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Vindictory Damages for Violation of Constitutional Rights: A Comparative Approach

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If presumption of innocence is the golden thread of criminal law, then right to remedy weaves to the heart of civil action: if there is a right, there should be a remedy (*ubi ius, ibi remedium*).¹ While remedy may take diverse forms, damages are probably the most common and the most sought after form of remedy in private law. To an ordinary litigant, his primary concern is unlikely to be what the law is, but rather what damages he will be able to get if he were successful. Thus, not surprisingly, the law of damages attracts significant attention in private law. Yet surprisingly, damages in public law have, until recently, been neglected. Compensation for actual loss aside, the courts have conventionally regarded a declaration as a sufficient remedy to vindicate the wrong done to an aggrieved claimant,² and on occasions were even hostile to the idea of damages in public law, as if the interest and concern of a claimant is completely transformed as soon as he embarks on a public law claim.³ The claimant is no longer treated as a victim but a publicly-spirited citizen who would be satisfied by putting the wrong to an end. As a result, damages, if ever awarded, are normally of a relatively modest level, if not nominal, and little attention has been given to the principles governing the award.

In recent years, the question of damages for vindication of constitutional right has received increasing attention in different common law jurisdictions. It is a controversial subject, an understanding of which is obfuscated by the loose usage of the terms “damages” and “vindication”. There are different types of damages – compensatory damages, restitutionary damages, performance damages, disgorgement damages, general damages, pecuniary and non-pecuniary damages, aggravated damages, exemplary damages, nominal damages and so on. In general, with the exception of exemplary damages and nominal damages, all other forms of damages are loss-based or gain-based. They are awarded

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¹ *Ashby v White* (1703) 2 Ld Raym 938, at 953, per Holt CJ: “If a 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 exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; want of right and want of remedy are reciprocal.”

² *Anufrijeva v Southwark LBC* [2004] QB 1124, per Lord Woolf. See also *R (Greenfield) v SOSHD* [2005] 1 WLR 673, at [19]; *R (Faulkner) v SOSJ* [2013] 2 AC 254, at [29].

³ For example, *Mosley v News Group Newspapers* [2008] EWHC 1777 (QB).

primarily upon proof of loss or gain. In this paper they are categorically regarded as “compensatory damages” (including restitutionary damages). The concern of this paper is less about compensatory damages, which are dependent on evidence and are often readily available whatever cause of action is successfully pursued, but whether a claimant would be entitled to a further and additional amount of non-pecuniary damages, widely known as vindicatory damages, for the violation of his constitutional rights. If so, what is the rationale and principles to guide the award and the assessment of such damages? Should there be an autonomous approach to damages in public law, or should the court attempt to seek equivalence with private law? It is not surprising that different jurisdictions have developed different approaches to these questions. Some jurisdictions have adopted an autonomous approach so that constitutional remedies are developed independently of tort remedies. Others have adopted a parallel approach but argued that development in public law should be informed by principles in private law. Meanwhile, certain jurisdictions have queried the utility of developing constitutional damages when common law damages are adequate to provide a just and appropriate remedy, and instead of relying on development in constitutional remedies, it was contended that an expansion of the common law principles would be the preferred route.

In considering these issues, it is inevitable that we will have to grapple with the controversial divide between public law and private law. A rigid distinction is untenable, but its complete obliteration is equally unrealistic. When human rights are protected by constitutions or Bills of Rights, there is no doubt that a public law dimension, given governance and systemic issues at stake. This is pertinent in those jurisdictions where the courts have powers to strike down legislative encroachment or when the issues involve redistribution of social benefits. Public interest must play an important role in fashioning any appropriate remedy. At the same time, human rights are about individual rights, so therefore a constitutional claim will predictably have a private law dimension of recovery of damages suffered by the victim. While a human rights claim is made in public law, no court would have ignored the human rights dimension in supervising the exercise of public law power.⁴ Hence, it would be artificial to adopt a mutually exclusive approach to the public/private law divide and to assign the role of the courts in a strictly public/private dimension.⁵

In offering his superb analysis, Geoff McLay perceptively asked these questions: “If damages ought to be provided in a constitutional action, what extra value does such an award add to the compensation provided by the common law? [Conversely], if the common law is to be expanded to award remedies where constitutional remedies might already apply, what is the value such an extension might have over the direct employment of the constitutional instrument.”⁶ This article argues that vindicatory damages deserves a proper place in public law, and in assessing vindicatory damages in public law, the approach has to be that a violation of constitutional rights is in itself an independent wrong. While there are shared objectives between damages in public law and some torts, there are also significant differences between a tort claim and a public law claim so that it is preferable to develop

⁴ Compare: Jason Varuhas, “The Development of the Damages Remedy under the New Zealand Bill of Rights Act 1990: From Torts to Administrative Law” [2016] *New Zealand Law Review* 213-254.

⁵ In this paper, the terms “a constitutional law claim” and “a human rights claim” are used interchangeably.

⁶ Geoff McLay, “Tort and Constitutional Damages: Towards a Framework” [2012] *Public Law* 45-60, at 60.

the two actions independently. It is further argued that vindictory damages should be confined to public law, whereas exemplary damages, which would be available in the common law, should not be available in public law. Section 1 of the paper sets out the background on the right to an effective remedy. Section 2 provides a comparative survey of the approaches to vindictory damages in different jurisdictions. It is argued that, notwithstanding some initial differences, there is an emerging trend of convergence towards a composite approach to vindictory damages in a constitutional claim. Finally, in Section 3, the article attempts to address some of the objections to the award of vindictory damages. It challenges the argument that tort law would provide a more generous or coherent approach to damages in public law. Among other things, it is argued that, stripped of semantic differences, there is no real objection to the award of vindictory damages in public law.

1. The Right to Effective Remedies

1.1 The Emergence of Human Rights

One of the most dramatic legal developments after the Second World War was the emergence of human rights, at both global and domestic levels. The unanimous adoption of the Universal Declaration of Human Rights 1948 led to the introduction of the two International Bills of Rights, and inspired a number of regional human rights treaties. Human rights provisions appeared in numerous domestic constitutions or Bills of Rights. These rights have been described as “fundamental”, “inalienable”, or “self-evident”, and are based on the inherent dignity and worth of the human person.⁷ The constitutional nature of these rights usually means that they enjoy a higher or entrenched status in domestic law. A restriction of these rights is subject to intense scrutiny both as to their legality as well as their proportionality. While these rights are originally framed as a negative restraint on States’ powers, it is now generally accepted that they also impose positive obligations on the States.⁸ When there is a violation of these fundamental rights, there is usually an obligation on the States, imposed by international treaties or domestic constitutions/Bills of Rights, to provide effective remedies to the victim.⁹ Enforcement of these constitutional rights in domestic law usually falls within the realm of public law.¹⁰

1.2 Just and Appropriate Remedies

⁷ See, for example, the Preamble to the Universal Declaration of Human Rights.

⁸ These obligations have been described as an obligation to respect, to protect, and to promote: See General Comment No 19, Economic, Social and Cultural Rights Committee, paras 43-51, UN Doc No. E/C.12/GC/19 (2008).

⁹ A right to effective remedy is expressly provided in Art 2 of the ICCPR, Art 13 of the European Convention on Human Rights, whereas the court is empowered to grant appropriate and just remedy under s 24 of the Canadian Charter and s 6 of the Hong Kong Bill of Rights Ordinance,

¹⁰ There were unsuccessful attempts to argue that a violation of a domestic Bill of Rights could give rise to a tortious action of breach of statutory duty in Hong Kong and New Zealand: see, for example, *Ho Chee Shing James v Secretary for Justice* [2015] 4 HKLRD 311 (HK), *Simpson v Attorney General* [1994] NZLR 667(NZ) and *R (Greenfield) v Secretary of State for the Home Department* [2005] 1 WLR 673 (UK). See further below.

While the right to remedies is formulated differently, according to the respective constitutional instrument, a common theme is that the remedies have to be effective, which in turn means that they have to be just and appropriate in the circumstances. Thus, Art 2 of the International Covenant on Civil and Political Rights (“ICCPR”) requires a member State to ensure that any person whose rights or freedoms are violated shall have an effective remedy. The Human Rights Committee has time and time again emphasized the central importance of the availability of effective remedies, including compensation, for the violation of the rights affirmed by the ICCPR.¹¹ The Committee attaches special importance to State Parties’ establishing appropriate judicial mechanisms for addressing claims of rights violations under domestic law, and it has been said that, without appropriate reparation, the obligation to provide effective remedy is not discharged.¹² Reparation could take many different forms, and will generally entail appropriate compensation.¹³ Damages are routinely awarded by international tribunals, although they are typically not of a substantial amount and the principles on which the damages are assessed are seldom set out.¹⁴ Likewise, the right to effective remedies before a national authority is expressly recognized in Art 13 of the European Convention of Human Rights. Art 41 further provides that the European Court of Human Rights shall afford just satisfaction to the injured party if the internal law of the High Contracting Party concerned allows only partial reparation to be made. In other words, Art 41 affords just satisfaction at the international level, and such just satisfaction is accorded on the premises that domestic remedies are insufficient. The primary obligation to afford and develop effective remedies still lies with the State parties. A similar emphasis on reparation has been made by the Inter-American Court of Human Rights. In *Velasquez v Rodriguez*, the Inter-American Court held:¹⁵

“It is a principle of international law, which jurisprudence has considered ‘even a general principle of law’, that every violation of an international obligation which results in harm creates a duty to make adequate reparation. Compensation, on the other hand, is the most usual way of doing so.”

The right to effective remedies has found its way into many domestic constitutions or Bills of Rights. For instance, s 24(1) of the Canadian Charter provides that anyone whose rights or freedoms under the Charter have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.¹⁶ Although there is no express reference to a right to remedy under the New Zealand Bill of Rights, the New Zealand Supreme Court and the Court of Appeal have recognized a positive duty under the ICCPR to provide effective and adequate remedies for a breach of the Bill of Rights in domestic law. Otherwise, the fundamental rights and

¹¹ See, for example, *Mbenge v Zaire*, Communication No 16/1977, UN Doc CCPR/C/OP/2, at 76 (1990), *Selected Decisions*, vol 2, p 76; *Acosta v Uruguay*, Communication No 110/1981, UN Doc Supp No 40 (A/39/40), at 169 (1984), *Selected Decisions*, vol 2, p 148; *Valenzuela v Peru*, Communication No 309/1988, UN Doc CCPR/C/48/D/309/1988 (1993).

¹² General Comment No 31, UN Doc CCPR/C/21/Rev.1/Add 13 (2004), at [15] & [16].

¹³ *Ibid*, [16].

¹⁴ See Tipping J, in *Taunoa v Attorney General* [2008] 1 NZLR 419, at [300].

¹⁵ (1990) 11 *Human Rights Law Journal* 127, at 129, [25]

¹⁶ A similar principle to grant effective remedy that is “appropriate and just in the circumstances” exists in s 6 of the Hong Kong Bill of Rights Ordinance; s 8(1) of the UK Human Rights Act; s 6 of the Constitution of Trinidad and Tobago, and many other constitutions.

freedoms that are guaranteed by the Bill of Rights would become, as Cooke P remarked, “a hollow shell”.¹⁷

A few observations could be made. First, the right to effective remedies is a fundamental right at both the international and the domestic levels. The primary duty to provide effective remedies lies with the State party, so any remedy to be granted by an international tribunal is only of a supplementary and secondary nature, which is to afford just satisfaction to the victim when remedies granted at domestic level are insufficient. There is nothing to suggest that a domestic court could not grant remedies that exceed what is required at the international level, as international human rights instruments are to set the minimum and not the maximum standards. Indeed, it is expressly provided in Art 5(2) of the ICCPR that no restriction of any fundamental rights recognized in any State party could be made on the premises that such rights are recognized to a lesser extent by the ICCPR.

Secondly, it follows that the primary obligation to develop effective remedies lies with the State party at the domestic level. The overarching requirement is that the remedy has to be effective. To be effective, the remedy has to be just and appropriate in the circumstances. To be just, the remedies have to address the extent of injury to the rights or their underlying interests, and be commensurate with the importance and significance of these rights in the domestic legal system. The courts have to be entrusted with broad discretion to decide what constitutes effective remedies, including damages. Any *a priori* restriction of the discretion as to what type of remedies can be granted would likely be contradictory to the very concept of effective remedies. A remedy will be just if it adequately compensates and vindicates the injury to the constitutional rights, whereas whether it is appropriate will depend on the purposes the remedy is to serve and the availability of other remedies. Save as to these general principles, international law does not prescribe the remedies to be provided at domestic law. Given that different jurisdictions may have developed their own procedural and evidential requirements for remedies, this is likely to be an area that an international court would afford a wide margin of appreciation to the States.

Thirdly, it is trite to suggest that a constitution must receive a broad, generous and purposive interpretation. When the right to remedies is enshrined as a constitutional right, whether expressly or by implication, the court enjoys an unfettered discretion, or indeed an obligation to fashion and, if necessary, to create a new remedy to redress a violation of constitutional rights.¹⁸ As De la Bastide CJ observed, in the context of the Constitution of the Republic of Trinidad and Tobago, that “given the breadth of this power, it is not readily apparent to me why in making an order for payment of damages as a consequence of a breach of a constitutional right, the court should be either: (a) limited in providing compensation for the injured party or (b) bound necessarily by the rules which govern the assessment of damages (including exemplary damages) at common law.”¹⁹

¹⁷ *Simpson v Attorney General* [1994] 3 NZLR 667, at [19]; *Taunua v Attorney General* [2008] 1 NZLR 419, at [106].

¹⁸ *Fose v Minister of Safety and Security* (1997) 3 SA 786 (CA), at [69], per Ackermann J; *Jorsingh v Attorney General* [1997] 3 LRC 333, at 344, per Sharma JA.

¹⁹ *Jorsingh v Attorney General* [1997] 3 LRC 333, at 338 (CA).

2. Responses to Vindictory Damages in Different Jurisdictions

In many jurisdictions, the award of constitutional damages is still a novel, albeit controversial, area of development. Apart from diverse legal, social, economic and political tradition of each jurisdiction, the approach that is adopted may also depend on varied judicial perceptions of the functions of constitutional damages. The discussion is further obscured by the absence of a common understanding of the meaning of the term. In the first place, at a general level, it can be said that all remedies, public or private, are vindictory or intend to serve the purpose of vindication.²⁰ This general meaning does not take the discussion too far, as the fact that all remedies serve a vindictory purpose do not prevent the emergence of different remedies. The real issues are: (1) what does vindication in public law mean; (2) what purposes do vindictory damages serve; (3) whether such purposes would have been served by existing remedies so that a new head of vindictory damage is redundant; and (4) how to assess vindictory damages and how they are different from the assessment of common law damages.

2.1 *The Case for Vindictory Damages in Public Law*

The case of vindictory damages rests on the intrinsic value of the constitutional rights itself. In this sense, vindication or vindictory damages in public law has a more narrow and specific meaning. They refer to a distinct category of damages in public law to recognize the intrinsic worth of a constitutional right, and are distinguished from a range of damages in private law that may serve a vindictory purpose. It is true that many constitutional rights have their origin in the common law and have long been protected under it. Yet these rights are recognized to be so fundamental that they are put in a constitution of higher authority under which the State is under an obligation to respect and to protect. If their violation attracts no more than the damages that are already available under the common law, would this not render the constitutional protection of these rights into nothing but rhetoric? It would be “a strange state if relatively innocuous common law breaches were compensated as of right whereas breaches of a constitutionally affirmed human right of an important kind were deemed less worthy of compensatory redress.”²¹ As Tipping J pointed out, there are two victims in a violation of a constitutional right – the particular victim of the breach and the public generally (impairing public confidence in the efficacy of constitutional protection). Public law vindication is not about vindicating the right of the victim as such but about vindicating the overall right of the public by reaffirming the primacy of constitutional rights.²² Similarly, as observed by the Canadian Supreme Court, vindictory damages are to recognize “that Charter rights must be maintained, and cannot be allowed to be whittled away by attrition.”²³ Meanwhile, violations of constitutional rights “impair

²⁰ See, for example, Andrew Burrows, “Damages and Rights”, in Donal Nolan and Andrew Robertson (eds), *Rights in Private Law* (Hart Publishing 2012,) 275-307, at 304.

²¹ See Tipping J in *Taunoa v Attorney General* [2008] 1 NZLR 429, at [318].

²² Ibid. Also see Mallon J in *Liston-Lloyd v The Commissioner of Police* [2015] NZHC 2614, at [42]-[43].

²³ At [25]

public confidence and diminish public faith in the efficacy of the protection”.²⁴ Hence, “while one may speak of vindication as underlining the seriousness of the harm done to the claimant, vindication as an object of constitutional damages focuses on the harm the Charter breach causes to the state and to society.”²⁵ Thus, vindication has to be understood in this narrow public law sense as opposed to a general meaning of vindicating a right. A different way of putting it is that vindication has both public and private law components. As Professor Jenny Steele pointed out, vindication could mean “vindication of the claimant’s right for the claimant’s benefit, or vindication of the right itself, for the purpose of securing that right in the public interest.”²⁶ Constitutional damages are primarily concerned with the latter meaning of vindication.

Accordingly, in a public law claim, the claimant is compensated not just as the victim as in the private law proceeding, but also as a citizen possessing a right which has intrinsic value in itself. As Thomas J observed, “compensation for a breach of the Bill of Rights therefore embraces the extra dimension of vindicating the plaintiff’s right, a right which has been vested with an intrinsic value, and it is that intrinsic value to the plaintiff for which he or she must be compensated over and above the damages which the common law torts have traditionally attracted. Thus, the right has a real value to the recidivist offender as well as to a model citizen.”²⁷

Therefore, vindictory damage, if its award is appropriate, is to provide an extra damage to vindicate the right of the complainant in the public law sense, as recognized by Lord Scott in *Merson v Cartwright*:²⁸

“If the case is one for an award of damages by way of constitutional redress... the nature of the damages awarded may be compensatory but should always be vindictory and, accordingly, the damages may, in an appropriate case, exceed a purely compensatory amount... The purpose is to vindicate the right of the complainant, whether a citizen or a visitor, to carry on his or her life in the Bahamas free from unjustified executive interference, mistreatment or oppression... In some cases a suitable declaration may suffice to vindicate the right; in other cases an award of damages, including substantial damages, may seem to be necessary.”

Two consequences follow: first, vindictory damages in public law are an additional head of damages. They do not preclude compensatory damages that would be available. It follows that the mere fact that the claimant has not suffered any personal loss does not preclude damages where the objectives of vindication clearly call for an award. At the same time, as a public law remedy, vindictory damages are discretionary and will be awarded only when the remedies taken as a whole, are insufficient to vindicate the rights. Secondly, while the focus of vindication is not punishment, it does share some similarities with

²⁴ Ibid, quoting from *Fose v Minister of Safety and Security*, (1997) 3 SA 786 (CC), at [82].

²⁵ At [29].

²⁶ Jenny Steele, “Damages in Tort and under the Human Rights Act: Remedial or Functional Separation?” (2008) 67(3) *Cambridge Law Journal* 606-634 at 618. See also Tipping J, in *Taunoa v Attorney General* [2008] 1 NZLR 429, at [300].

²⁷ *Dunlea v Attorney General* [2000] 3 NZLR, at [67].

²⁸ [2005] UKPC 38, at [18].

exemplary damages. The shared objectives mean that it is normally inappropriate to grant both vindicatory damages and exemplary damages at the same time.²⁹

Despite its novel nature, vindicatory damages have gradually gained recognition in different jurisdictions in recent years, although its justifications and its relations with common law damages remain controversial. The United Kingdom remains a notable exception.

