occurring over a long period of time suggest a much higher quantum of damages (*Henry*).

7. Including a *Charter* Damages Claim in a Personal Injury Lawsuit—A Recent Example

The personal injury case of [*Iser v. Canada \(Attorney General\), 2016 BCSC 985*](#) is a recent example of a personal injury claim that includes *Charter* damages.

The case is a “claim for damages brought by Ms. Jessica Iser who is the sister and guardian *ad litem* of Christopher Iser. Mr. Iser was assaulted when he was an inmate at Matsqui Institution (“Matsqui”) in August 2012. That assault was brutal, leaving him with a brain injury. His mother and his sister are committees and handle all of his affairs. The assault took place in a portion of the day yard that was not under security camera surveillance, and at a time when guards were apparently on a meal break.” (para. 2)

The plaintiff’s claim is for “general, aggravated, exemplary and special damages resulting from the Crown’s duties pursuant to the Occupiers Liability Act and/or s. 24(1) of the *Charter*. (para. 5)

And the legal basis asserted for “both the negligence and *Charter* damages include alleged failures in surveillance, monitoring, supervision, investigation and risk assessment relating to the placement of Mr. Iser at Matsqui and the institution’s knowledge of the gang affiliations of him and other inmates. The claim also alleges failure to provide adequate training and discipline with regard to staff, and failure to adequately respond to union complaints about working conditions brought under the *Canada Labour Code*.” (para. 6)

The matter had been set down for a five-week trial in late 2016, but the parties are still motioning each other (and appeals thereon) on various disclosure issues (mainly relating to confidential information privilege and public interest privilege.

Let me know if you’d like me to keep you up-to-date: emeehan@supremeadvocacy.ca

Eugene Meehan Q.C.