‘IT’S NOT JUST ABOUT THE MONEY’ — ENHANCING THE VINDICATORY EFFECT OF PRIVATE LAW REMEDIES

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I INTRODUCTION

Plaintiffs litigate for many reasons. Often they will seek monetary compensation for loss. At other times, their primary objective will be to ensure that harmful behaviour stops, for their benefit and for that of others. Underlying many claims will be a plaintiff’s desire to be vindicated: that the court make known to them, to the defendant and to the wider community that the harm they have suffered was caused by the defendant and is wrongful in the eyes of the law.[1] This objective assumes particular importance where the plaintiff suffers intangible harm, such as injury to reputation, feelings and dignity. In many such cases, an acknowledgment of wrongdoing or an apology will often have greater value than an award of money.[2]

Vindication of legal rights is an important purpose of private law.[3] Every court judgment and every remedy whether monetary or non-monetary has a vindicatory effect.[4] Damages are the most frequently awarded private law remedy, although specific relief is granted where damages are ‘inadequate’ to enforce or protect the

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1 This is well-established for survivors of sexual violence, where studies show that they are seeking more than money through civil litigation, such as a public affirmation of the wrong that they suffered and to be ‘heard’. Nathalie Des Rosiers, Bruce Feldthusen and Oleana Hankivsky, ‘Legal Compensation for Sexual Violence: Therapeutic Consequences and Consequences for the Judicial System’ (1998) 4 *Psychology, Public Policy and Law* 433, 433; Bruce Feldthusen, Olena Hankivsky and Lorraine Greaves, ‘Therapeutic Consequences of Civil Actions for Damages and Compensation Claims by Victims of Sexual Abuse’ (2000) 12 *Canadian Journal of Women and Law* 66.

2 A personal account of the need for an apology in settlement of a civil action is provided in Donna Carson and Debbie Ritchie, *Judas Kisses: A True Story of Betrayal and Survival* (Hardie Grant Books, 2007) 399. Donna Carson was doused in petrol and set alight by her de facto partner. She suffered burns to 65 per cent of her body and spent the next six months in hospital. While she was in hospital and later recuperating her two sons were taken out of her custody by the NSW child welfare services. Ms Carson recovered and later regained custody of her two sons. Having recovered criminal injuries compensation, she brought civil proceedings against the child welfare services for their negligence in investigating the circumstances which led them to remove the children from her custody. During settlement negotiations on the eve of trial, Ms Carson recounts saying to her lawyer, ‘If I got millions, it wouldn’t make up for the damage they’ve caused. This is about receiving an apology for something they got wrong. It isn’t about the money’, and her lawyer replying, ‘I’m afraid money is exactly what it’s about, whether you like it or not’.

3 See Part II A and B, below.

4 On the vindicatory effect of damages awards, see Normann Witzleb and Robyn Carroll, ‘The Role of Vindication in Torts Damages’ (2009) 17 *Tort Law Review* 16. More specifically on contract damages, see David Pearce and Roger Halson, ‘Damages for Breach of Contract: Compensation, Restitution and Vindication’ (2008) 28 *Oxford Journal of Legal Studies* 73.

plaintiff's legal rights. The awarding of damages is the conventional response to civil wrongdoing. However, the vindicatory function of civil remedies, although expressly recognised by the courts, is rarely given discrete attention as a relevant concern.[5] Despite the plaintiff's need for vindication, it is generally incidental to ordering compensation, restitution or (exceptionally) punishment against the defendant. Notwithstanding the often complementary role of vindication, a noticeable trend can be detected in recent years of courts and academic writers declaring vindication to be a distinct function of damages awards.[6] In this article, we argue that a plaintiff's need for vindication should also be a distinct concern in decisions about non-monetary remedies where the plaintiff has suffered intangible harm.[7]

We submit that existing legal doctrine poses no bar to a court having regard to the psychological needs of parties in remedial decision-making. Our argument is supported by therapeutically-oriented approaches to the resolution of legal disputes, which allow greater opportunity for psychological healing and restoration of relationships between wrongdoers and those they have harmed. There is increasing use of restorative practices and problem-solving courts in the criminal justice system, where emphasis has been directed away from retribution towards the psychological needs of victims and defendants.[8] Likewise, in civil disputes, there has been a significant rise in the use of mediation and other non-adversarial settlement processes.[9] There are numerous reasons for this, including concerns about costs associated with trials or settling on the eve of trial, the financial and emotional costs of the trial process and the narrow range of outcomes available by judicial order.

Non-adversarial processes allow parties to participate more actively and offer scope for solutions they agree to, rather than have imposed on them, including outcomes not confined to monetary terms. For this reason, a party seeking non-monetary vindication may favour mediation over an adjudicated process.

5 A notable exception is *Ashley v Chief Constable of Sussex Police* [2008] 1 AC 962, where the claimant's desire to receive vindication, rather than compensation, through an award of damages, was the central issue before the House of Lords. The vindicatory function of awarding damages for injury to reputation, feelings and dignity (where available) is typically achieved through awarding damages at large or through the award of aggravated damages, see Witzleb and Carroll, above n 4. For a recent analysis of aggravated damages, injury to dignity and differentiating between dignity and reputation, see John Murphy, 'The Nature and Domain of Aggravated Damages' (2010) 69 *Cambridge Law Journal* 353.

6 Many of the cases in which courts have awarded so-called vindicatory damages, or recognised vindication as a distinct function of a damages award, are concerned with remedies for breaches of human rights rather than private law wrongs. See, eg, *City of Vancouver v Ward* [2010] 2 SCR 28; *Taunoa v A-G* [2008] 1 NZLR 429; *A-G of Trinidad and Tobago v Ramanoop* [2006] 1 AC 328 (PC); *Merson v Cartwright* [2005] UKPC 38, see Lord Scott in particular. For a critical analysis, see Robert Stevens, *Torts and Rights* (Oxford University Press, 2007) 59ff; Witzleb and Carroll, above n 4.

7 Other court processes or orders may provide vindication to a defendant. For example, strike out orders, judgments against the plaintiff and costs orders. This article, however, is focused on remedies awarded by the court to a successful plaintiff.

8 Michael S King, 'Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice' (2008) 32 *Melbourne University Law Review* 1096, 1101–10.

9 See generally Hilary Astor and Christine M Chinkin, *Dispute Resolution in Australia* (Butterworths, 2nd ed, 2002) ch 1; Tania Sourdin, *Alternative Dispute Resolution* (Lawbook Co, 3rd ed, 2008) ch 1.

But when the parties cannot agree on a non-adversarial process, or when it is unsuitable, a plaintiff may have no choice but to pursue their case through the court and prevail upon the court to grant the remedy sought. Procedural justice theory, which is concerned also with the psychological response of parties to judicial and other legal processes, can contribute greatly to our understanding of a plaintiff's psychological experience of the litigation process. This article, however, is concerned with the vindicatory effect of judicial orders in contested proceedings, rather than the vindicatory effect of the judicial process, even though the two are inevitably connected. We submit that there is untapped potential for the law of remedies to acknowledge the plaintiff's therapeutic needs and to facilitate the plaintiff's recovery.

This article is structured as follows. In Part II the meaning of legal vindication is explained and a brief overview is provided of the orthodox approach to granting non-monetary orders as specific relief. In Part III we examine the remedial needs occasioned by a number of wrongs against personality interests. On the basis of studies involving victims of medical negligence, defamation and discrimination, we argue that the conventional remedy of damages may be insufficient in some cases to meet a party's need for vindication. We draw on therapeutically-oriented approaches to judicial decision-making to support our argument that courts should give due weight to a plaintiff's remedial preference for non-monetary remedies and for judicial pronouncements that support the plaintiff's choice of remedy. Part IV provides examples of how courts can strengthen the therapeutic benefit of judicial remedies and the vindicatory role of law more generally. Finally, we conclude that there are legal and therapeutic justifications for courts to give greater emphasis to vindication as a purpose of private law. This can be achieved by paying more regard in judicial decision-making to the non-monetary remedial needs of plaintiffs.

II VINDICATION AND THE CHOICE OF JUDICIAL REMEDIES

In this Part we examine the way in which courts traditionally approach questions of remedial choice under the general law and statutes. The difficulties of redressing non-pecuniary harm appropriately have been the subject of extensive debate; for example, whether damages are an effective way to compensate for non-pecuniary harm.[10] The issue raised here, however, is the ability of specific relief to provide stronger vindication than damages for certain types of wrongs.

10 Torts scholars have suggested various ways to redress non-pecuniary loss other than by awards of damages. See, eg, Richard Abel, 'General Damages Are Incoherent, Incalculable, Incommensurable and Inegalitarian (But Otherwise a Great Idea)' (2006) 55 *DePaul Law Review* 253, 254, who concludes that payment of treatment expenses by the tortfeasor, rather than money, is the proper way to deal with the pain that results from tortious injury. Daniel Shuman has argued that the law should be more encouraging of tortfeasors making apologies and other benevolent gestures to reduce the intangible loss that results from negligence and other torts: see Daniel W Shuman, 'The Role of Apology in Tort Law' (2000) 83 *Judicature* 180.

