Damages for Unconstitutional Actions: A Rule in Search of a Rationale

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The courts have severely restricted the scope for damages as a remedy for constitutional violations. In this paper, we articulate the present obstacles to the realization of damages for unconstitutional conduct and attempt to show that the justifications are not persuasive. These critiques in turn provide the basis for several avoidance strategies whose implementation may serve to promote the goals of compensation for victims of constitutional violations, access to justice and compliance with the Constitution.

1. INTRODUCTION

The courts' tendency to limit damage claims for unconstitutional conduct is at odds with a purposive interpretation of the Constitution. Damage awards for unconstitutional conduct vindicate individual rights, provide just compensation to victims of unconstitutional action, deter future unconstitutional action and punish egregious transgressions. From this perspective, the persistent unwillingness, on the whole, to allow claims for damages for unconstitutional conduct in all but exceptional circumstances is a principle in search of justification.

This paper attempts to articulate and analyze the most significant obstacles to the realization of damages for unconstitutional conduct. These critiques in turn provide the basis for avoidance strategies that may lead to the greater recognition of damages for unconstitutional action.

2. THE IMPORTANCE OF DAMAGE AWARDS AS A REMEDY FOR CONSTITUTIONAL VIOLATIONS

The purpose of the *Charter* is to protect fundamental rights and freedoms by placing them beyond the purview of legislatures and officials acting with governmental authority. The *Charter* heralded a new era in which the protection of minority rights from infringement by the majority, either by legislation or governmental conduct, has been secured to a greater extent. The degree to which the promise of the *Charter* is realized is directly dependent upon the degree to which damages are a realistic remedy for constitutional violations. The importance of robust remedies is essential to the protection of *Charter* rights, for, as Chief Justice McLachlin (as she is now) remarked "[w]ithout effective remedies, the law becomes an empty symbol; full of sound and fury but signifying nothing."[1]

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1 Justice Beverley M. McLachlin (as she then was), "The *Charter*: A New Role for the Judiciary?" (1991), 29 Alta. L. Rev. (No. 3) 540 at 548 (paper delivered on October 16, 1990, for the Weir Memorial Lecture at the University of Alberta, Edmonton, Alberta).

Damages as a remedy for constitutional violations achieve a number of goals. First, they provide compensation to the victims and ensure that there is effective redress for the wrong that has been suffered. Second, damages achieve a notable deterrent effect. The award of damages for a past infringement of the *Charter* presumably deters future prospective infringers and encourages proactive compliance. This idea lies at the root of remedies law itself, which seeks to put aggrieved parties in the position they would have occupied but for the breach. Third, damages for constitutional violations can be viewed as a means through which infringers can be punished in the case of egregious violations. Fourth, the availability of damages promotes access to justice; any economic analysis of litigation dictates that the absence of personal benefit will deter the commencement of constitutional claims. Fifth, ineligibility for damages would seem to contradict accepted principles of standing, according to which the plaintiff gains party status because he or she is "directly affected" by a monetary interest, and conversely a public interest litigant only gains standing where there is no effective means for the dispute to come before the courts.[2] For all of these reasons, damages as a remedy for constitutional violations serve the public interest by encouraging the continued respect for, and compliance with, *Charter* values.

3. OVERVIEW OF THE FRAMEWORK FOR THE ANALYSIS OF CONSTITUTIONAL CLAIMS

It is apparent that courts have the power to award damages. Section 52(1) of the *Constitution Act 1982*[3] states that "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." By virtue of this section, the *Charter* and the *Constitution Act 1982* have been accorded primacy over all laws inconsistent with their provisions. Section 24(1) of the *Charter* provides that "[a]nyone 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." There is nothing in the language to suggest a constraint on the awarding of damages.

4. CURRENT STATE OF THE LAW WITH RESPECT TO CLAIMS FOR DAMAGES AS A REMEDY FOR CONSTITUTIONAL VIOLATIONS

Despite these provisions, the courts have severely restricted the scope of damages as a remedy for the violation of constitutional rights. This reluctance has its roots in the pre-*Charter* concepts of government immunity. The seminal cases of

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2 *Canadian Council of Churches v. CanadaR.*, [1992] 1 S.C.R. 236, 1992 CarswellNat 25, 1992 CarswellNat 650 (S.C.C.); *League for Human Rights of B'Nai Brith Canada v. CanadaR.*, 2008 FC 732, 2008 CarswellNat 2601 (F.C.); affirmed (2009), 2009 CarswellNat 632, 2009 CarswellNat 3955 at para. 24-25 (F.C.A.).

3 *Constitution Act 1982* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

Welbridge Holdings Ltd. v. Greater Winnipeg,[4] and *Central Canada Potash Co. v. Government of Saskatchewan*,[5] established that the invalid exercise of statutory authority, by itself, could not give rise to subsequent liability.[6]

However, with the advent of the *Charter*, the traditional preclusive bases of government immunity should have corroded. In fact, the foundations remain firm and continue to impede claims against government acting in good faith.[7] The courts have been extremely reluctant to allow for declarations of invalidity under s. 52 of the *Charter* together with damages as a remedy under s. 24(1) of the *Charter*. The seminal case, which continues to have force[8], is *Schachter v. Canada*[9] in which the Supreme Court noted that:

> An individual remedy under s. 24(1) of the *Charter* will rarely be available in conjunction with action under s. 52 of the *Constitution Act, 1982*. Ordinarily, where a provision is declared unconstitutional and immediately struck down pursuant to s. 52, that will be the end of the matter. No retroactive s. 24 remedy will be available.[10]

The Supreme Court subsequently affirmed this general rule in *Guimond v. Quebec (Attorney General)*,[11] a case which has been followed more recently.[12] A qualified immunity enhances the effectiveness of government; to rescind this immunity would deter government officials from exercising their functions fully[13] and such punishment would be undeserved in the absence of bad faith.[14]

Mackin v. New Brunswick (Minister of Justice)[15] introduced a significant level of uncertainty into the law, by suggesting that negligence would be a sufficient standard upon which liability could be established.[16] This basis of liability was

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4 *Welbridge Holdings Ltd. v. Greater Winnipeg (Municipality)* (1970), [1971] S.C.R. 957, 1970 CarswellMan 83, 1970 CarswellMan 33 (S.C.C.). [*Welbridge*].

5 *Central Canada Potash Co. v. Saskatchewan (Attorney General)* (1978), [1979] 1 S.C.R. 42, 1978 CarswellSask 132, 1978 CarswellSask 100 (S.C.C.). [*Central Canada Potash Co.*].

6 *Supra* note 4 at 968-969 [S.C.R.] and *supra* note 5.

