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Public Law Values in the Law of Damages: Recent Developments in the English Common Law

Area of Investigation and Methodology

The English law of damages for civil wrongs has been extremely resilient to any influence exerted by public law interests and principles. A similar level of caution can be observed as regards those remedial awards which cannot be established using objective measures. Bar a few exceptions,[1] the quantification of the judicial awards is based upon either a financial loss of the victim or a financial gain of the wrongdoer. In the last two decades, however, new categories of damages have increasingly challenged this well-established judicial approach by introducing vindication as a central aim of the law of damages. Public law values have played a major role in stimulating these developments. The jurisprudence of the Judicial Committee of the Privy Council, an institution dealing as a supreme court with appeals from those few Commonwealth countries which still accept its jurisdiction, has been particularly active in this context. Furthermore, the Human Rights Act 1998, enacted mostly in October 2000, introduced a novel perspective which has questioned the traditional function of the law of damages.

I shall open my analysis locating the damages with a vindicatory aim on the map of the law of damages. For this purpose, I shall briefly discuss the so-called event-based classification. I shall then present two new categories of damages: one category is awarded following the violation of constitutional norms; the other category is linked to a cause of action which originates in the violation of human rights. The third part will be dedicated to a scrutiny of the first Supreme Court decision on vindicatory damages. Finally, I shall provide a few remarks by way of conclusion.

The Map of the Law of Damages

The science of the classification of legal institutions, or legal taxonomy, has in England one universally recognised father: Peter Birks, sometime Regius Professor of Civil Law at Oxford University. As Birks was an expert in Roman law, the latter features prominently in his legal analysis: he used Roman law structures to understand modern English law.[2] In so doing, he developed a map of the civil rights which has attracted a lot of approval and criticism

[1] The main one being exemplary damages, which will be considered later on. Furthermore, the judiciary has recently awarded a conventional sum, independent of the victim's loss, to stress the importance of certain rights. See *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52.

[2] See F. Giglio, 'Gain-Related Recovery' (2008) 28 OJLS 501-521.

alike. There is no denying that this classification has been extremely influential.

In Birks's event-based classification,[3] the rights which can be realised in court are labelled 'legal events'. The nominated categories of legal events are consent, wrongs, and unjust enrichment. The category 'consent' comprises only contracts: a contractual obligation is created through the agreement of the parties and adequate consideration. 'Wrongs' is a category with no direct equivalent in civilian systems, which do not distinguish, as English law does, between strict law and equity. English law has four categories of wrongs: torts, equitable wrongs, breach of contract, and statutory wrongs. To put it simply, a wrong is a violation of a legal duty, be it at law or in equity. Unjust enrichment is a brand new area of the law of obligations which has been recognised by English law only quite recently.[4] Birks rounded off the nominated categories with a default category, 'other causes'. It comprises all those legal events which are too few to deserve an independent category – let me mention by way of example necessitous intervention, or *negotiorum gestio*.

The individuation of the legal events is not a purely academic exercise. Each event elicits at least one legal response which is characterised by a specific goal. Birks identifies compensation, restitution, punishment, and other responses. Similarly to the events, beyond the nominated responses there is a residual category for all those responses which are too rare to warrant an independent category. A legal event can trigger more than one legal response. For example, the event 'wrong' can be remedied through compensation, punishment, and restitution. Today, we shall ask ourselves whether vindication is compatible with the existing goals of the law of damages and deserves to be treated as an independent, nominated category.

Damages for the Violation of Constitutional Rights

Our investigation starts from the constitution of Trinidad and Tobago, the first Chapter of which contains norms on the protection of fundamental human rights and freedoms. S. 14 concerns the enforcement of the constitutional rights. Subsection 1 states:

'(1) For the removal of doubts it is hereby declared that if any person alleges that any of the provisions of this chapter has been, is being, or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress by way of originating motion.'