2.2 The Starting Point

A convenient starting point is the decision of the Privy Council in *Maharaj v Attorney General of Trinidad and Tobago*.³⁰ The applicant, a barrister, was imprisoned for seven days for contempt of court without being heard before his committal. He sought redress pursuant to section 6 of the Constitution of Trinidad and Tobago, which provided the High Court the power to “make such orders... as [it] may consider appropriate for the purpose of enforcing or securing the enforcement” of the fundamental rights. The Privy Council held that this created a new cause of action in public law against the State directly, and not a private claim in tort for which the State was vicariously liable. Under this new cause of action, the court may grant effective redress, including reparation and monetary compensation. Such damages, as Lord Diplock observed, were a claim in public law for compensation for deprivation of liberty and not a tort claim of false imprisonment. Therefore, the method of assessment of such damages must be distinct from that under the law of tort, and “would include any loss of earnings consequent on the imprisonment and recompense for the inconvenience and distress suffered by the appellant during incarceration.”³¹

This judgment raised a number of questions, including: What is the nature of a public law claim for damages? Should damages in public law be assessed along tortious principles in private law, at least in situations where there is a concurrent claim in public law and tort? If not, what are the principles that govern the assessment of public law damages? How would they be different from the assessment of private law damages? More specifically, should vindicatory damages, in the sense of an additional award other than compensatory damages in order to vindicate the constitutional rights being violated, be made in public law? The court referred to loss of earning, which fell within the category of compensatory damages, and inconvenience and distress, which might be factors to be considered for vindicatory damages.

²⁹ *Takitota v Attorney General of the Bahamas* [2009] UKPC 12, at [13]. In this case, the claimant was detained for 8 years under miserable conditions without resolving his immigration status, but the treatment was not high-handed or different from other detainees. The trial judge considered inappropriate to grant exemplary damages. The Privy Council affirmed the award of \$100,000 by the Court of Appeal as constitutional or vindicatory damages. See also *Lumba (Congo) v Secretary of State for the Home Department* [2012] 1 AC 245, at 321, [238]

³⁰ [1978] 2 All ER 670 (PC).

³¹ *Ibid*, at 680.

Some of these issues were addressed by the Privy Council in the subsequent case of *Attorney General of Trinidad and Tobago v Ramanoop*, where, in an oft-cited passage, the Judicial Committee advised:³²

“When exercising the constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. *A declaration by the court will articulate the fact of the violation but in most cases more will be required than words.* If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a *useful guide* in assessing the amount of this compensation. But *this measure is no more than a guide because the award of compensation under section 14 is discretionary and, moreover, the violation of the constitutional right will not always be coterminous with the cause of action at law.*”

An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds *an extra dimension* to the wrong. An *additional award*, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasize the importance of the constitutional right and the gravity of the breach, and deter further breaches. All these elements have a place in this additional award. “Redress” in section 14 is apt to encompass such an award if the court considers it is required having regard to all the circumstances. Although such an award, where called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object. Accordingly, the expressions ‘punitive damages’ or ‘exemplary damages’ are better avoided as descriptions of this type of additional award.” (emphasis added)

Lord Nicholls stressed four points. First, vindication in most cases requires more than mere words. Secondly, constitutional claims are independent of common law tort claims. Thirdly, nonetheless, damages in common law tort claims would provide useful guidance. Finally, the Privy Council referred to an “extra dimension” and an “additional award” to reflect the sense of public outrage, emphasize the importance of the constitutional right that was violated and the gravity of the breach, and deter future breaches. This discretionary award is vindicatory and not punitive. These two decisions form the basis for the development of vindicatory damages in a number of jurisdictions, although unfortunately, the full ambit of *Ramanoop* is not always appreciated.

2.3 Canada

The Canadian Supreme Court has responded to these questions by adopting a sophisticated balancing approach that brings together the public law and the private law dimensions in

³² [2006] 1 AC 328, at [18]-[19].

the award of damages for human rights violations. In the leading case of *Victoria v Ward*,³³ the claimant was mistakenly identified as the person who threw a pie at the Prime Minister at a public ceremony. He was wrongfully detained for a few hours and was subject to a strip search at the police station. While he was detained, his car was also impounded. He brought an action in tort and an action for breach of his constitutional rights to be free from unreasonable search and seizure under s 8 of the Canadian Charter. The trial judge awarded damages under s 24(1) of the Charter at \$5,000 for the strip search and \$100 for the seizure of his car. These awards were affirmed by the Court of Appeal. The sole issue before the Supreme Court was the proper approach to the assessment of damages under the Charter.

In delivering the judgment of the Court, McLachlin CJ first made a few preliminary observations. First, the court has a broad discretion to grant appropriate and just remedy under the Charter. This discretion cannot be reduced by “casting it in a strait-jacket of judicially prescribed conditions”.³⁴ Nor is it possible “to reduce this wide discretion to some sort of binding formula for general application in all cases, and it is not for the appellate courts to pre-empt or cut down this wide discretion.”³⁵ Secondly, this discretion is not unfettered, as what is “appropriate and just” will depend on the facts and circumstances of the particular case, and the court will be guided by previous decisions. Thirdly, an “appropriate and just” remedy will have to, among other things, “meaningfully vindicate the rights and freedoms of the claimants” and “be fair to the party against whom the order is made.”³⁶ Lastly, an effective remedy includes the remedy of damages for a violation of Charter rights and, given that the award of public law damages is a new endeavor, the court should adopt a cautious and incremental approach, whilst bearing in mind that damages are just one of the available remedies.³⁷

With these caveats, the Chief Justice emphasized that an action for public law damages is a distinct public law action that lies directly against the state for which the state is primarily liable, and not a private tort action against individual actors for which the state is vicariously liable. In considering whether damages are “appropriate and just” under s 24 of the Charter, the award must further the general objects of the Charter and focus on the violation of constitutional rights as an independent wrong. It follows, as the Court held, that the existence of a concurrent tort claim would not preclude the claimant from obtaining public law damages, provided that there was no double recovery.

The Court then introduced a four-step test. The first step is to establish a breach of the Charter. Step two involves the identification of the purposes of damages. A functional approach to damages is adopted, that is, damages are “appropriate and just” to the extent that they serve a useful function or purpose. In this regard, damages, which are regarded as a unique public law remedy, are considered to be capable of serving three inter-related

³³ [2010] 2 SCR 28. For a commentary, see Chuks Okpaluba, “The Development of Charter Damages Jurisprudence in Canada: Guidelines from the Supreme Court” (2012) 23 Stellenbosch L Rev 55-75, and a less enthusiastic comment, see R Charney and J Hunter, “Tort Lite? – Vancouver (City) v Ward and the Availability of Damages for Charter Infringements” (2011) 54 SCLR (2d) 393-525.

³⁴ At [18].

³⁵ At [18], quoting from McIntyre J in *Mills v The Queen* [1986] 1 SCR 863 at 965.

³⁶ At [20].

³⁷ At [21].

functions: (1) compensation for any personal loss and suffering caused by the violation of one's constitutional rights; such compensation including both personal loss (physical, psychological and pecuniary) as well as harm to intangible interests (distress, humiliation, embarrassment and anxiety); (2) vindication of the right by affirming its constitutional values and importance, as violations of constitutional rights harm not only the victims but also "impair public confidence and diminish public faith in the efficacy of the constitutional protection";³⁸ and (3) deterrence in the sense of "regulating government behavior, generally, in order to achieve compliance with the Constitution."³⁹

Even when damages are functionally justified, the court would have to consider any countervailing factors in determining whether they are appropriate and just. At this third stage, the burden of establishing these countervailing factors is shifted to the State. Two countervailing factors were identified, namely the existence of alternative remedies and concerns for effective governance. If other remedies, including the availability of a tort claim, can adequately meet the need for compensation, vindication and/or deterrence, a further award of damages would not be "appropriate and just". Damages should also not be awarded unless the State conduct meets "a minimum threshold of gravity". Different thresholds may be adopted for different situations. The Court should take into consideration that, on the one hand, government should not be deterred from enforcing the law or making policy discretion due to the possibility of future award of damages, and on the other hand, state immunity should not be a defence to justify or condone a violation that has reached a minimum threshold of gravity. Thus, a State action pursuant to valid statutes that were subsequently declared invalid should generally attract State immunity, unless the State conduct is clearly wrong, in bad faith or an abuse of power.⁴⁰ Likewise, malice will be required to defeat state immunity in malicious prosecution because of the highly discretionary and quasi-judicial role of prosecutors.⁴¹ In this regard, private law thresholds and defences may offer guidance, but nothing more than guidance only, on whether it is appropriate and just to make an award of damages against the State, bearing in mind that the Charter action is a distinct and autonomous action from that under the private law.⁴²

Finally, if the State fails to refute that an award for damages is "appropriate and just", the court would then have to assess the quantum of damages. In general, compensation is the most important objective, and vindication and deterrence will only play supporting roles. In determining compensation, which includes both pecuniary and non-pecuniary loss, tort law may again provide assistance. The purpose is to put the claimant in the same position that he would have been had the breach not occurred. In this regard, the court would be benefited by considering similar awards in tort. However, tort law is less helpful in determining the quantum for vindication and deterrence. This is an exercise of rationality and proportionality, taking into account the seriousness of the breach, the impact of the breach on the claimant, the seriousness of the State misconduct, the public interest in good governance, and the need to avoid diverting large sums of funds from

³⁸ The Court drew support from *Fose v Minister of Safety and Security* (1997) (3) SA 786 (CC), at [55, 82].

³⁹ At [29]

⁴⁰ At [43]. Cf Blanchard J in *Taunoa v New Zealand* [2008] 1 NZLR 429. See post.

⁴¹ But see *Henry v British Columbia* [2015] 2 SCR 214, and post.

⁴² At [43].

public programmes to private interests. The damages have to be just to both the claimant and the State. While an unduly high amount of damages may have to be avoided, the damages have to represent a meaningful response to the seriousness of the breach and the objectives of compensation for the wrongs done, upholding Charter values and deterring future breaches.

Applying these principles, the Supreme Court in *Victoria v Ward* affirmed the award of \$5,000 for the violation of the claimant's right to be free from unreasonable search and seizure. The right was violated in an egregious fashion. The strip searches were inherently humiliating and degrading and constituted a significant injury to his intangible interests. A declaration was insufficient to satisfy the need for compensation. The State conduct was serious and reflected a lack of sensitivity to Charter interest, but it was not intentional, malicious, high-handed or oppressive.⁴³ Thus, no substantial damages were required to serve the objects of vindication and deterrence. The court further found that no damages were justified for the seizure of the car, as no functional purpose of damages would have been served. A declaration would be sufficient to serve the need for vindication of the right and deterrence of future improper car seizures.⁴⁴

The *Ward* approach was generally warmly received.⁴⁵ It provides a comprehensive and balanced framework for the determination of damages in public law. There were only a handful of damages cases after *Ward*, where the approach was adopted,⁴⁶ albeit with some isolated comments on its application.⁴⁷

The *Ward* approach was recently affirmed by the Supreme Court in *Henry v British Columbia (Attorney General)*.⁴⁸ In that case, the claimant was wrongfully convicted and imprisoned for almost 27 years as a result of the failure of the prosecution to disclose

⁴³ At [71]-[72].

⁴⁴ At [77].

⁴⁵ Okpaluba, "The Development of Charter Damages Jurisprudence in Canada", n 33; Kent Roach, "A Promising Late Spring for Charter Damages: *Ward v Vancouver*" (2010) 29 NJCL 145; Brooke MacKenzie, "Backpedalling on Charter Damages: *Henry v British Columbia (Attorney General)*" (2016) 45 *The Advocates' Quarterly* 359-381.

⁴⁶ Damages following the *Ward* approach were awarded in a handful of subsequent cases: see *Lamka v Waterloo Regional Police Services Board* (2012) 272 CRR (2d) 286 (Ont SCJ) and *Mason v Turner* (2014) BCSC 211.

⁴⁷ Given the novelty of this approach, it would not be surprising that questions were raised after *Ward*. In *Kazemi Estate v Iran* [2014] SCC 62, at [164]-[165], the Supreme Court queried how helpful the guiding principles in *Ward* were in providing a predictable result. It was noted that the determination of whether a remedy will truly compensate for a violation of one's rights is an intensely personal and subjective matter and would have to be decided on a case by case basis. This is true to some extent, but just like the award for pain and suffering in personal injury, it is a highly subjective award the appropriateness of which has to be assessed in light of the social and economic conditions of each country. Over time, subjectivity will be minimized by the operation of judicial precedents. It is for this reason that McLachlin CJ warned that an incremental approach should be adopted. In *R v Cote* [2011] 3 RCCS [28], the court held that it was important to identify the interest to be protected in considering the function of vindication. In that regard, a violation of the right to privacy by a warrantless search would be different from the same violation by a duly authorized search, even though the practical consequences may be the same. Meanwhile, in *De Montigny v Brossard* [2010] SCC 51, at [51], the Court remarked that exemplary damages in private law served the same function under the Charter as identified in *Ward*. This is probably a cursory statement that could not be taken too far.

⁴⁸ [2015] 2 SCR 214.

relevant exculpatory evidence. He brought a claim for damages in both tort law (negligence and malicious prosecution) and the Charter for the breach of the Crown's constitutional disclosure obligations. At the Supreme Court, it was accepted that there was a breach of the claimant's Charter rights and that an award of damages would serve the function of vindication. The only issue was whether the court could award damages against the Crown under the Charter for prosecutorial misconduct absent proof of malice. The focus was on the third stage of the *Ward's* test, namely, whether the prosecution would be able to establish countervailing factors against the award of damages. The Crown argued that a low threshold for alleging prosecutorial misconduct would hamper the ability of prosecutors to discharge their important public duties with adverse consequences for the administration of justice. The Supreme Court rejected this argument and held that this case was not about a highly discretionary prosecutorial discretion to initiate or continue a prosecution, but a distinct constitutional obligation to make proper disclosure of relevant information to the defendant. It was unanimous in holding that malice, which was rooted in the tort of malicious prosecution, was inappropriate and not required for a constitutional breach of wrongful disclosure. The Court, however, split on what the threshold standard would then be. The majority held that the public interest was not well served when Crown counsel were motivated by fear of civil liability, and hence the threshold could not be the standard of negligence or gross negligence. It held that the claimant has to show that the Crown intentionally withheld relevant information that it knew or ought reasonably to have known that the information was material to the defence and that the failure to disclose would likely impinge on the accused's liability to make full answer and defence. Further, the claimant has to show sufficient causation between the wrongful non-disclosure and the harm suffered, and this causation was to be established by the "but for" test. The minority, comprising the Chief Justice and Karakatsanis J, whilst agreeing that proof of malice was not required, held that the proper enquiry was whether the Crown has been able to refute that an award of damages were appropriate and just. As the duty to disclose was a Charter obligation and not a discretion, they found that the Crown has failed to show any chilling effect on prosecutorial discretion if a claim for damages was recognized. Referring to Canada's international obligations under the ICCPR, the minority held that to require proof of intention would be "to lower Charter protection below the level of protection founded in an international human rights instrument that Canada has ratified."⁴⁹ Thus, the claimant need not establish fault to justify an award of damages. While the minority agreed that there should be a causal connection between the Charter breach and the loss suffered by the claimant, they cast doubt, without deciding, on the appropriateness of the "but for" test for causation for this purpose.⁵⁰ On the appropriateness of awarding damages for vindicatory purpose, they held:⁵¹

"An award of Charter damages may also help vindicate the Charter rights that the Crown is alleged to have breached in Mr Henry's case. As explained in *Ward*, vindication in this context refers to repairing the damage done to the public through the state's violation of Charter rights. There are few scenarios that can shake the public's confidence in the justice system more deeply than those alleged by Mr Henry. According to the allegations, state action in breach of the Charter seriously

⁴⁹ At [137].

⁵⁰ At [118].

⁵¹ At [115].

undermined the fairness of Mr Henry's trial and the state subsequently imprisoned him for nearly three decades. In these circumstances, an award of Charter damages may help to publicly vindicate such a serious violation of Charter rights. Such an award would recognize the state's responsibility for the miscarriage of justice that occurred in Mr Henry's case, and the importance of respecting Charter rights in order to guarantee trial fairness."

It has been suggested that individual justice was drowned out by public interest concerns in *Henry*.⁵² Perhaps the case should be considered in its proper perspective. Firstly, the court was unanimous in endorsing the approach in *Ward*. Secondly, the tort claim of malicious prosecution failed in this case as no malice was proved, and hence no damages could have been awarded under the tort approach. Thus, there is no question that the Charter award was lower than the common law tort award. Thirdly, the court has extended the Charter liability to a situation when the tort of malicious prosecution failed, and the issue of damages was considered in such context. Fourthly, damages were considered appropriate to fulfill the vindication function, and public interest was taken into account as the prosecution argued that a substantial amount of damages would pose unjustifiable restraints on prosecutorial discretion. Had the common law tort been available, it would be difficult to see that such consideration would not have been material in assessing damages under the tort approach. On the other hand, the majority in *Henry* created an uncertainty, namely whether the claimant should bear the burden of establishing the threshold, which is a departure from the *Ward* approach where the burden to establish countervailing factors rests with the Crown.⁵³ The majority held that this burden was not an onerous one, and could be discharged by simply showing that the prosecution was in possession of exculpatory evidence and failed to disclose it.⁵⁴ They also took pains to emphasize that the threshold applied only to non-disclosure cases. Nonetheless, the reversed burden of establishing a threshold for Charter damages would create unnecessary uncertainty that would have to be clarified in future. The majority was clearly concerned of the implications of awarding damages on the exercise of prosecutorial discretion, but as the minority pointed out, "good governance is strengthened, not undermined, by holding the State to account where it fails to meet its Charter obligations."⁵⁵ It would be more consistent with the *Ward* approach if it were for the prosecution to establish that the non-disclosure was not intentional in order to refute a claim for damages. In this regard, the approach of the minority is much to be preferred.

⁵² Varuhas, "The Development of the Damages Remedy under the New Zealand Bill of Rights Act 1990: From Torts to Administrative Law", n 4 above, at 247, n 144; MacKenzie, n 45 above. It appears that Varuhas took the view that a substantial amount of compensatory damages would have been awarded under tort and that the vindicatory damages that the Court finally awarded were lower than the compensatory damages that should have been awarded under tort. The comparison is not equivalent, and damages were simply not available under malicious prosecution as the action failed to substantiate the element of malice. Assuming damages were available, they would have to be under the traditional head of exemplary damages, and it would be difficult to see why conduct of the State to take step to mitigate the wrong would not be relevant in considering how far the State should be punished.

⁵³ See MacKenzie, n 45 above, at 372.

⁵⁴ At [86].

⁵⁵ At [129].

Notwithstanding the different approaches to establishing the threshold for refuting damages in *Henry*, which difference should not be over-stated, the *Ward* test has been firmly established in Canada and is a welcome approach. It provides a pragmatic, flexible and balanced approach to damages in a public law claim. It recognizes that a constitutional claim and a tort claim are distinct and parallel legal avenues, and affirms the central importance of constitutional rights so that a violation of constitutional rights is treated as an independent wrong that is worthy of compensation in its own right, irrespective of whether there are losses to the victim. As the minority in *Henry* pointed out, “whereas breaches of the duty to disclose occur, Charter liability flows from the constitutionally entrenched mechanisms that permit individuals to hold the state to account. This is distinct from tort liability, which imposes conduct-based thresholds to regulate tortious conduct as between individuals.”⁵⁶ This right-centred approach will free the court from the constraints of the principles of tort law, which is primarily loss-centred. A distinct approach to public law damages enables the court to further develop the principles of awarding damages in public law, which will allow an individual to hold the State directly (and not an individual officer) to account in a State-individual relationship where it may not be appropriate to extend such principles to regulate tortious conduct between private individuals.⁵⁷ At the same time, it recognizes that tort law has an important role to play. Insofar as assessment of compensation is concerned, tort law will provide useful guidance, and there is no reason why the two causes of action should lead to different quantum or principles. This will ensure that a comparable amount of compensatory damages would be awarded under the Charter and that compensatory damages which is personal in nature would not be reduced by public interest consideration. Different considerations apply in relation to the function of vindication and deterrence. While they are (but not necessarily) the objectives of damages for some forms of torts, tortious award should be no more than a guide in this regard, as Lord Nicholls had cautioned in *Ramanoop*, that “the violation of the constitutional right will not always be coterminous with the cause of action at law.”⁵⁸ Infringement of privacy and discrimination are notable examples where tort law is not well developed to address the wrongs.⁵⁹ By clearly identifying the functions of damages and separating the function of compensation from vindication, it requires the court to direct its mind to different functions of damages. By excluding any reference to exemplary damage, and through a careful choice of language, the Court has sidestepped the debates surrounding the semantics that had plagued this aspect of the law of damages in England.⁶⁰ Further, the *Ward* test allows the court to explicitly balance the need to vindicate constitutional rights and any countervailing factors, with a provision that the burden to establish countervailing factors rests squarely on the state. This approach mirrors the test on constitutional liabilities, under which the burden to establish the rationality and proportionality of a restriction on constitutional rights rests on the State. It also allows the court to develop, albeit incrementally, the approach to public law damages, in response to any breach of a fundamental right, instead

⁵⁶ Ibid.

