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Emile Zitzke

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Constitutional Damages in South Africa: A Transformative Approach

Emile Zitzke | ORCID: 0000-0001-5288-8679
LLB LLD, Associate Professor of Law, School of Law,
University of the Witwatersrand, Johannesburg, South Africa
emile.zitzke@wits.ac.za

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Abstract

This article explores when constitutional damages can and should be awarded in South African law. The history of the divergence between common-law damages and constitutional damages (and the uncertainty that might arise about which type of damages a victim of an injury ought to pursue) is explored. Thereafter, a critical and constructive interpretation of the case law on constitutional damages is provided, which sets the scene for a precedent-inspired three-step approach to constitutional damages adjudication. This approach is then defended as a transformative constitutional one which squares easily against the notion of constitutional adjudicative subsidiarity.

Keywords

delict – constitutional damages – subsidiarity

1 Introduction

When can and should constitutional damages be awarded in South Africa? This is the main question that I will endeavour to answer in this contribution. There appears to be some degree of legal uncertainty about the relationship between so-called 'common-law damages' and 'constitutional damages' in

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South Africa, as a recent article published in this journal contends.[1] I will refer to that article as 'Two Fellows' for brevity's sake.

The authors of 'Two Fellows' problematise the common-law/constitutional damages relationship and call it the 'duplicity of damages' conundrum.[2] Their concern is that South African courts flip-flop between awarding common-law damages in some cases and constitutional damages in others, with no proper guidance being given on when the respective remedies are appropriate.[3] They ultimately find that 'it is still not clear as to when constitutional damages are appropriate, and how the relief should be couched'.[4] In response to their duplicity-of-damages problem, 'Two Fellows' in the end proposes a rather complex solution. That solution, pieced together from fragments throughout the article, might be called the precautionary-cautionary-relaxed-complementary approach.[5]

I take issue with both the framing of the extent of the problem and solution proposed in 'Two Fellows'. My argument will be developed in three parts.

I will start, in Part 2, with a brief sketch of the origin of the two streams of damages. This is not properly done in 'Two Fellows'.[6] From there, two main claims will be defended.

The first claim, defended in Part 3, is that the problem identified in 'Two Fellows' is perhaps overstated. While there is some degree of uncertainty regarding the law on constitutional damages, a more analytically rigorous reading of the case law from the South African national appeal-level courts paints a much clearer picture on some well-established guidelines for understanding when common-law versus constitutional damages can and should be awarded.

The second claim, defended in Part 4, is that the proposed solution in 'Two Fellows' is an undesirable and unworkable one, in part because it does not

1 Bronwyn Le-Ann Batchelor and Shelton Tapiwa Mota Makore, 'The Conundrum of Two Fellows in the Same Ship: A Comparative Legal Analysis of the Duplicity of Damages in South Africa' (2023) 15(2) African Journal of Legal Studies 215–241.

2 Batchelor and Makore (n 1) 217.

3 Batchelor and Makore (n 1) 218–219.

4 Batchelor and Makore (n 1) 234.

5 See especially Batchelor and Makore (n 1) 217–218, 239–240. I explain what this is supposed to mean later in this article.

6 See the non-linear discussion of case law in Batchelor and Makore (n 1) 224–228 where no clear timeline of developed principles can be discerned. In fact, the two types of damages are confusingly conflated at certain points. See especially the statement at 219 that common-law damages and constitutional damages both arise from the establishment of the five elements for common-law liability. Later, at 221, it is contradictorily said that the requirements for constitutional wrongs and common law delicts 'differ materially' but no further meaningful information is provided on the respective requirements.

engage robustly enough with existing precedent. Instead, a constitutionally transformative approach of constitutional adjudicative subsidiarity, which has existed in the South African literature for quite some time, is promoted as the most appropriate legal-algorithmic tool to address the damages conundrum.

