

# Beyond Dignity?

Grant Hammond\*

## Introduction

Popular culture contains significant insights into human dignity.<sup>1</sup> In an episode of *The Simpsons*, “A Milhouse Divided”,<sup>2</sup> the friends of that familiar family are playing a game of Pictionary. Kirk Van Houten draws a shapeless blob on the canvass and exclaims to his wife Luann, who sits looking confused, “It could not be more simple”. The timer runs out and he cries, “It’s dignity, gah! Don’t you even know dignity when you see it?” Luann, now thoroughly displeased, proceeds to attempt to “do better”. With the canvass turned away from the television audience she produces a drawing that remains a mystery – to us at least. Those sitting in the Simpsons’ lounge proclaim, “Oh that’s dignity alright” and “Worthy of Webster’s”. Likewise, the shape of “dignity” as a legal concept remains something of an enigma, difficult to pin down, but intuitively appealing.

Some have argued that, much like the introduction of a pool table in River City, an over-emphasis on human dignity in the law “spells trouble with a capital ‘T’”.<sup>3</sup> The argument runs that it will cause trouble in the law because it cannot be sufficiently spelled out, it will unduly shake things up, and it will disturb the legal status quo, for no real gain. That said, “human dignity” has “arrived” as a public ethical value, as a benchmark for assessing current public policy initiatives, as a legal norm, and as something which it is said should attract legal remedies, if there is a breach of a dignitary interest.

---

\* A Judge of the Court of Appeal of New Zealand. Sometime Professor of Law and Dean of Law at the University of Auckland. I am grateful to my clerk, Joel Harrison, for his research and editorial assistance.

<sup>1</sup> Christopher McCrudden for instance begins his working paper “Human Dignity” with Bob Dylan’s “Dignity” (1963): “So many roads, so much at stake / So many dead ends, I’m at the edge of the lake / Sometimes I wonder what it’s gonna take / To find dignity”. See online: Christopher McCrudden, “Human Dignity” (14 September 2007) Oxford Legal Studies Research Paper No. 10/2006 online: <<http://ssrn.com/abstract=899687>>.

<sup>2</sup> *The Simpsons*, “A Milhouse Divided” (Dir. Steven Moore, 1996).

<sup>3</sup> See David A. Hyman, “Does Technology Spell Trouble with a Capital ‘T’? Human Dignity and Public Policy” (2003) 27 Harv. J. L. & Pub. Pol’y 3 at 18. The reference is to Professor Harold Hill in *The Music Man* (1957) who warns that one thing (the introduction of the pool table) will lead to another: slothful pool playing will lead to smoking, drinking, gambling, and other unmentionable kinds of wrongs.

In this paper I begin by introducing how some persons have conceptualised human dignity, and then, briefly, how this has been incorporated into the law. With recognition of the broad dignity interest comes the most important question for this paper: how is the law to assess monetary compensation for a breach of this particular interest, if and when a court is empowered to award such a remedy? After noting that there are several “models” for assessing compensation, which are subsequently applied in a rather “pastiche” fashion in the case law, I canvass whether the utility of “human dignity” as a legal concept would be furthered by a focusing on the generation of specific remedies suitable to a particular context.

## **What Do We Mean by Human Dignity?**

### ***A. Human Dignity in Philosophy and Theology***

It is worth recalling briefly how some philosophers and religious leaders have seen the term “human dignity”.

Easily the most influential secular characterisation was that of Immanuel Kant. He was not the first to use the term, but added important new dimensions to the notion of human dignity. Kant is important because he seems to have been a (perhaps “the”) chief source of philosophic inspiration for 20<sup>th</sup> century efforts in international humanitarian law, and has also influenced domestic considerations of human dignity.

Kant defined dignity as “a quality of intrinsic, absolute value, above any price, and thus excluding any equivalence.”<sup>4</sup> Thus, on a Kantian view, human dignity is to be contrasted with something having a price. Of course something with a price is fungible: it can be substituted for or replaced by something else of equal value. “Value” here signifies the worth of the thing relative to that person’s desire. “Dignity”, by way of contrast to something with a price, cannot be replaced by anything else and it is not relative to anyone’s desire.<sup>5</sup>

---

<sup>4</sup> Izhak Englard, “Human Dignity: From Antiquity to Modern Israel’s Constitutional Framework” (2000) 21 *Cardozo L. Rev.* 1903 at 1918.

<sup>5</sup> Alan Gewirth, “Dignity as the Basis of Rights” in Michael J. Meyer & William A. Parent, eds., *The Constitution of Rights, Human Dignity and American Values* (Ithaca, N.Y.: Cornell University Press, 1992) 145-146.

In Kant's view, the claim to human dignity is grounded in human free will and thus in a capacity for moral choice. This capacity is exactly the same, in principle, in the most degraded or the most exalted of human beings. This gives rise to "autonomy", which is a central aspect of human dignity: the notion is that each person makes his own moral law for his own life.

This worldview led to Kant's celebrated "categorical imperative" or "formula of ends" which requires that people "[a]ct in such a way that you treat humanity, both in your person and in the person of each other individual, always at the same time as an end, never as a mere means".<sup>6</sup> Another way of putting this is that one must act in accord with law that one could conceive of as a universal obligation, or, yet again, on principles that each of us could endorse "as a legislator for mankind".<sup>7</sup>

A consequence of Kant's view is that human dignity should be seen not as some unitary idea, but rather as a series of inter-related attributes. These are significant for legal purposes: human dignity refers to a person's "worth", which all human beings have equally and essentially; it arises from self-conscious human autonomy and rationality; and finally, and most basically for legal purposes, it provides the basis for equal human rights.<sup>8</sup>

If we turn to theological considerations of the term, throughout his pontificate Pope John II was an indefatigable protagonist for the dignity and value of every human being. In a 1968 letter to the French theologian Henri de Lubac His Holiness wrote:

The evil of our times consists in the first place in a kind of degradation, indeed in a pulverisation of the fundamental uniqueness of each human person. This evil is even much more of the metaphysical order than of the moral order. To this disintegration, planned at times by atheistic ideologies,

---

<sup>6</sup> See Immanuel Kant, *Grounding for the Metaphysics of Morals*, 2d ed., Ellington trans. (Indianapolis: Hackett Pub Co., 1983) at 44 and Englard, *supra* note 4 at 1918-1920.

<sup>7</sup> Jeremy Rabkin, "What We Can Learn About Human Dignity From International Law" (2003) 27 Harv J. L. & Pub. Pol'y 145 at 147.

<sup>8</sup> Maxine D. Goodman, "Human Dignity in Supreme Court Constitutional Jurisprudence" (2006) 84 Neb. L. Rev. 740 at 749.

we must oppose, rather than sterile polemics, a kind of “recapitulation” of the inviolable mystery of the person ... .<sup>9</sup>

Pope John Paul II’s consideration of this issue appears to have rested on at least two pillars. First, the universality of one human nature that transcends the limits of history and culture. Hence human dignity is to be seen in an objective sense. But, secondly, it should also be seen in a subjective sense: the fact that human beings may employ their intellect and creatively constitute the individual self.

Another viewpoint of compelling interest has more recently been put forward by Jonathan Sacks, the Chief Rabbi of the United Hebrew Congregations of the Commonwealth.<sup>10</sup> Sacks reminds us that, according to the Book of Genesis, mankind was divided into different nations by the direct intervention of God. The confusion of tongues at the Tower of Babel is conceived of as punishment for the over-reaching ambition of those who seek to build a tower “whose top may reach unto Heaven”.<sup>11</sup> Sacks suggests that it was perhaps also an expression of divine mercy to prevent man from destroying humanity by ever again attempting an over-weaning project of that kind. And rather than leaving each and every individual to his own private language, God let some men understand each other so that there arose many distinct nations rather than a perpetual utter jumble of individuals. Thereby a world entirely composed of idiosyncratic beliefs or practices – a “wilderness of single instances” to quote Tennyson<sup>12</sup> – is avoided. But once difference is created, there arises a compelling need for respect for differences.

From the standpoint of legal philosophy, Roger Brownsword has recently argued for two conceptions of human dignity: dignity-as-liberty and dignity-as-constraint.<sup>13</sup> The first conception is really Kantian: dignity as a function of human autonomy, such as the freedom to make life choices and shape our own lives. In the second conception, dignity is not entirely autonomous: it can be compromised

---

<sup>9</sup> Cited in Rev. John J. Coughlin, “Pope John Paul II and the Dignity of the Human Being” (2003) 27 Harv. J. L. & Pub. Pol’y 65.

<sup>10</sup> Jonathan Sacks, *The Dignity of Difference: How to Avoid the Clash of Civilizations* (N.Y.: Continuum, 2002).

<sup>11</sup> Genesis 11:4.

<sup>12</sup> Lord Alfred Tennyson, *Aylmer’s Field* (1864).

<sup>13</sup> Roger Brownsword, “An Interest in Human Dignity as the Basis for Genomic Torts” (2003) 42 Washburn L. J. 413.

independently of human choice. Brownsword cites, for example, the French case where the Conseil d'Etat held that protection of human dignity justified a ban on the long-standing French sport of "dwarf-throwing", notwithstanding that the dwarfs consented, and made money from the sport.<sup>14</sup>

### ***B. Human Dignity in Legal Discourse***

The intellectual history of human dignity, let alone its migration into international and domestic law, has not yet been written.<sup>15</sup> One can see snatches of it here or there. By the mid 18<sup>th</sup> century the question of "dignity" amongst nations had emerged in law. Emerick de Vattel, at that time a leading authority on international law and who had influence with the American Founders, followed Locke in depicting each sovereign state as in a state of nature with all other states but also enjoying perfect equality and dignity with others.<sup>16</sup> Perhaps unsurprisingly the word dignity pops up at intervals in the Federalist Papers but the concern there seems to have been more with the dignity of office: the dignity of human authorities is a necessary precondition to the security of rights for ordinary human beings.<sup>17</sup> But in this can perhaps be seen the seeds of dignity as a collaborative endeavour, and not unrelated to the dignity of individuals.

The giant leap forward for mankind arose out of the horrors of fascism and Nazism during World War II. The overwhelming concern was to protect all men and women against humiliation by the state and ensuring their equal access to human rights. Simply put, what happened is that legal and political commentary turned to the term dignity to identify rights of personhood. As Mary Anne Glendon has said, human dignity is the "obvious candidate" for the Universal Declaration of Human Rights'<sup>18</sup> ultimate value: "Dignity enjoys pride of place in the Declaration: it is affirmed ahead of rights at the very beginning of the Preamble; it is accorded priority

---

<sup>14</sup> *Ville d'Aix-en-Provence*, 1996 Dalloz 177(Conseil d'Etat) req. nos. 143-578, see Brownsword, *ibid.* at 422-424.

