

Vindicating Reproductive Autonomy in Wrongful Conception Cases

ANNA CHRISTIE*

This article argues that a novel award of vindicatory damages should be available in New Zealand to reaffirm the reproductive autonomy interest negligently undermined in certain wrongful conception cases. Vindicatory damages would mark the wrong rather than compensate the losses flowing from it. The proposed vindicatory damages would be exempt from ACC's statutory bar. The award would be discretionary, depending on whether vindicatory damages were required to remedy the undermined interest. Secondary consideration would be given to public-facing concerns like ensuring compliance with medical standards, a communal vindication of the importance of women's equality and the appropriateness of the liability burden. Vindicatory damages would provide accountability in wrongful conception cases falling on or beyond the outer boundary of treatment injury and recognise undermined autonomy interests within or separate from the complaints process.

I INTRODUCTION

Since the introduction of the contraceptive pill, the growth of reproductive technologies has allowed for greater reproductive choice.¹ However, the attendant requirement that women's reproductive health be increasingly medicalised and subjected to clinical scrutiny is less recognised as a constraint on women's reproductive choices.² The heightened risks associated with the medicalisation of women's reproductivity is apparent in recent legal developments. *ACB v Thomson Medical Pte Ltd*, for example, recognised a new head of damages for loss of genetic affinity when the plaintiff's child was conceived using sperm other than her husband's due to the fertility clinic's negligence.³ This article sits at the intersection of these medico-legal developments, focusing on allegations against medical practitioners of negligently performing sterilisations or providing sterility advice.

* BA/LLB(Hons), University of Auckland. The author would like to thank Professor Jo Manning for her assistance in the preparation of this article.

1 Nicolette Prialux "Joy to the World! A (Healthy) Child Is Born! Reconceptualizing 'Harm' in Wrongful Conception" (2004) 13 Social & Legal Studies 5 at 6.

2 At 5-6.

3 *ACB v Thomson Medical Pte Ltd* [2017] SGCA 20, [2017] 1 SLR 918 at [126].

This article asks whether a novel award of vindictory damages should be available in New Zealand to reaffirm reproductive autonomy, which is negligently undermined in wrongful conception cases. It contends that an award of vindictory damages is appropriate in tort law. The proposed remedy differs from the prevailing view of tort law as a compensation mechanism. It instead frames the award as marking the infringement. This separation from the losses caused by the wrong exempts vindictory damages from New Zealand's statutory bar.

This article advances the case for the availability of vindictory damages in wrongful conception claims in three sections. Part II introduces the article's feminist and instrumentalist theoretical framework. This framework establishes that while tort law's primary function is to compensate the plaintiff for losses caused by the defendant, tort law can also exercise an alternative, vindictory function by awarding non-compensatory damages to mark the undermined autonomy of the plaintiff. Part III models vindictory damages using New Zealand Bill of Rights Act 1990 (NZBORA) damages and existing case law. This model is argued to have a place within negligence, notwithstanding certain objections: the inapplicability of public law remedies to private law, vindictory damages seeming to dispense with actionable damage and the suitability of pre-existing remedies to vindication. Part IV defends the introduction of vindictory damages within New Zealand's medico-legal system by evaluating the treatment of wrongful conception cases under the Accident Compensation Scheme (ACC) and the Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996 statutory complaints process.

II VINDICTORY DAMAGES: TOWARDS A RIGHTS-BASED THEORY OF NEGLIGENCE

Vindictory damages are an established class of damages in human rights law, designed to protect and affirm rights, express public disapproval and deter breaches.⁴ The focus is on the breach of the right, rather than its consequences. This focus enables vindictory damages to remedy the breach, irrespective of whether the plaintiff suffered loss.⁵ Vindictory damages also look beyond the immediate parties to what extent of vindication is necessary to protect society's interests in the observance of rights generally.⁶

The question whether vindictory damages should receive wider recognition in tort law has been given conflicting answers. *Ashley v Chief Constable of Sussex Police* represents an affirmative response. There, the House of Lords refused to strike out a claim, given the prospect of marking

4 *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 at [253].

5 Normann Witzleb and Robyn Carroll "The role of vindication in torts damages" (2009) 17 Tort L Rev 16 at 18.

6 *Taunoa*, above n 4, at [317].

the deceased's right not to have been fatally assaulted, with "rights-centred" vindictory damages as distinct from the "loss-centred" compensatory damages already conceded.⁷ Similarly, after awarding compensatory damages for a breach of privacy, the High Court of England and Wales, in *Mosley v News Group Newspapers Ltd*, recognised that vindication to mark the infringed right of the plaintiff was an additional factor for consideration.⁸ Arguably, recognition that vindictory damages should be available in tort law extends to negligence; in *Rees v Darlington Memorial Hospital NHS Trust*, the "conventional award" marked the infringement rather than compensated for it.⁹ This "conventional award" found favour with a minority in *Regina (Lumba) v Secretary of State for the Home Department*. There, Lady Hale emphasised that the right to be free from arbitrary imprisonment should be vindicated with damages marking the false imprisonment, irrespective of compensable harm occurring.¹⁰ Conversely, in giving the leading judgment in *Lumba*, Lord Dyson refused to let loose the "unruly horse" of vindictory damages on tort law.¹¹ This Part proceeds to develop a rights-based theory of negligence to support the availability of vindictory damages in tort law.

Recharacterising Harm: The (Gendered) Injury of an Unsolicited Pregnancy

The contention that vindictory damages should be available in tort law is premised on the need to vindicate an underlying public interest within an ostensibly private claim. In the wrongful conception context, the primary consideration is that pregnancy and childbirth are a gendered, rather than universal, experience. Decision-making in this area, therefore, disproportionately affects women.¹² The concept of "gendered harm" renders these effects visible as the undermining of women's autonomous control over whether and when to reproduce — what Laura Purdy terms the "linchpin of women's equality".¹³ From this perspective, an underlying public interest in reproductive autonomy is present in wrongful conception actions. However, this interest's legal visibility has been minimised in tort actions, due to autonomy being a devalued protected interest and women being devalued rights-bearers.¹⁴ This subpart characterises the wrong to be marked by

7 *Ashley v Chief Constable of Sussex Police* [2008] UKHL 25, [2008] 1 AC 962 at [22]–[23].

8 *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB) at [216]–[217].

9 *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52, [2004] 1 AC 309 at [8]; and Vanessa Wilcox "Vindictory Damages: The Farewell?: A Commentary on R (Lumba) v Secretary of State for the Home Department [2011] United Kingdom Supreme Court 12" (2012) 3 JETL 390 at 405.

10 *Regina (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245 at [217].

11 At [100]–[101].

12 Nicolette Priaulx *The Harm Paradox: Tort Law and the Unwanted Child in an Era of Choice* (Routledge-Cavendish, New York, 2007) at 5.

13 Priaulx, above n 1, at 7, 13 and 16.

14 Tsachi Keren-Paz "Gender Injustice in Compensating Injury to Autonomy in English and Singaporean Negligence Law" (2019) 27 Fem L S 33 at 40.

vindictory damages in wrongful conception actions as an interference with reproductive autonomy.

According reproductive autonomy its proper scope and weight requires going beyond the initial deprivation of choice (to decide whether to have children) to consider the circumstances affecting that choice. These include the power imbalances between women and health professionals and the further barriers to exercising autonomy faced by groups subject to systemic discrimination based on gender, race, class, disability, age and sexual preference.¹⁵ The reasoning of Gleeson CJ and Hayne J in *Cattanach v Melchior* exemplifies the required relational understanding of reproductive autonomy.¹⁶ Hayne J acknowledged that while the plaintiff may have chosen to keep her unintended child rather than seek adoption or abortion, this choice was negligently imposed — one the plaintiff had sought to, and was entitled to avoid.¹⁷ Resolving the choice imposed involves a complex range of considerations particular to the individual and going beyond financial concerns.¹⁸ Gleeson CJ then acknowledged that it harms women to impose reproductive choices upon them that they had sought to avoid.¹⁹ The harm results from the negligently-created relationship of dependency between parent and child and the interference with autonomy that parental responsibility imposes.²⁰ This relational approach to reproductive autonomy prevents the erasure of women's interests by challenging the logic predominant in *McFarlane v Tayside Health Board*²¹ that women are left unharmed when choosing to keep their unwanted child.²²

Recharacterising Negligence: Tort Law's Additional Vindictory Function

This subpart develops a rights-based theory of tort law to contend that while torts' primary function is to compensate the plaintiff for losses caused by the defendant, tort law can also exercise an alternative, vindictory function by awarding vindictory damages to mark the plaintiff's undermined reproductive autonomy in wrongful conception cases.

1 Compensation and Tort Law

Compensating loss is commonly seen as the most important goal of tort law.²³ This arises from the perception that private law is internally justifiable, as it “looks neither to the litigants individually nor to the interests of the

15 Susan Sherwin “A Relational Approach to Autonomy in Health Care” in *The Politics of Women's Health: Exploring Agency and Autonomy* (Temple University Press, Philadelphia, 1998) 19 at 22.

16 *Cattanach v Melchior* [2003] HCA 38, (2003) 215 CLR 1.

17 At [222].

18 At [222].

19 At [26].

20 At [26].

21 *McFarlane v Tayside Health Board* [2000] 2 AC 59 (HL) at 97.