This provision establishes that 'redress' is available for the violation of constitutional norms. It is not specified how the violation should be

[3] P. Birks, *Unjust Enrichment* (2nd edn, OUP, Oxford, 2005) 21-28.
[4] *Lipkin Gorman v. Karpnale* [1991] 2 AC 548 (HL).

concretely redressed. Yet, the norm clarifies that this form of redress is separated from any other available remedy. This means that the redress for the violation of a constitutional right should not be confused with the damages which are normally awarded for the wrong as such, independently of its constitutional connotation. How this norm works in practice is shown by the seminal case of *Attorney General of Trinidad and Tobago v. Ramanoop*.[5]

The respondent had been unlawfully arrested and detained by a police officer. Whilst under arrest, he was physically assaulted and tortured. These facts were not disputed at the trial started by the respondent's claim for the violation of his constitutional rights. The Privy Council considered the nature of the redress allowed by the Trinidad and Tobago constitution. Reading the judgment of their Lordships, Lord Nicholls distinguished the constitutional relief from the normal remedies for civil wrongs. Whereas the relevant constitutional provision is quite clear on this point, the constitution is silent as regards the aim of the remedy and the quantification of the concrete measure. The Privy Council held that civil and constitutional damages differed in the particular function exerted by the latter response. For their Lordships, rather than to compensate or punish, the legal response granted by the court should aim to vindicate the constitutional right affected.

Yet, vindication can be obtained in different ways, as the Privy Council recognised. Some of the avenues through which vindication can be realised are not necessarily based upon financial redress. Thus, even a judicial declaration that a wrong has been caused to the victim might, under certain circumstances, vindicate the constitutional right. Furthermore, it is difficult to keep separated the constitutional redress from the normal civil awards. A passage of the judgment clarifies all these issues:

'An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches. All these elements have a place in this additional award. "Redress" in section 14 is apt to encompass such an award if the court considers it is required having regard to all the circumstances. Although such an award, where called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object. Accordingly, the expressions "punitive damages" or "exemplary damages" are better avoided as descriptions of this type of additional award.'[6]

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[5] *A-G of Trinidad and Tobago v. Ramanoop* [2005] UKPC 1.
[6] Ibid para 19.

Lord Nicholls seems to say that there is an interaction between the remedies triggered by the violation of any right – independently of its colour – and the remedy available when this right is constitutionally guaranteed: the normal responses may be sufficient to vindicate the right; yet, in some circumstances a further, different form of redress may be necessary. Hence, we have two possible situations concerning the vindication of constitutional rights: in one scenario, the normal award suffices; in the other scenario, the normal award must be supported by an additional award. Some of the criteria to be considered for the award of damages under the second scenario are the sense of public outrage, the gravity of the breach, and the deterrence of further breaches. The same factors justify an award of exemplary damages. Exemplary damages aim to punish the wrongdoer. They have been considered quite unfavourably by English courts, which have restricted their application to few categories of cases.[7] As well-known, one of the main objections to exemplary damages for civil wrongs is that punishment is a public law, *rectius* criminal law, concept and requires a set of guarantees for the protection of the defendant which the common law does not offer.[8] Lord Nicholls is aware of the risk that constitutional damages end up being treated as a variation of exemplary damages. He tries to avert this risk of confusion by suggesting that the constitutional redress should not be called 'exemplary damages', for the constitutional relief would not punish the defendant, but vindicate the right. Yet, the difference is so subtle that some authors have concluded that these damages are punitive in all aspects but their name.[9]

In *Ramanoop*, the court qualified the constitutional relief as a 'parallel remedy',[10] which, as we have seen, has no punitive goals and may overlap to a different extent – even entirely – with compensation. What qualifies this response is a vindicatory aim. It follows that, whenever the normal remedy which is activated by the violation of a right does not provide what for the court is a substantial level of vindication, the judges will need to look elsewhere to achieve this goal. S. 41(1) of the Trinidad and Tobago Constitution provides this additional remedy.

In *Alphie Subiah v. Attorney General for Trinidad and Tobago*,[11] the Privy Council had the opportunity to reconsider constitutional damages. As in *Ramanoop*, the claimant brought an action for the violation of his constitutional rights

[7] Cf. the seminal speech of Lord Devlin in *Rookes v. Barnard (No 1)* [1964] AC 1129 (HL), with whom the other Lordships agreed.
[8] See Lord Devlin in *Rookes* (previous note) 1221: 'The object of exemplary damages is to punish and deter. It may well be thought that this confuses the civil and criminal functions of the law'.
[9] A. Burrows, 'Damages and Rights', proceedings of the Oxford conference Obligation V 'Rights and Private Law' Oxford, 14-16 July 2010, in the course of publication.
[10] *Ramanoop* (n 5) para 25.
[11] *Alphie Subiah v. A-G for Trinidad and Tobago* [2008] UKPC 47.