2 The (True) Origin of the Problem

2.1 *Common-Law Damages and Delict*

In order to understand the problem under discussion, some background information is needed. Until the early 1990s, the South African constitutional order did not recognise human rights in meaningful ways – a long and tragic story treated with much care in our great works on history.[7] In this pre-democratic era the common law was the primary vehicle for damages claims arising from injuries of various kinds. More specifically, the common law of delict (roughly, our version of tort law) provided the conditions for and consequences of liability for injuries.[8] The common law of delict applied to state and non-state wrongdoers in this regard.[9]

As early as 1934 it was declared by the Cape Provincial Division that common law delictual liability would, in principle, be determined with reference to general elements regardless of the type of harm at stake.[10] Thus, whether one dealt with a bodily injury or property harm, the five general definitional elements had to be established: harm, conduct, wrongfulness, culpability, and causation.[11] This generalising approach to delictual elements has, in more recent times, been endorsed by the Constitutional Court in the paradigmatic case of *De Klerk*.[12] The generalising approach to delict has distinctive

7 A particularly thorough analysis is provided by Sampie Terblanche, *A History of Inequality in South Africa, 1652–2002* (University of Natal Press 2002).

8 Some of the major works of the time include Manfred Nathan, *The South African Law of Torts* (Speciality Press of SA, 1921); RG McKerron, *The Law of Delict: A Treatise on the Principles of Liability for Civil Wrongs in the Law of South Africa* (Juta, 1971); PQR Boberg, *The Law of Delict* (Juta, 1984); NJ van der Merwe and PJJ Olivier, *Die Onregmatige Daad in die Suid-Afrikaanse Reg* (JP van der Walt, 1989).

9 Today, s 1 of the State Liability Act 20 of 1957 makes this clear. See also Leo Boonzaier, 'State Liability in South Africa: A More Direct Approach' (2013) South African LJ 330, 331–337.

10 *Perlman v Zoutendyk* 1934 CPD 151 at 155–158.

11 Correctly identified by Batchelor and Makore (n 1) 219–220, but then incorrectly complicated by the following statement at 220: '[i]t should be noted that within the definition of a delict reference is made to the infringement of a legally recognised right'.

12 *De Klerk v Minister of Police* 2021 (1) SA 585 (CC) [13].

European Continental flavour, which stands opposed to the casuistic systems of torts developed in English law, where each type of injury has a distinct set of requirements.[13]

Even though we have five general elements to a common law delict, there are necessary nuances in how the elements play out in relation to different types of harm. For example, in a defamation case one could rely on the defence of truth and public interest to extinguish wrongfulness, but that defence would not be of any logical or practical assistance in a case where a wrongdoer has shot and killed someone's breadwinner. Different types of injuries are thus treated slightly differently, but the general rule is that the five basic elements must be established. This is so whether a victim intends to claim damages for patrimonial and/or non-patrimonial harm.[14]

The nuanced differences between different types of legal injuries can be traced back to the three historical actions on which our common law of delict is based: the Roman *actio legis Aquiliae* (which historically covered property harms), the Germanic action for pain and suffering (the bodily-injury mirror of the Aquilian action), and the Roman *actio iniuriarum* (which historically covered intentional personality harms).[15] Because of these historic actions, sometimes, delict thinkers still refer to, for example, 'Aquilian liability' when talking about the substantive rules that deal with property delicts, given their peculiarities vis-à-vis personality violations.[16] But that does not mean that we still have the historical actions at our disposal in their original Roman form, or that our common law of delict is entirely or primarily Aquilian in nature, as 'Two Fellows' seems to suggest at one point.[17]

13 See JC van der Walt and JR Midgley, *Principles of Delict* (4th ed., LexisNexis 2016) [26]; M Loubser & R Midgley (eds), *The Law of Delict in South Africa* (3rd ed., OUP 2017) 18; J Neethling and JM Potgieter, *Law of Delict* (8th ed., LexisNexis 2020) 4–5.

14 See JM Potgieter, L Steynberg and TB Floyd, *Visser & Potgieter Law of Damages* (3rd ed., Juta 2012) chs 8–9 for a fuller exposition on these two types of damages traditionally recognised at common law.

15 See Van der Walt and Midgley (n 13) [2]; Loubser and Midgley (n13) 15–16; Neethling and Potgieter (n 13) 8.

16 See Anton Fagan, *Aquilian Liability in the South African Law of Delict* (Juta 2019) who interestingly identifies seven elements of Aquilian liability (in particular) as opposed to the traditional five mentioned earlier.

17 See e.g., Batchelor and Makore (n 1) 220: 'Therefore, it is conceivable that any right protected under the Constitution which is infringed is equally protected and compensated by the common law remedy, that is, the *actio legis Aquiliae* provided that the elements of delict are proven.'

