



Absence of Malice: Charter Damages Redefined

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The Supreme Court of Canada has radically transformed the basis upon which monetary damages will be awarded for the breach of a *Charter* right. Bad faith is no longer a necessary requirement for awarding such damages under section 24(1) of the *Charter*. In *Vancouver (City) v Ward*, [2010] SCJ No 27, a unanimous Supreme Court of Canada upheld a damages award for an unconstitutional strip search and vehicle seizure, absent bad faith on the part of the police.

In *Ward*, Vancouver police received a tip that an unknown individual was planning to throw a pie at then Prime Minister Jean Chrétien during a public appearance. Alan Ward was in attendance at the ceremony and was mistakenly identified as the suspect. He was arrested. In custody, he was subjected to a strip search, but was not asked to remove his underwear, nor was he touched by the officers. Police also impounded Ward's vehicle with the intention of obtaining a search warrant. When it was determined that there were no grounds for a warrant and there was insufficient evidence to support a charge, Ward was released.

Ward subsequently brought an action in tort and for breach of his *Charter* rights. The trial judge held that the officers' conduct violated Ward's section 8 *Charter* right to be free from unreasonable search and seizure, but determined there was no tort liability. Damages were awarded for the breach of his *Charter* rights in the amount of \$100.00 for the seizure of the car and \$5,000.00 for the strip search.

In confirming the trial judge's damages award, the Supreme Court of Canada articulated a four-step process by which damages for *Charter* violations are to be assessed.

First, a *Charter* breach must be established. At the second stage, the plaintiff must show that damages are "appropriate and just" because they "serve a useful function or purpose." In that regard, damages award must further the objects of the *Charter* by satisfying at least one of three broad objectives: (1) compensating the plaintiff for any loss or suffering caused by the breach; (2) vindicating the *Charter* right by emphasizing its importance and the gravity of the breach; or (3) deterring state agents from committing subsequent breaches.

Once the plaintiff establishes that *Charter* damages would serve a useful function or purpose, the onus shifts to the defendant at the third stage to show that there are countervailing factors to render a damages award inappropriate and unjust. In other words, even if the plaintiff satisfies the second step, the defendant can show that those objectives are offset by other considerations such as the availability of alternative remedies or the concern for good governance. It is noteworthy that the availability of a tort claim does not bar *Charter* damages. The *Charter*, however, cannot be used to provide double compensation.

If the defendant fails to establish that *Charter* damages are inappropriate or unjust, the final step is to calculate damages. A damages award must be "appropriate and just" in light of the factors from the

second and third stages. Compensation is the primary factor to be considered. Pecuniary losses must be supported by evidence. Tort case law can provide useful guidance for non-pecuniary losses. When vindication and deterrence are considered, the seriousness of the breach will be evaluated by both the impact on the claimant and the seriousness of the defendant's misconduct.

Of significance, the Supreme Court of Canada stressed that *Charter* damages awards should not be large and must be appropriate and just both from the perspective of the plaintiff and the defendant.

With *Ward*, the Supreme Court of Canada has provided plaintiffs with an avenue to prosecute government entities for monetary relief, even where such entities were not acting in bad faith. This will no doubt lead to an increase in litigation. ■