following the abuse of power on the part of police officers. The judgment was delivered by Lord Bingham. His Lordship said:

'Such redress may, in some cases, be afforded by public judicial recognition of the constitutional right and its violation. But ordinarily, and certainly in cases such as the present …, constitutional redress will include an award of damages to compensate the victim… Having identified an appropriate sum (if any) to be awarded as compensation, the court must then ask itself whether an award of that sum affords the victim adequate redress or whether an additional award should be made to vindicate the victim's constitutional right'.[12]

The nature of these constitutional damages is difficult to grasp. They may coincide with compensation, but only if the compensatory award vindicates the right. It is unclear why compensation should suffice in some cases and in other cases it should not. The criteria presented by Lord Nicholls in *Ramanoop* do little to shed light on this point. Be that as it may, when constitutional damages do not coincide with compensation, the measure of damages cannot be established on the basis of an objective set of requisites. The court will award what it deems just to achieve vindication in line with judicial discretion. Indeed, Lord Bingham observed:

''The quantum of a vindicatory addition to compensatory (including aggravated) damages cannot be calculated with scientific accuracy'.[13]

In other words, there are no rules to establish *a priori* the level of damages – just as it is impossible to establish *a priori* whether compensation will be adequate or not.

Damages for the Violation of Human Rights

We leave the analysis of constitutional damages to examine a different, but related situation. In 2000, most of the Human Rights Act 1998 (HRA) came into force. There was little doubt, at the time, that this statute would have exerted a profound impact on the common law. Indeed, it became clear quite soon that the public law values embedded in the 1998 Act interacted with the private law on different levels, and that the law of damages was an area in which this interaction was particularly evident.

In *Regina (Greenfield) v. Secretary of State for the Home Department*,[14] the appellant brought a claim for damages alleging the violation of his human rights under the HRA. He had been found guilty of a drug offence whilst in prison. The standard procedure required a hearing without representation before a deputy controller. Their Lordships held that, to be able to award

[12] *Subiah* (previous note) para 11.
[13] *Subiah* (n 11) para 13.
[14] *R (Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14.

damages under the HRA for the violation of art. 6 European Convention on Human Rights (ECHR), it was necessary to consider the jurisprudence of the Strasbourg Court. Hence, the Law Lords started their analysis from the Convention. Art. 41 ECHR states:

'If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.'

The concept of 'just satisfaction' is seminal for the protection of the human rights under the Convention. Delivering the leading opinion, Lord Bingham said:

'The routine treatment of a finding of violation as, in itself, just satisfaction for the violation found reflects the point already made that the focus of the Convention is on the protection of human rights and not the award of compensation… Where article 6 is found to have been breached, the outcome will often be that a decision is quashed and a retrial ordered, which will vindicate the victim's Convention right.'[15]

In human rights law, therefore, we encounter the same idea which we have already examined under constitutional law: the aim of the award is not to punish or compensate, but to vindicate the violation of a right. In the context of this analysis, Lord Bingham's *obiter dictum* on the nature of the HRA is particularly relevant:

'the 1998 Act is not a tort statute. Its objects are different and broader. Even in a case where a finding of violation is not judged to afford the applicant just satisfaction, such a finding will be an important part of his remedy and an important vindication of the right he has asserted.'[16]

This passage contains a precious piece of information. The Law Lord tells us that the cause of action which originates in the 1998 Act is not tortious. Hence, the statute does not activate tort law tools to achieve the just satisfaction which is the central aim of the statutory response. The fact that tort law is irrelevant in this context does not imply, of itself, that no remedy is available when human rights are violated. It simply means that this remedy cannot be tortious. We have already considered the concept of 'wrong' as the violation of a legal duty. As has already been explained, there are several categories of wrongs, including statutory wrongs. The violation of a human right is a statutory wrong. Andrew Burrows describes aptly this violation as an example of a public law, non-tortious wrong.[17]

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[15] *Greenfield* (previous note) para 9.
[16] *Greenfield* (n 14) para 19 (Lord Bingham).
[17] Burrows (n 9).