7 *Nelles v. Ontario*, [1989] 2 S.C.R. 170, 1989 CarswellOnt 415, 1989 CarswellOnt 963 (S.C.C.).

8 *R. c. Demers*, [2004] S.C.J. No. 43, [2004] 2 S.C.R. 489, 2004 CarswellQue 1548, 2004 CarswellQue 1547 at para. 62 (S.C.C.).

9 *Schachter v. Canada*, [1992] 2 S.C.R. 679, 1992 CarswellNat 658, 1992 CarswellNat 1006 (S.C.C.). [*Schachter*].

10 *Ibid.* per Lamer C. J. at para. 92.

11 *Guimond c. Québec (Procureur général)*, [1996] 3 S.C.R. 347, 1996 CarswellQue 918, 1996 CarswellQue 919 at para. 19 (S.C.C.). [*Guimond*].

12 *Drolet-Caron c. Québec (Ville)* (2003), [2003] J.Q. No. 753, 2003 CarswellQue 727 at para. 56 (Que. S.C.).

13 *Supra* note 11, at para. 15.

14 *Supra* note 11, at para. 17

15 *Mackin v. New Brunswick (Minister of Justice)* (2002), 209 D.L.R. (4th) 564, 2002 CarswellNB 59, 2002 CarswellNB 60, [2002] 1 S.C.R. 405 at para. 82 (S.C.C.).

16 *Ibid.*

subsequently discarded,[17] while the damages reasoning in *Mackin* continues to be applied.[18] In *Mackin*, Justice Gonthier, for the majority, affirms the general rule that a claim for damages cannot succeed following a declaration of unconstitutionality.[19] Justice Gonthier states, affirming the decision in *Guimond*, that an action against the government is no longer restricted to damages based on civil liability, owing to the compensatory and punitive damages made possible by the "appropriate and just" remedy under s. 24(1) of the *Charter*.[20] However, he reiterates that the immunity once enjoyed by government is now more limited, but still exists to the extent that government officials that have acted in "good faith and without abusing their power under prevailing law and only subsequently are their acts found to be unconstitutional . . . will not be liable, but rather, "only in the event of conduct that is clearly wrong, in bad faith or an abuse of power [will] damages may be awarded."[21] The basis for this principle lies in the fact that, absent such a qualified or limited immunity "the effectiveness and efficiency of government action would be excessively constrained."[22] However, Justice Gonthier goes on to suggest that simple negligence would be sufficient to establish a claim for constitutional damages.[23]

Further support for the above principles can be found in the case of *Wynberg v. Ontario*,[24] which has itself been applied subsequently.[25] Although no constitutional infringement was found in that case, the Court of Appeal addressed this question *in obiter*. The court affirmed the general principle as stated in *Schachter* and *Mackin*. The court noted that there are two types of constitutional remedies, under s. 52 and s. 24 respectively, and the arguments that are marshaled against

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17 See *Ferri v. Root* (2007), 279 D.L.R. (4th) 643, 2007 CarswellOnt 563 (Ont. C.A.); leave to appeal refused (2007), [2007] S.C.C.A. No. 175, 2007 CarswellOnt 5619, 2007 CarswellOnt 5620 (S.C.C.) [*Ferri*] and *Hawley v. Bapoo* (2007), 2007 CarswellOnt 4355, [2007] O.J. No. 2695 (Ont. C.A.) [*Hawley*].

18 *Trociuk v. British Columbia* (2008), [2008] B.C.J. No. 2355, 2008 CarswellBC 2606 at para. 28 (B.C. S.C.); *Jose Pereira E Hijos S.A. v. Canada (Attorney General)* (2007), [2007] F.C.J. No. 30, 2007 CarswellNat 47, 2007 CarswellNat 818 (F.C.A.); leave to appeal refused (2007), 2007 CarswellNat 1884, 2007 CarswellNat 1885 at para. 34 (S.C.C.).

19 *Supra* note 15, at para. 81.

20 *Supra* note 15, at para. 79.

21 *Ibid.*

22 *Ibid.*

23 *Supra* note 15, at para. 82.

24 *Wynberg v. Ontario* (2006), [2006] O.J. No. 2732, 2006 CarswellOnt 4096 (Ont. C.A.); leave to appeal refused (2007), 2007 CarswellOnt 2149, 2007 CarswellOnt 2148 (S.C.C.) [*Wynberg*].

25 *Mendoza (Guardian ad litem of) v. Community Living British Columbia* (2009), [2009] B.C.J. No. 1370, 2009 CarswellBC 1806 at para. 57 (B.C. S.C.); *Sagharian (Guardian ad litem of) v. Ontario (Minister of Education)* (2007), [2007] O.J. No. 876, 2007 CarswellOnt 1432 (Ont. S.C.J.); reversed (2008), 2008 CarswellOnt 2888 (Ont. C.A.); leave to appeal refused (2008), 2008 CarswellOnt 7199, 2008 CarswellOnt 7200 at para. 22 (S.C.C.).

damages as a remedy for unconstitutional action under s. 52 also apply to s. 24.[26] The court noted in particular that to render the government liable for damages "creates the risk of interfering with effective governance by deterring governments from creating new policies and programs"[27] and exposes the Crown to significant awards.[28] Consequently, the court affirmed the general rule that "[a]bsent bad faith, abuse of power, negligence or wilful blindness in respect of its constitutional obligations, damages are not available in conjunction with a declaration of unconstitutionality."[29]

In *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*[30] this general rule was extended by the Supreme Court to statutory human rights violations under the Quebec Charter of Human Rights and Freedoms.[31] This case stands for the proposition that a City could not be held liable for damages owing to the exercise of its legislative and regulatory powers[32] unless the conduct in question was clearly wrong, bad faith or abuse of power.[33] Surprisingly, this was due in part to the "unwritten principles inherent in the democratic and parliamentary form of Canadian government and its origins, principles which govern the exercise of an independent legislative power."[34]

Subsequently, in *Hislop v. Canada (Attorney General)*[35] the majority of the court discussed at length the reasons underlying the inability to award compensatory damages as a remedy for underinclusive legislation. The majority struggled with the fact that the award in question was retroactive in nature.[36] They entered into a lengthy analysis of whether judges create law or discover it[37] and found that where there has been a substantial change in the law, this is a necessary, albeit insufficient basis upon which to only award prospective, rather than retroactive relief.[38] In addition, there must be a factor such as bad faith to warrant retroactive

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26 *Supra* note 24, at para. 194.

27 *Supra* note 24, at para. 196.

28 *Supra* note 24, at para. 197.

29 *Supra* note 24, at para. 202.