A *Vindication as Giving Effect to Rights*

Vindication is a well-recognised function of private law. Generally, to 'vindicate' means 'to clear from censure, criticism, suspicion, or doubt, by means of demonstration; to justify or uphold by evidence or argument' and 'to assert, maintain, make good, by means of action, especially in one's own interests; to defend against encroachment or interference.'[11] In the context of litigation, a court 'makes good' the plaintiff's rights by granting a judicial remedy. As stated in the oft-cited passage of Holt CJ in *Ashby v White*:

> 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 to 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 …[12]

Courts have referred on numerous occasions to the importance of granting a remedy to vindicate rights that have been infringed.[13] Most recently, Lord Hope stated in *Chester v Afshar* that '[t]he function of the law is to enable rights to be vindicated and to provide remedies when duties have been breached.'[14]

B *Vindication as Validation of Social Status*

In some situations remedies are aimed at vindicating the interests that underlie the right or rights infringed. The clearest example of the vindication of underlying interests is seen in defamation cases where courts refer to the importance of vindicating a plaintiff's reputation.[15] In these cases, the remedy vindicates not only rights, but also the social status of the plaintiff. As we have explained elsewhere,[16] the vindication aimed for in awards of defamation damages differs from the vindication envisaged in the context of awards for other common law wrongs. In defamation, vindication means to 'clear'[17] the plaintiff's name of the suspicion of dishonourable conduct or character. It looks at the effect of the verdict on third parties who have or may become aware of the defamation and therefore need to be persuaded of its falsity. There is little to suggest, however, that this

11 John Simpson and Edmund Weiner (eds), *The Oxford English Dictionary* (Oxford University Press, 2nd ed, 1989) vol XIX.

12 (1703) 92 ER 126.

13 Examples include: the plaintiff's right to the exclusive use and occupation of his or her land, *Plenty v Dillon* (1991) 171 CLR 635, 654 (Gaudron and McHugh JJ); the plaintiff's right not to be unlawfully detained, *Ruddock v Taylor* (2005) 222 CLR 612; the right not to be subject to an unlawful battery, *Ashley v Chief Constable of Sussex Police* [2008] 1 AC 962; the right to be received and lodged at a hotel, *Constantine v Imperial Hotels Ltd* [1944] KB 693; the right not to be subject to unlawful discrimination, *Ma Bik Yung v Ko Chuen* [2000] 1 HKLRD 514; and the right to live free from unjustified executive interference, mistreatment or oppression, *Merson v Cartwright (Bahamas)* [2006] 3 LRC 264, [18].

14 *Chester v Afshar* [2005] 1 AC 134, [87] (Lord Hope).

15 *Associated Newspapers Ltd v Dingle* [1964] AC 371, 396; *Uren v John Fairfax & Sons* (1966) 117 CLR 118, 150 (Windeyer J); *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44, 60–1 (Mason CJ, Deane, Dawson, Gaudron JJ).

16 Witzleb and Carroll, above n 4, 33–5.

17 W V H Rogers, *Winfield and Jolowicz on Tort* (Sweet & Maxwell, 18th ed, 2010) [22]–[25].

vindicatory purpose actually provides a significant impulse for the assessment of defamation damages. Its role does not appear to go beyond reminding the court that the level of the award must be sufficient to impress upon the community that the defamation was wrongful and has been effectively remedied.[18] The belief that defamation damages effectively vindicate the plaintiff's reputation is likely to be one reason why the potential of alternative remedies, which would restore reputation more directly, remain under-utilised.

Statutory remedies for unlawful discriminatory conduct are another example of the law seeking to vindicate an applicant in the eyes of others. The non-pecuniary loss resulting from discrimination can be redressed by monetary as well as non-monetary relief, including orders to apologise.[19] Courts have exercised their powers to order a respondent to apologise to an applicant in order to vindicate the applicant in the eyes of the community,[20] or other groups, such as fellow employees.[21] In so doing, the law also protects the personality interest that underlies the right to freedom from discrimination.

C *Overview of the Current Approach to Remedial Decision-Making*

Torts and breaches of contract create a range of remedial needs that will differ depending on the affected right or interest (such as bodily integrity, property, reputation, dignity or enjoyment of life), the nature of the harm (such as physical harm, damage to property, financial loss or intangible harm), its extent (whether it has already occurred or is merely impending, and, if it has occurred, whether it can be reversed) and, in some cases, on the type of wrongdoing (intentional or accidental). Judicial decision-making regarding remedies is also governed by

18 See Witzleb and Carroll, above n 4, 33–5.

19 In Australia, see *Anti-Discrimination Act 1998* (Tas) ss 89(1)(b), s 98(1)(h); *Equal Opportunity Act 1995* (Vic) s 136(a)(iii); *Equal Opportunity Act 1994* (SA) s 96(1)(c); *Anti-Discrimination Act* (NT) s 88(1)(c); *Equal Opportunity Act 1984* (WA) s 127(b)(iii); *Anti-Discrimination Act 1977* (NSW) s 108(2); *Anti-Discrimination Act 1991* (Qld) s 209. Apology orders are available as a remedy for unlawful conduct under federal anti-discrimination legislation pursuant to s 46PO(4)(b) of the *Australian Human Rights Commission Act 1986* (Cth), which empowers the court to make an 'order requiring a respondent to perform any reasonable act or course of conduct to redress any loss or damage suffered by an applicant'. In Hong Kong see, eg, *Disability Discrimination Ordinance* (Hong Kong) cap 487, s 72(4)(b). In the Republic of South Africa see, eg, *Promotion of Equality and Prevention of Unfair Discrimination Act 2000* (South Africa) s 21(2).

20 See, eg, *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352.

21 *De Simone v Bevacqua* (1994) 7 VAR 246. Other courts and tribunals, however, apparently doubt the utility of an apology to achieve this purpose, referring instead to the vindicatory effect of the decision to award damages, *Lynton v Maugeri* [1995] QADT 3, and, in another case, to the published reasons for the court's decision, *Dunn-Dyer v ANZ Banking Group Ltd* [1997] HREOCA 52. In one case, an apology order was declined because a declaration on the public record was considered to be sufficient vindication, see *Ryan v Dennis* [1998] HREOCA 36, or, similarly, *Ralph v Pemar Pty Ltd* [1999] HREOCA 16, in relation to the findings of discrimination.

doctrinal principles that guide the choice between specific relief and damages,[22] as well as between personal and proprietary remedies.[23] In the exercise of their equitable jurisdiction, courts have the discretion to award specific relief, that is, to grant an injunction or other coercive order. The threshold requirement for awarding equitable relief for any common law wrong is that damages would not be an adequate remedy.[24] The court will ask whether it is 'just, in all the circumstances, that the plaintiff shall be confined to his remedy in damages'.[25]

Compensatory damages aim to put the plaintiff, as far as money can, in the position they would have been in had there been no wrong.[26] It is in this sense that damages are said to 'restore' the plaintiff to their former position. The nature of the plaintiff's right will be a central factor in determining whether specific relief will be ordered instead of an award of damages. Damages will generally not be adequate if the plaintiff is likely to suffer 'irreparable harm' if the application for injunctive relief is denied.[27] Most injunctions protect proprietary interests, in particular, an interest in land or a chattel that has special value for the plaintiff and cannot readily be replaced. The principles underlying the exercise of discretion in these cases are well-established. Less commonly awarded are injunctions for torts concerned with the protection of personality interests. These include assault, battery, false imprisonment, malicious prosecution, defamation, and, to the extent that it protects the plaintiff's privacy and home, trespass to land. In these cases, the court considers whether damages are adequate to restore the respective personal interests and to achieve compensation, vindication, deterrence, and, in some cases, denunciation of the wrongful conduct.

Before making an order for specific relief, a court needs to be satisfied that the order will be just and equitable, knowing that it is enforceable, if necessary, by orders for contempt involving fines and imprisonment. Courts also take into account many other factors in determining what form of relief will be just and equitable. The choice of remedy will depend on the circumstances of each case; in particular, the parties and their conduct, as well as the effect that an order for

22 While damages are usually compensatory, a court may award exemplary, gain-based and nominal damages in preference to specific relief when compensation is an inadequate response. This can be the case because the loss is minimal or because the wrong needs more stringent deterrence, or sometimes because of a combination of both factors. Only where none of these common law awards of damages are adequate will the granting of specific relief become a live issue.

23 The choice between proprietary and personal remedies arises in cases affecting financial and proprietary interests, rather than cases where the wrongdoing affects personality infringements, and therefore need not be considered here.

24 See, eg, *Bankstown City Council v Almado Holdings Pty Ltd* (2005) 223 CLR 660, [11] (Gleeson CJ, Gummow, Hayne and Callinan JJ). The 'inadequacy' criterion does not apply in equity's exclusive jurisdiction, that is, where the plaintiff seeks to protect an equitable right (for example, under the doctrine of breach of confidence).