⁵⁷ See also *Henry v British Columbia (Attorney General)* [2015] 2 SCR 214, at [129].

⁵⁸ [2006] 3 AC 328, at [18].

⁵⁹ While different torts such as trespass or breach of confidence may be relevant in protecting privacy, they do not serve to protect privacy interest as such. The nearest tort is the misuse of personal information, but that would still be a limited cause of action that is unable to cover the full range of privacy invasion.

⁶⁰ Okpaluba, “The Development of Charter Damages Jurisprudence in Canada”, n 33 above, at 73.

of just closely modelling public law damages on existing private law principles, the application of which would have denied any damages in *Henry*.

The Canadian approach has left a few issues to be determined in future, namely (1) the appropriate test for establishing causation in public law damages; (2) whether public law damages should be awarded for systemic failures or when the breach was a result of judicial failures or legislative encroachment; and (3) the appropriate threshold to counteract an award of public law damages, where the threshold has been held to be dependent on the facts of each case and the nature of the rights involved.

2.4 New Zealand

While the New Zealand Bill of Rights takes the form of an ordinary statute rather than a constitution, the New Zealand courts do not treat this as an impediment to adopting the principles developed in *Maharaj*. In that case, the Court held that a violation of the Bill of Rights was a separate cause of action in public law for which compensation was available. In *R v Goodwin*, Richardson J first pointed out that the Bill of Rights required a rights-centred approach so that primacy should be given to vindicate the human rights.⁶¹ Moreover in *Manga v Attorney General*,⁶² Hammond J clearly distinguished a breach of the Bill of Rights from a tort action by emphasizing the public dimension of the former. In the seminal case of *Simpson v Attorney General (Baigent's Case)*,⁶³ the majority of the Court of Appeal also held in favour of a distinct public law claim. In that case, the claimant's house was mistakenly searched pursuant to a search warrant which contained mistaken information. After the claimant has pointed out the mistaken information, the police still insisted on searching the house. The claimant brought various tort claims and a claim under s 21 of the New Zealand Bill of Rights. The tort claims were unavailable, either because the pleading failed to establish malice or bad faith, or that the Crown Immunity Act excluded the vicarious liability of the Crown.⁶⁴ Thus, the Court of Appeal was faced squarely with the question about the nature of a Bill of Rights claim.

The Court of Appeal emphasized the constitutional nature and purposes of the Bill of Rights, and relied, *inter alia*, on the ICCPR, which imposes on the State a duty to provide effective remedy for violation and to develop the possibilities of judicial remedy.⁶⁵ Relying on *Maharaj*, the Court held that a Bill of Rights claim was an independent cause of action in public law against the State, and not one arising from vicarious liability in private law. Accordingly, the Crown immunity from tort liability under the Crown Proceedings Act was not applicable. Hardie-Boys J, after surveying the authorities from India, Ireland, the United States and Canada, concluded that the Bill of Rights required a rights-centred approach.

⁶¹ [1993] 2 NZLR 153, at 193-194. See also *R v Grayson and Taylor* [1997] 1 NZLR 399, at 411-412.

⁶² [2000] NZLR 65, at [126].

⁶³ [1994] NZLR 667 (*Baigent's Case*).

⁶⁴ Gault J dissenting and held that, in light of the nature of the Bill of Rights and a duty of the court to develop the common law consistently with the Bill of Rights, an action for breach of statutory duty was not excluded by the Crown Immunity Act.

⁶⁵ Per Cooke P, at 676. Gault J delivered a powerful dissent that the cause of action could be a breach of statutory duty, and held that it was preferable to develop existing common law remedies than to chart an unknown course in public law.

Fundamental human rights are inherent in and essential to the structure of a society, and a primary focus of the court is to provide an appropriate remedy. This rights-centred approach does not necessarily require a remedy in the form of damages or other compensation, but it should be awarded if it is appropriate and proper to do so. The purpose is compensatory and not punitive.⁶⁶ It was held that damages were appropriate, as while a mere declaration might deter similar official conduct in future against other people, this would be of no benefit to the deceased claimant and would be “toothless”.⁶⁷ Nor would the normal remedy of exclusion of evidence be relevant when there was no criminal proceeding against the claimant. The award should, however, be “restraint” or “moderate” on the one hand, but it should not trivialize the breach.

Unlike the Canadian approach, the majority of the Court preferred to distance itself from tort principles in approaching public law damages. Cooke P emphasized that the Bill of Rights was not a mere platitude of declaration, and was not to be approached “as if it did no more than to preserve the status quo”.⁶⁸ Casey J observed that there would be problems in adapting traditional common law remedies such as negligence, trespass, and so on, to encompass all the rights and freedoms in the Bill in order to give appropriate redress for their infringement.⁶⁹ McKay J held that whether damages were available would depend on the nature of the right and of the particular infringement, and its consequences. When the infringement involved deprivation of liberty or invasion of privacy, monetary compensation was likely to be the appropriate remedy. Damages for false imprisonment or trespass should not preclude a separate public law claim, and the same damages might be recoverable by either route.⁷⁰ While not disagreeing with this approach, Gault J, in dissent, preferred to develop the remedy in the tort of breach of statutory duty, which was regarded as a familiar and more fruitful route than to chart into the unknown sea of public law remedies.⁷¹

The assessment of damages in a public law claim always has an aspect of arbitrariness. This will be compounded if these damages in public law, at least for those wrongs that are analogous to tortious wrongs, would produce different, albeit smaller, awards. This problem was well encapsulated by Daly CJ in *Jamakana v Attorney General*:⁷²

“The assessment of damages in tort, where one is dealing with non-pecuniary or general damages, is an attempt to perform the difficult and artificial task of converting into financial terms injury, loss, suffering and deprivation. As a result a number of conventions have been evolved. In dealing with deprivation of constitutional rights one is equally attempting to quantify in financial terms loss of liberty, loss of freedom of movement, loss of freedom of expression and so on. Some of these losses are closely analogous to tortious wrongs and both categories

⁶⁶ At 703. See also Casey J, at 691.

⁶⁷ This does not mean that damages would be necessary where a party was innocent and no repetition of the conduct in relation to that plaintiff was ever likely. The question is one of facts: see Mallon J in *Liston-Lloyd v The Commissioner of Police* [2015] NZHC 2614, at [46].

⁶⁸ At 676.

⁶⁹ At 691.

⁷⁰ At 718.

⁷¹ At 713.

⁷² [1997] 3 LRC 569, at 575 (CA).

share the same difficulties of quantification and for that reason alone should share similar conventions. Indeed, the end purpose is the same; recompense for a wrong and so the method of quantification should in my view be the same.”

A partial and pragmatic answer to this problem is for the courts to take account of the damages that would have been awarded under tort law in assessing public law damages so as to ensure an equitable result without double recovery. Accordingly, Cooke P advised (as endorsed by Casey and Hardie-Boys JJ):⁷³

“... in addition to any physical damage, intangible harm such as distress and injured feelings may be compensated for; the gravity of the breach and the need to emphasize the importance of the affirmed rights and to deter breaches are also proper considerations, but extravagant awards are to be avoided. If damages are awarded on causes of action not based on the Bill of Rights, they must be allowed for in any award of compensation under the Bill of Rights so that there will be no double recovery. A legitimate alternative approach, having the advantage of simplicity, would be to make a global award under the Bill of Rights and nominal or concurrent awards on any other successful causes of action.”

This approach comprises the elements of compensation, vindication and deterrence, and would take account of any award under the private law. Although the majority stressed that it would be inappropriate to refer to tort law in assessing public law damages, the above passage qualified the general statement and tortious award would still be relevant, at least regarding the element of compensation. Thus, while the court started with a strong autonomous position, it ended up with an approach that bears close resemblance to the Canadian approach. However, instead of distinguishing clearly vindication from compensation, Cooke P’s alternative solution was to make a global award without descending into details. The problem of a global award is that it tends to merge the award for compensatory and vindicatory purposes, which gives rise to a lot of confusion and ambiguities of the meaning of vindicatory damages in subsequent cases.

Since then the Supreme Court has had a number of opportunities to reconsider the issue of damages. The *Baigent’s Case* approach was never challenged.⁷⁴ Instead, the focus was on the proper role of public law damages, its relationship with private law damages in tort, when public law damages would be available and how to assess the damages.⁷⁵

In *Dunlea v Attorney General*,⁷⁶ another case of unreasonable body search of people mistakenly identified in an anti-terrorist operation, the question was whether damages for a

⁷³ *Simpson v Attorney General* [1994] 3 NZLR 667, at 678.

⁷⁴ For example, *Falwasser v Attorney General*, CIV-2008-463-000701, the court awarded NZ\$30,000 for assault and abuse of power by the police. In *Upton v Green* [1996] 3 NZHR 179, damages of NZ\$13,000 were awarded for breach of a right to fair hearing when a judge sentenced the appellant without allowing him an opportunity to be heard. In *R v Grayson* (1996) CA 255/96, the Court of Appeal stated that “the formulation of appropriate remedies should be approached broadly”, and such a robust and rights-centred approach called for a flexible approach to remedies. See also the table of cases set out at the end of the judgment of Stevens J in *Van Essen v Attorney General* [2015] NZCA 22.

⁷⁵ As noted by Heath J in *Taylor v Attorney General* [2015] NZHC 1706, at [59].

⁷⁶ [2000] 3 NZLR 136, at [82, 83].

breach of the Bill of Rights should typically follow the tort assessment. Without deciding the question, the majority opined in favour of a consistent approach. Keith J, delivering the judgment of the majority, gave three reasons: (1) unlike *Baigent's Case* where the tort claim failed, this was a case of a successful concurrent claim. The rights in question have long been recognized by the common law tort where compensation had been provided. These rights were affirmed by the Bill of Rights, and therefore the award should be comparable; (2) a comparable award was consistent with the approach adopted in overseas jurisdictions, notably the United States, Canada and Ireland; and (3) there was no aggravating factor to make a different award.⁷⁷

Thomas J, in partial dissent, found the overseas experience to be inconclusive. He argued for a rights-centred approach as opposed to the private law "loss-centred" approach, and held that vindication of the intrinsic value of human rights was not the same as an award of exemplary damages. It was the intrinsic value of the rights itself that deserved recognition. Compensation for a breach of the Bill of Rights must therefore embrace the extra dimension of vindicating the claimant's right, and therefore an amount *over and above* the damages which the common law torts have traditionally attracted.⁷⁸ While the amount may differ depending on the nature of the right that has been violated, the gravity of the breach, and such other matters as may be germane to the vindication of the right in the particular case, this award served to affirm the rights and not to punish the State. He further rejected the Crown's submission that an additional damage should only be available when there was no equivalent common law action or when existing remedy was inadequate. Nor was he convinced that vindictory damages would open the floodgates on the quantum of damages, as this could be judicially contained. The learned judge again drew a distinction between vindictory damages and compensatory damages:⁷⁹

"Not only must the plaintiffs be compensated for their loss, including the distress and humiliation which they suffered, but the plaintiffs' rights must be vindicated by recognizing their worth to them. To that end the compensation needs to be greater than that awarded by the trial judge and upheld in this court... Unless awards are realistic, the value which the community has chosen to place on the observance of those rights must be depreciated. What value is the right to be free of an unreasonable search or not to be unlawfully detained if the court's remedies for breaches of those rights are seen to be miserly? Parliament's will is not then implemented and the community's expectations are not then met."

The *Dunlea* case has been considered as a marked departure of the autonomous approach to damages in a public law claim.⁸⁰ This is probably an overstatement. First, the majority expressly stated that this was not the occasion to consider the question whether the assessment of damages under the Bill of Rights should be different from that under tort arising from the same facts for essential the same wrong, for the simple reason that this

⁷⁷ At [38]-[42].

⁷⁸ At [67].

⁷⁹ At [82]-[83].

⁸⁰ Bulter and Bulter, relying on this case, commented that it would be safe to conclude that at least in areas of concurrent liability, the damages awarded under the NZBOR would typically follow the common law standards: A Bulter and P Bulter, *The New Zealand Bill of Rights Act: A Commentary* (Lexis Nexis, 2005), at 991.

point was not argued or pursued in court.⁸¹ Secondly, their preference for a comparable award in tort was premised on the basis that this was a case of concurrent claim. The majority was at pains to point out that this was not a case where a tort claim was unsuccessful or when the tort liability was exempted so that the only possible claim was one under the Bill of Rights. It follows that had this not been a case of concurrent tort and public law claim, the same consideration might not be applicable. Thirdly, the trial judge held that the two successful claimants who were mistakenly identified as terrorist suspects were entitled to an award respectively of \$12,000 and \$11,000 for a breach of their rights under the Bill of Rights and \$6,000 and \$5,000 as exemplary damages, with parallel awards for assault and false imprisonment.⁸² The majority of the Court of Appeal set aside the award for exemplary damages because the conduct of the officers were not “outrageous or high-handed”. Having rejected the exemplary damages on the ground that they failed the common law test for the awards, the majority nonetheless upheld the overall awards in one lump sum for each of the two claimants in light of the nature and the wrong done to them.⁸³ It is unfortunate that the court did not provide any break down for the lump sum award. Yet if exemplary damages were considered to be inappropriate, what could have been the justification for upholding that same amount of awards apart from it constituting additional vindicatory damages under the Bill of Rights? In this regard, the difference between the majority and the minority was just one of extent, with Thomas J being prepared to make a more generous award as vindicatory damages but unfortunately also without providing details of how he came to the amount.⁸⁴

The question of the relations between a public law action and a private law claim in tort was further addressed by the Supreme Court in two important subsequent cases. In *Taunoa v Attorney General*,⁸⁵ a distinct public law approach to damages was again affirmed by the Supreme Court of New Zealand. Unlike the *Dunlea* case, this was not a case of concurrent claims. In *Taunoa*, the claimants were prisoners who were subject to inhuman and degrading treatment under an unlawfully strict regime. They brought an action under the Bill of Rights only. The Supreme Court emphasized the public law nature of the remedy, and expressly endorsed the idea of vindicatory damages.

The Court was unanimous in treating the public law claim separately from the private law claim as they served different purposes. The purpose of public law was twofold: to prevent the recurrence of the wrongdoing by the State and to mark societal disapproval of the official conduct. There were two victims in a Bill of Rights claim: the claimant as the immediate victim whose interests required the court to consider what, if any, compensation was due, and society as a whole as another victim. As the breach also tended to undermine the Rule of Law and societal norms, the court must also consider what was necessary by way of vindication in order to protect society’s interests in the observance of fundamental rights and freedoms.⁸⁶ Accordingly, in assessing the Bill of Rights damages, the court should not attempt to match it with the quantum of awards in tort law. Blanchard J pointed out

⁸¹ At [37].

⁸² At [7].

⁸³ At [34], [36].

⁸⁴ At [84].

⁸⁵ [2008] 1 NZLR 429, at [265].

⁸⁶ Tippling J, at [317]. See also Henry J, at [385], and McGrath J, at [367].

that there would be conceptual and practical difficulties in treating the Bill of Rights as a constitutional tort. In developing constitutional damages, tort principles such as causation, remoteness and mitigation might not fit well with cases where fundamental rights have been violated. Nor did the common law distinctions between compensatory, aggravated and exemplary damages apply.⁸⁷

The Supreme Court was unanimous that declaratory relief was not a sufficient remedy.⁸⁸ However, at this point the Court began to use the terms “vindication” and “damages” in a rather confusing manner. When a right has been infringed and a question of remedy arises, the general approach, as Blanchard J observed, was that the court “must begin by considering the non-monetary relief which should be given, and having done so it should ask whether that is enough to redress the breach and the consequent injury to the rights of the plaintiff in the particular circumstances.” The primary task was to “find an overall remedy or set of remedies which was sufficient to deter any repetition by agents of the State and to vindicate the breach of the right in question”.⁸⁹ The reference to an overall remedy for vindication appears to include compensation, vindication and deterrence.

Elias CJ seems to adopt a more narrow meaning of vindication. She emphasized that the damages are “to recognize the importance of the right and the gravity of the breach”.⁹⁰ They should try *not only* to compensate for the injury suffered through the denial of a right, which may include distress and injured feelings, as well as physical damages, but also to vindicate the importance of the rights. In referring to an “additional” award to vindicate the importance of the right,⁹¹ it is obvious that the Chief Justice did not intend to exclude compensatory award, for which assessment the tort principles would still be relevant.

In contrast, Tippling J stated that the approach should involve considering how much was necessary to achieve respectively the vindicatory purpose and the compensatory purpose, and then awarding the higher of the two sums. His reference to damages for vindicatory purpose seems to include both vindicatory damages, if any, and compensatory damages, as this seems implicit in the factors that he has identified as relevant in assessing damages, namely, (1) the nature of the right which has been violated; (2) the circumstances and the seriousness of the breach; (3) the seriousness of the consequences of the breach; (4) the response of the defendant to the breach, and (5) any relief awarded on a related cause of action.⁹² The last factor again pointed to the relevance of any tort award that has to be taken into consideration. Apart from damages, he also regarded the possibility of a more generous basis of awarding costs as part of the package of an effective remedy.⁹³

⁸⁷ At [307]. He expressly disagreed with the obiter of the majority of the Court of Appeal in *Dunlea v Attorney General* on adopting the same approach of common law and public law when both actions are available: at [304].

⁸⁸ For example, Elias CJ observed (at [107]) that damages were “the only practical effective remedy for the denial of the prisoners’ rights to be treated with dignity and respect for their inherent humanity.”

⁸⁹ At [253].

⁹⁰ At [111].

⁹¹ At [109].

⁹² At [305].

⁹³ At [334]; see also McGrath J, at [366].

Thus, notwithstanding the confusing use of the term “vindication”, it does not appear that the Court was to exclude the relevance of tort damages. Meanwhile, the Court was unanimous in holding that exemplary damages were inappropriate in a public law claim. The objective of public law damages was not to punish the transgressor. Tippling J further noted that no serious weight should be placed on the deterrent element beyond what was inherent in the sum appropriate as vindication.⁹⁴ He did not agree with the Supreme Court of Sri Lanka that deterrence was “hopelessly futile”, as there might be cases that deterrence might be relevant from the organization’s point of view to encourage better oversight and supervisory practices. Yet he did caution that deterrence should not be of major relevance given that punishment was hardly an appropriate consideration in public law and that damages were to be paid by the general taxpayers rather than the defendant as such.⁹⁵

The Court has not entered into any discussion of what damages would have been awarded under a tort claim, for the obvious reason that the claimants had not brought a tort claim. Had this been done, the likely damages that might be recovered would be those for physical damages, and distress and injured feelings as compensatory damages and more likely, exemplary damages. It appears that the Court has not excluded compensatory damages (save that they would be subsumed under the overall damages for vindication), and therefore the only significant difference between public law damages and tort damages would be exemplary damages. It is likely that the Court had in mind the restrictive circumstances for making exemplary award for punishment and deterrence in the common law, and its remark of not attempting to seek equivalence with tort awards would have to be understood in this context. Therefore, the amount of damages should not be extravagant. The reference that the award had to be adequate to provide an incentive to the State not to repeat the infringing conduct and also not to give an impression of trivializing the violation reinforced the above reading that the Court had in mind the punitive function of damages.⁹⁶ Such damages may be substantial if they are necessary in the particular circumstances.⁹⁷

By a majority, the Supreme Court lowered the damages awarded by the trial judge, but still awarded substantial damages to the three appellants respectively in the sum of \$35,000, \$20,000 and \$4,000. These sums were awarded to vindicate the right of personal liberty, taking into account the long period of detention, the degrading treatment meted out to them, and the attempt of the Government to stop the practice. In making these awards, the Court was aware that there might well be another 200 prisoners who had been placed in a similar situation. This factor prompted the remark of Blanchard J that the award of damages was “normally more to mark society’s disapproval of official conduct than it is to compensate for hurt to personal feelings.”⁹⁸

⁹⁴ At [327].