30 *Québec (Commission des droits de la personne & des droits de la jeunesse) c. Montréal (Communauté urbaine)*, [2004] 1 S.C.R. 789, 2004 CarswellQue 1109, 2004 CarswellQue 1110 (S.C.C.) [*City of Montreal*].

31 *Supra* note 30, at para. 1.

32 *Supra* note 30, at para. 19.

33 However in *Bolster v. British Columbia (Ministry of Public Safety & Solicitor General)* (2007), [2007] B.C.J. No. 192, 2007 CarswellBC 196 (B.C. C.A.); leave to appeal refused (2007), 2007 CarswellBC 2325, 2007 CarswellBC 2324 (S.C.C.) the court found that the *Human Rights Code* precluded reliance on the traditional Crown immunity rule. (at para. 76). [*Bolster*].

34 *Supra* note 30, at para. 16.

35 *Hislop v. Canada (Attorney General)*, [2007] 1 S.C.R. 429, 2007 CarswellOnt 1050, 2007 CarswellOnt 1049 (S.C.C.) [*Hislop*].

36 *Ibid.* per LeBel J and Rothstein J. at para. 84.

37 *Ibid.* per LeBel J and Rothstein J. at paras. 84–99.

38 *Ibid.* per LeBel J and Rothstein J. at paras. 95, 99, 103.

relief, as to hold otherwise exposes governments and their officials to liability for action that they did not know was unconstitutional, and based on their reasonable, and good faith reliance on the constitutionality of the law at the time.[39]

The court did concede that retroactive remedies were awarded in *Kingstreet Investments Ltd. v. New Brunswick (Department of Finance)*.[40] However this case was distinguished because it concerned the reimbursement of unconstitutional taxes, rather than the extension of underinclusive benefits. Consequently, the majority concluded that

> [i]mposing that sort of liability on the government, absent bad faith, unreasonable reliance or conduct that is clearly wrong would undermine the important balance between the protection of constitutional rights and the need for effective government that is struck by the general rule of qualified immunity. A retroactive remedy in the instant case would encroach unduly on the inherently legislative domain of the distribution of government resources and of policy making in respect of this process.[41]

Prior to the Ontario Court of Appeal's 2007 decision in *Ferri*, there was inconsistent reliance on the requirement for bad faith, malice, gross negligence or wilful disregard for an individual's rights. Some cases had required proof of bad faith or malice as a prerequisite for a *Charter* claim;[42] other cases required proof of bad faith.[43] Conversely, some cases required that good faith be shown,[44] others merely that good faith be a factor to be weighed among others,[45] even some cases in fact rejected the necessity to find *mala fides*.[46]

However, *Ferri* is the authority for the proposition that "[l]iability for a constitutional tort, such as under s. 6 and 7 of the *Charter* . . . requires wilfulness or *mala fides* in the creation of a risk or course of conduct that leads to damages. Proof of simple negligence is not sufficient for an award of damages in an action under the *Charter*."[47]

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39 *Ibid.* per LeBel J and Rothstein J. at paras 100-101, 113, 115.

40 *Kingstreet Investments Ltd. v. New Brunswick (Department of Finance)*, [2007] 1 S.C.R. 3, 2007 CarswellNB 7, 2007 CarswellNB 6 (S.C.C.) at para. 25 [*Kingstreet*].

41 *Supra* note 35, per LeBel J and Rothstein J. at para. 117.

42 See for e.g. *Scorpio Rising Software Inc. v. Saskatchewan (Attorney General)* (1986), [1986] S.J. No. 295, 1986 CarswellSask 359 (Sask. Q.B.); *McGillivary v. New Brusnwick* (1994), [1994] N.B.J. No. 265, 1994 CarswellNB 343 (N.B. C.A.); leave to appeal refused (1995), 421 A.P.R. 317 (note) at para. 9 (S.C.C.).

43 See for e.g. *supra* note 15.

44 See for e.g. *Stenner v. British Columbia (Securities Commission)* (1993), [1993] B.C.J. No. 2359, 1993 CarswellBC 1209 (B.C. S.C.); affirmed (1996), 1996 CarswellBC 2032 (B.C. C.A.); leave to appeal refused (1997), 219 N.R. 160 (note) (S.C.C.).

45 See for e.g. *Chrispen v. Kalinowski* (1997), [1997] S.J. No. 360, 1997 CarswellSask 274 (Sask. Q.B.).

46 *Lord v. Allison* (1986), [1986] B.C.J. No. 3205, 1986 CarswellBC 141 (B.C. S.C.).

47 *Ferri v. Ontario (Attorney General)Root* (2007), 279 D.L.R. (4th) 643, 2007 CarswellOnt 563 (Ont. C.A.); leave to appeal refused (2007), [2007] S.C.C.A. No. 175, 2007 CarswellOnt 5619, 2007 CarswellOnt 5620 at para. 108 (S.C.C.); *Hawley v. Bapoo* (2007), [2007] O.J. No. 2695, 2007 CarswellOnt 4355 at para. 10 (Ont. C.A.); *Québec*

Consequently, *Ferri* and *Hawley*[48] resolved the significant ambiguity that had been introduced by some of the prior decisions on whether negligence is a sufficient standard for a constitutional breach. *Hawley* affirmed the reasoning in *Ferri*,[49] and lower courts have followed suit.[50]

5. CASE LAW WHERE COURTS HAVE AWARDED DAMAGES FOR UNCONSTITUTIONAL CONDUCT

The dominant rationales described above are surprising. On its face, the broad language used in section 24 of the *Charter* clearly envisions that an appropriate and just remedy can include damages.[51] In fact, Justice McIntyre commented that it was "difficult to imagine language which could give the court a wider and less fettered discretion" than that found in section 24(1) and that "it is not for appellate courts to pre-empt or cut down this wide discretion."[52] To similar effect, Justice L'Heureux-Dubé noted that "[i]t is important to recognize that the *Charter* has now put into judges' hands a scalpel instead of an axe: a tool that may fashion, more carefully than ever, solutions taking into account the sometimes complementary and sometimes opposing concerns of fairness to the individual, societal interests, and the integrity of the justice system."[53]

(Commission des droits de la personne et & des droits de la jeunesse) v. c. Montréal (Communauté urbaine de Montréal), [2004] 1 S.C.R. 789, 2004 CarswellQue 1109, 2004 CarswellQue 1110 at para. 19 (S.C.C.).

48 *Hawley v. Bapoo* (2007), [2007] O.J. No. 2695, 2007 CarswellOnt 4355 (Ont. C.A.).

49 *Ibid.* at para. 10.