25 *Evans Marshall & Co Ltd v Bertola SA* [1973] 1 WLR 349, 369 (Sachs LJ).

26 *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, 39, regarding tort; *Robinson v Harman* (1848) 1 Ex 850, 855; 154 ER 363, 365 (Parke B); *The Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64, regarding contract.

27 Roderick Pitt Meagher, John Dyson Heydon and Mark James Leeming, *Meagher, Gummow and Lehane's Equity: Remedies and Doctrine* (Butterworths, 4th ed, 2002) [21]–[345].

specific relief will have on each of them and on third parties.[28] In addition, the court will take into account the effect of the order on the administration of justice and other more general policy considerations.[29] There is thus scope for creativity and development of new forms of equitable remedy,[30] yet courts are slow to award specific relief for wrongs where damages are the conventional remedy.[31]

Courts will also be influenced by their understanding of the relationship between rights and remedies and how much discretion they have been granted. There has been considerable debate among private law scholars about the extent to which the right being enforced by judgment dictates the remedy that can be awarded.[32] From this debate, a moderate view has emerged which recognises that whilst there is a strong link between right and remedy, the right alone does not determine the remedial response. This 'integrationist' approach to the selection of remedies allows for flexibility where it is necessary to achieving a just outcome.[33] It is consistent with the argument advanced in this article that there is no doctrinal impediment to awarding specific relief to protect personality interests more readily than is presently the case. When the right arises from a statute that creates a wide discretion as to remedy, the exercise of judicial power is sanctioned by Parliament and the same concerns about the limits of judicial discretion as under general law do not arise. Nonetheless, while the statutory basis of discretion may overcome concerns about the legitimacy of remedial discretion, it is no less important that courts exercising statutory powers do so in a reasoned and consistent manner.

In this Part we have identified the vindication of rights and the interests protected by those rights as a goal of private law. We have also seen that courts make decisions to award non-monetary remedies within doctrinal and practical boundaries that strongly influence their choice of remedy. We are proposing that the boundary between monetary and non-monetary relief should be reconsidered in some cases where a wrong affects personality interests. This would not undermine the primacy of damages for common law wrongs or replace the 'inadequacy' criterion with a strong and unrestricted discretion. Instead, we argue that a broadening of the

28 Michael Tilbury, *Civil Remedies Vol 1* (Butterworths, 1990) [6032]–[6043].

29 Ibid [6044]–[6047].

30 The Mareva injunction being a classic example.

31 See, eg, *Summertime Holdings Pty Ltd v Environmental Defender's Office Ltd* (1998) 45 NSWLR 291, further discussed below in Part IV, B, 2 ('Conditional Damages Awards and Judicial Persuasion').

32 On the monist view, the right dictates the remedy and there is no judicial power to select a remedy other than one previously awarded: see, eg, Peter Birks, *The Classification of Obligations* (Oxford University Press, 1997). At the opposite end of the spectrum of remedial choice is the dualist view, in which rights and remedies are completely separate and the nature of the right does not determine or constrain the appropriate remedy. In support of a flexible and responsive approach to remedial response, see Grant Hammond, 'Rethinking Remedies: The Changing Conception of the Relationship between Legal and Equitable Remedies' in Jeffrey Berryman (ed), *Remedies: Issues and Perspectives* (Carswell, 1991) 87; Grant Hammond, 'The Place of Damages in the Scheme of Remedies' in Paul D Finn (ed), *Essays on Damages* (Lawbook Co, 1992) 192; Ipp J, 'Introduction' in Robyn Carroll (ed), *Civil Remedies: Issues and Developments* (The Federation Press, 1996) xxvii.

33 For a brief overview and illustration of these views, see Jeffrey Berryman, 'The Law of Remedies: A Prospectus for Teaching and Scholarship' (2010) 10 *Oxford University Commonwealth Law Journal* 123; Ken Cooper-Stephenson, 'Principles and Pragmatism in the Law of Remedies' in Jeffrey Berryman (ed), *Remedies: Issues and Perspectives* (Carswell, 1991) 1.

circumstances in which equitable orders are available can be achieved through a more comprehensive inquiry into whether damages are 'adequate' and by giving more weight to factors that influence a plaintiff's preferences for non-monetary orders, including the therapeutic and empowering value of such orders. In the next Part we look to research and perspectives that provide additional support for the idea that due weight should be given to a plaintiff's preference for a non-monetary remedy.

III SUPPORT FOR VINDICATION AS A GOAL OF PRIVATE LAW THROUGH NON-MONETARY REMEDIES

For many plaintiffs, and for the law, damages are the preferred currency of vindication. Damages awards have many advantages. They cause the courts less concern about the enforceability of orders and the consequences of contempt. For the parties and their lawyers, damages provide a tangible form of relief and a means to pay legal costs. Further, where injury arises out of negligence and other loss-based torts, a plaintiff's claim is dependent upon proving loss or damage. These legal actions anticipate that a plaintiff brings their action for the primary purpose of obtaining compensation, with other purposes being secondary. If compensation for loss is not claimed, a plaintiff risks their claim being dismissed or regarded as frivolous.

We acknowledge that these factors will often point towards damages as the remedy of choice, both for the parties and for the courts. They explain the requirement at common law, referred to in the previous Part, that the plaintiff who seeks a non-monetary remedy show that damages would not be an adequate remedy. We invite reconsideration, however, of whether these factors should be such a powerful determinant in all cases, especially where the plaintiff would prefer that their rights be vindicated through non-monetary relief. In our view, the material presented in this Part supports the conclusion that individuals and society will benefit if the legal system looks beyond damages to remedy injury to reputation, feelings and dignity. In each instance, pecuniary losses may be significant and we are not discounting the importance of compensating such loss. But we submit that the vindicatory outcome of the legal process can be enhanced by paying greater attention to other remedies to protect non-pecuniary interests.

A *Evidence of Plaintiffs' Needs and Remedial Choice*

There is scant evidence available as to parties' perceptions of the vindicatory value of damages, let alone other remedies.[34] Some insight can be gained, however, from studies conducted in areas in which wrongs have a particularly

34 The absence of empirical evidence is not surprising as there has been very little empirical research of or on remedies. Richard Abel reported in 2006 that in a ten year period, from 1994–2004, torts articles discussed damages in only 7 per cent of cases, see Abel, above n 10, 253. One can predict that the number of articles on non-monetary remedies would be far less.

personal impact. We suggest that the following material supports a premise of this article, namely that people who have been injured often use legal processes to achieve vindication and other non-compensatory outcomes.[35]

1 *Medical Negligence*

Empirical research shows that communication and accountability is highly important to patients who have experienced an adverse medical event. The British medical journal *Lancet* reported on a study of 227 patients and their relatives who were taking legal action through medical negligence solicitors. Respondents to the study most frequently cited 'explanation and apology' as the action after the incident that might have prevented litigation.[36] The *Lancet* study asked patients and relatives to rate their reason for litigation, providing 13 explanations broadly falling into four categories. These categories distinguished 'accountability' (wishing to see staff disciplined and called to account), 'explanation' (a combination of wanting an explanation and feeling ignored after the incident), 'standard of care' (wishing to ensure that a similar incident did not happen again) and 'compensation' (wanting compensation and an admission of negligence).[37] The enforcement of standards and the seeking of an explanation ranked ahead of the need for compensation and achievement of accountability.[38] Money was the primary motivation only for those plaintiffs who sued on behalf of a relative (often a dependent child).[39]

Similar outcomes can be seen in Australia. In a study of complaints to Victorian hospitals, most issues were straightforward to resolve — more than half required only an apology or explanation.[40] Very few resulted in specific changes to hospital policy or procedure and compensation was paid only in rare cases.[41] Attention has increasingly been paid in Australia to the need for people who experience adverse medical incidents to be informed about what went wrong and to receive apologies. 'Open Disclosure' is a structured approach to discussing incidents with patients and families. It has become an established part of Australian health

35 A Dutch study involving interviews with personal injury victims and their relatives found that even if the most important reason for taking action is financial in nature, non-pecuniary needs, including the desire for an apology, can play an important role: Arno J Akkermans, 'Reforming Personal Injury Claims Settlement: Paying More Attention to Emotional Dimension Promotes Victim Recovery' (Working Paper Series No 01/2009, Amsterdam Interdisciplinary Centre for Law and Health (IGER), 2009) 2 <http://vu-nl.academia.edu/ArnoAkkermans/Papers/85711/Reforming_personal_injury_claims_settlement>.

36 Charles Vincent, Magi Young and Angela Phillips, 'Why Do People Sue Doctors? A Study of Patients and Relatives Taking Legal Action' (1994) 343 *Lancet* 1609, 1612.

37 Ibid 1612–13. Interestingly, the authors regarded the admission of negligence as part of 'compensation', thereby adopting an understanding of compensation that goes beyond monetary recompense and extends to acknowledgment of responsibility.

38 Ibid.

39 Ibid 1612.

40 David McD Taylor, Rory S Wolfe and Peter A Cameron, 'Analysis of Complaints Lodged by Patients Attending Victorian Hospitals, 1997–2001' (2004) 181(1) *Medical Journal of Australia* 31.