With this very brief birds-eye-view of the South African common law of delict out of the way, we can now turn to consider the point of origin of constitutional damages.

2.2 *Constitutional Damages*

With the introduction of constitutional democracy, first through the 1993 'Interim' Constitution,[18] eventually solidified in the 1996 Constitution,[19] there was some excitement at the prospect of revolutionising private-law thinking about injuries. The revolutionary optimism came from the broad nature of the 1993 Constitution's application provisions.

Section 7 of the 1993 Constitution clearly bound the state (in all its forms) to its constitutional obligations and entitled both natural and juristic persons to appropriate judicial relief for rights infringements. Section 35(3) additionally said that courts were dutybound to consider the spirit of the Bill of Rights while applying and developing the common law.

These two provisions seemed to open the door for two different streams of damages. The first stream was a (potentially) reimagined common law of delict. Relying on section 35(3) one could do progressive work with the common law of delict to claim damages that might not have been (easily) recoverable before the democratic era. For example, if a litigant in a defamation dispute wanted to present a case for the introduction of a new wrongfulness defence, rooted in the constitutional concern for a free press, then section 35(3) would be the appropriate mechanism.[20]

The second stream would be a 'purer' constitutional remedy. Relying on section 7, perhaps an argument could have been made for claiming 'appropriate relief' in the form of 'constitutional damages' as a totally distinct and separate cause of action from the common law of delict. That is exactly what was argued in the torture case of *Fose v Minister of Safety and Security*.[21]

After suffering a severe assault at the hands of the Police, the victim instituted a two-pronged vicarious liability claim against the state. First, he claimed common-law damages for medical expenses as well as pain and suffering (which are traditionally accepted heads of damages in the common law of delict); secondly, he claimed constitutional damages as a top-up over and above the common-law damages for his violated constitutional rights which

18 Constitution of the Republic of South Africa Act 200 of 1993.
19 Constitution of the Republic of South Africa, 1996.
20 This is the gist of the decision in *Du Plessis v De Klerk* 1996 (3) SA 850 (CC).
21 *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC).

included 'an element of punitive damages'.[22] The state disputed the validity of the claim for constitutional damages.[23]

Fose's case provides us with some first principles on the two streams of damages. The starting point is surely that 'appropriate relief' must mean an 'effective remedy'.[24]

The court held that various mechanisms rooted in the common law could provide this effective relief, especially because of the requirement in section 35(3) that courts had to consider the spirit of the Bill of Rights when applying and developing the common law.[25]

More specifically, damages broadly construed (not necessarily limited to the common law conception thereof) can amount to appropriate relief.[26] For example, when a delict victim succeeds in a claim for common-law damages on account of assault, the award would likely be robust enough for onlookers to say that the victim's rights have been vindicated, and in such a case, there is no need for a top-up award of constitutional damages.[27]

The reasoning is that, historically, our law has allowed damages claims for breaches of certain common-law duties and statutory duties. It would be strange if our law did not allow damages claims for certain constitutional-duty breaches too.[28]

However, the precise boundaries of a constitutional damages claim would have to be argued to a court very carefully because the issues of liability and quantum are circumstance dependent.[29]

The Court made it abundantly clear that constitutional damages cannot be claimed as punitive damages.[30] The gist of the reasoning is that punishment is the function of criminal law while damages awards are about compensation.[31]

The general principles regarding constitutional damages laid down in *Fose's* case have largely been well-received in various academic quarters.[32]

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22 *Fose* (n 21) [13].
23 *Fose* (n 21) [14].
24 *Fose* (n 21) [69].
25 *Fose* (n 21) [58].
26 *Fose* (n 21) [60].
27 *Fose* (n 21) [67].
28 *Fose* (n 21) [60].
29 *Fose* (n 21) [60].
30 *Fose* (n 21) [70].
31 *Fose* (n 21) [63]–[65]; [70].
32 The most thorough work arguing in favour of *Fose's* principles is André Mukheibir, 'The Wages of Delict – Compensation, Satisfaction, Punishment?' (DIuris Thesis, University of Amsterdam 2007). See also J Neethling, 'The Law of Delict and Punitive Damages' (2008) 29(2) Obiter 238; cf Abdul Karrim Funnah and Omphemetse Sibanda, 'Towards a

Since *Fose's* case, the 1996 Constitution has come into force. Section 8(1) of the 1996 Constitution binds the law and state to the Bill of Rights. Section 8(2) also explicitly binds non-state actors to the Bill of Rights if the right and correlative duty allows for such a reading. Section 8(3) clearly took a leaf from the *Fose* judgment: When applying the Bill of Rights to non-state actors, legislation that gives effect to the right in question must be relied upon; if there is no such legislation, the common law is the fall-back source for the victim's aid.