50 *Charlton v. St. Thomas Police Services Board* (2009), [2009] O.J. No. 2132, 2009 CarswellOnt 2914 at para. 57 (Ont. S.C.J.); *Roach v. Canada (Attorney General)*, [2009] O.J. No. 737, 2009 CarswellOnt 922 (Ont. S.C.J.); affirmed (2009), 2009 CarswellOnt 8324 at para. 49 (Ont. Div. Ct.); *Alexis v. Darnley* (2009), [2009] O.J. No. 376, 2009 CarswellOnt 476 (Ont. S.C.J.); additional reasons at (2009), 2009 CarswellOnt 2803 (Ont. S.C.J.); affirmed (2009), 2009 CarswellOnt 7518 at para. 55 (Ont. C.A.); *Wong v. Ontario* (2009), [2009] O.J. No. 1916, 2009 CarswellOnt 2570 (Ont. S.C.J.); affirmed (2009), 2009 CarswellOnt 7847 at para. 10 (Ont. C.A.); *Whatcott v. Schluff* (2009), [2009] S.J. No. 69, 2009 CarswellSask 65 at para. 53 (Sask. Q.B.); *Solomonvici v. Toronto Police Services Board* (2008), [2008] O.J. No. 4719, 2008 CarswellOnt 9350 at para. 19 (Ont. S.C.J.).

51 *R. v. Mills*, [1986] 1 S.C.R. 863, 1986 CarswellOnt 116, 1986 CarswellOnt 1716 (S.C.C.) at 883, 886, 948 [S.C.R.] per Lamer J. and at 971 per La Forest J.

52 *Ibid.* at 965 [S.C.R.].

53 *R. v. O'Connor*, [1995] 4 S.C.R. 411, 1995 CarswellBC 1151, 1995 CarswellBC 1098 at para. 69 (S.C.C.).

On occasion, therefore, the courts have indeed seen fit to award damages for unconstitutional action.[54] Recently, in *Dulude v. Canada*,[55] moral damages were awarded for the use of excessive force by the police[56] despite the lack of proof of damages and the absence of intentional or malicious acts.[57] Further, in *Lahaie v. Canada (Attorney General)*,[58] damages were awarded on the basis that the police obtained search warrants of the plaintiff's business by misrepresenting the law to the justice of the peace and caused significant damages to the plaintiff as the business went bankrupt.[59]

In general, the courts have been less restrictive in awarding damages for unconstitutional action by government officials. The law is more limiting with respect to awarding damages as a remedy for unconstitutional legislation. Nevertheless, in *Kingstreet*[60] *ultra vires* taxes were returned to the taxpayer,[61] concerns regarding fiscal inefficiency were best left to Parliament, and concerns with respect to governmental immunity were discarded.[62] In *Miron v. Trudel*,[63] a finding of inequality based on marital status in vehicle insurance legislation led to a retroactive remedy.

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54 In *R. v. Crossman*, [1984] 1 F.C. 681, 1984 CarswellNat 623, 1984 CarswellNat 178 (Fed. T.D.) damages were awarded for an infringement of an accused's right to retain counsel; in *Lord v. Allison* (1986), 1986 CarswellBC 141, [1986] B.C.J. No. 3205 (B.C. S.C.) damages, including punitive or exemplary and special damages were awarded for the failing to allow the then-accused to retain and instruct counsel and for subjecting the then-accused to cruel or unusual punishment or treatment; in *Bertram S. Miller Ltd. v. R.* (1985), 18 D.L.R. (4th) 600, 1985 CarswellNat 21F, 1985 CarswellNat 21 (Fed. T.D.); reversed (1986), 1986 CarswellNat 15, 1986 CarswellNat 691 (Fed. C.A.); leave to appeal refused (1986), 75 N.R. 158 (note) (S.C.C.), damages were awarded for the inappropriate relocation of a prisoner; in *Montminy c. Brossard (Ville)*, [1991] R.R.A. 299 (Que. S.C.) damages were awarded for unlawful arrest, illegal entry and unjustified use of force, although no punitive damages were awarded owing to the absence of bad faith on the part of the officers. However, in *Leroux c. Montréal (Communauté urbaine)*, [1997] R.J.Q. 1970, 1997 CarswellQue 728 (Que. S.C.) damages were awarded for unlawful arrest, detention and moral damage in addition to exemplary damages despite the fact that the infringement was accidental.

55 *Dulude v. Canada* (2000), [2000] F.C.J. No. 1454, 2000 CarswellNat 2772, 2000 CarswellNat 2169 (Fed. C.A.).

56 *Ibid.* at para. 30.

57 *Ibid.* at para. 18.

58 *Lahaie v. Canada (Attorney General)* (2008), [2008] O.J. No. 5276, 2008 CarswellOnt 7880 (Ont. S.C.J.).

59 *Ibid.* at para. 265.

60 *Supra* note 40.

61 *Supra* note 40, at para. 62.

62 *Supra* note 40, at para. 29-30.

63 *Miron v. Trudel* (1995), [1995] 2 S.C.R. 418, 1995 CarswellOnt 526, 1995 CarswellOnt 93 (S.C.C.).

6. CRITICAL EVALUATION OF THE JURISPRUDENTIAL OBSTACLES TO AWARDING DAMAGES

In my view, the severe constraint on the scope for damage awards for unconstitutional conduct is the result of a series of unnecessary obstacles.

(a) Equitable Remedies are more Appropriate

One justification against awarding damages as a remedy for constitutional infringements is that actions for damages are time-consuming, wasteful and painful for parties and courts, while a very high damage award will be necessary before the government will feel that there is a sufficient incentive for it to change its practices. This shortcoming could be more swiftly and beneficially redressed through the use of injunctive relief as opposed to damages.[64]

The advantages of this alternative are illusory. Damage awards are consistent with a view of the *Charter* that prizes parliamentary sovereignty. The manner in which the legislature seeks to correct its unconstitutional act or conduct is left to the legislature, whereas the same cannot be said for injunctive relief. Further, the power of injunctive relief is overestimated as compared to the deterrent effect of monetary damages. Damages provide an incentive for governments and their officers to be pro-active in seeking compliance. Conversely, injunctive relief offers no such incentive, as it only operates only prospectively.[65] This gives rise to perverse consequences. Little or no deterrent effect may result from the threat of an injunction, since the best case scenario for government is no remedy at all, while its worst case scenario is a restraint on its actions. Either way, the government may be better off acting without constitutional constraint.

In addition, awarding damages provides an incentive for persons to seek damages. This allows for constitutional claims to be made when they otherwise might not.[66] This enhances constitutional adherence by government and access to justice for the public. Those aggrieved by unconstitutional action may, through the issuance of damage awards, be able to pursue constitutional litigation when such litigation would otherwise be unavailable to them.