⁹⁵ At [319]-[321].

⁹⁶ At [109]

⁹⁷ *Ibid*, and the Chief Justice expressly referred to *Greenfield* and considered that the effect of *Greenfield* is not to deny substantial damages if they are warranted.

⁹⁸ At [259]. He considered that those who have suffered hurt to personal feeling could make a separate claim for damages, presumably as compensatory damages that require evidential proof to substantiate the claim. See further below.

In *Liston-Lloyd v The Commissioner of Police*, the claimant lodged a complaint against the police for unlawfully obtaining a buccal (oral) DNA sample pursuant to her conviction as the offence of which she was convicted was not a relevant offence for which such sample could be compelled. She brought her claim under the Bill of Rights only. Mallon J found that the sample was unlawfully obtained and hence there was a breach of her right under s 21 of the Bill of Rights. His Honour provided a succinct summary of the New Zealand position.⁹⁹ He referred to the private and the public law components of vindication. While it may be appropriate to have regard to common law damages, particularly where the focus of the award is on the compensation function, there is an “extra dimension” in a public law award of damages because of the constitutional dimension. Hence, common law damages should “set the floor rather than the ceiling” for public law damages.¹⁰⁰ His treatment of the functions of public law damages bears remarkable resemblance with the Canadian approach in *Ward*.¹⁰¹

“Vindication has both private and public law components. This recognizes that breaches of rights of this kind harm not only the particular victim of the breach but the public generally (impairing public confidence in the efficacy of constitutional protections). The objective is to ‘affirm the right’ (that is to defend and uphold it) and to deter further breaches. An award of damages may serve these purposes by compensating for the injury caused by the breach (compensation), marking the wrong that has occurred (vindication) and deterring the breach (deterrence). Thus, *NZBORA damages are concerned both with what a plaintiff should receive (the compensation function) and what the defendant should pay (the vindication and deterrence functions)*. Any one of these purposes may support an award. However, damages are not ordinarily required for deterrence purposes because a declaration ordinarily can be expected to encourage high standards of compliance. Rather, they are usually awarded to serve compensatory and/or vindicatory purposes.” (emphasis added)

The court took into account that the breach involved highly personal information, but the distress involved was at the low end and there were proper precautions on the use that could be made of the information. An award of \$2,500 was made to compensate the claimant’s for the upset and distress suffered and to recognize her right to be secure from unreasonable search and seizure. Mellon J expressly stated that if this were a common law tort action, an award of \$1,500 would have been made. He had adjusted the amount upward to mark the breach of an important right.¹⁰²

In *Van Essen v Attorney General*, the Court of Appeal carried out a survey of awards of public law damages, setting out the amounts awarded and the nature of the conduct that gave rise to the award.¹⁰³ The Court concluded:

⁹⁹ [2015] NZHC 2614, at [41]-[47].

¹⁰⁰ At [47].

¹⁰¹ At [42]-[43], footnotes omitted.

¹⁰² At [61].

¹⁰³ [2015] NZCA 22, at [106] and Annex on “Public Law Compensation Quantum of Awards”.

“First, in most cases in which damages are eventually awarded, the conduct concerned has involved physical restraint, direct infliction of physical harm, or a prolonged or significant deprivation of liberty. These cases span in seriousness from physical detention, handcuffing, to inappropriate solitary confinement and physical violence in prison similar situations. The seriousness of the circumstances is reflected in the quantum awarded to acknowledge the gravity of the breach in each case. Conversely there are very few cases in which public law damages have been awarded where no physical damage or interference with liberty has occurred. Where damages have been awarded in such cases, this has typically been to reflect equivalence with tortious claims, or on the basis of clear pecuniary loss arising directly from the breach of the right itself.”¹⁰⁴

In that case, the Attorney General admitted liability for a wrongfully obtained search warrant under the Bill of Rights and accepted a declaration as an appropriate relief. The common law claims for misfeasance in a public office and malicious procurement of the search warrants failed for want of evidence to substantiate the requisite intent. The tort claims for trespass to land and goods also failed because of statutory immunity. The trial judge, applying *Taunoa*, made an award of \$10,000 for damages under the Bill of Rights.¹⁰⁵ The issue before the Supreme Court was the appropriateness of the award of public law damages. The Supreme Court disagreed with the trial judge on whether the facts disclosed any aggravating factor that would justify an award. Accordingly, the public law damages were set aside, as a matter of a different assessment of facts rather than on any legal principle, and a declaration was held to constitute sufficient relief. Interestingly, while the court found that this was not an appropriate case to grant public law damages, it was prepared to make a more generous award of indemnity costs to the claimants as part of the package of adequate relief.¹⁰⁶

Varuhas heavily criticized the decision in *Taunoa*.¹⁰⁷ Amongst other things, it was argued that the public law paradigm in *Taunoa* would suppress the individual dimension in human rights claims. Damages would be subject to an exceptionally broad, and impressionistic judicial discretion. The assessment of damages was dominated by public interest concerns, which would not be the case in private law. Individual interests in redress were not of subsidiary importance. Rather than focusing on what was required to remedy a violation of the claimant’s interest, the focus was “nearly exclusively on whether the courts feel they are warranted in imposing liability on government.”¹⁰⁸ While these arguments will be addressed later, two points could be made here. First, it is important to note that in most of these cases, the only issue before the court was public law damages. The tort action either failed or was not pursued, and hence no damages could have been awarded under tort. Thus, it is artificial to argue that the public law damages were lower than the tort damages. Indeed, in most of these cases, the claimant was awarded more

¹⁰⁴ At [106]-[107].

¹⁰⁵ At [62]-[66].

¹⁰⁶ At [160] and [161].

¹⁰⁷ Varuhas, “The Development of the Damages Remedy under the New Zealand Bill of Rights Act 1990: From Torts to Administrative Law”, n 4 above.

¹⁰⁸ *Ibid*, at 240.

than what he would have obtained under the common law.¹⁰⁹ Secondly, while some of the judgments are not entirely clear, it appears that the focus of the court was not on compensatory damages. Vindictory damages are in addition to compensatory damages, so they do not and should not affect whatever compensatory damages that the claimant would be entitled to claim. Therefore, it is incorrect to say that individual rights and interests were subsidiary. Thirdly, compensatory damages aside, it has not been shown that a common law approach would have resulted in a higher amount. In most of these cases, compensatory damages are simply not available. It is true that damages for vindication are available in those torts that are actionable per se, but it has not been shown that the court would have awarded a higher amount of damages for vindictory purpose in similar circumstances.

The court has also had an opportunity to consider the award of public law damages when the violation was partly attributable to the judiciary or the legislature. In *Currie v Clayton*, the Court of Appeal noted that the *Baigent's case* damages were an "exceptional remedy" that was only available in "egregious cases".¹¹⁰ They were normally appropriate when the breach has resulted in some sort of irreparable harm.¹¹¹ In this case, the claimants claimed for public law damages for breach of prosecutorial duty to disclose relevant materials on the credibility of a key witness in a criminal trial. The court noted that a wide range of remedies such as exclusion of evidence, a stay of proceedings, quashing a decision made in breach of a guaranteed right, and a declaration of a NZBORA violation are available for a breach of the right to fair hearing. Hence, it would be rare for those who had been through the criminal process and had their NZBORA rights vindicated through such remedies to obtain a further remedy of compensation.¹¹² In *Attorney General v Chapman*, the majority held that there was no claim for public law compensation for any alleged breaches by the judiciary of the right to fair trial on ground of judicial immunity and the public interest of maintaining judicial independence.¹¹³ Elias CJ gave a powerful dissent, noting that it would be difficult to separate judicial breaches of rights from breaches by other state actors, and such distinction would lead to arbitrary results and problematic questions of attribution or materiality.¹¹⁴ When fairness could still be achieved, a stay of proceeding was inappropriate, and damages may be an appropriate remedy for undue delay. There was no reason why damages should not be available if the delay was partly attributable to the judiciary, or when an unreasonable search was a result of a mistake in granting a warrant.¹¹⁵

¹⁰⁹ See, for example, in *Dunlea*, the claimants were awarded an amount equivalent to exemplary damages which were not available under the common law. In *Liston-Lloyd*, the claimant was awarded a small sum of \$1,000 over and above what the court would have awarded under tort law. In *Van Essen*, while no public law damages were awarded, the claimants were awarded indemnity costs.

¹¹⁰ [2014] NZCA 511, at [81].

¹¹¹ At [82].

¹¹² At [82]. This case was a striking out appeal. The Court of Appeal held that whether compensation was appropriate was a matter for trial, but for the purpose of striking out, whether compensation should be awarded to remedy an unfair trial process, in particular whether a stay of proceedings was granted to the respondents, was a matter not settled in New Zealand.

¹¹³ [2012] NZLR 462.

¹¹⁴ At [53]. In *Upton v Green (No 2)* [1996] 3 NZHR 179, damages of NZ\$13,000 were awarded for breach of a right to fair hearing when a judge sentenced the appellant without allowing him an opportunity to be heard. The Law Commission's recommendation to repeal this case was not acted upon by Parliament: see Elias CJ, at [46]

¹¹⁵ At [53].

In *Taylor v Attorney General*, the court held that it had jurisdiction to make a declaration of inconsistency of the statutory restriction of the rights of prisoners to vote with the Bill of Rights.¹¹⁶ Although this is not a case on damages, the court noted that where there has been a breach of the Bill of Rights, there is a need for the court to fashion public law remedies to respond to the wrong inherent in any breach of a fundamental right, nor should the legislative branch of Government be in any different position. For parity, it is arguable that if one of the purposes of awarding damages is vindication, there seems to be no good reason to exempt the legislative branch if the violation is caused by fragmented encroachment by statute, albeit that damages are only awarded on rare occasions in the case of statutory encroachment so as not to deter public officers from carrying out statutory duties.

In summary, a body of precedent in public law damages has gradually emerged. The New Zealand courts have clearly opted for an independent approach for public law damages that is distinct from tort law. They serve different purposes and are best kept separated. The Bill of Rights has created new remedy, and the question is no longer whether a remedy is available for the violation of a constitutional right, but whether existing remedies are adequate to provide an effective remedy for that violation.¹¹⁷ The primary duty of the court is to fashion such a remedy. Public law damages are among the remedies available; they are direct and not vicarious claims against the State. Damages are discretionary and may not be necessary, but if they are considered necessary, the court should approach the assessment independently with a view to achieving compensation to the claimant, vindication of the constitutional rights and deterrence. It is unfortunate that these separate functions are not spelt out clearly, resulting in confusing use of the term “vindication”. However, stripped of the semantic problems, it appears that ordinary tort law principles are still relevant to inform the assessment of damages in a public law claim, particularly in the situation of concurrent claims with private law. But even in such cases, the court is not required to seek equivalence in tort law. While there should not be double recovery, vindication may require an extra amount than that available under tort law. The amount of vindictory damages should neither be derisory or excessive; they should adequately reflect the importance of the constitutional rights in the particular society, along with the seriousness and consequences of the breach. Damages are mostly available or required when there was physical violation to the liberty or integrity of the person, or when the violation has resulted in irreparable harm, and would be available only when the breach reached a certain degree of gravity. Thus, while New Zealand has started with a strong autonomous approach to public law damages, there is now considerable convergence in its approach with that of Canada. Damages may also be available for violation of the rights to fair hearing if other remedies are not effective or adequate. It is still an open question whether damages would be available for violation caused by the judiciary or by statutory encroachment.

2.5 United Kingdom

¹¹⁶ [2015] NZHC 1706.

¹¹⁷ Elias CJ, in *Chapman v Attorney General* [2010] NZHC 110, at [31].

In the United Kingdom, the discussion on public law damages is largely shaped by the judgment of the House of Lords in *R (Greenfield) v Secretary of State for the Home Department* on the relationship between the Human Rights Act (“HRA”) and the European Convention of Human Rights.¹¹⁸ Section 8(3) of the HRA provides that no award of damages is to be made unless, taking into account all the circumstances of the case, the court is satisfied that the award is necessary to afford “just satisfaction” to the claimant. Section 8(4) then provides that in deciding whether to award damages and the consequent quantum of damages, the courts must “take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention.” In this case, the House of Lords held that (1) the award of damages under the HRA was to be closely modeled on awards made by the European Court of Human Rights, and not on damages awarded under domestic law of tort. It was Strasbourg jurisprudence and not domestic precedents that should guide the courts in the award of human rights damages, and (2) the aim of the HRA “was not to give victims better remedies at home than they could recover in Strasbourg but to give them the same remedies without the delay and expense of resort to Strasbourg.”¹¹⁹ Lord Bingham gave two reasons for this decision. Firstly, as a matter of Parliamentary intention, the purpose of the HRA, as revealed in the White Paper, was to enable claimants “to receive compensation from a domestic court equivalent to what they would have received in Strasbourg.”¹²⁰ Secondly, as a matter of statutory interpretation, section 8(4) requires the court to take into account the principles applied by the European Court of Human Rights, not only when an award would be made but also what the quantum of an award should be. This so-called “mirror approach” has been universally criticized.¹²¹

The *Greenfield* decision of the House of Lords contravenes two major principles in human rights law. Firstly, as a regional treaty, the European Convention is intended to set the minimum standards.¹²² The “mirror approach”, which requires English courts to achieve similar awards as the Strasbourg court might be expected to do,¹²³ has effectively turned the standards under the European Convention into the maximum standards. Section 8(4) requires the court only to take into account “the principles” applied by the Strasbourg Court. A distinction could be drawn between “principles” and “remedies”. As the Law Commissions of England and Wales and of Scotland observed in their joint report, the English courts are only required to take “the principles” into account, leaving it free for the domestic courts to develop the quantum of damages to be awarded.¹²⁴ The “mirror approach” may arguably be justified regarding the development of uniform principles

¹¹⁸ [2005] 1 WLR 673. Interestingly, this judgment was delivered a month before *Ramanoop*, and two members, Lady Hale and Lord Brown, sat in both judgments.

¹¹⁹ *Id* at [19].

¹²⁰ *Ibid*, referring to Home Office, *Rights Brought Home: The Human Rights Bill* (Cm 3782, 1997), at para 2.6.

¹²¹ Jason Varuhas, “Damages: private law and the HRA – never the twain shall meet?”, in D Hoffmann (ed), *The Impact of the UK Human Rights Act on Private Law* (Cambridge University Press, 2016), 223-248; Jenny Steele, n 26 above; Burrows, “Damages and Rights”, n 20 above.

¹²² In *Van Colle v Chief Constable of Hertfordshire Police*, Lord Brown described “Convention claims are intended rather to uphold minimum human rights standards and to vindicate rights.” [2008] UKHL 50, at [138]. See also *Taunoa v Attorney General* [2006] 1 NZLR 429, at [179], per Blanchard J.

¹²³ *R(Greenfield) v Secretary of State for the Home Department* [2005] 1 WLR 673, at [19].

¹²⁴ Law Commissions of England and Wales and of Scotland, *Joint Report on Damages under the Human Rights Act 1998*, Law Commission No 266 (2000), at 266, [4.26] (hereafter referred to as “Joint Report 2000”).

governing rights and liabilities, but it does not follow that the same analysis should be applied to remedies. It is contrary to the general spirit of the Convention to provide a minimum standard of protection when Strasbourg decisions on the quantum of award are taken as the ceiling rather than the base of the award.

Secondly, by adhering to the damages awarded by the Strasbourg Court, the State arguably fails to discharge its treaty obligation to provide effective remedies under Art 13 of the European Convention, which obligation falls primarily on the domestic courts. It is true that the HRA has not incorporated Art 13, but the reason was to afford greater latitude for the British courts to fashion appropriate remedies, rather than to let the Strasbourg court to lead in this area.¹²⁵ As Varuhas observed, it was precisely because English courts were “rich in remedies” that the Government considered it unnecessary to incorporate Art 13, so that at least in the area of remedies, the power would be given back to British courts.¹²⁶ Indeed, the primary duty is set out in section 8(1), that is, the courts should grant such relief or remedy as it considers just and appropriate. This broad discretion is limited by section 8(3) so that damages could only be awarded to afford “just satisfaction”. While this term is borrowed from Article 41, this article is an enabling provision to confer jurisdiction on the European Court to award remedies. It is not a provision to impose obligations on domestic courts to adhere to the remedies granted by the Strasbourg Court. Thus, section 8(3) should be interpreted in light of section 8(1) and Article 13 of the Convention. The phrase “just satisfaction” should then be construed as nothing more than the familiar duty to grant “just and effective remedies”.¹²⁷ This is buttressed by the fact that no remedy would be just and appropriate if it fails to take into account the domestic situation and the special circumstances of the case, neither of which are matters that an international court is suitably placed or equipped to make an assessment on.¹²⁸ It could not have been the intention of the Legislature to restrict the discretion of the court to afford just and effective remedies. Nor does the reference in section 8(4) to Article 41 absolve the State from its treaty obligation to afford and develop effective remedies. The purpose of section 8(4) is to ensure that the domestic awards should not fall below that made by the international court, whose awards should provide the base and not the ceiling of remedies.¹²⁹

¹²⁵ Varuhas, “Damages: Private Law and the HRA – Never the Twain shall Meet?,” n 121 above, at 227; Steele, n 26 above.

¹²⁶ Varuhas, “Damages: Private Law and the HRA – Never the Twain shall Meet?,” n 121 above, at 227, 228.

¹²⁷ There is no reason why the phrase “just satisfaction” in domestic law has to be given the same meaning in international law when they operate at different levels and serve different purposes. In *Leung Kwok Hung v HKSAR* (2005) 8 HKCFAR 229, the Hong Kong Court of Final Appeal held that while the phrase “ordre public” may satisfy the requirement of legality in international treaty as a criteria to measure compatibility of domestic law with international norms, this phrase will be too vague to pass muster the constitutional test of legality when it is adopted in domestic law.

¹²⁸ This wide discretionary approach has indeed been recognized by the Court of Appeal in an earlier case in *Anufrijeva v Southwark London Borough Council* [2004] QB 1124, at [56] where Lord Woolf, in considering the appropriate remedy under the HRA, held that “[w]hat remedy is appropriate will of course depend both on the facts of the case and on a proper balance between the rights of the individual and the public interest. In some cases, the right course may be for the decision of the public authority in the particular case to be quashed. In other case, the only appropriate remedy may be an award of damages.