Section 39(2) of the 1996 Constitution mimics the development clause from the 1993 Constitution by demanding that human-rights spirit is infused into statutory interpretation and the development of the common and customary law, continuing the theme that other sources of law can be constitutionally harmonious.

When this is read alongside section 38, we see that 'appropriate relief' is still required for the victims of rights infringements, potentially keeping the backdoor open for constitutional damages claims. Indeed, since the 1996 Constitution has come into force, constitutional damages have not disappeared from the remedial discourse.

3 The (Actual) Rules Derived from Case Law

3.1 *Overview*

In 'Two Fellows' only two national appeal-level court decisions (decisions from the Supreme Court of Appeal and Constitutional Court) from South Africa are substantively engaged to some degree.[33] Including *Fose*, which I have already briefly discussed above, there are ten national appeal-level court decisions from South Africa that are relevant to this topic. It is surely desirable to provide a more orderly and thorough reading of the extant law before we make conclusions about whether the damages-debate jurisprudence in South Africa is in a state of shambles.

The most recent systematic historical survey of cases on constitutional damages in South Africa has been undertaken by André Mukheibir.[34] In light

Selective Awarding of Punitive Damages Awards in South Africa? A Comment on Fose v The Minister of Safety and Security' (2008) 48(2) Codicillus 36.

33 Batchelor and Makore (n 1) 224–225.

34 André Mukheibir, 'Constitutional Damages – A Stagnant or a Changing Landscape?' (2023) 26 Potchefstroom Electronic LJ <http://dx.doi.org/10.17159/1727-3781/2023/v26i0a15901> accessed 14 February 2024.

of her detailed contribution, read alongside the earlier work of Musa Kika,[35] my historical contribution should take on a slightly different flavour.

My angle of approach will involve this: For each of the nine constitutional-damages cases from the Supreme Court of Appeal or Constitutional Court that have followed on *Fose*, I will avoid repeating the detailed facts and rules that were narrowly peculiar to each case.[36] On my analysis, the facts of the cases are often so intricate and the legal applications so pedantic that a constricted focus on facts and fact-specific rules may cause us to miss the wood for the trees. Instead of hardcore casuistry, I will formulate at least one abstract rule or principle for each case that is more easily transposable to other situations. I will discuss the cases in the order that they were decided, which does not always correlate with the order in which they were reported.

My aim is to explain the principle(s) and critically evaluate their place in the existing jurisprudence, working towards a step-by-step method for reasoning through disputes dealing with constitutional damages, which seems to be missing from the discourse. That step-by-step method will only be introduced in Part 4 later, after considering the case law, academic commentaries, and the proposal made in 'Two Fellows'.

3.2 *Olitzki*

In 2001, the Supreme Court of Appeal in *Olitzki* denied a victim's claim for constitutional damages based on a violation of the constitutional right to administrative justice, as found in section 14 of the 1993 Constitution.[37]

The very broad principle from *Olitzki* could be phrased as follows: For constitutional damages to be awarded based on the violation of a right that requires appropriate relief, the court must consider all relevant policy considerations – the availability of alternative effective remedies (like

35 Musa Kika, 'Fashioning Judicial Remedies that Work in a Constitutional Society – Establishing a Framework for a Functional Approach to the Awarding of Constitutional Damages in South Africa and Comparative Jurisdictions' (PhD Thesis, University of Cape Town 2019) ch 4. For a briefer account see Iain Currie and Johan de Waal, *The Bill of Rights Handbook* (6th ed., Juta 2013) 200–205.