Of great concern is the fact that equitable relief is of no assistance in situations where there can be no equitable relief. This tautological statement points to a disturbing truth: if equitable relief is relied upon to the exclusion of monetary damages, there will be no relief for those who are not still suffering from unconstitutional action — even if at one point they did. For instance, where there is no likelihood that the unconstitutional act will be repeated against the claimant — where, for instance, an illegal search was carried out without charges being laid — equitable relief is of no assistance.[67]

Equitable relief is also too blunt an instrument to provide effective relief without jeopardizing other interests. In many cases, particularly in the criminal context,

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64 Christina Whitman, "Constitutional Torts" (1980), 79 Mich. L. Rev. 5 at 50.

65 Marilyn L. Pilkington, "Damages as a remedy for infringement of the Canadian *Charter* of Rights and Freedoms" 62 Can. Bar. Rev. 517 at 540.

66 *Ibid.* at 574.

67 *Ibid.* at 540.

judges are unwilling, or at least reluctant to grant equitable relief, such as the exclusion of evidence pursuant to s. 24(2) where doing so would risk raising the ire of public consciousness by seeming to bring the administration of justice into disrepute.[68] In *R. v. Germain*, Justice McDonald noted that an award of damages was preferable to a stay in a situation where a stay would be met with revulsion in the community.[69]

Monetary damages and injunctive relief need not be mutually exclusive; they can logically complement one another. Yet the failure to issue a damage remedy leaves the victim of an unconstitutional action with no compensation, in the face of the language of s.24(1) calling out for such redress.

(b) Damages Allow the Government to "Buy Their Way Out" of Constitutional Compliance

The exclusive award of damages for unconstitutional action could theoretically result in the perverse consequence of governments being able to buy their way out of constitutional compliance.[70]

One of the more extreme illustrations of this danger lies in the context of voting rights: It is obviously not appropriate for the only remedy in the context of a denial of an individual's voting rights to be an award of damages, since the government could disenfranchise certain groups simply by paying damages, and literally buy itself power.

However, all of this assumes that the damage award granted is at such a level that it would not be a sufficient deterrent in itself. Further, as has previously been stated, there is no reason why damages must be the exclusive form of relief; other redress may be necessary supplements, but without damages there is no compensation for the individual.

(c) Causation

There is some debate as to whether or not there can be damages for constitutional infringement *per se*, without proof of further loss. For instance, in *Vespoli v. Canada*[71] no damages were awarded despite a finding that there had been a violation of the applicant's constitutional rights, as there was purportedly no loss suffered by the applicant.[72] The traditional approach has been to incorporate tort law principles of causation, including the "but for" test into the analysis of remedies under the *Charter*. In *R. v. Mills*, the court interpreted the absence of prescription contained in s. 24(1) as indicative of a deference to existing principles of interpretation with respect to the awarding of damages on the basis that the *Charter* "was not intended to turn the Canadian legal system upside down."[73] Some have encouraged

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68 See for e.g: *R. v. Grant*, 2009 SCC 32, 2009 CarswellOnt 4105, 2009 CarswellOnt 4104, [2009] 2 S.C.R. 353 (S.C.C.).

69 *R. v. Germain* (1984), 53 A.R. 264, 1984 CarswellAlta 475 at para. 20-21 (Alta. Q.B.).

70 *Supra* note 65.

71 *Vespoli v. Canada* (1984), [1984] F.C.J. No. 709, 1984 CarswellNat 252 (Fed. C.A.).

72 *Ibid.*

73 *Supra* note 52, at 952-953.

the importation of tort law principles out of fear for the alternative. It has been said that "an overly specialized enquiry, so essential as a component of the whole, may be short-sighted and potentially damaging if it does not properly consider in some degree the entirety of its context."[74] In *Schachter*, both the majority and the dissent found that, according to the classic theory of damages, such damages should be equivalent to whatever is required to return the plaintiff to the *status quo ante*.[75] As the court was unable to determine whether the plaintiff would have benefitted from a non-discriminatory scheme (as an equal, yet ungenerous regime would have been constitutional) the court could not award damages.[76]

It goes without saying that tort law and constitutional law serve different purposes;[77] to subject constitutional claims to the common law tort analysis loses sight of the central purpose underlying the existence of constitutional remedies. As noted in the United States, "[t]he common law tort model has the courts find value in the sometimes insignificant collateral consequences of the violation of the constitutional rights but ignores the primary value of the right itself."[78] Further, owing to the rule against double recovery, it tends to render the existence of constitutional torts redundant.

The vindication of constitutional rights is too important an objective to be subject to the rigours of a tort-based analysis *after* a violation has already been shown and that violation is not saved under section 1. Subjecting constitutional claims to this supplementary tort-based analysis adds additional hurdles and is excessively onerous, barring many claims for recovery. In dissent Justice La Forest noted in *Schachter* that were the court to enter into the business of effectively designing legislative schemes it would "distract the courts from their fundamental duty under the *Charter* to protect the rights guaranteed to the individual"[79]. However, quite the opposite appears to be more true, in that, restrictive approaches to awarding damages as a remedy fail to sufficiently provide for individuals' rights.

(d) Overburdening the Court System

Concerns are expressed that allowing for claims for constitutional damages would open the "floodgates" to limitless litigation as practically every governmental decision would be subject to attack while there would be increased incentive to pursue such attacks in light of the prospect for damages to be awarded.[80]

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74 Ken Cooper-Stephenson, "Tort Theory for the *Charter* Damages Remedy" 52 Sask. L. Rev. 1 1988 at 6.

75 *Supra* note 9, per Lamer C. J. at para. 105.

76 *Supra* note 9, per Lamer C. J. at para. 106. See also: *supra* note 24, at para. 198 and 201.

77 Kent Roach, *Constitutional Remedies in Canada* (Toronto: Canada Law Book, 1994) at 11.48.

78 The authors of Note, Damage Awards for Cosntitutional Torts: A Reconsideration After *Carey v. Piphus* (1980), 93 Harv. L. Rev. 966 at 980.

79 *Supra* note 9, per La Forest J. at para. 110.