The separation of tort and HRA cause of action, which is actively pursued by the courts, has practical consequences because it creates two independent systems of remedies, as *Van Colle v. Chief Constable of Hertfordshire Police* shows.[18] Death threats had been reported by the victim to the police, which failed to act. When the victim eventually was killed, his relatives commenced proceedings on the victim's behalf and in their own name under the HRA. In a conjoined appeal, *Smith v. Chief Constable of Sussex Police*, the victim had reported the threats issued by his former partner to the police, which again took no action. The claimant, severely injured, brought a claim against the Chief Constable. Unlike *Van Colle*, in *Smith* the action was based on tort alone, not on the HRA. Lord Bingham highlighted a major issue concerning the relationship between public law values and the application of the common law:

'I would for my part accept that a court should not lightly find that a public authority has violated one of an individual's fundamental rights or freedoms, thereby ruling, as such a finding necessarily does, that the United Kingdom has violated an important international convention.'[19]

This is indeed a central point, to which the seminal case of *Osman v. United Kingdom* [20] had already drawn attention. To acknowledge that English tort law does not offer remedies which are in line with those required by the European Convention on Human Rights is tantamount to recognise that English law has no adequate remedies for the protection of human rights. This is an outcome which no English court would be ready to accept without very strong evidence. And in fact the court did not deny the necessity of those preventative measures to save human lives which were required by the Strasbourg court in *Osman*. Rather, to avoid holding the police liable the court circumvented the obstacle laid down by the judges in *Osman* by stating that, in *Van Colle*, the police could not have anticipated that the threats were real and immediate.

This shortcut could not be taken by their Lordships in the conjoined appeal, *Smith*, because the claim was based upon tort law and there was a long line of cases which established that public authorities could not be held liable in tort for acts and omissions linked to their statutory function. The technical tool to deny liability is the finding that no duty of care is due by the public authority, here the police, to the victim. On the other hand, this doctrine was countered by counsel for the victim in *Smith* with the argument that, as tort law on this point was incompatible with legislation on human rights, the public policy consideration which suggested the protection of the public authorities should

[18] *Van Colle v. Chief Constable of Hertfordshire Police* [2008] UKHL 50.
[19] *Van Colle* (previous note) para 30.
[20] *Osman v. UK* (1998) 29 EHRR 245.

be abandoned; otherwise, the same set of facts would lead to two different results under the HRA and in tort law.

That this last point had considerable force emerges in Lord Bingham's dissenting opinion, in which his Lordship made clear that, had the pleaded facts been proven, he would have held the chief constable liable in tort. But the majority of the Law Lords rejected any integration of – public law – human rights and – private law – tort liability. Lord Hope said:

'In cases brought under sections 6 and 7 of the Human Rights Act 1998 where the article 2 positive obligation is said to have been breached by a public authority, the relevant principle is that described by the Strasbourg court in *Osman*. In my opinion the common law, with its own system of limitation periods and remedies, should be allowed to stand on its own feet side by side with the alternative remedy. Indeed the case for preserving it may be thought to be supported by the fact that any perceived shortfall in the way that it deals with cases that fall within the threshold for the application of the *Osman* case can now be dealt with in domestic law under the 1998 Act.'[21]

Lord Brown agreed with Lord Bingham in *Greenfield* that:

'Convention claims have very different objectives from civil actions. Where civil actions are designed essentially to compensate claimants for their losses, Convention claims are intended rather to uphold minimum human rights standards and to vindicate those rights.'[22]

Whilst commenting on this last passage, Mary Arden observed that *Ashley v. Chief Constable of Sussex Police*[23] shows that vindication can also be a function of the law of tort.[24] Yet, it will be seen presently that, in *Ashley*, only one voice was raised in favour of vindication as an acceptable primary aim of tort law. On the other hand, after *Lumba*, which will be considered presently, the argument can be made that vindication is now to be regarded as a possible goal within the law of damages, whereas it remains doubtful whether it is a primary, or rather only a secondary goal.