¹²⁹ This seems to be the reading of *Greenfield* by Elias CJ, who pointed out that the need for deterrence may be less important when a State is bound to comply with international obligations. It is on that basis that English courts acting under the HRA are not free to depart from the remedies that were considered appropriate by the

Indeed, Lord Carnwath reinforced the point in an extra-judicial context.¹³⁰ Insofar as pecuniary damages are concerned, it is largely about an assessment of evidence, and the European Court is not in the same position as a domestic court to evaluate evidence. Moreover, the economic situation of different jurisdictions makes it difficult to make any meaningful comparison. Given that the European Court is a highly diverse court with members coming from a variety of background and experience, it is better for English courts to develop their own jurisprudence. There is no reason to suppose that domestic assessment of non-pecuniary damages would not satisfy the requirement of “just satisfaction” under the Convention. Remarkably, for someone who has participated in the European Court, Lord Carnwath pointed out that the European Court would indeed be informed by the jurisprudence of domestic courts on damages!¹³¹ The House of Lords’ decision in *Greenfield* will result in circular reasoning.¹³²

Lord Bingham held that the HRA was not a statutory tort, as its objects were different and broader. This is in line with the approach of other jurisdictions. The rights are public law, not private law rights. The object of the HRA is to protect these rights against the State.¹³³ The primary function of tort remedies is to provide compensation for the wrongdoing, whereas the primary function of a HRA action is the vindication of rights. Yet it does not follow that the court should then ignore altogether the well-established principles of award of damages in domestic law. Nor does it follow that the court would then have to follow slavishly the decisions of a foreign court, with its different composition and domestic situation. Andrew Burrows argued that the mere fact that a violation of HRA is a non-tortious wrong does not mean that the scale of quantum of damages for compensation for non-pecuniary loss in tort law should be rejected. He criticized that the approach in *Greenfield* could not be supported in principle or in practice.¹³⁴ Reference to Strasbourg jurisprudence is not practical, as there is an absence of any clear principles on damages. The difficulty is further compounded by the loose adherence to precedents from Strasbourg and different equivalence of monetary value among member States to the Convention. A caution to be made is that the distinction between pecuniary loss and non-pecuniary loss at the Strasbourg courts are not the same as compensatory damages and vindicatory damages in this context, and any comparison of the size of award may have to be treated with caution. Further, the approach of the House of Lords is also in marked contrast to that adopted by the Privy Council in *Ramanoop*, the judgment of which was delivered within a month after *Greenfield*. If the House of Lords had not decided to tie English law with Strasbourg jurisprudence in terms of damages, the English courts would have been able to develop distinct public law remedies as in Canada or New Zealand.

ECHR in the sense that they should not be less generous, but free to be more generous, than what would have been awarded by the Strasbourg courts: *Taunua v Attorney General* [2006] 1 NZLR 429, at [109].

¹³⁰ Robert Carnwath, “ECHR Remedies from a Common Law Perspective” (2000) 49 ICLQ 517-527.

¹³¹ Eg, in *Perks*, the European Court made an award in light of what the damages would have been assessed under domestic law in *Thompson and Lunt*.

¹³² See also Steele, n 26 above, at 612.

¹³³ Burrows, n 20 above, gave 6 reasons to support the conclusion that HRA is a non-tortious public law action.

¹³⁴ *Ibid*, at 300-301.

A consequence of *Greenfield* is that damages under the HRA, if ever awarded, would typically be lower than that in tort law for the same loss or violations. Indeed, if the remedy for interference with Convention rights is consistently less generous than the domestic remedy in tort, this may itself raise a question of compliance with the European Convention.¹³⁵ As Andrew Burrows powerfully stated:

“the rights protected by the HRA 1998 cause of action are fundamental rights. They are at least as important as the rights protected by the law of tort. If a victim suffers, and is being compensated for, a loss as a result of a breach by a public authority of his or her Convention rights, he or she should receive at least the same compensation as he or she would be entitled to in tort for suffering the same loss. One is otherwise treating a breach of a Convention right less seriously than the breach of a right protected in tort.”¹³⁶

Given the House of Lords’ decision in *Greenfield*, which frustrated general expectations of developing a close relationship between tort and the HRA, it is not surprising that many commentators turn to tort law as an alternative. The pendulum has swung from total exclusion of tort principles to complete assimilation of tort principles. It was argued that either tort law, the development of which would be free from the constraints of the HRA, may provide the appropriate remedies, or that the court should abandon the “mirror approach” and seek assistance from tort principles in domestic law in assessing damages.¹³⁷

Despite the emergence of varying degrees of acceptance of vindictory damages in various jurisdictions, vindictory damages were doubted if not rejected by the majority of the House of Lords in *Lumba (Congo) v Secretary of State for the Home Department*.¹³⁸ In that case, the claimants were detained pending deportation pursuant to an unpublished policy. It was found that they would inevitably have been detained if the Secretary of State had applied the published policy. Hence, the issue was (1) whether the detention was unlawful; and (2) if so, whether they would be entitled to damages for their false imprisonment. The court split on both questions of liability and quantum. For the majority of six judges who held that the State was liable, three of them (Lord Collins, Lord Dyson and Lord Brown) held that the claimants were entitled to no more than nominal damages, and the other three judges (Lord Hope, Lady Hale and Lord Walker) held that they were entitled to either exemplary damages or vindictory damages, but they also split among themselves on quantum.

Lord Dyson drew a distinction between a vindictory purpose and vindictory damages. It was one thing to say that an award of compensatory damages was to serve a vindictory purpose; it was quite another thing to make an additional award simply to

¹³⁵ See Steele, n 26 above, at 606; Burrows, n 20 above, at 298.

¹³⁶ Burrows, n 20 above, at 298.

¹³⁷ See, for example, Burrows, *ibid*.

¹³⁸ [2011] 2 WLR 671. For an analysis of this case, see Chuks Okpaluba, “Vindictory approach to the award of constitutional and public law damages: contemporary Commonwealth developments” (2012) 45(2) *The Comparative and International Law Journal of Southern Africa* 127, at 149-157. See also McBride and Bagshaw, *Tort Law* (Pearson Education, 2015), at 846-848

reflect the nature of the wrong. As the claimants had suffered no loss or damage as a result of the unlawful exercise of the power to detain, they should receive no more than nominal damages. His Lordships criticized vindictory damages as arbitrary and unprincipled, serving no useful purpose, and as an “unruly horse”, they should be discarded.¹³⁹ Besides, if they were available for false imprisonment, there was no reason why they should not be extended to other torts. Lord Collins held that all damages, be it compensatory or vindictory, served the incidental purpose of vindicating a right; therefore there was no purpose to make a separate award for vindictory damages.¹⁴⁰ His Lordship refused to follow *Ward* and *Taunooa*, and noted that exemplary damages under the common law would be adequate to serve the vindictory purpose where the executive has acted in an oppressive, arbitrary or unconstitutional manner.¹⁴¹

To the extent that vindictory damages should not be awarded if conventional remedies, including declaratory relief and exemplary damages, provide sufficient relief, the decision of the majority of the House of Lords is impeccable. However, this does not address the question of whether vindictory damages should be available if other remedies are inadequate to reflect the gravity of the wrong done. It would require a momentous leap in reasoning to infer from the fact that conventional damages provide adequate relief in a particular case to a general conclusion that vindictory damages should never be recognized in any case.

In contrast, Lady Hale, supported by Lord Hope and Lord Walker in the minority, preferred to rest her decision on the centrality of constitutional rights: these rights are so important that the law should be able to vindicate in some way, irrespective of whether compensatable harm has been suffered or whether the conduct of the authorities has been so egregious as to merit exemplary damages.¹⁴² Here, the conduct of the official was so deplorable that she was prepared to award a modest sum of £500 to recognize the claimant’s fundamental right whereas Lord Walker and Lord Hope were prepared to be more generous to award a sum of £1,000. An underlying point of contention between the two groups of judges is the fundamental question of whether the law should provide damages only for consequences of a violation of a constitutional right, in the absence of which only nominal damages should be awarded, or whether the law should provide damages for the very act of violation itself, thereby acknowledging that the constitutional right itself has an intrinsic value that deserves protection.

2.6 South Africa

The Constitutional Court of South Africa is prepared to fashion a new remedy, if necessary, to protect and enforce constitutional rights, and emphasised that an appropriate relief has to be an effective remedy to vindicate the entrenched rights. The approach to

¹³⁹ See *Lumba (Congo) v Secretary of State for the Home Department* [2011] 2 WLR 671. Lord Philips, Lord Kerr and Lord Rodger dissented on liability, but would agree with Lord Dyson on damages if liability were established.

¹⁴⁰ At [236].

¹⁴¹ At [221].

¹⁴² At [217].

constitutional damages is, however, unsettled. In *Hoffmann v South African Airways*, the Constitutional Court held that a determination of appropriate relief should balance various objectives, including (1) to address the wrong; (2) to deter future violations; (3) to make an order that can be complied with; and (4) to be fair to all those who might be affected by the infringement.¹⁴³ In the leading case of *Fose v Minister of Safety and Security*,¹⁴⁴ the Constitutional Court held that appropriate relief might include an award for damages where such an award may be necessary to enforce constitutional rights. Didcott J highlighted that society has an interest in the defence against encroachment of constitutional rights, as their encroachment will, unless adequately remedied, impair public confidence and diminish public faith in the efficacy of the protection and encourage further violations. Ackermann J, in an oft-cited passage, held:¹⁴⁵

“It seems to me that there is no reason in principle why appropriate relief should not include an award of damages, where such an award is necessary to protect and enforce chap 3 rights. Such awards are made to compensate persons who have suffered loss as a result of the breach of a statutory right if, on a proper construction of the statute in question, it was the Legislature’s intention that such damages should be payable, and it would be strange if damages could not be claimed for, at least, loss occasioned by the breach of a right vested in the claimant by the supreme law. When it would be appropriate to do so, and what the measure of damages should be will depend on the circumstances of each case and the particular right which has been infringed.”

While Ackermann J agreed that vindication is the primary object of a constitutional remedy, he is skeptical of separating constitutional damages from delictual damages. He rejected the relevance of nominal damages, which were hardly “effective or appropriate” as they were not compensatory in outlook, purport and effect. They would serve no deterrent or preventive effect, and a nominal punitive award would only serve to trivialize the rights violated.¹⁴⁶ He further rejected the relevance of exemplary damages, as there should be no place for punitive damages in constitutional law. Such damages were not “justifiable in a modern system of law”.¹⁴⁷ The Court was content to hold that delictual damages under common law would be sufficient to redress breaches of fundamental rights in light of the facts of that case, and left open the issue whether an action for damages in the nature of constitutional damages existed in law and, if so, whether constitutional damages could be awarded in addition to delictual damages.¹⁴⁸ Likewise, in *Law Society of South Africa v Minister of Transport*, Moseneke DCJ expressed a preference for developing common law remedies to vindicate constitutionally entrenched rights.¹⁴⁹

¹⁴³ 2001 (1) SA 1; 2000 (11) BRLR 1235.

¹⁴⁴ 1997 (3) SA 786 (CC).

¹⁴⁵ At [60].

¹⁴⁶ *Ibid*, at [71].

¹⁴⁷ *Ibid*, at [70].

¹⁴⁸ Okpaluba doubted if the South African courts could ever award constitutional or vindicatory damages given that the Court in *Fose* has rejected both nominal damages and exemplary damages: Chuks Okpaluba, “Vindicatory approach to the award of constitutional and public law damages: contemporary Commonwealth developments”, n 138 above, at 146.

¹⁴⁹ 2011 (1) SA 400 (CC), at [74]: “There appears to be no sound reason why common law remedies, which vindicate constitutionally entrenched rights, should not pass for appropriate relief within reach of s 38. If

The point was taken up in *Member of the Executive Council: Welfare v Kate*, a case concerning a claim for constitutional damages for undue delay in approving applications for social welfare.¹⁵⁰ The Supreme Court of Appeal held that whether monetary damages were appropriate in a particular case must necessarily be determined casuistically with due regard to, amongst other things, the nature and relative importance of the rights that were in issue, the alternative remedies that might be available to assert and vindicate them, and the consequences of the breach for the claimant concerned. The court found that the delay was endemic in nature and the problem had been in existence for years; thus, a declaration would not serve any useful purpose.¹⁵¹ It also rejected mandamus as an effective remedy as it would only encourage more litigation without addressing the systemic issues. Having decided that *Fose* posed no obstacle to an award of constitutional damages, the Court of Appeal held that the violation should be remedied directly by constitutional remedy and not indirectly by delictual damages. Furthermore, the endemic breach called for a clear recognition of the constitutional right. On the relationship between delictual and constitutional damages, Nugent JA held:¹⁵²

“No doubt the infusion of constitutional normative values into delictual principles itself plays a role in protecting constitutional rights, albeit indirectly. And no doubt delictual principles are capable of being extended to encompass state liability for the breach of constitutional obligations. But the relief that is permitted by s 38 of the Constitution is not a remedy of last resort, to be looked to only when there is no alternative – and indirect – means of asserting and vindicating constitutional rights. While that possibility is a consideration to be borne in mind in determining whether to grant or to withhold a direct s 38 remedy it is by no means decisive, for there will be cases in which the direct assertion and vindication of constitutional rights is required. Where that is so the further question is what form of remedy would be appropriate to remedy the breach. In my view the breach in the present case warrants being vindicated directly for two reasons in particular. First, I see no reason why a direct breach of a substantive constitutional right (as opposed to merely a deviation from a constitutionally normative standard) should be remedied indirectly. Secondly, the endemic breach of the rights that are now in issue justifies – indeed, it calls out for – the clear assertion of their independent existence.”

Constitutional damages were also affirmed and awarded in *Modderfontein Squatters v Modderklip Boerdery (Pty) Ltd*, a case concerning the failure of the State to protect the property right of the claimant against trespassers, resulting in the land being occupied by

anything, the Constitution is explicit that, subject to its supremacy, it does not deny the existence of any other rights that are recognized and conferred by the common law.” See also *Steenkamp v Provincial Tender Board, Eastern Cape* (2007) 3 SA 121 (CC), where the Constitutional Court held that delictual damages would only be awarded for a violation of constitutional rights when award of such damages was reasonable in the community’s sense of justice, such as where an administrative decision was tainted with bad faith or corruption

¹⁵⁰ [2006] SCA 46 (RSA).

¹⁵¹ At [29].

¹⁵² At [27]. Damages in an amount equivalent to the interest payable when money is unlawfully withheld were awarded, with a rider that the damages ought not to accumulate such as to exceed the capital amount: at [33].

approximately 40,000 persons.¹⁵³ The Supreme Court of Appeal found that the return of land was not feasible. Damages were the only realistic remedy so that the property owner would be compensated, the occupiers could remain where they were, and the State was relieved from the burden of providing alternative land for a huge number of people. The damages, which were to be assessed, appeared to be compensatory rather than vindictory in nature.¹⁵⁴

Conversely, in *The Minister of Police v Mboweni*, the Supreme Court of Appeal distinguished both *Kate* and *Modderklip*, describing them as the only two cases where constitutional damages were awarded.¹⁵⁵ *Mboweni* involved a claim by the daughters for deprivation of their constitutional right to parental care, as a result of the death of their father in police custody caused by wrongful police conduct. The Court of Appeal was troubled by the lack of evidence on liability, and rejected the approach of the court below to start an inquiry with the appropriateness of remedy as being incorrect and premature. Even if liability could have been established, which the Court of Appeal was doubtful, the proper approach was to first consider the adequacy of the existing remedy under the common law. If it was inadequate, the court should consider whether the deficiency could be remedied by a development of the common law. It doubted if constitutional damages would encompass a *solatium* or general damages.¹⁵⁶

The comments of the Supreme Court of Appeal on constitutional damages in *Mboweni* may be *obiter*, as the primary decision was that the claim for a loss of constitutional right to parental care has not been established. Nonetheless, it is illustrative of the general position in South Africa. While the right to constitutional damages as an appropriate relief has been acknowledged, an award for constitutional damages is regarded as exceptional and secondary, only when the common law remedies have been exhausted and found to be inadequate. The courts clearly prefer to develop the common law remedies, if necessary to expand the common law delictual principles in light of the constitutional imperatives, then to engage in an award for constitutional damages. However, as noted by Currie and De Waal, there are at least two reasons why development of constitutional damages is necessary. Firstly, there are circumstances that a declaratory relief or other remedies would make no sense and damages may be the only appropriate remedy to vindicate the rights. Secondly, the possibility of a substantial award may encourage victims to litigate, hence deterring further infringements.¹⁵⁷

2.7 Hong Kong

In Hong Kong, the issue of constitutional damages has arisen only recently and is still largely an open question. In *Ghulam Rbani v Secretary for Justice*, the applicant was wrongfully

¹⁵³ 2004 (6) SA 40 (SCA).

¹⁵⁴ At [43].

¹⁵⁵ [2014] ZASCA 107.

¹⁵⁶ At [24].

¹⁵⁷ Currie and De Waal, *Bill of Rights Handbook*, 201, as quoted in JA Robinson and R Prinsloo, "The Right of the Child to Care and Constitutional Damages for the Loss of Parental Care: Some Thoughts on *M v Minister of Police* and *Minister of Police v Mboweni*" (2015) 18 Potchefstroom Elec. L.J. 1670, at 1676-1677.

detained and claimed damages under tort principles and the Bill of Rights.¹⁵⁸ The court awarded damages in the sum of HK\$30,000 for false imprisonment. The Bill of Rights claim failed because of a reservation in the Bill of Rights Ordinance regarding immigration decisions. The court, however, proceeded to discuss the claim for constitutional damages if the Bill of Rights claim were successful. The court referred to *Ward* in Canada and *Baigent's case* in New Zealand, and noted that they were not followed by the House of Lords in *Lumba (Congo) v Secretary of State for the Home Department*.¹⁵⁹ Without deciding if there was a right to constitutional damages, the court held that the claim for constitutional damages did not add anything to the claim for damages for false imprisonment, and even if constitutional damages were available, no award should be made to avoid double recovery.

In *Ho Chee Shing James v Secretary for Justice*,¹⁶⁰ the applicant, a civil servant who was denied a fair hearing at a disciplinary proceeding, filed a tort claim for breach of the Bill of Rights, partly because he was time-barred to take out judicial review proceeding, and partly because there were serious disputes of fact which could only be resolved by discovery and made the case inappropriate for judicial review. Relying on the drafting history of the Bill of Rights, the Court held that it was not the intention of the legislature to create a statutory tort for a violation of the Bill of Rights.¹⁶¹ Any action under the Bill of Rights would only be a public law claim. The court added, in passing, that the constitutional claim would add nothing to a tort or a breach of contract claim. More recently, in *Saeed v Secretary for Justice*, a case concerning arbitrary body search, Judge Li distinguished *Ward* and *Baigent's case* partly because of their rejection in the United Kingdom, yet also on the basis of dissimilar social and economic background in Canada and a more liberal approach to civil liberty and constitutional matters in New Zealand. He remarked that the law in Hong Kong has not developed to a stage where vindictory damages were recognized for breach of constitutional rights, in addition to the conventional damages awards.¹⁶²

In all these cases, the courts were heavily influenced by the House of Lords' decision in *Lumba*, and have not conducted a thorough examination of the issues. Nor has the higher court had an opportunity to consider these issues.

2.8 Other Jurisdictions¹⁶³

¹⁵⁸ [2012] 2 HKC 1. While the case was reversed on appeal, this part of the judgment was not affected.

¹⁵⁹ [2012] 1 AC 245.

¹⁶⁰ [2015] 4 HKLRD 311. The appeal was settled and did not proceed to hearing.

¹⁶¹ The court relied primarily on the removal from the consultative White Bill of a clause that a breach of the Bill of Rights would constitute a tort. This reasoning is not convincing, as the reason for the removal of the tort clause was unclear. Indeed, the main reason for its removal was a concern that the Bill of Rights would be extended to cover private litigations, particularly in the novel areas of privacy and discrimination. It does not follow that a claim for breach of statutory duty for other tortious wrong against the State is necessarily excluded. The exclusion should be justified on the more familiar public law grounds.

¹⁶² [2015] 1 HKLRD 1030, at [332]-[336]. The reason for distinguishing Canadian and New Zealand cases was hardly convincing.

¹⁶³ For a helpful discussion of the approach in the Caribbean, see Chuks Okpaluba, "Vindictory approach to the award of constitutional and public law damages: contemporary Commonwealth developments", n 138 above, and Michael de la Bastide, "Developments in judicial protection of human rights in the Commonwealth Caribbean", (2010) 36(2) *Commonwealth Law Bulletin* 223-233.

Reference has already been made to *Attorney General of Trinidad and Tobago v Ramanoop*, where Sharma CJ first coined the term “vindicatory damages”.¹⁶⁴ The Chief Justice had held in an earlier case that the courts would be guilty of the most serious betrayal if they failed to secure and vindicate constitutional rights that were violated.¹⁶⁵ In the words of the President of the Caribbean Court of Justice, “every time a constitutionally protected right or freedom is contravened without an effective response from the courts, the right or freedom breached suffers diminishment. For the court’s response to be effective, it must serve to vindicate the right or freedom infringed by countering the negative effect of its breach.”¹⁶⁶ Since the principal judgment of the Privy Council in *Attorney General of Trinidad and Tobago v Ramanoop*,¹⁶⁷ vindicatory damages have been consistently awarded by the Privy Council,¹⁶⁸ an approach that stands in sharp contrast to the United Kingdom.

