Vindicatory approach to the award of constitutional and public law damages: contemporary Commonwealth developments

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Abstract

In order to provide the missing link in the constitutional damages formulation by Lord Diplock in *Maharaj v Attorney General of Trinidad and Tobago (No 2)* 1979 AC 385 and its attendant practical difficulties of quantifying what the plaintiff will receive in money terms, the Privy Council recently came up with the vindicatory approach in *Attorney General of Trinidad and Tobago v Ramanoop* 2005 2 WLR 1324. The background to the development of this approach is unarguably traceable to the earlier 'right-centred/value-laden' approach of New Zealand Court of Appeal in the interpretation and application of the New Zealand Bill of Rights Act and the criticisms of the Diplock formula by the Court of Appeal of Trinidad and Tobago. Although the vindicatory approach informs the award of constitutional damages by the Supreme Court of Canada and the Constitutional Court of South Africa in the interpretation of the Canadian *Charter* and the South African Bill of Rights respectively, the Supreme Court of the United Kingdom has denied its applicability in English law in the case of *Lumba v Secretary of State for the Home Department* 2011 2 WLR 671 (UKSC). This article maintains that the attitude of the UK Supreme Court smacks of its predecessor's approach to the award of public law damages in the English jurisdiction generally, contrary to the developments elsewhere in the Commonwealth.

INTRODUCTION

In propounding the concept of constitutional damages in Commonwealth public law, the Privy Council held in *Maharaj v Attorney General of Trinidad and Tobago (No 2)*[1] that damages was the appropriate remedy for

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1 *Maharaj v Attorney General of Trinidad and Tobago (No 2)* [1979] AC 385 (PC).

the deprivation of personal liberty arising from an unlawful order of imprisonment by a High Court judge. For the majority, Lord Diplock not only emphasised that a claim for damages consequent upon a constitutional motion was a separate cause of action;[2] he also held that the method of assessing such damages must be distinct from the manner of quantifying damages in the law of tort.[3] The Diplock formulation left many questions unanswered. For instance, would a successful plaintiff in an application for appropriate relief for breach of a fundamental right recover in addition to compensatory award, exemplary damages – a controversial head of damage under the common law adjudicative system? His Lordship did not address this question as the appellant expressly indicated that he was not claiming such an award.

The question, therefore, arose peripherally in *Attorney General of St Christopher, Nevis & Anguilla v Reynolds*.[4] This was an action for unlawful detention for which compensation was recoverable in terms of section 3(6) of the Constitution of St Christopher, Nevis and Anguilla 1967. The question turned on the quantum of the compensation involved. The Privy Council sought to maintain the dichotomy it had enunciated in *Maharaj 2* between damages in a tort claim and damages as a constitutional relief. However, on the facts, their Lordships could find nothing to justify their interfering with the damages as assessed by the Court of Appeal even though it included a small sum as exemplary damages. Lord Salmon held that:

> The Attorney General relied on the last few words of the judgment which revealed that the sum awarded included 'a small sum as exemplary damages'. His argument was that no exemplary damages should have been awarded because compensation alone could be claimed under section 3(6) of the Constitution. This, no doubt, would be true but for section 16(1) of the Constitution, which makes it plain that anyone seeking redress under the Constitution may do so 'without prejudice to any other action with respect to the same matter which is lawfully available'; and in the present case, the plaintiff claimed (1) damages for false imprisonment, and (2) compensation pursuant to the provisions of section 3(6) of the Constitution.[5]

Subsequently, the courts in the Caribbean awarded what they called 'preventive, punitive and exemplary damages' for acts of torture, cruel and inhuman treatment, and degradation of human dignity arising from acts of

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2 *Id* at 399F–H.
3 *Id* at 400.
4 *Attorney General of St Christopher, Nevis & Anguilla v Reynolds*.[1980] AC 637 (PC).
5 *Id* at 662D/E–F.

prison officers in *Peters v Marksman;*[6] and for unconstitutional arrest, search and detention of a legal practitioner by police officers in *Tynes v Barr.*[7] Although the Court of Appeal of Trinidad and Tobago did not consider the exemplary damages head in the case of a suspended judge in *Crane v Rees*,[8] it awarded him compensatory damages for distress, inconvenience and loss of reputation. In another case, it made an award for loss of earning due to the Industrial Court's delay in issuing judgment expeditiously.[9] Again, although the Court of Appeal had a problem assessing the damages due to the suspended judge in *Rees*, it was in *Jorsingh* that two justices of that court called upon the Privy Council to provide the missing link(s) in the *Maharaj* formulation.

PRELUDE TO THE INTRODUCTION OF THE VINDICATORY AWARD

Soon after the *Maharaj* judgment, the Chief Justice of the Supreme Court of the Solomon Islands demonstrated the practical difficulties in applying its formulation in assessing constitutional damages. The problem was the following: if constitutional damages differ from damages in private law, how then would a court quantify such an award? This question, posed in *Jamakana v Attorney General and Another*,[10] may appear simple, but the answer was by no means easy. Since compensation was authorised directly by the Constitution of the Solomon Islands, Daly CJ did not have to grapple with that aspect of the *Maharaj* legacy.[11] The court's immediate problem was to consider the assessment of what that compensation should be, after a finding that the plaintiff had been deprived of his right to personal liberty and his right to free movement through the orders of the Acting Minister for Police Affairs.

The difficulty encountered by Daly CJ stemmed from the distinction drawn in *Maharaj* between 'a claim in tort for false imprisonment under which the damages are at large' and 'a claim in public law for deprivation of liberty alone'. Thus, if the wrong done is exactly the same whether it is termed 'false imprisonment' or 'deprivation of liberty', the assessment in financial

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6 [2001] 1 LRC 1 (St Vincent & the Grenadines).

7 (1994) 45 WIR 7 (Bahamas).

8 *Crane v Rees* [2001] 3 LRC 510 (CA).

9 *Jorsingh v Attorney General* [1997] 3 LRC 333 (CA) (*Jorsingh*).

10 *Jamakana v Attorney General and Another* [1985] LRC (Const) 569 (HC).

11 Okpaluba 'Constitutional damages, procedural due process and the *Maharaj* legacy: a comparative review of recent Commonwealth decisions (parts 1 & 2)' (2012) 26/1 *SAPL* 256 and (2012) 27/1 *SAPL*.

terms of the results of that wrong should be the same whether the assessment is for 'damages' or 'compensation'.[12] Daly CJ hastened to align himself with the problems raised by Lord Hailsham regarding the quantification of such damages if the action lies outside the law of tort,[13] and concluded:

> 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 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.[14]

The court held that the measure of compensation awarded in terms of section 17 of the Constitution should exclude any award of exemplary damages but that the compensation was assessable 'at large', in that case regard should be had to any aggravating features in the way in which the contravention of the applicant's constitutional right took place.[15] After referring to section 18(2) of the Solomon Islands' Constitution, the enforcement provisions of which are in *pari materia* with the Constitution of Trinidad and Tobago, Daly CJ held:

> It will be noted that the discretion here granted to make orders of compensation is expressly related to the enforcement of the protective provisions and therefore would seem to go beyond the normal common law principles which would, for example, require only one award of damages to be made against joint tort-feasors sued in one action.[16] I consider that my paramount duty is to enforce or secure the enforcement of the protective provisions of the Constitution and, hence, if it is necessary to do so in the performance of this duty, I may award compensation separately against persons alleged to have contravened the constitutional rights of an applicant.[17]

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12 *Jamakana* n 10 above at 574.
13 *Maharaj 2* n 1 above at at 410.
14 *Jamakana* n 10 above at at 575b/c–d.
15 *Id* at 576g–h.
16 *Broome v Cassell* [1972] 1 All ER 801 (HL) at 816.
17 *Jamakana* n 10 above at 578c–d/e.