80 See for instance, *Milgaard v. Kujawa* (1994), 1994 CarswellSask 243, 118 D.L.R. (4th) 653 (Sask. C.A.); leave to appeal refused (1994), 101 W.A.C. 320 (note) (S.C.C.). See also: *Nelles v. Ontario*, [1989] 2 S.C.R. 170, 1989 CarswellOnt 963, 1989 CarswellOnt

However, this expression of alarm does not withstand any reasoned scrutiny. If an individual were to protest against the assistance of an elderly person across the street on the basis that other elderly persons would also seek assistance, we would be incredulous. It seems absurd to argue against assistance to elderly people on the basis that we are presently unable to afford it to all of them. The issue is not the merits of the claim, but rather the ability of the court to manage such claims. Yet if the claim is meritorious, it should be heard, and if it is not meritorious, mechanisms should be in place to dispense with it expeditiously. As has been noted in the United States "when we automatically close the courthouse door solely on this basis [i.e. budgetary inadequacies], we implicitly express a value judgment on the comparative importance of classes of legally protected interests. And current limitations upon the effective functioning of the courts arising from budgetary inadequacies should not be permitted to stand in the way of the recognition of otherwise sound constitutional principles."[81]

(e) Expense

If the government were liable for damage awards for unconstitutional action *generally*, it is conceivable that this would be a very expensive obligation. In *Gosselin v. Quebec (Attorney General)*, Justice L'Heureux-Dubé felt that an award of damages would be inappropriate in part due to the fact that such an award, in that case estimated at $500 million, would have a significant impact on the government's financial situation, and potentially, a significant impact on the economy of Quebec as a whole.[82] Similarly, the courts in *Wynberg* and *Hislop* balked at the "potentially vast scale of liability" that exposure to damages as a constitutional remedy would entail, as this would hamper the effectiveness of government.[83] An award of damages may also be inappropriate for a different reason. As Christina Whitman has written "[f]inancial burdens may seem a poor justification for the deprivation of constitutional rights. But, when funds are limited, it may make more sense to require that any available money be used directly to improve the conditions that caused the problems and promise to give rise to future wrongs, rather than to repay a particular victim who has had the resources and staying power to bring and win a lawsuit."[84] Diverting money to prior victims when that money could be used to correct existing problems is not necessarily prudent.[85] In *Schachter*, the majority of the Supreme Court noted that were the court to extend a benefit currently unavailable to a certain group "the ensuing financial shake-up

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415 (S.C.C.) in which the court considered whether reducing the absolute immunity rule for Crown prosecutors would result in a flood of litigation and dismissed the concern on the basis that there are built in preventative traps to the tort of malicious prosecution.

81 *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) per Harlan J, concurring at 411.

82 *Gosselin c. Québec (Procureur général)*, [2002] 4 S.C.R. 429, 2002 CarswellQue 2706, 2002 CarswellQue 2707 at para. 297 (S.C.C.).

83 *Supra* note 24, at para. 197; and *supra* note 35, at para. 117.

84 Christina Whitman, "Constitutional Torts" (1980), 79 Mich. L. Rev. 5 at 50.

85 *Supra* note 65, at 562.

could mean that other benefits to other disadvantaged groups would have to be done away with to pay for the extension."[86] To similar effect, the court in *Wynberg* noted that certain programs may have to be cut in order to provide benefits to those awarded damages.[87]

It is possible that critics of damages for unconstitutional conduct overestimate the scope of the expense entailed. Conversely, the critics may underestimate the necessary expenditures, in which case the rampant pervasiveness of constitutional infringements provides all the more reason for the use of *Charter* damages to deter such conduct. Either way, it is not clear why an order to pay damages for unconstitutional conduct would necessarily divert money from present sufferers to past victims of unconstitutional conduct. If such a diversion does occur it reflects the explicit choice of the government at hand (and may give rise to further liability for so doing).

More fundamentally, leaving aside the fact that governments are not impecunious, impecuniousity is not a defence for companies or individuals, nor should it be for governments.[88] As Justice Wilson rhetorically queried in *Air Canada v. British Columbia*;[89] "Why should the individual taxpayer, as opposed to taxpayers as a whole, bear the burden of government's mistake? I would respectfully suggest that it is grossly unfair that X, who may not be (as in this case) a large corporate enterprise, should absorb the cost of government's unconstitutional act."[90] As between an innocent party subjected to a constitutional violation and the body politic as a whole, responsible for electing the government guilty of the transgression, the loss should not fall upon the innocent party. The nature of democracy is to share in its benefits and its burdens, and there is no principled reason to make a distinction in the constitutional sphere.

(f) Intrusion on the Legislature's Policy-making Role

It is true that a court's determination that an individual is entitled to damages from the government has budgetary ramifications which necessarily disrupt the allocation of resources as between individuals (namely, from expenditure to redress). As was noted by the majority in *Schachter*, "[a] remedy which entails an intrusion into this sphere [budgetary policy] so substantial as to change the nature of the legislative scheme in question is clearly inappropriate."[91] Consequently, where the budgetary implications of a court's decision are very significant, judicial interven-

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86 *Supra* note 9, per Lamer C. J. at para. 99.

87 *Supra* note 24, at para. 200.

88 Wilson J. dissenting in *McKinney v. University of Guelph*, 1990 CarswellOnt 1019, 1990 CarswellOnt 1019F, [1990] 3 S.C.R. 229 (S.C.C.).

89 *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161, 1989 CarswellBC 706, 1989 CarswellBC 67 (S.C.C.).

90 *Ibid.* per Wilson J in dissent at para. 93.

91 *Supra* note 9, per Lamer C.J. at para. 64

tion has been considered to be inappropriate[92] as it would thrust the court into a policy-making role and usurp the sovereignty of the legislature over such matters.[93]

A related concern is that the awarding of damages as a remedy under s. 24(1) of the *Charter* may not have been truly contemplated at the time that the *Charter* was drafted, and yet, damage awards under the *Charter* are now at the complete discretion of the judiciary. While the citizenry is able to vote out those politicians who make laws that they do not like, the check on judicial excess with respect to constitutional damage awards is non-existent. There is no room for a "*Charter* dialogue"[94] with respect to damage awards, for even the notwithstanding clause only applies to rights and not to remedies.

The humility of the courts in their resistance to intruding on legislative autonomy is to be commended, although it is less commendable that, in doing so, they have abdicated their responsibility. For the court is constitutionally *required* to determine what remedy would be "appropriate and just" in the circumstances, and as such, to the extent that the exercise of this power places the court in what is tantamount to a "policy-making" role, that role is constitutionally endowed. It should be noted, of course, that the Constitution could always be changed such that the *Charter* dialogue could continue. Yet insofar as it remains in its present state it must be respected as having the authority that it does, namely, constitutional authority.

(g) Traditional Government Immunity

Underlying this "umbrella" objection are concerns with respect to overriding the traditional common law governmental immunity with respect to policy rather than operational decisions, and the danger of over-deterring government and impeding its effective operation. All of these concerns have generally led to the requirement of bad faith by government before a constitutional violation can lead to a damage award.

With respect to the "Policy vs. Operational" distinction, under the common law, governments and their officials making policy decisions are not liable for the consequences of these decisions owing to the notion that to do so would be unfair. They are acting in the best interests of the public, and inevitably their decisions will enure to the benefit of some and the detriment of others. That is the very essence of policy choices in the context of scarce resources.[95] However, once a policy choice has been made, the implementation of that choice can give rise to a claim in damages insofar as the government or an official exercising governmental authority fails to adhere to the appropriate standard of care.