41 Only in 0.4 per cent of cases: ibid.

care practice through the introduction of a National Open Disclosure Standard.[42] Open Disclosure includes 'an expression of regret; a factual explanation of what happened and the potential consequences; and the steps being taken to manage the event and prevent recurrence'.[43] The desire for disclosure and apologies[44] is indicative of the importance that parties to medical negligence claims place on finding out what happened and on receiving an acknowledgment of responsibility for the occurrence. Without this, a greater number of patients will resort to litigation to achieve these non-monetary objectives (and vindication more generally). While the litigation process may ultimately result in the disclosure of factual information and some, if not all, of the answers a plaintiff seeks, such disclosure will generally merely be a procedural step towards an award of damages.[45]

2 *Defamation*

Studies of the attitudes of defamation plaintiffs confirm many of the observations made above in relation to medical negligence suits. While empirical evidence is largely dated and from the United States, it suggests that victims of defamation, immediately after publication, are most interested in achieving a swift correction of the public record to restore their reputation.[46] The majority of defamation plaintiffs do not sue to obtain monetary relief for financial harm. Instead, they are motivated by a desire to restore their reputation and have perceived falsities corrected.[47] Punishment of the media and recovery of money, on the other hand, appear to play a relatively minor role — at least for plaintiffs with a public reputation.[48]

This suggests that many plaintiffs who suffer an infringement of highly personal interests do not primarily sue for financial gain. Their main concern is often that the indignity they suffered is redressed. Violations of a personal character affect

42 The National Open Disclosure Standard was developed by the former Australian Council for Safety and Quality in Health Care in 2002. The Australian Commission on Safety and Quality in Health Care is now responsible for the implementation of the Open Disclosure Standard.

43 Australian Commission on Safety and Quality in Healthcare, *Open Disclosure Standard* (Commonwealth of Australia, 2008) 1.

44 People interviewed about their experience of adverse medical events who expressed satisfaction about the disclosure process, typically 'are those whose expectations of a full apology ... and an offer of tangible support were met': Rick Iedema et al, 'Patients' and Family Members' Experiences of Open Disclosure Following Adverse Events' (2008) 20(6) *International Journal for Quality in Health Care* 421, 430.

45 Nonetheless, efforts have been made to encourage apologies being offered in the context of civil disputes through the introduction of legislation that restricts (to varying degrees) the use of apologies as evidence of wrongdoing. See *Civil Liability Act 2002* (NSW) s 69; *Civil Liability Act 2002* (Tas) s 7; *Civil Liability Act 1936* (SA) s 75; *Civil Liability Act 2003* (QLD) s 72; *Civil Law (Wrongs) Act 2002* (ACT) s 14; *Civil Liability Act 2002* (WA) s 5AH. For analyses of these Australian legislative models and commentary, see Prue Vines, 'Apologising to Avoid Liability: Cynical Civility or Practical Morality?' (2005) 27(3) *Sydney Law Review* 483.

46 Frederick Schauer, 'Social Foundations of the Law of Defamation: A Comparative Analysis' (1981) 1 *Journal of Media Law and Practice* 3; see also Randall P Bezanson, Gilbert Cranberg and John Soloski, 'Libel Law and the Press: Setting the Record Straight' (1985) 71 *Iowa Law Review* 215, 220.

47 Randall P Benzanson, 'The Libel Suit in Retrospect: What Plaintiffs Want and What Plaintiffs Get, the Symposium: New Perspectives in the Law of Defamation' (1986) 74 *California Law Review* 789, 791.

48 Ibid 794.

the relationship of the parties as a whole and may require restoration and public vindication, rather than compensation. There is thus a mismatch between the plaintiff's needs and the available relief. In a large-scale study of US libel suits, approximately two-thirds of the plaintiffs, both successful and unsuccessful, expressed dissatisfaction with the litigation. The authors of the study attributed the dissatisfaction mainly to the 'unresponsiveness of the judicial system to the plaintiffs' claimed harm'.[49] However, it has to be borne in mind that this data is somewhat dated and relates to the litigation experiences of US claimants. US libel laws have features which distinguish them significantly from English or Australian law.[50] These features include the fact that US jurisprudence makes it quite difficult for public plaintiffs to succeed[51] and also the particular dislike of US courts to grant injunctive relief for defamation.[52]

Notwithstanding these differences, concern about the law's preoccupation with damages awards as the dominant remedy for defamation is international. In a minority judgment, Sachs J of the South African Constitutional Court provided a fundamental critique of current defamation proceedings which, he stated, 'tend to unfold in a way that exacerbates the ruptured relationship between the parties, driving them further apart rather than bringing them closer together'.[53] His Honour called for 'greater scope and encouragement for enabling the reparative value of retraction and apology to be introduced into the proceedings. In jurisprudential terms, this would necessitate reconceiving available remedies to focus more on the human and less on the patrimonial dimensions of the problem.'[54]

For the most part, plaintiffs believe that in the absence of suitable alternatives the libel suit itself is the best means to respond publicly to defamation and to achieve significant vindication (whether ultimately successful or not).[55] However, current defamation law's preference for monetary relief does little to redress the victim's need for more direct restoration of his or her reputation and correction of the public record.[56] The link between an order to pay compensation and vindication of the plaintiff in the eyes of others is tenuous and 'purely the result of historical residue'.[57] The primacy of damages in common law actions has had

49 Ibid 795.

50 See Andrew Kenyon, *Defamation: Comparative Law and Practice* (UCL Press, 2006).

51 *Gertz v Robert Welch, Inc* 418 US 323 (1974).

52 See Stephen A Siegel, 'Injunctions for Defamation, Juries and the Clarifying Lens of 1868' (2008) 56 *Buffalo Law Review* 655; Erwin Chemerinsky, 'Injunctions in Defamation Cases' (2006–7) 57 *Syracuse Law Review* 157.

53 *Dikoko v Mokhatla* [2006] 6 SA 235 (Constitutional Court), [111].

54 Ibid [112]. Sachs J concludes that 'the fuller the range of remedial options available the more likely will justice be done between the parties': at [121]. See also Albie Sachs, *The Strange Alchemy of Life and Law* (Oxford, 2010) ch 3, where his Honour reflects extra-curially on the vital role of the Constitutional Court in acknowledging and upholding human dignity. For similar views about the importance of applying principles of restorative justice in defamation cases, see Mokgoro J in the *Dikoko* case.

55 Benzanson, above n 47, 798.

56 New South Wales Law Reform Commission, *Defamation*, Report No 75 (1995) ch 6; Dario Milo, *Defamation and Free Speech* (Oxford University Press, 2008) 261–6.

57 Una Ni Raifeartaigh, 'Fault Issues and Libel Law — A Comparison between Irish, English and United States Law' (1991) 40 *International and Comparative Law Quarterly* 763, 778.

the unfortunate result that alternative remedies, which could potentially restore reputation more quickly and more directly, remain under-utilised.[58]

3 *Discrimination*

Legislation in Australia and other countries provides courts and tribunals with a wide discretion to make various orders following unlawful discrimination.[59] Damages are frequently sought, though the amounts awarded for non-pecuniary loss are notably low.[60] There is evidence that forms of redress other than damages are of considerable importance to complainants.[61] These include declarations and various forms of coercive orders to not repeat or continue the offending conduct or to implement or undertake specific training programs. Apology orders can be made where they will redress the loss or injury caused by the discriminatory conduct. While apology orders are not common, there are a number of cases where they have been made, usually in addition to damages,[62] but, occasionally, as the only order.[63]

The remedies available to redress the loss or damage resulting from discriminatory or other unlawful conduct are said to serve multiple purposes, including compensation, vindication and education.[64] Although vindication is only one purpose, courts have at times expressly taken it into account in deciding whether to make an order to apologise.[65] At other times, courts are content to rely on the vindicatory effect of the decision, an award of damages, or the published reasons for their decision, to achieve this purpose. We argue that each of these ways of vindicating a plaintiff's rights has a role to play when courts explore the potential of non-monetary remedies in redressing intangible harm.

There is no research focusing directly on whether and how a complainant to an anti-discrimination claim experiences vindication through the various orders

58 Australian law clearly acknowledges the role that remedial actions other than monetary payments play in resolving defamation disputes, albeit by agreement rather than by order. This is evident from the provisions on the offer to make amends and on apology in the uniform defamation legislation. See, eg, *Defamation Act 2005* (Vic) pt 3.

59 See the statutory references, above n 19.

60 Australian Human Rights Commission, *Five Years On: An Update on the Complaint Handling Work of the Australian Human Rights Commission* (2005) Table 4.

61 The Annual Reports of the Federal and State bodies responsible for handling discrimination complaints contain information about the nature of complaints, the conciliation process and outcomes. See, eg, Equal Opportunity Commission of Western Australia, *Equal Opportunity Commission Annual Report* (2009) 32, which states that '[i]n 2008/09 the most common types of outcomes negotiated during the conciliation of complaints included: monetary settlement — 89; apology — 70; respondent's explanation satisfactory to complainant — 41; equal opportunity law program/education — 36; private settlement between parties — 26; policy change within the organisation — 13'.