Approach of the New Zealand Court of Appeal[18]

Before the emergence of the concept of 'vindicatory damages' of *Ramanoop*[19] vintage, the New Zealand courts, interpreting their Bill of Rights Act 1990, had led the rest of the Commonwealth in providing some theoretical flesh to the bare bones of the *Maharaj* formulation. In other words, the contribution of the New Zealand Court of Appeal in *Baigent's Case*[20] was the emphasis on the 'right-centred/value-laden' approach to the assessment of constitutional damages.[21] For instance, Hardie Boys J made it clear that the need for a 'rights-centred'[22] approach to infringements of fundamental rights does not necessarily require a remedy in the form of damages or other compensation.[23] But, when the remedy is compensation, its assessment must emphasise the compensatory and not the punitive element, as the objective is to affirm the right, not to punish the transgressor.[24]

In *Dunlea v Attorney General,*[25] Thomas J, dissenting in part, went even further. He applied the need for a 'rights-centred' as opposed to the private law 'loss-centred' approach to the quantification of damages in human rights breaches. In his view, such rights could only be vindicated by compensating the plaintiff for the value vested in the right. Vindication of that intrinsic value was not the same as an award of exemplary damages. Neither would such an approach open the floodgates on the quantum of damages as that could be restrained, whilst remaining a realistic vindication of the rights infringed. Thomas J adopted the views expressed by Huscroft and Rishworth that the Bill of Rights Act has been 'taken as a launching pad for the judicial

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18 It should be pointed out that the Supreme Court of New Zealand judgment in *Taunoa v Attorney General* [2007] NZSC 70, [2007] 5 LRC 680, [2008] 1 NZLR 429 (SCNZ) *(Taunoa*) a discussion of which is not warranted in the present context, is a consolidation of sorts of the *Baigent* principles on the award of Bill of Rights damages in New Zealand – Okpaluba & Osode *Government liability: South Africa & the Commonwealth* (2010) par 3.2.1.2.2.

19 *Attorney General of Trinidad and Tobago v Ramanoop* [2005] 2 WLR 1324 (PC) pars 17–20 (*Ramanoop*).

20 *Simpson* v *Attorney General [Baigent's Case]* [1994] 3 NZLR 667 (CA).

21 *Per* Cooke P, Hardie Boys J *Baigent's Case* n 20 above at 677 and 703 – *Government liability* n 18 above par 17.4.2.

22 In *R v Goodwin* [1993] 2 NZLR 153 at 193–194, Richardson J had pointed out the need for the 'rights-centred approach' that necessarily requires that 'primacy be given to the vindication of human rights'. See also *R v Grayson* [1997] 3 LRC 486 at 499–500.

23 *Baigent's Case* n 20 above at 703.

24 *Ibid*.

25 [2000] 5 LRC 566.

development of remedies which in other countries are retained for constitutional violations'.[26]

Applying the principles of vindication and a 'rights-centred approach' to the award of damages for the breach of a right in the New Zealand Bill of Rights Act, Thomas J concluded that:

> In this case, the plaintiffs were innocent third parties. They were involved in what must have been a terrifying experience. While much of the conduct on the part of the police may have to be excused for the reasons given in the judgment of the majority, the fact remains that this court has concluded that the plaintiffs' fundamental rights under the Bill of Rights were infringed in certain respects. Mr Buxton and Mr Graham were arbitrarily detained contrary to s 22 of the Bill of Rights, Mr Buxton was subjected to an unreasonable search of his person contrary to s 21 and the three plaintiffs endured an unreasonable search of their premises contrary to the same section. 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 recognising 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.[27]

The Trinidad and Tobago Court of Appeal

Clearly, the observations of the justices of the Court of Appeal of Trinidad and Tobago in *Jorsingh,* not only encouraged the local courts to award exemplary damages on claims for constitutional relief,[28] they must have stirred the Privy Council into completing the unfinished business of formulating the guidelines on the award of constitutional damages when the occasion arose in *Attorney General of Trinidad and Tobago v Ramanoop*.[29] In *Jorsingh,* two justices of the Court of Appeal of Trinidad and Tobago raised doubts as to the 'tentatively austere approach' to constitutional

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26 Huscroft & Rishworth (eds) *Rights and freedoms: the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (1995) 75.

27 *Dunlea v Attorney General* [2000] 5 LRC 566 pars 82 and 83.

28 See *eg Ramesar v Attorney General of Trinidad & Tobago* HCA S–95 of 1992 (20 January 1999); *Abraham v Attorney General of Trinidad & Tobago* HCA 801of 1997 (26 February 1999).

29 *Ramanoop* n 19 above.

damages enunciated by Lord Diplock. Sharma JA recognised the 'misgivings and apprehensions of Lord Hailsham' which 'were to sit if not uneasily, certainly, incompatibly with the broad and generous approach the Privy Council has consistently taken when it came to the interpretation of the fundamental rights under the Constitution'.[30] Commenting on the *Maharaj*/*Reynolds* judgments, De la Bastide CJ observed that:

> Their Lordships accepted the submission that exemplary damages were not recoverable as part of an award of damages for a breach of a constitutional right. If that is to be regarded as part of the *ratio decidendi*, then I would respectfully express the hope that the Privy Council may be persuaded to re-examine this issue when it is raised again before them, as inevitably it will be.[31]

The Chief Justice considered the jurisdiction invested in the courts in terms of section 14(2) of the 1976 Constitution of the Republic of Trinidad and Tobago and concluded that the discretion given to the court by those provisions was indeed very wide.[32]

The Chief Justice could, therefore, not see any limitation to the order the court could make for the purpose of enforcing the guaranteed fundamental rights. 'Given the breadth of this power', he observed, '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.'[33] Referring to the judgment of Daly CJ in *Jamakana*[34] on the scope of the constitutional power of the court to grant relief for constitutional rights breach, De la Bastide CJ said:

> I would respectfully agree with the learned Chief Justice that the constitutional provision which makes enforcement of the guaranteed rights the object of the relief which the court is empowered to grant has the effect of releasing the court from the constraints of common law rules governing the award of damages more so as our section 14(2) (unlike s 18(2) in the

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30 *Per* Sharma JA, *Jorsingh* n 9 above at 345g/h.
31 *Id* at 338a–b.
32 *Id* at 338c.
33 *Id* at 338c–d.
34 *Ibid*.

> Solomon Islands) makes no express mention of the "payment of compensation".[35]

But the crucial speech in the Court of Appeal on vindication belongs to Sharma JA when he said that not only could the court enlarge old remedies, it could 'invent new ones as well, if that is what it takes or is necessary in an appropriate case to secure and vindicate the rights breached. Anything less would mean that the court itself, instead of being the protector, and defender and generator of the constitutional rights, would be guilty of the most serious betrayal.'[36] Like the Chief Justice, Sharma JA also expressed the hope that the Privy Council would at an appropriate occasion revisit the issue.[37]

When *Ramanoop* came before the High Court, Bereaux J awarded the plaintiff $18,000 for the deprivation of his liberty for two hours and $35,000 for the assaults he received from his police officer/arrestor. He declined jurisdiction, as indeed he had in *Jones v Attorney General of Trinidad & Tobago,*[38] to award exemplary damages for outrageous conduct by the police officer which, in an ordinary tort action would attract an award of exemplary damages. In the lead judgment by Sharma CJ in the Court of Appeal, it was held that there was nothing in section 14(1) of the 1976 Constitution limiting the form of redress the court may award. With Warner JA dissenting, the majority of the Court of Appeal allowed the plaintiff's appeal and remitted the matter to a judge for the assessment of 'exemplary/vindicatory' damages. Again, it was Sharma CJ who coined the term 'vindicatory damages' as a head of damage in claims for breach of constitutionally protected rights and freedoms.[39]

The scope of the investigation

The critical observations, especially from the Commonwealth courts above, soon yielded to the articulation of the vindicatory approach as the essence of

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35 *Id* at 338d/e–h/j.

36 *Id* at 344e–f/g. In *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) (*Fose*) par 69, Ackermann J spoke of 'forging new tools' and 'shaping innovative remedies' in order to provide the victim of constitutional breach effective remedy. See Okpaluba, 'Of "forging new tools" and "shaping innovative remedies": unconstitutionality of legislation infringing fundamental rights arising from legislative omissions in new South Africa' (2001) 3 *Stellenbosch Law Review* 462.

37 *Id* n 9 above at 346c.

38 HCA 19 of 1998.

39 Address by De la Bastide PCCJ 'The Inaugural Symposium: Current Developments in Caribbean Community Law' Port of Spain 9 November 2009 par 5; *per* Lord Dyson, *Lumba v Secretary of State for the Home Department* [2011] 2 WLR 671 (UKSC) par 97 (*Lumba* n 39 above).

the award of constitutional damages. In the process, the Privy Council – without either approving or disapproving the *Maharaj* judgment[40] – nonetheless deliberated upon that aspect it did not cover: the availability or otherwise of 'exemplary damages' in the event of the breach of a fundamental right. The end result is not only the invention of the vindicatory damages approach but its entering the fray in the form of: (a) 'additional', and (b) 'substantial' awards. Clearly emerging from this presentation, is that the concept of 'vindicatory damages' further isolates English public law damages from those of the Commonwealth jurisdictions dealt with in this paper.