These are the facts in *Ashley*. During a raid to arrest a suspected drug dealer, one of the police officers shot dead the victim. The room was dark and the officer did not realise that the victim was unarmed. The claim was brought by the father and the son of the victim, claiming both as dependants and on behalf of the estate. The chief constable admitted liability in negligence and false imprisonment. The case concerned an interlocutory appeal in which

[21] *Van Colle* (n 18) para 82.
[22] *Van Colle* (n 18) para 138.
[23] *Ashley v. Chief Constable of Sussex Police* [2008] UKHL 25.
[24] M. Arden (Arden LJ), 'Human Rights and Civil Wrongs: Tort law under the Spotlight' [2010] Public Law 140-159, 150.

their Lordships had to decide whether a claim in battery should be allowed. The peculiarity of this case is that, had the additional claim be granted, the claimants would have not obtained any further financial relief. A majority of their Lordships held that the claim in battery could be brought. What makes this case particularly interesting for our topic is that, for the first time, a link was established between damages originating in the violation of constitutional provisions and damages under the HRA. This big step was taken by Lord Scott, who expressly referred to *Ramanoop* and other similar cases:

'the right to life, now guaranteed by article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and incorporated into our domestic law by the Human Rights Act 1998, is at least equivalent to the constitutional rights for infringement of which vindicatory damages were awarded in *Ramanoop* and *Merson v Cartwright*.'[25]

By establishing this equivalence between constitutional damages and the HRA, Lord Scott was able to apply the concept of vindication even in the area of human rights. His statement marks the passage from vindication for the violation of constitutional rights to a fully-fledged concept of vindicatory damages. Lord Scott continued:

'[T]he [claimants] are determined … to take the assault and battery case to trial not for the purpose of obtaining a larger sum by way of damages … but in order to obtain a public admission or finding that the deceased … was unlawfully killed … They want a finding of liability on their assault and battery claim in order to obtain a public vindication of the deceased's right not to have been subjected to a deadly assault …
Whether, if liability is established, the vindication should be marked by an award of vindicatory damages or simply a declaration of liability is, in my opinion, unimportant.'[26]

For Lord Scott, therefore, the 'just satisfaction' granted by the HRA allows the introduction of a new category of damages into English law, vindicatory damages, of which little is known beyond their vindicatory aim. Their content and the application radius remain quite vague. Lord Scott's statement can be seen as an attempt to modify directly the common law - but not the tort law, because the HRA cause of action is non-tortious. The other Lordships did not seem really convinced by Lord Scott's analysis. Thus, Lord Rodger accepted that '[compensatory] damages can indeed serve a vindicatory purpose'.[27] But he did not follow Lord Scott on the path of the identification of a discrete source of damages. And Lord Carswell, dissenting, said:

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[25] *Ashley* (n 23) para 22.
[26] *Ashley* (n 23) para 23.
[27] *Ashley* (n 23) para 60.

'I am unable to agree with Lord Scott's view that it would be a suitable case for what he terms vindicatory damages. In my opinion the only function for damages of this kind is when there is no other remedy which will meet the case – there being perhaps no provable loss-except a nominal award of damages to establish formally the validity of the claim. It is a time-honoured way of establishing a point of principle or vindicating wounded feelings or character'.[28] (para 80)

Lumba v. Secretary of State for the Home Department

Recently, the newly formed Supreme Court has said for the first time an authoritative word on the issue of vindicatory damages in *Lumba v. Secretary of State for the Home Department*.[29] This decision allows us to establish a couple of firm points on the subject at issue. The link between constitutional damages and damages for the violation of human rights is now accepted – at least by some of their Lordships. Further, vindication becomes a judicially recognised primary aim of the law of damages. Finally, it remains unclear even after *Lumba* how these vindicatory damages should be quantified.

The case concerns two claims for detention pending deportation of foreign national prisoners. The Secretary of State had applied a detention policy which differed from the official, published policy. A majority of the 9-member bench held that the policy applied to the claimants was illegal and therefore they had been falsely imprisoned. Within the majority, three of their Lordships awarded £1 and three a conventional sum, which for two of them was £1000 and for one £500. The reason for these modest sums is that the majority noted that, had the correct policy been applied, the claimants would have still been detained during the time before deportation. Lords Phillips, Brown, and Rodger, dissenting, held that no award should be made because the claimants had not been unlawfully detained.