22 Prialx, above n 12, at 177.

23 Robert Stevens *Torts and Rights* (Oxford University Press, Oxford, 2007) at 321.

community as a whole, but to a bipolar relationship of liability”.²⁴ Hence, doctrinal requirements like causation assume importance, as the plaintiff’s claim depends on a wrong suffered at the defendant’s hand. The corrective justice theory that adopts these premises cannot countenance vindictory damages within negligence, as they promote an aim unconnected with the wrong suffered by the plaintiff.²⁵ While broader notions of corrective justice accept a role for punishment where it repairs “moral injury”, none countenance damages to redress disrespect for rights generally.²⁶

The distributive justice theory similarly gives precedence to the plaintiff’s loss and the consequent importance of compensation. Peter Cane describes distributive justice as concerned with the division of benefits and burdens, which tort law distributes as the benefit of suing for damages following harm, and the burden of avoiding causing harm and repairing harms caused.²⁷ Moreover, distributive justice invites considerations beyond those involving the immediate parties and includes broader societal interests.²⁸ While preferable for having the capacity to evaluate tort law’s distributive effects upon public interests like women’s equality, distributive justice cannot accommodate vindictory damages. Its concern is to ensure those benefiting from the activity (namely the medical practitioners performing the sterilisation or providing the advice) bear its costs, or to ensure loss-spreading by allocating the loss according to what is fair, just and reasonable.²⁹

While distributive and corrective justice can both justify the primary characteristic of tort law — putting the plaintiff in the position he or she would have occupied but for the tort’s occurrence — they fail to encompass the secondary characteristics of tort law’s remedial responses. These characteristics are not compensatory but are instead punitive or restitutionary.³⁰ An accurate theory requires dismissing the conception of torts as exclusively private; punitive damages represent neither losses suffered by the plaintiff nor gains made by the defendant, but rather society’s interest in deterring the harm.³¹ A correct expression of tort law’s functions must accept that tortious remedies can incorporate public aspects by looking beyond the immediate parties to the protection of interests and deterrence of unwanted conduct: “tort law is not just about making good losses, but is also concerned to protect certain rights irrespective of whether interference with the right causes damage”.³² Cane further argues that “the courts must always have an eye on the role of tort law as public morality”.³³ The following subpart adopts

24 Ernest J Weinrib *The Idea of Private Law* (Rev ed, Oxford University Press, Oxford, 2012) at 2.

25 Ernest J Weinrib “Restitutionary Damages as Corrective Justice” (2000) 1 *Theo Inq L* at 29.

26 Pey-Woan Lee “Contract Damages, Corrective Justice and Punishment” (2007) 70 *MLR* 887 at 889.

27 Peter Cane “Distributive Justice and Tort Law” [2001] *NZ L Rev* 401 at 406.

28 At 410.

29 Tsachi Keren-Paz *Torts, Egalitarianism and Distributive Justice* (Ashgate Publishing, Hampshire, 2007) at 86.

30 Stevens, above n 23, at 321.

31 Peter Cane *The Anatomy of Tort Law* (Hart Publishing, Oxford, 1997) at 116.

32 At 116.

33 At 227.

this expanded account of tort law's functions and develops one additional function: the prospective availability of vindicatory damages.

2 Vindication and Tort Law

In characterising the features of vindicatory damages, this subpart draws upon a rights-based account more common to public law than to private law. In doing so, the contention is that vindication is a remedial purpose shared between public and private law.³⁴ Tort law can benefit from looking to vindication in the human rights context to clarify and expand the role of vindication in private law to develop a separate award.

(a) Damages Substitutive for the Right Infringed

The primary characteristic of vindicatory damages is that they are substitutive for the right infringed, rather than compensatory for losses consequent upon the infringement.³⁵ Substitutive damages are assessed at the time of infringement, as opposed to loss-based damages, which are assessed at the time of judgment.³⁶ Substitutive damages are available even if there is no loss to the plaintiff or gain to the defendant consequent upon the infringement.³⁷

The distinction between damages substitutive for the right and those compensatory for consequential loss assumes relevance in situations where the primary aim of tortious damages — compensation — is insufficient to respond to the wrong. The emphasis of vindication is on making good the plaintiff's rights by attesting to, affirming and reinforcing their importance and inherent value through providing an *effective* remedy.³⁸ *Ashby v White* illustrates this distinction.³⁹ There, the plaintiff had been prevented from voting but had suffered no loss consequent upon the infringement, as his preferred candidate was elected.⁴⁰ The principle that every violation of a right imports damage affirms the primary characteristic of vindication as recognising the wrong, irrespective of loss:⁴¹

If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for ... want of right and want of remedy are reciprocal.

34 Kit Barker "Private and Public: The Mixed Concept of Vindication in Torts and Private Law" in Stephen GA Pitel, Jason W Neyers and Erika Chamberlain (eds) *Tort Law – Challenging Orthodoxy* (Hart Publishing, Oxford, 2013) 59 at 65.

35 Stevens, above n 23, at 60.

36 At 60.

37 At 60.

38 Jason NE Varuhas "The Concept of 'Vindication' in the Law of Torts: Rights, Interests and Damages" (2014) 34 OJLS 253 at 258.

39 *Ashby v White* (1703) 92 ER 126 (KB).

40 At 135–136.

41 At 136–137.

...

[S]urely every injury imports a damage, though it does not cost the party one farthing, and it is impossible to prove the contrary; for a damage is not merely pecuniary, but an injury imports a damage, when a man is thereby hindered of his right.

In the wrongful conception context, the action accrues not with the unwanted child's birth but with its conception. This is when the woman's right to bodily integrity and decisional autonomy is infringed.⁴² Vindictory damages would thus be available, irrespective of whether the child was born alive or if the woman were to suffer a miscarriage or seek an abortion.⁴³ Such damages would stand apart from claims for consequential losses such as pregnancy, birth and childcare costs.⁴⁴

(b) Damages Awarded to Reflect Communal Interests

The second characteristic of vindictory damages is to acknowledge the impact beyond the immediate parties when rights are breached.⁴⁵ As the violation of the immediate victim's rights also undermines the rule of law and societal norms, society is also victimised.⁴⁶ Vindictory damages reflect society's interest in observing fundamental rights.⁴⁷ While Tipping J's two victim account was given in the context of statutorily affirmed rights,⁴⁸ it can apply to breaches of important common law rights by those in positions of public trust, including a doctor's duty towards their patient. Breaching this duty undermines the immediate patient's autonomy, with potentially profound effects on their health and wellbeing.⁴⁹ Violating this interest also harms society by impairing public confidence in the healthcare system. Tort law can develop vindictory damages as a discretionary remedy that addresses the affront to the plaintiff and "[brings] home" to the defendant that the court condemns their conduct on society's behalf.⁵⁰

Towards a Rights-Based Theory of Negligence

This Part has developed the article's theoretical underpinnings, which are feminist and instrumentalist. Its starting premise is women's especial vulnerability to having their reproductive autonomy undermined in wrongful conception cases.⁵¹ The account proceeded to accept that while tort law's primary function is to compensate the plaintiff for losses caused by the

42 Stevens, above n 23, at 77.

43 At 77–78.

44 At 77–78.

45 *Taunoa*, above n 4, at [317].

46 At [317].

47 At [317].

48 At [318].

49 *Montgomery v Lanarkshire Health Board* [2015] UKSC 11, [2015] AC 1430 at [68].

50 *Taunoa*, above n 4, at [255].

51 Joanne Conaghan "Tort Law and Feminist Critique" (2003) 56 CLP 175 at 182.

defendant, it can also exercise an alternative, vindicatory function by awarding non-compensatory damages to mark the undermined autonomy in wrongful conception cases. The award is substitutive for the right infringed and reflective of communal interests in upholding the right.

III VINDICATORY DAMAGES: CONCEPTUALISING THE REMEDY

Modelling Vindicatory Damages on NZBORA Damages

Having drawn on a rights-based theory of tort law to develop the theoretical underpinnings for the availability of vindicatory damages, this Part models vindicatory damages on NZBORA damages. It is acknowledged that this approach faces difficulties, the most visible being the supposed divide between NZBORA damages as a public law remedy and private law remedies in tort law. This Part's rebuttal is that focusing on the principal function of human rights law — vindicating and protecting individual rights — rejects a firm distinction between public and private law. Rather, tort law and NZBORA offer overlapping protections for shared concerns.⁵² Indeed, given that the autonomy interest in wrongful conception claims is of public importance, consistency between NZBORA and tort law rights protection is desirable, and achievable by modelling vindicatory damages upon NZBORA damages.

1 Applying the Framework of NZBORA Damages to Vindicatory Damages

Following the enactment of NZBORA, the courts introduced a remedy of NZBORA damages, traditionally associated with private law, into public law. This subpart charts the development of NZBORA damages over three cases: *Simpson v Attorney-General (Baigent's case)*,⁵³ *Dunlea v Attorney-General*⁵⁴ and *Taunoa v Attorney-General*.⁵⁵ The difference between the tort law-based approach in *Dunlea* and the administrative law-based approach in *Taunoa* is highlighted, with a stated preference for the former as a model for vindicatory damages.

(a) Purpose

The decision in *Baigent's case* to recognise compensation for NZBORA breaches was premised on the need for a rights-centric response to

52 Jason NE Varuhas “The Development of the Damages Remedy under the New Zealand Bill of Rights Act 1990: From Torts to Administrative Law” [2016] NZ L Rev 213 at 214.

53 *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA) [*Baigent's case*].

54 *Dunlea v Attorney-General* [2000] 3 NZLR 136 (CA).

55 *Taunoa*, above n 4.

infringements.⁵⁶ The primary objective of the remedy was to provide effective relief to persons whose rights had been infringed, while allowing for subsidiary purposes like promoting compliance with the statute.⁵⁷ However, Jason Varuhas argues that the classification of the remedy as public law damages complicates the prioritisation of societal interests relative to individual interests.⁵⁸ In this respect, the subsequent case of *Dunlea*, which pivoted to a tort law-based approach, was a welcome acknowledgement that tort law has long remedied breaches of important rights and, therefore, there were strong reasons for a consistent approach between tort law and human rights law.⁵⁹ *Taunoa* later undermined these developments, returning to *Baigent's case's* conception of NZBORA damages as a novel public law remedy.⁶⁰ The result was to subsume the remedial focus under the broader functions of administrative law, subordinating individual justice to marking society's disapproval of unlawful conduct.⁶¹ As *Taunoa* inverted the remedial priority to favour assessing the suitability of liability over remedying the invasion of the plaintiff's rights, *Dunlea* is a preferable model for vindictory damages.⁶²

(b) Considerations Affecting the Award

The jurisprudence in this area reflects a movement away from NZBORA damages as a personal remedy that affirms the individual's rights, and towards declaratory relief, with damages as a rarity.⁶³ The rights-centred approach in *Baigent's case* tied the availability of damages to the need for an effective remedy for the infringement.⁶⁴ The "objective [of damages was] to affirm the right, not to punish the transgressor" and was intended to reflect the gravity of the breach, the importance of the right, additional physical damage or intangible harm and to deter further breaches.⁶⁵ Similarly, *Dunlea* advanced the proposition that the award should reflect the circumstances of the unlawful act, including the value of the right, both to the individual and more generally.⁶⁶

Conversely, *Taunoa* prioritised ending unlawful conduct and ensuring future compliance, resulting in a preference for declaratory relief.⁶⁷ Only where the court considers non-monetary relief inadequate should it consider

56 *Baigent's case*, above n 53, at 702.

