DAMAGES AS A REMEDY FOR INFRINGEMENT OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

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Section 24(1) of the Canadian Charter of Rights and Freedoms confers on the courts the power to award to anyone whose rights or freedoms under the Charter have been infringed "such remedy as the court considers appropriate and just in the circumstances". This article discusses the issues with which the courts will have to deal if they are asked to award damages for infringement of constitutional rights. It considers, inter alia, the purposes which the award of damages may serve; the elements of a constitutional damage claim; the defendants against whom such a claim may be made; and the appropriate measure of damages. In exercising this jurisdiction Canadian courts will no doubt find it useful to refer to the common law of damages and to the experience in the United States in the awarding of damages in constitutional cases. However the author concludes that the courts should not be constrained by common law principles and that the Charter confers on them a much broader jurisdiction than that of the United States courts. Canadian courts should therefore fashion a remedy in damages which will effectively redress contraventions of the rights and freedoms guaranteed by the Charter.

L'article 24(1) de la Charte canadienne des droits et libertés donne aux tribunaux le pouvoir d'accorder à toute personne dont les droits et libertés garantis par la charte ont été enfreints "la réparation que le tribunal estime convenable et juste eu égard aux circonstances". Dans cet article, l'auteur examine les questions auxquelles le tribunal devra répondre quand il aura à faire face à une demande de dommages et intérêts pour violation de droits constitutionnels. Il considère entre autres à quelles fins ce genre de réparation peut servir, les éléments qui constituent une demande constitutionnelle en dommages et intérêts, les défendants contre lesquels une action de ce genre peut être intentée et la méthode d'évaluation des dommages. Les juges canadiens trouveront certainement utile, pour exercer ce pouvoir, de se référer au droit des dommages et intérêts de la common law aussi bien qu'à la jurisprudence américaine qui a l'expérience de ce genre d'allocation dans les affaires constitutionnelles. L'auteur affirme cependant dans sa conclusion que les tribunaux canadiens ne devraient pas s'en tenir aux principes de la common law ni imiter les décisions américaines car les pouvoirs que leur accorde la charte sont beaucoup plus étendus que ceux accordés aux tribunaux américains. Il encourage donc les tribunaux canadiens à se créer un recours en dommages et intérêts qui réparera effectivement les violations des droits et libertés garantis par la charte.

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Introduction

Section 24(1) of the Canadian Charter of Rights and Freedoms[1] confers on courts an entrenched and unfettered discretion to remedy infringements of guaranteed rights. This responsibility thrusts the courts into an overt policy-making role: they must determine what remedy is "appropriate and just in the circumstances".

Since constitutional guarantees operate as a limit on legislative and governmental power, it is perhaps easiest to fashion defensive remedies to shield against unconstitutional laws and government action.[2] A defensive remedy is requested when, for example, a person charged with an offence argues that proceedings against him should be stayed because prosecution delays have denied his right to be tried within a reasonable time;[3] or that evidence obtained in an unreasonable search should be inadmissible against him;[4] or that a reverse onus provision which infringes his right to be presumed innocent until proven guilty should be declared of no force and effect.[5] These defensive remedies operate by way of nullification. Their effects may be significant and their use controversial,[6] but the role the court plays is limited to telling legislatures and governments what they cannot do. This may cause a legislature or government to change its conduct or policies, or redirect its expenditures, but the actual decision as to how this should be done is left to the legislature or government.

More difficult issues arise when a court is asked to grant affirmative remedies to redress constitutional infringements. The victims of unconstitutional acts may seek redress in damages or they may seek mandatory injunctions to correct the conditions which have resulted in the infringe-

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[1] Constitution Act, 1982, Part 1, Canadian Charter of Rights and Freedoms, (hereinafter cited as "Canadian Charter of Rights and Freedoms"). For a history of s. 24(1) of the Charter, see R.D. Gibson, Enforcement of the Canadian Charter of Rights and Freedoms, in W.S. Tarnopolsky and G.-A. Beaudoin (ed.), Canadian Charter of Rights and Freedoms Commentary (1982), 489, at p. 492.

[2] The distinction between defensive and affirmative constitutional remedies is made by W.E. Dellinger, Of Rights and Remedies: The Constitution as a Sword (1972), 85 Harv. L. Rev. 1532, at pp. 1532 *et seq.*, and by A. Hill, Constitutional Remedies (1969), 69 Colum. L. Rev. 1109, at pp. 1111-1112.

[3] Canadian Charter of Rights and Freedoms, s. 11(b). See, for example, *Re Gray and the Queen* (1982), 70 C.C.C. (2d) 62 (Sask. Q.B.).

[4] Canadian Charter of Rights and Freedoms, ss. 8, 24(2). See, for example, *R.* v. *Cohen* (1983), 33 C.R. (3d) 151 (B.C.C.A.).

[5] Canadian Charter of Rights and Freedoms, s. 11(d); Constitution Act, 1982, s. 52. See, for example, *R.* v. *Oakes* (1983), 40 O.R. (2d) 660 (Ont. C.A.).

[6] Dellinger, *loc. cit.*, footnote 2, at p. 1533, notes that the decisions of the American Supreme Court in *Mapp* v. *Ohio*, 367 U.S. 643 (1961) (excluding from criminal trials evidence illegally seized) and *Miranda* v. *Arizona*, 384 U.S. 436 (1966) (excluding from criminal trials statements made by an accused who has not been properly advised of his constitutional rights) have been among the Court's "most warmly disputed decisions".

ment of their constitutional rights. The injunctive remedy may require courts to supervise government institutions and direct the expenditure of public funds. Even the damages remedy, much more straightforward, may deter public officials in the vigorous execution of public policy and result in the reallocation of substantial resources from public expenditure to private redress.

The Charter provides no explicit guidance as to the purposes for which remedies are to be given, the principles according to which courts should determine whether a remedy is appropriate and just in the circumstances, or the procedures through which applications for remedies should be made. There is nothing in section 24(1) which limits remedies only to those already known to law or equity and nothing which limits the availability of existing remedies only to those circumstances in which they would currently be available. Accordingly, section 24(1) provides a new starting point for consideration of remedies appropriate to redress constitutional wrongs, and courts must develop means of assessing which remedies will be appropriate in what circumstances.

It will be argued that the governing standard in providing remedies ought to be three-fold: what remedy or combination of remedies will (1) most effectively redress the wrong suffered by the plaintiff, (2) foster the implementation of the constitution by deterring future infringements and ensuring future compliance, and (3) interfere as little as possible with the exercise of legislative and executive responsibilities. These criteria should be applied not only to a choice among existing remedies, but also to the requirements for entitlement to any particular remedy. The tests applied to determine entitlement to damages at common law, or an injunction at equity, may not be appropriate to redress a constitutional wrong. They must be reassessed in light of the purposes for which the remedy is given.

This article explores issues which courts will confront when asked to award damages for infringement of constitutional rights. It begins with a review of the experience of the United States Supreme Court in awarding damages for constitutional wrongs and then argues that Canadian courts have wider scope to award damages than their American counterparts. It inquires into the purpose of damages as a remedy for constitutional, as distinct from common law, wrongs and seeks to assess the appropriateness of damages as a constitutional remedy. It considers the elements of a constitutional damages claim and, in particular, the tests of causation which should be applied. It discusses the types of defendants against whom constitutional damages claims should be available and the extent to which they should be protected from liability through immunity defences. Finally, it discusses the appropriate measure of damages for a constitutional wrong. These are issues that courts must address in recasting a private law remedy in a public law mode.

I. *Damages as a Remedy in American Constitutional Law*

Canadian courts must develop their own standards for determining when damages are an appropriate and just remedy for a constitutional wrong, but as they begin to do so, it will be useful to take account of the American experience and the constraints within which it has developed.[7] It is only fairly recently that the United States Supreme Court has held damages to be available as a remedy for constitutional wrongs, and the limitations the Court has imposed on the remedy impede its effectiveness. Since damages remedies against those acting under state law have a different source than damages remedies against those acting under federal law, they are discussed separately below.

A. *Damages Remedies Against State Officials—Civil Rights Act, 1871, Section 1983*

The Fourteenth Amendment, which provided for the extension of guaranteed rights against the states,[8] also authorized Congress to legislate to enforce these rights.[9] In 1871, as part of a Civil Rights Act, Congress enacted section 1983[10] to provide a cause of action against persons acting under colour of state law who deprive or cause another person to be deprived of his constitutional rights.[11] The section was passed in reaction to serious infringements of civil rights in the Reconstruction period,[12] but its usefulness was soon limited by restrictive interpretations of the Fourteen Amendment.[13] It was not until the 1960's that the remedy became effec-

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[7] This article examines the experience of the United States Supreme Court in developing a constitutional remedy in damages and seeks to assess its relevance in Canada. The experience of other jurisdictions is not explored here.

[8] U.S. CONST. Fourteenth Amendment, s. 1, provides:

> . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of laws.

[9] U.S. CONST. Fourteenth Amendment, s. 5, provides:

> The Congress shall have power to enforce, by appropriate legislation, the provisions of this Article.

[10] Ch. 22, s. 1, 17 Stat. 13 (1873), now 42 U.S.C., s. 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[11] Congress conferred jurisdiction on the federal courts to hear such actions: 28 U.S.C., s. 1343.

[12] For a history of the early construction of s. 1983, see Developments in the Law, Section 1983 and Federalism (1977), 90 Harv. L. Rev. 1133, at pp. 1154 *et seq.*

[13] *Ibid.*, at pp. 1156-1169.

tive; the watershed was the decision of the Supreme Court in *Monroe* v. *Pape*[14] to the effect that section 1983 will support a cause of action for a constitutional infringement in the federal courts, even though the conduct complained of is also actionable in tort under state law and no state remedy has been sought.

Since then, the number of cases brought in federal courts under section 1983 has rapidly multiplied.[15] The strategic attractions of bringing such suits in the federal, rather than the state, courts[16] provide incentive to attempt to frame tort claims as constitutional wrongs. This has not only contributed to the overburdening of the federal court system,[17] but has also led to trivialization of the kinds of interests submitted as worthy of constitutional protection[18] and increased intervention of the federal courts in assessing the actions of state officials at a time of growing sensitivity to federal-state balances.[19] In addition, doubts have been raised as to the effectiveness of the damages remedy as a means of enforcing or implementing the constitution.[20] Some commentators argue that because of these concerns, the United States Supreme Court has developed doctrines

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[14] 365 U.S. 167 (1961), (overruled in part by *Monell* v. *Dept. of Social Services of the City of New York*, 436 U.S. 658 (1978) as to whether a municipality is subject to suit under s. 1983).

[15] The authors of Note, Damage Awards for Constitutional Torts: A Reconsideration After *Carey* v. *Piphus* (1980), 93 Harv. L. Rev. 966, at p. 974, footnote 56 state:

> Section 1983 is one of the most litigated sections of the United States Code. The nationwide total of the number of suits filed under the civil rights statutes was 296 in 1961, 5,138 in 1971, 13,113 in 1977, and 12,829 in 1978. Administrative Office of the U.S. Courts, Annual Report of the Director 78 (1976); *id.* at 179 (1978).Prisoners' petitions and habeas corpus petitions are not included in the figures given. No statistics are available for s. 1983 alone. *But cf.* P. Bator, P. Mishkin, D. Shapiro and H. Wechsler, Hart and Wechler's The Federal Courts and the Federal System 149 (2d ed. Supp. 1977) (noting that "[t]he 'impressive flood' of s. 1983 litigation . . . has, in the past five years, reached epic proportions").

[16] One attraction of suing in federal rather than state courts is that "[s]tate officials are forced to account for their actions before a federal court judge, who is far less likely to be swayed by local pressures": M.M. Egan, Constitutional Civil Law (1980), 31 Mercer L. Rev. 885, at p. 891. See also C. Whitman, Constitutional Torts (1980), 79 Mich. L. Rev. 5, at pp. 22 *et seq.*

[17] Whitman, *ibid.*, at pp. 10, 26-29. F.M. McClellan and P.H. Northcross, Remedies and Damages for Violation of Constitutional Rights (1980), 18 Duq. L. Rev. 409, at p. 414.

[18] McClelland and Northcross, *ibid.*, at p. 414.

[19] Whitman, *ibid.*, at pp. 30-40; McClellan and Northcross, *ibid.*, at pp. 414, 418; J.L. Oakes, The Proper Role of the Federal Courts in Enforcing the Bill of Rights (1979), 54 N.Y.U. L. Rev. 911, at pp. 942-944; M.R. Durchslag, Federalism and Constitutional Liberties: Varying the Remedy to Save the Right (1979), 54 N.Y.U. L. Rev. 723; A. Cox, Federalism and Individual Rights Under the Burger Court (1978), 73 Northwest U.L. Rev. 1; W. McCormack, Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Protections (1974), 60 Va. L. Rev. 1.

[20] Whitman, *ibid.*, at pp. 47 *et seq.*

which lessen the likelihood of a claim for damages to redress constitutional wrongs succeeding.[21]

The United States Supreme Court has limited the availability of damages to redress constitutional wrongs in four ways, which are further discussed in later sections of this article. First, in some cases in which damages have been sought for constitutional wrongs, the court has narrowly construed rights protected by the Fourteenth Amendment, thus holding that an alleged wrong does not come within the protections of the constitution and can be redressed, if at all, only in a common law action in the state courts.[22] Second, the court has applied strict tests to the elements of a constitutional tort claim: a constitutional wrong is deemed to have "caused" the plaintiff's damage only if the damage would not have occurred "but for" the constitutional wrong. Thus where a government decision has been motivated by unconstitutional considerations but can be justified on other grounds, the infringement of constitutional rights will go unredressed.[23]

Third, the court has limited the plaintiff's likelihood of recovery for constitutional wrongs committed under colour of state law through its acceptance of immunity defences. A plaintiff cannot recover damages against a state because, in the absence of express action by Congress pursuant to the Fourteenth Amendment, the Eleventh Amendment[24] provides states with absolute immunity.[25] Cities and other local government units are not immune from damages claims. They may be held directly liable for constitutional infringements authorized by official policy,[26] but, on a restrictive interpretation of section 1983, they cannot be held vicariously liable for the unconstitutional acts of their employees.[27] Because of these limits on the liability of government entities, frequently the only available defendants are individual government employees or agents, but they too are protected by qualified immunity. An individual defendant acting under colour of state law is liable under section 1983 only if the constitutional right is clearly established and he knew or should have

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[21] Whitman, *ibid.*, at pp. 6-11, 47-62; Oakes, *loc. cit.*, footnote 19, at pp. 940 *et seq.*

[22] See the discussion of *Paul* v. *Davis*, 424 U.S. 693 (1976), in the text accompanying footnotes 143-151, *infra*; Oakes, *ibid.*, at p. 941; Whitman, *ibid.*, at p. 8.

[23] See text accompanying footnotes 161-178, *infra*.

[24] U.S. CONST. Eleventh Amendment:

> The Judicial Power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

[25] See *Queen* v. *Jordan*, 440 U.S. 332 (1979).

[26] *Monell* v. *Dept. of Social Services, supra*, footnote 14; *Owen* v. *City of Independence*, 445 U.S. 622 (1980). See text accompanying footnotes 245-258, *infra*.

[27] *Ibid.*

known that his action would violate the plaintiff's constitutional rights.[28] Even if the individual defendant is not immune from suit, he may well be judgment proof, and accordingly not worth suing.

Fourth, at least for due process claims, the Court has held that only nominal damages will be awarded to redress a constitutional wrong, unless actual injury is established. The Court rejected the argument that, because of the importance of constitutional rights, and the need to deter violations of them, every infringement should be presumed to cause injury and be redressed with substantial damages.[29] Accordingly, unless the victim of an unconstitutional act has also suffered some consequential damage, there is little incentive to sue.

B. *Damages Remedies Against Federal Officials—Implied from the Constitution*

There is no statutory provision comparable to section 1983 to authorize actions in damages against persons acting under colour of federal law. Although the Supreme Court had previously enforced the constitution against federal officers by means of defensive remedies such as the exclusionary rule, and affirmative remedies in the nature of injunctions and other equitable relief,[30] it was not until 1971 that the Supreme Court held that a remedy in damages could be implied from the constitution without autorization from Congress. In *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*,[31] the plaintiff sought damages in federal

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[28] *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974); *Wood* v. *Strickland*, 420 U.S. 308 (1975). See text accompanying footnotes 211-215, *infra*.

[29] *Carey* v. *Piphus*, 435 U.S. 247 (1978). See text accompanying footnotes 259-267, *infra*.

[30] *Marbury* v. *Madison*, Cranch 137, 2 L. Ed. 60 (1803): the seminal case on judicial power to remedy constitutional infringements involved equitable relief. See *Carlson* v. *Green*, 446 U.S. 14 (1980) per Rehnquist J., dissenting, at p. 42, note 8. See also, *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971) per Harlan J., concurring, at pp. 404 and 408, note 8. See also *Swann* v. *Charlotte-Mecklenberg Board of Education*, 402 U.S. 1 (1971) (re: use of equitable remedies to achieve school desegregation).

[31] *Ibid.* Bivens alleged that the agents of the Federal Bureau of Narcotics, acting under claim of federal authority but without a warrant and without probable cause, entered his apartment, arrested him, manacled him in front of his wife and children, threatened to arrest the whole family, thoroughly searched his apartment, and took him to the courthouse where he was interrogated, booked and subjected to a visual strip search (at p. 389). The complaint filed against Bivens was dismissed by a United States Commissioner. Bivens claimed to have suffered great humiliation, embarrassment and mental suffering as a result of the defendants' unlawful conduct. Bivens' suit was dismissed by the District Court on the basis that (1) it failed to state a federal cause of action and (2) the respondents were immune from suit: 276 F. Supp. 12 (1967). The Court of Appeals affirmed on the first ground: 409 F. 2d 718 (1969). The Supreme Court reversed on this ground and remanded the case to the Court of Appeals (at pp. 397-98). On remand, the Court of Appeals held that the officers would have a valid defence if they acted in good faith and with a reasonable belief in the validity of the arrest and search and in the necessity for carrying out the search as they did: 456 F. 2d 1339 (1972).

court on the grounds that narcotics agents had contravened his constitutional rights by unreasonably searching his home and his person without a warrant and without probable cause. The majority of the Supreme Court held that damages are an appropriate remedyfor an invasion of personal interests protected by the Fourth Amendment guarantee against unreasonable search and seizure, and, further, that the court has the power to create this remedy even though it is not expressly authorized to do so by the constitution or by act of Congress. Justice Brennan, for the majority,[32] asserted:[33]

> . . . although the Fourth Amendment does not in so many words provide for its enforcement by an award of damages . . . it is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.

The court concluded that Bivens was not limited to seeking a remedy under ordinary tort law, designed to deal with wrongs committed by private persons, but was entitled to seek damages directly under the constitution. The dissenting judges objected to this "judicial legislation",[34] arguing that it is not open to the court to create a remedy against federal officials comparable to that established by Congress against state officials. To the majority, the fact that Congress had not authorized the remedy was significant only to the extent of requiring the court to consider whether there were any "special factors counselling hesitation in the absence of affirmative action by Congress".[35] The court did not specify the nature of such "special factors", but held that none were present in the *Bivens* case.[36]

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[32] Douglas, Stewart, White and Marshall JJ. joined in the Court's opinion; Burger C.J., Black and Blackmun JJ. filed dissenting opinions.