62 See CCH Australia, *Australian and New Zealand Equal Opportunity Law and Practice*, 'Comparative Table: Damages Awarded', ¶89-960, which also sets out orders made other than for damages.

63 See, eg, *Falun Dafa Association of Victoria Inc v Melbourne City Council* [2004] VCAT 625 (7 April 2004).

64 See, eg, *De Simone v Bevacqua* (1994) EOC ¶92-630, 77, 361 (compensation and vindication); *Menzies v Owen* [2008] QADT 20, [279] (education).

65 See, eg, *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352. See further the cases referred to in above n 21 and accompanying text.

that can be made in this jurisdiction.[66] A recent study, however, sheds some light on the value that parties to anti-discrimination complaints place on apologies and vindication.[67] In this study, 24 complainants and respondents to complaints dealt with in the Western Australian Equal Opportunity Commission or the State Administrative Tribunal, related their experiences of the dispute, its resolution and the value of apologies in the settlement process. One specific aim of the study was to explore parties' perceptions about the value of ordered apologies. None of the proceedings relating to the participants in this study led to an ordered apology. However, participants were invited to offer their thoughts on the value of an ordered apology. Not surprisingly, most complainants considered voluntary apologies to have more value and to be more likely to be sincere than ordered apologies. Nonetheless, some complainants considered an ordered apology capable of having value as a vindication of their complaint. An important consideration for one complainant was the enforcement of the apology by an external authority.[68]

The various studies referred to in this Part highlight the importance to litigants of acknowledgment and accountability for harmful conduct and wrongdoing. One way this can be achieved is to obtain a legal verdict and an award of damages. However, damages will not necessarily be as effective as specific forms of relief at addressing the plaintiff's need for vindication and protecting their reputation, dignity and feelings. It is arguable that the desire for more personalised responses to wrongdoing has been one of the factors underlying the significant growth in non-adversarial approaches to dispute resolution and increasing attention to ways to achieve therapeutic as well as legal outcomes for the parties involved.

B *Social and Psychological Perspectives of Remedial Choice*

The common law aims to redress harm by awarding money as a substitute for what has been lost or injured. Rarely is specific relief used to protect personality interests once the harm has been done. Yet the law's conventional view that damages are an adequate way to restore feelings, reputation and dignity does not necessarily take into account the psychological experience of the plaintiff. Nor does the law concern itself with the actual use of the award for intangible loss or whether it in fact achieves its restorative purpose. There is now, however, a considerable body of scholarship available to assist our understanding of the

66 Research indicates a high level of satisfaction with the terms of settlement agreed upon in conciliation of discrimination complaints in the Australian Human Rights Commission, see Tracey Raymond and Sofie Georgalis, 'Dispute Resolution in the Changing Shadow of the Law: A Study of Parties' Views on the Conciliation Process in Federal Anti-Discrimination Law' (2002) 6(2) *ADR Bulletin* 31. Terms of settlement sometimes include apologies and other terms that do not involve monetary payments, see, eg, Australian Human Rights Commission, *Annual Report 2008/2009* (2009). The experience of an anti-discrimination complainant, whose 'complaint was not about money' is also recounted in Dominique Allen, 'Dealing with Employment Discrimination' (2010) 35(2) *Alternative Law Journal* 109.

67 Alfred Allan, Dianne McKillop and Robyn Carroll, 'Parties Perceptions of Apologies in Resolving Equal Opportunity Complaints' (2010) 17(4) *Psychiatry, Psychology and Law* 538, 543.

68 Ibid 544.

relationship between the law, legal process and the psychological process of restoration and healing.

Susan Daicoff has described the various ways that lawyers and others involved in the legal system take an 'explicitly comprehensive, integrated, humanistic, interdisciplinary, restorative and often therapeutic approach to law and lawyering' as a 'comprehensive law movement'.[69] Daicoff has identified two common features of disciplines and practices within the comprehensive law movement, namely their aim to, firstly, maximise the emotional, psychological and relational wellbeing of the individuals and communities involved in each legal matter and, secondly, to focus on more than just strict legal rights, responsibilities, duties, obligations and entitlements.[70] Many of the practices, theories and approaches that fall within this broadly defined movement, including holistic approaches to law, restorative justice[71] and therapeutic jurisprudence, reflect concerns about the adversarial system of justice and the need to move away from the traditional paradigm of rights-based litigation.[72]

This article is concerned with strengthening the therapeutic effects of judicial decisions in civil litigation where there necessarily will be a focus on legal rights and entitlements.[73] This is relevant to cases in which the parties cannot agree on a non-adversarial process or where such a process is unsuitable and a plaintiff has no choice but to pursue their case through the courts. It is also relevant when the victim of civil wrongdoing prefers civil litigation over a settlement process, for some, or all, of the following reasons. Unlike non-adversarial processes, a trial provides a public forum in which responsibility for harm can be objectively determined and an opportunity exists for the official recognition, and redress, of the plaintiff's trauma through a reasoned judgment. A civil trial also offers the victim 'an opportunity to tell her story in a neutral and dignified arena'[74] and may be perceived as fairer than bilateral settlement processes.[75] Through its coercive power, the judicial system can assist in reshaping power imbalances in the relationship between wrongdoer and tort victim.[76] The public recognition of

69 Susan Daicoff, 'Law as a Healing Profession: The "Comprehensive Law Movement"' (2006) 6 *Pepperdine Dispute Resolution Law Journal* 1, 1.

70 Ibid 5.

71 Restorative justice has, to date, largely been applied in the context of criminal law: Michael King et al, *Non-Adversarial Justice* (Federation Press, 2009) ch 3. We suggest that restorative justice could also be applied beneficially to some tortious claims, see also Michael S King, 'Towards a More Comprehensive Resolution of Conflict: The Role of Restorative Justice' (Paper presented at the Restorative Justice: Bringing Justice and Community Together Conference, Melbourne, 14 May 2008).

72 King et al, above n 71.

73 The important insights provided by procedural justice and therapeutic jurisprudence can also improve how courts interact with parties in an adversarial context: ibid 4.

74 Ronen Perry, 'Empowerment and Tort Law' (2008–9) 76 *Tennessee Law Review* 959, 980.

75 Bruce J Winick, 'On Autonomy: Legal and Psychological Perspectives' (1992) 37 *Villanova Law Review* 1705, 1767; E Allan Lind et al, 'In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System' (1990) 24 *Law and Society Review* 953, 980. For an Australian study, see Marie Delaney and Ted Wright, *Plaintiffs' Satisfaction with Dispute Resolution Processes: Trial, Arbitration, Pre-trial Conference and Mediation* (Justice Research Centre and Law Foundation of New South Wales, 1997).

76 Daniel W Shuman, 'The Psychology of Compensation in Tort Law' (1994–5) 43 *University of Kansas Law Review* 39, 56.

the defendant's wrong and its consequences through a judgment in the plaintiff's favour may 'facilitate recovery and bolster empowerment'.[77]

Shuman demonstrates how understanding the psychology of compensation in tort law can help to realise the restorative potential of tort law and 'the full human potential of the injured'.[78] In doing so, his work is an example of what therapeutic jurisprudence has to offer. Therapeutic jurisprudence provides a lens through which the law's impact on the physical and psychological wellbeing of people can be studied.[79] It shows the law (its rules, procedures and actors) as a social force that can produce therapeutic or anti-therapeutic consequences. Therapeutic jurisprudence and empowerment theories provide insight into the (potentially) therapeutic consequence of restoring a plaintiff through judicial remedies and pronouncements.

In relation to damages awards for torts, Perry notes that 'the financial transfer from the aggressor to the victim reverses — at least symbolically, the disempowering event'.[80] We suggest that awarding specific relief in some circumstances, rather than confining a plaintiff to an award of damages, goes beyond merely symbolically reversing the wrong suffered. It provides direct redress for the injury sustained and validates the plaintiff's experience of injustice. Remedial decisions that emphasise the vindicatory purpose of the law are therefore likely to enhance therapeutic outcomes for plaintiffs and lead to greater empowerment of the tort victim. Respect for the plaintiff's choice of remedy also strengthens plaintiff autonomy and leads to more satisfaction with, and acceptance of, the judicial decision.[81] Drawing on these perspectives, we submit that courts should take into account the potential therapeutic value of awarding specific relief when the plaintiff applies for it and damages would not be adequate to achieve the vindicatory purpose of the law.

C *Development of Statutory Remedies and Law Reform Proposals*

In this section, we point to developments in statutory remedies that provide support for our proposal. Many important Australian statutory enactments contain extremely broad remedial provisions. For example, s 232 of the *Australian*

77 Perry, above n 74, 987–8.

78 Shuman, above n 76, 41.

79 See generally David Wexler and Bruce Winick, *Essays in Therapeutic Jurisprudence* (Carolina Academic Press, 1991); David Wexler, *Therapeutic Jurisprudence: The Law as a Therapeutic Agent* (Carolina Academic Press, 1990). David B Wexler is the Director of the International Network on Therapeutic Jurisprudence. His work began in the field of mental health but has now been applied to an extensive range of legal areas, as witnessed by the extensive bibliography available on the therapeutic justice network website: David B Wexler, *TJ Bibliography* (2011) International Network on Therapeutic Jurisprudence < http://www.law.arizona.edu/depts/upr-intj/>.