India has held that the Constitution provided a separate cause of action that is independent of a tort action. Damages have been awarded as an additional remedy in a public law action for breach of a constitutional right.¹⁶⁹ In Ireland, the Court took the view that common law torts are in general sufficient to vindicate constitutional wrongs. It was thus prepared to eschew the distinction between different forms of damages and was prepared to award substantial damages for a breach of constitutional rights. In *Kennedy v Ireland*, Hamilton P set out the approach of the court:¹⁷⁰

“... the injury done to the plaintiffs has been aggravated by the fact that it has been done by an organ of the state which is under a constitutional obligation to respect, vindicate and defend their rights. The plaintiffs are in my opinion entitled to substantial damages and it is, in the circumstances of the case, irrelevant whether they be described as ‘aggravated’ or ‘exemplary’ damages.”

In the United States, constitutional rights could be enforced by an action under s 1983 of the USC, which created a constitutional tort against the individual perpetrators acting on behalf of the federal government or state law but not local government. Alternatively, a civil action against state or federal officials is possible under the so-called *Biven’s* action,¹⁷¹ but this is rarely available and not constitutionally significant.¹⁷² Punitive damages are available under both actions, and a substantial amount of punitive damages are frequently awarded. This has been explained on two alternative grounds.¹⁷³ First, there

¹⁶⁴ [2003] 65 WIR 313, at 327

¹⁶⁵ *Jorsingh v Attorney General* [1997] 52 WIR 501, at 512.

¹⁶⁶ de la Bastide, n 163 above, at 223-224.

¹⁶⁷ [2006] 1 AC 328, at [18]-[19].

¹⁶⁸ *Fraser v Judicial and Legal Services Commission* [2008] 73 WIR 175; *Inniss v Attorney General* [2009] 2 LRC 546.

¹⁶⁹ *Nilabati Behera v State of Orissa* [1994] 2 LRC 99; *Basu v State of West Bengal* [1997] 2 LRC 1, at 26

¹⁷⁰ [1978] IR 587, at 594.

¹⁷¹ *Bivens v Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 US 388 (1971). This action is available when there is a violation of a citizen’s rights under the Due Process Clause and the Cruel and Unusual Punishments Clause.

¹⁷² *Correctional Service Corporation v Malesko*, 534 US 61, at 68 (2001) where the Supreme Court held that it would be reluctant to expand the scope of *Bivens* action.

¹⁷³ See also Lord Scott, Justice Randy Holland and Chilton Davis Varner, “The Role of ‘Extra-Compensatory’ Damages for Violations of Fundamental Human Rights in the United Kingdom and the United States” 46 Va J Int’l L 475 (2006). They recorded (at 497-498) that in 2001, over \$162 billion in punitive damages were

is a deeply-seated distrust against the Government and a strong belief in individual rights in the American tradition. Hence, punitive damages are more readily awarded for any violation of constitutional rights. Secondly, American juries tend to award a huge sum of damages, compensatory or otherwise, and the repeated awards of breath-taking amounts of punitive damages have desensitized American society to such awards. This unique social and cultural background and legal tradition in the United States make it difficult to do any meaningful comparison with other systems.

2.9 A Summary

A few observations can be drawn from the above comparative survey. Firstly, virtually all jurisdictions agree that a breach of constitutional rights is a public law action. Although Professor Forsyth has argued that a breach of the Human Rights Act could be perceived as a species of breach of statutory duty,¹⁷⁴ no jurisdiction has so far gone down this path and the argument has indeed been rejected in all major common law jurisdictions.

Secondly, the court has a duty to provide effective remedy for a violation of constitutional rights. This duty may arise as a result of international treaty obligations, constitutional obligations or common law (or a combination of all or some of them). To be effective, the remedy has to be just and appropriate. What constitutes “just and appropriate” remedy would depend on the circumstances of each case.

Thirdly, the court has a discretion to consider what remedy is just and appropriate in each case. A just and appropriate remedy may include damages, but they are not necessary in all cases.

Fourthly, a claimant is entitled to be compensated for the loss that he has suffered as a result of the constitutional wrong. This is the same whether the damages are known as common law damages or constitutional damages. Compensation may cover both tangible (physical, psychological) and intangible loss (distress, humiliation, embarrassment, anxiety, and so on). The claimant must show that the loss was caused by the breach, and to substantiate the claim for the loss.

Fifthly, non-pecuniary damages, including exemplary or aggravated damages, are available under the common law.

Sixthly, as a matter of general principle, a claimant is not entitled to double recovery.

Beyond this common foundation, there are divergent approaches to the award and assessment of constitutional damages. In Canada and New Zealand, the assessment of constitutional damages is an independent exercise that is separated from the common law claim. Constitutional damages serve the purpose of compensation, vindication and deterrence. If the constitutional wrong also constitutes an actionable tort, damages

awarded at trial or affirmed on appeal, and in two cases, over \$3 billion in punitive damages were awarded (in one of them the punitive damages were indeed reduced from an initial award of \$11.9 billion!)

¹⁷⁴ HWR Wade and CF Forsyth, *Administrative Law*, (Oxford: Oxford University Press, 11th ed, 2014), 637.

awarded under tort law should be adopted as a guide, but nothing more than guidance, in assessing constitutional damages. Compensatory damages are largely modeled on tort law, though the court insisted that they are not the same. Vindictory damages should be awarded only when other remedies are inadequate. The amount of vindictory damages should be moderate, but not derisory, and it should be adequate to reflect the importance of the constitutional rights that were being violated. In both jurisdictions, a body of precedent on constitutional damages has gradually emerged. In India and Ireland, the courts are prepared to award damages in addition to that awarded under tort principles. While South Africa is prepared to accept vindictory damages, they would be awarded only in exceptional circumstances. The courts prefer to develop common law principles and have more or less confined public law damages to those that are recoverable under common law principles. The position in the United Kingdom is awkward. On the one hand, the English courts rejected the relevance of tort damages, and were prepared to adhere to Strasbourg jurisprudence, which was a widely criticized position. On the other hand, they also rejected vindictory damages, as such damages do not add anything to common law damages and their recognition would serve no useful purpose. Most commentators advocated for the adoption of tort principles to make awards of damages under the HRA. In Hong Kong, a similarly skeptical attitude was adopted regarding vindictory damages.

3. Objections to Vindictory Damages

3.1 Purposes of Vindictory Damages

3.1.1 The Objections

A principal objection to vindictory damages goes to the purposes served by vindictory damages. In *Lumba (Congo) v Secretary of State for the Home Department*,¹⁷⁵ Lord Collins remarked that whatever their purposes, they were adequately served by existing remedies. His Lordship stated emphatically:¹⁷⁶

“In my view, the purpose of vindicating a claimant’s common law rights is sufficiently met by (i) an award of compensatory damages, including (in the case of strict liability torts) nominal damages where no substantial loss is proved; (ii) where appropriate, a declaration in suitable terms; and (iii) again, where appropriate, an award of exemplary damages. There is no justification for awarding vindictory damages for false imprisonment to any of the FNPs.”

Likewise, Andrew Burrows rejected vindictory damages as “entirely arbitrary” and serving no valid or useful purpose.¹⁷⁷ Given the existence of exemplary or punitive damages, it was argued that nothing useful would be gained by introducing vindictory damages into English tort law.

¹⁷⁵ [2012] 1 AC 245.

¹⁷⁶ At [101].

¹⁷⁷ At 303-307.

Jenny Steele is more cautious.¹⁷⁸ She argued that the skepticism of the role of tort in human rights claim is an overreaction. The two causes of action serve some overlapping and some distinct objectives. While the two causes of action are not coterminous, at least in those areas where they overlap, the quantum of damages in tort law should provide prima facie measures for assessment of damages for a violation of HRA. Indeed, some areas such as deprivation of personal liberty, tort law may have more to offer as it tends to be more generous. Tort law may also be benefited by parallel developments under the HRA. Like Burrows, she was skeptical of the utility of vindictory damages, as tort law, when properly understood, would also be able to serve the same vindictory purposes in public law and there is no need to resort to the unorthodox notion of vindictory damages.

Robert Stevens took the case even further. He took on the House of Lords by arguing that the HRA was indeed possibly the most important tort statute ever enacted. He argued that the award of damages in all cases of tort and breach of contract is non-compensatory; instead, they are to provide a substitute for, and hence to vindicate, the right that has been infringed.¹⁷⁹ Substitute damages are assessed by valuing the right infringed. It is irrelevant whether a claimant has suffered any loss or made any gain, although such loss could be added as consequential damages. It is unnecessary for this article to devolve into this conceptual argument. A major problem of Stevens' thesis is that it is over-inclusive, as Burrows has convincingly demonstrated.¹⁸⁰

3.1.2 Vindication in Public Law

These objections raise the question of in what ways vindication in public law is different from vindication in private law, if this is one of the functions of private law. Again it should be emphasized that vindication (and for this purpose vindictory damages) in public law bears a narrow specific meaning of vindicating the intrinsic worth of constitutional rights. In general, tort remedies are compensatory and bipolar in nature, seeking to redress the consequences of a breach of duty owed to the plaintiffs. The traditional purposes of damages in private law are to compensate the plaintiff, punish the defendant or achieve restitution, with vindication at best assuming a secondary purpose, save in those torts that protect against interference with a personal right.¹⁸¹ The emphasis is on what the plaintiff is entitled to receive. Public law remedies seek an additional purpose of vindicating a public right that the state has solemnly affirmed to respect and to protect. The violation is a breach by the State of an obligation that is owed to the public, the plaintiff

¹⁷⁸ Steele, n 26 above.

¹⁷⁹ Robert Stevens, *Tort and Rights* (Oxford University Press, 2007), p 289.

¹⁸⁰ Burrows, n 20 above, at 278-290; Jason Varuhas, "The Concept of 'Vindication' in the Law of Torts: Rights, Interests and Damages" (2014) 34(2) *Oxford Journal of Legal Studies* 253-293, at 271-275. Varuhas agreed with Burrows on the criticism of the thesis of Steven. Their disagreement is that Burrows then concluded vindictory damages should be rejected altogether, whereas Varuhas argued that vindictory damages have always been awarded for torts that are actionable per se, and this could easily be extended or adapted to human rights damages under the HRA. This shows that Varuhas' attack on the public/private distinction could not be taken to mean a complete obliteration of the distinction between public law and private law, but rather that his argument is very much confined to situations where there are concurrent vindictory tort and public law actions.

¹⁸¹ Norman Witzieb and Robyn Carroll, "The Role of Vindication in Torts Damages" (2009) 17 *Tort L Rev* 16-44, at 42.

being one of the subjects. Thus, in addition to considering what the plaintiff is entitled to receive, the court has to consider also what the defendant must pay for what, if any, is necessary to vindicate the breach or denounce the conduct concerned or deter future breaches.

Unlike private law under which the court, in awarding damages, typically looks back to events that have already taken place in order to determine how to compensate the victim or punish the transgressor, public law damage is concerned not just with the past, but also with the future. As Robinson and Prinsloo pointed out, public law damages should be forward-looking, community oriented and structural,¹⁸² as they have routinely had an impact on governance and public administration that goes far beyond the immediate case before the court and may affect even third parties. As Hammond J observed:¹⁸³

“Cases based upon violations of the Bill of Rights are about the vindication of statutory policies which are not ‘just’ private: they have overarching, public dimensions. The context of such a proceeding necessarily changes, in at least three ways. First, the case is not a winner-takes-all kind of case. Damages are an economic concept. Bill of Rights cases routinely involve a rearrangement of the social relations between the parties, and sometimes with third parties. The object is to promote mutual justice, and to protect the weak from the strong. Secondly, the future consequences of such a case are every bit as important as the past, and the particular transgression. Thirdly, there is a distinct interface with public administration, and indeed, the governance of a given jurisdiction.”

Likewise, Amos argued against the adoption of the tort model, as tort law was not designed to resolve claims for damages involving breaches of human rights, nor was it clear if tort would result in a higher level of damages.¹⁸⁴ Du Bois argued that it is better to develop constitutional damages independently of the common law. Tort law is about corrective justice between two parties, with each having corresponding rights and obligations, whereas constitutional damages are about distributive justice between two unequal parties, one having more power over the other. Tort remedies aim to restore the parties to the original position as if no tort has been committed, whilst constitutional remedies aim at ensuring the proper exercise of public powers and limiting the impact or the consequences of the act of the public authorities over the subject. The object of public law remedies is to achieve restorative justice as well as distributive justice, under which the primary consideration would be proportionality and rationality in order to produce a socially

¹⁸² JA Robinson and R Prinsloo, n 157 above, at 1676. See also Francois du Bois, “Human Rights and the Tort Liability of Public Authorities” (2011) 127 LQR 589- 609, at 599-600 where she pointed out that what matters for distributive justice is the distribution itself, not the distinction of act/omissions or causation pertaining to that; nor would the cost-benefit analysis in public law compatible with the moral structure of tort law. Tort law focuses on the reasonableness of behaviour; human rights law focuses on the reasonableness of the outcomes.

¹⁸³ [2002] 2 NZLR 65 at [126]

¹⁸⁴ Merris Amos, “Damages for Violations of Human Rights Law in the United Kingdom”, in E Baginska (ed), *Damages for Violations of Human Rights* (Switzerland: Springer International Publishing, 2016), 371-394.

just result. Thus, the framework for tort damages is ill-suited to providing remedies in respect of breaches by the State of its duties under public law.¹⁸⁵

3.1.3 Vindication in Private Law

Jason Varuhas challenges those in support of vindictory damages for taking too narrow a view of vindication in private law. He argues that different torts serve different functions, and that vindication is nothing new and has always long been the primary function in some torts, such as those torts that are actionable per se or defamation (which he called “vindictory torts”), and that damages have been awarded in order to reinforce the inherent value of the particular interests in and of itself, regardless of any financial loss or injury to feelings.¹⁸⁶ Indeed, one can add that vindication has been recognized even beyond vindictory torts. In *Rees v Darlington Memorial Hospital NHS Trust*, a case of wrongful birth due to negligent administering of sterilization by the defendant, the House of Lords awarded a substantial damage of £15,000 to recognize the claimant’s loss of the opportunity “to live her life in the way that she wished and planned.”¹⁸⁷ Lord Bingham expressly stated that the damages were neither compensatory, nominal nor derisory, but were intended to “afford some measure of recognition of the wrong done.”¹⁸⁸ In another context, Pearce and Halson argued that there were occasions where vindictory damages, which were rights-based, were awarded to provide a measure of recognition of the violation of the claimant’s right when other curial measures were inadequate, and the damages were neither compensatory nor restitutionary.¹⁸⁹

Following this line of argument, Varuhas argued for the adoption of a vindictory, tort-based approach to human rights damages. He argued that this vindictory function in torts shapes the approach to compensatory damages so that damages are generally recoverable for the normative injury to one’s underlying interests, notwithstanding whether the claimant suffers any negative psychological, physical, emotional or economic effects as a consequence of the wrong. The familiar tort principles provided an established and reasonably coherent and principled approach that would promote coherence and consistency across domestic law.¹⁹⁰ Given that current remedies meet the purposes of vindication, and that vindictory damages perform similar functions to exemplary damages, vindictory damages are otiose and should be rejected.¹⁹¹ Varuhas further argues that an

¹⁸⁵ Du Bois, n 182 above, at 596, 600. While she accepted that distributive justice might form a consideration in tort, it is secondary or serves as a constraining value, which is very different from distributive justice being the basic criterion for determining liability (at 598). See also Burrows, n 20, at 303-307.

¹⁸⁶ Jason Varuhas, “The Concept of ‘Vindication’ in the Law of Torts: Rights, Interests and Damages”, n 180 above, at 291. See also Edelman, “Vindictory Damages”, a paper presented at TC Beirne School of Law Conference on “Private Law in the 21st Century”, 15 Dec 2015, where he referred to the example of general damages, such as the loss of use cases and the conversion cases, where damages were awarded when no financial loss was proved. He argued, however, that these cases could be explained as restitutionary damages for unjust enrichment.

¹⁸⁷ [2004] 1 AC 309, at [8].

¹⁸⁸ Ibid.

¹⁸⁹ D Pearce and R Halson, “Damages for Breach of Contract: Compensation, Restitution and Vindication” (2008) 28(1) *Oxford Journal of Legal Studies* 73-98

¹⁹⁰ Varuhas, “Damages: Private Law and the HRA –Never the Twain Shall Meet?”, n 121 above, 223-248.

¹⁹¹ Varuhas, “The Concept of ‘Vindication’ in the Law of Torts: Rights, Interests and Damages”, n 180 above, at 291; Varuhas, *Damages and Human Rights* (Oxford and Portland, Oregon: Hart Publishing, 2016), at 125-129.

administrative law paradigm in public law that focuses on abuse of powers will not be conducive to the development of human rights damages, which is the primary focus of tort.¹⁹² This paradigm would bring in consideration the balancing of various public interests, and as a result, the normative right to conventional damages in tort is reduced to a discretion, and public law considerations are allowed to creep into the process of determination of damages, which considerations would likely result in a lesser amount of damages to be awarded in public law than in tort. He attributed the failure to extend the vindicatory torts to human rights damages to an outmoded conception of public/ private law divide.

3.1.4 A Rejoinder

This is a thought-provoking thesis and a short paper of this nature would not do justice to the argument. A few observations would be made. First, according to Varuhas, the core features of vindicatory torts are (1) damages are as of right; (2) a wide range of damages are available, including compensatory damage, non-compensatory damages such as nominal damages, gain-based damages, and exemplary or punitive damages. Apart from exemplary damages and nominal damages which will be separately considered below, it is not in serious dispute that the other types of damages, which are either loss-based or gain-based, would continue to be available under a public law claim. In *Ward*, MacLachlin CJ referred to the compensatory function of damages. “Compensation” is used in a general sense and includes both personal loss (physical, psychological and pecuniary), as well as harm to intangible interests (distress, humiliation, embarrassment and anxiety).¹⁹³ Although it is not expressly mentioned in the judgment, there is no reason why gain-based restitutionary loss would not be included. The court also emphasized that in these areas guidance could be drawn from the common law. Likewise, in *Baigent’s* case and *Taunoa*, the court referred to an amount of damages that was in addition to the common law awards. Vindicatory damages are additional to and not a substitute for other types of damages. These other types of damages are broadly compensatory in nature and nothing could be gained by labeling them as tort-based damages. To the extent that they also serve the function of vindication, the term “vindication” is used in a general sense, which does not take the matter too far. When existing remedies are adequate, a further award of vindicatory damages is in any event unnecessary. To the extent that vindication of the constitutional rights is already recognized in vindicatory tort, it makes little difference whether the approach in vindicatory torts is adopted or that damages awarded in vindicatory torts should be taken into account in awarding vindicatory damages in public law claims. They may take different forms, but the end result is the same.

Secondly, a tort-based approach to damages may be too narrow. Varuhas’ argument rests heavily on vindicatory torts, such as trespass, false imprisonment, defamation, assault and battery, which, apart from defamation, are about deprivation of personal liberty. Not all violations of human rights would constitute an actionable tort. A violation of one’s right to privacy by covert surveillance does not necessarily involve any breach of tort principles,

¹⁹² Varuhas, “The Development of the Damages Remedy under the New Zealand Bill of Rights Act 1990: From Torts to Administrative Law”, n 4 above.

¹⁹³ At [29]

as *Malone* shows. A failure to disclose material information to an accused in a criminal trial may not support a claim for malicious prosecution. The court is reluctant to extend the duty of care in the exercise of public duties. Many violations of human rights, such as free speech, peaceful assembly, right to vote, may not be covered by any corresponding tort action. Tort action is of limited assistance when the encroachment is statutory in nature. It is not easy to disentangle damages from liability, and it would be difficult to apply a tort-based approach to damages when tortious liability is not established in the first place. Even when a tort is established, the interest protected by tort may not be the same as that in public law. A colourful example was given by Gibbs CJ in *Merest v Harvey*:¹⁹⁴

“Suppose a gentleman has a paved walk in his paddock, before his window, and that a man intrudes and walks up and down before the window of his house, and looks in while the owner is at dinner. Is the trespasser to be permitted to say, ‘here is a halfpenny for you, which is the full extent of all the mischief I have done.’ Would that be a compensation? I cannot say that it would be.”