57 At 702–703.

58 Varuhas, above n 52, at 215.

59 *Dunlea*, above n 54, at [38]–[41].

60 Jenny Steele "Damages in Tort and Under the Human Rights Act: Remedial or Functional Separation?" (2008) 67 CLJ 606 at 619.

61 Geoff McLay "Damages for Breach of the New Zealand Bill of Rights — Why Aren't They Sufficient Remedy?" [2008] NZ L Rev 333 at 366–367.

62 Varuhas, above n 52, at 240.

63 At 238.

64 *Baigent's case*, above n 53, at 703.

65 At 678 and 703.

66 *Dunlea*, above n 54, at [42].

67 Varuhas, above n 52, at 237.

damages.⁶⁸ If damages are appropriate, the overriding considerations are settling on a figure that responsible citizens would feel comfortable awarding, ending the infringing conduct and ensuring future compliance.⁶⁹ Subordinate to these considerations are the nature of the infringed right and the breach, the effect on the victim and other redress provided.⁷⁰ The possibility of damages is further reduced by introducing considerations focusing on the defendant's conduct, namely whether they have acknowledged wrongdoing, whether and how quickly the wrongdoing ended, whether preventative measures have been adopted and whether the defendant apologised.⁷¹ Insofar as *Taunoa* represents a set of remedial priorities focused on marking society's disapproval, engendering compliance and deterrence for the benefit of the public over vindicating the plaintiff, *Baigent's case* and *Dunlea* are preferable. Those earlier cases accorded these wider societal concerns an important, albeit subsidiary role.⁷²

(c) Quantum

While courts have consistently stipulated that “extravagant” awards of NZBORA damages are inadvisable, what amounts to an appropriate “modest” award has altered over time.⁷³ The \$70,000 mooted in *Baigent's case* for a brief but serious invasion of the plaintiff's right to be free from unreasonable search and seizure, and where no physical harm ensued, indicates an increasingly conservative approach. Compare this with the \$18,000 awarded for a similar breach in the later case of *Dunlea*.⁷⁴ This tendency away from large damages awards is reinforced by the view expressed in *Taunoa* that damages are a remedy of last resort, when non-monetary remedies are inadequate.⁷⁵ There is difficulty reconciling this trend towards modest awards with the ostensible objectives of affirming rights and deterrence.⁷⁶ If, following *Taunoa*, the importance of societal disapproval and ensuring compliance has eclipsed *Baigent's case's* rights-centric approach, there is real danger that such “modest” awards will insufficiently encourage defendants to give rights the necessary respect.⁷⁷ This trend indicates an unsatisfactory departure from the central concern of human rights law: providing effective

68 *Taunoa*, above n 4, at [257]–[258].

69 At [259]–[260].

70 At [259].

71 At [262].

72 Varuhas, above n 52, at 239.

73 Juliet Philpott “Damages under the United Kingdom's Human Rights Act 1998 and the New Zealand Bill of Rights Act 1990” (2007) 5 NZJPIL 211 at 234.

74 At 234.

75 *Taunoa*, above n 4, at [258].

76 McLay, above n 61, at 373; and Philpott, above n 73, at 233.

77 Philpott, above n 73, at 233.

remedies for infringements.⁷⁸ Elias CJ's dissenting judgment in *Taunoa* expresses the preferable approach to quantum:⁷⁹

[109] With respect to those who think that damages for vindication of right must be “moderate”, I do not think the adjective assists. It can be readily accepted that awards of damages should not be “extravagant”. ... Bill of Rights Act damages in such cases should be limited to what is adequate to mark any additional wrong in the breach and, where appropriate, to deter future breaches.

(d) Accident Compensation Act 2001

The Accident Compensation Act 2001, s 317(1) prohibits actions for compensatory damages arising directly or indirectly from personal injuries covered by the Act. The decision in *Wilding v Attorney-General* that NZBORA damages are not barred by s 317(1) presents a model for how vindictory damages could similarly be exempted.⁸⁰ *Wilding* concerned a plaintiff suing the police for assault and battery, alongside a NZBORA claim. The plaintiff sought damages and a declaration for breaches of ss 9 and 23(5).⁸¹ The issue was whether the plaintiff's NZBORA claim was barred. In the course of the alleged breach of his NZBORA rights — the police ordering a dog to bite the plaintiff while handcuffed on the ground — the plaintiff sustained an injury from the bite.⁸² The Court held that the statutory bar operates where a claim for damages arises out of personal injury, rather than against a claim relating to personal injury.⁸³ NZBORA damages could be awarded for a breach of NZBORA that resulted in personal injury, provided the award was not quantified to provide compensation for the injury itself.⁸⁴ *Wilding* shows how vindictory damages could exist as a non-loss-based award that would not subvert the Act if damages were directed towards remedying the undermined right.

2 Applying “Public Law” NZBORA Damages to “Private Law” Remedies

The primary objection to modelling vindictory damages on NZBORA damages is the supposed division between public and private law, with NZBORA damages falling on the public law side. This subpart rejects a firm distinction between public and private law, because tort law and NZBORA offer overlapping protections for shared concerns. Once the existence of overlapping protections is conceded, damages that are vindictory and protected from the statutory bar can be applied to wrongful conception claims.

78 See the long title of the New Zealand Bill of Rights Act 1990; and International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 2(3)(a).

79 *Taunoa*, above n 4 (footnotes omitted).

80 *Wilding v Attorney-General* [2003] 3 NZLR 787 (CA) at [16].

81 At [3].

82 At [2] and [5].

83 At [11].

84 At [16].

Maintaining a firm distinction between public and private law has proven troublesome in New Zealand because there is no conception of the “state” in the common law tradition to which a distinctive and coherent idea of public law can be anchored.⁸⁵ This was acknowledged in Elias CJ’s dissent in *Taunoa*:⁸⁶

... I do not think it appropriate to consider the usefulness of a dichotomy between “private law” and “public law” damages without further consideration of how such a division fits within the New Zealand legal tradition.

While the prevailing view has been to characterise NZBORA damages as a novel public law remedy, distinct from tort law, a strong opposing view attesting to the dynamic relationship between human rights law and tort law is traceable through Gault J’s dissent in *Baigent’s case*, Keith J’s majority judgment in *Dunlea* and Elias CJ’s dissent in *Taunoa*.⁸⁷

In *Baigent’s case*, Gault J challenged the view that NZBORA’s enactment departed from the common law. NZBORA formally identified existing principles, as many of the rights declared and remedies provided had evolved in the common law.⁸⁸ It did not follow from enactment of NZBORA that rights independent of the Act were not recognised, or could not come to be regarded as rights by the common law, as privacy has been.⁸⁹ NZBORA should be regarded as part of the existing law, enabling dynamic interaction for mutual benefit.⁹⁰ It is unsurprising, then, that Gault J accepted NZBORA damages might be appropriate in areas commonly regarded as the domain of tort law, where existing torts were insufficient to vindicate the interest or were not easily modifiable to do so.⁹¹ In this spirit of dynamic interaction, torts can be modified, through vindicatory damages, to better protect interests that overlap with human rights law. Indeed, recognising that the dynamics of the common law did not cease with NZBORA’s enactment is to recognise that NZBORA is inherently limited. If the protection of rights were confined to the Act, plaintiffs would lose out.⁹²

In the wrongful conception context, no clear NZBORA provision exists upon which to base a claim as, unlike s 7 of the Canadian Charter of Rights and Freedoms, which engages personal autonomy,⁹³ New Zealand’s equivalent section is more limited.⁹⁴ Given NZBORA’s operational framework, even if it were amended to protect personal autonomy, the case

85 Varuhas, above n 52, at 217.

86 *Taunoa*, above n 4, at [108].

87 *Baigent’s case*, above n 53, at 703–715; *Dunlea*, above n 54, at [1]–[44]; and *Taunoa*, above n 4, at [1]–[120].

88 *Baigent’s case*, above n 53, at 709.

89 At 709.

90 At 711.

91 At 712.

92 At 709.

93 Canadian Charter of Rights and Freedoms, pt 1 of the Constitution Act 1982, being sch B to the Canada Act 1982 (UK), s 7.

94 New Zealand Bill of Rights Act 1990, s 8.

for the availability of vindictory damages would remain. Section 3 limits NZBORA claims to acts done by the government or by persons or bodies in the performance of any public function, power, or duty conferred or imposed by or pursuant to law. While this means NZBORA can apply to acts of non-government actors, this is only in respect of those actors' "public functions".⁹⁵ As the divide between public and private blurs when public services are delivered by private actors — with healthcare being a clear example — excluding the availability of vindictory damages could prejudice women and their partners, depending on whether they sought sterilisation or advice through a DHB.⁹⁶ While the enactment of further rights to protect personal autonomy is conceivable, changes to the settled operational framework of NZBORA are not. Hence, the potential for tort law to vindicate rights apart from NZBORA and wrongs between private individuals, is important.⁹⁷ As wrongful conception cases demonstrate power imbalances between doctors and their female patients, "public law" personal autonomy concerns are engaged within the supposedly "private sphere" of fertility and reproduction. Consequently, vindictory damages should be available to vindicate wrongs between private individuals where such imbalances of power exist and attract public concern.⁹⁸

3 Application in Practice: *Dunlea and Ashley*

This subpart provides a supporting example for applying NZBORA reasoning across the supposed divide between public and private law. In particular, this subpart applies the principles arising out of *Dunlea* — a case concerning a successful claim for damages for breaches of ss 21 and 22 NZBORA⁹⁹ — to a claim for assault and battery of the kind seen in *Ashley v Chief Constable of Sussex Police*.¹⁰⁰ The latter case concerned claims arising from the death of James Ashley, who was fatally shot within seconds of police raiding his home, despite him being naked and unarmed.¹⁰¹ Ashley's son, father and estate brought civil proceedings for compensatory damages for assault and battery or negligence by the officer in shooting him.¹⁰² The issue was whether the assault and battery claims should proceed to trial, given the defendant had accepted liability for all consequential damages and, therefore, the claims held no prospect for increasing the defendant's liability for compensatory damages.¹⁰³

95 Sylvia Bell, Paul Roth and Christopher Jury *Brookers Human Rights Law – New Zealand Bill of Rights Act 1990* (online ed, Thomson Reuters, 2008) at [BOR3.01].