[33] *Supra*, footnote 30, at p. 396, quoting from *Bell* v. *Hood*, 327 U.S. 678, at p. 684 (1946) (footnote omitted).

[34] *Supra*, footnote 30, at p. 430, per Blackmun J. Both Black and Blackmun JJ. agreed that the court had no jurisdiction to award damages for infringement of a constitutional right, and argued that, even if the court did have such jurisdiction, it should decline to exercise it: first because it would lead to a flood of claims in already overburdened courts (see Black J. at pp. 428-429; per Blackmun J. at p. 430; see, *contra*, per Harlan J. at p. 411, quoted in footnote 125, *infra*) and, second, because "such suits might deter officials from the *proper* and honest performance of their duties" (per Black J. at p. 429; see also Blackmun J. at p. 430).

[35] *Ibid.*, at p. 396.

[36] By way of example of a "special factor counselling hesitation", Brennan J. noted, *ibid.*, that inferring a cause of action in *Bivens* did not amount to:

> dealing with a question of "federal fiscal policy", as in *United States* v. *Standard Oil Co.*, 332 U.S. 301, 311 (1947). In that case we refused to infer from the Government-soldier relationship that the United States could recover damages from one who negligently injured a soldier and thereby caused the Government to pay his medical expenses and lose his services during the course of his hospitalization. Noting that Congress was normally quite solicitous where the federal purse was involved, we pointed out that "the United States [was] the party plaintiff to the suit. And the United States has power at any time to create the liability.

See J.S. Wunsch, Remedies for Constitutional Torts: 'Special Factors Counselling Hesitation' (1976), 9 Indiana L. Rev. 441, at pp. 453 *et seq.*

Accordingly the court held that, if the plaintiff could establish the facts he alleged, he was entitled to damages against the federal agents.[37]

If Bivens had not been permitted to sue the federal agents in damages, he would have had no means of redressing the violation of his rights. After the wrongful search and seizure, Bivens was arrested, but he was subsequently released. Accordingly, he could not assert his constitutional rights by seeking an injunction (since no recurrence of the conduct was anticipated) or by seeking to exclude any evidence illegally obtained (since he was not tried). As Harlan J. concluded, "[f]or people in Bivens' shoes, it is damages or nothing",[38] Since the government was protected by sovereign immunity from liability on such a claim,[39] it was damages against the officers personally or nothing. The court did not, however, rest its decision on the basis that the claim in damages was the only means available to enforce the Fourth Amendment.[40] Rather, it held the remedy to be appropriate to redress a wrongful interference with personal rights guaranteed by the constitution. Accordingly, it appeared that a remedy in damages would be available even if there were some other means of raising the constitutional issue and vindicating the plaintiff's rights.

The effect of *Bivens* was to establish the power of the federal courts to employ the remedies within their jurisdiction[41] to redress violations of constitutional rights. In *Butz* v. *Economou*[42] in 1978, the court reaffirmed its decision in *Bivens*, stating that it had established that the damages remedy would be available to "a citizen suffering a compensable injury to a constitutionally protected interest".[43] In subsequent decisions, the Supreme Court has extended the damages remedy to redress violations of the Fifth and Eighth Amendments.

In *Davis* v. *Passman*,[44] the plaintiff sought damages[45] against her former employer, a member of Congress, alleging that, in terminating her employment, he had discriminated against her on the basis of sex, in violation of the Fifth Amendment.[46] The court held that the Fifth Amend-

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[37] *Ibid.*, at pp. 397-398.

[38] *Ibid.*, at p. 410.

[39] See text accompanying footnotes 98-103, *infra*.

[40] *Supra*, footnote 30, per Brennan J. at p. 397.

[41] See text accompanying footnotes 92-93, *infra*.

[42] 438 U.S. 487 (1978). The case considered whether the qualified immunity extended to state officials should also be extended to federal officials.

[43] *Ibid.*, at p. 504.

[44] 442 U.S. 228 (1979).

[45] Davis also sought equitable relief: reinstatement, promotion and a salary increase; however, since Passman was no longer a congressman when the case reached the Supreme Court, such relief was no longer available: *ibid.*, at p. 232, note 4.

[46] U.S. CONST. Fifth Amendment:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; . . . .

ment conferred on the plaintiff "a constitutional right to be free from gender discrimination",[47] and that the court will use its existing jurisdiction to enforce that right in the absence of any other effective means of doing so.[48] The court further held that damages was an appropriate remedy,[49] despite special concerns counselling hesitation, namely that the court was interfering with actions taken by a congressman in the course of his official conduct.[50] The four dissenting judges[51] would have denied the cause of action primarily on the basis that principles of comity and separation of powers require the court to refrain from interfering with the employment of congressional staff unless authorized to do so by Congress.[52]

In both *Bivens* and *Davis* v. *Passman*, the court had permitted a claim in damages based directly on the constitution where the plaintiff had no alternative means of redressing the infringement of his or her constitutional right. In 1976, Congress amended the Federal Tort Claims Act[53] to waive sovereign immunity and to create a cause of action directly against the United States for intentional torts committed by federal law enforcement agents. In *Carlson* v. *Green*,[54] the Supreme Court was called upon to decide whether this alternative remedy in tort precluded an action in damages against federal agents based on the constitution. The plaintiff, representing her son's estate, sued federal prison officials alleging that, while her son was a prisoner in a federal prison, he died because they failed to give him proper medical treatment, in violation of his Eighth Amendment[55] rights.

The Supreme Court held that, in order to preclude a *Bivens*-type remedy, Congress must provide an alternative remedy which Congress views as equally effective and, further, Congress must explicitly declare this remedy to be a substitute for an action based directly on the constitution.[56] That had not been done in the case of the Federal Tort Claims Act. In the absence of such a declaration, the court would preclude a *Bivens*-type action only if there were "special factors counselling hesitation in the absence of affirmative action by Congress".[57] The majority

[47] *Supra*, footnote 44, at pp. 235-236.

[48] *Ibid.*, at p. 242.

[49] *Ibid.*, at pp. 245-248.

[50] *Ibid.*, at p. 246.

[51] Burger C.J., Stewart, Powell and Rehnquist JJ. dissented. *Ibid.*, at pp. 249-255.

[52] *Ibid.*

[53] 28 U.S.C. s. 2680(h).

[54] *Supra*, footnote 30.

[55] U.S. CONST. Eighth Amendment:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

[56] *Supra*, footnote 30, at pp. 18-19.

[57] *Ibid.*, at p. 19.

concluded that there were no special factors in that "the petitioners did not enjoy such independent status in our constitutional system as to suggest that judicially created remedies against them might be inappropriate".[58] Thus the majority's test for precluding an action against federal officials had not been met. Nonetheless, the majority considered whether there was any other evidence of Congress' intention. Relying on the Act itself, its legislative history and speculation that Congress would have concluded that the *Bivens* remedy is more effective than the remedy under the Federal Tort Claims Act,[59] they concluded that Congress had not intended to preclude an action in damages based directly on the constitution.

Justice Powell, joined by Justice Stewart, argued for broader discretion in the court, holding that the *Bivens*-type remedy should be denied if the defendant shows adequate alternative avenues of relief, whether or not Congress declares an alternative remedy to be an equally effective substitute.[60] Nonetheless, they found the Federal Tort Claims Act remedy to be inadequate and accordingly concurred with the court in the result. Burger C.J. dissented; in his view, the Federal Tort Claims Act provided "an adequate remedy for prisoners' claims of medical mistreatment".[61]

Only Justice Rehnquist disputed the right of the court to imply a damages remedy at all, arguing that the creation of such remedies is a "task that is more appropriately viewed as falling within the legislative sphere of authority".[62] He argued that "Congress is free to devise whatever remedy it sees fit to redress violations of constitutional rights . . . and to have that remedy altogether displace any private civil damages remedies that this court may devise".[63]

By its decisions in *Bivens, Davis* v. *Passman* and *Carlson* v. *Green*, the Supreme Court has, in effect, made the same damages remedy available against federal officials as is available against state officials under section 1983 of the Civil Rights Act, 1871. Although section 1983 makes damages available for violations of all constitutional rights, it remains to be seen whether the court will extend *Bivens*-type actions to all constitutional infringements.[64] The Supreme Court has held that, at least as far as immunity defences are concerned, there is no reason to treat the two levels

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[58] *Ibid.*

[59] *Ibid.*, at pp. 19-23.

[60] *Ibid.*, at pp. 26-27.

[61] *Ibid.*, at p. 30.

[62] *Ibid.*, at p. 34.

[63] *Ibid.*, at pp. 52-53.

[64] For a summary of decisions of the federal courts on the availability of a *Bivens*-type remedy for infringement of other constitutional rights, see L. Friedman, Constitutional Torts (1981), 5 ALI-ABA Course Materials Journal 7, at pp. 10-16. See also M.P. Lehmann, *Bivens* and its Progeny: The Scope of a Constitutional Cause of Action for Torts Committed by Government Officials (1977), 4 Hastings Const. L. Quart. 531.

of officials differently.[65] It is also likely that in *Bivens*-type actions the court will apply the same principles of causation[66] and measurement of damages[67] that it has applied in section 1983 actions.

C. *Claims Against the United States Government under the Federal Tort Claims Act*

The victim of a constitutional infringement committed by a federal official may have a claim in damages against the United States government, as did the plaintiff in *Carlson* v. *Green*. The Federal Tort Claims Act[68] renders the government vicariously liable for damage "caused by the negligent or wrongful act or omission of any employee of the government while acting in the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant".[69] However, this general liability is subject to a number of exceptions. Until 1974 liability was excluded for virtually all intentional torts committed by government employers. The exemption was then limited to make the government liable for claims of assault, battery, false imprisonment, false arrest, abuse of process or malicious prosecution by investigative or law enforcement officers of the United States government.[70] Accordingly, a plaintiff in Bivens' position would now have a claim in damages against the United States government. His claim would not be for violation of constitutional rights, however, but for the intentional torts for which the government can be held liable. Proposals to make the United States government liable for constitutional torts have been introduced in Congress but none has been adopted.[71]

D. *Conclusion*

In the United States, a remedy in damages is available to redress constitutional infringements committed by persons acting under colour of state or federal law or by local units of government. These remedies are available by the authority or sufferance of Congress. State and federal governments are immune from suit for constitutional wrongs *per se*, although they may be vicariously liable to the extent that they have waived

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[65] *Butz* v. *Economou*, *supra*, footnote 42.

[66] See text accompanying footnotes 157-178, *infra*.

[67] See text accompanying footnotes 259-300, *infra*.

[68] 28 U.S.C., ss. 1346, 2671-2680(n).

[69] 28 U.S.C., s. 1346(b), s. 2674.

[70] 28 U.S.C., s. 2680(h). See J. Boger, M.H. Gitenstein and P.R. Verkuil, The Federal Tort Claims Act Intentional Tort Amendment: An Interpretive Analysis (1976), 54 N. Carolina L. Rev. 497.

[71] M.W. Dolan, Constitutional Torts and the Federal Tort Claims Act (1980), 14 U. of Rich. L. Rev. 281; T.J. Madden, N.W. Allard and D.H. Remes, Bedtime for *Bivens*: Substituting the United States as Defendant in Constitutional Tort Suits (1983), 20 Harv. J. Leg. 469, at p. 470.

immunity for common law torts committed by their officials. Officials themselves enjoy a qualified immunity from liability for constitutional wrongs. Their liability can be established only by meeting strict tests of causation, and damages are awarded only if the victim has suffered some actual injury as the result of the infringement of his rights. The victim of a constitutional wrong thus faces substantial hurdles if he seeks redress in damages, and he is unlikely to succeed.[72]

II. *The Broader Jurisdiction of Canadian Courts*

The experience of American courts in awarding damages for constitutional wrongs provides a starting point for considering the availability of damages as a remedy under section 24(1) of the Canadian Charter of Rights and Freedoms. It is important to note, however, that Canadian courts have more authority and more discretion than their American counterparts to develop remedies tailored to redress constitutional infringements. First, the remedial authority of Canadian courts under section 24(1) is constitutional, not statutory, and accordingly the courts, not the legislatures, are empowered to determine what remedies are appropriate and just. Second, since Canada has a basically unitary court system to decide both common law and constitutional claims, it will not be inhibited by federalism concerns from finding and remedying constitutional wrongs. Third, Canadian courts are not limited to using their ordinary jurisdiction to redress constitutional infringements. Finally, the Canadian Charter of Rights and Freedoms is enforceable against the senior levels of government. Accordingly, it is arguable that Canadian courts have more scope than their American counterparts to develop an effective remedy in damages to redress constitutional wrongs.

A. *The Role of the Court versus the Role of the Legislature*

In American constitutional law, the primary responsibility for developing remedies for constitutional wrongs lies with Congress. Congress is empowered to establish the jurisdiction of the federal courts and allocate judicial resources;[73] accordingly, it arguably has power to exclude some or all constitutional claims from the federal courts or limit the remedies available in such claims.[74] Congress is also expressly authorized to legis-

[72] A survey of the final disposition of *Bivens*-type cases against federal officials showed that a plaintiff was successful in only five of 172 cases. Forty of the cases were dismissed on the merits; eighty-nine were dismissed on grounds unrelated to the merits. The remainder were pending or their status unknown. See W.M. Smith, Damages or Nothing—The Efficacy of the Bivens-type Remedy (1979), 64 Cornell L. Rev. 667, at pp. 693-697. See also Dolan, *loc. cit.*, footnote 71, at p. 283.

[73] U.S. CONST. article III, section 1:

> The judicial power of the United States, shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish . . .

[74] Proposals have been made to limit the federal courts' powers to require busing of

late to enforce Fourteenth Amendment rights, and to specify remedial measures for doing so.[75] The courts are given no express authority to fashion remedies to enforce the constitution, and even when they do so, they recognize Congress' authority to substitute its judgment as to what is an equally effective but more appropriate remedy.[76]

By contrast, the Canadian Charter of Rights and Freedoms expressly authorizes courts to provide whatever remedies are, in the courts' judgment, appropriate and just to redress infringements of rights guaranteed by the Charter.[77] Although Parliament and the legislatures control the existence and jurisdiction of the courts,[78] their authority to do so is limited by the fact that the continued existence of courts is constitutionally assumed,[79] and the right of the victim of a constitutional wrong to apply to a court for a remedy is constitutionally guaranteed.[80] Neither Parliament nor a legislature can preclude a particular judically created remedy to redress infringement of a guaranteed right, and if any remedy is provided by legislative action, not only its adequacy but its appropriateness will be open to review by the courts. The role of Parliament is further more limited than that of Congress in that Parliament does not have power comparable to Congress' power under the Fourteenth Amendment to legislate to enforce constitutional rights in the provinces.[81]

It might be argued that Parliament or a legislature can limit the remedial power of the courts through its exercise of the "override power" provided in section 33(1)[82] of the Charter. The "override power" does not, however, extend to remedial action. It enables Parliament or a legislature to

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students. See N. Trabulus, Braking the Law: Antibusing Legislation and the Constitution (1973-74), 34 N.Y.U. Rev. L. & Soc. Change 119.

[75] See text commencing at footnote 9, *supra*.

[76] See text accompanying footnotes 7-63, *supra*.

[77] Canadian Charter of Rights and Freedoms, s. 24(1).

[78] Constitution Act, 1867, provides in s. 92(14) that provincial legislatures have jurisdiction over the "constitution and maintenance of courts in the province" and in section 101 that the federal Parliament may establish a "court of general appeal for Canada" and "courts for the better administration of the laws of Canada".

[70] See P.W. Hogg, Constitutional Law of Canada (1977), pp. 42-47; and P.W. Hogg, Canada Act 1982 Annotated (1982), pp. 92-93.

[80] Canadian Charter of Rights and Freedoms, s. 24(1).

[81] The Canadian Charter of Rights and Freedoms provides in s. 31:

Nothing in this Charter extends the legislative powers of any body or authority.

See P.W. Hogg, Canada Act 1982 Annotated (1982), p. 74; and K.E. Swinton, Application of the Canadian Charter of Rights and Freedoms, in Tarnopolsky and Beaudoin, *op. cit.*, footnote 1, pp. 42-44.

[82] Canadian Charter of Rights and Freedoms, s. 33(1):

Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

declare that legislation will operate notwithstanding section 2 or sections 7 to 15 of the Charter. Accordingly, Parliament or a legislature may use the "override power" to authorize infringement of the rights and freedoms guaranteed in those sections, and thus preclude constitutional remedies for the infringement. However, to the extent that a right is infringed and the infringement is not protected by the "override clause", it is for the court to determine what remedy is just and appropriate. It is not open to Parliament or a legislature to declare under section 33 that, although a right exists, it shall be remedied only in specified ways. Similarly, although section 1[83] of the Charter protects reasonable limits on guaranteed rights and freedoms, it does not authorize any limits on the remedies available when rights or freedoms are held to have been infringed or denied in a manner which cannot be justified under section 1.

Accordingly, the Canadian Charter of Rights and Freedoms entrenches both the right to apply to a court for a remedy and the court's discretion to fashion the appropriate remedy. One consequence is that, if Parliament or a legislature decided to establish a compensation scheme for victims of constitutional wrongs,[84] it could not make it an exclusive remedy.[85] Section 24 should not discourage legislative initiative, but it does provide protection against legislative attempts to undermine the effectiveness of

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[83] Canadian Charter of Rights and Freedoms, s. 1:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[84] In his dissenting opinion in *Bivens, supra*, footnote 30, at pp. 422-423, Burger C.J. suggested that Congress establish a quasi-judicial tribunal empowered to award damages against the United States government to any person who has sustained damage "by conduct of government agents in violation of the Fourth Amendment or statutes regulating official conduct". This remedy was to be "in lieu of the exclusion of evidence secured for use in criminal cases in violation of the Fourth Amendment". See also Dolan, *loc. cit.*, footnote 71, at p. 283.

[85] In *The Board of Governors of the Seneca College of Applied Arts and Technology* v. *Bhadauria*, [1981] 2 S.C.R. 181, (1981), 124 D.L.R. (3d) 193, the Supreme Court of Canada held that, where the legislature has provided a comprehensive remedial scheme to inquire into and redress racial discrimination, it is not open to the courts to give relief by holding discrimination to be a new common law tort or founding a cause of action on breach of the legislation. Laskin C.J.C., for the court, concluded, at p. 195, that the legislation had "foreclosed" judicial innovation in this area. Accordingly, it follows that legislatures may limit the power of courts to recognize new common law rights and also exclude the exercise of the courts' ordinary remedial power to redress such rights. The role of the legislatures and courts is, however, reversed where constitutional rights are concerned. Unless the legislature exercises its override power under section 33 of the Canadian Charter of Rights and Freedoms, it cannot displace or foreclose a court's decision that certain acts are unconstitutional. Further, s. 24(1) provides that it is for courts to determine what remedy is just and appropriate to redress constitutional wrongs. Accordingly, although Parliament or a legislature could establish an administrative agency to compensate victims of unconstitutional acts they could not exclude applications for other remedies since to do so would infringe the guarantee of s. 24(1) that an aggrieved person may apply to a court for a remedy.

guaranteed rights and freedoms by limiting remedies for their infringement. Under the Canadian Charter of Rights and Freedoms, it is clear that the courts have the final say on remedies.