36 I have decided to exclude discussions of High Court decisions because they do not seem to add much (if anything) to the national appeal-level court jurisprudence on constitutional damages. I have also decided to exclude arbitration awards, like the Life Esidimeni matter, partly because it does not create binding precedent and partly because the legal reasoning employed in that arbitration is subject to serious critique as argued by Emile Zitzke, 'The Life Esidimeni Arbitration: Towards Constitutional Damages?' (2020) 3 J for SA Law 419.

37 *Olitzki Property Holdings v State Tender Board* 2001 (3) SA 1247 (SCA).

interdicts and administrative law review) and potential depletion of the state purse being factors weighing against an award for constitutional damages.[38]

3.3 *Jayiya*

In 2003, in *Jayiya*,[39] the Supreme Court of Appeal had to determine whether constitutional damages could be claimed for a violation of the right to administrative justice, this time under section 33 of the 1996 Constitution. By this stage, Parliament had passed the Promotion of Administrative Justice Act (PAJA)[40] to give effect to section 33.

The key general principle from *Jayiya* could be formulates as follows: If a statute protects a victim's constitutional right(s) by providing an effective remedy (like administrative law review and/or statutory damages) then that statute cannot be circumvented in favour of a claim for constitutional damages.[41] While the court explicitly only relies on *Fose* as the springboard for this principle, *Olitzki's* policy consideration of alternative remedies is embodied more concretely in *Jayiya*.

3.4 *Modderklip*

The Constitutional Court was faced with a claim for constitutional damages again in 2005 in *Modderklip*,[42] where a landowner's constitutionally protected property (rooted in section 25) had been violated. It was well-settled by the time that *Modderklip* was decided that the availability of alternative remedies would be a relevant consideration in determining whether constitutional damages amount to appropriate relief when a constitutional right has been violated.[43]

On my reading, *Modderklip* adds three major points of substance to that idea. The potential effectiveness of an alternative remedy in lieu of constitutional damages is influenced by: (1) the length of the dispute and the current

38 *Olitzki* (n 37) [38]–[40], [42]. These policy considerations are also flagged as significant in two commentaries on this case: J Neethling and JM Potgieter, 'Die Handves van Regte en Deliktuele Aanspreeklikheid Wees Verbreking van 'n Statutêre Voorskrif' (2002) 2 Journal for South African Law 381, 382; Chuks Okpaluba, 'Bureaucratic Bungling, Deliberate Misconduct and Claims for Pure Economic Loss in the Tender Process' (2014) 26(2) SA Mercantile LJ 387, 398–399.

39 *Jayiya v MEC for Welfare, Eastern Cape* 2004 (2) SA 611 (SCA). This decision was handed down in 2003 but reported in 2004.

40 3 of 2000.

41 *Jayiya* (n 39) [9].

42 *President of the Republic of South Africa v Modderklip Boerdery* 2005 (5) SA 3 (CC).

43 *Modderklip* (n 42) [57].

urgency of its pending resolution;[44] (2) the impact of any given remedy on third parties' rights;[45] and (3) the relationship between the remedy and the separation-of-powers doctrine, i.e., whether the remedy would amount to inappropriate micromanagement of the executive's discretionary powers.[46]

Sarah Fick has argued that the state's available resources and its relationship with distributive justice should necessarily also feature as considerations in a case like *Modderklip*, even though it did not feature in this case.[47] Such an approach would certainly be in line with the state-resources principle derived from *Olitzki* mentioned above.

3.5 *Kate*

Shortly after *Modderklip*, early in 2006, the Supreme Court of Appeal decided *Kate*.[48] This case involved a provincial government that showed systemic incompetence in the administration of social grants to some of the most vulnerable members of society who have a constitutional right thereto, found in section 27.[49]

For the first time the court was decidedly clear on more concrete principles: An award for constitutional damages must be casuistically decided considering

44 *Modderklip* (n 42) [59].

45 *Modderklip* (n 42) [53]–[55], [58]. This aspect of the judgment is praised as being particularly original and appropriate by AJ van der Walt, 'The State's Duty to Protect Owners v The State's Duty to Provide Housing: Thoughts on the Modderklip Case' (2005) 21(1) SA J on Human Rights 144, 159–161. This was a point no doubt enhanced by the amici curiae interventions in this case, as shown by Kate Tissington, 'Demolishing Development at Gabon Informal Settlement: Public Interest Litigation Beyond Modderklip' (2011) 27(1) SA J on Human Rights 192, 197–200.