80 Perry, above n 74, 989.

81 Winick, above n 75, 1767.

Consumer Law ('*ACL*')[82] and s 1324 of the *Corporations Act 2001* (Cth) give the court an unfettered discretion to grant an injunction where a person has engaged, or is proposing to engage, in a contravention of specified provisions of the *ACL* or the *Corporations Act*, respectively. The remedial provisions in state anti-discrimination legislation also provide for a wide range of orders, including, for example, an order that a respondent do 'any reasonable act to redress the loss and damage suffered by the plaintiff'.[83] These Acts do not limit or direct the exercise of the court's discretion in awarding one remedy in preference to another. Similarly, proposals developed recently by the Australian Law Reform Commission ('ALRC') and the New South Wales Law Reform Commission ('NSWLRC') for a statutory cause of action against serious invasions of privacy, give the court the widest possible powers to fashion the appropriate relief to protect non-pecuniary as well as pecuniary interests through a wide range of orders, including non-monetary orders.[84] The justification for providing a list of this type is to 'enable the court to choose the remedy that is most appropriate in the fact situation before it, free from the jurisdictional constraints that may apply to that remedy in the general law.'[85]

At the moment there is a large divide, and little interaction between, the choice of remedy principles under general law and the position under statute law. However, we consider that it would be advantageous if jurisprudence on remedies under general law had closer regard to the developments in the area of statutory remedies. In our view, the fact that Parliament enacts and law reform agencies support remedial discretion in very broad terms suggests at least two things: first, that the traditional hierarchy between common law and equitable relief is not in all cases able to do justice to the parties' remedial needs and, second, that there is no concern that courts will not be able to exercise a wide discretion sensibly. With this in mind, we argue in the next Part that courts should make greater use of the discretionary powers currently available to them and that in the fashioning of equitable relief that is fair and equitable to both parties, it is legitimate for the court to take into account the likely vindicatory effect of the remedy.

82 This provision has replaced the *Trade Practices Act 1974* (Cth) s 80 since 1 January 2011, which provided for injunctions against misleading and deceptive conduct (s 52 of the former *Trade Practices Act 1974* (Cth)).

83 See, eg, *Equal Opportunity Act 1984* (WA) s 127(b)(iii). Similar provision is made in other state legislation, see above n 19.

84 In its report, Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008) vol 3, [74.177]–[74.180], the Australian Law Reform Commission proposes that the courts should be empowered to order any or more of the following remedies: (a) damages, including aggravated damages, but not exemplary damages; (b) an account of profits; (c) an injunction; (d) an order requiring the respondent to apologise to the claimant; (e) a correction order; (f) an order for the delivery up and destruction of material; and (g) a declaration. See also New South Wales Law Reform Commission, *Invasion of Privacy*, Report No 120 (2009) [7.5]–[7.8]. Both recommendations would give the court ample discretion in fashioning the appropriate relief, including relief that may serve a vindicatory purpose more fully than an award of damages. Cf Victorian Law Reform Commission, *Surveillance in Public Places*, Final Report No 18 (2010) [7.217], recommending compensatory damages, injunctions and declarations as orders for its proposed privacy action.

85 New South Wales Law Reform Commission, *Invasion of Privacy*, Consultation Paper No 1 (2007) [8.3]; supported by Australian Law Reform Commission, above n 84, [74.176].

IV ENHANCING THE VINDICATORY EFFECT OF PRIVATE LAW

In this Part we set out a number of examples of how the vindicatory effect of private law can be strengthened. The first section looks at approaches to remedial decision-making that place greater emphasis on a plaintiff's choice of remedy. The second section provides examples of other ways courts can promote the vindicatory purpose of the law and at the same time recognise the psychological needs of a plaintiff.

A *Vindication and the Choice of Remedy*

We have seen that courts take a range of factors into account in deciding whether to grant specific relief to a plaintiff. We submit that a court could attach greater weight to a plaintiff's choice of remedy without abandoning the conventional remedial hierarchy. This approach would enable courts in suitable cases to order specific rather than monetary relief to restore a plaintiff who has suffered harm to their personality interests.

1 *Adequate Respect for Party Preference*

A court may deny an order for specific relief when it concludes that the resultant benefit to the plaintiff would not be sufficient to render it just to make the order against the defendant. To make this determination, a court looks to the facts of the individual case, the obligation owed by the defendant to the plaintiff, the benefit likely to accrue to the plaintiff if the order for specific relief is made and how the order will affect the defendant. Although the question of benefit ultimately is decided by the court on an objective basis, we argue that the court should give real weight to the remedial choice of the plaintiff.

Arguments about 'benefit' have been significant in discrimination cases where the plaintiff has sought an apology order. Judicial views have differed about the 'futility' of ordering an apology that a defendant has declined to offer voluntarily. Some courts have taken the view that an apology that the defendant does not offer voluntarily will be insincere, meaningless and therefore futile.[86] Other courts have not expressed any view about the sincerity of an apology.[87] Concerns about the need to have sincerity for an apology to be of value have more recently been addressed by construing an apology order, pursuant to anti-discrimination legislation, as 'a public acknowledgment of wrongdoing rather than as an actual

86 See, eg, *Evans v National Crime Authority* [2003] FMCA 375, [115]; *Jones v Toben* (2002) 71 ALD 629, [106], citing Hely J's decision in *Jones v Scully* (2002) 120 FCR 243, [245].

87 See, eg, *Korda v Balack and White Distribution Pty Ltd* [2006] WASAT 75; *Chew v Director-General of the Department of Education and Training* (2006) 44 SR (WA) 174.

statement of regret', which is therefore distinguishable from a personal apology.[88] Courts could draw upon a considerable body of scholarship that explores the psychological value of apologies in general and to parties to legal disputes in particular.[89] Where a plaintiff applies for an ordered apology, it is apparent that they also regard an involuntary and insincere apology as having value. We submit that in deciding whether there would be any benefit in ordering an apology,[90] whether offered voluntarily or not, adequate weight ought to be given to the plaintiff's preference. Unless there are other factors relating to the defendant or the circumstances of the case that make the order unjust or inappropriate, the plaintiff's preference should be respected and an apology order made.

2 *Greater Use of Declaratory and Coercive Orders*

From a policy perspective, a monetary award is ill-suited to actually restoring personality interests. Taking defamation as an example, effective vindication of the plaintiff's reputation depends on a reversal of the effect of the disparaging allegations on the regard in which the community holds the plaintiff. This requires that the recipients of the original publication are speedily and authoritatively informed that the plaintiff has been unfairly or inaccurately represented. This could be achieved through truth-related remedies, such as declarations or correction orders. We are conscious that suggestions that courts should be more willing to use declaratory and coercive remedies to redress injury to personality may face opposition for doctrinal, policy and practical reasons. The aim of this section is to highlight the fact that there are already remedies available that have a strong vindicatory purpose and to point out that more serious consideration could be given to their use.

88 See *Burns v Radio 2UE Sydney Pty Ltd (No 2)* [2005] NSWADT 24, [30]; *Collier v Sunol (No 2)* [2006] NSWADT 88, [9], endorsed in *Sunol v Collier* [2006] NSWADTAP 51, [54]; *Cohen v Hargous* [2006] NSWADT 275, [11]; *Menzies v Owen* [2008] QADT 20, [279]. For analysis of the apology order under anti-discrimination legislation in Australia, see Robyn Carroll, 'You Can't Order Sorriness, so Is There Any Value in an Ordered Apology? An Analysis of Apology Orders in Anti-Discrimination Cases' (2010) 32 *University of New South Wales Law Journal* 360.

89 See, eg, Hiroshi Wagatsuma and Arthur Rosett, 'The Implications of Apology: Law and Culture in Japan and the United States' (1986) 20 *Law and Society Review* 461; Susan Alter, *Apologising for Serious Wrongdoing: Social, Psychological and Legal Considerations — Final Report for the Law Commission of Canada* (Law Commission of Canada, 1999); Daniel Shuman, 'The Role of Apology in Tort Law' (2000) 83 *Judicial Law Reports* 180; Erin O'Hara and Douglas Yarn, 'On Apology and Consilience' (2002) 77 *Washington Law Review* 1121; Alfred Allan, 'Apology in Civil Law: A Psycho-Legal Perspective' (2007) 14 *Psychiatry, Psychology and Law* 5. These analyses explore the role that apologies might play in supplementing and even reducing the need for compensation in the form of damages awards, but do not address the potential for an apology to be ordered as a remedy itself.