B. *Federal versus Unitary Court Systems*

Canada has a basically unitary court system, with the Supreme Court of Canada as a general court of appeal from both the provincial and federal appellate courts, entitled to substitute its judgment on all legal issues arising on appeal.[86] Accordingly, constitutional questions and common law tort issues can be decided in the same courts.

An American federal court, faced with a constitutional tort claim, must determine whether the plaintiff asserts a constitutional interest to be protected in the federal courts rather than leaving the claim to be dealt with by state tort law and the state courts.[87] It will determine whether a federal institution (a federal court) will displace state institutions in assessing the actions of state officials,[88] and affect the respective workloads of the two court systems.[89]

Canadian courts will not face this problem. The same court system will decide the claim whether it is based on the common law or on the constitution. Canadian courts are likely to be as cautious as their American counterparts about "constitutionalizing" the common law and thereby putting it beyond the reach of democratic institutions.[90] They will not, however, be further inhibited by the federalism concerns which confront the American federal courts. Nor are Canadian courts likely to be under as much pressure as American federal courts to "constitutionalize" what could as effectively be dealt with under common law principles.[91] Since the same court system will decide constitutional and common law claims, there will not be strategic or procedural advantages to formulating a claims as a constitutional issue, other than those which arise from section 24(1) itself. Accordingly, Canadian courts may, on the one hand, be less reluctant than the American federal courts to recognize constitutional claims and, on the other hand, under less pressure to do so.

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[86] Supreme Court of Canada Act, R.S.C. 1970, c. S-19, ss. 35-41, as amended by R.S.C. 1970 (1st Supp.), c. 44 and S.C. 1974-75-76, c. 18, ss. 3-5; Federal Court of Canada Act, R.S.C. 1970 (2nd Supp.), c. 10, ss. 31-34, as amended by S.C. 1974-75-76, c. 18, s. 9; P.W. Hogg, Constitutional Law of Canada (1977), pp. 115-117; W.R. Lederman, Current Proposals for Reform of the Supreme Court of Canada (1979), 57 Can. B. Rev. 687.

[87] Whitman, *loc. cit.*, footnote 16, at pp. 8-10.

[88] *Ibid.*, at pp. 30-40.

[89] *Ibid.*, at pp. 26-30.

[90] *Ibid.*, at pp. 38-39.

[91] See the text accompanying footnotes 141-153, *infra*.

[92] See *supra*, footnote 10.

C. *Jurisdiction to Grant Remedies for Constitutional Wrongs*

The authority of American courts to grant remedies for constitutional wrongs is more narrowly stated than the authority granted to Canadian courts by section 24(1) of the Charter. Section 1983 of the United States Civil Rights Act, 1871, authorizes a claim for redress to be made "in an action at law, suit in equity, or other proper proceeding for redress".[92] Similarly, in *Bivens*-type actions, the federal courts use their ordinary jurisdiction and remedial authority to award damages to redress constitutional infringements.[93] Accordingly, a person seeking damages for a constitutional wrong must bring an action in a court having ordinary jurisdiction to award the damages he seeks and in accordance with its procedures.

By contrast, the Canadian Charter of Rights and Freedoms authorizes a court of competent jurisdiction to grant whatever remedy it considers appropriate and just in the circumstances to redress an infringement of constitutional rights. Professor Hogg suggests that:[94]

> . . . this means that the court should not be one which is subject to jurisdictional restrictions which would deny it jurisdiction over the subject matter in issue or the parties to the application. However, a court which is competent as to subject matter and parties is probably not confined to remedies which are within its usual jurisdiction; the section itself confers the authority to grant an appropriate remedy.

If this interpretation be correct, all Canadian courts are authorized to fashion remedies to redress constitutional wrongs, regardless of their ordinary jurisdiction. This would provide substantially greater scope to remedy constitutional wrongs than is available to American courts. It is, however, arguable that in Canada, when a claimant seeks an affirmative remedy for a constitutional wrong, he must bring his claim in a court with jurisdiction to award such a remedy and in accordance with the procedural

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[93] It should be noted that this has not prevented the federal courts from developing creative remedies such as the exclusionary rule and equitable relief through which wide ranging institutional reforms are effected. In *Bivens, supra*, footnote 30, Harlan J., concurring, noted at p. 408, note 8:

> . . . today's decision has little, if indeed any, bearing on the question whether a federal court may properly devise remedies—other than traditionally available forms of judicial relief—for the purpose of enforcing social policies embodied in constitutional or statutory policies. Compare today's decision with *Mapp* v. *Ohio* . . . and *Weeks* v. *United States*. . . . The Court today simply recognizes what has long been implicit in our decisions concerning equitable relief and remedies implied from statutory schemes; i.e., that a court of law vested with jurisdiction over the subject matter of a suit has the power—and therefore the duty—to make principled choices among traditional judicial remedies. Whether special prophylactic measures—which at least arguably the exclusionary rule exemplifies . . .—are supportable on grounds other than a court's competence to select among traditional judicial remedies to make good the wrong done, . . . is a separate question. (references omitted.)

[94] Hogg, *op. cit.*, footnote 81, p. 65.

requirements established for the prosecution of such a claim.[95] If this interpretation be correct, the jurisdiction and procedures of Canadian courts in claims for damages for constitutional wrongs will be analogous (apart from federal-state issues) to that of American courts. It remains to be seen whether the Supreme Court of Canada will interpret the open language of section 24(1) to confer a full range of remedial powers on all courts before whom constitutional infringements are raised.

In any event, section 24(1) makes it clear that a court exercising remedial jurisdiction is not limited by existing substantive principles of common law and equity. It must determine what remedy is just and appropriate in the circumstances to redress a constitutional infringement and effectuate a constitutional guarantee. The American Supreme Court has acknowledged the need to tailor remedial principles to the constitutional interests they redress, but the court appears to be reluctant to depart from common law principles in practice.[96] Section 24(1) of the Charter makes it clear that Canadian courts are entitled to award remedies on the basis of their justness and appropriateness, and are not limited by existing remedial principles.[97]

D. *Government Immunity*

Canadian courts have substantially more scope than their American counterparts to order constitutional remedies against governments.[98] The United States government is immune from suit except to the extent that it has waived immunity by statute.[99] The state governments are also immune from suit except to the extent that they waive liability or Congress renders them liable when exercising its authority to legislate to enforce the Fourteenth Amendment.[100] Professor Dellinger has suggested that it may be arguable that sovereign immunity cannot protect an American government from accountability for unconstitutional action,[101] but sovereign immunity appears to be strongly established, even against constitutional claims. It is frequently cited as one of the most significant problems in developing an effective damages remedy to redress constitutional wrongs.[102]

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[95] See Gibson, *op. cit.*, footnote 1, pp. 500-502; and the cases noted in footnote 131, *infra*.

[96] See, for example, the discussions of the Court's approach to causation and measure of damages in the text accompanying footnotes 161-178 and 259-300, *infra*.

[97] See Gibson, *op. cit.*, footnote 1, pp. 502-508. See also *R.* v. *Germain* (1984), 53 A.R. 264 (Alta. Q.B.), per McDonald J. at paras. 25-28, citing *Maharaj* v. *Attorney-General of Trinidad and Tobago (No. 2)*, [1979] A.C. 385, [1978] 2 All E.R. 670 (P.C.).

[98] See text accompanying footnotes 24-27, *supra*, and footnotes 235-242, *infra*.

[99] See text accompanying footnotes 68-71, *supra*.

[100] See text accompanying footnotes 24-25, *supra*.

[101] Dellinger, *loc. cit.*, footnote 2, at pp. 1557.

[102] See, for example, Smith, *loc. cit.*, footnote 72, at pp. 697 *et seq.*

By contrast, section 32 of the Canadian Charter of Rights and Freedoms expressly provides that the Charter applies to the Parliament and government of Canada and the legislatures and governments of the provinces. Accordingly, section 24 of the Charter, which enables courts to remedy constitutional infringements, is enforceable against governments. Since the purpose of a bill of rights is to protect guaranteed rights and freedoms from government action, it is important that courts be able to order the full range of remedies against governments. Claimants in Canada will not be limited to suing government officials when it is really the government itself which is responsible for a constitutional infringement.[103] Nor will they be denied the fruits of their victory against an official since it is open to a court to find government vicariously liable whenever it is appropriate and just to do so. In Canada, government accountability for constitutional infringement is constitutionally entrenched, and is not, as in the United States, dependent on government action. This too provides Canadian courts with greater remedial scope.

E. *Conclusion*

It is thus arguable that Canadian courts have more scope than American courts to employ damages to remedy constitutional wrongs. Accordingly, American authorities which limit the effectiveness of damages as a constitutional remedy should not be followed where they are based not on policy or principle but on constraints which do not bind Canadian courts.

III. *When are Damages "Appropriate and Just"?—Constitutional Wrongs Distinguished from Common Law Torts*

Section 24(1) of the Charter leaves it to the court's discretion to determine what remedy will be "appropriate and just in the circumstances". On what basis is a court to determine that damages will be appropriate and just? One must look to the function of constitutional rights law: to protect individual rights against the will of the majority, as expressed in legislation, and against the power of the government, as exercised by its officials. A constitutional remedy should vindicate guaranteed rights and prevent or deter future infringements, Where appropriate, it should also compensate for past infringements and, in egregious cases, punish the infringer. In granting a remedy, a court must seek to balance competing interests, by enforcing rights and freedoms guaranteed by the Charter, without imposing an excessive burden on government conduct.[104] As discussed in section V. of this article, the elements of a remedy in damages for constitutional wrongs can be tailored to meet these objectives.

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[103] See text accompanying footnotes 235-258, *infra*.

[104] T.A. Eaton, Causation in Constitutional Torts (1982), 67 Iowa L. Rev. 443, at p. 444.

There is a need for a remedy in damages under section 24(1) of the Charter, in addition to or instead of common law remedies, to vindicate constitutional rights. As others have argued, the primary role of a court in constitutional litigation is different from its role in conventional litigation.[105] The emphasis shifts from dispute resolution to the articulation and enforcement of constitutional values. In any event, constitutional wrongs may be qualitatively different from ordinary civil wrongs. One acting in the name of the government has potential ability to bring about substantially greater harm than the ordinary person, and the victim of his wrongful act has fewer avenues of redress.[106] As Brennan J. explained in *Bivens*:[107]

> . . . we may bar the door against an unwelcome private intruder or call the police if he persists in seeking entrance. The availability of such alternative means for the protection of privacy may lead the State to restrict imposition of liability for any consequent trespass. A private citizen, asserting no authority other than his own, will not normally be liable in trespass if he demands, and is granted, admission to another's house. But one who demands admission under a claim of federal authority stands in a far different position. The mere invocation of federal power by a federal law enforcement official will normally render futile any attempt to resist an unlawful entry or arrest by resort to the local police; and a claim of authority to enter is likely to unlock the door as well. "In such cases there is no safety for the citizen, except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the government, professing to act in its name. There remains to him but the alternative of resistance, which may amount to crime."

Other constitutional rights have no analogue in the law of torts or are uniquely rights against government action. The guarantees of rights of free

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[105] See A.B. Chayes, The Role of the Judge in Public Law Litigation (1976), 89 Harv. L. Rev. 1281; see also O.M. Fiss, The Social and Political Foundations of Adjudication (1982), 6 Law & Human Behaviour 121; B.H. Wildsmith, An American Enforcement Model of Civil Process in a Canadian Landscape (1980), 6 Dalhousie L.J. 71.

[106] See *Rookes* v. *Barnard*, [1964] A.C. 1129, at p. 1226, [1964] 1 All E.R. 367, at p. 410 (H.L.) in which the House of Lords differentiated unconstitutional conduct by government officials from oppressive conduct by others; and limited the availability of punitive damages to the former:

> The first category is oppressive, arbitrary or unconstitutional action by the servants of the government. I should not extend this category . . . to oppressive action by private corporations or individuals. Where one man is more powerful than another, it is inevitable that he will try to use his power to gain his ends; and if his power is much greater than the other's, he might, perhaps, be said to be using it oppressively. If he uses his power illegally, he must of course pay for his illegality in the ordinary way; but he is not to be punished simply because he is the more powerful. In the case of the government it is different, for the servants of the government are also the servants of the people and the use of their power must always be subordinate to their duty of service. It is true that there is something repugnant about a big man bullying a small man and, very likely, the bullying will be a source of humiliation that makes the case one for aggravated damages, but it is not, in my opinion, punishable by damages.

Note that Canadian courts have not similarly limited the availability of punitive damages: see S.M. Waddams, The Law of Damages (1983), paras. 979-987.

[107] *Supra*, footnote 30, at p. 394 (references omitted).

speech and association, for example, protect intangible interests which may be violated without infringing any interest in person or property which is protected by common law tort principles.[108]

Even where the common law of tort would provide compensation for the actual injury a victim has suffered, a remedy in damages under section 24(1) of the Charter should be available to vindicate the infringement of a constitutional right. The plaintiff in *Bivens* could have recovered compensation for his actual loss by suing in the state courts claiming damages for trespass, assault and false imprisonment, but he was allowed to frame his action as a constitutional claim in order to vindicate his constitutional rights and enforce constitutional values. Where a wrongful act gives rise both to an action at common law and an application for damages under section 24(1) of the Charter it is not appropriate to apply the principle, often cited but not always applied in cases involving legislative jurisdiction, that a court should seek to decide a case on other than constitutional grounds.[109] Where a litigant alleges that his constitutional rights have been infringed, he has a right, under section 24(1) of the Charter, to apply to a court for a remedy which enforces constitutional values.

Although the United States Supreme Court has provided a remedy in damages to redress infringements of constitutional rights, its approach reflects some ambivalence about the purpose of such an award. On the one

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[108] Whitman, *loc. cit.*, footnote 16, at p. 14; Wunsch, *loc. cit.*, footnote 36, at p. 450.

[109] For a discussion of the application of this principle see B.A. Strayer, The Canadian Constitution and the Courts (2nd edn., 1983), p. 181 *et seq.* See also P.C. Weiler, The Supreme Court and the Law of Canadian Federalism (1973), 23 U. Toronto L.J. 307, at pp. 308-311. There is some ground for concern that where litigants challenge the constitutionality of legislation, the Supreme Court of Canada may require them to elect whether the challenge is on division of powers principles or on the basis of infringement of the Charter of Rights and Freedoms. In *Westendorp* v. *The Queen*, [1983] 1 S.C.R. 43, (1983), 144 D.L.R. 259, the appellant, who had been charged with an offence under a prostitution bylaw, argued that the bylaw was *ultra vires* the legislative authority conferred by s. 92 of the Constitution Act, 1867 and invalid in that it infringed rights guaranteed by s. 7 of the Canadian Charter of Rights and Freedoms. The appellant abandoned the challenge under the Charter apparently because the court indicated that the Charter argument could be raised only if the appellant conceded that the bylaw was otherwise *intra vires* (at pp. 46-47 (S.C.R.), 261-262 (D.L.R.)). Accordingly, it appears that the court was not prepared to entertain arguments in the alternative. The written reasons do not reveal the basis of the court's view. It should be noted, however, that s. 32(1) of the Charter provides that the Charter applies to Parliament "in respect of all matters within the authority of Parliament" and to the legislatures of each province "in respect of all matters within the authority of the legislature of each province". Perhaps the court considered that no issue arose under the Charter unless it was first found that the impugned legislation was within provincial jurisdiction under s. 92 (as to which see the text accompanying footnote 191, *infra*). Nonetheless, this would not explain why the issues could not be argued in the alternative on appeal. It is to be hoped that the court will soon clarify its position, and permit both jurisdicitonal and Charter issues to be argued in the alternative in a constitutional case. See also J.D. Whyte, Developments in Constitutional Law: The 1982-83 Term (1984), 6 Supreme Court L. Rev. 49, at pp. 55-56.

hand, the court has emphasized the importance of claims in damages as a "vital means of providing redress for persons whose constitutional rights have been violated",[110] and as a "deterrence of future egregious conduct".[111] It has noted that, if litigants cannot invoke the existing jurisdiction of the courts to protect their constitutional rights, those rights will become "merely precatory".[112] It has asserted the effectiveness of actions in damages against government officials to deter infringements of constitutional rights.[113] On the other hand, when it comes to valuing damages claims, the court's touchstone appears to be compensation, not deterrence. The court expects that the vindication and deterrence objectives will be met by awarding a damages remedy based on compensation principles.

It is difficult for a court to assess the probable deterrent effect of an award of damages,[114] particularly if it has little control over the determination of who will actually pay. Vicarious liability or the availability of indemnity or insurance may well dilute the deterrent effect of a damage award.[115] As well, the damage award is not a fine, calculated to punish and deter wrongdoers and paid into the public coffers. Instead, it is paid to the victim and should bear some relation to his loss. But what is the loss? The victim may or may not have suffered consequential damage, but he has suffered an interference with his constitutional rights, the protection of which is important not only to him but to all members of society. This loss in itself should be redressed. Furthermore, because enforcement of constitutional rights depends on private action, it may be important (if effective enforcement is desired) to provide some incentive for an aggrieved individual to act as a private prosecutor.[116] No public agency is charged with enforcement of the constitution, and, in any event, private prosecution, independent of government, is likely to be a more effective means of

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[110] *Butz* v. *Economou*, *supra*, footnote 42 at p. 504.

[111] *Smith* v. *Wade*, 103 S. Ct. 1625, at p. 1636 (1983).

[112] *Davis* v. *Passman*, *supra*, footnote 44, at p. 242.

[113] *Carlson* v. *Green*, *supra*, footnote 30, at p. 23 and note 6.

[114] The American Supreme Court demonstrates this difficulty in its opinions in *Carlson* v. *Green*, *ibid.* The majority, speaking through Brennan J., held that an action in damages against the prison officials, based directly on the constitution, is a more effective deterrent than an action against the United States under the Federal Tort Claims Act (at pp. 21 *et seq.*). The reasoning involved in this assessment is highly speculative. The court has no empirical evidence before it to support its judgment, and, not surprisingly, Rehnquist J., dissenting, makes equally compelling arguments as to why such an action is not more effective as a deterrent (at pp. 44 *et seq.*). Further, in *Owen* v. *City of Independence*, *supra*, footnote 26, the majority and minority reach different conclusions as to the extent to which strict liability for constitutional infringements would inhibit government action. See the text accompanying footnotes 247-258, *infra*.

[115] Whitman, *loc. cit.*, footnote 16, at p. 50.