The leading speech for the '£1 majority'[30] was delivered by Lord Dyson:

'It is one thing to say that the award of compensatory damages, whether substantial or nominal, serves a vindicatory purpose: in addition to compensating a claimant's loss, it vindicates the right that has been infringed. It is another to award a claimant an additional award, not in order to punish the wrongdoer, but to reflect the special nature of the wrong.'[31]

Discussing the aim of an award of vindicatory damages, his Lordship referred expressly to *Ramanoop*. This link with constitutional damages, it should be

[28] *Ashley* (n 23) para 80.
[29] *Walumba Lumba v. Secretary of State for the Home Department* [2011] UKSC 12.
[30] Given that the £1 award was supported by three Law Lords, whereas the other Lordships did not manage to form a wider agreement, the nominal award constitutes the majority view.
[31] *Lumba* (n 29) para 100.

remembered, had been established by Lord Scott's speech in *Ashley*, where the Law Lord had discussed vindicatory damages outside their normal role as a public law response to the violation of constitutional rights. Lord Scott's statement was met with a very decisive rejection:

'The implications of awarding vindicatory damages in the present case would be far reaching. Undesirable uncertainty would result. If they were awarded here, then they could in principle be awarded in any case involving a battery or false imprisonment by an arm of the state. Indeed, why limit it to such torts? And why limit it to torts committed by the state? I see no justification for letting such an unruly horse loose on our law. In my view, the purpose of vindicating a claimant's common law rights is sufficiently met by (i) an award of compensatory damages, including (in the case of strict liability torts) nominal damages where no substantial loss is proved, (ii) where appropriate, a declaration in suitable terms and (iii) again, where appropriate, an award of exemplary damages.'[32]

Hence, according to Lord Dyson vindicatory damages as an autonomous legal response are dangerous and useless. They are dangerous because they would introduce an element of uncertainty in the law. And they are useless because they would not add any new element to the existing range of damages. Vindication would be achieved already through compensation and punishment. Furthermore, vindication would also be obtained through non-remedial avenues, such as a declaration that the victim has been unlawfully wronged.

Lord Hope, who was in favour of a conventional award, rejected the link between punishment and vindication:

'Although such an award is likely in financial terms to cover much the same ground as an award by way of punishment in the sense of retribution, punishment in that sense is not its object … Its purpose is to recognise the importance of the right to the individual, not to punish the executive. It involves an assertion that the right is a valuable one as to whose enforcement the complainant has an interest. Any award of damages is bound, to some extent at least, to act as a deterrent against further breaches. The fact that it may be expected to do so is something to which it is proper to have regard.'[33]

Lady Hale, who too favoured a conventional award, developed this idea further. Vindicatory damages would not aim 'to compensate [the victim] for harm or to punish the defendant for wrongdoing but simply to mark the law's recognition that a wrong has been done'.[34]

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[32] *Lumba* (n 29) para 101.
[33] *Lumba* (n 29) para 178.
[34] *Lumba* (n 29) para 230.

Some Remarks

After having considered the statutory and the judicial position, it is now time to draw some conclusions on the relationship between public law values and the law of damages as regards the new category of vindicatory damages. We have seen that they were applied first as a remedy for violations of legal rights anchored in the constitution. The concept of vindication was subsequently extended to the violation of human rights. Finally, *Lumba* has allowed the judiciary to discuss their possible role in the private law of damages for the first time. The Law Lords were split on the position which the novel damages deserve within the common law. Indeed, they were even uncertain whether this category should play a role at all in private law. The outcome of *Lumba* has been properly summarised by Lady Hale in *Kambadzi v. Home Department*:

'A … majority in *Lumba* has now clearly rejected the view, taken by some members of the Court, that deliberate breaches of constitutional rights might attract a conventional sum in vindicatory damages even if the officials' conduct were not so egregious as to attract exemplary or punitive damages. That view has, of course, to be respected.'[35]

Yet, this does not mean that vindicatory damages will disappear from the courts. Her Ladyship states only that vindication will not be achieved in courts through the award of a conventional sum – which leaves some room to the introduction of vindication in the law of damages through other avenues in the future.

If vindicatory damages are analysed from the perspective of the event-based classification, the caution which some judges exert appears well-founded. As intimated, the judiciary has pointed out that the legal event which triggers a vindicatory response is non-tortious, at least when the event is linked to a HRA cause of action. Burrows has explained the non-tortious nature of the damages at issue with their public law origin. In fact, as regards the vindicatory aim of the response, the values protected by the constitutional and human right statutes differ from those traditionally protected by the private law. It can be argued that these public law values are the main obstacle to the integration of vindicatory damages within the common law.