No better evidence of the foregoing assertion and, in particular, of the accompanying confusion and lack of clarity apparent in the award of public law damages in the Commonwealth, can be found in decided cases than the recent judgment of the UK Supreme Court in *Lumba v Secretary of State for the Home Department*.[41] The straightforward question in this case was whether the detention of the appellants pending their deportation to their home countries, after they had completed their terms of imprisonment, was unlawful. If so, were they entitled to vindicatory damages? The fact that the court was split on the question of liability is perhaps not surprising. But the split by the same majority on the type of award the appellants were to receive, is more bewildering. Broken down to its nitty-gritty, the six Supreme Court justices who made up the majority, held the state liable in false imprisonment for the detention of the appellants. However, on the issue of the type of damage they were entitled to, they were split as follows: three justices held that they were entitled to no more than nominal damages[42] and the other three held that they should be awarded 'conventional' or 'vindicatory' damages respectively.[43]

For Lord Collins, one of the three upholding a nominal award, there was no room for the incorporation into the common law of the concept of vindicatory damages.[44] Again, one of the three dissenting justices, Lord Brown, not only criticise the award of nominal damages; in his view, a substantial award was even more objectionable.[45] From *Lumba*, certain propositions can be framed, namely: (a) vindicatory damages may, in

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40 *Ramanoop* n 19 above at par 11.
41 *Lumba* n 39 above.
42 *Per* Lords Dyson, Collins and Kerr, *Lumba* n 39 above at pars 169, 237 and 256.
43 *Per* Lords Hope, Walker and Lady Hale, *Lumba* n 39 above at pars 180, 195 and 217.
44 *Per* Lord Collins, *Lumba* n 39 above at par 237.
45 *Per* Lord Brown, *Lumba* n 39 above at par 361.

instances, mean the same thing as a conventional award; (b) while it is difficult neatly to separate vindicatory damages from exemplary damages, the conventional award though possessing a vindicatory purpose, neither relates to, nor is tantamount to exemplary damages; and (c) if anything, the conventional award falls somewhere between the nominal and compensatory awards.

This background sets the tone of this paper. It explores the emerging concept of vindicatory damages in Commonwealth public law. It is not intended to enter into any elaborate discussion of the compensatory award or the distinguishing features between public and private law damages, save that to the extent that compensatory aspects of public law damages are entangled, they form part of this discussion. The scope of this discussion, therefore, is circumscribed in this way to avoid traversing terrain already trodden in recent times.[46] The 'right-centred'/'value-laden' approach of the New Zealand Court of Appeal are discussed as the precursor to this latest creature of the law; the vindicatory approach in the context of breaches of constitutional rights. Finally, the attempt to bring the vindicatory approach outside the realm of constitutional law, and how that effort has been scuttled by the reverse majority of the Supreme Court of the United Kingdom in *Lumba* concludes this investigation.

LAYING THE FOUNDATION FOR VINDICATORY DAMAGES IN THE CONSTITUTIONAL CONTEXT

As has been noted, the opportunity to revisit the issue of constitutional damages presented itself to the Privy Council in *Attorney General of Trinidad and Tobago v Ramanoop*.[47] Accordingly, their Lordships recognised and adopted the concept of vindicatory damages in the context of a serious violation of a fundamental right by a police officer. It was held that when exercising the constitutional relief jurisdiction, the court is concerned with upholding or vindicating 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

46 *Government Liability* n 18 above pars 16.2–16.3 and 17.4.
47 [2006] 1 AC 328 (PC).

and, moreover, the violation of a constitutional right will not always be coterminous with the cause of action at law.[48]

It was further held that an award of compensation will go some way towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well fall short. 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, emphasise 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.[49] '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.[50]

The Privy Council subsequently applied the vindicatory approach in two classes of case. First, in *Merson v Cartwright and Another,*[51] it was held that in the exercise of their constitutional jurisdiction, their Lordships were concerned to uphold or to vindicate the constitutional right which had been contravened. In this case, the plaintiff claimed damages for assault and battery, false imprisonment, malicious prosecution, and contravention of her constitutional rights. It was held that the purpose of a vindicatory award 'is not a punitive purpose. It is not to teach the executive not to misbehave. The purpose is to vindicate the right of the complainant, whether a citizen or visitor, to carry on his or her life in the Bahamas free from unjustified interference, mistreatment or oppression.'[52] Secondly, although the breach in *Inniss v Attorney General of Saint Christopher and Nevis*[53] did not involve

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48 *Ramanoop* n 19 above at par 18.

49 All these elements were found to be absent in *James v Attorney General of Trinidad and Tobago* [2010] UKPC 23 (29 July 2010) pars 40–42 – Okpaluba, 'Constitutional damages, proof of damage and the Privy Council' (2011) 74 (4) *THRHR* 567.

50 *Ramanoop* n 19 above at par 19.

51 [2005] UKPC 38 (PC) (*Merson*).

52 *Id* at par 18.

53 [2008] UKPC 42 (PC) (*Inniss*). In *Fraser v Judicial and Legal Services Commission and Another* [2008] UKPC 25 (PC) (6 May 2008) par 22, vindicatory damages were awarded in the form of distress and inconvenience to a magistrate for unconstitutional removal that was also in breach of contract. Again, in *Durity v Attorney General of Trinidad & Tobago* [2008] UKPC 59 (08 December 2008) par 35, the appellant suffered distress

a breach of an entrenched right, it was based on both procedural and substantive breaches of other provisions of the Constitution, as well as of contractual rights. The question was the method of the appellant's removal from office as Registrar and Additional Magistrate regulated by section 83(3) of the Constitution of St Christopher and Nevis. The respondent questioned whether damages would be appropriate at all in this case, in that a declaration that there has been a contravention of section 83(3) of the Constitution would have been sufficient relief for the appellant in the circumstances. Lord Hope held that the function that the granting of relief is intended to serve, is to vindicate the constitutional right. In some cases, a declaration on its own may be all that is needed to achieve this.[54] With reference to the earlier cases, Lord Hope held that:

> But the fact that the guidance that was offered in those cases was given in that context does not deprive it of its value in a case such as this, where the provision that has been breached is to be found elsewhere in the Constitution. Allowance must of course be made for the importance of the right and the gravity of the breach in the assessment of any award. The fundamental points are of general application, however. The purpose of the award, whether it is made to redress the contravention, or as relief, is to vindicate the right. It is not to punish the Executive. But indication involves an assertion that the right is a valuable one, as to whose enforcement the complainant herself has an interest. Any award of damages for its contravention 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.[55]

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because of the gross delay and the consequences to his reputation of his long suspension from office coupled with the fact that this was a serious abuse of the commission's regulations and justified an additional award. *Contra* the recent decision in *Graham v Police Service Commission of Trinidad & Tobago* [2011] UKPC 46 (20 December 2011) pars 17 and 27 where the Privy Council upheld the Court of Appeal's rejection of the appellant's claim that additional award of vindicatory damages was called for where the trial judge's finding was in the nature of a want of procedural fairness – a failure to accord the appellant a right to be heard. There was no question of bad faith or deliberate wrongdoing. There was evidence of administrative bungling in handling the promotion of the appellant. Furthermore, the respondent backdated his seniority twice and indicated that consideration would be given to his 'relative seniority when next promotions to the office of Assistant Commissioner of Police are made'. Coupled with the finding of the Court of Appeal that no particulars of damage were given and their Lordships' holding that the available information bearing on the 'appellant's pecuniary loss [was] meagre and certainly incomplete', there was no basis upon which to make an additional award of vindicatory damages in this case.

54 *Inniss* n 53 above at par 21.

55 *Id* at par 27.

Constitutional damages as exemplary damages?

Surprisingly, and without offering any explanation, their Lordships so soon after, appeared to have abandoned the *Ramanoop/Merson* approach. Although they had earlier enjoined the jettisoning of the traditional exemplary/punitive damages approach, they reverted to it in *Takitola v Attorney General and Others*[56] seemingly conflating it with the vindicatory approach. The appellant was detained in custody for over eight years in The Bahamas. The appellant had arrived in The Bahamas early August 1992 as a lawful entrant, but within a short time of his arrival he lost his belongings, including his passport and money. He was arrested for the offence of vagrancy and detained at the Central Police Station. On 18 August 1992 the Minister of Employment and Immigration signed an order for the detention and deportation of the appellant. He was kept in custody until 10 October 2000, when he was released on a bail bond. He was never charged with any offence or brought before a court in the whole of that period. Sporadic efforts were made to establish the appellant's nationality, but it was not accepted by the Japanese authorities that his claim to be a Japanese national was correct, nor was he accepted to be Chinese. He simply remained in prison, with little or no attempt being made to resolve his situation. The only ground stated in the detention order was that his presence in The Bahamas was 'undesirable and not conducive to the public good'.