<sup>15</sup> One of the most useful papers is that by McCrudden, *supra* note 1.

<sup>16</sup> Arthur Nussbaum, *A Concise History of the Law of Nations* (N.Y.: Macmillan, 1954) at 161-162.

<sup>17</sup> Rabkin, *supra* note 7 at 156.

<sup>18</sup> Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

again in Article 1; and it is woven into the text at three key points ...”.<sup>19</sup> Both the United Nations Charter and the Universal Declaration make this proclamation. The first line of the Declaration’s Preamble recognises “the inherent dignity and ... the equal and inalienable rights of all members of the human family”. Article 1 of the Declaration states: “All human beings are born free and equal in dignity and right. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.” Authoritative international legal texts then adopted this concept of human dignity, in connecting human dignity to the required provision of human rights.<sup>20</sup>

So regarded, human dignity provides each of us with equal moral standing under the law: “It furnishes each one of us, whether strong or weak, politically powerful, or disenfranchised, competent or retarded, and whatever our race, religion, sex or sexual orientation with an indefeasible moral standing to protest (or to have protested on our behalf) all insidious attempts to degrade our persons.”<sup>21</sup>

The common law has long protected dignity interests through the law of tort. The various torts which protect against assault, false imprisonment, malicious prosecution, intentional infliction of mental anguish, defamation, invasion of privacy, and alienation of affection all recognise in greater or lesser measure an affront to personality, and in some respects, dignity. But in modern regimes, the concept of “dignity” is increasingly invoked in the human rights context.

Some short illustrations from Canadian Supreme Court jurisprudence will suffice.<sup>22</sup> In *Re B.C. Motor Vehicles Act*<sup>23</sup> Justice Lamer seems to have had a view of

---

<sup>19</sup> Mary Ann Glendon, “Knowing the Universal Declaration of Human Rights” (1998) 73 *Notre Dame L. Rev.* 1153 at 1172.

<sup>20</sup> See McCrudden, *supra* note 1 at 12-15. See also, Gay Moon and Robin Allen Q.C., “Dignity Discourse in Discrimination Law: A Better Route to Equality?” [2006] *E.H.R.L.R.* 610 at 620-624.

<sup>21</sup> William A. Parent, “Constitutional Values and Human Dignity” in Michael J. Meyer & William A. Parent, eds., *The Constitution of Rights, Human Dignity and American Values* (Ithaca, N.Y: Cornell University Press, 1992) at 48.

<sup>22</sup> In New Zealand resort has been had to the concept of “human dignity” in litigation under the *New Zealand Bill of Rights Act, 1990* [*N.Z.B.O.R.A.*] and the *Human Rights Act, 1993* [*H.R.A.*], in tort, and in employment litigation: see the discussion at *infra* note 78, 83, 91 (*N.Z.B.O.R.A.*), and 63 onwards (employment and *H.R.A.*) with accompanying text. See also, in the New Zealand context, the remarks of Thomas J. dissenting in *Brooker v. Police*, [2007] 3 *N.Z.L.R.* 91 at para. 177-182.

<sup>23</sup> [1985] 2 *S.C.R.* 486; 24 *D.L.R.* (4th) 536; and see R. James Fyfe, “Dignity as Theory: Competing Conceptions of Human Dignity at the Supreme Court of Canada” (2007) 70 *Sask. L. Rev.* 1. See also

dignity-as-liberty. Subsequently, in *R v. Morgentaler*, Justice Wilson attached human dignity to a somewhat broader liberty conception, although confined to “a degree of personal autonomy *over important decisions* intimately affecting their private lives.”<sup>24</sup> Justice Wilson made quite extensive reference to the Kantian conception of liberty. More recently, in *R v. Malmo-Levine* the Supreme Court rejected an argument that lifestyle choices such as marijuana smoking go to the “core of what it means to enjoy individual dignity and independence”.<sup>25</sup> In its required balancing exercise under section 7 of the *Canadian Charter of Rights and Freedoms*<sup>26</sup> the Court was particularly impressed that the marijuana prohibition protected “[v]ulnerable groups ... including adolescents with a history of poor school performance, pregnant women and persons with pre-existing diseases”.<sup>27</sup> This approach is a pretty clear example of Roger Brownsword’s distinction between dignity-as-liberty and dignity-as-constraint. Interestingly, taking a Kantian line, Justice Arbour (dissenting) argued that criminal sanctions should not treat persons as mere means to broader social ends.<sup>28</sup>

### C. A Concern

At this point, it is appropriate to voice a problem which is of the greatest importance to the law of remedies. I have suggested elsewhere that, as a working approach to civil lawsuits, a “dualistic” thesis is preferable: first, identify a right and whether, in the particular context, it has been breached; secondly, then ask what remedy is appropriate, again in the particular context, for the breach of that right.<sup>29</sup>

---

Denise G. Réaume, “Indignities: Making a Place for Dignity in Modern Legal Thought” (2002) 28 Queen’s L.J. 61.

<sup>24</sup> [1988] 1 S.C.R. 30 at 171 [emphasis added].

<sup>25</sup> *R v. Malmo-Levine*, [2003] 3 S.C.R. 571 at para. 85 [*Malmo-Levine*], quoting *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844 at para. 66.

<sup>26</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11 [*Charter*].

<sup>27</sup> *Malmo-Levine*, *supra* note 25 at para. 135.

<sup>28</sup> *Ibid.* at para. 257-266, see especially at para. 258: “the state cannot prevent the general population, under threat of imprisonment, from engaging in conduct that is harmless to them, on the basis that other, more vulnerable persons may harm themselves if they engage in it, particularly if one accepts that imprisonment would be inappropriate for the targeted vulnerable groups.”

<sup>29</sup> Grant Hammond, “Rethinking Remedies: The Changing Conception of the Relationship Between Legal and Equitable Remedies” in Jeffrey Berryman, ed., *Remedies: Issues and Perspectives* (Ontario: Carwell, 1991) 87; and Grant Hammond, “The Place of Damages in the Scheme of Remedies” in P.D. Finn, ed., *Essays on Damages* (Sydney: Law Book Co. Ltd., 1992) 192. See also *Butler v. Countrywide Finance Ltd.*, [1993] 3 N.Z.L.R. 623 (H.C.).

That second step raises problems about the choice of remedy, and who is to make that choice. I have suggested that the sorts of factors which need to be considered include the relative severity of the claimed remedies on the parties; economic efficiency; the “weight” or moral value to be attached to the interests at stake; the effect of a given remedy on third parties or the public; the conduct of the parties; the difficulties of calculating loss; and the practicality of enforcement. And in more modern terms, there must still be some relationship between the right and the remedy. Just as one does not use a sledgehammer to crack a nut, one does not award a remedy in an overwhelming form with respect to a relatively weak and confined right, otherwise a broad proportionality principle is infringed.

That said, in some areas of the law there are still overtones of the older “monistic” thesis of the common law, which was essentially that where there were enough instances in which a court was prepared to interfere, with distinct relief, it could be said that something we could call a “right” had come into existence. The difficulty for remedies lawyers, however, is that embryonic or inadequately articulated rights give rise to very considerable remedial difficulties.

Quite where British Commonwealth courts should go from here in relation to cases involving “human dignity” leaves open real avenues for disagreement about the appropriate remedies and, particularly, monetary awards.

One rather drastic possibility is to say that a wrong turning has been taken in the law. That is, that the term dignity is a useful rallying point, but that it is not an effective functional concept for the highly reductionist world of the practising lawyer and the professional judge. In short, that it cannot be made to work effectively, and it should be left simply at the hortatory level.

Such an argument strains for too much. In the first place, as I have already suggested, from at least the mid 18<sup>th</sup> century the concept has been in place in legal systems throughout the world. It is now centre-stage. In a practical sense, it is hard to see things being unravelled now at the substantive level. Moreover, it is difficult to see how any such unravelling could realistically now gain public acceptance. “Dignity” has caught the public soul.

Alternatively, we can press on, and endeavour to advance a better articulation and understanding of what we are seeking to protect, and what the consequences are of that to the development of monetary and other remedies in this subject area.

## **Assessing Compensation**

### **A. Introduction**

In this paper I am not concerned with the admittedly difficult questions of remedial choice. Where there is a breach of a statutory provision or one of a constitutional or quasi-constitutional character (such as a Bill of Rights), the court may and will usually have the ability to employ declaratory, and perhaps even coercive relief. Common law courts today have wide remedial powers. For present purposes I assume the existence of a court with jurisdiction to grant and broadly determine compensatory relief.<sup>30</sup> Neither am I in this paper concerned with pecuniary or consequential losses, such as loss of wages or expenses for medical treatment and the like. One can safely assume that in a claim relating to a breach of a dignitary interest where there are losses of that kind they will be dealt with in much the same way as they are in any other lawsuit.<sup>31</sup> The hard question to be addressed is therefore, should there be anything in the way of “compensation,” or a monetary award, for breach of the dignitary interest; and if so, in the time-honoured phrase, how is it to be measured?

### **B. Alternatives**

In all national courts and international tribunals, the most striking feature of awards for non-pecuniary loss is the absence of developed principles for injury to dignitary interests. Things like pain and suffering, fright, nervousness, grief, anxiety,

---

<sup>30</sup> In New Zealand, courts have that power in *N.Z.B.O.R.A.* cases: *Simpson v. Attorney-General [Baigent's case]*, [1994] 3 N.Z.L.R. 667; (1994) 1 H.R.N.Z. 42 (C.A.).

<sup>31</sup> Thomas J. in *New Zealand Fasteners Stainless Ltd. v. Thwaites*, [2000] 2 N.Z.L.R. 565 at para. 40 (C.A.) [*Thwaite*], discussing compensation for an unjustified dismissal, was of the view that: “general damages are not an adjunct to monetary loss. Compensation for humiliation, loss of dignity and injured feelings is a head of damage in its own right. It should not be seen as some sort of *solatium* to be added to the ‘real’ compensation”.

and indignities are said to constitute “elements” of damages, but very little articulation is given to assessment of the quantum of damages. Of course such things are particularly personal, and therefore immensely difficult to measure. Yet common experience suggests that the reality of physical and emotional suffering is the very thing which has most concerned victims. The law fails claimants if it cannot do better in articulating the basis on which these harms are to be considered.

It is therefore worth briefly reviewing the broad possibilities of approach. I will do so under these heads: (1) no judicial compensation; (2) corrective justice; (3) economic models; (4) distributive justice; (5) vindication models; and (6) conventionalism.