96 At [BOR3.01].

97 Section 3.

98 Susan Boyd "Challenging the Public/Private Divide: An Overview" in Susan Boyd (ed) *Challenging the Public/Private Divide: Feminism, Law and Public Policy* (University of Toronto Press, Toronto, 1997) 3 at 9.

99 *Dunlea*, above n 54, at [82].

100 *Ashley*, above n 7, at [5].

101 At [6].

102 At [9].

103 At [12] and [15].

Lord Scott argued for a rights-centric approach to tort law, framing the law's function as to enable rights vindication, provide remedies sufficient to mark the infringement and demonstrate that the defendant's duty of care was not "a hollow one, stripped of all practical force and devoid of all content".¹⁰⁴ Lord Scott's conclusion that the case could proceed to trial was premised on the potential availability of vindictory damages, which his Lordship saw as distinct from the compensatory damages the defendant had already conceded.¹⁰⁵ Lord Scott premised this distinction upon Thomas J's dissenting reasoning in *Dunlea*, which distinguished between loss-centred and rights-centred damages, with the latter awarded to demonstrate that the right should not have been infringed.¹⁰⁶ Lord Scott allowed the claim to proceed for the sole purpose of obtaining the public vindication of Ashley's right not to have been fatally assaulted, which, if successful, would be marked by vindictory damages or a declaration.¹⁰⁷

The wider significance of Lord Scott applying Thomas J's dissent in *Dunlea* is to implicitly reject, by applying NZBORA damages across the public-private divide, the firm public-private distinction that Thomas J had advanced.¹⁰⁸ The result is a synthesis of the judgments in *Dunlea* — accepting the majority's acknowledgement of the dynamic relationship between tort law and human rights, while adopting the minority's distinction between loss-based and rights-based damages. This synthesised approach is a welcome addition to tort law and should be applied in wrongful conception cases.

Vindicating Autonomy within Existing Tort Law

This subpart demonstrates existing support for the availability of vindictory damages for injuries to autonomy.

I McFarlane v Tayside Health Board

Mr McFarlane's doctors negligently advised the McFarlanes that, following a vasectomy, Mr McFarlane was sterile. Having relied on this advice, Mrs McFarlane unexpectedly became pregnant and gave birth to a fifth child.¹⁰⁹

The House of Lords awarded damages for the pain and distress of pregnancy and childbirth, while refusing recovery for childrearing costs.¹¹⁰ Lord Millet's dissent is noteworthy for rejecting the plaintiffs' claims and instead suggesting a "conventional sum", not expected to exceed £5,000, to respect the parents' decision to limit their family's size as an important aspect of their autonomy that had been denied by the defendants' negligence.¹¹¹

104 *Chester v Afshar* [2004] UKHL 41, [2005] 1 AC 134 at [87] as cited in *Ashley*, above n 7, at [22].

105 At [22].

106 At [22].

107 At [23].

108 *Dunlea*, above n 54, at [56].

109 *McFarlane*, above n 21, at 66.

110 At 74.

111 At 114.

The vindicatory character of the award becomes apparent from Lord Millet's framing of the actionable damage supporting the action. His Lordship framed the damage as the injury that occurred when the defendants failed to take reasonable care to ensure the information given to the McFarlanes was correct, followed by an invasion of Mrs McFarlane's bodily integrity upon conception that threatened further physical and financial damage.¹¹² However, his Lordship did not agree to measure the plaintiffs' loss *by the consequences* of the conception of the child.¹¹³ Instead, the true wrong was the plaintiffs' loss of autonomy following the denial of their freedom to choose their family's size.¹¹⁴

The proposed "conventional sum ... [of] £5,000" cannot be compensatory, as it does not accord with the compensatory principle, by which damages place the plaintiffs in the position they would have occupied but for the wrong. The sum disregarded the plaintiffs' characteristics and the impact of the wrongdoing.¹¹⁵ This is demonstrated by the equivalence drawn between the McFarlanes' claims in awarding £5,000 jointly, irrespective of the loss of autonomy being more pronounced for Mrs McFarlane as the party who conceived.¹¹⁶ Likewise, in quantifying the award, no reference was made to the effects of having a fifth child upon the plaintiffs' autonomy. These effects included increased financial strain from mortgage commitments undertaken when the plaintiffs had considered their family complete with four children; a fifth child prevented Mrs McFarlane from returning to work to meet these commitments.¹¹⁷ Instead, the "conventional sum" is explicable as an example of non-loss-based vindicatory damages, where the relatively inflexible figure represents the objective importance the law attaches to respecting and protecting the personal autonomy denied by the defendants' wrongdoing.¹¹⁸

2 Rees v Darlington Memorial Hospital NHS Trust

In *Rees*, Lords Bingham, Nicholls, Scott and Millett appropriated Lord Millet's "conventional award" from *McFarlane* in response to the plaintiff's claim for damages arising from the negligent sterilisation performed on her.¹¹⁹ The plaintiff claimed childcare costs and additional expenses incurred as a result of her providing childcare while visually disabled, which was her primary reason for seeking sterilisation.¹²⁰

Their Lordships modified the "conventional award" in several respects, which makes deciphering its character difficult. First, recovery was

112 At 107.

113 At 114.

114 At 114.

115 At 114.

116 At 78 and 114.

117 At 75 and 106.

118 At 75 and 114.

119 *Rees*, above n 9, at [8], [17], [123] and [148].

120 At [21]–[24].

permissible for pain and suffering from pregnancy and birth.¹²¹ Secondly, the quantum was no longer subject to individual assessment but fixed in all cases at £15,000.¹²² Their Lordships explained these modifications inconsistently, oscillating between compensatory and vindicatory analyses. In the former category, Lord Millet altered his rationale from *McFarlane*. Lord Millet's altered view was that the plaintiff's loss of autonomy, namely the right to limit her family's size, was the "proper subject for compensation by way of damages".¹²³ Accordingly, his Lordship advanced the following reasoning:¹²⁴

The award of a modest sum would not ... reflect the financial consequences of the birth of a normal, healthy child; but it would not be meant to. They are not the proper subject of compensation for the reasons stated in *McFarlane*. A modest award would, however, adequately compensate for the very different injury to the parents' autonomy; moreover it would be available without proof of financial loss ...

Conversely, Lord Bingham explicitly adopted a vindicatory approach, characterising the actionable loss as the plaintiff being denied the opportunity to live her life in the way she had wished and planned because of the defendant's negligence.¹²⁵ His Lordship characterised the award by stating:¹²⁶

The conventional award would not be, and would not be intended to be, compensatory. It would not be the product of calculation. But it would not be a nominal, let alone a derisory, award. It would afford some measure of recognition of the wrong done.

Donal Nolan rejects a rights-vindication analysis akin to Lord Bingham's, because perceiving the conventional award as a "token of the court's perception that the parents' rights ... have been infringed" would fundamentally challenge negligence principles.¹²⁷ Viewing the award in this way would require combining the loss-based approach of negligence with the rights-based approach of torts actionable *per se*. While it is permissible for torts actionable *per se* to dispense with actionable damage because they involve direct and intentional wrongful conduct, negligence applies to unintentional conduct. Therefore, actionable damage is essential if the tort of negligence is not to unduly restrict people's freedom.¹²⁸ To avoid these difficulties, Nolan reframes the loss of autonomy in *Rees* as compensated by the conventional sum, rather than marked by it.¹²⁹ This interpretation necessitates accepting diminished autonomy as actionable damage in

121 See Witzleb and Carroll, above n 5, at 38.

122 At 38.

123 At [123].

124 At [125].

125 At [8].

126 At [8].

127 Tony Weir *A Casebook on Tort* (10th ed, Sweet & Maxwell, London, 2004) at 17 as cited in Donal Nolan "New Forms of Damage in Negligence" (2007) 70 Mod L Rev 59 at 79, n 120.

128 Nolan, above n 127, at 79.

129 At 79.

negligence, but allows Nolan to dismiss the Court's "rights talk" as "probably no more than an unfortunate rhetorical slip".¹³⁰

A vindictory account of the award is more persuasive than Nolan's because the conventional sum does not comply with the compensatory principle: for damages to place the plaintiff in the position they would have occupied but for the wrong.¹³¹ An award fixed to £15,000 in all wrongful conception cases cannot be compensatory, as it disregards the plaintiff's characteristics and how they were affected by the wrongdoing. These considerations were especially pertinent in *Rees*, where the plaintiff's disability affected her capacity to care for her child.¹³² Instead, the award in *Rees* is explicable as a "vindictory impulse", appropriate where the orthodox compensatory function of negligence is unsuitable for ensuring the infringement does not go unremedied.¹³³ The vindictory nature of the award of a fixed figure is rendered conceptually sound by reference to the considerations affecting NZBORA damages, including the objective importance of the interest affirmed.¹³⁴

3 Chester v Afshar

In *Chester v Afshar*, Chester claimed against Afshar for negligently failing to advise her of an inherent risk to the medical procedure Chester underwent. That risk eventuated despite Afshar exercising due care.¹³⁵ Crucially important was Chester's concession that had she been fully informed, she would have delayed the surgery to explore other options, but ultimately would have proceeded.¹³⁶ The issue was whether Chester should recover, even though she could not show that Afshar's negligence caused her loss.¹³⁷

As in *Rees*, the character of the award is difficult to decipher. Instead of appealing to the clearer concept of vindication as a distinct goal of negligence, Lords Steyn, Hope and Walker, in the majority judgment, used the need to protect the plaintiff's rights to modify the requirements of causation and compensable damage. The results of this approach are mixed, with welcome recognition that the plaintiff's right to know and deliberate the risks warranted vindication.¹³⁸ If no remedy was granted, the correlative effect of failing to vindicate the right would render the doctor's duty of care:¹³⁹

[A] hollow one, stripped of all practical force and devoid of all content ... [losing] its ability to protect the patient and thus to fulfil the only purpose which brought it into existence.