The problem was not only with the appellant's detention, but also with the conditions under which he was detained which were so bad that on at least three occasions he attempted to commit suicide. In a passage quoted by the Privy Council, the trial judge, Longley J, described the conditions under which the appellant was detained including, among others, 'a filthy floor' where the plaintiff slept with only 'a single blanket' which was inadequate to cover him or serve as a bed. In the summer months, conditions were 'hot and steamy'; there was no running water, requiring the plaintiff 'to urinate and defecate in a bucket'. There were also mosquito problems. As the judge put it: '[t]he plaintiff had to endure these conditions for roughly eight (8) years while sealed in a room at Maximum Security Prison with hardened criminals in Fox Hill. He said and I am satisfied that it must have happened, that he had been assaulted and attacked and taken advantage of by prisoners and was afraid to use the bucket provided by the authorities and so sometimes he urinated and defecated himself.'[57] The Court of Appeal of the

[56] [2009] UKPC 12 (Bahamas) (*Takitola*).

[57] *Id* at par 4.

Commonwealth of the Bahamas categorised the appellant's treatment as 'less than human' as well as a 'flagrant misuse/abuse of power'.[58]

In the plaintiff's action for damages, including aggravated and exemplary damages for wrongful imprisonment and breach of his fundamental rights under the Constitution of the Commonwealth of the Bahamas, the trial judge held that his detention was initially unlawful, but ceased to be so after the making of the deportation order. He proceeded to award the plaintiff the sum of $1 000 for the initial detention and false imprisonment. The trial judge did not find it necessary to consider the claim for exemplary damages as there was no evidence of highhandedness or 'different' treatment meted out to the plaintiff. According to Longley J, the overall period of detention was excessive for the purpose of deporting the plaintiff and that there was a breach of his rights under articles 17 and 19 of the Constitution. The trial judge, however, made no further award; instead, he quashed the deportation order and directed that the plaintiff be afforded such status as would enable him to remain in the Bahamas and seek employment.[59]

The Court of Appeal allowed the appellant's appeal against the finding that his detention was lawful from the time of the signing of the deportation order, and held that the whole period of his incarceration constituted unlawful detention. He was awarded a total of $500 000 damages, comprising $400 000 compensatory damages and $100 000 exemplary damages. The Court of Appeal arrived at these figures by using the award of the trial judge as representing four days of the initial detention of the plaintiff at the rate of $250 per day. On further appeal to the Privy Council on quantum, it was contended for the appellant that: (a) the compensatory award was incorrect in principle and in amount; (b) the award of exemplary damages was excessively low; (c) a further and separate award should have been made for breach of constitutional rights; (d) the Court of Appeal had omitted to include any element for aggravation in their calculation of the compensatory damages; and that (e) it was erroneous to reduce the sum to reflect the fact that the appellant was to receive a lump sum.

Their Lordships were unable to find the basis for the Court of Appeal's assessment of their award of $250 per day, raising two 'substantial difficulties' in their calculation. First, the respondent was correct in arguing that it is usual and proper to reduce the level of damages by tapering them

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58 *Ibid*.
59 *Id* at par 5.

when dealing with an extended period of unlawful imprisonment.[60] Secondly, where a figure is to be awarded to represent a period of future financial loss or loss of amenities, it is correct to reflect in the calculation that the claimant will receive an immediate capital sum, being the present value of the future annual losses, which is materially less than the total. This does not apply, however, when the award represents past loss of damage. In such an instance, full restitution for the loss sustained by the claimant should ordinarily be awarded and there is no basis for reducing the award on the ground that the claimant will receive a capital sum.[61]

Lord Carswell who delivered the judgment of the Judicial Committee, held, firstly, that the Court of Appeal appeared to have equated aggravated damages with exemplary damages whereas they constitute a quite distinct head of damage based on altogether different principles. It is not clear from the judgment whether in making the compensatory award, the Court of Appeal took into account the aggravating circumstances.[62] Secondly, the award of damages for breach of constitutional rights has much the same object as the common law award of exemplary damages.[63] Therefore, it was not appropriate to make an award both by way of exemplary damages and for breach of constitutional rights.[64] Thirdly, and accordingly, when the vindicatory function of the constitutional damages has been discharged, with the element of deterrence that a substantial award carries with it, the purpose of exemplary damages would largely have been achieved.

In conclusion, their Lordships held that the sum of $100 000 representing constitutional or vindicatory damages should remain undisturbed. To be added to this, is the amount reassessed by the Court of Appeal for compensatory damages to make up the final award of damages to the appellant. Having rejected their method of calculating the award of the compensatory damages, their Lordships referred the matter back to the Court of Appeal expressly requesting that:

> [They] should determine what they consider to be an appropriate figure to reflect compensation for the long period of wrongful detention of the appellant, taking into account any element of aggravation they think proper, reflecting the conditions of his detention and, in their own words, the misery

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60 *Per* Lord Woolf MR, *Thompson v Commissioner of Police of the Metropolis* [1998] 1 QB 498 at 515.

61 *Takitola* n 56 above at par 9.

62 *Id* at par 11.

63 *Id* at par 13 per Lord Carswell.

64 *Id* at par 15 per Lord Carswell.

> which he endured. In assessing the proper figure for compensation for such long-term detention, they should take into account that any figure they might regard as appropriate for an initial short period, if extrapolated, should ordinarily be tapered…. The final figure for compensatory damages should therefore amount to an overall sum representing appropriate compensation for the period of over eight years' detention, taking account of the inhumane conditions and the misery and distress suffered by the appellant.[65]

The approach of the Supreme Court of Canada[66]

Like the Supreme Court of New Zealand which dealt extensively with constitutional damages for the first time in *Taunoa v Attorney General,*[67] the Supreme Court of Canada fully deliberated upon the award of Charter damages, again for the first time, in the recent case of *Vancouver (City) v Ward.*[68] The common trend in both cases is that *Ramanoop* and *Merson* were cited with approval, and in *Ward* which was a single judgment of a unanimous court, vindication 'in the sense of affirming constitutional values' appeared at least in two stages of a four-stage construct in ascertaining whether damages would be appropriate and just in a claim under section 24(1) of the Canadian Charter of Rights and Freedoms 1982. It was at the second stage when the court was considering whether an award of damages would serve a functional purpose, that vindication made its first showing in the judgment. McLachlin CJC held that once the plaintiff establishes that a Charter right has been implicated in the conduct of state functionaries, he must go further to show why damages are a just and appropriate remedy under section 24(1) of the Charter.[69] Essentially, the plaintiff must prove that damages would fulfil one or more of the related functions of compensation, vindication of the right, and/or deterrence of future breaches.[70]

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65 *Id* at par 17 per Lord Carswell.

66 Okpaluba 'The development of *Charter* damages jurisprudence in Canada: the guidelines from the Supreme Court' (2012) 3/1 *Stellenbosch LR.*

67 [2008] 1 NZLR 429 (SC).

68 [2010] 2 SCR 28 (SCC) (*Ward*).

69 *Id* at par 28 citing *Fose* n 36 above at pars 55 and 82.

70 *Ward* n 68 above at par 29. See also *Ramanoop supra*; *Taunoa* n 18 above at par 259; *Smith v Wade* 461 US 30 (1983) at 49. *Cf* the general deterrence factor in sentencing in criminal law – *R v BWP* [2006] 1 SCR 941 (SCC). *Contra* in *Fose v Minister of Safety and Security, ibid* par 71 where Ackermann J held that: 'For awards to have any conceivable deterrent effect against the government they will have to be very substantial and, the more substantial they are, the greater the anomaly that a single plaintiff receives a windfall of such magnitude. And if more than one person has been assaulted in a particular police station, or if there has been a pattern of assaults, it is difficult to see on what principle, which did not offend against equality, any similarly placed victim could be denied comparable punitive damages.'