46 *Modderklip* (n 42) [60]–[64]. This last point is, at best, obiter. There have been calls for South African courts to take a more interventionist stance in cases of chronic government incompetence. See Anashri Pillay, 'South Africa: Acccess to Land and Housing' (2007) 5(3) International J of Constitutional L 544, 554–556; Jackie Dugard, 'Modderklip Revisited: Can Courts Compel the State to Expropriate Property where the Eviction of Unlawful Occupiers is Not Just and Equitable?' (2012) 21 Potchefstroom Electronic LJ <http://dx.doi.org/10.17159/1727-3781/2018/v21i0a3477> accessed on 20 February 2024; Carol C Ngang, 'Judicial Enforcement of Socio-Economic Rights in South Africa and the Separation of Powers Objection: The Obligation to Take Other Measures' (2014) 14(2) African Human Rights LJ 655.

47 Sarah Fick, 'Compensating Landowners? The State's (Limited) Duty towards Landowners in Delayed Eviction Matters' (2021) 24 Potchefstroom Electronic LJ <http://dx.doi.org/10.17159/1727-3781/2021/v24i0a6190> accessed on 20 February 2024.

48 *MEC, Department of Welfare, Eastern Cape v Kate* 2006 (4) SA 478 (SCA).

49 On this history preceding this case, see the authorities mentioned in *Kate* (n 48) [3], [5]–[6].

the 'nature and relative importance of the rights', alternative remedies, and consequences for the victim.[50]

When considering the rights involved, attention must be paid to the substance of the right and the fact that an infringement may be endemic.[51]

When considering the availability of alternative remedies, the court held that these should not be overemphasised because constitutional damages are 'not a remedy of last resort', especially when there has been a direct and endemic violation of a substantive right (as opposed to the breach of a mere normative standard).[52]

When considering the consequences for the victim, it seems that patrimonial and non-patrimonial consequences are relevant, including the unquantifiable effect that state conduct has had on a vulnerable victim's dignity.[53] In my view, by dignity here the court clearly does not mean a personal feeling of self-worth (like we might find under the common law's *actio iniuriarum*) but rather the right to be treated in a way that shows respect for the person as someone with inherent worth – perhaps in a Kantian sense.

Towards the end of the judgment, the court also adds flesh to the 'state purse' concern originally mentioned in *Fose* and *Olitzki*: Sometimes the executive should pay damages to victims at the strain of public funds so that they are made to account to the legislature.[54]

A potential game-changing principle from *Kate* is that constitutional damages are not a remedy of last resort. On first glance, *Kate* fits uncomfortably with *Olitzki* and *Jayiya* where alternative remedies were given prime consideration. However, if *Kate* is read restrictively, it could be aligned with *Modderklip* in that the court simply meant to say that exceptional circumstances can exist that justify a first port stop at constitutional damages in cases unlike *Olitzki* and *Jayiya*. The court's reasoning would have been more convincing if it clarified the relationship between *Kate* and the cases that preceded it. More careful reasoning around why endemic rights breaches attract constitutional damages, especially in cases where lone plaintiffs are involved, could have enhanced our understanding of this principle too.

50 *Kate* (n 48) [25].
51 *Kate* (n 48) [27], [31].
52 *Kate* (n 48) [27], [29], [31].
53 *Kate* (n 48) [33].
54 *Kate* (n 48) [32].

3.6 *Mboweni*

Surprisingly, in the wake of the apparent constitutional-damages optimism created by *Modderklip* and *Kate*, it took nearly eight years before the Supreme Court of Appeal again faced a constitutional damages conundrum in *Mboweni* in 2014.[55] In this case, the victims were the children of a man who died in police custody and alleged that their constitutional right to parental care in section 28 had been violated.