It does not surprise, therefore, that for the judiciary 'the 1998 [Human Rights] Act is not a tort statute', as Lord Bingham in *Greenfield* said.[36] Following the same idea, in *Van Colle* the majority of their Lordships kept tort and Convention remedies separated.[37] At closer inspection, it appears that, in

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[35] *Shepherd Masimba Kambadzi v. Secretary of State for the Home Department* [2011] UKSC 23, para 74.

[36] See above (n 16).

[37] J. Steele, 'Damages in Tort and under the Human Rights Act: Remedial or Functional Separation?' (2008) 67 CLJ 606-634, 629.

Lumba, what is at stake is not really, or not only, the category of vindicatory damages, but arguably the values which are borne by those damages: social, cohesive, public values which collide with the liberal approach of the English tort law. From the viewpoint of the legal events, the obligation which triggers vindicatory damages fits perfectly within the recognised categories. The HRA cause of action, as Burrows points out, is a wrong, and as such not different from all the other wrongs which activate legal obligations. Once the public law duty becomes a private law obligation, the central issue is no longer whether the wrong should have a place within the private law, but rather whether the legal response, vindicatory damages, is compatible with the other private law responses. In this context, the proper question is not whether vindication is or can be an aim of the law of damages, but rather whether vindication can be a primary aim of a legal response – which would justify its independent position among the responses.

The last thought brings us to the other category of the event-based classification: the legal responses. For the judiciary, tort law compensates, whereas constitutional and human rights violations require a response which vindicates the right.[38] This apparently quite neat distinction would be able to keep vindicatory damages at bay. In *Van Colle*, the majority of their Lordships resisted the pressure of the public law values by asserting the existence of two parallel systems. Yet, it is doubtful whether this parallelism can be really taken to be a correct interpretation of what happens in the English law of damages. Jenny Steele argues that it is tort law, rather than the European Convention on Human Rights, that tends to vindicate rights. She observes that, whereas tort law awards damages even for an invasion of rights *per se*, such as in the case of trespass, the Convention requires the need to establish consequential losses,[39] which can be pecuniary and non-pecuniary, or, using English legal terminology, special and general damages. Therefore, the judicial view needs to be clarified. The difference between the vindication applied in private law and the concept of vindication which is introduced under the pressure from public values is that the public law vindication is the main, if not the sole, aim of the award.

A significant issue as regards the acceptance of vindicatory damages is not that tort law, without a specific vindicatory response, would not vindicate rights, but, as Lord Dyson put it in *Lumba*, that, by introducing vindicatory damages, the judiciary would let an 'unruly horse loose' in the common law.[40] Hence, the challenge posed by vindicatory damages might be the taming of the horse. A conventional award, supported by three Law Lords in *Lumba*, does not seem to offer a satisfactory solution. As emerges clearly in the speeches of their Lordships, there is no objective criterion to which a conventional award can be linked. So far, this element of uncertainty has been

[38] See e.g. Lord Brown's speech in *Van Colle* above (n 22).
[39] Steele (n 37) 630.
[40] *Lumba*, see above (n 29).

typical of exemplary damages, the role of which in the common law had been strongly restricted by the judiciary in *Rookes v. Barnard*. In *Lumba*, the three Law Lords who were in favour of a conventional award appeared to reverse this trend introducing an element of vagueness in the law of damages. From this perspective, the fact that the majority rejected their view sends a positive signal for the future development of this category of damages.

A few final words ought to be spent on question whether vindicatory damages are an instance of 'governance through law', as the title of the present section of our workshop seems to indicate. It appears that non-private law values have encroached into the sphere of private law through the gateway of human rights – but it is unlikely that other private law sectors will remain unaffected. This attempt to introduce governance in this area of private law might have been successfully fought off by the courts, after an internal struggle, but it has not been totally banned from the private law. What survives is a vindicatory award which, albeit devoid of negative financial consequences, might still be seen as an example of that 'good governance' which has been discussed at this workshop, because it allows the courts to steer the conduct of the private law operators by attaching a negative label to the conduct which triggers vindication.