This is a common law principle that is not authoritative in the constitutional context of s. 24 of the *Charter*.[96] The government, and its officials, are constitutionally prohibited from enacting laws or acting in a manner inconsistent with the

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92 *Supra* note 35, per LeBel J and Rothstein J. at para. 117.

93 See generally; Stephen Holmes & Cass R. Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (New York: W.W. Norton and Company, 1999).

94 See generally: Peter Hogg and Allison Bushell. "The *Charter* Dialogue Between Courts and Legislatures" (1997), 35 Osgoode Hall L.J. 75.

95 See for e.g.: *supra* note 4 and *supra* note 5.

96 Kent Roach, *Constitutional Remedies in Canada* (Toronto: Canada Law Book, 1994).

Charter, regardless of any pre-*Charter* principles of common law. More fundamentally, the very basis for the *Charter* is to afford protection for the minority from acts or omissions by the majority.

With respect to the traditional common law qualified immunity principle, underlying this principle is a policy concern of overriding importance, namely the effectiveness of government. While rights should be protected, were the courts to assume a supervisory role over policy choices, this level of "micro-managing" could impede the effectiveness of government to an unworkable extent: Government officials might be unwilling to act lest their acts be found to be in violation of the *Charter*. As such, there may be a "chilling effect" for government officials in the course of exercising their duties.[97] This was recognized as a legitimate fear, for instance, in *Guimond, Mackin* and *Wynberg*.[98]

To the extent that "over-deterrence" is a legitimate concern, Crown immunity is misguided because the problem of "over-deterrence" can be solved in other ways. If there is a risk of over-deterrence of government action, it would be surprising if no deterrence is the superior solution. Most importantly, it is very difficult to see how a government promulgating unconstitutional laws can be said to be effective, so to the extent that awarding damages for unconstitutional action prevents that form of "effectiveness" that is a good thing.

Further, from a corrective justice and democratic accountability perspective, the government or official who infringed rights is left completely unaccountable except through the diluted and indirect mechanism of elections, absent the awarding of damages for unconstitutional action. Finally, from a compensatory perspective, qualified immunity is manifestly unfair to the victim of the constitutional violation who is denied compensation and redress contrary to the seemingly explicit language of s. 24(1).

All of these concerns have generally led to the requirement that bad faith be exhibited by government before constitutional violation can lead to a damage award. Yet doing so flies in the face of the goal of compensation for victims of unconstitutional action. Good faith action should not function as a complete bar to recovery as that hardly seems to be an appropriate nor just system. Conversely, an appropriate and just remedy would allow for behaviour modification and deterrence.

As previously stated, the Crown immunity rule's rationale is not clear in the context of constitutional litigation. It is far from obvious why an effectively higher standard of proof should be imposed on individuals in order for them to be able to assert their rights. This mental requirement is inconsistent with the purpose of the *Charter*. It is inconsistent with the generous interpretation that it is usually accorded to the Constitution and it fails to adhere to the stipulation in *Big M* that the

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97 *Stenner v. British Columbia (Securities Commission)*, [1993] B.C.J. No. 2359, 23 Admin. L.R. (2d) 247, 1993 CarswellBC 1209 (B.C. S.C.); affirmed (1996), 1996 CarswellBC 2032 (B.C. C.A.); leave to appeal refused (1997), 219 N.R. 160 (note) at para. 85 (S.C.C.).

98 See for e.g.: *supra* note 11, at para. 15; *supra* note 15, at para. 79; *supra* note 24, at para. 196.

Charter should be given a generous rather than legalistic interpretation, aimed at fulfilling its purposes.[99]

(h) Impossibility of Declaratory Relief under s. 52 Combined with Damages

In *Guimond* the Supreme Court noted that the bad faith requirement informs the view that declaratory relief under s. 52 of the Constitution cannot be combined with damages under s. 24.[100] Absent bad faith, an individual operating under a constitutional law at the time of acting should not be held liable for his act if it was only subsequently determined to be unconstitutional. In *Schachter v. Canada*, the majority noted that "[a]n individual remedy under s. 24(1) of the *Charter* will rarely be available in conjunction with an action under s. 52 of the *Constitution Act, 1982*. Ordinarily where a provision is declared unconstitutional and immediately struck down pursuant to s. 52, that will be the end of the matter. No *retroactive* s. 24 remedy will be available. It follows that where the declaration of invalidity is temporarily suspended, a s. 24 remedy will not often be available either."[101] [emphasis added] As previously noted, this general principle has been repeatedly confirmed in subsequent jurisprudence.[102]

In fact, in *Lucas v. Toronto Police Services Board*,[103] the court held that the government of Canada is not strictly liable nor negligent for failing to repeal s. 159 of the *Criminal Code* that had already been declared constitutionally invalid by the Court of Appeal in *R. v. M. (C.)*.[104] The court found that there was no private law duty on the government, but rather a public duty to all citizens and that to hold otherwise would restrictively fetter the government.[105] Finally, as previously noted, in *Hislop*, where the law has substantially changed it is inappropriate to award retroactive relief.[106]

However, there is no principled basis for ""unpredictable constitutional law . . . to have only prospective effect whereas unpredictable development in the common law operates retrospectively"[107] Prior to a law being declared unconstitutional it was still unconstitutional, it simply had not been declared as such, as of yet. While it is true that the *Charter* can be said to be in need of interpretation the same holds true for most laws and does not absolve a transgressing individual or com-

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99 *Supra* note 96.

100 *Supra* note 11, at para. 18.

101 *Supra* note 9, per Lamer C. J. at para. 92.

102 See: *supra* note 15; *supra* note 30.

103 *Lucas v. Toronto Police Services Board* (2001), 54 O.R. (3d) 715, 2001 CarswellOnt 2119 (Ont. Div. Ct.); leave to appeal refused (2001), 2001 CarswellOnt 5046 (Ont. C.A.); leave to appeal refused (2002), 2002 CarswellOnt 1901, 2002 CarswellOnt 1902 at para. 7 (S.C.C.).

104 *R. v. M. (C.)* (1995), 23 O.R. (3d) 629, 1995 CarswellOnt 125 (Ont. C.A.).

105 *Supra* note 103, at para. 10.

106 *Supra* note 35, per LeBel J and Rothstein J. at paras. 95, 99, 103.