130 At 80.

131 Witzleb and Carroll, above n 5, at 38.

132 At 38.

133 Varuhas, above n 38, at 269.

134 At 269.

135 *Chester v Afshar* [2004] UKHL 41, [2005] 1 AC 134 at [4]–[5].

136 At [7].

137 At [9].

138 At [22]–[24].

139 At [87].

While it was appropriate to conclude a remedy was required, the intermingling of compensatory and vindicatory rationales reduces conceptual clarity. The finding that Afshar was liable for all consequences of the surgery is difficult to sustain — the vindicatory impulse arises from the deprivation of the right to deliberate following Afshar’s failure to warn Chester of the risks of her procedure, not from an increased risk of injury following the same failure to warn.¹⁴⁰ As the award can be better traced to the deprivation of the plaintiff’s autonomy, it was vindicatory. Yet, the quantum was incorrectly calculated to compensate for the consequences of the undermined autonomy — the personal injury.¹⁴¹ Lord Hoffman’s suggestion in the minority of a “modest solatium” to vindicate the patient’s right to choose — reminiscent of the “conventional sum” in *Rees* — better captures the quantum as referable to the autonomy interest, rather than the consequent injury.¹⁴²

4 Actionable Damage

The first objection to characterising the remedies in the above cases as non-loss-based vindicatory damages is whether, given the supposed dispensation with actionable damage, the cause of action in negligence is complete.¹⁴³ After all, if vindicatory damages are not assessed with reference to factual losses, the “gist of the action” is absent.¹⁴⁴ Loss is no longer the feature founding liability, setting time running for limitation purposes or determining damages.¹⁴⁵

This subpart rejects the presumption that vindicatory damages are incompatible with negligence by offering two species of actionable damage present in wrongful conception cases: loss of autonomy and personal injury. Crucially important to this analysis is Nolan’s observation that the damage establishing the cause of action cannot be confused with harms for which recovery is permitted once the cause of action is established.¹⁴⁶ This is why, for example, distress and upset cannot themselves support negligence, but if brought about by harm that does, damages are generally available.¹⁴⁷ Vindicatory damages, therefore, do not dispense with actionable damage, they merely go beyond the damage establishing the action.¹⁴⁸

140 At [61].

141 Tsachi Keren-Paz “Compensating Injury to Autonomy in English Negligence Law: Inconsistent Recognition” (2018) 26 *Med L Rev* 585 at 592–593.

142 *Chester*, above n 135, at [33]–[34].

143 Tsachi Keren-Paz “Compensating Injury to Autonomy: A Conceptual and Normative Analysis” in Kit Barker, Karen Fairweather and Ross Grantham (eds) *Private Law in the 21st Century* (Hart Publishing, Oregon, 2017) 411 at 419.

144 Jane Stapleton “The Gist of Negligence: Part 2 The Relationship Between ‘Damage’ and Causation” (1988) 104 *LQR* 389 at 393.

145 Craig Purshouse “Liability for lost autonomy in negligence: Undermining the coherence of tort law?” (2015) 22 *TLJ* 226 at 234.

146 Nolan, above n 127, at 61.

147 At 61.

148 David Neild “Vindicatory Damages in the Child Welfare Tort Cases” (LLM Thesis, Victoria University of Wellington, 2011) at 58.

The first solution to the actionable damage requirement is to recognise diminished autonomy itself as actionable damage in negligence. Tsachi Keren-Paz argues that actionable damage occurs where a plaintiff opting for sterilisation prefers not having a child to having a child, and whose decision is undermined by their doctor's negligence.¹⁴⁹ Any patient has a cause of action, irrespective of the risk of a child being conceived, if they can establish that, if fully informed, they would not have consented to their worsened condition caused by a doctor's negligence.¹⁵⁰ Existing authorities are explicable on this analysis. One of these authorities is *Rees*, where negligent interference with reproductive autonomy led to the conventional award.¹⁵¹ Another is *Yearworth v North Bristol NHS Trust*, where the true injury was the lost option to become a father,¹⁵² not the negligent "destruction of the sperm as property *per se*".¹⁵³ This analysis can be applied to wrongful conception by acknowledging lost autonomy as the actionable damage and framing vindictory damages as recognising the undermined interest, rather than compensating for the consequences.

The second solution to the actionable damage requirement is to recognise pregnancy following a failed sterilisation as an actionable personal injury, as in *Allenby v H*.¹⁵⁴ Nolan's distinction between actionable damage and recoverable heads of damage is particularly crisp in this context because of New Zealand's statutory bar prohibiting compensatory damages for personal injury.¹⁵⁵ This distinction underlies the decision to make available exemplary damages in *Donselaar v Donselaar*, notwithstanding the statutory bar.¹⁵⁶ While in *Donselaar*, the cause of action arose from personal injury — the assault on the plaintiff with a hammer — exemplary damages were not directed towards the injury, but rather the defendant's outrageous conduct.¹⁵⁷ The decision in *Wilding* to allow a claim for NZBORA damages rests on the same distinction between damages arising from personal injury and the claim itself.¹⁵⁸ The applicability to vindictory damages is an analogous insistence that, while the claim is premised on personal injury as actionable damage, vindictory damages recognise important rights, not the personal injury.

5 *The Unruly Horse*

The second objection to characterising the remedies in the above cases as vindictory damages is the view taken in *Lumba*, and endorsed in *Shaw*,¹⁵⁹ that the "unruly horse" of vindictory damages should not be let loose on tort

149 Keren-Paz, above n 143, at 417.

150 At 417.

151 *Rees*, above n 9, at [123].

152 *Yearworth v North Bristol NHS Trust* [2009] EWCA Civ 37, [2010] QB 1 at [57].

153 Keren-Paz, above n 141, at 598–599 (emphasis in original).

154 *Allenby v H* [2012] NZSC 33, [2012] 3 NZLR 425 at [76].

155 Accident Compensation Act 2001, s 317; and Nolan, above n 127, at 61.

156 *Donselaar v Donselaar* [1982] 1 NZLR 97 (CA) at 107.

157 At 98 and 109.

158 *Wilding*, above n 80, at [11].

159 *Shaw v Kovac* [2017] EWCA Civ 1028, [2017] 1 WLR 4773 at [84].

law.¹⁶⁰ Lord Dyson, giving the leading judgment in *Lumba*, declined to award vindictory damages to plaintiffs who had been falsely imprisoned. His Lordship reasoned that such an award would create undesirable uncertainty when applying *Attorney-General of Trinidad and Tobago v Ramanoop*, which awarded vindictory damages for breaches of constitutional rights to a private claim against the executive.¹⁶¹ This reasoning is unconvincing, given his Lordship's insistence that vindictory damages closely resemble exemplary damages.¹⁶² Either vindictory damages are so distinctive to constitutional law that to apply them to any private claim is "a big leap", or they are so closely linked to existing tortious remedies that vindictory impulses in private law are already answerable.¹⁶³

Lord Dyson further claimed that uncertainty would result because there would be no basis for refusing vindictory damages in other torts, including those committed by non-state actors.¹⁶⁴ This claim warrants attention. While there would be no basis for refusing vindictory damages for other torts and against non-state actors, vindictory damages' prospective availability can be rendered certain by recognising that tort law's vindictory function is subsidiary to its compensatory function. Assessing the applicability of the compensatory principle reins in Lord Dyson's "unruly horse" because vindictory damages will frequently be unnecessary in claims concerning quantifiable loss. Where the harm is to an intangible interest, like reproductive autonomy, compensation is an imperfect mechanism for restoration and protection.¹⁶⁵ Vindictory damages should be considered as separate from general damages — the normal remedial response to violations of intangible interests — when the significance of the right is such that it requires protection beyond a "modest solatium" intended to provide comfort, relief and consolation.¹⁶⁶ Hence, Lord Dyson's "unruly horse" is restrained to exceptional cases where the significance of the right to determine whether, and when, to reproduce, and the significance of a doctor's corresponding duty, may justify awarding vindictory damages.

Lord Dyson's claim also underlies Davis LJ's refusal in *Shaw* to make a conventional award. In *Shaw*, the defendants accepted they had breached their duties of care in failing to sufficiently inform Shaw of the operation's risks and that, as he would not have undergone the operation if warned, this breach caused his death.¹⁶⁷ Davis LJ distinguished *Rees* on the basis that the claimant was seeking an additional, free-standing award to compensate lost

160 *Lumba*, above n 10, at [101]; and *Attorney-General of Trinidad and Tobago v Ramanoop* [2005] UKPC 15, [2006] 1 AC 328.

161 *Lumba*, above n 10, at [100] citing *Attorney-General of Trinidad and Tobago*, above n 160, at [19]–[20].

162 *Lumba*, above n 10, at [100].