[116] J.C. Love, Damages: A Remedy for Violation of Constitutional Rights (1979), 67 Calif. L. Rev. 1242, at p. 1263.

making government and government officials accountable for constitutional infringements. If an individual will not recover damages unless he can establish that the infringement of his right resulted in some consequential injury, it is less likely that infringements of constitutional rights will be pursued in the courts. In these cases, the constitution will have been breached with impunity. Accordingly, it will be argued herein[117] that, where damages are employed as a constitutional rather than a common law remedy, they should be available not only to compensate for consequential losses but to redress the infringement of the right itself.

Damages awarded on this basis will provide a more effective means of deterrence than compensatory damages, but even so the deterrent effect is indirect and difficult to assess. It is assumed that awarding damages against wrongdoers for past wrongs will deter others from committing similar wrongs in the future, and thus constitutional values will be protected. As Professor Whitman has argued, equitable remedies which "direct future conduct rather than apportioning blame for past conduct"[118] may be more effective than damage awards to deter constitutional infringements, particularly when they arise from "systemic problems" within government institutions:[119]

> Damage actions can lead to systemic change, but this will occur, if at all, only through a process that is time-consuming, wasteful, and painful for both parties and the courts.
>
> [A] great many successful damage actions, perhaps including punitive awards, may be necessary to engender a cost sufficiently great to induce change that a . . . government is reluctant to institute of its own accord. Equitable relief can achieve the same result—a result, we must remember, that is constitutionally required—more quickly and with less expenditure of everyone's time and money.

Where an action—particularly a class action[120]—is brought to restrain continuing unconstitutional action within a government institution, a court

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[117] See text accompanying footnotes 278-287, *infra*.

[118] Whitman, *loc. cit.*, footnote 16, at p. 51.

[119] *Ibid.*, at p. 50 (references omitted). See, also C.P. Sunstein, Judicial Relief and Public Tort Law (1983), 92 Yale L.J. 749, at p. 753.

[120] This assumes that an effective class action procedure is available or that, in the absence of an established procedure, a court would be prepared to exercise its direction under s. 24(1) of the Canadian Charter of Rights and Freedoms to give directions for the prosecution of a class action. In *General Motors of Canada* v. *Naken*, [1983] 1 S.C.R. 72, *sub. nom. Naken* v. *General Motors of Canada Ltd.* (1983), 144 D.L.R. (3d) 385, the Supreme Court of Canada held that Ontario's existing class action provision (Rule 75) did not provide sufficient authority for a class action claim in damages on behalf of owners of an allegedly defective model of car. However, some of the reasons for so finding would be avoided if the relief claimed were limited to prospective injunctive relief. The class action is under review in Ontario: see the Ontario Law Reform Commission's Report on Class Actions (3 vols., 1982). In Quebec, comprehensive provisions have been adopted: Code of Civil Procedure, R.S.Q. 1977, c. C-25. In the United States, the class action has been an important vehicle of constitutional reform through litigation: see A. Cox, The New Dimensions of Constitutional Adjudication (1975-76), 51 Wash. L. Rev. 791, at pp. 808-813;

might be justified in granting only prospective equitable relief without seeking to compensate for past deprivations of rights. In any event, in a class action it would be virtually impossible to assess the damage suffered by each claimant. Individual assessments of damages would be required, and such assessments of personal damages cannot conveniently be made within class action proceedings.[121] In deciding what remedy is just and appropriate in the circumstances, the court might well hold that it is appropriate to direct the expenditure of public funds to restructuring the institution so that future infringements will be avoided.

However, where individual plaintiffs whose constitutional rights have been infringed seek a remedy, and there is no likelihood that the infringement will be repeated against them, it is unlikely that a court will turn the application for a remedy into an investigation of systemic problems within the government institution. Damages will be an appropriate remedy to compensate the victims, to deter other infringements by holding the wrongdoers accountable, and, where the conduct has been particularly egregious, to punish the wrongdoers. The availability of damages to redress past infringements of constitutional rights also encourages governments and their officials to avoid infringement—something which cannot be achieved by equitable relief alone since it operates only prospectively, and does not hold officials accountable for past actions.

Damages may be criticized as being a means of "permit[ting] government to buy its way out of having to comply with constitutional commands",[122] but even where alternative remedies are available, damages may be more appropriate in the circumstances because they vindicate the constitutional right without interfering disproportionately with the implementation of legitimate government policy. Thus as McDonald J. held in *R.* v. *Germain*:[123]

> There may be circumstances in which quashing or staying proceedings or dismissing an indictment will be a just remedy for an infringement of a *Charter* right. However, when the offence in question is a serious one, it might not be just to grant such a remedy. It might not be just because it would foster a sense of injustice in the community at large. To grant the remedy might cause revulsion in the community because the community might see such a remedy as disproportionate to the infringement of the constitutional right. That sense of injustice might be greater than would be the case, if some other remedy were available which would not result in the freeing of a possibly guilty offender.

O.M. Fiss, The Civil Rights Injunction (1978), pp. 14-15; T. Wilton, The Class Action in Social Reform Litigation: In Whose Interest? (1983), 63 Boston U. L. Rev. 597; A. Chayes, *loc. cit.*, footnote 105, at pp. 26 *et seq.*

[121] See *Markt & Co. Ltd.* v. *Knight Steamship Co. Ltd.*, [1910] 2 K.B. 1021 (C.A.); *Farnham* v. *Fingold* (1973), 33 D.L.R. (3d) 156, at p. 160, [1973] 2 O.R. 132, at p. 136 (Ont. C.A.); *General Motors of Canada Ltd.* v. *Naken*, *ibid.*, at pp. 84-88 (S.C.R.), 393-397 (D.L.R.).

[122] Dellinger, *loc. cit.*, footnote 2, at p. 1563.

[123] *Supra*, footnote 97, at paras. 20 *et seq.* See, also the discussion in the text at footnotes 172-177, *infra*.

The effectiveness of damages both as compensation and as deterrent and punishment will depend to a considerable extent on who is liable to pay a damage award. This issue is considered in a later section of this article.[124]

It thus appears that whether damages are an appropriate and just remedy for a constitutional infringement will depend on the nature of the proceedings and the court's purpose in affording the remedy. Where the court seeks to enforce the constitution, to deter unconstitutional actions and punish their perpetrators, damages may be appropriate, even in the absence of compensable injury, depending on the nature of the defendant's conduct, the availability of other remedies, and their relative efficacy as deterrents. Although Canadian courts are entitled to take into account a broad range of policy considerations in determining the appropriateness and justness of a remedy in damages, extraneous considerations such as the fact that court workloads may be increased if a remedy in damages is made available, are not relevant to this task.[125]

In determining whether damages are an appropriate remedy to redress a constitutional wrong, a court should ask the following questions:

(1) What are the purposes of the constitutional guarantee?

(2) What other remedies are available to redress the infringement of that guarantee? Do they provide an effective means of vindicating the plaintiff's rights and deterring similar unconstitutional conduct without interfering disproportionately with the implementation of legitimate government policy? Would a remedy in damages achieve these purposes any more effectively, taking into account who will eventually pay?

(3) Was the conduct of the defendants so egregious as to warrant punishment through the imposition of damages? Is there any other mechanism available for effective punishment?

(4) Has the plaintiff suffered consequential injuries which should be compensated?

These questions may guide a court in assessing the appropriateness of a remedy in damages, but a court must still make some assumptions, particularly as to the deterrent effect of awards of damages in various circumstances. Empirical research evaluating the impact of awards of damages would assist the courts. When courts make remedial decisions they can do so only on an *ad hoc*, case by case basis.[126] It is difficult for them to take

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[124] See text accompanying footnotes 207-258, *infra*.

[125] See footnote 34, *supra*; and see *Bivens*, *supra*, footnote 30, per Harlan J. at p. 411:

> . . . when we automatically close the courthouse door solely on this basis, 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.

[126] Whitman, *loc. cit.*, footnote 16, at p. 62, note 276.

account of the broad range of policy factors which could be put before a legislature or a legislative committee evaluating the efficacy of various remedies. It is partly for this reason that the American Supreme Court is prepared to defer to Congress' judgment as to what is an equally effective remedy to redress constitutional infringements.[127] Canadian courts, however, are obliged to determine what remedy is appropriate and just in the circumstances. Since Canadian courts are obliged to make essentially policy choices in this area, it is important that an information base be developed to inform those choices.[128]

Courts have a good deal of experience in awarding damages as a remedy, but the principles they have developed at common law to attribute liability for, and determine the extent of, recoverable damages will not necessarily be appropriate to a claim for damages for an infringement of constitutional rights.[129] Because the purpose of a damage remedy in the law of torts is different from its counterpart in constitutional law, common law principles can provide nothing more than a "starting point" for constitutional tort law, not "a complete solution".[130]

IV. *Elements of a Damages Claim for Infringement of a Constitutional Right*

A plaintiff seeking damages for violation of a constitutional right should have to establish[131] that an interest of the plaintiff, which is constitutionally

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[127] See the text accompanying footnotes 53-63 *supra*. Note, however, that where remedies other than damages are concerned, the United States Supreme Court has indicated that it will assess whether a legislative remedy is equally effective as its own. Thus in *Miranda* v. *State of Arizona*, *supra*, footnote 6, it was argued that the court should refrain from specifying procedures for warning an accused of his rights in a custodial interrogation until state legislatures could deal with the problem. Warren C.J., for the court, rejected the argument (at pp. 490-491):

> We have already pointed out that the Constitution does not require any specific code of procedure for protecting the privilege against self-incrimination during custodial interrogation. Congress and the States are free to develop their own safeguards for the privilege, so long as they are fully as effective as those described above in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it. . . . Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them.

[128] Without such research, courts can do little but speculate as to the impact of various remedies. See footnote 114, *supra*.

[129] As Rehnquist J., dissenting, cautioned in *Carlson* v. *Green*, *supra*, footnote 30, at p. 39:

> The determination by federal courts of the scope of such a remedy [in damages] involves the creation of a body of common law. . . . This determination raises such questions as the types of damages recoverable, the injuries compensable, the degree of intent required for recovery, and the extent to which official immunity will be available as a defence.

[130] *Carey* v. *Piphus*, *supra*, footnote 29, per Powell J., at p. 258. Note that some commentators argue that it is a mistake to look to the common law even for a starting point: see, e.g., Sunstein, *loc. cit.*, footnote 119, at p. 758.

[131] The plaintiff may also have to establish that the court has jurisdiction to award

protected, has been infringed or denied;[132] that the defendant caused or is otherwise responsible for the infringement, and if compensation for actual injury is claimed, that the infringement caused the damage;[133] further, that the defendant's actions, which constitute the infringement, are subject to the Charter;[134] that damages are an appropriate and just remedy for the infringement;[135] and, finally, the appropriate measure of damages.[136] The defendants can, of course, contest the plaintiff's claim on each of these bases and, in addition, raise whatever defences are available to them to limit or mitigate their liability.[137]

A. *Has an interest of the plaintiff, which is constitutionally protected, been infringed or denied?*

(1) *Standing*

The right to claim damages or any other remedy for violation of constitutional rights is limited by section 24(1) of the Charter to "anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied". The right to seek a remedy under section 24(1) is a personal one which, it appears, cannot be asserted by an interested citizen or an affected third party.[138] In American constitutional law a third party whose interests are injured as the result of legislation which interferes with others' constitutional rights may be granted standing to challenge the constitutionality of the legislation.[139] Canadian courts may be prepared to permit such a third party to challenge the validity of legislation under section 52 of the Charter, but the opportunity to apply for a remedy under section 24(1) of the Charter is limited to those whose own constitutional rights have been infringed. Thus, for example, it appears that prison guards who are unhappy about their working conditions could not seek damages, or an injunction, under section 24(1) on the basis that the conditions

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damages: see *Re Seaway Trust Co. et al.* v. *The Queen in Right of Ontario et al.* (1983), 146 D.L.R. (3d) 586, 41 O.R. (2d) 501 (Ont. Div. Ct.); rev'd (1983), 146 D.L.R. (3d) 620, 41 O.R. (2d) 532 (Ont. C.A.); leave to appeal denied by the Supreme Court of Canada; *Collin* v. *Lussier*, [1983] 1 F.C. 218 (T.D.).

[132] See the text accompanying footnotes 139-156, *infra*.

[133] See the text accompanying footnotes 157-188, *infra*.

[134] See the text accompanying footnotes 189-206, *infra*.

[135] See the text accompanying footnotes 104-128, *supra*.

[136] See the text accompanying footnotes 259-300, *infra*.

[137] For a discussion of immunity defences, see the text accompanying footnotes 207-258, *infra*.

[138] Gibson, *op. cit.*, footnote 1, pp. 493-498. See also Hogg, *op. cit.*, footnote 81, p. 65. *Contra*, Strayer, *op. cit.*, footnote 109, pp. 170-171; *R.* v. *Big M. Drug Mart Ltd.* (1983), 5 D.L.R. (4d) 121, [1984] 1 W.W.R. 625 (Alta. C.A.), leave to appeal to the Supreme Court of Canada granted; 5 D.L.R. (4th) 121n.

[139] See, for example, *Craig* v. *Boren*, 429 U.S. 190 (1976). See also Note, Standing to Assert Constitutional Jus Tertii (1974), 88 Harv. L. Rev. 423; R.A. Sedler, The Assertion of Constitutional Jus Tertii: A Substantive Approach (1982), 70 Calif. L. Rev. 1308.

amount to cruel and unusual punishment of the inmates in their charge.[139a] On the other hand, as in *Carlson* v. *Green*,[140] a constitutional infringement could presumably be asserted, and a remedy in damages claimed, by one who succeeds to the plaintiff's interest.

(2) *Is the Interest Asserted Constitutionally Protected?*

The plaintiff must establish that the interest he asserts comes within the rights and freedoms guaranteed by the Charter, and that the action he impugns constitutes an infringement or denial of those guaranteed rights. Courts will be called upon to determine whether an interest is protected only at common law or comes within a constitutional guarantee. The issue is important in that, when an interest is held to be constitutionally protected, it is put beyond legislative revision, other than by exercise of the override power or by constitutional amendment.[141] The extent and significance of this "constitutionalizing" of tort law will depend on two factors: first, the range of interests protected by constitutional guarantees; and, second, the range of actors to whom the constitution applies.[142]

American courts have confined the "constitutionalizing" of tort law, in part through the state action doctrine which limits the application of the constitution,[143] but also by narrowly construing the interests protected by the due process guarantee of the Fourteenth Amendment[144] so as to exclude some interests which are actionable at common law. In *Paul* v. *Davis*,[145] the plaintiff sought damages under section 1983 of the Civil Rights Act, 1871[146] on the basis that his reputation had been injured without due process when the police included his photograph in a flyer of "Active Shoplifters". At the time of the notice, the plaintiff had been charged with

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[139a] It appears that the issue may arise in *Re Hussey and Attorney General of Ontario* (1984), 46 O.R. (2d) 554, at p. 566 (Ont. Div. Ct.).

[140] *Supra*, footnote 30.

[141] See Whitman, *loc. cit.*, footnote 16, at pp. 38-39. Professor Henry P. Monaghan has argued that in the United States there has developed a body of constitutional common law which is subject to legislative revision:

> . . . a surprising amount of what passes as authoritative constitutional "interpretation" is best understood as something of a quite different order — a substructure of substantive, procedural, and remedial rules drawing their inspiration and authority from, but not required by, various constitutional provisions; in short, a constitutional common law subject to amendment, modification, or even reversal by Congress.

H.P. Monaghan, The Supreme Court 1974 Term: Foreword: Constitutional Common Law (1975), 89 Harv. L. Rev. 1, at pp. 2-3. Cf. T.S. Schrock and R.C. Welsh, Reconsidering the Constitutional Common law (1978), 91 Harv. L. Rev. 1117. See also Dellinger, *loc. cit.*, footnote 2, at pp. 1559-1563.

[142] See the text accompanying footnotes 190-206, *infra*.

[143] See the text accompanying footnotes 201-202, *infra*.

[144] See, *supra*, footnotes 8 and 9.

[145] *Supra*, footnote 22.

[146] *Supra*, footnote 10.

shoplifting, but the charges were subsequently dismissed. The Supreme Court held that mere defamation by a state official is actionable in tort, but not in a section 1983 action. This result appears to have been motivated by the concern that the plaintiff's claim "would seem almost necessarily to result in every legally cognizable injury which may have been inflicted by a state official acting under 'color of law' establishing a violation of the Fourteenth Amendment".[147]

As Justice Brennan argued in dissent, the court overstated its argument. To Justice Brennan, "[t]he stark fact is that the police here have officially imposed on respondent the stigmatizing label 'criminal' without the salutary and constitutionally mandated safeguards of a criminal trial".[148] This act, he argued, was not simply defamation, but an infringement of the plaintiff's liberty without due process and accordingly was actionable under section 1983.[149]

The majority decision in *Paul* v. *Davis* reflects concern that the federal courts hearing claims against government officials under section 1983 of the Civil Rights Act, 1871 are displacing the authority of state courts,[150] and replacing the common law with less flexible constitutional decisions, which are not subject to legislative correction.[151] As noted above,[152] with Canada's unitary court system, and the availability of legislative override, there is less reason for Canadian courts to strain to avoid a finding that an interest is constitutionally protected. In any event, provided the constitution applies only to those exercising governmental powers,[153] tort law will continue to be elaborated in common law actions.

(3) *Infringement*

Once it has been established that the interest asserted by the plaintiff is constitutionally protected, it must also be determined that the plaintiff's constitutional rights have been infringed. The impugned action must interfere with the plaintiff's rights whether by preventing their exercise, attaching adverse consequences to their exercise, or otherwise interfering with their enjoyment. It is not, however, clear whether it will be open to a defendant to argue that the infringement was, in the circumstances, reasonable and justified.

The rights and freedoms in the Canadian Charter are, for the most part, guaranteed in absolute terms, subject to such reasonable limits as can

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[147] *Supra,* footnote 22, at pp. 697-699.

[148] *Ibid.,* at p. 718.

[149] *Ibid.,* at pp. 722-735.

[150] Whitman, *loc. cit.,* footnote 16, at pp. 30-40.

[151] *Ibid.,* at pp. 38-39.

[152] See text accompanying footnotes 73-91, *supra.*

[153] See the text accompanying footnotes 190-206, *supra.*

be justified under section 1.[153a] Thus, it is arguable that the only limits which can be placed on guarantees such as freedom of expression are those which, as provided in section 1, are "reasonable", "prescribed by law" and "demonstrably justified in a free and democratic society". In other words, courts cannot qualify the scope of, for example, freedom of expression, to take into account other conflicting and compelling interests, except as provided in section 1. This may create difficulties when an alleged infringement results from an action taken by government officials in the purported exercise of their general authority, but which is not expressly prescribed by law. If the guaranteed rights and freedoms which are expressed in unqualified terms[154] are subject only to such limits as are "prescribed by law", then, unless "prescribed by law" is very broadly construed, courts will be driven to the position that actions which could be justified as reasonable limits on constitutional rights, nonetheless constitute infringements of those rights.