90 See also Elizabeth Latif, 'Apologetic Justice: Evaluating Apologies Tailored toward Legal Solutions' (2001) 81 *Boston University Law Review* 289; Brent White, 'Say You're Sorry: Court Ordered Apologies as a Civil Rights Remedy' (2006) 91 *Cornell Law Review* 1261, 1270; Robyn Carroll, 'Beyond Compensation: Apology as a Private Law Remedy' in Jeff Berryman and Rick Bigwood (eds), *The Law of Remedies: New Direction in the Common Law* (Irwin Law, 2010) 323; Kilaan van Wees, 'Apology as an Enforceable Remedy in Private Law: A Dutch Perspective' (Paper presented at the Non-Adversarial Justice Conference, Melbourne, 4–7 May 2010); AJ Akkermans et al, 'Excuses in het Privaatrecht' [2008] *Weekblad voor Privaatrecht, Notariaat en Registratie, 6772* 778 <http:/hdl.handle.net/1871/15265>.

(a) Declarations

Declarations are a judicial pronouncement of the existence or non-existence of legal rights concerning the parties. While declarations have historically developed in the equitable jurisdiction, the contemporary declaratory remedy is now generally regarded as a statutory remedy,[91] or part of the superior courts' inherent jurisdiction.[92] The vindicatory effect of a declaratory order will depend on the circumstances. Where a declaration is sought before a wrong has occurred (and is likely to resolve the dispute between the parties) it will generally be sufficient to vindicate the plaintiff. After a wrong has occurred, in particular where it has caused injury to the plaintiff, a declaration will often be sought in conjunction with other remedies. In that case, a declaration on its own is not likely to have a strong vindicatory effect. Vindication will then primarily be effected by the award of compensatory, restitutionary or exemplary damages, or through coercive remedies.

A declaration will therefore often only play a supplementary role in vindicating the plaintiff's personality interest where the defendant has caused actual loss to the plaintiff.[93] For this reason, declarations also have little use as a remedy in medical negligence and other personal injury cases. Even where no loss has been suffered, a declaration may be too weak a response when the case calls for a remedy that provides a more emphatic denunciation of the defendant's conduct. In particular, when the defendant has obtained a profit from his or her wrongdoing, a mere declaration is unlikely to be a sufficient deterrent of future misconduct. In extreme cases, exemplary damages (or vindicatory damages) may be needed to provide a sufficiently robust protection against future wrongdoing by the defendant.

Declarations play no significant role in defamation law practice because defamation is actionable without proof of special damage.[94] The law presumes that the publication of a defamatory matter causes loss to the plaintiff and allows

91 See, eg, *Judiciary Act 1903* (Cth) ss 31–2 (no express reference to declaratory judgments), s 39B(1A); *Federal Court of Australia Act 1976* (Cth) ss 21, 23, 33Z(1)(c); *Supreme Court Act 1970* (NSW) s 75; *Supreme Court Act 1986* (Vic) s 36. In some areas, specific statutory powers to make declarations facilitate and encourage their use: see, eg, *Competition and Consumer Act 2010* (Cth) s 163A — the new name of the *Trade Practices Act 1974* (Cth), pursuant to the *Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010* (Cth).

92 *Ainsworth v Criminal Justice Commission (Qld)* (1992) 175 CLR 564, 581–2.

93 See, eg, *Trevorrow v State of South Australia (No 5)* (2007) 98 SASR 136: the plaintiff was an Aboriginal man who was removed from his family as a child without their knowledge or consent. He successfully brought an action against the State of South Australia based on misfeasance of public office, false imprisonment, breach of duty of care and breach of fiduciary and statutory duties. The Court awarded compensatory and exemplary damages (award upheld on appeal: (2010) 106 SASR 331, although the trial judge's findings on wrongful detention and breach of statutory duty were overturned). In his reasons, the trial judge, Gray J, indicated that he was prepared to make declarations consistent with his findings that the plaintiff was treated unlawfully, indicating that a minute of orders be prepared to reflect his conclusion. In so doing, Gray J expressed the view that '[t]he making of specific declarations is likely to assist in relieving the ongoing suffering of the plaintiff and provide a measure of remedy and relief': at [1238]. This case illustrates the capacity for a declaration to vindicate rights and the plaintiff's experience, but also the reality that an award of damages may have greater remedial (and perhaps symbolic) force.

94 See, eg, *Defamation Act 2005* (NSW) s 7(2).

the recovery of substantial general damages even where no loss is proven. This leaves little room for declaratory relief unless a plaintiff is willing to forego damages. Under the present regime, defamation plaintiffs who claim that 'it's not just about the money' are more likely to pledge that they will donate their damages to charity than to limit their claim to declaratory relief. This is despite the fact that a judicial declaration that a statement is false and defamatory would be a particularly suitable means to vindicate the plaintiff and reduce the future impact of the defendant's wrongful imputation.

Generally, we argue that where a plaintiff asks for a declaration, a court should be more willing to make such an order. There is no general jurisdictional bar to the making of declaratory orders in defamation cases and law reform agencies have repeatedly called for them.[95] Although not available under Australian law, declarations of falsity are now specifically provided for under s 9 of the *Defamation Act 1996* (UK).[96] Notably, declarations also form part of the suite of remedies envisaged for the proposed statutory privacy tort.[97]

(b) Injunctions and Other Coercive Orders

An injunction[98] is the most direct vindication of a plaintiff's rights because it seeks to protect or restore their primary legal entitlement. In its prohibitory form, the injunction bans the defendant from acting to the contrary. In its rarer mandatory form, it requires the defendant to take positive steps to protect the plaintiff's entitlement. Prohibitory injunctions generally aim at preventing future harm, for example by banning the defendant from repeating a defamatory statement, from disclosing private information or from engaging in discriminatory conduct. Orders intended to 'correct' the infringement of the plaintiff's personality rights or to 'restore' the plaintiff's reputation, feelings or dignity, will fall into the category of mandatory injunctions. These injunctions can include orders to retract or correct a falsehood, or to apologise to the plaintiff.

95 See, eg, Committee on Defamation (Faulks Committee), *Report of the Committee on Defamation*, Cmnd 5909 (1975) [378]; Australian Law Reform Commission, *Unfair Publication: Defamation and Privacy*, Report No 11 (1979) [274]; New South Wales Law Reform Commission, *Defamation*, Report No 75 (1995) ch 6.

96 This provision only applies to relief under the summary disposal procedure, ie where the matter does not go to trial; see, eg, *Bin Mahfouz v Ehrenfeld* [2005] EWHC 1156 (QB). Declarations are, however, generally available under *Defamation Act 2009* (Ireland) s 28.

97 New South Wales Law Reform Commission, above n 84.

98 Or, in some cases, an order for specific performance: In *Summertime Holdings Pty Ltd v Environmental Defender's Office Ltd* (1998) 45 NSWLR 291, 297, the plaintiff sought to specifically enforce a promise made by a defendant to broadcast an apology pursuant to a settlement agreement of a defamation action. The Court accepted that it had the power to make such an order, but refused to make it out of concern for the defendant's freedom of expression.

Correction orders would reduce the need for vindication through an award of damages.[99] Their main advantage over damages is that they provide a much better mechanism to correct the public record because they can be targeted to reach the same audience as the original publication. While a court has the power to order the correction of a falsehood or defamatory statement through a mandatory injunction,[100] these orders raise the possibility of requiring a defendant to make a statement against his or her convictions. A defendant is likely to resist this form of relief with the argument that the imposition of a corrective order impinges upon freedom of speech. Even when an action in defamation is successful, concerns about freedom of speech will usually lead the court to award damages rather than order a correction.[101]

Freedom of speech, however, is not absolute. An order requiring a correction would merely need to be shown as 'just', notwithstanding its effect on the defendant's freedom of speech. Countervailing considerations are the interest in the dissemination of factually accurate information and the interest in correcting the public record. The latter interests cannot always be adequately protected by an award of damages. This is also recognised in statutory enactments giving courts the power to require the publication of corrective statements.[102] The extent to which a correction order would interfere with freedom of speech would depend on the form of the order. If a defendant was free to indicate that the correction was made by order of the court, there would be no suggestion that the defendant no longer stood by the impugned statement. This would be a lesser interference than requiring a defendant to retract a statement. Similar issues arise in the context of orders to apologise.[103] Concerns about the coercion of speech and expression of an opinion or emotion not held by the defendant have been ameliorated by recognising that an apology ordered pursuant to a statutory power does not require personal contrition.[104]

It is not certain how often plaintiffs would seek non-monetary orders in preference to damages if they were more readily available, particularly if the damages awarded were reduced significantly. The material referred to above in Part C suggests, however, that there are cases where a plaintiff genuinely would prefer some form of non-monetary order. Potentially, these remedies are more

99 *Humphries v TWT Ltd* (1993) 114 ACTR 1; Australian Law Reform Commission, above n 95, [258]; Attorney-General's Department (Cth), *Revised Outline of a Possible National Defamation Law* (2004) 33–4; Committee on Western Australian Defamation Law Reform, *Western Australian Defamation Law* (2003) 26–7; John G Fleming, 'Retraction and Reply: Alternative Remedies for Defamation' (1978) 12 *University of British Columbia Law Review* 15.