### **1. No Judicially Awarded Compensation**

We could take the position that the calculation of awards for breaches of human dignity is simply “too difficult” and that we should therefore deny a monetary remedy, and instead place heavy reliance on declaratory and coercive remedies, perhaps coupled with a nominal *solatium*.

It would also be possible to have something of an “administrative” compensation system, rather like the criminal compensation systems to be found in some jurisdictions.<sup>32</sup> Such a system awards monies to identified classes of persons who are affected by criminal acts.

Matthew Palmer has made much of a concept of “constitutional realism” in his recent writings.<sup>33</sup> The argument is that the real interpreters of the *New Zealand Bill Of Rights Act, 1990 (N.Z.B.O.R.A.)* are state officials, not courts. One logical conclusion to that line of argument would be for a sort of state compensation system for breaches.

---

<sup>32</sup> See, e.g., the *Criminal Compensation Scheme, 2001* (UK), administered by the Criminal Injuries Compensation Authority: (8 October 2007) online: <[https://www.cica.gov.uk/pls/portal/docs/PAGE/INFORMATION\\_PAGES/INFO\\_BOX\\_BOTTOM\\_ABOUTCICA/SCHEME2001\\_1.PDF](https://www.cica.gov.uk/pls/portal/docs/PAGE/INFORMATION_PAGES/INFO_BOX_BOTTOM_ABOUTCICA/SCHEME2001_1.PDF)>. New Zealand does not have a specific criminal compensation system. Instead, compensation is available for personal injuries generally under the *Injury Prevention, Rehabilitation, and Compensation Act, 2001*, administered by the Accident Compensation Corporation.

There are two fundamental difficulties with that sort of possibility. One is that there appears to be a high degree of cynicism and disillusionment with both politicians and senior officials today. The disillusionment is not so much personal, but rather with what at one time would have been called (impersonally) “the affairs of state”, and the capacity of the state to produce sensible solutions to things like welfarism and prisons and breaches of rights.<sup>34</sup> In short, at best, a scheme for the award of remedies along administrative lines would be publicly viewed as just another milksop. The second point is one of deep principle. It will be agencies of the state who are under fire in a *N.Z.B.O.R.A.* case. Hence neither the state nor its agencies should be enabled to get too close to the issue of what to do about breaches of the *N.Z.B.O.R.A.*

## 2. Corrective Justice

The primary function of corrective (or remedial) justice is to rectify the wrong done to a victim. That is, the purpose is to “correct injustice”. The conceptual framework for compensatory justice goes back at least as far as Aristotle, who said:

What the judge aims at doing is to make the parties equal by the penalty he imposes, whereby he takes from the aggressor any gain he may have secured. The equal, then, is a mean between the more and the less. But gain and loss are each of them more or less in opposite ways, more good and less evil being gained, the more evil and the less good being lost. The equal, which we hold to be just, is now seen to be intermediate between them. Hence we conclude that corrective justice must be the mean between loss and gain. This explains why the disputants have recourse to a judge; for to go to a judge is to do justice ... . What the judge does is to restore equality.<sup>35</sup>

In modern terminology, a remedy of this variety is designed to place an aggrieved party in the same position as he or she would have been had no injury occurred.<sup>36</sup> It is the rights infringing wrongful conduct that is the source of a claim.

---

<sup>33</sup> Matthew S. R. Palmer, “Using Constitutional Realism to Identify the *Complete* Constitution: Lessons from an Unwritten Constitution” (2006) 54 Am. J. Comp. L. 587.

<sup>34</sup> See generally, David Burchell & Andrew Leigh, eds., *The Prince’s New Clothes: Why do Australians Dislike their Politicians?* (Sydney: UNSW Press, 2002), in particular Part I.

<sup>35</sup> Aristotle, *The Ethics of Aristotle: The Nichomachean Ethics*, J. A.K. Thomson trans. (Harmondsworth: Penguin Books, 1955) at 148-149.

<sup>36</sup> The corrective rationale has been accepted, in New Zealand, in the employment context (see *Waugh v. Commissioner of Police*, [2004] 1 E.R.N.Z. 450 at para. 135 (E.C.)) and under the *Human Rights Act, 1993* [*H.R.A.*] (see *Laursen v. Proceedings Commissioner*, (1998) 5 H.R.N.Z. 18 at 26 (H.C.))

To achieve this end by holding the wrongdoer responsible for providing the remedy serves a moral need.

Aristotle's ideal pertains to acts between individuals, not to unjust acts permitted by civil society against a group or a government against an individual. Nevertheless the approach does provide a basis for public law remedies. Violations of human rights are wrongs committed against the individual victim and against the social order; these may therefore be particularly serious wrongs because human rights are "maximally weighty moral claims".<sup>37</sup>

In functional terms, corrective justice will usually have to involve a monetary amount, in such a sum as will be equivalent to, or replace that which has been lost. But of course, corrective justice need not always involve a monetary remedy. For instance, restoration to an office by a coercive remedy may go some real distance to assuaging a loss of dignity.<sup>38</sup>

### 3. Economic Models

At root, law and economics theory holds that law should always be efficient. An activity that is profitable even after payment of all the costs it imposes on others is said to be efficient. The corrective justice model, which is concerned primarily with determining the consequences of a wrongful act, has real difficulties in the eyes of economists. As Richard Posner put it, "the Aristotelian concept of corrective justice

---

[*Laursen*] (Gallen A.C.J. accepting a comparison with tort). See also, *Anufrijeva v. Southwark London Borough Council*, [2004] Q.B. 1124 at para. 58-59: "The fundamental principle underlying the award of compensation is that the court should achieve what it describes as *restitutio in integrum*. The applicant should, in so far as this is possible, be placed in the same position as if his Convention rights had not been infringed." In contrast, see the discussion of Tipping J's judgment in *Taunoa & Ors v. Attorney-General*, [2007] N.Z.S.C. 70 [*Taunoa S.C.*], *infra* note 105. A further comparison could also be made to the remedy of exclusion of evidence for breach of the N.Z.B.O.R.A. in the criminal law: see *R. v. Anderson*, (2005) 21 C.R.N.Z. 393 at para. 43 (C.A.) and *R. v. Ram*, [2007] 3 N.Z.L.R. 322 at para. 74 ("The defendant is to be restored to a pre-breach position").

<sup>37</sup> L. Lomasky, "Compensation and the Bounds of Rights" in John W. Chapman, ed., *Compensatory Justice* (N.Y.: N.Y.U. Press, 1991) at 24.

<sup>38</sup> For instance, the New Zealand *Employment Relations Act, 2000*, s. 125 provides that reinstatement is to be the primary remedy for an unjustified dismissal.

does not tell us who is a wrongdoer or who has vested rights; all it tells us is that a wrongful injury is not excused by the moral superiority of the injurer to the victim.”<sup>39</sup>

The economic reasoning is based on at least three fundamental assumptions: first, that conditions of scarcity preclude the fulfilment of every human desire; second, that in a condition of scarcity most individuals behave rationally most of the time to maximise the achievement of their various goals and desires; and third, that individuals are the best, perhaps even the only, judges of their own preferences and therefore act in their self-interests. In the result, a cost-benefit analysis can predict whether a change in the law will lead to the desired response in those subject to it by analysing whether an increase in costs will discourage behaviour that is undesirable.

It follows that the amount of damage need not be compensatory in fact, if by that we mean some direct relationship between the damages paid and the victim’s loss and its magnitude. Rather, damages should be set at an appropriate level to deter the misconduct; a level that may be higher or lower than the actual losses of the victim. The basis of the award is therefore functionally deterrence, and it is assumed to work because rational acts outweigh the anticipated costs of transgressions against the anticipated benefits.

The neo-classical economic approach comes under fire (and very distinctly so in relation to something like human dignity) because it seemingly allows wrongdoers to continue their harmful acts so long as they pay for the “damage” they cause. Injuries become commensurable with money, and the victim becomes just another cost. This commodification is said to be inappropriate for human rights discourse and dignitary complaints precisely because rights violations are often incommensurable. Thus, it is said, when choices and values are incommensurable, a loss is sustained for which compensation is impossible. Money cannot replace a badly brutalised or lost loved one. As even Richard Posner put it, “Most people would not exchange their lives for anything less than an infinite sum of money if the exchange were to take place immediately”.<sup>40</sup> Consequently, as Youdof has observed, “society’s interest in human dignity is so great that the recovery may [have to] exceed any plausible

---

<sup>39</sup> Richard A. Posner, “The Concept of Corrective Justice in Recent Theories of Tort Law” (1981) 10 J. Legal Stud. 187 at 193.

<sup>40</sup> Richard A. Posner, *Economic Analysis of Law*, 4d ed (Boston: Little, Brown and Co., 1992) at 197.

estimate of economic injury”.<sup>41</sup> It follows that breach of a dignitary interest (particularly in a Bill of Rights case) then has to be treated as a form of “superliability”.<sup>42</sup>

#### 4. Distributive Justice

This concept refers to justice as expressed in the distribution of rights, privileges, duties, and liabilities amongst classes and members of the community. It is concerned with “real” justice.<sup>43</sup>

Distributive justice has been most debated in the field of equality and anti-discrimination law. Denise Réaume, for instance, has characterised equality rights as “a means of challenging the existing distribution of some benefit or burden”.<sup>44</sup> In contrast to “formal equality” – Aristotle’s maxim, “justice considers that persons who are equal should have assigned to them equal things”<sup>45</sup> – the concern of anti-discrimination theorists has been to give content to a goal of “substantive equality”. Moon and Allen put the matter bluntly: “Any deep consideration of human dignity leads to the realisation that the non-random distribution of opportunity and chance must be addressed.”<sup>46</sup>

So, for example, it could be argued that if we define a base level of “capabilities” that should be available to all persons,<sup>47</sup> a focus on substantive equality would tell us that because “individuals vary greatly in their needs for resources and in their abilities to convert resources into valuable functionings”<sup>48</sup> a focus on

<sup>41</sup> Mark G. Yudof, “Liability for Constitutional Torts and the Risk-Averse Public School Official” (1976) 49 S. Cal. L. Rev. 1322 at 1379-1380; see also Jeffrey Berryman, “Reconceptualizing Aggravated Damages: Recognizing the Dignitary Interest and Referential Loss” (2004) 41 San Diego L. Rev. 1521.

<sup>42</sup> See *Attorney-General v. Udompun*, [2005] 3 N.Z.L.R. 204; (2005) 7 H.R.N.Z. 811 at para. 214 (C.A.) per Hammond J [*Udompun* C.A. cited to N.Z.L.R.].