163 At [100]–[101].

164 At [101].

165 Witzleb and Carroll, above n 5, at 23.

166 At 23.

167 Craig Purshouse "Autonomy, Affinity and the Assessment of Damages: *ACB v Thompson Medical PTE Ltd* [2017] SGCA 20 and *Shaw v Kovak* [2017] EWCA Civ 1028" (2017) 26 Med L Rev 675 at 680; and *Shaw*, above n 159, at [25].

autonomy, absent physical injury.¹⁶⁸ To award a conventional sum in an informed consent case would open the floodgates to its availability in other torts involving infringements of personal autonomy.¹⁶⁹

The persuasive authority of *Shaw* is impaired by the lack of comprehensive pleadings; the conventional award was only raised in oral argument.¹⁷⁰ The plaintiff was seen as seeking “a ‘vindicatory’ award of damages over and above the compensatory award ordinarily to be expected in tort cases of [that] kind”,¹⁷¹ with a value far exceeding that contemplated in *Lumba* or *Rees*. This led the Court to understand that a substantial additional remedy was being sought, intended to bypass statutory limitations. This was a crucial factor in the Court rejecting the appeal.¹⁷² Given this shaky foundation, it is unsurprising that Davis LJ failed to convincingly distinguish *Rees* from *Shaw*. Davis LJ refused to make a conventional award due to the Administration of Justice Act 1982 (UK), which restricts the recovery of post-mortem damages.¹⁷³ However, the same reasoning could have applied in *Rees*, where *McFarlane*, as the equivalent to the Act, should have prevented recovery for childcare costs. *Rees*, however, was able to claim for lost autonomy, and *Shaw* was not.¹⁷⁴ Either autonomy is a separate form of damage in which case both claimants should have received damages, or it is not, in which case both should have been refused an award.¹⁷⁵ Nor can the distinction rest on the availability of general damages, as *Rees* was awarded damages for pain and suffering and this did not preclude awarding a conventional sum.¹⁷⁶

It is unprincipled to restrict the availability of vindicatory damages by focussing on the *consequences* of the infringement — namely, whether physical injury occurred. A better justification for reining in the “unruly horse” is to make vindicatory damages a discretionary award. The award would apply in situations where the harm caused to the plaintiff is significant but unsuited to the application of the compensatory principle, where the plaintiff’s right and defendant’s duty are significant and where the breach is serious.¹⁷⁷

Vindicatory Damages Distinguished from Other Remedies

This subpart responds to Kit Barker’s argument rejecting the need for vindicatory damages.¹⁷⁸ Barker argues that vindicatory damages have no

168 *Shaw*, above n 159, at [80]–[81].

169 At [81].

170 At [75].

171 At [51].

172 At [65]–[69] and [73].

173 Purshouse, above n 167, at 682.

174 At 682.

175 At 682.

176 At 682.

177 Ronald JJ Wong “Upkeep claims for wrongful birth, wrongful conception or wrongful fertilisation? IVF mix-up in the Singapore High Court: *ACB v Thomson Medical Pte Ltd* [2015] SGHC 9” (2015) 23 Tort L Rev 172 at 181.

178 Barker, above n 34, at 86.

normative life of their own and are instead parasitic upon the declaratory, compensatory and deterrence purposes that characterise existing tortious remedies.¹⁷⁹ The aims underpinning vindicatory damages can, therefore, be met by existing remedies.¹⁸⁰ This subpart demonstrates the utility of a discrete head of vindicatory damages by analysing the insufficiency of declarations, nominal damages and exemplary damages to accomplish vindicatory purposes fully.

1 Nominal Damages

The leading statement on nominal damages is given in *The Owners of the Steamship “Mediana” v The Owners, Master and Crew of the Lightship “Comet”*:¹⁸¹

“Nominal damages” is a technical phrase which means that you have negated anything like real damage, but that you are affirming by your nominal damages that there is an infraction of a legal right which, though it gives you no right to any real damages at all, yet gives you a right to the verdict or judgment because your legal right has been infringed.

One can surmise that the purpose of nominal damages is to vindicate rights so important that interference with them is actionable without loss.¹⁸² Such vindication is achieved when all the elements of the tort are established, entitling the plaintiff to damages of a token amount — in some cases as little as \$1.¹⁸³ The public-facing aspect of vindication is also present with nominal damages having a declaratory effect stronger than a declaratory order which, as an equitable remedy, is discretionary. Nominal damages, meanwhile, are ostensibly granted as of right once the tort is established.¹⁸⁴

However, nominal damages are limited in achieving vindicatory purposes, as they are only awarded for torts actionable *per se*.¹⁸⁵ Even if nominal damages were available in negligence, their vindicatory effect is limited; there is a contradiction between awarding damages to recognise rights absent proof of loss and valuing said rights as little as \$1.

2 Exemplary Damages

Exemplary damages are not compensatory, but are instead intended to punish a defendant’s outrageous misconduct, deter future misconduct and register the Court’s condemnation.¹⁸⁶ As a remedy of last resort, they serve a subsidiary

179 At 90.

180 At 86.

181 *The Owners of the Steamship “Mediana” v The Owners, Master and Crew of the Lightship “Comet”* [1900] AC 113 (HL) at 116.

182 Bill Atkin “Remedies” in Stephen Todd (ed) *Todd on Torts* (8th ed, Thomson Reuters, Wellington, 2019) 1313 at 1337.

183 At 1337.

184 At 1336–1337.

185 Harvey McGregor *McGregor on Damages* (19th ed, Sweet & Maxwell, London, 2014) at 447.

186 *Wilkes v Wood* (1763) Lofft 1 at 18–19, 98 ER 489 (KB) at 498–499.

function to compensatory damages and are available only where compensation is inadequate redress.¹⁸⁷ However, this subsidiary function has been recognised important in New Zealand, justifying the availability of exemplary damages notwithstanding ACC's statutory bar.¹⁸⁸

The vindicatory capacity of exemplary damages is stronger than that of nominal damages, as demonstrated by *Bottrill v A*.¹⁸⁹ *Bottrill* accepted that exemplary damages might be awarded in negligence for outrageous conduct, as their main function was to mark the court's disapproval of unacceptable conduct, rather than to punish the defendant.¹⁹⁰ This approach was curtailed in *Couch v Attorney-General (No 2)*, which increased the emphasis on the defendant's intention or subjective recklessness, with a notable dissent from Elias CJ that "such [a] precondition restricts the general exemplary jurisdiction to mark society's condemnation of outrageous behaviour by the defendant which is insufficiently addressed by other remed[ies]".¹⁹¹ Consequently, exemplary damages could accomplish the public-facing aspect of vindication, as it is through condemnation that the plaintiff's rights are vindicated.¹⁹² This possibility would be enhanced by adopting the wider concept of exemplary damages advanced by Thomas J in *Bottrill*, where his Honour argued that in addition to punishment, exemplary damages deter, vindicate, condemn, educate, discourage abuses of power, appease the victim and symbolise society's disapproval.¹⁹³ Exemplary damages would serve a vindicatory purpose by recognising the value of the right and highlighting that the violation of certain values is itself objectionable, irrespective of any compensable loss ensuing.¹⁹⁴ This possibility holds strategic merit, as expanding the purposes of exemplary damages may prove easier than introducing vindicatory damages and arguing their exemption from the statutory bar.

However, exemplary damages are limited in accomplishing vindicatory purposes, as their availability is determined by the defendant's conduct, rather than the significance of the right disregarded by said conduct. While exemplary damages capture the public-facing aspect of vindication, looking to the defendant's misconduct means the plaintiff's rights only receive incidental protection.

187 *Cassell & Co Ltd v Broome* [1972] AC 1027 (HL) at 1121–1122.

188 *Donselaar*, above n 156, at 107.

189 *Bottrill v A* [2003] 2 NZLR 721 (PC).

190 At [20].

191 *Couch v Attorney-General (No 2)* [2010] NZSC 27, [2010] 3 NZLR 149 at [4] and [178]–[179].

192 Bevan Marten "Exemplary Damages" in Peter Blanchard (ed) *Civil Remedies in New Zealand* (2nd ed, Brookers, Wellington, 2011) 521 at 528–529.

193 *Bottrill v A* [2001] 3 NZLR 622 (CA) at [95] and [101].

194 At [98].

3 Declarations

The High Court has the discretionary power to grant declaratory orders under the Declaratory Judgments Act 1908 or as an exercise of the Court's inherent jurisdiction:¹⁹⁵

[A] declaratory judgment is a judicial statement confirming or denying a legal right to the applicant ... The declaratory judgment merely declares and goes no further in providing relief to the applicant than stating his rights.

Although not traditionally a tortious remedy, a declaration may vindicate rights where the plaintiff is not seeking compensation but instead requires a statement from the courts as to whether their rights have been infringed.¹⁹⁶ This function was acknowledged in *Re Chase*, where the court accepted that courts have an increasing societal role in inquiring and adjudicating on matters of public importance.¹⁹⁷ While in that case Henry J noted the limitations of a declaration and did not grant one, his Honour acknowledged that a declaration offers a mechanism for vindication, provided the declaration is useful for protecting, enforcing or judicially recognising the rights of the parties.¹⁹⁸ Nevertheless, the inadequacy of a declaration to accomplish vindicatory purposes in the NZBORA context applies equally in tort law, where a declaration may accomplish deterrence, publicise the wrong and ensure compliance. Without accompanying damages, however, a declaration may not adequately recognise and address the affront to the victim, nor bring home to the defendant that society condemns their conduct.¹⁹⁹

4 Conclusion

While this subpart has accepted that a vindicatory role exists within existing tortious remedies, it has also demonstrated the inadequacy of existing remedies to accomplish vindicatory purposes. Only a discrete head of vindicatory damages can look to the wrong and, if appropriate, mark it with a non-nominal sum that recognises and addresses the affront to the plaintiff, and society as a secondary victim.

Drawing it Together: Vindicatory Damages for Wrongful Conception

This concluding subpart presents a model for awarding vindicatory damages in wrongful conception cases.

195 Lazar Sarna *The Law of Declaratory Judgments* (2nd ed, Carswell Co Ltd, Ontario, 1988) at 1.

196 Atkin, above n 182, at 1359.

197 *Re Chase* [1989] 1 NZLR 325 (CA) at 342–343.

198 At 342–343.

199 *Taunoa*, above n 4, at [255].