The second instance is in considering whether the plaintiff could seek compensatory and punitive damages by way of an 'appropriate and just' remedy under section 24(1) of the Charter. The Chief Justice observed, albeit *obiter*, that as much as the plaintiff could in theory seek compensatory and punitive damages under the subsection,[71] the reality is that public law damages, in serving the objects of vindication and deterrence, may assume a punitive aspect.[72] Nevertheless, it is worth noting the general reluctance in the international community to award purely punitive damages.[73] The crux of the matter, according to McLachlin CJC, is that 'the amount of damages must reflect what is required to functionally serve the objects of compensation, vindication of the right, and deterrence of future breaches, insofar as they are engaged in a particular case, having regard to the impact of the breach on the claimant and the seriousness of the state conduct. The award must be appropriate and just from the perspective of the claimant and the state.'[74]

The Constitutional Court approach[75]

While the principles of constitutional and delictual liability have been developed by leaps and bounds by South African courts in the last decade, such corresponding development has not taken place with respect to the quantification of the damages which the successful litigant may receive. There is therefore, little indication in the law reports of the actual sums those successful plaintiffs were awarded and not much information as to how such sums were, or should be, calculated in the 'context' of human dignity, freedom and security of the person cases since *Carmichele (1)*.[76]

However, the landmark decision of the Constitutional Court in *Fose v Minister of Safety and Security*[77] remains the leading authority on the issue of constitutional damages in South Africa. In his lead judgment, Ackermann J emphasised vindication as the primary object of a constitutional remedy, including damages. He expressed doubt as to whether any amount, however

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71 *Mackin v New Brunswick (Minister of Finance)* [2002] 1 SCR 405 par 79.

72 *Cf* the Privy Council approach in *Takitola* n 56 above at pars 13 and 15.

73 *Ward* n 68 above at par 56 citing *Taunoa* n 18 above at pars 319-321.

74 *Ward* n 68 above at par 57.

75 See *Government Liability* n 18 above par 16.3.1.

76 *Carmichele v Minister of Safety and Security and Another* 2001 4 SA 938 (CC). See *eg Minister of Safety and Security and Another v Rudman and Another* 2005 2 SA 680 (SCA); *Minister of Safety and Security and Another v Hamilton* 2004 2 SA 216 (SCA); *Minister of Safety and Security and Another v Carmichele (2)* 2004 3 SA 305 (SCA); *Van Eeden v Minister of Safety and Security and Another* 2003 1 SA 389 (SCA); *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA).

77 1997 3 SA 786 (CC).

small, could be recovered as constitutional damages even where an applicant has incurred no injury upon which compensation could be based. Since 'effectiveness' or 'appropriateness' is the guiding beacon in this area of law, nominal damages – not being compensatory in outlook, purport and effect – may not fit into this definition. A victim of breach of a constitutional right who has incurred no actual physical, personal or economic damage, could as well be content with a declaration of right; an interdict to compel performance if failure to act was in issue; or a restraining interdict to prevent continuing interference with the right. Each of these remedies can, in respective circumstances, be 'appropriate' as well as 'effective'. Now, the type of award being discussed here may be distinguished from that introduced by Lord Bingham in the House of Lords as 'a conventional award' in *Rees v Darlington Memorial Hospital.*[78]

Ackermann J similarly doubted whether exemplary damages could be awarded in circumstances where an applicant had been adequately compensated. He further stated:

> The question whether, in addition to compensatory damages, "penal" or "punitive" or "exemplary" damages (expressions often used interchangeably and confusingly) are (or ought to be) awarded in delictual claims is a matter of some debate in South Africa. It appears to be accepted that in the Aquilian action and in the action for pain and suffering an award of punitive damages has no place…. There appears to be scanty authority for the award of punitive damages in the case of assault, over and above the damages awarded for patrimonial loss, pain and suffering and for the *contumelia* suffered, which can itself be aggravated by the circumstances of and surrounding the assault.[79]

The Constitutional Court approved of the criticisms levelled against the idea of imposing punitive damages in the law of delict, that is, 'the historical anomaly of awarding additional sentimental damages as a penalty for outrageous conduct on the part of the defendant', as not 'justifiable in a modern system of law' and foreign to the basic purposes of the law of delict.[80] Ackermann J, for the court, came to the conclusion that 'we ought

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78 [2003] 4 All ER 987 (HL) par 8; *per* Lord Millett in *McFarlane v Tayside Health Board* [2000] 2 AC 59 at 114 (HL).

79 1997 3 SA 786 (CC) par 62.

80 Van der Walt *Delict: principles and cases* (1979) 6; Potgieter, Steynberg & Floyd, *Visser and Potgieter law of damages* (3ed 2012) 195–198. The current edition of Van der Walt & Midgley *Principles of delict* (3ed 2005) par 143 state the matter bluntly: 'no punitive damages are awarded'. In *Dikoko v Mokhatla* 2006 6 SA 235 (CC) pars 75 and 76, a defamation action between two public functionaries, Mokgoro J adverted to the purposes

not, in the present case, to hold that there is any place for punitive constitutional damages'.[81] For the same reasons of blurring the distinction between the purposes of damages in private law and the essence of punishment in criminal law where the theory of deterrence has failed, the court also approved of the reasons given by academics for objecting to anomalous and unsatisfactory features of a constitutional damages remedy aimed at punishment or deterrence.[82] The conclusion, therefore, was that:

> Nothing has been produced or referred to which leads me to conclude that the idea that punitive damages against the government will serve as a significant deterrent against individual or systemic repetition of the

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of damages award in South African law of delict. In her view, equity much more than punishment and deterrence was desirable in the assessment of damages, which, in the case of defamation, serve as solace to a plaintiff's wounded feelings and not to penalise or deter people from doing what the defendant has done. Mokgoro J went on to state that: 'Clearly, punishment and deterrence are functions of the criminal law. Not the law of delict. In our law a damages award therefore does not serve to punish for the act of defamation. It principally aims to serve as compensation for damage caused by the defamation, vindicating the victim's dignity, reputation and integrity. Alternatively, it serves to console.' See also *Lynch v Agnew* 1929 TPD 974 at 978; Kinghorn 'Defamation' in Joubert (ed) *The law of South Africa (LAWSA)* vol 7 (2ed 2005) pars 94 and 96.

81 1997 3 SA 786 (CC) par 70.

82 Quite recently, in *Media 24 Ltd and Others v SA Taxi Securitisation (Pty) Ltd* 2011 5 SA 329 (SCA) pars 105, 106, 110 and 111, dissenting in part from the majority judgment which held that a corporation has a claim for general damages in defamation [par 55], Nugent JA spoke in stronger tone than Mokgoro J did in *Dikoko.* He expressed the view that 'general damages for defamation can never be said not to be punitive, even if that is so only in part, if only because the contrary cannot be shown, and if they are only partly punitive the good is not capable of being separated from the bad. I cannot see how we can compel a defendant to pay money for a wrongful act if he or she is justified in saying that it serves to punish.' Nugent JA considered *Fose* as a binding authority for holding that it is unconstitutional to punish without the protections that are afforded by the criminal law. Further, to impose general damages on a person who has defamed a trading corporation must then also be an unjustified invasion of the protected right of free expression. While it must be reiterated that a trading corporation is entitled to a remedy to vindicate the interest that it has in its reputation, that remedy is not damages, there are alternative remedies available for that purpose. Finally, such an alternative relief will not serve to punish, and 'the prospect of such an order being granted will have a lesser deterrent effect than an award of damages. But if it is punishment and deterrence that is really wanted then civil proceedings are not the place to exact them. Unlawful defamation constitutes a criminal offence – as this court recently affirmed in *S v Hoho* 2009 1 SACR 276 (SCA) – and it is the criminal process that must be looked to for punishment and deterrence, as in the case of any act that constitutes both a criminal offence and a civil wrong.… it would be unconscionable if a plaintiff were to be permitted to abjure its criminal remedy in favour of exacting punishment and deterrence through the medium of the civil law.' A useful analysis of this case has been undertaken by Neethling & Potgieter 'Defamation of a corporation: aquilian liability for patrimonial (special) damages and *actio iniuriarum* for non-patrimonial (general) damages' (2012) 75/2 *THRHR* 304–312.