<sup>43</sup> Support for the proposition that the common law does, and should, operate this way can be found in the judgment of Lord Steyn in *McFarlane v. Tayside Health Board* [2000] 2 A.C. 59 at 82 (H.L.). See also Lord Steyn, “Perspectives of Corrective and Distributive Justice in Tort Law” (2002) 37 I.R. Jur. 1.

<sup>44</sup> Denise G. Réaume, “Discrimination and Dignity” (2003) 63 La. L. Rev. 645 at 647 [Réaume, “Discrimination and Dignity”].

<sup>45</sup> Quoted in Moon and Allen, *supra* note 20 at 634.

<sup>46</sup> *Ibid.* at 643.

<sup>47</sup> See *infra* note 110 and accompanying text for a discussion of Martha C. Nussbaum’s capabilities approach.

<sup>48</sup> Martha C. Nussbaum, “In Defense of Universal Values” (2000) 36 Idaho L. Rev. 379 at 409.

transforming social practices (through the re-distribution of resources) is required. Martha Nussbaum provides the following illustrations:

Nutritional needs vary with age, occupation, and sex. A pregnant or lactating woman needs more nutrients than a nonpregnant woman. A child needs more protein than an adult. A person whose limbs work will need few resources to be mobile, whereas a person with paralyzed limbs needs many more resources to achieve the same level of mobility.<sup>49</sup>

This raises difficult questions concerning the role of the judiciary.<sup>50</sup> The Supreme Court of Canada has said of the right to equality in the *Charter* that its purpose is to:

[P]revent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration. ... For the purpose of analysis under s. 15(1) of the *Charter* [equality before the law and non-discrimination] [h]uman dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances that do not relate to individual needs, capacities, or merits. It is enhanced by laws that are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society.<sup>51</sup>

Réaume has consequently argued that there are three forms of indignity to be addressed by equality law: the grounding of legislation in prejudice; the use of stereotype; and “exclusion from benefits or opportunities that are particularly significant because access to them constitutes part of the minimum conditions of a life with dignity.”<sup>52</sup> Dignity then, as a foundational and universal norm, is seen as the basis to overcome the unanswered questions posed by formal equality, “when are two persons in a comparable position and ... what should be the nature of the different

---

<sup>49</sup> *Ibid.* at 410.

<sup>50</sup> For instance, some have criticised the focus on dignity in anti-discrimination law on the basis that it transforms the right to non-discrimination into “the preserve of those whom the courts consider disadvantaged and in need of assistance”: see Huscroft, quoted in McCrudden, *supra* note 1 at 37.

<sup>51</sup> *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497; 170 D.L.R. (4th) 1 at para. 51-53.

<sup>52</sup> Réaume, “Discrimination and Dignity”, *supra* note 44 at 672.

treatment when persons are in different situations.”<sup>53</sup> This is so precisely because it is an established norm<sup>54</sup> recognisable by particular markers unique to the individual: (for example) the effect on autonomy or the capacity to fully participate in society as a result of the exclusion from certain benefits. Rather than focusing on the treatment of like cases, the analysis shifts to, as Moon and Allen have argued, “seeing the whole person for who and what they are.”<sup>55</sup>

## 5. Vindication Models

This approach to monetary awards proceeds on the basis that, particularly in Bill of Rights cases, there is a significant difference from purely private law remedies. There is still in some sense a “personal” element, but the important point is that there is also a significant public function involved in the award of a sum of money.<sup>56</sup> In the simplest terms, the award must (in addition to any truly compensatory aspect) be such as to “mark-out” the offending behaviour, and discourage future breaches.<sup>57</sup> This has some affinities with Youdof’s concern that inviolable rights should be seen and recognised and proclaimed as such. The eternal problem of distributive justice (whose justice?) is avoided, and the eternal problem of “compensation” (how to measure an intangible loss?) becomes less acute.

## 6. Conventionalism

I hope enough has been said to indicate that all the foregoing approaches have their own strengths and weaknesses. However, from a judicial point of view, courts

---

<sup>53</sup> Moon and Allen, *supra* note 20 at 634.

<sup>54</sup> Unlike, in itself, distributive justice: see Gay Moon, “From Equal Treatment to Appropriate Treatment: What Lessons can Canadian Equality Law on Dignity and on Reasonable Accommodation Teach the United Kingdom” [2006] E.H.R.L.R. 697. See also Moon and Allen *supra* note 20 at 634-635, quoting Lord Hoffmann in *Matthews v. Ministry of Defence*, [2003] 1 A.C. 1163 at para. 21: “distributive justice is a good thing. But it is not a fundamental human right.”

<sup>55</sup> Moon and Allen, *supra* note 20 at 635.

<sup>56</sup> A related point, outside the scope of this paper, concerns costs awards in *N.Z.B.O.R.A.* compensation cases. On this issue see *Taunoa S.C.*, *supra* note 36 at para. 334 per Tipping J, *Greenwood v. Attorney-General*, [2006] D.C.R. 586 at para. 50 (D.C.), *Udompun C.A.*, *supra* note 42 at para. 186 per Glazebrook J and at para. 219-225 per Hammond J.

<sup>57</sup> See, for example, *Taunoa S.C.*, *supra* note 36 at para. 253 per Blanchard J., quoting *Fose v. Minister of Safety and Security*, 1997 (3) S.A. 786 at para. 82 per Didcott J., “One of the ordinary meanings which ‘to vindicate’ bears, the aptest now so it seems to me, is ‘to defend against encroachment or interference’”. And at para. 259: “the award of public law damages is normally more to mark society’s

do not exist to resolve particular theories. They exist to determine particular controversies. Somewhat unsurprisingly, to assist this endeavour, in a number of areas of the law courts have resorted to “conventionalising” awards.<sup>58</sup>

For instance, in the area of personal injuries awards, in jurisdictions in which it is still possible to advance such claims, routinely one finds statements that “full compensation” in the *Livingstone v. Rawyards Coal Co*<sup>59</sup> sense is required. That is, the injured party is to be put in the position he or she would have been in if he or she had not sustained a wrong. But as Lord Diplock said in *Wright v. British Railways Board*:

[G]iven the inescapably artificial and conventional nature of the assessment of damages for non-economic loss and personal injury actions ... it is an important function of the Court of Appeal to lay down guidelines ... as to the quantum of damages appropriate to compensate for various types of commonly occurring injuries ... . The purpose of such guidelines is that they should be simple and easy to apply though broad enough to permit allowances to be made for special features of individual cases which make the deprivation caused to the particular plaintiff by the non-economic loss greater or less than in the general run of cases involving injuries of the same kind.<sup>60</sup>

In *Heil v. Rankin*<sup>61</sup> the England and Wales Court of Appeal set down guidelines (or tariffs) for damages for non-pecuniary loss in respect of personal injuries, and in so doing cited Justice Dickson in *Andrews v. Grand Toy Alberta Ltd*:

There is no medium of exchange for happiness. There is no market for expectation of life. The monetary evaluation of non-pecuniary loss is as a philosophical and policy exercise more than a legal or logical one. The award must be fair and reasonable, fairness being gauged by earlier decisions; but the award must also of necessity be arbitrary or conventional. No money can provide true restitution. Money can provide the proper care: this is the reason that I think the paramount concern of the Courts when awarding damages for personal injury should be to assure that there will be adequate future care.

---

disapproval of official conduct than it is to compensate for hurt to personal feelings.” See also the discussion of Tipping J’s judgment, *infra* note 102 and accompanying text.

<sup>58</sup> Of course, in relation to personal injuries, in a given jurisdiction, the damages may have been awarded by a jury (although subject to any residual discretion in an appellate court to interfere with the award).

<sup>59</sup> (1880) 5 App. Cas. 25 (H.L.).

<sup>60</sup> [1983] 2 A.C. 773 at 784 (H.L.).

<sup>61</sup> [2000] 3 All E.R. 138.

However, if the principle of paramountcy of care is accepted, then it follows that there is more room for the consideration of other policy factors in the assessment of damages for non-pecuniary losses. In particular, this is the area where the social burden of large awards deserves considerable weight. The sheer fact is that there is no objective yardstick for translating non-pecuniary losses, such as pain and suffering and loss of amenities, into monetary terms. This area is open to widely extravagant claims. It is in this area that awards in the United States have soared to dramatically high levels in recent years. Statistically, it is the area where the danger of excessive burden of expense is greatest.<sup>62</sup>

A current New Zealand illustration of courts evolving a relatively “conventionalised” set of awards is to be found under section 123(1)(c)(i) of the *Employment Relations Act, 2000*. This section provides that where an employee is found to have a justified personal grievance, several remedies are available, including compensation for “humiliation, loss of dignity, and injury to the personal feelings of the employee”.

The New Zealand Department of Labour maintains statistics on the spread of awards granted in the Employment Relations Authority and the Employment Court.<sup>63</sup> During the period 1 January 2002 – 30 June 2006 there were 777 awards in the ERA, and 70 awards in the appellate body from that tribunal, the Employment Court. Approximately 59.5% of the awards fell within the range of \$1,000 to \$6,000 under this head.<sup>64</sup> The Department’s statistics also highlight those cases where an award of \$15,000 or more has been made. There have been 36 cases of that kind, and a significant proportion of them (26 out of 36) appear to have resulted in awards of \$15,000 exactly. One could easily conclude that there is at least a rule-of-thumb or a conventionalised \$15,000 benchmark in relatively serious employment cases.

However, in *Telecom New Zealand Ltd v. Nutter*<sup>65</sup> the Court of Appeal said that its awards should not be taken as indications of a conventionalised basis for

---

<sup>62</sup> [1978] 2 S.C.R. 229; (1978) 83 D.L.R. (3d) 452 at 475-476 [cited to D.L.R.].

<sup>63</sup> Department of Labour, “Compensation and Cost Award Tables” (14 September 2007) online: Department of Labour <<http://www.ers.dol.govt.nz/publications/ccat.html>>.

<sup>64</sup> Drawing from the views of Chief Judge Goddard in particular, Gordon Anderson has suggested that this shows “a degree of tokenism”: G. Anderson, “Reimbursement and Compensation for Unjustified Dismissal” (2006) 12 N.Z.B.L.Q. 230 at 251.