107 *Supra* note 65, at 567.

pany from liability. For instance, *Donoghue v. Stevenson*[108] involved a novel claim for damages and established that "a duty of care could arise in any situation where there was foresight of harm to the person or property of another."[109] This decision changed the face of tort law.[110] The action was not recognized as a valid cause of action at the time, but was subsequently held to be a valid cause of action from which damages could flow, although ultimately the claim was settled.[111]

Further, it should be noted that in *Bolster*[112] the court found that the *British Columbia Human Rights Code* precluded reliance on the traditional Crown immunity rule as the legislation did not provide for the continuance of this common law rule.[113] It is difficult to see how the supremacy of the *Charter* should bow to such an ancient common law rule as common law immunity in the absence of any explicit provision to that effect in the *Charter* as well.

In addition, it is worth recalling that in *Kingstreet* the retroactive payment of unconstitutional taxes levied was granted. While this case was distinguished in *Hislop* by the majority, on the basis that *Kingstreet* concerned the restitution of monies taken whereas *Hislop* concerned the awarding of a benefit,[114] it is not properly distinguishable. As Justice Bastarache noted, "[a] government has no more right to discriminate in the provision of benefits than it does to collect unconstitutionally levied taxes. In Kingstreet, there were no legitimate concerns with applying the general rule of retroactivity. The legislature retained the ability to enact remedial legislation to cure any adverse effects and a purely prospective remedy would have left the claimant empty-handed."[115] At the root of the majority's distinction in *Hislop* lies an outdated distinction between positive and negative rights which has its roots in an under-appreciation of the extent of government involvement in the provision and protection of negative rights, absent which a Hobbesian state of nature is all too likely to prevail.

Further, failing to provide for damages as a remedy for unconstitutional action depresses the incentive for launching actions and discourages actions to establish new constitutional principles.[116]

With respect to the comments in *Lucas*, the idea that the government need not repeal unconstitutional laws and that officers of the law may continue to prosecute individuals under unconstitutional laws with impunity (although admittedly the charge will likely be withdrawn), on its face appears to run afoul of the entire pur-

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108 *Donoghue v. Stevenson*, [1932] A.C. 562 (U.K. H.L.).

109 G.H.L. Fridman, *The Law of Torts in Canada* 2d ed. (Toronto: Carswell, 2002) at 318.

110 A. M. Linden, "The Good Neighbour on Trial: A Fountain of Sparkling Wisdom" 17 U. Brit. Colum. L. Rev. 68 1983 at 68 and 86.

111 M.R. Taylor, "The Good Neighbour on Trial: A Message From Scotland" 17 U. Brit. Colum. L. Rev. 68 1983 at 65.

112 *Bolster v. British Columbia (Ministry of Public Safety & Solicitor General)* (2007), [2007] B.C.J. No. 192, 2007 CarswellBC 196 (B.C. C.A.); leave to appeal refused (2007), 2007 CarswellBC 2325, 2007 CarswellBC 2324 (S.C.C.).

113 *Ibid.* at para. 76.

114 *Supra* note 35, per LeBel J and Rothstein J. at para. 108.

115 *Supra* note 35, per Bastarache J at para. 163.

116 *Supra* note 65 at 567.

pose of the court and rulings in which constitutional damages were awarded. The silver lining, to the extent that it exists, lies in the fact that damages were denied as a *Charter* infringement itself was not made out. As such, this case does not have any direct bearing on the ability to receive *Charter* damages once a claim has been made out.

In *R. v. Ferguson*[117] it was noted that s. 52 of the Constitution and s. 32 of the *Charter* provide for different remedies in that s. 52 provides a remedy for unconstitutional laws, whereas s. 24(1) provides an individual remedy for governmental acts that violate Charter rights.[118] Yet Ferguson also conceded that the two can be sought in conjunction in rare circumstances.[119]

7. AVOIDANCE TECHNIQUES

Apart from voicing the criticisms described in this paper of the limiting rules that prevail today, litigators can be more strategic in their actions. For example, actions against the Crown may be more likely to succeed than actions against an individual acting pursuant to Crown authority. Much of the basis for Crown immunity relies upon the fact that an individual has acted in accordance with a law that was reasonably relied upon in the circumstances as valid. Thus the imposition of liability for a law that is subsequently found to be invalid is regarded as unfair to the individual. Yet, the force of this argument does not carry as much weight with respect to the amorphous entity of government itself, for which it is difficult to be sympathetic when it passes unconstitutional laws and escapes meaningful responsibility. This strategy dissolves most of the objections to the payment of constitutional damages.[120] As Professor Pilkington notes:

> . . . although it would be unfair to hold an official personally liable for an act which he could not foresee would be held unconstitutional, the same considerations [do] not justify immunity for governments . . . after all, it is the public at large which enjoys the benefits of the government's activities, and it is the public at large which is ultimately responsible for its administration. Thus, even where some constitutional development could not have been foreseen by municipal officials, it is fairer to allocate any resulting financial loss to the inevitable costs of government borne by all taxpayers, than to allow its impact to be flet solely by those whose rights, albeit newly recognized, have been violated.[121]

Another strategy is to limit the remedy sought to s. 24(1). If the preclusive rule that originated in *Schachter* prevents the granting of both s. 52(1) and 24(1) remedies arising out of allegedly unconstitutional laws, one solution may be to ask for a s. 24(1) remedy alone, geared to the individual circumstances of the applicant. As noted by Raymond MacCallum[122] this appears to have occurred in *Margolis v.*

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117 *R. v. Ferguson*, [2008] S.C.J. No. 6, 2008 CarswellAlta 229, 2008 CarswellAlta 228, [2008] 1 S.C.R. 96 (S.C.C.). [*Ferguson*].

118 *Ibid.* at para. 59–60.

119 *Supra* note 117, at para. 63.

120 *Supra* note 96, at 11.520.

121 *Supra* note 65, at 566.

122 The rule in *Schachter*: Rights without Remedies.

R.[123] whether by design or omission." The Federal Court, without reference to s. 52(1) or *Schachter*, ordered a s. 24(1) remedy of damages in a s. 15 age discrimination challenge relating to public service death benefits.

8. CONCLUSION

The Constitution is the supreme law of Canada. Individuals subjected to Charter violations should have those losses compensated. The transgressing individual or institution should be deterred. Courts have erected numerous obstacles. Some are based on antiquated common law doctrines such as government immunity that should not apply in the constitutional context. Others dictate an unwillingness to award damages where the law has changed, even though this routinely occurs under the common law. Insufficient recognition of constitutional rights has exacerbated formidable access to justice barriers and prevented individuals from effectively obtaining redress for the injuries sustained as a result of the constitutional violations. This in turn has weakened the public interest in effective deterrence from unconstitutional action.

123 *Margolis v. R.* (2001), [2001] F.C.J. No. 402, 2001 CarswellNat 542 (Fed. T.D.).