> infringement in question is anything but an illusion. Nothing in our recent history, where substantial awards for death and brutality in detention were awarded or agreed to, suggests that this had any preventative effect. To make nominal punitive awards will, if anything, trivialise the right involved. For awards to have any conceivable deterrent effect against the government they will have to be very substantial and the more substantial they are the greater the anomaly that a single plaintiff receives a windfall of such magnitude. And if more than one person has been assaulted in a particular police station, or if there has been a pattern of assaults, it is difficult to see on what principle, which did not offend against equality, any similarly placed victim could be denied comparable punitive damages. This would be the case even if, at the time the award is made, the individuals responsible for the assaults had been dismissed from the police or other effective remedial steps taken.[83]

From the *Fose* judgment a number of observations emerge. First, there is no marked distinction between constitutional damages and delictual damages. For, although the Constitutional Court did not expressly or by implication repudiate the separate existence of constitutional damages, it held that there was nothing to suggest that common law or statutory remedies would never be suitable to redress breaches of fundamental rights where such an award was necessary to protect and enforce the entrenched right.[84] Secondly, and this flows from the first, there can be no separation in the manner of quantifying constitutional and delictual damages.[85] Thirdly, and most importantly for present purposes, it is doubtful whether South African courts will adopt the muddled concept of vindication and exemplary damages as expressed in *Takitola*, given that neither punitive nor exemplary damages is available in South African courts.[86] Finally, given the Supreme Court of

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83 *Per* Ackermann, J *Fose* n 81 above at 71. Neethling & Potgieter n 82 above at par 71. Instead of awarding exemplary damages, South African courts, appropriate cases, will consider the order of special or punitive costs to mark the courts' disapproval of the manner in which the defendant conducted his/her defence at every stage of the trial. See *eg Madyibi v Minister of Safety and Security* [2008] ZAECHC 30 (Tk) par 31; *Brits v Van Heerden* 2001 3 SA 257 (C) at 286E–G; *SA Liquor Traders' Association v Chairperson, Gauteng Liquor Board* 2009 1 SA 565 (CC) pars 47 and 49; *Law Society of South Africa v Road Accident Fund* 2009 1 SA 206 (C). Cf the reverse approach of the Supreme Court of Appeal in *Sandton Civic Precinct (Pty) Ltd v City of Johannesburg* 2009 1 SA 317 (SCA).

84 *Fose* n 36 above at par 58*(b)*.

85 *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd and Others* 2005 5 SA 3 (CC) par 65.

86 Neethling 'The law of delict and punitive damages' (2008) 29 *Obiter* 238 has spearheaded a debate which postulates that 'aggravated compensatory damages' should be considered as an alternative to punitive damages. Potgieter, Steynberg &Floyd, *Visser and Potgieter Law of Damages* (3ed 2012) 217 doubt whether the Neethling proposition

Appeal's emphasis on keeping the awards for breaches of personal liberty and of human dignity within the *Seymour* formula[87] and its application to subsequent fundamental rights cases,[88] it is doubtful whether South African courts will adopt either the *Ramanoop* 'additional award' or *Merson* 'substantial award', or both. When the appeal by Constitutional Court judges to the traditional concept of African/Roman-Dutch values of humanness, linked to the values embedded in the Constitution,[89] is included in the equation, it is unthinkable that any outlandish award could ever be made in the name of a vindicatory approach.

EXTENDING THE PROVINCE OF THE VINDICATORY APPROACH

The House of Lords, following on the heels of the Privy Council, has joined Commonwealth courts in their deliberations over public law damages in the light of their vindicatory and value-laden purposes. While the cases discussed above were understandably based on the interpretation of the fundamental rights provisions in the Constitutions of the respective states (with the exception of those from New Zealand), there are cases where the House of Lords has applied precedents based on constitutional adjudication to common law issues in a context where a Human Rights Act and not the written Constitution applied.[90] On the question whether the principle of vindicatory damages for violation of constitutional rights should be extended to pure public law circumstances in English law, Eady J answered that it should to some extent. In awarding damages for breach of the claimant's right to privacy, after recognising the compensatory nature of damages for

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'could provide a viable alternative to retaining a penal element in the *actio iniuriarum* in order to serve the true nature of satisfaction and to provide fair and just compensation in terms of such an action'. Granted that we must await future decisions in appropriate cases to point the way forward, there is merit in bringing in the 'aggravated' factor into the debate. It will not only take the sting off the abhorrent penal element in punitive/exemplary damages conundrum; it will, in addition to being compensatory, account for the manner in which the defendant caused the injury. It will ultimately improve the quantum of the award made in personal liberty cases since *Seymour* (n 87 below) and still not fall within the category of outlandish awards.

87 *Seymour v Minister of Safety and Security* 2006 6 SA 320 (SCA) discussed in *Government Liability,* n 18 above*,* par 20.3.1; Visser 'Damages – wrongful arrest and detention – quantum of damages' (2008) 71 *THRHR* 173.

88 *Rudolph v Minister of Safety and Security* 2009 5 SA 94 (SCA); *Minister of Safety and Security v Tyulu* 2009 5 SA 85 (SCA) (*Tyulu*). Discussed by Curlewis, L in 'Drunken driving on appeal' (2009) November *De Rebus* 37.

89 Mokgoro & Sachs JJ *Dikoko v Mokhatla* 2006 6 SA 235 (CC) pars 68–69, 112.

90 *Eg Ashley v Chief Constable of Sussex Police* [2008] 3 All ER 573 (HL).

infringement of privacy,[91] the trial judge held in *Mosley v News Group Newspapers Ltd*[92] that there was another factor which 'probably' had to be taken into consideration, namely the vindication to mark the infringement of the right. On the other hand, *McGregor on damages*[93] argues that 'it cannot be said to be established that the infringement of a right can in our law lead to an award of vindicatory damages'. According to this line of reasoning, the constitutional cases from the Caribbean are said to be 'far removed from tortious claims at home under the common law'.[94]

Assault and battery

In *Ashley v Chief Constable of Sussex Police*,[95] damages were sought for the death of Ashley in a police shooting. Lord Scott wondered how the deceased's right not to be subjected to a violent and deadly attack should have been vindicated if the claim for assault and battery, a claim the chief constable steadfastly and consistently disputed, were not allowed to proceed. In Lord Scott's own words: 'the purposes for which damages are awarded to the deceased Mr Ashley himself, if he had not died as a result of the shooting, are not confined to a compensatory purpose but include also, in my opinion, a vindicatory purpose.'[96] Otherwise, how would the right of the deceased not to be subjected to a violent and deadly attack be vindicated if the claim for assault and battery were not allowed to proceed, especially where the matter was disputed? Further,

> [a]lthough the principal aim of an award of compensatory damages is to compensate the claimant for loss suffered, there is no reason in principle why an award of compensatory damages should not also fulfil a vindicatory

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91 *Contra* in *Wainwright v Home Office* [2003] 4 All ER 969, par 34 where the House of Lords held that there was no protection in English law for the invasion of the right to privacy even though that right is guaranteed in article 8 of the European Convention for Human Rights and Freedoms 1950 and incorporated into the Human Rights Act 1998. Accordingly, the prison authorities were not liable in damages for a tort that was not known to the law. See also *R (Greenfield) v Secretary of State for the Home Department* [2005] 1 WLR 673 (HL). Cf *Fairlie v Perth and Kinross Healthcare NHS Trust* 2004 SLT 1200 at 1209L par 36. In his article 'Privacy: a missed opportunity' (2005) 13/3 *Tort Law Review* 166, Jonathan Lewis examines the inadequacy of the English common law albeit bolstered by the Human Rights Act to provide protection for the right to privacy. In his analysis of the South African law which is the opposite of the English, he believes that English courts can develop the tort along the lines of South African law from the angle of dignity. See also Moreham 'Privacy in the common law: a doctrinal and theoretical analysis' (2005) 121 *LQR* 628.

92 [2008] EWHC 1777 (QB) pars 216–217.

93 (18ed 2009) 42–009.

94 *Ibid*.

95 [2008] 3 All ER 573 (HL), [2007] 1 WLR 398 (CA) (*Ashley*).

96 *Id* at par 22.

> purpose. But it is difficult to see how compensatory damages can ever fulfil a vindicatory purpose in a case of alleged assault where liability for the assault was denied and a trial of that issue never took place.[97]

Their Lordships were unanimous in holding that if self-defence could be established as an answer to the claims of tortious assault and battery, no question of vindicatory damages would arise. Even if the claims did not have a reasonable prospect of success, this should be no reason to disallow the assault and battery claim from proceeding to a trial. It was unimportant whether, if liability were established, the vindication should be marked by an award of vindicatory damages or a declaration of liability. Lord Scott referred to analogous Commonwealth cases justifying such a conclusion. First, Thomas J observed in *Daniels v Thompson*[98] that: 'Compensation recognises the value attaching to the plaintiff's interest or right which is infringed, but it does not place a value on the fact that the interest or right ought not to have been infringed at all.' Again in *Dunlea v Attorney General,*[99] Thomas J drew a distinction between damages which were loss-centred and damages which were right-centred, which are awarded in order to demonstrate that the right in question should not have been infringed at all. Lord Scott also referred to *Ramanoop* and *Merson* – the two important West Indian cases discussed above.