Trespass to land serves to protect the interest against unlawful interference with possession. If privacy is protected, it is an incidental result. Thus, it is arguable that damages awarded for trespass to land should not be the same as damages awarded for an invasion of one’s right to private life under a constitutional claim. Of course, there is close resemblance with tort in the area of deprivation of personal liberty, especially when the deprivation is malicious, outrageous or contumelious. Yet the bilateral corrective justice approach in tort law is less equipped to deal with situations where there is no malice or ill-intentioned conduct, but the violation is a result of mere maladministration or systemic failures.¹⁹⁵

The requirement of causation in private law may pose another issue for extending tort principles to assessing damages in public law. While it must be right for a claimant for constitutional damages to prove that the loss was caused by the breach, it is arguable whether the same but-for test in private law is appropriate for considering public law damages. This question has not been decided, although MacLachlin CJ has cast doubt on the appropriateness of the but-for test.¹⁹⁶ Even if the but-for test for causation in private law is adopted, this test has limited application for awarding damages for purposes other than compensation. Vindication is to re-assert the primary importance of the constitutional rights and to restore public confidence in the efficacy of the constitutional protection. Thus, it is not easy to apply a but-for test, or at least one without substantial modification in the context of vindication.

Apart from ensuring a just outcome for a claimant where no other remedy is available, Pearce and Halson argued that vindictory damages, in the context of contract, are likely to be relevant “where the breach causes no loss within the conventional meaning

¹⁹⁴ “(1815) 128 ER 761 at 761. See also *Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309, where the majority of the House of Lords affirmed an award of £15,000 for wrongful conception. It is difficult to explain the award other than for vindication.

¹⁹⁵ *Harris v Evans* [1998] 1 WLR 1285; *Neil Martin Ltd v Revenue and Customs Commissioners* [2007] EWCA Civ 1041, [2007] All ER (D) 393. See also the excellent analysis of Du Bois, n 182 above.

¹⁹⁶ *Henry v British Columbia* [2015] 2 SCR 214, at [54].

of loss, where an award of compensatory damages would be oppressive as regards the defendant, and where an award of compensatory damages will not be an adequate remedy because all or part of the loss caused by the breach is not loss for which the defendant is liable to the claimant.”¹⁹⁷ Vindictory damages would also be appropriate to ensure that no undue liability is imposed on the defendant. In *Chester v Afshar*,¹⁹⁸ a case on failure to advise of certain risk in a proposed operation, the House of Lords held that the claim failed as the defendant’s breach had not been the effective cause of the injury and it had not been shown that the breach had increased the risk of the injury. However, the House of Lords also believed that the claimant should receive some damages for the failure to give the warning. Pearce and Halson contended that an outright denial of damages would fail to vindicate the right to be warned, but the imposition of liability to compensate for loss which did not arise from the breach was unduly onerous. Thus, a better solution would have been to award vindictory damages of a fair and reasonable amount to recognize the wrong.¹⁹⁹

Thirdly, to the extent that there are concurrent liabilities in a tort claim and a constitutional claim, it must be right that the damages recoverable under either action should be comparable, as a matter of fairness and equity. Otherwise, the value of the right, such as personal liberty, would be regarded as of less worth in one action than the other. Yet it does not follow that vindictory damages in constitutional claims should be rejected simply because they are available in torts. The reverse is equally true. If damages for vindication under vindictory torts are recognised and available, it is difficult to argue why damages for vindication under constitutional claims for the same wrong should not be recognized or available, so long as there is not double recovery under both causes of action. If they are of the same nature and for the same purpose, the objection to vindictory damages in constitutional claim is one of form rather than substance. The only serious objections are then double recovery, which can be easily taken care of, or redundancy, which rests on the proposition that the principles for awarding damages for vindictory purposes in tort law are clear, coherent and apposite for remedying a constitutional wrong. As shown above, this may be true in vindictory torts, but it is far from clear once we move beyond this area.

Fourthly, it was argued that under a tort-based approach, damages are normative, whereas damages are discretionary and may be reduced by public law considerations in a public law. A distinction may have to be drawn between compensatory and vindictory damages. For compensatory damages, which are loss-based or gain-based, it is right that there should not be any room for public interest considerations to reduce the damages recoverable. While some of the categorical statements in *Taunoa* may suggest the contrary, it has been argued above that the judgment has to be read in the context that common law claims were not in issue in that case. A careful reading suggests that the public law considerations were relevant only in vindictory damages. As McLachlin CJ cautioned, a just and appropriate remedy in public law has to be just and fair to all parties, including the State, when the purpose of vindication is to mark society’s disapproval.²⁰⁰ With this purpose in mind, it would be difficult to imagine that the conduct of the State officials,

¹⁹⁷ Pearce and Halson, n 189 above, at 87.

¹⁹⁸ [2004] UKHL 41; [2005] 1 AC 134.

¹⁹⁹ *Ibid*, at 98.

²⁰⁰ *City of Vancouver v Ward* [2010] 2 SCR 28, at [53].

including any step taken to remedy the wrong or to address systemic issues, would not be relevant in assessing the amount of damages, even under vindictory torts. Henceforth, there may not be many distinctions between vindication in vindictory torts and vindictory damages in constitutional claims.

A variation of this argument is that if damages in public law can be reduced by public interest consideration, why could this not be done in vindictory torts? And why would this stop at vindictory torts and not apply to other torts? This “thin end of the wedge” argument is further dealt with below.²⁰¹ It suffices to point out here that part of the justification lies in the public/private law divide. It is true that many constitutional rights are recognized and protected in private law well before the advent of public law, which, at least in English common law, was not formally introduced until *O’Reilly v Mackman* in the 1980s. Nor has the demarcation between public law and private law ever been clear.²⁰² Private law and public law form different parts of the same legal system and share basic legal principles, values and objectives. They complement one another, and cross-pollinate the development of each other. A rigid distinction between private law and public law is untenable. Yet it would be equally artificial to obliterate any distinction between these two spheres either. A constitution or a Bill of Rights binds the State only. Their application to inter-citizen litigation remains controversial and is limited in scope. Thus, there is nothing unusual that a public law action will lie against the State whereas the same action could not lie against an individual in a similar situation. The nature of public law claim requires the court to take into account public interest and mandates a discretionary nature of damages, and the different nature of the claims points to the inappropriateness of extending a public law approach to a tort claim.²⁰³

Fifthly, it was said that public law damages would result in a lower amount of award than tort damages. While it is accepted that tort law has much to offer in assessing vindictory damages, it is not obvious that tort law would necessarily tend to give a more generous awards.²⁰⁴ There are no doubt cases on both sides of the line. As shown above, an express recognition of vindictory damages has indeed in some cases resulted in additional damages that would not have been awarded under the common law.²⁰⁵ There are no doubt cases where the award was simply too low, whether they were made under tort or public law.²⁰⁶ In this regard, one has to be careful in making any comparison. It is inappropriate to compare the amount of vindictory damages with tort awards when tort

²⁰¹ See Section 3.3 below.

²⁰² See the well-known decisions in *Roy v Kensington and Chelsea Family Practitioner Committee* [1992] 1 AC 624; *Wandsworth LBC v Winder* [1985] AC 461, at 480.

²⁰³ See du Bois, n 180 above. Lord Hope observed that the difference in available remedies in private law and public law was a good reason why there should not be closer conformity in substance between tort law and Human Rights Act: *Van Colle v Chief Constable of Hertfordshire Police* [2008] UKHL 50, at [82].

²⁰⁴ Amos, “Damages for Violations of Human Rights Law in the United Kingdom”, n 184 above, at 391.

²⁰⁵ For example, *Liston-Lloyd v The Commissioner of Police* [2015] NZHC 2614, at [41], [47], where the court expressly awarded an additional amount of vindictory damages over tort damages. See also the discussion below.

²⁰⁶ Varuhas, *Damages and Human Rights*, n 191 above, at 129. It was argued that an award of £500 to £1,000 for a serious, two-year wrongful imprisonment was a mockery to the rhetorical importance of the liberty interest. I agree, but it has to be compared with the alternative of awarding nominal damages by the majority under tort claim!

awards were not available in the first place. Comparison is also difficult when the court simply makes a global award without breaking down the compensation and the vindictory elements, or it may be misleading if vindictory damages in public law are to compare with compensatory damages in tort. With the limited number of cases on public law damages, it is probably too early to draw any conclusive finding.

Finally, it is accepted that there is considerable force in the argument that the amount of damages awarded in tort and in a public law claim should be comparable when the violation constitutes a concurrent action in tort and in public law. However, as Varuhas himself has qualified, the vindictory function of tort may not always be appreciated, or may not assume equal prominence in all torts. By lumping the function of vindication in conventional damages, the function of vindication could easily be undermined or ignored in a tort-based approach. The Canadian approach on vindictory damages has the distinct advantage of bringing the function of vindication to the fore. By expressly acknowledging the separate functions of compensation and vindication, it requires the courts to address these different functions in the award of public law damages separately, and reach a decision that provides just and appropriate remedy in the circumstances of the case. As Witzleb and Carroll point out, the advantages of the express recognition of vindictory damages are that (1) they reduce the need to stretch the bounds of compensation or restitution to explain non-punitive awards; (2) they can be awarded without resorting to punishment, particularly where exemplary damages are unavailable; and (3) they ensure the availability of a remedy that is sufficiently robust and flexible to make good on the infringed rights.²⁰⁷

Lord Collins refers to the award of nominal damages. While the award of nominal damages affirms that a right has been violated, it hardly serves any vindication purpose. To the extent that declaratory relief constitutes sufficient vindication, the award of nominal damages does not serve any additional vindication purpose. To the claimant, nominal damages are unlikely to be able to provide adequate satisfaction to vindicate the rights that were violated. On the contrary, it may achieve the precisely opposite effect if it conveys a derisory message that the rights do not deserve protection or that the violation is a mere technicality or that the claimant deserved what has been meted out to him.

This leaves only exemplary damages, which are said to serve the same function as vindictory damages and this forms a major ground for rejecting vindictory damages. It is argued below that there are both conceptual and practical problems of treating exemplary damages as a sufficient substitute for vindictory damages.

3.2 *Vindictory damages and Exemplary Damages*

Another main objection to vindictory damages is that they overlap with exemplary or punitive damages. As exemplary damages and vindictory damages cannot be awarded concurrently, this reinforces the argument that the purposes of the latter is already served

²⁰⁷ Witzleb and Carroll, n 181 above, at 43.

by the availability of the former.²⁰⁸ Lord Nicholls stated in *Kuddus v Chief Constable of Leicestershire Constabulary*:²⁰⁹

“The availability of exemplary damages has played a significant role in buttressing civil liberties, in claims for false imprisonment and wrongful arrest. From time to time cases do arise where awards of compensatory damages are perceived as inadequate ... The nature of the defendant's conduct calls for a further response from the courts. On occasion conscious wrongdoing by a defendant is so outrageous, his disregard of the plaintiff's rights so contumelious, that something more is needed to show that the law will not tolerate such behaviour. Without an award of exemplary damages, justice will not have been done. Exemplary damages, as a remedy of last resort, fill what would otherwise be a regrettable lacuna.”

In the first place, it is clear, unlike exemplary damages, that the purpose of vindictory damages is not to punish the wrongdoer. As Lord Hope, in *Inmiss v Attorney General of St Christopher and Nevis*, observed, it was inappropriate in public law to punish the executive, and hence terms like “exemplary damages” or “punitive damages” are best avoided.²¹⁰

“Although such an award is likely in financial terms to cover much the same ground as an award by way of punishment in the sense of retribution, punishment in that sense is not its object. The expressions “punitive damages” or “exemplary damages” are therefore best avoided. Allowance must be made for the importance of the right and the gravity of the breach in the assessment of any award. Its purpose is to recognize the importance of the right to the individual, not to punish the executive. It involves an assertion that the right is a valuable one as to whose enforcement the complainant has an interest. Any award of damages is bound, to some extent at least, to act as a deterrent against further breaches. The fact that it may be expected to do so is something to which it is proper to have regard.”

This is more than a semantic response. While there is no doubt that certain objectives overlap between exemplary damages and vindictory damages, the focus of vindictory damages is not on the wrongdoer's culpability, but the assertion of the primacy of the claimant's rights in society. It is the constitutional significance of the Bill of Rights and the community's interest in ensuring that those rights are heedfully respected by the State that justify the need to vindicate the rights.²¹¹ Some may argue that this is just a matter of emphasis. Four points could be made in reply. Firstly, if the violation of a constitutional right does not support an actionable tort, there is no basis for awarding tort damages, let alone exemplary damages. Secondly, even if an actionable tort is established, exemplary damages may not be available even though the injury to the constitutional rights is significant or serious. Thirdly, it is possible to extend exemplary damages to situations where such damages would not have been available under tort law, yet in such cases it is artificial to regard such damages as still “exemplary”. It would make no difference whether the

²⁰⁸ Burrows, n 20 above, at 305; Varuhas, *Damages and Human Rights*, n 191 above, at 126-127.

²⁰⁹ [2002] 2 AC 122, at [63].

²¹⁰ [2008] UKPC 42, at [27].

²¹¹ See Thomas J, in *Dunlea v Attorney General* [2000] 3 NZLR 136, at [71].

damages are called exemplary or vindicatory. The objection to vindicatory damages would then be one of form rather than substance. Finally, in those situations where there is an overlap between vindicatory damages and exemplary damages, no injustice would result, as there would be no double recovery. Indeed, a better approach is to replace exemplary damages by vindicatory damages in public law. Let me elaborate.

Firstly, it has already been argued that tort law and public law are not coterminous. Not all violations of constitutional law would constitute a tortious wrong, and vice versa. In general, tort law is developed in the context of rights and obligations between private individuals. Save in exceptional circumstances or when there are statutory obligations, tort law in general does not impose liabilities for omissions. When it is extended to public authorities, basically the same principles apply. By contrast, public law is concerned with the powers of the State, and the extensive positive duties imposed in public law means that public law liabilities extend beyond the reach of private tort law. In general, there is no duty in tort law to provide benefits, nor any duty of care in the exercise of public functions.²¹² The *Malone* case is a classic example where tort law was reluctant to impose liabilities.²¹³ Even in the area of commission, the extent of liabilities is not the same. Tort law is designed to resolve conflicts between rights-holders, whereas public law is designed to supervise the exercise of public powers. Public law is more ready to impose liabilities on the State because of the power of the State over individuals, and hence it may provide remedy for systemic failures or maladministration when the common law of tort refuses to do so.²¹⁴ In *Rabone v Pennine Care NHS Trust*,²¹⁵ a parent has no cause of action against another private person for bereavement arising from the death of their adult child, but he could bring an action and claim damages against the State under the Human Rights Act for the State's failure to protect his child's right to life. When a common law remedy is simply not available because the wrong is not established, as in the *Henry* case, or when civil liability of the State is excluded, as in *Baigent's case*, or when remedy in the common law does not offer adequate protection, as in the *Ward* case, there is no reason why damages should not be awarded in public law if this is appropriate and just in the circumstances of the case. This should not restrict the discretion of the court to award just and appropriate remedy by excluding any appropriate form of remedy.

Secondly, English courts have traditionally been skeptical about exemplary damages and as a result, exemplary damages are available only in rather restricted circumstances. In the leading case of *Rookes v Bernard*,²¹⁶ exemplary damages were confined to three narrow categories: (1) deliberate malpractice by a public officer or authority; (2) conduct committed with deliberate intent that the profits from it would exceed any possible compensatory damages; or (3) where a statute expressly provided for punitive damages. Their availability was further restricted by the Court of Appeal in *AB v South West Water Services Ltd*,²¹⁷

²¹² *Rowling v Takaro Properties Ltd* [1988] 1 AC 473 (PC). See also F du Bois, n 180 above.

²¹³ *Malone v Commissioner of Police of the Metropolis* [1979] Ch 344, where the absence of prohibition of the police to use surveillance device was taken to mean that it was lawful, contrary to the public law principle that all powers of public authorities should derive from the law.

²¹⁴ *Harris v Evans* [1998] 1 WLR 1285; *Neil Martin Ltd v Revenue and Customs Commissioners* [2007] All ER (D) 393.

²¹⁵ [2012] 2 AC 72. Privacy is another example where the common law offers limited protection.

²¹⁶ [1964] 1 All ER 367, at 410-411.

²¹⁷ [1993] QB 507.

which held that exemplary damages would only be available under those causes of action that existed at the time of *Rookes v Bernard*. While *AB v South West Water Services Ltd* was repealed by the House of Lords in *Kuddus v Chief Constable of Leicestershire Constabulary*, and while Lord Nicholls was prepared to recognize the role of exemplary damages in buttressing civil liberties, and he advocated for a more liberal approach to the award of exemplary damages, such damages should still be confined to occasions where the wrongdoing of a defendant was so “outrageous” or “contumelious”, and that exemplary damages should be the “last resort”.²¹⁸ The purpose of exemplary damages is clearly to punish the tortfeasors for their outrageous conduct. Thus, they may not be available when a violation of constitutional rights is serious but the violation was not malicious or capricious. In *Ward*, the court accepted that the strip search was not ill-intended, malicious, high-handed or oppressive, but a result of insensitivity to Charter rights.²¹⁹ The court in *Henry* found that the failure to disclose exculpatory evidence to the claimants in a criminal trial was not done with malice.²²⁰ In *Welfare v Kate*, the court found the delay was not malicious but endemic in nature.²²¹ In *Dunlea*, the court found that the treatment of the claimants was not outrageous or high-handed and expressly rejected the award of exemplary damages. Nonetheless, in all these cases the courts upheld the amount of damages to vindicate the rights violated.²²² There are bound to be circumstances that vindictory damages may be called for in public law in order to provide an effective remedy, but exemplary damages would not be available for similar situations in private law.

There is of course the option of expanding the scope and availability of exemplary damages. In *Ashley v Chief Constable of Sussex Police*,²²³ Lord Scott suggested that vindictory damages could be awarded in an action for trespass when the purpose of vindication cannot be fulfilled by compensatory awards. Yet he spoke with a lone voice. Lord Bingham and Lord Rodger did not mention any additional award. Lord Carswell (in dissent) expressly rejected vindictory damages in tort, and Lord Neuberger joined the dissent on the ground that mere vindication was insufficient to justify the pursuit of a claim for trespass. In a later case, the distinction between tort and HRA was again reinforced.²²⁴ The existence of distinct remedies and limitation periods were among the reasons for not maintaining a closer integration between the two actions. Besides, the Law Commission has recommended an extension of exemplary damages to any tort or equitable wrong case where the defendant’s conduct “showed a deliberate and outrageous disregard of the plaintiff’s rights and [when] other remedies... would be inadequate to punish the defendant for his conduct.”²²⁵ The recommendation was not accepted because there was no clear consensus on whether exemplary damages should be abolished or retained.²²⁶ Further, an

²¹⁸ [2002] 2 AC 122, at [63]. While the restriction in *AB* was overruled, the House of Lords left open the question whether exemplary damages were available under the HRA: at [46], [92].

²¹⁹ [2010] 2 SCR 28, at [71]-[72].

²²⁰ *Henry v British Columbia (Attorney General)* [2015] 2 SCR 214.

²²¹ [2006] SCA 46 (RSA).

²²² [2000] 3 NZLR 136, at [36].

²²³ [2008] UKHL 25; [2008] 2 WLR 975.

²²⁴ *Van Colle v Chief Constable of Hertfordshire Police* [2008] UKHL 50. Steele argued that this was an over-reaction and an unfortunate development: see J Steele, n 26 above, at 630.