Here the court took us back to the fundamental basis of a claim for constitutional damages: The facts must show that a constitutional right was violated unlawfully,[56] having due regard for the victim's right and the wrongdoer's correlative duty.[57]

Slightly recasting *Fose*, the principle is also laid down that extant delictual claims available at common law should first be considered as appropriate constitutional remedies before resorting to a pure constitutional cause of action.[58] This seems to be a subtle backtracking on *Kate's* softened stance on alternative remedies, especially given that *Kate* is not substantively engaged in *Mboweni* at all.[59] However, I would argue that *Mboweni* does not somehow override *Kate* insofar as alternative remedies are concerned. *Mboweni* is clearly distinguishable from *Kate* in that in the former case there was no endemic breach of rights and there was no egregious conduct of the state that violated the victims' dignity. While a more robust engagement with *Kate* would have been welcomed in *Mboweni*, the two cases are probably reconcilable.

Finally, in line with *Kate* (but without mentioning *Kate*), the court implores us to carefully balance the interests of victim and state in deciding whether to award constitutional damages, which translates into a concern for the sustainability of public funds.[60]

In summary, *Mboweni* stands for the authority that constitutional damages could only be awarded if a right has been unlawfully violated by a duty bearer, no other alternative remedy at common law exists, and once the interests of the parties have been squared.

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55 *Minister of Police v Mboweni* 2014 (6) SA 256 (SCA).

56 *Mboweni* (n 55) [6], [10]–[14]. On the constitutional rights at stake in this case, see JA Robinson and R Prinsloo, 'The Right of the Child to Care and Constitutional Damages for the Loss of Parental Care: Some Thoughts on M v Minister of Police and Minister of Police v Mboweni' (2015) 18(5) Potchefstroom Electronic LJ <https://doi.org/10.4314/pelj.v18i5.14> accessed 20 February 2024.

57 *Mboweni* (n 55) [18]–[19].

58 *Mboweni* (n 55) [21]–[22].

59 The only references to *Kate* are made in passing in *Mboweni* (n 55) [4], [5], [24].

60 *Mboweni* (n 55) [25].

3.7 *Ngomane*

The next case up for discussion is *Ngomane* that was decided by the Supreme Court of Appeal in April 2019.[61] In this case, the constitutionally protected property of street dwellers was unlawfully and inhumanely confiscated and destroyed by the local municipality, leading to concurrent breaches of their rights to dignity (section 10) and privacy (section 14). The general principles drawn from *Ngomane* are the following: When a property right of negligible commercial value is unlawfully violated and unlikely to be compensated at common law in urgent court, the victims may claim constitutional damages as nominal damages to vindicate their rights;[62] if there is a concurrent breach of the victim's dignity and/or privacy on account of an disrespectful intent and/or mean-spiritedness on the part of the wrongdoer, an award for constitutional damages will necessarily include a dimension of aggravated damages.[63]

3.8 *Komape*

In December 2019, the Supreme Court of Appeal decided *Komape*.[64] In this case the surviving family of a child who was killed as a result of the Limpopo provincial government's incompetence succeeded with their common-law claim for the infliction of psychiatric lesions as a breach of their section 12 right to bodily and psychological integrity.[65] On top of this, they claimed constitutional damages. Given that the victims were already fully compensated at common law, the court determined that an award for constitutional damages here would amount to punitive damages, which we already know from *Fose's*

61 *Ngomane v Johannesburg* (*City*) 2020 (1) SA 52 (SCA). The decision was handed down in 2019 but was reported in 2020.

62 *Ngomane* (n 61) [24]–[25]. The court could have deepened its reasoning on available common-law remedies and the constitutional rights violation in question, but the outcome is nevertheless praised by ZT Boggenpoel, 'Revisiting the Tswelopele Remedy: A Critical Analysis of Ngomane v City of Johannesburg Metropolitan Municipality' (2020) 137 South African LJ 424.

63 *Ngomane* (n 61) [27]. The term 'aggravated damages' is not used in the judgment. However, the gist of the English conception of aggravated damages is tacitly relied upon in this case. This is a point made by Emile Zitzke, 'Grondwetlike Skadevergoeding as "Nominale" en "Verswaarde" Skadevergoeding in Dringende Aansoeke: Ngomane v Johannesburg (City) 2020 1 SA 52 (HHA)' 17(2) LitNet Akademies 790, 798–800.

64 *Komape v Minister of Basic Education* 2020 (2) SA 347 (SCA). The decision was handed down in December 2019 but was reported in 2020.