1 *The Plaintiff*

Those who can establish the negligent performance of a sterilisation procedure or provision of sterility advice have standing. While women and their partners' reproductive autonomy is undermined in these circumstances, Lord Millet was incorrect to suggest that "it would be absurd to distinguish between the claims of the father and mother".²⁰⁰ As conception is the point at which reproductive autonomy is undermined, the gendered nature of this harm requires recognition. The undermining of bodily integrity and decisional autonomy is uniquely female.²⁰¹ The consequent frustration of the choice to avoid parenthood and the imposition of reproductive choices like abortion, adoption or keeping the child, should receive greater weighting for the plaintiff who conceived.²⁰²

2 *The Defendant*

Direct liability for medical practitioners is justifiable, as their actions directly undermine reproductive autonomy. The possibility of vicarious liability for a medical practitioner's employer, usually a DHB, is more controversial. The closest analogy to vindictory damages is vicarious liability for exemplary damages in personal injury proceedings. The balance of authority in New Zealand dismisses vicarious liability for exemplary damages as unfair and unprincipled, unless the party has committed punishable behaviour.²⁰³ This dismissal is less persuasive for vindictory damages, where the primary purpose is affirming rights. Deterrence is a subsidiary function of vindictory damages. Transferring liability from the primary wrongdoer to their employer would not dilute vindictory damages' primary purpose.²⁰⁴ If anything, the vindication would be amplified by recognition at the DHB level. The public-facing aspects of vindication would also be enhanced, with the employer's potential liability incentivising supervision and education of their workforce.²⁰⁵ On balance, vicarious liability for vindictory damages should be available.

3 *The Award*

As vindication is a secondary function to compensation, vindictory damages should be discretionary. Courts should have regard to other forms of relief available in determining whether, given the scheme of priorities in *Dunlea*, an award is appropriate.²⁰⁶ This entails assessing whether vindictory damages

200 *McFarlane*, above n 21, at 79.

201 *Stevens*, above n 23, at 77.

202 At 77–78.

203 *S v Attorney-General* [2003] 3 NZLR 450 (CA) at [124].

204 Joanna Manning "Civil Proceedings in Personal Injury Cases" in Peter Skegg and Ron Paterson (eds) *Health Law in New Zealand* (Thomson Reuters, Wellington, 2015) 1061 at 1075.

205 At 1075.

206 *Dunlea*, above n 54, at [42]. See also *Baigent's case*, above n 53, at 702–703.

are required to remedy the invasion of the plaintiff's interests, with secondary consideration given to public-facing concerns like ensuring compliance with standards of conduct, deterrence, the wider public interest and the appropriateness of the liability burden. Using *Dunlea* in this manner provides conceptual stability to the otherwise inconsistently reasoned award in *Rees*.

In terms of the considerations affecting the award, the first point of distinction is between the conventional sum as conceived in *McFarlane*, with a base figure subject to discretionary adjustment,²⁰⁷ and the conventional sum as conceived in *Rees*, with a fixed figure in all cases.²⁰⁸ While arbitrary, the *Rees* approach is attractive in New Zealand, given the importance of vindicatory damages remaining non-compensatory. By drawing no distinctions between differently situated plaintiffs, *Rees* avoids the consequentialist assessments that are characteristic of compensatory damages. However, this is achieved at the expense of this article's premise: that respecting autonomy requires recognising that not *all* parents are identically situated, particularly female parents.²⁰⁹

The better view is to prefer the conventional sum in *McFarlane* but to limit the discretionary considerations affecting adjustments to the base figure to those bearing on the autonomy interest at the time of infringement. This limits the assistance from considerations affecting NZBORA damages to the importance and value of the right to the individual and the gravity of the breach, and secondarily, the importance of the right infringed to society, deterrence, engendering compliance and the appropriateness of marking society's disapproval. As the primary variable is the importance of the right to the individual, an adjustment should be made to reflect where the plaintiff is female and, as in *Rees*, other objective factors bearing on the autonomy interest, such as disability.

For the base figure for vindicatory damages, a balance needs to be struck between awarding an amount that is not derisory of the right and awarding an amount so substantial as to invite comparison with compensatory damages. While remaining mindful that NZBORA damages are compensatory, guidance may be taken from the trend towards more modest awards. Vindicatory damages should not exceed those awarded for NZBORA breaches — around \$15,000. Guidance might also be derived from awards of exemplary damages in personal injury cases. These demonstrate that the most serious instances of negligence may incur damages of between \$15,000 and \$20,000.²¹⁰ While these figures sketch an upper limit for vindicatory damages, the base figure is more elusive. The \$4,000 awarded for breach of the plaintiff's right to respect for her dignity in *Attorney-General v Udompun* most closely resembles the autonomy interest in wrongful conception cases.²¹¹ This base figure should be reviewed to ensure it creates the appropriate

207 *McFarlane*, above n 21, at 1006.

208 *Rees*, above n 9, at [123].

209 Prialx, above n 12, at 76.

210 Atkin, above n 182, at 1349.

211 *Attorney-General v Udompun* [2005] 3 NZLR 204 (CA) at [178].

amount of vindication and incentives, while not being so extravagant as to resemble compensatory damages.

IV VINDICATORY DAMAGES: EVALUATING THE REMEDY IN CONTEXT

This Part evaluates the appropriateness of vindicatory damages within New Zealand's medico-legal system under two arms: the "treatment injury" arm of the accident compensation scheme and the legislated Code for dealing with patient complaints.²¹² Outside these sit negligence claims for injuries not covered by ACC and for exemplary damages, irrespective of statutory coverage. This separation of pathways for patients pursuing action following adverse medical events divides types of accountability — communication, correction, restoration and sanction — between the two arms.²¹³

This Part argues that the current extent of statutory coverage for pregnancy following a failed sterilisation is limited in achieving vindication. This deficit should be addressed by enhancing the vindicatory effects of other accountability pathways and by making vindicatory damages available as a prospective remedy.

Evaluating Coverage under the Accident Compensation Scheme

The accident compensation scheme was introduced as a social contract where, in return for surrendering the right to sue, New Zealanders would receive comprehensive coverage for personal injury.²¹⁴ The Accident Compensation Act, s 317(1) provides the mechanism for this exchange. If there is cover under the Act, claimants cannot sue for compensatory damages.²¹⁵

1 Normative Limitations

In *Allenby*, the New Zealand Supreme Court extended coverage to pregnancy following a failed sterilisation, with impregnation constituting a personal injury caused by medical misadventure (now treatment injury) under s 20(2)(b). The consequent physical impact of the developing pregnancy constituted a gradual process injury under s 20(2)(f) or s 20(2)(g).²¹⁶ While it is tempting to equate ACC compensation with the relinquished right to sue, the normative differences between the two limit ACC's ability to vindicate. The duty to repair is agent-relative under tort law, because of the causal

212 PDG Skegg "A Fortunate Experiment? New Zealand's Experience with a Legislated Code of Patients' Rights" (2011) 19 Med L Rev 235 at 235.

213 Marie Bismark and others "Accountability sought by patients following adverse events from medical care: the New Zealand experience" (2006) 175 Canadian Medical Association Journal 889 at 890.

214 Rosemary Tobin "Unwanted Pregnancy: The outer boundary of 'treatment injury' in the New Zealand accident compensation scheme" (2015) 23 JLM 204 at 205.

215 At 205.

216 *Allenby*, above n 154, at [26].

connection between the healthcare provider's wrongful action and the outcome.²¹⁷ Conversely, the duty is agent-neutral under ACC, because the connection between the wrongful action and the outcome is severed by the distributive justice consideration that the community should perform the duty to repair, not the wrongdoer.²¹⁸ Wrongfulness, therefore, is reconfigured under ACC to constitute a wrong vis-à-vis the community and is determined by the norm of community responsibility, rather than causation.²¹⁹

While this article has contended that vindication should have a public-facing aspect, this should be subordinate to recognition of the infringement. Therefore, *Allenby* cannot be framed as primarily vindicating the plaintiff's reproductive autonomy. Instead, the Court's concern was that failing to provide cover would breach the social contract between the government and the people, and that a return to the right to sue would disproportionately increase the insurance burden on health practitioners.²²⁰ Vindictory damages will often be unavailable in claims involving personal injury because the right to be free of physical injury is sufficiently vindicated through ACC. Nevertheless, vindictory damages should be available following a failed sterilisation, notwithstanding coverage for pregnancy, as such damages provide agent-relative accountability. The exceptional case, where the harm is to an intangible interest like reproductive autonomy, justifies awarding vindictory damages outside the ACC bar.²²¹ Compensatory damages are an imperfect mechanism in such cases. Recovery is further justified by the significance of the right to determine whether, and when, to reproduce and the significance of a doctor's duty to provide services with reasonable care and skill.

2 Practical Limitations

Allenby ensures that doctors who negligently perform sterilisation procedures on female patients will not face actions for compensatory damages.²²² However, the practical limitations of non-comprehensive coverage, which persist following *Allenby*, incentivise the availability of vindictory damages where common law claims remain available.

The first practical limitation is where the failed sterilisation is performed on a man, and his partner becomes pregnant. This scenario presents difficulties in terms of the Accident Compensation Act, where cover under s 20(2)(b) extends to personal injury that is treatment injury, with treatment injury defined in s 32(1) as injury suffered by a person seeking or receiving treatment from a registered health professional. There is, therefore, an

217 Jesse Wall "In What Sense 'Rights'? Principles of Justice and the Code of Patients' Rights" in Mark Henaghan and Jesse Wall (eds) *Law, Ethics, and Medicine: Essays in Honour of Peter Skegg* (Thomson Reuters, Wellington, 2016) 293 at 298–299.

218 At 299.

219 At 299.

220 *Allenby*, above n 154, at [77]–[78].

221 Witzleb and Carroll, above n 5, at 23.

222 *Allenby*, above n 154, at [31] and [77]. See also Tobin, above n 214, at 216.

insufficient causal connection between the man who seeks or receives treatment in terms of the failed sterilisation and the woman who experiences what would otherwise be the personal injury of a resulting pregnancy. This was the reason a woman was able to pursue a common law claim in *SGB v WDHB* — she was not the patient receiving treatment, and her husband suffered no personal injury.²²³ The Court in *Allenby* was not minded to overturn *SGB* because of the lack of an applicable statutory provision for the situation where the consequence of a negligent procedure on a man is visited upon a woman.²²⁴ As it is doubtful that the legislation can be amended to cover this scenario without undermining the causality and primary party requirements under s 32(1)(a) and (b), vindicatory damages should be available to meet the vindicatory interests of those whom ACC cannot cover.