False imprisonment

In *Lumba v Secretary of State for the Home Department,*[100] Lord Dyson agreed with the argument postulated in *McGregor on damages*,[101] adding that Lord Nicholls' speech in *Ramanoop* that the award would reflect public outrage, shows 'how closely linked vindicatory damages are to punitive and exemplary damages'.[102] In that light, Lord Dyson who led the majority on the issue of liability, held that:

> The implications of awarding vindicatory 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 an unruly horse loose on our law. In my view, the purpose

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97 *Id* at par 22.
98 [1998] 3 NZLR 22 at 70.
99 [2000] 5 LRC 566.
100 [2011] 2 WLR 671 par 100.
101 Note 93 above at 42–009.
102 *Lumba* n 39 above at par 100.

> 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 vindicatory damages for false imprisonment to any of the FNPs.[103]

On the issue of liability, Lord Dyson held that the detention of the appellants was unlawful and that their claims on false imprisonment succeeded. They were detained pending deportation after they had served their sentences following the application of certain unpublished departmental policies. The question arising was whether the appellants were entitled to receive nominal, compensatory or vindicatory damages. It was contended that even if it was inevitable that the appellants would have been detained, if the statutory power to detain them had been lawfully exercised, they were nevertheless entitled to substantial and not merely nominal damages. In addition, it was emphasised that as a tort of strict liability, false imprisonment was actionable without proof of damage, the focus being on the claimant's right rather than the culpability of the defendant's conduct.[104]

Lord Dyson held that the question was simply whether, on the hypothesis under consideration, the victim of the false imprisonment has suffered any loss which should be compensated in more than nominal damages. Exemplary damages apart, the purpose of damages is to compensate the victims of civil wrongs for the loss and damage that the wrongs have caused. If the power to detain had been exercised by the application of lawful policies, and on the assumption that the principles established in *Ex parte Hardial Singh*[105] had been properly applied, it is inevitable that the appellants would have been detained. In short, they 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.[106] This ruling is consistent with the decision of Lord Griffiths in *Murray v Ministry of Defence*,[107] to the effect that 'if a person is unaware that he has been falsely imprisoned and has suffered no harm, he can normally expect to recover no more than nominal damages.'[108] In the final analysis, Lord Dyson held that both appellants succeeded in their

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103 *Id* at par 101.

104 *Id* at par 91. See also *Roberts v Chief Constable of the Cheshire Constabulary* [1999] 1 WLR 662.

105 [1984] 1 WLR 704 discussed by Lord Dyson, [2011] UKSC 12 pars 102–105.

106 *Lumba* n 39 above at par 95.

107 [1988] 1 WLR 692 at 703A–B.

108 *Lumba* n 39 above at par 96.

action on the narrow ground that the Secretary of State unlawfully exercised her statutory power to detain them pending deportation, because she applied an unpublished policy which was inconsistent with her published policy. In the circumstances where the appellants would have been detained in any event, they were not entitled to exemplary damages; they were only entitled to nominal damages.[109]

Lord Hope concurred in the view that this was not a case for exemplary damages. He agreed, however, with Lord Walker and Lady Hale that the breach of the appellants' fundamental rights that had occurred in these cases should not 'be marked by an award only of nominal damages'. At the same time, an award on 'ordinary compensatory principle' was out of the question. It is clear that the appellants would not have had any prospect of being released from detention if the Secretary of State had acted lawfully and therefore could not point to any quantifiable loss or damage which required to be compensated. The conduct of the officials in this case, however, amounted to a serious abuse of power; it was deplorable.[110] Something more than a declaration or merely nominal damage was required.[111] Further:

> 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 recognise 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.[112]

Even though Lord Hope had objected to the idea of a conventional award under the English tort system as contrary to principle in *Rees v Darlington Memorial Hospital NSH Trust,*[113] he settled for such an award in this case. There must be, as Lord Nicholls noted in *Ramanoop*, some recognition of the gravity of the breach of the fundamental right which resulted in false imprisonment and account should be taken of the deterrent effect of an award

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109 *Id* at par 169.
110 *Id* at par 176; per Lord Walker par 194.
111 *Id* at par 176.
112 *Id* at par 178.
113 [2004] 1 AC 309 pars 46, 70–77.

lest there be a possibility of further breaches. But account should also be taken of the underlying facts and circumstances which indicate that it should not be more than a modest one. Such amount should not be 'nominal or derisory'. Again, although no yardstick existed to test the accuracy of the amount of €1 000 proposed by Lord Walker, and while he would have arrived 'at a substantially lower figure', Lord Hope had no reason to disagree with this assessment.[114]

Agreeing with Lord Dyson on the non-availability of exemplary damages to the appellants in this case, in spite of the deplorable official conduct, Lord Walker held it was not a case of nominal damages. Apart from the Caribbean constitutional rights cases, the common law has always recognised that an award of more than nominal damages should be made to vindicate an assault on an individual's person or reputation, even if the claimant can prove no special damage.[115] On the facts of the present case, Lord Walker held that each claimant had a very bad criminal record and would undoubtedly have been kept in custody under the Secretary of State's published policies. They could not establish a claim for special damages and although the causation argument would not completely destroy their claim; they were each entitled to the sum of €1 000 damages.[116]

Lady Hale considered the vindicatory award as 'a middle course between compensatory and exemplary damages' and held, along with Lord Collins, that the concept of vindicatory damages has been developed in terms of written constitutions enshrining certain fundamental rights and principles and containing broadly worded powers to afford constitutional redress.[117] After referring to those constitutional cases decided by the Privy Council from the West Indies, namley *Ramanoop*, *Merson*, *Fraser*, *Inniss* and *Takitola*, Lady Hale held that the case at hand was not concerned with a written constitution with broad power to grant constitutional redress; nor with 'a statutory provision, such as sections 8(3) and (4) of the Human Rights Act 1998, with a narrowly drawn power to award damages'.[118] And yet, the court was dealing with a decision taken at the highest level of government to detain people irrespective of the statutory purpose of the power to detain. Further, no one can deny that the right to be free from arbitrary imprisonment by the state is of fundamental importance in the United Kingdom. 'It is not the less

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114 *Lumba* n 39 above at par 180.
115 Note 93 above at pars 42–008–009.
116 Per Lord Walker, *Lumba* n 39 above at par 195.
117 *Lumba* n 39 above at par 214.
118 *Id* at par 216.

important because we do not have a written constitution. It is a right which the law should be able to vindicate in some way, irrespective of whether compensatable harm has been suffered or the conduct of the authorities has been so egregious as to merit exemplary damages.'[119] Having thus said, Lady Hale expressed her trust in the capacity of the common law to grow and adapt to meet new situations such as the recent invention of the concept of the conventional award. Along that line, Lady Hale would award the modest sum of €500 rather than €1 000 designed to recognise that the claimant's 'fundamental constitutional rights' have been breached by the state and to encourage all concerned to avoid this happening again.[120]

Lord Collins concurred with the lead judgment of Lord Dyson and held that the serious breach of public law in this case culminated in the detention of the appellants being unlawful. To hold otherwise would negate the rule of law.[121] His Lordship then turned to the question whether the appellants were entitled to more than nominal damages or, vindicatory damages.[122] In an extensive review of the constitutional jurisprudence on vindicatory damages, covering not only familiar West Indian cases, but also the case of *Taunoa v Attorney General*[123] from New Zealand, and the recent Canadian case of *Vancouver (City) v Ward,*[124] Lord Collins held that to make a separate award for vindicatory damages would 'confuse the purpose of damages awards with the nature of the award. A declaration, or an award of nominal damages, may itself have a vindicatory purpose and effect. So, too, a conventional award of damages may serve a vindicatory purpose.'[125] He found support in Lord Bingham's speech in *Rees v Darlington Memorial Hospital NSH Trust,*[126] to the effect that the 'award would not be, and would not be intended to be, compensatory. It would not be the product of calculation. But it would not be a nominal, let alone a derisory, award. It would afford some measure of recognition of the wrong done.' However, his lordship held that neither the award in *Rees,* nor the minority dicta in *Ashley* would justify a conclusion that there is a separate head of vindicatory damages in English law.[127] Lord Scott suggested in *Ashley* that the claim should proceed in order that