<sup>65</sup> *Telecom New Zealand Ltd v. Nutter*, [2004] 1 E.R.N.Z. 315 [*Nutter*].

awards in this area.<sup>66</sup> The Court expressed its concern that the award of \$10,000 in that particular case seemed a “meagre award given the humiliating circumstances of, and grounds for, the dismissal and the consequent loss by Mr Nutter of what [seemed] to have been his social network within Telecom and elsewhere”.<sup>67</sup> The Court of Appeal also referred to *New Zealand Fasteners Stainless Ltd v. Thwaite* where Justice Thomas, lamenting the tendency towards parsimony, noted that as at 1999 “except where the employee has been a senior executive or senior manager, the award has invariably been \$10,000 or less”.<sup>68</sup>

Awards under the comparable provision of the *Human Rights Act, 1993*<sup>69</sup> appear to follow a similar process of constraint. According to statistics provided by the Ministry of Justice, out of a total of 44 awards made in the Human Rights Review Tribunal since 1994,<sup>70</sup> 30 have been less than \$5,000. On my own reading of the cases, the average award made appears to be a little under \$4,000.<sup>71</sup> Only two cases have exceeded \$10,000. There is one anomalous instance of an award of \$20,000 for a case involving serious sexual harassment and abuse of a 16 year old in the care and employment of the appellant.<sup>72</sup> The case has subsequently been labelled “the upper end of the scale”.<sup>73</sup> However, it is worth noting that Acting Chief Justice Gallen, in making the award, made the following points: first, that awards in this area “appear to be lower and out of step with those awarded in comparable jurisdictions”; secondly,

---

<sup>66</sup> Citing *Nutter, ibid.*, the Employment Court in *Staykov v Cap Gemini Ernst & Young Ltd* EC AK AC18/05 20 April 2005 per Travis J. increased the compensation awarded by the Authority from \$8,000 to \$30,000.

<sup>67</sup> *Nutter, supra* note 65 at para. 93.

<sup>68</sup> *Thwaite, supra* note 31 at para. 39. The award of \$50,000 in *Ogilvy & Mather (New Zealand) Ltd. v. Turner*, [1996] 1 N.Z.L.R. 641 (C.A.) has been described as “the highwater mark in cases of its kind” in *Carter Holt Harvey Ltd v. Pirie*, [1997] E.R.N.Z. 648 at 652 (C.A.), but there have nevertheless been several cases involving significant awards: see *Prins v. Tirohanga Group Ltd (formerly Tirohanga Rural Estates Ltd)*, [2006] 1 E.R.N.Z. 321 at para. 59 (E.C.) per Colgan C.J.

<sup>69</sup> *H.R.A.*, s. 92M provides that the Human Rights Review Tribunal may “award damages [for] ... humiliation, loss of dignity, and injury to the feelings of the complainant or, as the case may be, the aggrieved person” in relation, primarily, to findings of discrimination or sexual harassment. Awards for “humiliation, loss of dignity and injury to feelings” can also be made by the Human Rights Review Tribunal under the *Health and Disability Commissioner Act, 1994*, s. 57(1)(c) and the *Privacy Act, 1993*, s. 82.

<sup>70</sup> Taking into account multiple awards for multiple victims and excluding “global” awards, i.e. those containing unparticularised pecuniary losses.

<sup>71</sup> The limit for awards is now, as per the *H.R.A.*, s. 92Q, that set by the *District Courts Act, 1947*, namely \$200,000.

<sup>72</sup> *Laursen, supra* note 36.

<sup>73</sup> *Sahay & Anor v. Proceedings Commissioner*, (1999) 5 N.Z.E.L.C. 98,567 (H.C.).

and consequently, that a review was needed;<sup>74</sup> and thirdly, that the award of \$20,000 was necessarily affected by the previous ceiling of \$2,000, which applied to part of the offending (pre-1992), intimating an even higher award might have been appropriate.<sup>75</sup>

What this shows as an approach to intangible loss is a strong concern at the Bar and amongst trial judges to have what might be described as a “scale more certain” and a concern on the part of appellate courts to see that there is an appropriate range. However, there is the concomitant difficulty of keeping that range current, and not operating as an unduly artificial “ceiling”.

### **From Theory to Practice**

The rather obvious remedial difficulty in the case of human dignity is less one of principle, and rather more one of measurement. The various rationales for compensation are invoked almost simultaneously in various judgments, leaving the question of the ultimate basis for an award either unanswered or difficult to articulate.

One possibility open to a judge is quite specifically “judgment”. By that I do not mean simply “pick-a-figure”. Rather, I invoke the judge’s sense of what strikes him or her as “about right” in the legal landscape of his or her day, or as Karl Llewellyn once put it, for the judge to endeavour to use his or her “situation sense”.<sup>76</sup> This involves “looking around” the particular legal system to see what is done in other areas of the law for comparative yardsticks which will at least operate as a constraint on personal judicial idiosyncrasy, and which may give some guidance, whilst not under-valuing the importance of the dignitary interest.<sup>77</sup>

---

<sup>74</sup> This point has been made in several Human Rights Review Tribunal cases. See, for instance, *Ngapera v. Reddick*, [2004] N.Z.H.R.R.T. 5 at para. 18: “the time for a systematic survey, and, if necessary, recalibration of awards in the Tribunal is long overdue.”

<sup>75</sup> *Laurson*, *supra* note 36 at 26-28.

<sup>76</sup> See, e.g., Karl Llewellyn, *Common Law Tradition: Deciding Appeals* (Boston: Little, Brown and Co., 1960) 201.

<sup>77</sup> Gallen A.C.J. for instance in *Laurson*, *supra* note 36 at 29 stated that “awards of damages in cases [for breach of a dignity interest under the *H.R.A.*] should be reconsidered in the light of what has clearly become an established pattern overseas and in the Employment Court in this country.”

It may be useful to now outline decisions of courts in four actual cases which have had to determine monetary claims for breaches of dignity of one kind or another, to see how (if at all) these various approaches have been employed, and how they worked out.

**A. Manga v. Attorney-General<sup>78</sup>**

This case – and its aftermath – provides a useful example of a single person versus the state type of claim, raising questions as to how one values “liberty”, whether the “liberty” value is at the top of the dignitary tree, and the drive towards conventionalism.

Mr Manga was a serving prisoner who was detained in prison longer than he should have been, because a real mess was made of his release date. Mr Manga calculated that he should have been released on a particular date; the Crown (the Department of Corrections) said he was not due to be released for some time yet. Mr Manga protested the calculation through such channels as were open to him within the prison system. Still denied release, he then commenced High Court proceedings and, eventually, the Court of Appeal confirmed the unlawfulness of the detention.<sup>79</sup> Following an admission from the Crown that Mr Manga had been wrongly imprisoned for 252 days more than he should have been, Mr Manga sued for damages for wrongful imprisonment. He said that his detention (being unlawful) was also an arbitrary detention for the purposes of the *N.Z.B.O.R.A.*

In this case no economic loss was pleaded. Mr Manga had suffered from no physical injuries. The Crown conceded that he had been subject to shock, distress, and indignities. He had been given an appreciation (correctly, as it subsequently turned out) that he would be released at a certain time, but then there had been a sudden about-face so that he was “staring at another two-thirds of a year in prison, and the trauma associated with the endeavours to secure his liberty and the succession

---

<sup>78</sup> *Manga v. Attorney-General*, [2000] 2 N.Z.L.R. 65; (1999) 17 C.R.N.Z. 18; (1999) 5 H.R.N.Z. 177; [1999] N.Z.A.R. 506 (H.C.) [*Manga* H.C. cited to N.Z.L.R.].

<sup>79</sup> *Attorney-General v. Manga*, [1999] 1 N.Z.L.R. 129 (C.A.).

of rebuffs he had to endure”.<sup>80</sup> Mr Manga was married with children. He had thereby been deprived of their consortium for a lengthy period of time.

Mr Manga’s counsel argued that, at the level of fundamental jurisprudence, “liberty” should be seen in this case as being an absolute claim or a “trump”, as Ronald Dworkin would call it. As against that, the Crown drew attention to certain authorities (particularly from Canada) to the effect that liberty is “a conditional right”.<sup>81</sup> This had some distinct relevance to the instant case because Mr Manga was no stranger to the criminal law, and this was not his first period of incarceration.

As to tort damages for wrongful imprisonment, after a survey of the British Commonwealth authorities, I concluded, sitting in the High Court, that an appropriate figure for compensation to Mr Manga for his wrongful imprisonment, was \$60,000:

[95] I think I have to make my calculation transparent. I first have to identify a starting point. This is not the worst kind of case – imprisonment which was unlawful from the outset, and then a long period of confinement, under protest. Mr Manga was properly sent to jail. He served his appropriate sentence, and was then unlawfully kept for an inordinate period of time, under protest. The first class of case could conceivably attract general damages in excess of \$100,000 for the loss of liberty. The range for the class of cases I am here considering could, I think, be \$50,000 – \$100,000. I emphasise that in stating that range, I am addressing long “overruns” of imprisonment.

[96] I consider that a miserly approach should not be taken to this particular, and very serious, breach of a fundamental right. I adopt as a starting point a figure of \$90,000. I deduct therefrom one-third for the “reduced impact” of prison on Mr Manga because of his past exposure to such institutions, to yield a net figure of \$60,000.

I did not award exemplary damages because:

[97] This was a case of unlawful state action. But the actions of the Department of Corrections were not high-handed, or in distinct defiance of Mr Manga’s rights. The department took appropriate legal advice, and acted on it. That will not always be a defence. But here the legislation was unhappily drawn. In the Court of Appeal, Tipping J described it as like being in “Hampton Court maze” ... and a perusal of all the Court of Appeal judgments demonstrates the difficulties which even that Court encountered.

---

<sup>80</sup> *Manga* H.C., *supra* note 78 at para 53.

<sup>81</sup> See *LeBar v. The Queen*, [1987] 1 F.C. 585; (1987) 46 C.C.C. (3d) 103 (F.C.A.).

That was not, however, the end of the matter. Given that there was an admitted breach of the *N.Z.B.O.R.A.*, there was the additional issue as to whether the tortious award which had been handed down was in effect “sufficient” to also vindicate the *N.Z.B.O.R.A.* interest. After a discussion of the difference between private law and public law remedies, I suggested:

[126] 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.

In the result, the Court made a declaration that Mr Manga had been wrongfully imprisoned both in violation of his common-law rights and the *N.Z.B.O.R.A.*, but did not “top up” his tort damages any further.

As to judicial technique, *Manga* was quite orthodox: the Court looked around the British Commonwealth for such assistance as it could get in reaching a figure, illustrating the kind of “globalisation” of awards in cases of this kind which appears to be occurring. And so what happened after *Manga* is of some interest.