The second practical limitation is in the provision of childrearing costs and weekly compensation for those who lose earnings following a failed sterilisation. The Court of Appeal in *J v Accident Compensation Corporation* held that the plaintiff's entitlement to weekly compensation under s 69(1)(c) of the Act was limited by s 103(2) to the period she was unable to work because of the physical and mental symptoms of pregnancy and birth.²²⁵ Asher J, for the majority, took the view that the purpose of the Act and the definition of personal injury imply an emphasis on physical and mental injuries to the claimant.²²⁶ Hence, the test under s 103(2) for determining the availability of weekly compensation defined inability to work as arising from something that happened to the claimant's mind or body.²²⁷ The consequence of this more restrictive approach was to concede that the plaintiff had a possible common law claim to weekly compensation for lost wages for the period following her physical and mental recovery from pregnancy, and for childrearing costs.²²⁸ Asher J was unconvinced that such a claim would be successful, expressing scepticism of *Cattanach* in favour of *McFarlane*.²²⁹

In a strong dissent, Kós P took the contrasting view that, as the failed sterilisation caused the plaintiff the personal injury of a pregnancy for which she had cover, and a baby and the need to care for it were natural consequences of that injury, the inability to work because of needing to care for the baby was also a natural consequence of the injury.²³⁰ The plaintiff was entitled to periodic compensation for incapacity under s 103(2) for so long as the need to care for her child precluded her return to employment.²³¹ Kós P ventured the view that if the plaintiff were to pursue a common law claim, on the present and progressive state of New Zealand's tort law, *Cattanach* would be followed, not *McFarlane*.²³²

223 *SGB v WDHB* [2002] NZAR 413 (HC) at [34]–[36].

224 *Allenby*, above n 154, at [77]–[78].

225 *J v Accident Compensation Corporation* [2017] NZCA 441, [2017] 3 NZLR 804 at [32].

226 At [24].

227 At [31].

228 At [40]–[41].

229 At [39] and [41].

230 At [51].

231 At [51].

232 At [70].

While all agreed that the proper approach to construing the Act was to be “generous and uniggardly”,²³³ Stephen Todd and Rosemary Tobin share Asher J’s view that this approach remained practically limited by scope and purpose.²³⁴ Regarding weekly compensation, Todd notes that “[t]he statute is concerned with physical injury to the mother, not the economic consequences of the relationship between parent and child.”²³⁵ Likewise, Tobin argues that childrearing costs were not envisaged as statutory entitlements under s 69(1).²³⁶ Given the practical limitations of the scheme in extending coverage to these circumstances, combined with the need to alleviate the financial burdens of childcare and decreased employment prospects, Todd maintains that claims of this nature will not be affected by s 317(1).²³⁷ While there is disagreement about how New Zealand courts would approach such claims, Todd maintains that *McFarlane* is preferable against the background of the ACC scheme. Common law claims would allow courts to address the economic consequences of the relationship between parent and child falling beyond the boundaries of ACC with prospective compensatory damages.²³⁸ As the imposed relationship between parent and child also has significant implications for the parents’ autonomy, courts should consider vindicatory damages when such a claim is brought.

Evaluating the Effectiveness of the HDC Complaints Procedure

The Health and Disability Commissioner Act 1994 was enacted to “promote and protect the rights of health consumers and disability services consumers”,²³⁹ with the rights in question being those stated in the Code.²⁴⁰ The complaints regime is the means of achieving this aim by facilitating “the fair, simple, speedy, and efficient resolution of complaints relating to infringements of those rights”.²⁴¹ This subpart contends that the complaints process is limited in realising the balance of the previously mentioned accountability categories — communication, correction and sanction — and proposes reforms.

1 Limitations

Section 31(1) of the Health and Disability Commissioner Act permits any person to complain to the Commissioner alleging that a healthcare provider has breached the Code, providing an immediate improvement upon ACC, where coverage for pregnancy following a failed sterilisation depends on

233 *J v ACC*, above n 225, at [13]–[14] and [37] per Asher J, and [52] per Kós P.

234 At [36]; Stephen Todd “Accidental Conception and Accident Compensation” (2012) 28 *Journal of Professional Negligence* 196 at 205; and Tobin, above n 214, at 216.

235 Todd, above n 234, at 205.

236 Tobin, above n 214, at 216.

237 Todd, above n 234, at 208.

238 At 216.

239 Section 6.

240 Clause 1(1).

241 Health and Disability Commissioner Act 1994, s 6.

whom the procedure was performed. The relevant Code rights that may be breached in wrongful conception cases include Right 4(1), which entitles every consumer to services provided with reasonable care and skill, potentially covering a negligently performed sterilisation.²⁴² Right 6(1) provides every consumer with the right to information that a reasonable consumer, in that consumer's circumstances, would expect to receive, including the results of tests and procedures; potentially covering failures to properly advise a consumer regarding their sterility.²⁴³

If the Commissioner believes that a provider has breached the Code, s 45(2)(f) provides that they may refer the provider to the Director of Proceedings (DP) to decide whether to institute civil proceedings before the Human Rights Review Tribunal (HRRT). This pathway allows an aggrieved person to bring HRRT proceedings personally if, following a breach opinion, the Commissioner failed to refer the breach to the DP or having done so, the DP failed to instigate proceedings.²⁴⁴ However, the decision in *Marks v Director of Health and Disability Proceedings* to confine "aggrieved person" to consumers whose Code rights have been breached, prevents secondary victims — namely the partner who did not undergo the sterilisation or receive the advice — from bringing proceedings in their own right.²⁴⁵

Should the DP or "aggrieved person" institute HRRT proceedings, these are limited in achieving vindicatory purposes. Although s 54(1)(c) empowers the HRRT to award damages where the Commissioner cannot, s 52(2) replicates the statutory bar on compensatory damages. People who have suffered personal injuries covered by ACC, therefore, cannot obtain damages arising out of that injury.²⁴⁶ The combined effect of limiting the rights of "aggrieved person[s]" to institute proceedings to primary victims and extending coverage to pregnancy following a failed sterilisation is that there is no practical gain to HRRT proceedings in wrongful conception cases.²⁴⁷ While s 54 empowers the HRRT to grant other remedies, including declaring Code breaches and damages per s 57, it is unlikely their vindicatory effects outweigh the cost of instituting proceedings.²⁴⁸

2 Reforms

The vindicatory effects of the complaints process can be enhanced by expanding the definition of "aggrieved person" in s 51 to enable secondary victims to bring HRRT proceedings. This reform would enable the partner of the consumer to access accountability in wrongful conception cases.

242 Clause 2, rt 4(1).

243 Clause 2, rt 6(1)(e), (f) and (g).

244 Health and Disability Commissioner Act, s 51.

245 *Marks v Director of Health and Disability Proceedings* [2009] NZCA 151, [2009] 3 NZLR 108 at [47].

246 Sections 52(2) and 54(1)(c).

247 Joanna Manning "'Fair, Simple, Speedy and Efficient'? Barriers to Access to Justice in the Health and Disability Commissioner's Complaints Process in New Zealand" [2018] NZ L Rev 611 at 627–628.

248 Sections 54(1) and 57.

Conceivably, this impact could carry over to the availability of compensatory damages in the HRRT, as the partner will not have experienced the personal injury associated with the Code breach and s 52(2) will not apply. Expanding accessibility to civil proceedings, while increasing procedural fairness for those with no other means of complaint resolution, could endanger the simplicity, speed and efficiency of the process.²⁴⁹ However, this danger could be tempered with a requirement to obtain leave to appeal from the HRRT.

A further enhancement would be to include vindictory damages within the types of damages the HRRT is empowered to award under s 57(1).²⁵⁰ While s 57(1)(c) and (d) are the closest approximation to vindictory damages, as (c) focuses on the consequences of the breach and (d) the defendant's conduct, neither would recognise the invasion of the complainant's reproductive autonomy. As previously argued in respect of vindictory damages' circumvention of the statutory bar, including vindictory damages in s 57(1) would not fall foul of s 52(2).²⁵¹ The potentiality of the HRRT awarding vindictory damages should exist alongside negligence claims for the same, as is currently the case for exemplary damages.

Evaluating the Remedy in Context

New Zealand's unique system for responding to adverse medical events requires evaluating prospective changes holistically. That said, it is appropriate to introduce vindictory damages following common law or HRRT proceedings.

V CONCLUSION

This article has engaged with the medico-legal phenomenon of allegations against medical practitioners of negligently performing sterilisations or providing sterility advice, resulting in a wrongful conception. It has defended the proposition that, while tort law's primary function is to compensate plaintiffs, tort law can also exercise an alternative, vindictory function by awarding vindictory damages to mark undermined reproductive autonomy.

This article conceptualised the remedy using NZBORA damages to support the availability of vindictory damages. These damages would be substitutive for the right infringed and reflect the communal interest in upholding the right. Those who could establish the negligent performance of a sterilisation or provision of sterility advice would have standing. Medical practitioners could be held directly liable and their employers vicariously liable. Vindictory damages would be discretionary, dependent on the need to

249 See Manning, above n 247, at 652.

250 Section 57(1).

251 Sections 52(2) and 57(1).

vindicate the interest, with secondary consideration given to public-facing concerns like ensuring compliance with medical standards and publicly vindicating women's equality. Like exemplary and NZBORA damages, vindicatory damages would be exempt from ACC's statutory bar.

This article then evaluated the appropriateness of vindicatory damages within New Zealand's medico-legal system. This evaluation revealed the limitations of the accident compensation scheme and the complaints process in vindicating patients' interests. The availability of vindicatory damages following common law or HRRT proceedings would provide accountability in wrongful conception cases falling on, or beyond, the outer boundary of treatment injury and would recognise undermined autonomy within or separate from the complaints process.