There are two possible but unsatisfactory approaches to avoiding this result. First, a court could hold that any action taken by a government official in the purported exercise of his authority is deemed to be prescribed by law, and accordingly, if it is reasonable, taking into account the needs of a parliamentary democracy, it will not constitute an infringement of a guaranteed right. This would permit abridgement of rights through administrative discretion and accordingly would require an extension of the meaning currently ascribed to the phrase "prescribed by law" in section 1.[155] Second, the courts could construe each guarantee as being qualified, so that, for example, not every conceivable constraint on freedom of expression would come within the protection of the fundamental guarantees of section 2 of the Charter. This approach, however, undermines the guarantee in section 1 that the rights and freedoms can be limited only as therein provided.

Even if no means is found to uphold reasonable limits on constitutional rights which are not prescribed by law, the problem may not have widespread impact. In the first place, several of the Charter guarantees are

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[153a] *Supra*, footnote 83.

[154] Some of the rights and freedoms guaranteed by the Canadian Charter of Rights and Freedoms are qualified: for example, security against *unreasonable* search and seizure (s. 8); the right not to be *arbitrarily* detained or imprisoned (s. 9); and see also s. 11(a) and (e), s. 12, s. 23. Other rights and freedoms, e.g., the fundamental rights (s. 2) and the right to vote (s. 3) are stated in unqualified form but, in any event, are subject to such limits as can be justified under s. 1 of the Charter.

[155] See *Re Ontario Film and Video Appreciation Society and Ontario Board of Censors* (1983), 147 D.L.R. (3d) 58, at p. 67, 41 O.R. (2d) 583, at p. 592 (Ont. Div. Ct.): a limit "prescribed by law" does not include a limit imposed by the exercise of administrative discretion. The decison was affirmed on appeal: (1984), 5 D.L.R. (4th) 766, 45 O.R. (2d) 80 (Ont. C.A.); leave to appeal to the Supreme Court of Canada granted; 5 D.L.R. (4th) 766n.

qualified,[156] and in relation to the interests protected by such guarantees justified actions can be upheld without resorting to section 1 of the Charter. Even where a reasonable, justifiable action is held to infringe an unqualified guarantee, the impact of the decision can be minimized by determining that it would not be appropriate and just to award a remedy for this kind of "unconstitutional" act. Nonetheless, if clearly justified actions are held unconstitutional, it cannot but tend to trivialize the constitution.

B. *Causation and Responsibility*

Section 24 of the Charter does not specify, as does section 1983 of the American Civil Rights Act, 1871,[157] from whom a remedy can be sought[158] or the basis upon which a defendant will be held responsible for the infringement of the plaintiff's rights. Accordingly, Canadian courts have considerable leeway to articulate appropriate principles for establishing responsibility, in light of the purposes and policies of the Charter.

(1) *Causation*

Section 24 does not expressly require that causation be established, and thus it may be arguable that a court could order government to pay damages to redress infringement of a plaintiff's rights even if causation is not established. However, if the Charter applies only to those exercising governmental powers,[159] it will be necessary to establish that such a person has caused the infringement of the plaintiff's rights. Accordingly, the mere fact of infringement will not be sufficient; its cause will also be material.

A further issue of causation arises if a plaintiff seeks compensation for consequential damage allegedly flowing from the infringement of his right. As in common law tort, the court may have to determine whether the infringement was a "cause in fact" of the plaintiff's injury.[160] As a general rule, at common law a plaintiff must establish that the defendant's conduct in fact caused his injury by proving that the injury would not have occurred "but for" the defendant's conduct.[161] The defendant's action, no matter how wrongful, is not a cause of the plaintiff's damage if the damage would have been incurred regardless of the defendant's conduct.[162] The defendant is required to compensate the plaintiff, not for breaching the defendant's duty of care, or infringing the plaintiff's rights, but only for injuries caused by his wrongful act.[163]

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[156] *Supra*, footnote 154.

[157] *Supra*, footnote 10.

[158] See text accompanying footnotes 189-258, *infra*.

[159] See text accompanying footnotes 189-206, *infra*.

[160] For a discussion of causation in American constitutional torts see: Eaton, *loc. cit.*, footnote 104; Love, *loc. cit.*, footnote 116, at pp. 1270-1271.

[161] J.G. Fleming, The Law of Torts, (6th ed., 1983), p. 171.

[162] *Ibid.*

[163] See E.J. Weinrib, A Step Forward in Factual Causation (1975), 38 Mod. L. Rev.

The "but-for" test may be appropriate in constitutional tort cases for determining liability to compensate for actual injury suffered as the result of a constitutional infringement. However, it will not always be adequate to vindicate constitutional rights. Where a decision which leads to injury is motivated by unconstitutional concerns, but the decision can be supported on other grounds, the "but-for" test will prove inadequate to vindicate constitutional rights.

The decision of the United States Supreme Court in *Mt. Healthy School District Board of Education* v. *Doyle*[164] illustrates the problem. Doyle was an untenured teacher who, if his contract was renewed, would obtain permanent status. Doyle had been argumentative with his colleagues, and had used inappropriate language and made obscene gestures to students. In addition, when the school principal circulated for discussion a proposed teachers' dress code, Doyle disclosed the contents of the memorandum to a radio station without any prior discussion with the school administration.[165] The Board had full discretion whether or not to rehire Doyle. It declined to do so, citing his "notable lack of tact in handling professional matters" and referring specifically to the radio-station incident and to the obscene-gesture incident.[166] Doyle sought reinstatement and damages, claiming that the refusal to rehire him violated his rights under the First[167] and Fourteenth[168] Amendments. The court held that Doyle's communication with the radio station was constitutionally protected and had been a "motivating factor" in the decision not to rehire him.[169] Nonetheless, the court held that this interference with the plaintiff's constitutional rights did not necessarily entitle him to a remedy. It was open to the School Board to establish that it would have declined to rehire the plaintiff even if he had not exercised his right of free speech.[170] In other words, if the Board could establish that Doyle's exercise of free speech was not the "but-for" cause of the decision not to rehire, the Board would avoid any liability for infringing Doyle's rights. Although this result vindicates the plaintiff's rights to the extent of shifting the onus to the defendant to prove that valid reasons would have led to the same result, it provides no

518. Note also that in some cases damages may be presumed to flow from infringement of the right. See text accompanying footnote 278-287, *infra*.

[164] 429 U.S. 274 (1977).

[165] *Ibid.*, at pp. 281-282.

[166] *Ibid.*, at pp. 282-283.

[167] U.S. CONST., First Amendment:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

[168] *Supra*, footnote 8.

[169] *Supra*, footnote 164, at p. 287.

[170] *Ibid.*

meaningful redress to the plaintiff, not even a paper victory, if the defendants can muster other persuasive reasons to support their decision.

Instead of the "but-for" test, the court could have chosen to apply a "substantial factor" test of causation. It is arguable that the court has an overriding responsibility to enforce the constitution, and that, where unconstitutional considerations have been a substantial factor motivating a decision, the decision is tainted and the plaintiff is entitled to redress.[171]

The court in *Mt. Healthy* implicitly rejected this approach. It reasoned that the plaintiff should not be in a better position as a result of the exercise of constitutionally protected conduct than that he would have occupied had he done nothing.[172] Justice Rehnquist, for the court, considered that "[t]he constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct".[173] Accordingly, the constitutional infringement itself will not be redressed unless it results in some consequential harm. The court considered that it should not prevent the implementation of a warranted governmental decision because unconstitutional considerations played a part therein.[174] This argument may be persuasive insofar as reinstatement is the remedy. Why should future students be subjected to an inferior teacher because those in authority contravened his constitutional rights? On the other hand, why should officials be permitted to infringe constitutional rights simpy because, coincidentally, they can support their decision on other grounds? By applying a "but-for" test to avoid reinstatement, the court also must deny any remedy in damages. As Professor Eaton observes,[175]

> [t]he compromise reached in *Mt. Healthy* illustrates the use of cause in fact to resolve questions of policy. In this instance, the policies of deterrence, vindication and compensation are slightly overridden by the value of encouraging governmental freedom to act.

If the only remedy available to redress constitutional wrongs is a claim in damages for actual injury suffered as a result of the constitutional wrong, then an argument can be made for preferring a "substantial factor" test of causation, which will redress infringement of constitutional rights. If a choice must be made between enforcing constitutional norms and upholding any particular government decision, it is arguable that a court should

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[171] There is precedent for such an approach. In housing discrimination cases decided under s. 1982 of the Civil Rights Act, 1871, lower courts have held that "[i]f a plaintiff proves that race was one reason for the defendant's refusal to rent or sell, the defendant cannot avoid liability by showing that other reasons existed for the refusal". Love, *loc. cit.*, footnote 116, at p. 1271.

[172] *Supra*, footnote 164, at p. 285.

[173] *Ibid.*, at pp. 285-286.

[174] *Ibid.*, at p. 286.

[175] Eaton, *loc. cit.*, footnote 104, at p. 461. See also Weinrib, *loc. cit.*, footnote 163, at p.529.

give primacy to the former over the latter. But no such choice need be made. Both interests can be accommodated. It appears that the United States Supreme Court saw its choice as one of finding that the constitutional wrong caused Doyle's damage or not, and, consequently, a choice of reinstating Doyle with back pay or not. By applying a "but-for" test, the court concluded that Doyle's injury was not caused by the constitutional wrong. Accordingly, Doyle was entitled to no redress. Doyle would be entitled to compensation only for consequential injury caused by the constitutional wrong. If the court had considered its task as being one of providing an appropriate and just remedy for the infringement of the plaintiff's constitutional rights, rather than one of compensating the plaintiff for consequential injury caused by a constitutional wrong, it might have reached a different result.

If the problem arose in Canada, it could be dealt with more effectively as a question of appropriate remedies. Those who contravened the plaintiff's constitutional rights by holding against him his exercise of free speech, could be ordered to pay damages for the violation of his right.[176] However, if the decision not to rehire the plaintiff would have been made in any event, then the damages should be limited to those presumed or proven to flow from the infringement of free speech and should not include those which flow from the decision not to rehire.[177] On this basis, a Canadian court could redress infringement of the plaintiff's constitutional right and, at the same time, uphold a government decision which can be justified on independent grounds. Tests of causation, designed to achieve the compensatory purposes of common law tort, should not be applied to constitutional wrongs without assessing their efficacy as a means of effectuating constitutional policy.[178]

(2) *State of Mind*

The state of the defendant's mind when he commits the act which infringes the plaintiff's constitutional rights may be relevant to the defences he raises[179] and to the availability of punitive damages against him,[180] but it is less clear whether the plaintiff should be required to establish, as an element of his case, that the defendant acted with any particular state of mind.[181] Certainly section 24 imposes no such requirement, but as courts consider the appropriateness and justness of awarding damages to redress

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[176] See text accompanying footnotes 278-287, *infra*.

[177] This is the approach taken by the Supreme Court in *Carey* v. *Piphus*, *supra*, footnote 29, discussed in the text at footnotes 259-267, *infra*.

[178] Whitman, *loc. cit.*, footnote 16, at p. 21.

[179] See text accompanying footnotes 211-215, *infra*.

[180] See text accompanying footnotes 289-300, *infra*.

[181] For discussion of state of mind requirements in American constitutional tort, see: W.A. Lockhart, Basis of Liability in a Section 1983 Suit: When is the State-of-Mind Analysis Relevant? (1982), 57 Ind. L.J. 459; L. Kirkpatrick, Defining a Constitutional Tort

infringements of constitutional rights, they may have to address this question: should intentional or reckless conduct be required to establish liability or should a defendant be held liable for negligently infringing the plaintiff's constitutional rights?

The United States Supreme Court has held that section 1983 liability is not limited to intentional conduct and that the remedy "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions".[182] Thus, as a general matter, the plaintiff can establish the required state of the defendant's mind by proving that the defendant intended to act and that it was reasonably foreseeable that infringement of the plaintiff's constitutional rights would result.[183] Recently, the court has confirmed that section 1983 imposes no express state of mind requirement and has suggested that simple negligence may be sufficient to support a plaintiff's claim for infringement of at least some constitutional rights.[184] The court has not explained why negligent infringement of some rights would be actionable but of others would not. However, as some commentators suggest, it appears that at least where a government official has a clearly defined constitutional duty in his dealings with individuals, his negligence may be sufficient to be actionable.[185]

Accordingly, it would appear that the state of mind of the defendant should not be a separate element which the plaintiff must establish, but rather should be considered as one of the factors in determining whether there has been an infringement of a constitutional right, or, if there has, whether it is appropriate and just to provide a remedy. In *Parratt* v. *Taylor*,[186] the United States Supreme Court held that prison officials who negligently lost a hobby kit ordered by mail by a prisoner were not liable for depriving him of property without due process. The simple negligence of the officials was not sufficient to amount to a constitutional violation. On the other hand, the negligence of officials who deny medical attention to a prisoner, may be held to amount to cruel and unusual punishment.[187] In the latter case the constitutional duty is clearly established, and imposes an affirmative obligation on prison officials. In the former case, it would be unrealistic to require that officials provide due process before negligently

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under Section 1983: The State-of-Mind Requirement (1977), 46 U. Cin. L. Rev. 45; McCellan & Northcross, *loc. cit.*, footnote 17, at p. 415.

[182] *Monroe* v. *Pape*, *supra*, footnote 14, at p. 187; overruled in part by *Monell* v. *Department of Social Services of the City of New York*, *supra*, footnote 14.

[183] Friedman, *loc. cit.*, footnote 64, at pp. 16-18.

[184] *Parratt* v. *Taylor*, 451 U.S. 527 (1981).

[185] Lockhart, *loc. cit.*, footnote 181, at p. 476. For a discussion of a standard of negligence to govern the liability of supervisors of government activity see, Note, A Theory of Negligence for Constitutional Torts (1983), 92 Yale L.J. 683.

[186] *Supra*, footnote 184.

[187] See, for example, *Carlson* v. *Green*, *supra*, footnote 30.

handling a prisoner's property.[188] Since the state of mind required for infringement of constitutional rights will vary with the right, no particular state of mind requirements can be established for constitutional damages claims. State of mind will be material to the issue of infringement. It may also be relevant to any defence of good faith which is available, and, ultimately, to the question whether it is appropriate to provide a remedy in damages. To require that it be proved as a separate element of the plaintiff's case will serve no further purpose.

C. *Defendants and their Defences*

Section 24(1) of the Charter does not specify from whom a remedy can be sought. By contrast, section 1983 of the American Civil Rights Act, 1871,[189] provides that a remedy can be obtained from "any person acting under color of state law or custom".

(1) *Application of the Charter of Rights and Freedoms*

The Charter does provide, in section 32(1), that it applies to the Parliament and government of Canada and to the legislature and government of each province in respect of matters within their respective authority. Accordingly, section 32(1) subjects the Crown to the guarantees and remedial provisions of the Charter and excludes the defence of crown immunity.[190]

On a strict reading, the waiver of Crown immunity in section 32(1) of the Charter appears to be limited to *intra vires* activity, in that the section specifies that the Charter applies:

> (a) to the Parliament and government of Canada *in respect of all matters within the authority of Parliament* . . . ; and
>
> (b) to the legislature and government of each province *in respect of all matters within the authority of the legislature of each province*.[190a]

Accordingly, it appears that section 32(1) does not waive Crown immunity for government action which contravenes the Charter but which is taken pursuant to *ultra vires* legislation. It is well-settled that a government cannot rely on Crown immunity to shield itself from claims based upon *ultra vires* statutes,[191] and accordingly if action taken pursuant to such a statute infringes guaranteed rights, a remedy pursuant to section 24(1) of the Charter should be available. The Charter should apply to all exercises of

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[188] But see Note, A Theory of Negligence for Constitutional Torts, *loc. cit.*, footnote 185, at pp. 691 *et seq.*

[189] *Supra*, footnote 10.

[190] See text accompanying footnotes 236-238, *infra*.

[190a] Emphasis added.

[191] *B.C. Power Corporation Limited* v. *B.C. Electric Company Limited and A.G. B.C.*, [1962] S.C.R. 642, 34 D.L.R. (2d) 196; *Amax Potash* v. *Gov't of Saskatchewan* [1977], 2 S.C.R. 576, (1976), 71 D.L.R. (3d) 1.

government power, *intra* or *ultra vires*, which infringe guaranteed rights. Accordingly, section 32(1) should be interpreted to mean that the Charter applies to both levels of government in the exercise or purported exercise of their jurisdiction and authority.

Since Parliament and the legislatures are subject to the Charter in respect of matters within their authority, any body acting under their statutory authority is also subject to the Charter.[192] Parliament or a legislature cannot authorize a person or body acting under statutory authority to infringe rights or freedoms guaranteed by the Charter, except through exercise of the override power.

Section 32(1) also provides that the Charter applies to the "government" of Canada and of each province. Accordingly, government activity based on common law or prerogative powers rather than statutory authority will be subject to the Charter.[193] The meaning of the term "government" will require definition. Most narrowly, one might define it as those who command the support of the House of Commons together with the Ministries they direct. "Government" might be interpreted more broadly as meaning "the Crown (and those bodies which are by virtue of ministerial control or express statutory stipulation servants or agents of the Crown)" and thus defined in accordance with the case-law defining the Crown.[194] "Government" might be extended further to include "public bodies which are not servants or agents of the Crown".[195] It is difficult, however, to determine which bodies are governmental: some "public" bodies have regulatory powers and are thus analogous to governments, but others, which are owned by government and compete in the private sector, are arguably not "governmental".[196]

These first three definitions of "government" are institutional, with the effect that any act committed by a person or body which is defined as being part of the government would be subject to the Charter. The definition of "government" might also be approached functionally.[197] In other words, any body exercising powers which are governmental would be required to comply with the Charter. This functional definition would differ in two ways from the institutional definition of "government". First, it might exclude from the application of the Charter those activities of government which are analogous to private activities. In other words, government would be bound by the Charter when regulating or otherwise affecting members of the general public but not when acting in its capacity

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[192] Hogg, *op. cit.*, footnote 81, at p. 75.

[193] *Ibid.*, at pp. 75-76.

[194] *Ibid.*, at p. 76.

[195] *Ibid.*

[196] Swinton, *op. cit.*, footnote 81, pp. 53-54.

[197] *Ibid.*, at pp. 49 *et seq.*

as an employer, contractor or proprietor.[198] Against this result one can argue that, since government usually has the power, through its control of Parliament or the legislature, to specify and alter unilaterally the terms on which it conducts itself as a contractor, employer, or proprietor, etc., it is unrealistic to argue that it should be treated like any other private sector player.[199] Even when acting in these capacities, government should be subject to the Charter. Nonetheless, it is arguable that "government should be given more discretion when it acts as an employer than when it acts as a regulator of the general public".[200]

The second difference between the institutional and functional definitions of "government" is that the latter would also apply to government activities undertaken by the private sector. In the United States, private sector entities have been held subject to the Bill of Rights under the "state action" doctrine. Where a "private" activity depends upon a grant of government power, or is supported by government financial aid or is otherwise instigated, influenced or encouraged by government, it may be required to comply with the guarantees of the constitution.[201] The state action doctrine thus prevents government from doing indirectly what it cannot do directly.