The Crown did not appeal against the judgment. There were other cases pending by prisoners who said their cases too had involved miscalculations of time to be served in prison. A scheme was prepared and was specifically approved by the New Zealand Cabinet in the administration of the day. It is a publicly available document. Where a person has been wrongly convicted and imprisoned, there are now specific Cabinet “guidelines” for compensation, as follows:

- 1 The calculation of compensation payments under the Cabinet criteria should be firmly in line with the approach taken by New Zealand courts in false imprisonment cases;

- 2 The starting figure for calculating non-pecuniary losses should be set at \$100,000 and this base figure is to be multiplied on a pro rata basis by the number of years spent in custody so that awards for non-pecuniary losses are proportional to the period of detention;
- 3 The figure obtained under the calculations referred to above should be then added to the figure representing the amount assessed for the presence/absence of the factors outlined in the Cabinet guidelines;
- 4 Only those cases with truly exceptional circumstances would attract general compensation that is greater than \$100,000, and that on average the relevant figure should even out around \$100,000;
- 5 A claimant's pecuniary losses should be calculated separately, and the resulting figure should then be added to the amount assessed for non-pecuniary loss, the sum of which represents the total compensation payable to a claimant.

Hence, the New Zealand Government accepted *Manga* as the guiding authority, but even more significantly, by doing so, in effect imposed a “cap” on what a claim should be: \$100,000 per year. This illustrates some things which may be thought to be debatable. First, it gives primacy to “first-in-best-dressed” in the way of cases (that is, the early cases determine very heavily where later cases go). Secondly, it raises a concern surrounding the quantification of awards by the Executive, i.e. the body liable for the breach of the *N.Z.B.O.R.A.*<sup>82</sup> Thirdly, the eventual conclusion to this litigation shows the practical desire for conventionalism in cases of this kind.

### **B. Udompun<sup>83</sup>**

This case is useful as one of a non-citizen versus the state for undignified treatment in an immigration context, and for comments concerning the “superliability” basis of *N.Z.B.O.R.A.* damages.

Mrs Udompun was a Thai national who was endeavouring to get into New Zealand. She had made a previous attempt at entry through Christchurch. She was turned around and returned to Singapore. A year later she made another attempt to enter at Auckland. She was referred on arrival to an Immigration Officer because she had previously been denied entry to New Zealand. The officer made a decision to

---

<sup>82</sup> See discussion *supra* note 32 and accompanying text.

<sup>83</sup> *Udompun C.A.*, *supra* note 42.

refuse entry. As the next available flight back to Thailand was not until two days later, she was detained under section 128 of the *Immigration Act, 1987*.

It was what happened during that detention which led to this proceeding. Because there were no appropriate facilities for detention at the airport she was taken to the Papakura Police Station. So, following a ten-hour flight from Bangkok, she had spent six and a half hours at Auckland Airport and was then detained in police cells for four hours. No food was offered to her until she reached the police station. The dignitary claim, which was of the greatest concern to her, was that she was suffering at the time from a heavy menstrual period which had started unexpectedly on the flight to New Zealand. She had no sanitary pads and no sanitary products were provided to her, nor were washing or bathing facilities made available before she was “deported”, despite her complaint. She would therefore have had a most unpleasant return flight to Thailand.

Mrs Udompun brought proceedings alleging breaches of the *N.Z.B.O.R.A.* She claimed that she had not been adequately informed of the reason for her detention, and had not been informed of her right to consult a lawyer, contrary to section 23(1) and section 27.<sup>84</sup> Further, Mrs Udompun argued that she had not been treated with respect for the inherent dignity of the person, contrary to section 23(5).<sup>85</sup>

A High Court Judge awarded her compensation of \$50,000, pre-judgment interest, and indemnity costs. The Crown appealed. On the appeal it was held there was no breach under section 23(1) or section 27 of the *N.Z.B.O.R.A.*, but that there was a breach of section 23(5). The Court of Appeal unanimously held that there was a breach of that provision arising out of a combination of all the circumstances (which exacerbated one another): the failure to provide Mrs Udompun with sanitary products having been informed of the need for them; the failure to provide her with an

---

<sup>84</sup> *N.Z.B.O.R.A.*, s. 23(1) relevantly provides:

- (1) Everyone who is arrested or who is detained under any enactment—
  - (a) Shall be informed at the time of the arrest or detention of the reason for it; and
  - (b) Shall have the right to consult and instruct a lawyer without delay and to be informed of that right; . . . .

*N.Z.B.O.R.A.*, s. 27 provides for the right to natural justice.

<sup>85</sup> *Ibid.* s. 23(5) provides that “Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the person.”

opportunity to change her clothes before being taken to the police station or to offer her a shower at the station; and the delay in providing food. Further, this occurred in circumstances where Mrs Udompun did not speak English and was without any means to communicate her needs in a dignified way.

On the compensation issue, four members of the Court of Appeal supported a reduction in Mrs Udompun’s damages from \$50,000 to \$4,000. I dissented on that issue<sup>86</sup> and would have awarded a greater sum than \$4,000. I further noted that there is a present pressing problem for the Bar, and in particular for those who advise the Crown, as to how damages are to be fixed in a case like this. I then suggested that “full and proper recognition must be accorded to the ‘public’ dimensions of the breach of rights ... [and that] the inherent dignity of human beings is a ‘merit’ good. It is not a tradeable private right. To the extent that compensation is awarded, that compensation should therefore, in principle, be of a ‘superliability’ character”.<sup>87</sup>

Mrs Udompun applied for leave to appeal to the Supreme Court. On 9 February 2006 that Court refused such leave.<sup>88</sup> One of the grounds on which leave was sought was that “the sum awarded was inadequate to vindicate the breach of the s 23(5) right”.<sup>89</sup> In New Zealand, the Supreme Court is required to give (relatively brief) reasons for declining leave. On the quantum point it said:

On quantum, we are not persuaded that it could arguably be said that the award was outside the range properly open to the Court on the authorities. Accordingly no question of general principle arises, nor did it arise as between the majority of the Court of Appeal and Hammond J in his dissenting judgment.<sup>90</sup>

### C. Taunoa<sup>91</sup>

<sup>86</sup> *Udompun C.A.*, *supra* note 42 at para. 204-218.

<sup>87</sup> *Ibid.* at para. 214.

<sup>88</sup> *Udompun v. Minister of Immigration*, (2006) 8 H.R.N.Z. 6; (2006) 18 P.R.N.Z. 163; [2006] 1 N.Z.L.R. 343 [*Udompun S.C.* cited to N.Z.L.R.].

<sup>89</sup> *Ibid.* at para. 6.

<sup>90</sup> *Ibid.* at para. 7.

<sup>91</sup> (2004) 7 H.R.N.Z. 379 [*Taunoa H.C.* (liability)] and (2004) 8 H.R.N.Z. 53 [*Taunoa H.C.* (relief)]; [2006] 2 N.Z.L.R. 457; (2005) 8 H.R.N.Z. 119 [*Taunoa C.A.* cited to N.Z.L.R.]; *Taunoa S.C.*, *supra* note 36.

The behaviour of certain prisoners in high security prisons in New Zealand had become of the greatest concern to the Department of Corrections. The Department decided to put in place a Behaviour Modification Regime (subsequently called the Behaviour Management Regime or “B.M.R.”). The regime was intended to assist in dealing with these most difficult of prisoners by providing a highly controlled environment involving the loss, or partial loss, of certain privileges normally enjoyed by maximum security prisoners. The environment could become less restrictive, depending on the prisoner’s behaviour.

Mr Taunoa and eight other prisoners were “treated” under this regime. These prisoners brought proceedings alleging breaches of, importantly, the domestic Penal Institutions legislation and the *N.Z.B.O.R.A.* Claims were also founded on the *International Covenant on Civil and Political Rights*<sup>92</sup> and the *Convention against Torture and Cruel, Inhuman, or Degrading Treatment or Punishment*.<sup>93</sup>

It is regrettable to have to report in a country such as New Zealand that the High Court found it necessary to uphold the prisoners’ claims both under the domestic penal legislation, and section 23(5) of the *N.Z.B.O.R.A.* It determined that *N.Z.B.O.R.A.* compensation should be paid to five of the prisoners. The claims related essentially to the treatment prisoners received under the B.M.R., and the subsequent dignitary invasions, which included long periods of solitary confinement in which prisoners were denied changes of clothes and bedding and made to clean toilets and wash basins with shared buckets of water and one communal cloth.

As to the substantive liability issue, the High Court, the Court of Appeal, and the Supreme Court all agreed there was a breach of section 23(5) of the *N.Z.B.O.R.A.* A much more contentious issue was whether section 9 had been infringed.<sup>94</sup> The High Court, Court of Appeal, and three Justices of the Supreme Court said it had not; the Chief Justice and, in relation to one appellant, the next most senior Justice of the

---

<sup>92</sup> G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976.

<sup>93</sup> G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987.

<sup>94</sup> *N.Z.B.O.R.A.*, s. 9 provides: “Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.”

Supreme Court said it had. The case is of considerable interest to human rights lawyers as to the proper approach to questions arising under section 9.

For present purpose, in the High Court the prisoners had sought \$1.35 million. In the result, five of them (including Mr Taunoa, who was a convicted murderer) were awarded, in total, \$130,000, with legal costs of \$358,000, by the High Court.

The Court of Appeal held that compared with the modest awards in other jurisdictions for claims for non-pecuniary loss, the High Court had awarded substantial sums. However, in awarding public law damages there was a need to vindicate the right that was violated. It was appropriate to determine the awards in line with cases where general damages had been awarded for non-pecuniary loss. The awards made by the High Court, though they could and perhaps should have been lower, were not wholly erroneous to the point of requiring intervention by the Court of Appeal. However, in respect of Mr Taunoa's cross-appeal, his award was increased by \$10,000 to correct an error in the calculation of his period of detention under the B.M.R.

One prisoner (Mr Tofts) was in a particularly difficult situation under the B.M.R. He suffered from distinct mental disabilities. The Court of Appeal accepted that the degrading, undignified, and inhumane treatment would have fallen even more harshly upon him. It unanimously said there had been a breach of section 9 of the *N.Z.B.O.R.A.* Nevertheless, with Justice Hammond dissenting on this point, the Court held the existing award to Mr Tofts was sufficient to vindicate the breaches of both section 9 and section 23(5) and compensate him for the impact of those breaches.