²²⁵ Law Commission, *Aggravated, Exemplary and Restitutionary Damages* (Law Commission No 247, 1997), at 4 (hereinafter referred to as “Law Commission Report 1997”).

²²⁶ *Ibid*, at 78-79.

expansion of the scope and availability of exemplary damages to public law would mean (1) the objection to vindictory damages in public law would become one of form rather than substance; and (2) it will lead to the same objection of uncertainty in the law that Lord Dyson was concerned. Whereas it is possible to confine vindictory damages to public law, an expansion of exemplary damages in tort law in one area would make it more difficult to resist its extension to other areas of private law. As the current law now stands, there seems to be no cause for optimism that the court is prepared to expand the scope of exemplary damages.

In any event, insofar as vindictory damages serve the same purpose as exemplary damages, a simple reply is that it does not matter since the principle against double recovery will prevent any excessive award. In *Falwasser v Attorney General*, Stevens J, following *Taunoa*, made an award of NZ\$30,000 to vindicate the public law rights “to cement the Court’s and society’s denunciation of the conduct in question”.²²⁷ The court undertook a separate exercise of considering exemplary damages (if available), and, not surprisingly, came to the same amount of award, which was to be reduced to nil so as to prevent double recovery. Given that it is not the purpose of public law to punish the State, it may be better simply to deny the applicability of exemplary damages and substitute them with vindictory damages whenever appropriate.

3.3 Uncertainty in the Law

Another objection to vindictory damages is a kind of a “thin end of a wedge” argument. Once the unruly horse of vindictory damages is unleashed, it will take other aspects of private law for a proverbial ride, resulting in uncertainty in the law. In *Lumba (Congo) v Secretary of State for the Home Department*,²²⁸ Lord Collins expressed his second objection to vindictory damages as follows:²²⁹

“The implications of awarding vindictory damages in the present case would be far reaching. Undesirable uncertainty would result. If they were awarded here, then they could in principle be awarded in any case involving a battery or false imprisonment by an arm of the state. Indeed, why limit it to such torts? And why limit it to torts committed by the state? I see no justification for letting such unruly horse loose on our law.”

Yet this objection is precisely the reason why it is preferable to develop vindictory damages in public law independently of tort law, as it does not follow from the availability of vindictory damages in public law that the same damages would have to be made available to private litigants in private law. Public law and private law serve fundamentally different purposes. A public law claim is only directed at and will only affect the State and public authorities.²³⁰ Private law applies to State as well as individuals. The bipolar nature

²²⁷ CIV-2008-463-000701 (19 March 2010), at [123]. See also [124], [126]-[130].

²²⁸ [2012] 1 AC 245.

²²⁹ At [101].

²³⁰ Steele argued that this by itself is hardly a decisive argument to treat damages differently in public law from private law: see Steele, n 26 above, at 616.

of private law, as succinctly illustrated by Hammond J in *Manga v Attorney General*, means that “the sort of factors influencing remedial choice in a private law suit (which include plaintiff autonomy; economic efficiency; the relative severity of the remedy; the nature of the right to be supported; difficulties of calculation; the effect of a remedy on third parties; the practicability of enforcement; and the conduct of the parties) are not wide enough for a case involving a violation of a constitutional character.”²³¹ Conversely, while it is possible to extend tortious principles in light of public law concerns, this may not always be possible or appropriate. As Hardie-Boys J observed in *Baigent’s case*, it may be inappropriate to extend a duty of care only to those classes who are subject to the Bill of Rights, yet quite unwarranted to extend it universally, or even to violations by private individuals.²³²

Additionally, as the primary purpose of private law remedies is compensatory, the claimant is entitled to damages as of right. Conversely, damages in public law are discretionary. In assessing vindicatory damages in public law, the court has to balance a range of countervailing factors, including adequacy of alternative remedies, concern for effective governance, and gravity of the violation. Good governance may take different forms. On the one hand, respect for fundamental rights is always part of good governance. On the other hand, the Government should not be deterred of carrying out their lawful duties of exercising policy-making discretion.²³³ Thus, in general, vindicatory damages are not “appropriate and just” without a minimum threshold of gravity. What that standard is a question that may vary from case to case, so again private law thresholds and defences may offer guidance. The overriding consideration is one of proportionality. Thus, in *Henry v British Columbia*,²³⁴ the Supreme Court held that it was not appropriate to require malice in a case of non-disclosure of evidence in criminal prosecution. This standard of malice is firmly rooted in the tort of malicious prosecution, which has a distinctive history and purpose. It was not appropriate when, unlike the decision to prosecute which involves high policy content, no core prosecutorial discretion was involved as disclosure of relevant information in a criminal prosecution was a constitutional obligation. Hence, the motive to withhold information was immaterial and therefore an onerous threshold to insulate the State from judicial scrutiny or civil damages was unwarranted. Even when damages are to be awarded in public law, the court has to balance various competing interests to assess the quantum. The amount of compensation awarded has to be sufficient to reflect the importance of the rights violated. A nominal compensation will only diminish the value of the rights, whereas a substantial amount may adversely affect other public interests.²³⁵ These balancing exercises, and the ensuing uncertainty, are typical in public law but are not necessarily relevant in private law litigation between individuals.

3.4 Arbitrariness to assess vindicatory damages

²³¹ [[2000] NZLR 65, at [126].

²³² [1994] NZLR 667, at [123].

²³³ *Macklin v New Brunswick (Minister of Finance)* [2002] 1 SCR 405, at [79] per Gonthier J.

²³⁴ [2015] 2 SCR 214.

²³⁵ Connolly, pp 190-191, 199-200. Such floodgate argument has been deployed in *R (Bernard) v London Borough of Enfield* [2002] EWHC (Admin) 2282.

A further objection to vindictory damages is that the award is arbitrary. In the first place, the fact that it is difficult to assess vindictory damages is not a reason to deny its existence. Non-pecuniary damages, aggravated damages or exemplary damages in private law are equally difficult to assess, and the assessment will become more consistent once the court is able to develop the precedents. The exercise is not an exact science, and the appropriate amount for vindication purposes has to be determined by reference to the social, historical and legal contexts of the particular society.

In a tort action, the principle for assessing damages is *restitutio in integrum*, that is, putting the parties into the position as if the wrong had not been committed. This concept has also been accepted by the European Court of Human Rights, and there is no doubt that the approach taken by the common law in similar circumstances will be relevant if not also significant when determining the scope of an appropriate remedy in public law. However, there is no reason that damages in public law has to be confined or limited by what is available in analogous cases at common law or in equity, given the public dimension of a public law action.²³⁶

For exemplary damages, the Law Commission has recommended that they should be of a moderate amount because a substantial punitive amount should fall within the domain of criminal law, which provides better safeguards than in civil process, and that punitive damages should not result in a windfall to the claimant, which might financially compromise other valuable or essential public services.²³⁷ These concerns deserve equal consideration in awarding vindictory damages.

On the amount of vindictory damages, while there are isolated dicta to the effect that the award could be substantial, the experience of those jurisdictions where vindictory damages have been awarded shows that the concern for excessive awards is unfounded. The amounts awarded were moderate, and were nowhere near anything that would significantly compromise financially other public services.

Emerging judicial consensus is that damages must not be extravagant, yet they must be sufficiently significant so as not to trivialize the breach. The determination of an appropriate amount would of course be an act of art, and some latitude, as well as reasonable disagreement, would have to be expected. In vindicating the constitutional rights, the amount would have to be such that a reasonable claimant would feel that it is worth making the claim, taking into account the stress and perhaps the cost involved. The court will have to assess what amount reasonable and responsible members of that society will feel comfortable, taking into account all the circumstances, including the nature of the infringed right, the nature of the breach, the effect on the victim and the other redress which has been ordered. A nominal award usually benefits neither the society nor the individual. In this regard, the helpful judgment of Blanchard J in *Taunoa* deserves closer attention than it has hitherto received.²³⁸ If there is a successful concurrent tort claim, the damages awarded under the tort claim would have to be taken into consideration in assessing damages under the public law claim. In such cases, a further award of damages in

²³⁶ See Tipping J in *Taunoa v Attorney General* [2008] 1 NZLR 429, at [323].

²³⁷ Law Commission Report 1997, n 225 above, at 78-79.

²³⁸ *Taunoa v Attorney General* [2008] 1 NZLR 429, at [253]-[266].

public law would be unnecessary and would not serve any useful purpose. If there is no available claim (or other adequate remedies), non-pecuniary damages would have to be assessed and the amount would be dependent on the nature and the gravity of the breach as well as its duration and any attempt by the state to take remedial action. Some breaches, such as a violation of fair hearing, would not normally require non-pecuniary damages other than quashing the impugned decision. Whereas some breaches, such as torture and inhuman and degrading treatment or punishment, would normally require an additional amount of damages to reflect social abhorrence of such official conduct, taking into account also the intention behind the impugned conduct and the duration of the breach. While the amount is not to compensate for hurt feelings, it has to be an amount that the claimant would not reasonably feel that the award is trivializing the breach. It will also have “to reflect the ways in which the State has acknowledged the wrongdoing; whether, and with what speed, it has brought to an end the wrongful conduct and put in place measures to prevent reoccurrence; and whether it has publicly apologized to the victim in appropriate terms.”²³⁹

It should also be recognized that “an award of Bill of Rights Act damages does not perform the same economic or legal function as common law damages or equitable compensation; nor should it be allowed to perform the function of filling perceived gaps in the coverage of the general law, notably in this country in the area of personal injury.”²⁴⁰ The same principle applies when the breach is systemic in nature. Blanchard J cautioned that in such case, the amount of damages should be no more than the sum which is appropriate for that case, and should not be inflated to reflect the effect of the systemic failure upon other persons, for they may choose to make their own claims.²⁴¹

On the question of windfall, this is partly taken care of by the fact that the award is only moderate, and partly by the factors that the court has to take into account in determining the amount, including the nature, the gravity and the duration of the violation of constitutional rights. A more conceptual challenge is that if the purpose is to vindicate a wrong and not to compensate the claimant, why should the damages be payable to the claimant who would arguably receive a windfall? To some extent the same argument could have been made against exemplary damages. It should also not be overlooked that the claimant is both a victim as well as a member of the public. To the extent that the violation happened to him as a member of the public, he does not receive a windfall if the damages represent public abhorrence of what has happened to him. Public law is not just about what the claimant is to receive, which is taken care of by, inter alia, compensatory damages, but also about what the defendant has to pay for the wrong. As Blanchard J advised, the general level of damages should not vary significantly depending upon the character of the particular victim. Claimants who have been maltreated in a similar way with similar consequences should receive comparable amounts without weight being placed upon their individual records. Rather, the variance should depend upon the severity and duration of breach in each case.²⁴²

²³⁹ At [261].

²⁴⁰ At [258]-[259], per Blanchard J.

²⁴¹ At [263]. The Canadian court seems to be more hesitant in making a substantial award in the case of systemic failure: see *Victoria v Ward*, [2010] 2 SCR 28, at [43].

²⁴² At [264]-[265].

It has been argued that if the purpose of the award is to vindicate the right on behalf of the public, the amount should not be different in different cases. In his prominent work, Dr Harvey McGregor took the view that damages were all about the consequences of wrongdoing. If there were no consequences, there could not be anything more than nominal damages. Therefore, there is no role for vindictory damages if its only role is to vindicate the rights.²⁴³ In other words, a violation of a constitutional right per se without consequences should not receive any damages other than nominal. Similarly, James Edelman argued that the goal of damages is to ameliorate the consequences of wrongdoing, whereas vindictory damages were not concerned with consequences but the violation itself. He asked rhetorically, “why an award of further damages is needed even when the law has responded to all consequences of a wrong, including sending any required message about the impropriety of the wrongful act by an award of nominal or exemplary damages.”²⁴⁴ This begs the question whether the law has responded to all consequences of a wrong. The argument assumes that existing remedies are adequate, yet it is precisely in situations where available remedies, including declaratory relief and nominal damages, are inadequate to reflect the gravity of the wrong done that vindictory damages are justified. It also underlines an important issue of whether a constitutional right itself has some intrinsic value so that its violation would per se attract damages irrespective of any other loss. Edelman’s response is then how different awards for vindictory damages could be justified if the purpose of the damages was to vindicate the right itself, and not the consequences of the violation.²⁴⁵ In reply, Varuhas argued while the right was the same, vindication was about the underlying interests, and the extent the interests was violated may depend on the gravity of the violation, the manner of violation, and the consequences to the claimant.²⁴⁶ Another way of putting it is that vindictory damages are to reflect public abhorrence of the violation, and the extent of public abhorrence will depend on the nature, the manner, and the gravity of the violations. Hence, different awards would be justified. This seems to be consistent with the jurisprudence in Canada and New Zealand.

In summary, the assessment of vindictory damages is not as arbitrary as it is suggested. Just like any exercise in assessment of damages, absolute certainty is impossible. On the other hand, a number of guiding principles have gradually emerged: (1) the remedy has to be just and appropriate; vindictory damages are not always necessary and are to be awarded only when other remedies are inadequate to satisfy the objectives of damages; (2) the purpose of damages is to publicly vindicate the right, and not to punish the State or its officials; (3) the quantum is to be guided by the seriousness of the breach, the impact of the breach on the claimant, and the seriousness of the state misconduct. Large award is generally inappropriate, but the award has to be sufficiently meaningful to represent a serious response to the breach and the objectives of compensation, upholding the constitutional values and deterring future breaches; and (4) given the shared objectives of

²⁴³ H McGregor, *McGregor on Damages* (London: Sweet & Maxwell, 19th ed, 2014), at 10, [1.019], 598, [16.001], and 606, [16.005]. See also Edelman, “Vindictory Damages”, n 186 above.

²⁴⁴ Edelman, “Vindictory Damages”, n 186 above.

²⁴⁵ James Edelman, “The Meaning of Loss and Enrichment”, in R Chambers, C Mitchell and J Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford: Oxford University Press, 2009), at 219; Burrows, n 20 above, at 280.

²⁴⁶ Varuhas, “The Concept of ‘Vindication’ in the Law of Torts: Rights, Interests and Damages”, n 180 above.

vindictory damages in public law and exemplary damages in private law, the established principles in tort law may still be relevant as a guide, so long as there is no double recovery.

4. Conclusion

Four different approaches to constitutional damages are discernable: the autonomous public law rights-based approach in New Zealand that rejects the relevance of tort law; the composite approach in Canada that retains the autonomous nature of public law claims but draws upon private law principles whenever possible; a parallel approach in South Africa that gives prominence to private law principles but leaves public law damages available as an exception; and the “mirror approach” with Strasbourg jurisprudence coupled with a rejection of vindictory damages in the United Kingdom.²⁴⁷ Notwithstanding these differences, more recent developments suggest that, with the exception of the United Kingdom, there is an emerging trend of converging towards the composite approach in Canada, which is a compromise between a strictly public law approach and a strictly private law tort approach. This is a desirable development.

It is argued that the Canadian approach, with minor modifications, would provide a structured and principled approach to public law damages. A breach of constitutional rights in an independent wrong, for which the court has to provide just and appropriate remedies. The courts have a wide discretion to fashion just and appropriate remedies. It is undesirable to reduce the discretion by straitjacketing damages into existing categories. The Canadian approach recognizes three main functions of damages, that of compensation, vindication and deterrence, and builds in a balancing approach to addressing countervailing factors, with a provision that the burden of establishing the countervailing factors, consistent with human rights jurisprudence on restriction of rights, is shifted to the State. The compensation function will ensure that the court will not overlook one of the most important objectives of constitutional claims, namely, to protect individual rights, whereas the vindication and deterrence functions ensures that the courts will address the public dimension of human rights and to affirm their importance in society. While affirming constitutional damages as stand-alone damages, the courts stress that it is desirable to draw guidance from tort principles in assessing damages whenever appropriate. This approach allows the court to fashion the most appropriate remedies in the circumstances of each case, without disturbing the principles of tort law, which applies not only to the State but also among individuals. Simultaneously, it allows cross-pollination of both private law and public law, by providing the necessary degree of certainty of the law and yet enabling the court to freely develop both branches of law. This approach addresses the shortcomings of both an entirely separate and autonomous public law approach and a full assimilation of tort law and public law remedies, and goes a long way to address some of the objections to vindictory damages. The modifications/clarifications are (1) compensatory damages should not be reduced by public law consideration, and should normally be awarded; (2) vindictory damages are discretionary and should normally be awarded only when other remedies are insufficient to vindicate the constitutional rights. It is awarded to reflect the public disapproval of the violation and is additional to the compensatory damages; (3) the

²⁴⁷ See also McLay, n 6, above, at 60, and Opkaluba, n 33 above, at 74.

burden of establishing countervailing factors to reduce the amount of vindictory damages should rest squarely on the State; and (4) there is no reason in principle why damages should not be awarded for a violation caused by systemic failure, the judiciary, or the Legislature, although it would be easier for the State to refute an award if independence of the judiciary is threatened.

A constitution has been described as a living tree that is capable of growth. It has not been seriously argued that substantive constitutional rights should be developed in the same way as similar rights protected by private law. So, why should damages be different then? Vindictory damages have its place in public law, as a primary objective in public law is to uphold and vindicate constitutional rights, given the sui generis nature of constitutional rights. Their purpose is not to punish the executive, but rather to affirm the sanctity of constitutional rights. They have to be “appropriate and just”, and this formulation allows the court to balance public interest with the award – on the one hand to ensure that the level of damages, taking holistically, are sufficient to reaffirm the unacceptability and to mark social disapproval of the violations, and on the other hand, to balance the damages against a whole range of public law considerations, including its impact on good governance. While vindictory damages bear similarity with exemplary damages, they are different. Exemplary damages are punitive; vindictory damages are affirmative. Exemplary damages focus on the conduct of the offender; vindictory damages focus on the rights violated. Exemplary damages look to the past conduct; vindictory damages are forward-looking, community-based and structural. Instead of tying the hands of the judiciary to the rather restrictive principles for granting exemplary damages, the judiciary must be given a broad discretion to fashion remedies that are most appropriate in the context.²⁴⁸ Thus, it is argued that exemplary damages should be excluded from public law damages. Vindictory damages, which should be confined to public law, may play a similar role as exemplary damages in private law, and would no doubt draw upon the principles governing the award of exemplary damages. As time passes, they may be developed in different directions. By treating constitutional damages as sui generis, it would allow the courts to further develop public law remedies with the assistance of but not constrained by the existing confines of the existing principles in private law.

Ultimately, a fundamental difference underlying the diverse approaches to damages is whether the function of damages is to compensate for the consequences of a wrong, which is typical of that of tort law, or whether the wrong is the violation itself, which is regarded as the compensable injury that deserves vindication. Should vindictory damages be rejected as an unruly horse that threatens to unseat legal certainty? When the European concept of proportionality was first introduced into the common law, it was greeted with skepticism for being unprincipled, subjective and arbitrary. Likewise, public law damages are still in their early days of development. As we embark on this new journey, it could not be more

²⁴⁸ As Richardson J succinctly summed up in *Martin v Tauranga District Court*, [1995] 2 NZLR 419 at 428: “... the objective is to vindicate human rights, not to punish or discipline those responsible for the breach. The choice of remedies should be directed to the values underlying the particular right. The remedy or remedies granted should be proportional to the particular breach and should have regard to other aspects of the public interest.” See also Opkaluba, “Vindictory approach to the award of constitutional and public law damages: contemporary Commonwealth developments”, n 138 above, at 157, and de la Bastide, n 163 above, at 226.

apposite to recall the advice of Lord Nicholls in *Re Spectrum Plus Ltd* regarding declaratory relief in public law that the best approach is probably “never say never”.²⁴⁹

²⁴⁹ [2005] 2 AC 680 at 699: “Rigidity in the operation of a legal system is a sign of weakness, not strength. It deprives a legal system of necessary elasticity. Far from achieving a constitutionally exemplary result, it can produce a legal system unable to function effectively in changing times. ‘Never say never’ is a wise judicial precept, in the interest of all citizens of the country.” The same sentiment was echoed by McLachlin CJ in *Henry v British Columbia (Attorney General)* [2015] 2 SCR 214, at [35].