100 In *TV3 Network Ltd v Eveready New Zealand Ltd* [1993] 3 NZLR 435, the New Zealand Court of Appeal recognised that in principle such orders may be made.

101 The importance attributed to free speech also generally stands in the way of restraining an alleged defamatory publication in interlocutory proceedings: *ABC v O'Neill* (2006) 227 CLR 57.

102 See, eg, *Australian Consumer Law Act 2010* (Cth) s 246(2)(d) (court order to publish an advertisement in terms specified in the order).

103 For discussion of the apology as a common law remedy, see, generally, Carroll, above n 90.

104 See *Burns v Radio 2UE Sydney Pty Ltd (No 2)* [2005] NSWADT 24, [30] where the New South Wales Anti-Discrimination Tribunal defined an 'apology' as an 'acknowledgement of the wrongdoing' that is a 'fulfillment of a legal requirement rather than as a statement of genuinely held feelings'.

vindicatory than damages because they seek to redress the injury by restoring the plaintiff's dignity and personality. We argue that if a plaintiff is willing to accept non-monetary relief in substitution for or in combination with a reduction of damages, then a court should give this possibility serious consideration. Interference with freedom of speech is a major argument against the granting of specific relief in many instances, but should not present an insurmountable bar. The defendant's freedom of speech should be balanced against the competing interests of protection of the personality interests of the plaintiff and the public interest in dissemination of correct information. Careful wording of an order can further limit interference with the defendant's interest.

B *Enhancing the Vindicatory Effect of Private Law More Generally*

The examples of judicial strategies presented in this section highlight the capacity of courts to vindicate the parties other than by granting a remedy or through costs orders. At the same time, they provide examples of 'judging in a therapeutic key',[105] as in each case the court is striving to address the psychological needs of the plaintiff within the rights-based paradigm of judicial remedies. The following examples are drawn from the areas of law examined in this article to show the potential for judicial creativity in promoting the vindicatory purpose of law.

1 *Vindication through the Reasons for Judgment*

In many cases, plaintiffs will feel vindicated not only through the order made, but also through express judicial recognition that they have been wronged.[106] On occasion, courts take the opportunity to expressly acknowledge the plaintiff's need for vindication in their reasons for judgment. An example is provided by *Ma Bik Yung v Ko Chuen*.[107] In this case, the Hong Kong Court of Appeal upheld an award of damages for harassment on the ground of disability, but lifted an order to apologise made by the lower court. On an appeal solely on the question of whether an unwilling respondent can and should be ordered to apologise, the Court of Final Appeal also denied the plaintiff an apology order.[108] However, the Court of Final Appeal expressly acknowledged that the respondent's harassment of the appellant caused her considerable distress and condemned the actions of the respondent as conduct that should not be tolerated in society. The Court also stated that its judgment should provide further vindication to the plaintiff.[109]

105 This phrase is the title of a book on the development of therapeutic jurisprudence and its application for judging: Bruce Winick and David Wexler (eds), *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (Carolina Academic Press, 2003).

106 On therapeutic judgments, see Nathalie Des Rosiers, 'From Telling to Listening: A Therapeutic Analysis of Courts in Minority–Majority Conflicts' (2000) 31 *Court Review* 31.

107 [2000] HKCA 397.

108 *Ma Bik Yung v Ko Chuen* [2002] 2 HKLRD 1.

109 Ibid [59].

In some defamation cases defendants have successfully argued that a reasoned judgment in favour of the plaintiff has a vindicatory effect and the amount of damages awarded should therefore be reduced.[110] Dicta in these cases recognise that the falsity of the imputation can be inferred from a defamation verdict,[111] but this appears to conflict with a longstanding *obiter dictum* of the House of Lords that a judgment in the plaintiff's favour should not be taken into account in the assessment of damages.[112] More recently in *Purnell v Business Magazines*,[113] the English Court of Appeal thoroughly reviewed the relevant English authorities. In the leading judgment, Laws LJ held that a reasoned judgment is 'at least capable of providing some vindication of a claimant's reputation'[114] and that a court may take it into account in the assessment of damages. The decision leaves open, however, when a court should address the plaintiff's need for vindication in its reasons for judgment. We submit that a court should consider providing (additional) vindication in its reasons for judgment when the defamation has caused intangible harm, the defendant has unreasonably resisted the plaintiff's wish to receive a correction or apology and the court is unwilling or unable to order a correction or apology.

Even in some cases where the plaintiff's action has not been successful, remarks made in a judgment can be construed as an attempt to vindicate the plaintiff's hurtful experience. In *Creek v Cairns Post Pty Ltd*,[115] for example, the court acknowledged that the applicant suffered hurt and humiliation at the hands of the respondent, notwithstanding that that the applicant could not prove her allegation that the respondent's conduct contravened the *Racial Discrimination Act 1975* (Cth).[116]

2 *Conditional Damages Awards and Judicial Persuasion*

In *Summertime Holdings Pty Ltd v Environmental Defender's Office*,[117] the plaintiff sought an order enforcing a term of a compromise by which the defendant had agreed to broadcast an apology via radio. The apology was sought in respect

110 *Hook v Cunard Steamship* [1953] 1 WLR 682, 686 (Slade J); *Rackham v Sandy* [2005] EWHC 482 (QB), [124]–[125] (Grady J).

111 Where a court rejects the defendant's defence that the alleged defamation was true, the plaintiff can point to the judgment as vindication of his or her reputation.

112 *Associated Newspapers Ltd v Dingle* [1964] AC 371.

113 [2007] EWCA Civ 744.

114 Ibid [27], referring to the requirement under the *Convention for the Protection of Human Rights and Fundamental Freedoms,* opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art 10 to not limit the right of free expression further than is necessary in a democratic society.

115 (2001) 112 FCR 352.

116 Kiefel J also noted that she would have ordered a short apology if the discrimination complaint had been made out, as this may have helped vindicate the applicant in the eyes of her community: ibid 360. An approach similar to that taken by the court in this case has been urged in the context of US federal court civil rights cases, on the grounds that a court's written opinion can, in itself, be a form of remedy which addresses many of the needs of the civil rights claimants. See Jonathan Lahn, 'Writing as Remedy: The Possibilities of Court-Generated Narrative in "Personal Status Litigation"' (2009) 34 *Vermont Law Review* 121.

117 (1998) 45 NSWLR 291.

of allegedly defamatory statements made by the defendants in an earlier radio broadcast. The Court declined to grant an order requiring the defendant to publish the apology. However, Young J suspended the order that the defendant pay $10 000 damages for breach of its promise to broadcast the apology for seven days after the reasons were handed down. This order gave the defendant a final opportunity to agree with the plaintiff on the publication of a suitable apology. This case is an illustration of a non-coercive means of recognising a plaintiff's remedial preference.

Another case, from the discrimination jurisdiction, shows once again a judicial preference to use persuasion rather than coercion to fulfil the educative and vindicatory purposes of this jurisdiction. In *Evans v National Crime Authority*,[118] Federal Magistrate Raphael found an employer to have contravened the relevant Act but refused to order an apology. Instead, his Honour employed 'moral signposting' by expressing his expectation that 'those now in charge at the NCA will understand [the importance of their legal obligations], will reflect upon it and at the appropriate time make Ms Evans the apology which I believe she deserves to receive'.[119]

V CONCLUSION

Affirmation of a plaintiff's rights where they have been infringed is at the heart of the legal process. In recent years, interest in the vindicatory purpose of the law has increased. This article has examined the role of remedies law in giving effect to rights that protect personality interests including reputation, dignity and feelings. We argue that plaintiffs who express a preference for a non-monetary order will often not feel sufficiently vindicated if they are limited to an award of damages. In these circumstances, a court should give due weight to a plaintiff's preference, or at least acknowledge their preference, in their judicial pronouncement.

In making this argument, we have referred to studies indicating the remedial needs of victims of medical negligence, discrimination and defamation. We also draw on insights from therapeutic jurisprudence and the intersecting fields of comprehensive law and non-adversarial justice. Psychological theories help us to understand how a plaintiff can be restored after being wronged and how law affects this process. Therapeutic jurisprudence provides a way of evaluating the psychological impact of the types of remedies granted in civil proceedings. These perspectives support an approach to judicial choice of remedy that takes into account the potential for particular remedies to maximise the psychological wellbeing of a plaintiff by supporting their choice of remedy.

The article has examined how remedies such as declarations, corrections and apologies can be used to enhance the vindicatory aims of the law. We conclude that within the law of remedies the capacity already exists to give greater emphasis

118 *Evans v National Crime Authority* (2003) EOC ¶93-298.

119 Ibid [115].

to vindication as a function of private law, other than by awards of damages. Equitable principles do not prevent courts from having proper regard to the psychological and other intangible needs of the plaintiff in establishing whether damages are an 'inadequate' remedy. On the contrary, we maintain that there is untapped potential to strengthen both the vindicatory purpose and the therapeutic effect of law through non-monetary remedies and judicial pronouncements.