I held that the High Court's consideration of the damages awards was too narrow. Such damages, in my view, should have been characterised as stemming from either a new public law remedy, where the right breached was contained in a constitutional instrument, or as a constitutional tort akin to the private law approach taken in the United States of America. A third approach to damages was a "top-up" to the quantum, available when the wrongdoing was actionable both in tort and under

the *N.Z.B.O.R.A.*<sup>95</sup> In light of those considerations, this was an area where compensation should be tailored to the particular interest protected, without applying the old principles restrictively, nor putting their guidance aside too lightly. Once the section 9 threshold is crossed, I considered “the case takes on a different hue ... [the plaintiff is then] an exemplar of state wrongdoing. He comes much closer to a plaintiff who should, were they available, have exemplary damages”.<sup>96</sup>

There was no appeal or cross-appeal in the Supreme Court with respect to the award to Mr Tofts. The Crown did, however, appeal the awards to the other prisoners. In the result their compensation was almost halved by the Supreme Court. Mr Taunoa’s damages were reduced from \$65,000 to \$35,000, Mr Robinson’s from \$40,000 to \$20,000, and Mr Kidman’s from \$8,000 to \$4,000. The Chief Justice dissented, and would not have disturbed the Court of Appeal awards.

The Chief Justice noted that the principles upon which damages for breaches of rights are to be assessed “are not greatly developed in New Zealand or in comparable jurisdictions”.<sup>97</sup> Whilst she accepted that awards of damages should not be extravagant she considered the adjective “moderate” does not assist in this subject area.<sup>98</sup> Her Honour continued: “where a plaintiff has suffered injury through denial of a right, he is entitled to Bill of Rights Act compensation for that injury, which may include distress and injured feelings, as well as physical damage. ... Without adequate compensation, the breach of right is not vindicated”.<sup>99</sup>

Justice Tipping devoted a distinct section of his judgment to remedies.<sup>100</sup> He did not doubt that the task of the court was to award an effective remedy which was appropriate in proportion to the circumstances. As His Honour noted, that is at the

---

<sup>95</sup> Elements of this can be seen in the judgment of Blanchard J in *Taunoa S.C.*, *supra* note 36 at para. 258: “When, therefore, a court concludes that the plaintiff’s right as guaranteed by the Bill of Rights Act has been infringed and turns to the question of remedy, it 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, taking into account any non-Bill of Rights damages which are concurrently being awarded to the plaintiff. It is only if the court concludes that just satisfaction is not thereby being achieved that it should consider an award of Bill of Rights Act damages.”

<sup>96</sup> *Taunoa C.A.*, *supra* note 91 at para. 311.

<sup>97</sup> *Taunoa S.C.*, *supra* note 36 at para. 108.

<sup>98</sup> *Ibid.* at para. 109.

<sup>99</sup> *Ibid.*

highest level of generality.<sup>101</sup> The Judge traversed overseas authorities, in particular Privy Council authority, and then said:

The general tenor of the cases I have mentioned, and most of the other material I have read on the subject, gives at least presentational priority to vindication as opposed to compensation. My view, however, is that both aspects have an equal claim for attention in providing an effective remedy for a Bill of Rights breach. The dual purpose of Bill of Rights remedies is reflected in the fact that when there is a breach of human rights there are two victims. First there is an immediate victim. The interests of that victim require the court to consider what, if any, compensation is due. But, because the breach also tends to undermine the rule of law and societal norms, society as a whole becomes a victim too. Hence, the Court must also consider what is necessary by way of vindication in order to protect society's interests in the observance of fundamental rights and freedoms.<sup>102</sup>

Justice Tipping said that compensation for a breach of the *N.Z.B.O.R.A.* should not be limited to, or be confined by, what is available in analogous cases at common law or in equity.<sup>103</sup> Nevertheless, he continued, the approach which the common law and equity take in similar or parallel circumstances will be relevant and often significant when determining the scope of an appropriate award.

It is necessary to add a post-script to *Taunoa*. The claims were brought against a background that a number of prisoners had indicated the likelihood of their bringing similar claims. The issue became an intensely political one in New Zealand. When the claims reached a figure which is said to have been in the region of \$8 million, considerable pressure was placed on the administration of the day by victims' rights organisations and members of the public to legislate against "pay-outs" to prisoners, even where there were established breaches of the *N.Z.B.O.R.A.* The Government passed the *Prisoners' and Victims' Claims Act, 2005* after the decision of Justice Ronald Young in the High Court in *Taunoa*. The Act came into force on 3 June 2005. Essentially, it deflects any awards gained by prisoners into a victims' claims trust bank account and provides a procedure for the making and determination of *victims'* claims. The remedy of compensation for prisoners themselves is reserved

---

<sup>100</sup> *Ibid.* at para. 299-324.

<sup>101</sup> *Ibid.* at para. 300.

<sup>102</sup> *Ibid.* at para. 317 [footnotes omitted].

<sup>103</sup> *Ibid.* at para. 323.

for “exceptional cases” only;<sup>104</sup> instead the money awarded to them goes to their victims.

As a sitting Judge it is not appropriate for me to comment on the appropriateness of this legislation. Further, counsel for the successful prisoner claimants in *Taunoa* apparently intends advancing the matter to the United Nations, by way of complaint against the New Zealand Government. It will be observed however that the effect of the statute is that both the Court of Appeal and the Supreme Court were not precluded from deciding the compensation issues, but the sums awarded will likely not reach the hands of the prisoners who made successful claims. The significance of this for “vindication” theory, let alone “corrective justice”, will be readily apparent.

#### **D. The Aloeboetoe Case<sup>105</sup>**

This case is of interest as a “group claim”, both as to who can claim, and how a court should endeavour to “monetarise” the particular harms.

The Inter-American Commission of Human Rights brought a claim against the Government of Suriname in the Inter-American Court of Human Rights over an attack by soldiers on a group of unarmed Bushnegroes, all of whom were badly maltreated. Several of them were subsequently taken away and massacred. Mr Aloeboetoe was one such person.

The basis of the monetary claim by family members was psychological harm resulting from the deaths of loved ones, from being denied information as to the victims whereabouts, and from being unable to bury the bodies. The Commission also argued that family members had suffered a loss of position in their culture due to the death of each husband or father, because the traditional standing of each family was based in part on the contributions of working men to their parents and grandparents. Consequently, the dignity of the men reflected on the family as a

---

<sup>104</sup> *Prisoners' and Victims' Claims Act, 2005*, s. 3.

<sup>105</sup> *Aloeboetoe v Suriname*, (1991) 11 Inter-Am. Ct.H.R. (ser. C) No. 15 [*Aloeboetoe* (liability)] and *Aloeboetoe v Suriname (Reparations)*, (1994) 15 Inter-Am. Ct. H.R. (ser. C) [*Aloeboetoe* (remedies)].

whole. The Government agreed in principle to compensate for moral damages to the family members, but strongly objected to the request to compensate the tribe.

The Court found that the victims had suffered “moral damages” due to abuse by the armed band that deprived them of their liberty and later killed them:

The beatings received, the pain of knowing they were condemned to die for no reason whatsoever, the torture of having to dig their own graves are all part of the moral damages suffered by the victims. In addition, the person who did not die outright had to bear the pain of his wounds being infested by maggots and of seeing the bodies of his companions being devoured by vultures.<sup>106</sup>

The Court considered that this amount of “moral damages” should be “based upon the principles of equity” considering the special circumstances of the case.<sup>107</sup> In the result the Court awarded US\$29,070 for each of six families and US\$38,755 for the seventh. By the standards of that country, these were huge awards to impoverished village families.

However, the Court did not accept the claim on behalf of the tribe:

The Court believes that the racial motive put forward by the Commission has not been duly proved and finds the argument of the unique social structure of the Saramaka tribe to be without merit. The assumption that a domestic rule on territorial jurisdiction was transgressed in order to violate the right to life does not of itself establish the right to moral damages claimed on behalf of the tribe. The Saramakas could raise this alleged breach of public domestic law before the competent jurisdiction; however, they may not present it as a factor that justifies the payment of moral damages to the whole tribe.<sup>108</sup>

## Compensation Revisited

### A. *The High Road*

---

<sup>106</sup> *Aloeboetoe remedies, ibid.* at para. 51.

<sup>107</sup> *Ibid.* at para. 85-87.

<sup>108</sup> *Ibid.* at para. 84.

As I have suggested, one of the real difficulties in the way of corrective justice in relation to “dignitary wrongs”, is that compensation necessarily turns on what we are supposed to be compensating for. If we respond with phrases like, the “indignity” or the “humiliation” of being treated in the way that (say) Mrs Udompun was, we lack benchmarks against which remedial figures can be set, other than “other cases”. What is more, “other cases” might themselves simply represent the impressionistic behaviour of judges in those other cases: it could, at worst, be a case of the blind leading the blind. There is too the very real difficulty that “loss of dignity” does not usually stand alone; as in *Taunoa* there are usually a mix of closely related breaches of rights.

What this might suggest is a need to get deeper into the substantive content of human dignity, and to inquire whether there are features of our humanity which are lost or detracted from, if dignity is infringed, and to then address those factors distinctly. This in turn might suggest that we need to break out dignity into more manageable bites, which may attract different responses.<sup>109</sup> Dignity then becomes a starting point, not an end point, and one which is simply too large for necessary legal reductionism.

One recent work of philosophy which might lend itself to such an endeavour is Martha Nussbaum’s *Frontiers of Justice*.<sup>110</sup> Nussbaum is interested in “the capabilities approach”. Rather than a comprehensive moral scheme, she sees this as a political doctrine about basic entitlements – as a matter of practical philosophy, the specifying of some necessary conditions for a decently just society, in the form of a set of fundamental entitlements for all citizens. Failure to secure these to citizens is a particularly grave violation of basic justice since these entitlements are held to be implicit in the very notions of human dignity and a life that is worthy of human dignity. Nussbaum has attempted to devise a “theory” based on the idea of “capabilities” (which I have over-simplified), in contrast to the social contract tradition (as most recently developed by Rawls). In doing so, Nussbaum’s theory

---

<sup>109</sup> I repeat the observation I made in *Taunoa C.A.*, *supra* note 91 at para. 309: “I accept at once Beyleveld and Brownsword’s general observation that “the concept of human dignity . . . is something of a loose cannon open to abuse and misinterpretation” (“Human Dignity, Human Rights and Human Genetics” (1998) 61 MLR 661, p 662). In law, context is all and it is how something operates ‘on the ground’ which is so distinctly important.”

provides a basis for conceiving a path towards greater justice for all (which in her work also includes the treatment of non-human animals; that has been by far the most controversial aspect of her work).

Nussbaum suggests that the basic idea is that “with regard to each of these, we can argue, by imagining a life without the capability in question, that such a life is not a life worthy of human dignity”.<sup>111</sup> She freely acknowledges that the argument in each case is based on imagining a form of life, and is therefore intuitive and discursive. That said, one has to start somewhere, and the notion of a life which otherwise attracts certain “capabilities” having something “subtracted” from it is a useful starting point for legal analysis. At the very least it gives us checkpoints against which things can be assessed.