Accordingly, even if section 32(1) of the Charter is construed as providing that the Charter applies only to Parliament, provincial legislatures and their governments, it will apply to a wide range of activity undertaken under statutory authority and may extend beyond to activities which may be characterized as "government action".

It is, however, arguable that the Charter applies even to strictly private activity. Section 32(1) does not expressly confine the Charter's application only to legislative and government action. Section 32(1) may have been included only to waive Crown immunity. Furthermore, there is nothing in the Charter comparable to the provisions of the United States constitution which expressly limit their application to congressional or state action.[202]

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[198] See M. Wells and M. Hellerstein, The Government-Proprietary Distinction in Constitutional Law (1980), 66 Va. L. Rev. 1073.

[199] The capacity of government unilaterally to alter the terms of negotiated agreements by legislation has been demonstrated by recent restraint legislation in Ontario and British Columbia: see Inflation Restraint Act. S.O. 1982, c. 55; Public Sector Prices and Compensation Review Act, S.O. 1983, c. 70; Public Sector Restraint Act. S.B.C. 1983, c. 10.

[200] Eaton, *loc. cit.*, footnote 104, at p. 460.

[201] Swinton, *loc. cit.*, footnote 81, at pp. 54-57; see, also J.B. Elkind, State Action: Theories for Applying Constitutional Restrictions to Private Activity (1974), 74 Colum. L. Rev. 656; L.H. Tribe, American Constitutional Law (1978), ch. 18; E.M. Albamonte and P.B. Wheeler, The Supreme Court Corrals a Runaway Section 1983 (1983), 34 Mercer L. Rev. 1073; H. Ayoub, The State Action Doctrine in State and Federal Courts (1984), 11 Florida State U.L. Rev. 893.

[202] U.S. CONST. Fourteenth Amendment, s.1, provides that

No state shall make or enforce any law which shall abridge the privileges or immunities

Rather, the guarantees of the Charter are expressed in broad language.[203] As Professor Gibson has demonstrated, an argument can be made that the Charter does and should apply to private activity.[204] The more generally accepted position, however, is that, since the purpose of guaranteeing rights in a constitution is to limit the power of governments, the guarantees should be applied only against government action.[205] A full discussion of this issue is beyond the scope of this article, but it is important to note that the broader the application of Charter guarantees, and accordingly the broader the availability of remedies under section 24(1) of the Charter, the more tort law will become constitutionalized, and put beyond the corrective jurisdiction of the legislatures.[206]

(2) *Personal Liability of Government Officials*

The Charter specifies that it applies to Parliament, the provincial legislatures and governments. It is silent with respect to personal liability of government officials, except that section 24(1) provides for whatever remedy is appropriate and just in the circumstances, without specifying the defendants against whom a remedy may be granted.

It is well-established at common law that a Crown officer or servant is personally liable for wrongs committed by him in the course of his office or employment.[207] He may be expressly authorized by statute or Crown prerogative to perform an act which would be actionable if committed by a private person,[207a] but the authorization itself must be lawfully given in order to be effective. Authorization to commit an act which infringes guaranteed rights would be invalid unless (a) prescribed by a law which can be upheld under section 1 of the Charter or (b) expressly declared to be operative notwithstanding those sections of the Charter which are subject to the legislative override provided in section 33. If legislative override is not invoked, a government official who is authorized to act in a manner which infringes a right guaranteed by the Charter, would be subject to personal

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of citizens of the United States; *nor shall any State* deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of laws. (emphasis added).

S. 1983 of the Civil Rights Act, 1871 (enacted pursuant to s. 5 of the Fourteenth Amendment, see *supra*, footnote 9) provides a remedy against anyone "acting under color or state law or custom".

[203] R.D. Gibson, The Charter of Rights and the Private Sector (1982), 12 Man. L.J. 213, at pp. 216-217.

[204] *Ibid. passim*; see also Swinton, *op. cit.*, footnote 81, pp. 44-49.

[205] Hogg, *op. cit.*, footnote 81, pp. 76-77; Swinton, *ibid.*, pp. 44-49.

[206] See text accompanying footnotes 141-153, *supra*.

[207] See *Roncarelli* v. *Duplessis*, [1959] S.C.R. 121, (1959), 16 D.L.R. (2d) 689, in which damages were awarded against Premier Duplessis personally for instigating the Quebec Liquor Commission to cancel the licence of a Jehovah's Witness.

[207a] P.W. Hogg, Liability of the Crown (1971), pp. 110-111.

liability in a claim under section 24(1) of the Charter.[208] He would also be liable for any infringement of guaranteed rights which is not authorized, or for performing an authorized act in a manner which infringes rights or denies freedoms.

It may be argued that, where a government official without authorization commits an unconstitutional act in the course of his duties or does unconstitutionally an act authorized to be done in a legal manner, he is acting beyond his authority to act on behalf of the government, and that, accordingly, the wrong he commits is personal rather than constitutional.[209] On this analysis, unless the Charter applies to private persons, the victim would be confined to a common law tort remedy rather than a remedy under section 24(1). The better view, however, is that any person whose rights have been infringed by one who exercises or purports to exercise governmental functions is entitled to claim redress for a constitutional wrong. One who acts in the name of the government has a greater capacity to inflict harm, whether or not he has been authorized to do so. Accordingly, any infringement of rights committed in the purported exercise of government authority should be treated and remedied as a constitutional wrong.

Assuming that a claim for damages against a government official may be made under section 24(1) of the Charter, a court must assess whether it is appropriate and just in the circumstances to grant a remedy. In doing so, the court must re-evaluate principles developed at common law and by statute which protect government officials from liability.

(a) *Qualified Immunity for Government Officials*

In Anglo-Canadian law, governments and their officials are protected from liability in negligence when acting in a legislative capacity or exercis-

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[208] *Ibid.*, p. 111. See aso C.L. Pannam, Tortious Liability for Acts Performed under an Unconstitutional Statute (1965-67), 5 Melb. U.L. Rev. 113. S.L. Goldenberg, Tort Actions Against the Crown in Ontario, in Special Lectures of the Law Society of Upper Canada (1973), p. 362, footnote 83, points out that some legislatures have sought to exclude personal liability of government officials, particularly judicial officers, for acts performed pursuant to *ultra vires* legislation: see the Proceedings Against the Crown Act, R.S.S. 1978, c. P-27, s. 5(7); and the Public Authorities Protection Act, R.S.O. 1980, c. 406, s. 13. Further, in *Central Canada Potash Co. Ltd.* v. *Government of Saskatchewan*, [1979] 1 S.C.R. 42, (1978), 88 D.L.R. (3d) 609, the Supreme Court of Canada held that a government official is not guilty of the tort of intimidation because of his enforcement of a statute which is subsequently declared to be *ultra vires* in that it exceeds provincial jurisdiction under s. 92 of the Constitution Act, 1867. Where an infringement of guaranteed rights is authorized by law, it may be appropriate to relieve the official from liability but hold the government itself liable: see the text accompanying footnotes 243-258, *infra*.

[209] In *Bell* v. *Hood*, *supra*, footnote 33, the United States Supreme Court held that there was federal jurisdiction to hear a claim in damages for violation of constitutional rights. However, on remand, the District Court held (71 F. Supp. 813, at pp. 820-821 (1947)) that there was no cause of action against the officials under constitutional or federal law:

ing a statutory discretion. This protection is supported on the basis that, in making policy choices, public officials owe a duty to the public, not to private interests. They are entitled and indeed obliged to set priorities, allocate limited resources and make choices in the public interest which may adversely affect private interests. They do not have any obligation to private persons other than to act reasonably and in good faith. A decision negligently made may be subject to nullification, but it does not give rise to private claims for damages. By contrast, government officials who are implementing, rather than making, policy do have obligations to those who may foreseeably be affected either by their failure to exercise due care, or their failure to perform at all.[210]

This distinction between policy and operational decisions is arguably inappropriate where the wrong alleged against government or government officials is not common law negligence, but rather, infringement of rights guaranteed by the Charter, whether intentional or negligent. The range of policy choices available to an official is limited by the Charter. Any official making a policy choice or exercising a statutory discretion must do so in accordance with the rights guaranteed by the Charter. Further, the rights guaranteed by the Charter are for the benefit of individuals or groups of individuals, to protect them against government action which infringes their rights. Accordingly an individual whose rights have been infringed should be entitled to redress, whether or not the infringement resulted from a policy decision or an act of implementation.

In American constitutional rights cases, the absolute immunity once accorded to government officials exercising discretion[211] has been qualified. An official acting in good faith is protected from liability if he acted

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> Whenever a federal officer or agent exceeds his authority, in so doing he no longer represents the Government and hence loses the protection of sovereign immunity from suit. . . . but inasmuch as the prohibition of the Fourth and Fifth Amendments do not apply to individual conduct, the Amendments themselves, when violated, cannot be the basis of any cause of action against individuals.

See Dolan, *loc. cit.*, footnote 71, at p. 282. In subsequent decisions of the United States Supreme Court it is assumed that officials can be sued for unauthorized infringements of constitutional law.

[210] See *Welbridge Holdings Ltd.* v. *Metropolitan Corporation of Greater Winnipeg*, [1971] S.C.R. 957, (1970), 22 D.L.R. (3d) 470; *Bowen* v. *City of Edmonton* (1977), 80 D.L.R. (3d) 501, [1977] 6 W.W.R. 344 (Alta. T.D.); *Toews and Snesar* v. *MacKenzie et al.* (1980), 109 D.L.R. (3d) 473, [1980] 4 W.W.R. 108 (B.C.C.A.). The American, English, Australian and Canadian law relating to the policy-operational distinction is reviewed in M. Aronson and H. Whitmore, Public Torts and Contracts (1982), pp. 36-99. For a discussion of the extent to which government tort liability should be governed by different principles than private tort liability see C. Harlow, Compensation and Government Torts (1982). See also M.G. Bridge, Governmental Liability, the Tort of Negligence and the House of Lords Decision in *Anns* v. *Merton London Borough Council* (1978), 24 McGill L.J. 277; G. Samuel, Public and Private Law: A Private Lawyer's Response (1983), 46 Mod. L. Rev. 558.

[211] *Barr* v. *Matteo*, 360 U.S. 564 (1959).

on reasonable grounds, taking into account the circumstances as they appeared at the time and the scope of the official's discretion.[212] The official must, however, act in good faith, and the test of good faith is objective. An official will be denied immunity if he knew or reasonably should have known that his action, taken within his sphere of official responsibility, would violate a person's constitutional rights.[213]

A qualified immunity for governmental officials is a means of balancing the protection of constitutional rights against the needs of effective government, or, in other words, determining whether a remedy is appropriate and just in the circumstances. A government official is obliged to exercise his powers in good faith and to comply with "settled, indisputable" law defining constitutional rights. However, if he acts reasonably in the light of the current state of the law and it is only subsequently determined that his action was unconstitutional, he will not be held liable. To hold him liable in this latter situation might "deter his willingness to execute his office with the decisiveness and judgment required by the public good".[214] Further, since a primary purpose of imposing liability in damages is to deter unconstitutional acts, it makes sense to limit liability to those acts which are clearly unconstitutional, particularly in light of the evolutionary character of constitutional rights.[215]

(b) *Absolute Immunity for Judges and Prosecutors*

Although the United States Supreme Court has established that a qualified immunity from damages liability should be the general rule for government officials who have allegedly infringed constitutional rights, it has also held that officials exercising special functions require absolute immunity from liability. As far as these functions are concerned, the court has concluded that the needs of effective government outweigh the protection of constitutional rights. It is well-established at common law that judges and prosecutors should be protected from civil liability for actions

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[212] *Scheuer* v. *Rhodes*, *supra*, footnote 28, at p. 247.

[213] *Harlow* v. *Fitzgerald*, 457 U.S. 800, at p. 818 (1982). Previously, in *Wood* v. *Strickland*, *supra*, footnote 28, at p. 322 (re: s. 1983 action) and in *Butz* v. *Economou*, *supra*, footnote 42, (re: *Bivens*-type action), the court had specified a test of good faith which was both objective and subjective: an official would be denied immunity if he knew or reasonably should have known that his action would violate a person's constitutional rights, or if he took the action with malicious intention to cause a deprivation of rights or other injury to the person affected. The subjective test was abandoned in *Harlow* v. *Fitzgerald* in favour of the objective standard which can be resolved more easily in summary judgment without a lengthy trial.

[214] *Scheuer* v. *Rhodes*, *supra*, footnote 28, at p. 240; see also *Wood* v. *Strickland*, *ibid.*, at p. 319.

[215] See *Owen* v. *City of Independence*, *supra*, footnote 26, at p. 669 per Powell J., dissenting, quoted at footnote 257, *infra*. See also *Procunier* v. *Navarette*, 434 U.S. 555, at p. 562 (1978): public officers "cannot be expected to predict the future course of constitutional law".

taken in the course of their duties,[216] and the United States Supreme Court has extended this absolute immunity to government officials exercising analogous functions.[217]

It seems clear that prosecutors in the courts and government officials exercising adjudicative or prosecutorial functions are obliged to comply with the Charter,[218] and it also appears that courts are subject to the Charter.[219] However, even if prosecutors and judges are bound by the Charter in the exercise of their duties, a court acting under section 24(1) must determine whether it is appropriate and just to afford any claim in damages against them for infringement of guaranteed rights, and, if so, in what circumstances.

At common law[220] and by statute[221] judges are protected from liability for all acts done in the exercise of their jurisdiction. The immunity is intended to preserve the integrity and independence of judicial decision making: a judge's

> errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation.[222]

American courts have enforced this immunity even against allegations that a judge has contravened a claimant's constitutional rights. It is assumed

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[216] See, *infra*, footnotes 220 and 224.

[217] *Butz* v. *Economou, supra,* footnote 42, at pp. 508-514 and pp. 515-516. Note, also, that the United States Supreme Court has accorded an absolute immunity to government officials exercising legislative or presidential functions: J.M. Byrd, Rejecting Absolute Immunity for Federal Officials (1983), 71 Calif. L. Rev. 1707, at p. 1715; P.J. Kennedy, An Examination of Immunity for Federal Executive Officials (1982-83), 28 Villanova L. Rev. 956. The court has also accorded absolute immunity to government officials (in this case, policemen) in their capacity as witnesses in judicial proceedings: *Briscoe* v. *La Hue*, 103 S. Ct. 1108 (1983). See F.M. Williams, Tort Immunity—*Briscoe* v. *La Hue*: Abandonment of the Balancing Approach in Immunity Cases Under Section 1983 (1984), 62 N. Carolina L. Rev. 584.

[218] Several of the Charter guarantees are designed to limit prosecutorial and adjudicative discretion: see in particular the rights specified in ss. 8-14 of the Canadian Charter of Rights and Freedoms.

[219] Hogg, *op. cit.*, footnote 81, at p. 76. See *R.* v. *Begley* (1982), 38 O.R. (2d) 549, at p. 554 (Ont. H.C.).

[220] *Floyd* v. *Barker* (1607), 12 Co. Rep. 23, 77 E.R. 1305 (K.B.); *Sirros* v. *Moore*, [1975] Q.B. 118, [1974] 3 All E.R. 776 (C.A.). See Aronson and Whitmore, *op. cit.*, footnote 210, pp. 137-147. See also A. Rubinstein, Liability in Tort of Judicial Officers (1964), 15 U. Toronto L.J. 317; D. Thompson, Judicial Immunity and the Protection of Justices (1958), 21 Mod. L. Rev. 517.

[221] See, for example, Proceedings Against the Crown Act, R.S.O. 1980, c. 393, ss. 2(d) and 5(b); Public Authorities Protection Act, R.S.O. 1980, c. 406, s. 2 etc.

[222] *Pierson* v. *Ray*, 386 U.S. 547, at p. 554 (1967), quoted in *Scheuer* v. *Rhodes, supra*, footnote 28, at p. 244.

that the importance of preserving judicial independence generally outweighs the injustice of any particular case.[223]

Like judges, prosecutors acting within their jurisdiction are also immunized from suit at common law[224] with the intent of insuring that their independence of judgment is not affected by the possibility of personal liability. The American Supreme Court has extended this immunity to exclude liability under section 1983 of the Civil Rights Act, 1871[225] for infringements of constitutional rights arising out of the decision to prosecute or the actual presentation of the case,[226] and the Ontario High Court has also recently held that the Attorney General and his Crown attorneys are immune from suit under section 24(1) of the Canadian Charter of Rights and Freedoms.[227]

It may be argued that unconstitutional behaviour by judges is adequately deterred by judicial traditions, the prospect of correction on appeal and the availability of other means to inquire into judicial conduct;[228] and that unconstitutional behaviour by prosecutors may be deterred by professional standards, the prospect of judicial criticism and the availability of professional discipline proceedings. Nonetheless there are two problems with the absolutely immunity accorded to judges, prosecutors and, at least in the United States, officials exercising those functions. First, a victim of unconstitutional action by a prosecutor or judge is denied any redress, even though he may have suffered egregious wrong at the hands of people who should be held to the highest standards of conduct in exercising a public trust. Second, the wrongdoer cannot be held accountable by the victim through legal process. The fact that most unconstitutional conduct will be deterred is not a sufficient reason for denying redress in those instances

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[223] In *Pierson* v. *Ray*, *ibid.*, the court held that the immunity of judges at common law is preserved under s. 1983 of the Civil Rights Act, 1871. The court described the scope and purpose of the immunity (at pp. 553-554):

> Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdictions. . . . This immunity applies even when the judge is accused of acting maliciously and corruptly, and "it is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences". (References omitted.)

[224] *Richman* v. *McMurtry et al.* (1983), 147 D.L.R. (3d) 748, 41 O.R. (2d) 559 (Ont. H.C.).

[225] *Supra*, footnote 10.

[226] *Imbler* v. *Pachtman*, 424 U.S. 409 (1976). See. Note, Delineating the Scope of Prosecutorial Immunity from Section 1983 Damage Suits (1977), 52 N.Y.U. L. Rev. 173.

[227] *Nelles* v. *Her Majesty the Queen in Right of Ontario et al* (Ont. H.C., August 1983, unreported) per Fitzpatrick J.: "I find that the Canadian Charter of Rights has not removed the immunity from civil action of the Attorney-General of Ontario".