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119 *Id* at par 217.
120 *Id* at par 217.
121 *Id* at par 221. See also *Christie v Leachinsky* [1947] AC 573 (HL); *Holgate-Mohammed v Duke* [1984] AC 437 (HL) at 443.
122 *Lumba* n 39 above at par 222.
123 [2008] 1 NZLR 429 (SC).
124 [2010] 2 SCR 28 (SCC).
125 *Lumba* n 39 above at par 236.
126 [2004] 1 AC 309 par 8.
127 *Lumba* n 39 above at par 237.

vindicatory damages could be available,[128] having regard to the view of Lord Hope, that 'the function of the law is to enable rights to be vindicated and to provide remedies when duties have been breached.'[129] Lord Collins found no basis in law or policy for the creation of a head of vindicatory damages at common law, distinct from the existing compensatory or exemplary damages. Accordingly, Lord Collins agreed with Lord Dyson to restrict the remedy in this case to nominal damages.[130]

According to Lord Kerr, the primary function of damages has traditionally been to compensate the individual for the loss suffered. This is the compensatory damages.[131] In the second place, there is the concept of restitutionary damages. This has been recognised in circumstances where damages for the tort are measured according to the gain that the defendant has obtained or the value that the right infringed might have had to the claimant where, for instance, unknown to the claimant, the defendant has used the claimant's property. This category is of no concern in the present context. The third category, vindicatory damages, has been awarded where there has been a breach of constitutional rights.[132] For the same reasons given by Lord Dyson, Lord Kerr held that an award of exemplary damages was not warranted in the present case and that if there was any scope for the award of vindicatory damages where exemplary damages were not appropriate, it must be very limited indeed:[133]

> Such an award could only be justified where the declaration that a claimant's right has been infringed provides insufficiently emphatic recognition of the seriousness of the defendant's default. That situation does not arise here. The defendant's failures have been thoroughly examined and exposed. A finding that those failures have led to the false imprisonment of the appellants constitutes a fully adequate acknowledgement of the defendant's default. Since the appellants would have been lawfully detained if the published policy had been applied to them, I agree that no more than a *nominal* award of damages is appropriate in their cases.[134]

Since the President of the Supreme Court of the United Kingdom, dissented on the issue of liability (having held that the detentions of the appellants

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128 [2008] AC 962 (HL) par 148.
129 *Chester v Afshar* [2005] 1 AC 134 par 87.
130 *Lumba* n 39 above at par 237.
131 *Id* at par 254.
132 *Ibid.*
133 *Lumba* n 39 above at par 256.
134 *Id* at par 256.

were lawful), the heads of damage that should be awarded became superfluous. However, Lord Phillips expressed the view that had he held otherwise, he would have inclined to Lord Dyson's approach to the damages awardable and Lord Collins' conclusions on vindicatory damages.[135] On his part, Lord Brown – dissenting also on the issue of liability (Lord Rodger concurring) – held that since it was unanimously agreed that there was no prospect of the appellants being released, even if the published policies were applied to them, there was no breach of public law rights in their circumstances.[136] Lord Brown nonetheless observed that:

> The bulk of this judgment was written upon my understanding that the essential choice facing the court was between (a) no false imprisonment and (b) false imprisonment but nominal damages only. It now appears that some members of the court favour a third outcome: (c) false imprisonment with damages of perhaps £500 – £1,000 by way of a "vindicatory" or "conventional" award. Describe such an award how one will, to my mind it cannot sensibly be justified here. Is the court really to award substantial damages to those conceded to have been rightly detained? I have made clear my difficulties with a nominal award of damages. A substantial award would appear to me more objectionable still. Lord Hope[137] refers to *Attorney General of Trinidad and Tobago v Ramanoop*[138] – a constitutional challenge based upon "some quite appalling misbehaviour by a police officer"[139] – and calls here for "some recognition of the gravity of the breach of the fundamental right which resulted in false imprisonment." Properly critical though our judgments may be of the conduct of Home Office officials in these and similar cases, I find it quite impossible to recognise in them any breach (grave or otherwise) of the detainees' fundamental rights. The detainees, I can only repeat, were rightly detained and it would have been wrong to release them.[140]

CONCLUSION

When enunciated, the vindicatory approach was designed to emphasise the constitutional value attached to the right violated or sought to be protected. It was clearly meant to substitute or bypass the controversial common law terms – 'exemplary' or 'punitive' damages – and to remove their connotations from the constitutional damages regime. De la Bastide PCCJ explains this constitutional head of damage:

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135 *Id* at par 335.
136 *Id* at par 360.
137 *Id* at par 177.
138 [2006] 1 AC 328 (PC).
139 *Per* Lord Nicholls par 2.
140 *Lumba* n 39 above at par 361.

> 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. This objective may be achieved at least to some extent, by the award of compensatory damages to the person affected. But there are times when compensatory damages are an inadequate response to the breach. It is in those cases that an additional award of vindicatory damages should be made.[141]

This definition brings out the necessary intentions of the Privy Council's 'additional' and 'substantial' awards in *Ramanoop* and *Merson* respectively. What is clear from *Lumba* is that the Supreme Court of the United Kingdom, just as did the now defunct House of Lords, has continued to distance English law of damages from mainstream development in contemporary Commonwealth public law. Rather than bring clarity to the understanding of the vindicatory approach, the fragmented judgments in *Lumba* have compounded the confusion. Another problem is that the distinction between the vindicatory award as a head of damage and exemplary damages remains blurred having regard to the *Takitola* judgment. It is, therefore, correct to say that:

> [t]he question whether, and if so, how, vindicatory damages are distinguishable from exemplary damages, has provoked a good deal of discussion both by judges and academics. Initially, the tendency was to identify and highlight perceived differences between the two types of damages. For example, the point was made that while exemplary damages are punitive, vindicatory are not. It was also suggested that exemplary damages focus more on the offender while vindicatory damages focus more on the right infringed.[142]

This presentation further shares the sentiments of the President of the Caribbean Court of Justice when he further observed that the differences between the two types of damages are not all that clear-cut. 'They are differences more of emphasis than of substance', since there is a great deal of overlap between them. Furthermore, the Privy Council itself has accepted that both forms of damages have a good deal in common. The Privy Council judgment in *Takitola v Attorney General*[143] lends credence to this assertion. For instance, Lord Carswell said that 'the award of damages for breach of

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141 De la Bastide Address, n 39 above, par 3.

142 *Id* at par 8.

143 [2009] UKPC 12.

constitutional rights has much the same object as the common law award of exemplary damages.'[144] But, as de la Bastide PCCJ has warned, vindicatory damages should not be 'so hedged around with rules and restrictions that its usefulness as a tool for the enforcement of constitutionally protected rights and freedoms would be impaired'.[145] Notwithstanding the seeming vacillation of their Lordships in *Takitola*, it is submitted that the vindicatory award appears well established to protect constitutionally guaranteed rights and freedoms and exemplary damages remains confined to the common law, whether or not it vindicates the rule of law as claimed.[146]

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144 *Takitola* n 56 above at par 13.

145 De la Bastide Address n 39 above at par 9.

146 Siopis J of the Federal Court of Australia (*Fernando v Commonwealth of Australia (No 4)* [2010] FCA 1475 par 51), the House of Lords (*Kuddus v Chief Constable of Leicestershire Constabulary* [2002] 2 AC 122 (HL) par 79), the High Court of Australia (*New South Wales v Ibbett* (2006) 229 CLR 638 pars 46–47) and the English Court of Appeal (*Muuse v Secretary of State for the Home Department* [2009] EWHC 1886 QB) state that the rule of law embodies the principle that all persons are entitled to the equal protection of the law, and that the making of exemplary damages is a means whereby the court vindicates the rule of law. So where, as in *Fernando,* those exercising executive power actually infringed the rule of law, an award to vindicate the rule of law was called for. It was held in the principal case – *Fernando v Commonwealth* [2010] FCA 753 pars 41 and 42 – that in deciding to cancel the plaintiff's permanent residence visa without representations from him, the Acting Minister acted in conscious and contumelious disregard for the rights of the plaintiff to procedural fairness and his right not to have his liberty curtailed, save by lawful process. Further, having regard to the statutory context in which the breach occurred, the impugned conduct comprised an outrageous, arbitrary and high-handed exercise of executive power. Again, although the High Court of Australia had held that the considerations that enter into the assessment of exemplary damages are quite different from considerations that govern the assessment of compensatory damages, there is no necessary proportionality between the assessments of both categories (*XL Petroleum (NSW) Pty Ltd v Caltex Oil Pty Ltd* (1985) 155 CLR 448 at 471).