It is worth setting out in its entirety Nussbaum’s present provisional list of the central human capabilities:

1. *Life*. Being able to live to the end of a human life of normal length; not dying prematurely, or before one’s life is so reduced as to be not worth living.
2. *Bodily Health*. Being able to have good health, including reproductive health; to be adequately nourished; to have adequate shelter.
3. *Bodily Integrity*. Being able to move freely from place to place; to be secure against violent assault, including sexual assault and domestic violence; having opportunities for sexual satisfaction and for choice in matters of reproduction.
4. *Senses, Imagination, and Thought*. Being able to use the senses, to imagine, think, and reason – and to do these things in a “truly human” way, a way informed and cultivated by an adequate education, including, but by no means limited to, literacy and basic mathematical and scientific training. Being able to use imagination and thought in connection with experiencing and producing works and events of one’s own choice, religious, literary, musical, and so forth. Being able to use one’s mind in ways protected by guarantees of freedom of expression with respect to both political and artistic speech, and freedom of religious exercise. Being able to have pleasurable experiences and to avoid nonbeneficial pain.
5. *Emotions*. Being able to have attachments to things and people outside ourselves; to love those who love and care for us, to grieve at their absence; in general, to love, to grieve, to experience longing, gratitude, and justified anger. Not having one’s emotional development blighted by fear and anxiety. (Supporting this

---

<sup>110</sup> Martha C. Nussbaum, *Frontiers of Justice* (Cambridge, Massachusetts: Belknap Press, 2006).

<sup>111</sup> *Ibid.* at 78.

- capability means supporting forms of human association that can be shown to be crucial in their development.)
6. *Practical Reason.* Being able to form a conception of the good and to engage in critical reflection about the planning of one's life. (This entails protection for the liberty of conscience and religious observance.)
  7. *Affiliation.*
    - A. Being able to live with and toward others, to recognise and shown concern for other human beings, to engage in various forms of social interaction; to be able to imagine the situation of another. (Protecting this capability means protecting institutions that constitute and nourish such forms of affiliation, and also protecting the freedom of assembly and political speech.)
    - B. Having the social bases of self-respect and nonhumiliation; being able to be treated as a dignified being whose worth is equal to that of others. This entails provisions of nondiscrimination on the basis of race, sex, sexual orientation, ethnicity, caste, religion, national origin.
  8. *Other species.* Being able to live with concern for and in relation to animals, plants, and the world of nature.
  9. *Play.* Being able to laugh, to play, to enjoy recreational activities.
  10. *Control over One's Environment.*
    - A. *Political.* Being able to participate effectively in political choices that govern one's life; having the right of political participation, protections of free speech and association.
    - B. *Material.* Being able to hold property (both land and movable goods), and having property rights on an equal basis with others; having the right to seek employment on an equal basis with others; having the freedom from unwarranted search and seizure. In work, being able to work as a human being, exercising practical reason and entering into meaningful relationships of mutual recognition with other workers.<sup>112</sup>

It will be objected that for legal purposes a list something like the forgoing is hopelessly over-broad and stretches "dignity" beyond anything like its permissible bounds; that it makes "privacy" and *Roe v. Wade*<sup>113</sup> look like child's play. Nevertheless, merely to state the list is to demonstrate both the perils and the potential of a much closer analysis of human dignity and its place in the legal order. It also demonstrates the influence that remedies can have on the definition of the substantive right itself. This is because one of the chief problems attendant on such an endeavour is that, apart from breaking human dignity into constituent parts, there would then be the problem of the relative value to be attributed to each human capability.

---

<sup>112</sup> *Ibid.* at 76-78.

<sup>113</sup> 410 U.S. 113 (1973).

The only case law that I am aware of that comes anywhere near this approach is the work of the Inter-American Court of Human Rights, and its concept of *proyecto de vida*. In the seminal case of *Loayza Tamayo v. Peru*<sup>114</sup> that Court described this as the applicant's "reasonable expectations for the future". There was acceptance of the principle, and although no award was made in that case, the Court did seem to suggest that future victims and their representatives should present a methodology for calculating such damages. What seems to be in contemplation is that reasonable self-actualisation of the person, grounded in individuality, is compensable. As Dinah Shelton has said:

The damage to *proyecto de vida* threatens the ultimate goal of and value of life itself to the person, harming the core of the human being and affecting the spiritual sense of life. They invite a rethinking of all reparations in light of the integrity of the victim and the restoration of human dignity.<sup>115</sup>

### ***B. A Road More Frequently Travelled?***

Perhaps the greatest difficulty with any "high road" approach to monetary awards for breaches of dignity is precisely that it would require what amounts to a systems approach. A court would have to say, presumably in outline, what scheme it is pursuing before addressing the particular subset of the dignity norm for which compensation is being awarded, and how that is to be assessed.

This would involve an extraordinary endeavour. History might well be a guide in this respect. It seems clear enough that in the evolution of the United Nations Declaration of Human Rights the proponents of that document would themselves have preferred a broken-out scheme, if they could have achieved it.<sup>116</sup> The resort to the general notion of human dignity as a central norm was, consequently, quite deliberate, when the somewhat larger task could not be achieved. If that is so, then the magnitude of a task facing even a final appellate court, and even assuming the inclination to assay the task, would be enormous.

---

<sup>114</sup> *Loayza Tamayo v. Peru*, 33 Inter-Am.Ct. H.R. (ser. C) No. 42 and *Loayza Tamayo v. Peru (Reparations)*, (1998) 42 Inter-Am.Ct. H.R. (ser.C).

<sup>115</sup> Dinah Shelton, *Remedies in International Human Rights Law* (Oxford: Oxford University Press, 1999) at 231.

<sup>116</sup> See, e.g., McCrudden, *supra* note 1 at 11 and 39.

Yet courts have to start somewhere. It is true that the first decisions may have a disproportionate impact. Perhaps the most encouraging aspect has been the readiness of courts in the western world to look to each other's struggles to find measures of awards which are not necessarily jurisdictionally dependent. At the same time, cases have to be decided within a given jurisdiction, and within a wide variety of civil contexts, including sometimes Bill of Rights claims. But it is also highly relevant to look to those very same areas of the law, such as employment law, or accident compensation law, and, in so doing, map out a given legal landscape in a particular jurisdiction from which general features and some guidance may be derived.<sup>117</sup> The downside is that – as seems to have happened in New Zealand – courts and tribunals may be unduly cautious (particularly where there is no danger of over-inflated jury awards).

### *C. Fashioning a Package of Remedies*

Although this paper has examined the possible bases for assessing monetary remedies, it should be stated that there is a certain artificiality in considering this on a “stand-alone” basis. It is both appropriate and necessary to do so for analytical purposes, but it is not how most cases come before courts. Usually there is a claim for restoration of some kind, perhaps a requirement for an apology, recompense for out-of-pocket expenses, and “something” for hurt and humiliation. Stand-alone cases of compensation, like *Udompun*, are relatively unusual. This suggests that overlapping, multivariate remedies – where compensation is only a part, may well have a distinct role to play in this area of the law.

### **Conclusion: Beyond our Present Dignity**

“Human dignity” in its modernist legal sense began as a rallying cry and a compromise. It came into being in international documents post-World War II, migrated into modern Bill of Rights texts and other quasi-constitutional documents,

---

<sup>117</sup> Nussbaum's metaphor of “a spider sitting in the midst of its web, able to feel and respond to any tug in any part of complicated structure”, stressing “responsiveness and an attention to complexity”, may be apt: Martha C. Nussbaum, *The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy* (Cambridge: Cambridge University Press, 1986) at 69. See generally, Mary Anne Case, “Atalanta's Apples: The Values of Multiplicity” (2000) 19 Q.L.R. 243.

and has had increasing influence in domestic law. The phrase is a creative ambiguity. It came about somewhat like constitutional ambiguities such as “due process” and “unreasonable searches”, all of which were created “with brushes of comets’ hair”<sup>118</sup>. Such phrases are to be shaped and reshaped to meet the needs of evolving, pluralistic societies.

Unsurprisingly therefore, there are very real differences across, and for that matter within, particular domestic jurisdictions. As McCrudden has rightly said:

The meaning of dignity is ... highly context specific, varying significantly from jurisdiction to jurisdiction and (often) over time within particular jurisdictions. Indeed, instead, of providing a basis for principled decision making, dignity seems open to significant judicial manipulation, increasing rather than decreasing judicial discretion, and that is one of its significant attractions to both judges and litigators alike. Dignity often provides a convenient cover for the adoption of interpretations of human rights guarantees that appear to be intentionally, not just coincidentally, highly contingent on local circumstances.<sup>119</sup>

Some persons see human dignity as simply being another way to express the more general idea of human rights. Others see it not as a synonym for human rights, but as expressing a stand-alone value, unique in itself. In this thicker role, the functional role of dignity is primarily to help in the identification of a catalogue of specific rights or applications.<sup>120</sup> But as with (say) the general concept of negligence, the concept does not involve a closed list and generates more applications over time with better appreciation and articulation, in a context specific way.

Human dignity is not to be thought of as something contingent. It is now a well-established legal norm, to which courts are required to give effect. But this is an area of the law where the relationship between right and remedy is more than usually important. The law of remedies is therefore faced with the important, if difficult, burden of awarding remedies (including compensation) which will give proper

---

<sup>118</sup> The phrase is from R. Kipling, “When Earth’s Last Picture is Painted” in Kipling, *A Selection of His Stories and Poems*, J. Beecroft ed., Vol. 2 (1892) at 482. See also R. Grant Hammond, “Embedding Policy Statements in Statutes: A Comparative Perspective on the Genesis of a New Public Law Jurisprudence” (1982) 5 *Hastings Int’l & Comp. L. Rev.* 323 at 329.

<sup>119</sup> McCrudden, *supra* note 1 at 21.

<sup>120</sup> *Ibid.* at 23.

context to the norm itself. In short, to return to *The Simpsons*, now that we have begun to see what dignity looks like, what are we going to do with it?

The answer suggested by this paper, at least from a remedies standpoint, is that the supposed moral and functional superiority of universalistic approaches over particularistic approaches is likely wrong-headed. Judges may well have to get their hands dirty, by hard graft: either we overtly break human dignity down into more redressible components and address them systematically; or we will have to build up dignity attributes and awards slowly and incrementally, in the time-honoured fashion of the common law. Either way, as Sacks put it, “The universality of moral concern is not something we learn by being universal but by being particular.”<sup>121</sup>

---

<sup>121</sup> Sacks, *supra* note 10 at 58.