[228] See, for example, Judges Act, R.S.C. 1970, c. J-1 (as amended by 1974-75-76, c. 48, ss. 17-18; and by 1976-77, c. 25, ss. 15-16), ss. 39-43; Provincial Courts Act, R.S.O. 1980, c. 398, ss. 4, 8.

where it does take place. If it can be established that a judge or prosecutor has abused his powers, acting with malicious intention to deprive a person of his rights, or that he has infringed settled, indisputable constitutional rights, he like other officials should be accountable to the victim. The fact that the prospect of such accountability may affect his decisions is surely all to the good — judges and prosecutors should act in good faith and respect constitutional rights. If other officials are deemed to know and obliged to comply with well-settled constitutional law, surely the same can reasonably be expected of judges and prosecutors. To the extent that it is desirable to protect judges and prosecutors from litigation designed to harass and intimidate them in the exercise of their duties, this purpose could be met by requiring that a plaintiff obtain leave to institute such an action. Under section 24(1) of the Charter, a court must consider what remedy is just and appropriate in all the circumstances. In doing so, it should reconsider the appropriateness and justness of even the most well-established common law principles and statutory protections.[229]

(c) *Liability for Infringements Committed by Subordinates*

The official who actually commits the unconstitutional act may not be the only individual personally liable to the victim. If his superior has either ordered or ratified the act which constitutes the infringement, he can be held personally liable for it, unless the subordinate official has performed an authorized act in a manner which is unauthorized and unconstitutional.[230] Where both subordinate and superior officials are employees of the Crown, the liability of the superior can arise only directly, not vicariously.[231] Direct liability should arise where a superior officer knows that unconstitutional practices are routine in the work under his supervision and does nothing to stop them. In such a situation a supervisor should be considered as responsible as the subordinate who actually commits unconstitutional acts.[232] The imposition of liability recognizes that responsibility and creates a needed deterrent.

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[229] See J.C. Filosa, Prosecutorial Immunity: No Place for Absolutes, [1983] U. of Illinois L. Rev. 977. But see, *contra*, *R.* v. *Germain*, *supra*, footnote 97, at para. 29, citing *Maharaj* v. *A.G. for Trinidad and Tobago (No. 2)*, *supra*, footnote 97.

[230] Halsbury's Laws of England (4th ed.), vol. 8, para. 971.

[231] Hogg, *op. cit.*, footnote 207a, p. 109; Halsbury, *ibid.*, para. 971; Aronson and Whitmore, *op. cit.*, footnote 210, p. 2.

[232] The United States Supreme Court has been reluctant to recognize supervisory responsibility for preventing constitutional infringements. In *Rizzo* v. *Goode*, 423 U.S. 362 (1976), the United States Supreme Court refused to grant equitable relief in an action brought against the Mayor of Philadelphia, the Police Commissioner and others alleging "pervasive patterns of illegal and unconstitutional mistreatment by police officers . . . directed against all Philadelphia residents in general". The allegations were based on "conduct ranging from express authorization or encouragement of this mistreatment to failure to act in a manner so as to assure that it would not recur in the future" (at pp. 366-367). The court denied relief since it had not been established that the responsible

(d) *Conclusion*

It is important that individual officials be made accountable for constitutional wrongs and deterred from committing them. Personal liability reinforces a regime of rights which is otherwise dependent on self-enforcement by those whose conduct it governs. Nonetheless, individual liability alone may be ineffective, both as a means of compensating the plaintiff and as a means of deterring infringements of constitutional rights. Frequently, unless they are indemnified or insured, individual defendants will be unable to satisfy judgments in damages, thus leaving plaintiffs uncompensated both for the wrong they have suffered and the expense of asserting their rights.[233] In addition, constitutional infringements frequently derive from systemic problems in government organizations.[234] In these situations, imposing liability only on the person who actually commits or authorizes the unconstitutional act will not reach the real problem.

(3) *Government Liability for Constitutional Wrongs*

In some cases where constitutional wrongs reflect systemic problems within government agencies or institutions, radical restructuring and/or additional financial resources are needed to correct fundamental problems. The damages remedy is not appropriate to this task, and, if inadequate funding is at the root of the problem, diverting funds to pay damage awards may only exacerbate it.[235] In these situations, the creative application of equitable remedies may be required to prevent continuing infringement of constitutional rights. Nonetheless, the fact that the deterrent capabilities of damage awards may be insufficient to cure a situation which will lead to further constitutional wrongs is not a reason to deny redress to one whose rights have been infringed. There is little incentive for a government to take the initiative to put its operations in order if the only sanction it faces is an equitable remedy with prospective effect. The Charter of Rights and Freedoms provides a basis for individual citizens to hold government

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authorities had played an affirmative part in any unconstitutional deprivations (at pp. 376-377) or had direct responsibility for the actions of those who committed them (at pp. 373-376). Failure to act in the face of a statistical pattern of infringements by subordinates was held insufficient to establish liability (at pp. 373-376).

The three dissenting judges considered that failure to supervise subordinates should be actionable under s. 1983 of the Civil Rights Act, 1871 (at pp. 381-387) where equitable remedies are sought. They expressed no opinion on "the question under what circumstances failure to supervise will justify an award of money damanges" but noted (at p. 385, note 1) that criminal liability has been imposed for failure to supervise subordinates: *United States* v. *Park*, 421 U.S. 658 (1975). See, also, Note, A Theory of Negligence for Constitutional Torts, *loc. cit.*, footnote 185, discussing a "negligence standard to govern supervising liability".

[233] See Smith, *loc. cit.*, footnote 72, at p. 692.

[234] Whitman, *loc. cit.*, footnote 16, at pp. 49 *et seq.*

[235] *Ibid.*, at p. 50.

accountable for infringing guaranteed rights, and a claim in damages will frequently be the appropriate means for enforcing that accountability.

Government itself may be held liable for damages either on the basis of its vicarious liability for the acts of its employees or on the basis of its own direct responsibility for the infringement of the plaintiff's rights. At common law, the Crown is immune from suit.[236] In Canada that immunity has been significantly waived by statute.[237] Now the Canadian Charter of Rights and Freedoms, by specifying that the Charter applies to the Parliament of Canada, the provincial legislatures and their governments, waives legislative and governmental immunities where infringements of the Charter are concerned.[238]

(a) *Vicarious Liability of Government*

By contrast to American constitutional law, in which Congress and the state legislatures retain control over the extent of government liability,[239] the Canadian Charter of Rights and Freedoms transfers that authority to the courts. Since the Charter, including its remedial provision, applies to governments, the vicarious liability of governments for the wrongs of their employees, already established by statute,[240] is now entrenched and extended, at least to the extent that a court considers it appropriate and just to hold a government liable in all the circumstances of the case. By statute, a government may limit its vicarious liability to exclude acts which an employee is authorized to perform by statute or Crown prerogative.[241] However, a statutory authorization which infringes rights guaranteed by the Charter will be of no force and effect.[241a] A legislature cannot by ordinary statute place any limitations on liability for constitutional infringements which will be binding on the courts. Accordingly, it is open to courts to find governments vicariously liable for constitutional wrongs committed by their servants and agents in the purported exercise of their duties.

To insure that the victim of a constitutional wrong does recover damages to vindicate her rights and compensate for any actual injury incurred, government should be vicariously liable. To insure personal accountability of the wrongdoers, government should have a right to claim

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[236] Hogg, *op. cit.*, footnote 207a, pp. 2-3; Goldenberg, *op. cit.*, footnote 208, pp. 345-347; Aronson and Whitman, *op. cit.*, footnote 210, pp. 1-2.

[237] Goldenberg, *ibid.*, pp. 348 *et seq.*

[238] Gibson, *loc. cit.*, footnote 203, at pp. 214-215.

[239] See text accompanying footnotes 8-9, 92-97, 98-103, *supra*.

[240] See, for example, Proceedings Against the Crown Act, R.S.O. 1980, c. 393; Crown Liability Act, R.S.C. 1970, c. C-38.

[241] See Crown Liability Act, R.S.C. 1970, c. C-38, s. 3(6); cf. Proceedings Against the Crown Act, R.S.O. 1980, c. 393, s. 5(3).

[241a] Constitution Act, 1982, s. 52.

contribution from the government official who committed the infringing act. If, however, that official is protected by absolute immunity, it may be appropriate and just to order government to pay damages: the immunity may protect the public interest in effective performance of the official's function, but government should be held responsible to the victim for any constitutional infringements committed in the course of carrying out that public function.[242]

(b) *Direct Liability of Government*

In circumstances where government itself is responsible for infringement of Charter rights, it may be possible to establish that government is directly liable. Responsibility for constitutional wrongs may be attributed to government on three bases. First, the government could be held liable where an infringement of guaranteed rights or freedoms is established, or an unconstitutional means of performing an otherwise constitutional act is authorized, by statute, regulation, order-in-council, by-law, resolution or other decision officially adopted and promulgated under government authority. To hold a legislative body liable on this basis requires that any legislative immunity be set aside where the Charter is concerned. It has been well-established since the Bill of Rights of 1689, "[t]hat the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament".[243] Nonetheless, it appears that by providing that the Charter, including its remedial provision, applies to the Parliament of Canada and the provincial legislatures, this legislative immunity is, to that extent, set aside. It is important that legislative bodies take care that their laws comply with the Charter. Where a law is contrary to the Charter and its adoption or its enforcement infringes guaranteed rights, it is reasonable to impose liability directly on the government which has promulgated it.

The adoption of a law or policy may itself prevent a person from exercising constitutional rights even without any action by government to enforce it. It is the infringement of rights which should be actionable, regardless of the means by which it is effected. Accordingly, not only is it possible to hold governments accountable in damages for laws which infringe or authorize infringements of guaranteed rights, but it will be appropriate and just to do so in some circumstances.

A second basis for holding government directly liable arises where an unconstitutional practice is not officially authorized, but it has become so well-established that it amounts to a custom which is officially tolerated. This ground of liability is but an extension of the first; it would prohibit a government from doing indirectly what it could not do directly.

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[242] See *R.* v. *Germain*, *supra*, footnote 97, at para. 29; *Maharaj* v. *Attorney-General of Trinidad and Tobago (No. 2)*, *supra*, footnote 97, at pp. 399 (A.C.), 679 (All E.R.).

[243] 1 Wm. & M., Sess. 2, c. 2.

Third, by analogy to company law, in which the criminal actions of responsible officers of a corporation are held to be the acts of the corporation itself.[244] It could also be argued that a government (or other body which is subject to the Charter) is directly liable for the unconstitutional acts of those senior officials who are given responsibility and authority for directing and exercising the powers of government.

All three approaches to establishing government liability were implicitly recognized by the United States Supreme Court in *Monell* v. *New York City Dept. of Social Services*[245] in which the court held that a municipality as an entity may be directly liable in an action under section 1983 of the Civil Rights Act, 1871, "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury . . ."[246]

As noted above,[247] at common law governments are protected from liability in the exercise of policy-making powers as distinct from operational powers, but this distinction is arguably inappropriate where the wrong alleged is not common law negligence but infringement of guaranteed rights. In *Owen* v. *City of Independence*[248] the United States Supreme Court explained why the distinction could not be relied on to establish immunity from damages for infringing constitutional rights:[249]

> That common-law doctrine [immunity for discretionary decisions] merely prevented courts from substituting their own judgment on matters within the lawful discretion of the municipality. But a municipality has no 'discretion' to violate the Federal Constitution; its dictates are absolute and imperative. And when a court passes judgment on the municipality's conduct in a s. 1983 action, it does not seek to second-guess the 'reasonableness' of the city's decision nor to interfere with the local government's resolution of competing policy considerations. Rather, it looks only to whether the municipality has conformed to the requirements of the Federal Constitution and statutes.

In *Owen* v. *City of Independence*, the municipality was held liable in damages for depriving its former police chief of liberty without due process. The council of the municipality had adopted a resolution by which it publicly released an allegedly false statement impugning the honesty of the police chief and instructed the city manager to take appropriate action. The following day, the police chief was dismissed. He brought an action claiming that his constitutional rights had been violated in that he had not

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[244] L.C.B. Gower, Principles of Modern Company Law (4th ed., 1979), pp. 206-210 and cases cited therein. See also *R.* v. *St. Lawrence Corpn.*, [1969] 2 O.R. 305 (Ont. C.A.). See also Hogg, *op. cit.*, footnote 207a, pp. 10-11, citing *The Truculent*, [1952] P. 1, [1951] 2 All E.R. 968 (P.D.A.), and see *Nord-Deutsche* v. *The Queen*, [1969] 1 Ex. C.R. 117, at pp. 228-229.

[245] 436 U.S. 658 (1978).

[246] *Ibid.*, at p. 694.

[247] See text accompanying footnote 210, *supra*.

[248] *Supra*, footnote 26.

[249] *Ibid.*, at p. 649.

been given notice of the allegations against him or opportunity to respond to them. He sought declaratory and injunctive relief, back pay and attorney's fees. The Court divided five to four in favour of finding that his constitutional rights had been infringed. The infringement was based on a principle established by the Supreme Court in a case decided after the police chief had been fired.[250] The municipality argued that its decision had been made in good faith on the basis of then current constitutional law and should be protected by qualified immunity. The majority, however, held the government strictly liable for the constitutional infringement. The majority relied on "the principle of equitable loss-spreading",[251] arguing that, 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 did not justify immunity for governments:[252]

> . . . [a]fter 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 felt solely by those whose rights, albeit newly recognized, have been violated.

Further, the majority reasoned that, although personal liability for unforeseen constitutional wrongs might inhibit officials from effectively carrying out their duties, government liability would not have the same effect, and, in any event, such inhibition as would occur would have a positive result:[253]

> . . . consideration of the *municipality's* liability for constitutional violations is quite properly the concern of its elected or appointed officials. Indeed, a decisionmaker would be derelict in his duties if, at some point, he did not consider whether his decision comports with constitutional mandates and did not weigh the risk that a violation might result in an award of damages from the public treasury.

The dissenting judges doubted the capacity of local governments to provide a "deep pocket" to satisfy damages claims[254] and argued that it would be as unfair[255] and inhibiting[256] to impose strict liability on government for infringing undeclared constitutional rights as it would be to impose it on individuals. They held that there had been no constitutional infringement and that, even if there had, the municipality was protected from liability because it had acted in good faith and accordingly could assert a qualified immunity.

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[250] *Board of Regents* v. *Roth*, 408 U.S. 564 (1972) and *Perry* v. *Sindermann*, 408 U.S. 593 (1972), which established "the right to a name-clearing hearing for a government employee allegedly stigmatized in the course of his discharge".

[251] *Supra*, footnote 26, at p. 657.

[252] *Ibid.*, at p. 655.

[253] *Ibid.*, at p. 656.

[254] *Ibid.*, at p. 670.

[255] *Ibid.*, at p. 683.

[256] *Ibid.*, at pp. 668-669.

The effect of the qualified immunity for constitutional wrongs committed in good faith is that decisions which extend constitutional protection to a new interest have prospective effect only. This result is apparently justified on the basis that constitutional law is unpredictable. Thus, Justice Powell, for the dissenting judges in *Owen*, asserted:[257]

> [c]onstitutional law is what the courts say it is and—as demonstrated by today's decision and its precursor, *Monell*—even the most prescient lawyer would hesitate to give a firm opinion on matters not plainly settled. Municipalities, often acting in the utmost good faith, may not know or anticipate when their action or inaction will be deemed a constitutional violation.

There are two difficulties with this approach. First, there is little attempt to explain why unpredictable constitutional law should have only prospective effect whereas unpredictable developments in the common law operate restrospectively.[258] Second, it discourages actions to establish new constitutional principles. The plaintiff may obtain a declaration of rights but no other relief. In addition, there is little incentive for government to take initiative to comply with constitutional guarantees until a court declares that it is required to do so. Governments should be constantly scrutinizing their official policies to insure substantial, not minimum, compliance with constitutional guarantees. Although it may well be unfair to require individual officials to predict the development of constitutional law in the course of carrying out their duties, it is arguable that government itself should bear responsibility for its failure to meet constitutional standards in its official policies, its well-established customs and the decisions of its directing minds.

V. *Measuring Damages for a Constitutional Wrong*

The measure of damages appropriate to remedy a constitutional wrong will depend upon the purpose the remedy is designed to serve. If the court seeks to compensate the plaintiff, it must decide whether the plaintiff is entitled to recover damages only for consequential injury or also for the infringement of his constitutional rights *per se*, and, if so, how the value of the right or the cost of the infringement should be assessed. If the purpose of the court is to use damages to deter future infringements, the court must assess, not only the extent of the plaintiff's loss, but also the nature of the defendant's conduct and the likely effectiveness of damages as a deterrent to others in a

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[257] *Ibid.*, at p. 669.

[258] In *Owen* v. *City of Independence, ibid.*, at p. 683, Powell J. dissenting, stated:

> . . . suits under s. 1983 typically implicate evolving constitutional standards. A good-faith defense is much more important for those actions than in those involving ordinary tort liability. The duty not to run over a pedestrian with a municipal bus is far less likely to change than is the rule as to what process, if any, is due the bus driver if he claims the right to a hearing after discharge.

However, the fact that tort principles are less likely to change than constitutional principles does not explain why defendants should be treated differently when they do change.

like position. If the court seeks to award damages to punish the defendant, then, again, the nature of the defendant's conduct will be material.

The United States Supreme Court has discussed some of these questions in *Carey* v. *Piphus*,[259] a case in which students suspended from school without due process claimed damages pursuant to section 1983 of the Civil Rights Act, 1871,[260] for infringement of their constitutional rights. The students argued that they were entitled to recover substantial non-punitive damages for the denial of due process even if the suspensions were justified and even if they could not prove that they had suffered any actual damage from the denial of due process.[261] In other words, they argued that they were entitled to damages for a denial of a constitutional right *per se*, on the basis, first, that there is a need to deter violations of constitutional rights, which are important in and of themselves; and second that, even if the purpose of a section 1983 damage award is compensation, every deprivation of procedural due process could be presumed to cause some injury.[262]

The American Supreme Court rejected both arguments. First, the court held that the basic purpose of section 1983 is compensation and that there is no evidence that Congress intended to establish a deterrent other than that inherent in an award of compensatory damages.[263] Second, the court refused to presume that damages will flow from every deprivation of due process or that such damages as do occur would be difficult to prove.[264] Accordingly, in the absence of proof that the plaintiffs had suffered any mental or emotional distress because of the denial of due process,[265] the court refused to award compensatory damages. However, because of "the importance to society that procedural due process be observed" and in order to vindicate the deprivation of the plaintiff's rights, the court held that the plaintiffs would be entitled to nominal damages, not to exceed one dollar.[266]

This does not mean that the United States Supreme Court will never presume damages to flow from the violation of a constitutional right. The court emphasized:[267]

> . . . the elements and prerequisites for recovery of damages appropriate to compensate injuries caused by the deprivation of one constitutional right are not necessarily appropriate to compensate injuries caused by the deprivation of another. . . . these

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[259] *Supra*, footnote 29.

[260] *Supra*, footnote 10.

[261] *Supra*, footnote 29, at p. 248.

[262] *Ibid.*, at p. 254.

[263] *Ibid.*, at pp. 254 and 256.

[264] *Ibid.*, at p. 263.

[265] *Ibid.*, at p. 267.

[266] *Ibid.*, at pp. 266-267.

[267] *Ibid.*, at pp. 264-265.

> issues must be considered with reference to the nature of the interests protected by the particular constitutional right in question.

The United States Supreme Court's refusal to presume that damage results from violation of a constitutional right conforms to general common law principles, but even at common law it would be open to a court to award damages for interference with an important constitutional right without any proof or presumption that consequential damage flows from it. In any event, it would be open to a Canadian court exercising its jurisdiction under section 24(1) of the Charter to award a remedy for violation of a constitutional right *per se*. In *Vespoli* v. *The Queen*,[267a] however, the Federal Court of Appeal rejected a claim for damages for infringement of the guarantee against unreasonable search and seizure on the grounds that it could "find in the record no solid evidence that the appellants really suffered damages as a consequence of the illegal seizures". The court concluded, without explanation, that it would not be appropriate and just to award damages in these circumstances.

A. *Compensatory Damages: Actual and Presumed*

At common law, damages are available to redress consequential injury or loss flowing from the violation of a right, but interference with the right alone, without proof of other injury, is generally not compensable.[268] In some cases injury will be presumed, but the plaintiff will be awarded only nominal damages unless he can establish the likelihood that substantial loss was suffered. Thus libels and slanders actionable *per se* are actionable without proof of damage.[269] Actual injury is difficult to prove and the extent of it difficult to assess except on the basis of the opinion and judgment of reasonable people.[270] Because of the nature of the wrong, damage is presumed. Damage may also be said to be presumed where "the plaintiff establishes that he has probably suffered a loss", but the loss is difficult to quantify.[271] Thus, "in several kinds of cases damages are said to be 'at large', by which is meant that it will be presumed in the plaintiff's favour that he suffers a loss even though precise proof is lacking".[272] Where damages are presumed, the plaintiff will be awarded only nominal damages unless he can establish the likelihood that substantial loss was suffered. The United States Supreme Court, on the basis of common law principles, properly found that, in the absence of any proof of actual injury, damages would be presumed only if it is reasonably certain that the violation of a particular right will result in actual injury and the injury

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[267a] (1984), 84 D.T.C. 6489, at p. 6491.

[268] H. McGregor, Damages (14th ed., 1980), para. 260.

[269] A.M. Linden, Canadian Tort Law (3rd edn., 1982), pp. 687, 689-691.

[270] McGregor, *op. cit.*, footnote 268, paras. 263, 1522-1523.

[271] Waddams, *op. cit.*, footnote 106, para. 1053.

[272] *Ibid.*, para. 1058.

would be difficult to prove. The court might find these conditions are met with respect to infringements of some constitutional rights, but it quite rightly refused to presume that actual injury will result from every denial of due process.[273] Further, it was not open to the court to assess damages at large on the basis that the injury suffered by the plaintiffs was not susceptible of precise proof since the plaintiffs had not established even a possibility that they had suffered actual injury. Accordingly, on the basis of common law principles, the United States Supreme Court's decision in *Carey* v. *Piphus* is unassailable.

Nonetheless, the principles developed to balance the protection of private interests against the freedom of action of other private persons, should not necessarily apply to constitutionally protected rights. When a person's constitutional rights or freedoms have been infringed or denied, he should be entitled to a remedy which vindicates his rights—not solely on the basis that he has suffered some consequential injury, but for the violation of the right itself. As American commentators have argued, "[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".[274] Limiting damages to consequential injuries not only detracts from the vindication of constitutional rights but also undermines their deterrence value:

> In the due process context, for example, there is less incentive to extend a prior hearing if damages will be awarded only when a court determines after the fact that an administrative hearing would have led to a different result. Similarly, the incentive offered law enf .rcement officers to abstain from electronic surveillance diminishes if it is made a function of their confidence that little actual injury will be inflicted. The prospect that valuable entitlements to privacy will be compromised may be safely ignored.[275]

B. *Nominal Damages*

One of the purposes of a damages award in a constitutional tort case is to vindicate constitutional rights. In *Carey* v. *Piphus*, where the plaintiff's rights had been infringed but they had proven no actual damage, and the court was not prepared to presume damage, the court awarded nominal damages for this purpose. Such an award is not solely an abstract victory—it may be accompanied by an important award of costs.[276] Nonetheless it constitutes a disincentive to private enforcement of constitutional rights

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[273] *Carey* v. *Piphus*, *supra*, footnote 29, at p. 263.

[274] Note, Damage Awards for Constitutional Torts: A Reconsideration after *Carey* v. *Piphus*, *loc. cit.*, footnote 15, at p. 980. See also Love, *loc. cit.*, footnote 116, at pp. 1259-1266.

[275] Note, Damage Awards for Constitutional Torts: A Reconsideration after *Carey* v. *Piphus*, *loc. cit.*, footnote 15, at pp. 982-983.

[276] Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. 94-559, 90 Stat. 2641, amending 42 U.S.C., s. 198. See Love, *loc. cit.*, footnote 116, at p. 1272.

through litigation.[277] The plaintiff recovers nothing except the satisfaction of proving that his rights were infringed. To achieve that satisfaction, he has invested substantial time, energy and resources. Even if costs were awarded on a solicitor and client scale, the plaintiff would not be compensated for the full cost of enforcing his rights, let alone awarded anything for the violation of them.

C. *Damages for Violation of a Constitutional Right*

The usual principles of damages at common law do not provide appropriate or just redress for violations of constitutional rights. Actual and presumed damages provide compensation only for consequential damage which flows from violation of a right. Nominal damages vindicate the right itself, but do little to redress or deter its infringement. Accordingly, courts exercising remedial jurisdiction under section 24(1) of the Charter should not be bound by the usual common law principles of the measurement of damages. Where appropriate, courts should award substantial damages for the violation of constitutional rights in themselves. In doing so, they would not be without precedent. The House of Lords held, in *Ashby* v. *White*,[278] that a plaintiff has an action in damages against a returning officer who denies his right to vote in Parliamentary elections, even though the plaintiff has suffered no damage other than the infringement of his rights. In dissenting reasons, which were adopted by the majority in the House of Lords, Chief Justice Holt emphasized the fundamental importance of the right to vote:[279]

> The right of voting at the election of burgesses is a thing of the highest importance, and so great a privilege, that it is a great injury to deprive the plaintiff of it.

Holt C.J. emphasized the importance of providing a remedy to redress infringement of the right, both to vindicate the right[280] and deter public officers from future infringements.[281] He rejected the view that damages are awarded to redress only pecuniary injury, relying on other tort actions in assault, trespass and slander which provide redress for interference with the plaintiff's interests.[282] In subsequent cases, *Ashby* v. *White* has been held to provide for damages without proof of actual loss for invasion of an

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[277] Love, *ibid.*, at p. 1273.

[278] 2 Ld. Raym. 938, 92 E.R. 126 (K.B.; H.L.).

[279] *Ibid.*, at pp. 953 (Ld. Raym.), 135 (E.R.).

[280] *Ibid.*, at pp. 953 (Ld. Raym.), 136 (E.R.):
If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal.

[281] *Ibid.*, at pp. 956 (Ld. Raym.), 137 (E.R.):
If public officers will infringe men's rights, they ought to pay greater damages than other men, to deter and hinder other officers from the like offences.

[282] *Ibid.*, at pp. 955 (Ld. Raym), 137 (E.R.).

absolute right[283] or a common law right which is also a public right.[284] Since constitutional rights are public rights, it is arguable that, even without relying on section 24(1) of the Charter, damages are available to redress their infringement *per se*. Accordingly, it is open to a court to find that it is just and appropriate to award damages for infringement of a constitutional right without proof of actual loss.

The United States Supreme Court has recognized that, at least where voting rights are concerned, a plaintiff whose rights have been infringed is entitled to damages without proof of actual loss.[285] There does not appear to be any persuasive reason why this approach should not be applied to infringements of other constitutional rights.

If damages are awarded for violation of a constitutional right *per se*, how can they be quantified? American commentators have suggested that "Congress could authorize recovery of a liquidated sum, guarantee recovery of a minimum amount, or grant the trier of fact discretion to allow recovery within a specified range".[286] Within their respective legislative authority, it would be open to Parliament and the provincial legislatures to enact such statutory minimum remedies. It is also open to the courts to develop guidelines for the quantum of such awards. The appropriate amount would be "neither so small as to trivialize the right nor so large as to provide a windfall".[287]

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[283] See *Embrey* v. *Owen* (1851), 6 Exch. 353) at p. 368, 155 E.R. 579, at p. 585; *Canadian Ironworkers Union No. 1* v. *International Union Local 97 et al.* (1968), 63 W.W.R. 377, at pp. 379 *et seq.* (B.C.S.C.); see also *Zamulinski* v. *The Queen* [1956-1960], Ex. C.R. 175, at p. 189, (1957), 10 D.L.R. (2d) 685, at p. 698 (Exch. Ct.); *Orchard et al.* v. *Tunney*, [1957] S.C.R. 436, at p. 447, (1957), 8 D.L.R. (2d) 273, at p. 283.

[284] See *Chaffers* v. *Goldsmid*, [1894] 1 Q.B. 186 (Q.B.D.); *Bluechel and Smith* v. *Prefabricated Buildings Limited and Thomas*, [1945] 2 D.L.R 725, at pp. 727 *et seq.*, [1945] 2 W.W.R. 309, at pp. 312 *et seq.* (B.C.S.C.). Note, however, that in *The Board of Governors of the Seneca College of Applied Arts and Technology* v. *Bhadauria, supra*, footnote 85, at pp. 191 (S.C.R.), 201 (D.L.R.), Laskin C.J.C., for the court, noted with respect to *Ashby* v. *White* that "there was a proprietary aspect to the right to vote". He also refers to subsequent English authority in which the principle in *Ashby* v. *White* is used to support an award of nominal damages. See also McGregor, *op. cit.*, footnote 268, para. 303.

[285] Note, Damage Awards for Constitutional Torts: A Reconsideration After *Carey* v. *Piphus*, *loc. cit.*, footnote 15, at pp. 968-970.

[286] Love, *loc. cit.*, footnote 116, at p. 1284; see also Note, Damage Awards for Constitutional Torts: A Reconsideration After *Carey* v. *Piphus*, *ibid.*, at pp. 988-90; W.W. Call, Money Damages for Unconstitutional Searches: Compensation or Deterrence, [1972] Utah L. Rev. 276, at p. 281, note 29; Note, Measuring Damages for Violations of Individuals' Constitutional Rights (1974), 8 Valparaiso L. Rev. 357.

[287] *Piphus* v. *Carey*, 545 F. 2d 30, at p. 32 (7th Cir. 1976), rev'd, 435 U.S. 247 (1978).

D. *Punitive Damages*

The role of punitive damages at common law is to punish the defendant for "high-handed, malicious conduct showing a contempt of the plaintiff's right", and "to make an example of the defendant in order to deter others from committing such torts".[288] After suggesting in dicta in several cases[289] that punitive damages may be available in an appropriate case to deter or punish violations of constitutional rights, the United States Supreme Court has recently decided the issue. In *Smith* v. *Wade*,[290] an inmate of a reformatory for youthful first offenders sued a reformatory guard for damages under section 1983 on the basis that his Eighth Amendment right to be free from cruel and unusual punishment had been violated. He alleged that he had been harassed, beaten and sexually assaulted by his cellmates. Because the guard was protected by qualified immunity,[291] the trial judge instructed the jury that he would be liable only if " 'gross negligence' (defined as 'a callous indifference or a thoughtless disregard for the consequences of one's act or failure to act') or 'egregious failure to protect' " the plaintiff were established. The trial judge instructed that virtually the same test would support an award of punitive damages.[292] The availability of punitive damages was challenged in the Supreme Court. The court held that, in an action under section 1983, punitive damages will be available, as they are at common law, not only when the defendant's conduct is motivated by evil motive or intent, but also when it involves reckless or callous indifference to the plaintiff's federally protected rights.[293] The court further held that such recklessness is sufficient to support punitive damages even when it is also the standard on which liability for compensatory damages is determined under section 1983.[294]

Justice Brennan, for the majority, noted that in awarding punitive damages "[t]he focus is on the character of the tortfeasor's conduct—whether it is the sort that calls for deterrence and punishment over and above that provided in compensatory awards".[295] The availability of punitive damages is particularly important as a remedy for constitutional infringements in American law. In *Carlson* v. *Green*,[296] Brennan J. had noted:

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[288] Linden, *op. cit.*, footnote 269, pp. 51-52.

[289] See, for example, *Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, at pp. 269-270 (1981); *Carlson* v. *Green, supra,* footnote 30, at p. 22 and note 9; *Carey* v. *Piphus*, *supra,* footnote 29, at p. 257, note 11.

[290] *Supra,* footnote 111.

[291] See the text accompanying footnotes 211-213, *supra.*

[292] *Supra,* footnote 111, at p. 1628.

[293] *Ibid.*, at pp. 1631-1637.

[294] *Ibid.*, at pp. 1638-1640.

[295] *Ibid.*, at p. 1639.

[296] *Supra,* footnote 30, at p. 22, note 9.

> After *Carey* punitive damages may be the only significant remedy available in some s. 1983 actions where constitutional rights are maliciously violated but the victim cannot prove compensable injury.

Even in England, where the House of Lords has held that punitive damages are not generally available, they are retained to deal with cases of oppressive, arbitrary or unconstitutional actions by servants of government. This exception is justified on the basis that "servants of the government are also servants of the people and the use of their power must always be subordinate to their duty of service".[297] In Canada, punitive damages are not similarly restricted,[298] and they should be available in particularly egregious cases of constitutional infringement.

There are a number of problems with punitive damages.[299] As a punishment, punitive damages are anomalous within tort law, which otherwise seeks only to compensate injury and vindicate rights; they exact a punishment without the protections the criminal law would afford; they can lead to multiple sanctioning; they are difficult to assess; and they result in a windfall to the plaintiff. On the other hand, they may provide incentive for persons wronged by the actions of officials to take private action to enforce the constitution against them, and thus may be effective in deterring as well as punishing official misconduct.

Should punitive damages be available against governments? Do they serve a useful purpose as a punishment or deterrent against governments? The availability of punitive damages may provide added incentive for elected government officials to insure that the most egregious unconstitutional policies are avoided. Otherwise, they may be held accountable to an electorate concerned about the tax increases which are required in order to pay substantial damage awards. Nevertheless, the main purpose of punitive damages is to punish, and accordingly such an award is most effective if it is borne by those who have committed the wrongful act. If punitive damages are awarded against governments, this burden will be shifted to the public at large. For this reason, the United States Supreme Court has held that punitive damages should not be awarded against municipal governments.[300]

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[297] *Rookes* v. *Barnard*, *supra*, footnote 106, at pp. 1226 (A.C.), 410 (All E.R.). See also *Cassell & Co.* v. *Broome*, [1972] A.C. 1027, at p. 1130, [1972] 1 All E.R. 801, at p. 873 (H.L.).

[298] Waddams, *op. cit.*, footnote 106, paras. 979-987.

[299] For discussions of punitive damages see Waddams, *ibid.*, paras. 979-987; M.P. Feeney, Punitive Damages in Constitutional Tort Actions (1982), 57 Notre Dame Lawyer 530; J.D. Ghiardi, The Case Against Punitive Damages (1972), 8 Forum 411; Note, In Defence of Punitive Damages (1980), 55 N.Y.U. L. Rev. 303.

[300] *Newport* v. *Fact Concerts, Inc.*, *supra*, footnote 289. State governments are immune from suit under s. 1983: see text accompanying footnotes 24-25, 100, *supra*. The United States is immune from suit except to the extent that it has waived liability: see text accompanying footnotes 68-71, 99, *supra*. Under the Federal Tort Claims Act, punitive damages are not available against the United States: 28 U.S.C., s. 2674.

E. *Conclusion*

At the very least, the victim of a constitutional wrong should be entitled to recover nominal damages but such an award will do little to enforce the constitution or deter infringement of it. It is arguable that at common law a court may award damages for an interference with a constitutional right even in the absence of actual damage, and certainly a court acting under section 24(1) of the Charter has authority to make such an award. Parliament and the provincial legislatures could specify a minimum amount for such damages or the courts could develop a suitable minimum award. In addition, the victim of a constitutional wrong should be entitled to compensation for the consequential injuries caused by the infringement. Where the defendant's conduct has been motivated by malice or involves reckless or callous indifference to the plaintiff's constitutional rights, a further award of punitive damages should also be available.

Conclusion

A claim in damages is an important remedy in constitutional law, not only as a means of compensating victims of infringements, but also as a means of enforcing constitutional rights. Where no declaratory, injunctive or defensive remedy is available, a claim in damages may be the only vehicle for vindicating a past infringement of a constitutional guarantee. Even where other remedies are available, damages may be appropriate to compensate the victim of a constitutional wrong and provide a means of holding wrongdoers accountable.

The damages remedy is well-known at common law, and this familiarity poses both a danger and a challenge. The danger is that principles for determining entitlement to and valuing damages, designed to accommodate conflicting private law interests, may, when applied to constitutional claims, undermine the effectiveness of damages as a means of vindicating, compensating and deterring constitutional wrongs. The challenge is to reassess conventional damages principles and mold them to develop an effective means of redressing constitutional infringements. In particular, tests of causation and principles for assessing the measure of damages must be re-examined, and the scope of immunity defences must be assessed. In this process, the interests of the individual whose rights have been infringed, supported by the interest of society as a whole in enforcing constitutional rights, must be balanced against the needs of effective government.

In addressing these issues, Canadian courts can learn from American experience. However, just as common law principles should not be automatically applied to remedies under the Canadian Charter of Rights and Freedoms, neither should American constitutional precedents be automatically followed. Canadian courts have more discretion than their American counterparts to develop effective constitutional remedies. They are subject

to fewer constraints and can avoid the difficulties which have undermined the effectiveness of the damages remedy in American constitutional law.

This is not necessarily to advocate an "activist" role for the courts. The scope for judicial intervention in matters which would otherwise be left to democratic processes will depend on the range of interests which the courts determine are protected by constitutional guarantees, their decisions as to whose actions are subject to the Charter, and the willingness of Parliament and the legislatures to use their override powers to displace these judgments. Nonetheless, remedial issues also present an opportunity for confining the impact of judicial decisions. In determining whether it is appropriate and just to afford a remedy to redress infringement of a right, a court determines whether it will implement and enforce guaranteed rights and freedoms. However, it would surely both reflect and generate profound cynicism if courts declare interests to be constitutionally protected but use the remedial discretion to curb the impact of such declarations. In other words, remedies should not be the vehicles of judicial restraint. Insofar as interests are declared to be constitutionally protected, effective remedies should be made available to redress their infringement.

An effective remedy in damages under section 24(1) of the Canadian Charter of Rights and Freedoms will be one which redresses the infringement of a guaranteed right as well as compensating for the consequential damages which flow from the infringement. It will be available against government officials who perpetrate or are responsible for the infringement, but not if they acted in good faith in reliance on the then current state of constitutional law. It will be enforceable against government on the basis of vicarious liability or, where government itself has authorized the infringement, against the government directly. In this fashion, victims will be compensated, government officials will be held accountable but protected in the good faith exercise of their duties, and governments will be responsible for putting their laws, policies and operations in order. To the extent that the burden ultimately falls on taxpayers, it must be accepted as a cost of the government enterprise conducted for their benefit and as a justifiable expenditure in recognition of rights which are, by definition, fundamental.