65 *Komape* (n 64) [56].

case would not be allowed.[66] On my reading, there is no new principle introduced in *Komape* insofar as constitutional damages are concerned.[67]

3.9 *Industry House*

In October 2021, the Constitutional Court decided *Industry House*.[68] The victims claimed constitutional damages for violations of their rights to dignity (section 10) and privacy (section 14) on account of home searches executed in terms of what was alleged to be unconstitutional legislation.[69] The majority of the court, per Mhlantla J, surveyed the case law on constitutional damages in the national appeal-level courts and provided a statement of general principles:[70]

> There are two overarching considerations: the first is the existence of an alternative remedy that would vindicate the infringement of the rights alleged by the claimant; and the second is whether that alternative remedy is effective or appropriate in the circumstances. Ancillary factors include whether the infringement of the constitutional rights was systemic, repetitive and particularly egregious; whether the award will significantly deter the type of constitutional abuses alleged; the effect of the award on state resources; and the need to avoid opening the floodgates in respect of similar matters.

Under the heading of 'alternative remedies', the majority explains that a common-law or statutory remedy is not an absolute obstacle to claiming constitutional damages, but it is 'a weighty consideration against' it.[71] (This incidentally aligns with the restrictive reading of *Kate* that reconciles *Olitzki*, *Jayiya* and *Modderklip* that I explained earlier). Under this same heading, the

66 *Komape* (n 64) [59], [63].

67 This interpretation and outcome is supported in the academic literature too. See Emile Zitzke, 'Critiquing the Komape Decision' (2019) 4 J for SA Law 814, 827–829; Michael C Buthelezi, 'The Impact of the Komape Judgment on the South African Law of Delict: An Analytical Review' (2022) 43(3) Obiter 630, 637–639; Emile Zitzke, 'Transforming the Law on Psychiatric Lesions' (2021) 32(2) Stellenbosch LR 253, 258–259. Cf Johan Neethling, 'Deliktuele Vergoeding Weens Verlies ("Bereavement") as Gevolg van 'n Sterfgeval in die Familie: RK v Minister of Basic Education [2019] ZASCA 192 (18 Desember 2019)' (2020) 17(1) 527, 534.

68 *Residents, Industry House v Minister of Police* 2023 (3) SA 329 (CC). The case was decided in 2021 but only reported two years later.

69 *Industry House* (n 68) [19], [89].

70 *Industry House* (n 68) [103].

71 *Industry House* (n 68) [104].

court incorporates the consideration of the effectiveness of the alternative relief. The majority says that the effectiveness of an alternative remedy must be determined with reference to the question of whether it would be '*manifestly unjust or unreasonable* in the circumstances' to expect the victim to rely on it.[72] In this regard, a court should consider 'the nature and extent of the violation, the position of the claimants, and the impact of the violation on the requirements for obtaining alternative relief'.[73] However, the mere fact that an alternative remedy's elements are difficult or inconvenient to prove does not amount to the type of injustice and unreasonableness that triggers the need for constitutional damages.[74]

Next, the majority dealt with the heading of 'appropriate relief' which appears to be something wholly distinct from effectiveness. Appropriateness grants the courts wide discretion to balance all the interests at stake in the case, guided by justice and equity.[75] Significantly, the majority held that constitutional damages must be 'the *most appropriate remedy* available to vindicate constitutional rights', not merely one of many notional appropriate remedies at the victim's disposal.[76] Necessarily this means that the alternative remedies must be considered again. Factors like deterrence and the effect on state resources should be considered at this stage.[77]

An initial point of critique against the majority judgment in *Industry House* is that the various considerations at play could have been dealt with in a more systematic manner, as promised in the broad statement of principles that I quoted above. Logically, the first question must be whether a statute or the common law provides a notional remedy of some kind to the victim. The second question should then be about the appropriateness and effectiveness of those alternative remedies vis-à-vis constitutional damages having due regard for the conspectus of policy considerations at play (what the court labels as ancillary factors) which aims to balance the interests of the victim, the state as wrongdoer, and society at large. Even though the statement of general principles seems to say we should consider effectiveness *or* appropriateness, what the court envisages and applies in *Industry House* is clearly appropriateness *as/and* effectiveness.

72 *Industry House* (n 68) [105] emphasis in the original.
73 *Industry House* (n 68) [105].
74 *Industry House* (n 68) [110].
75 *Industry House* (n 68) [113]–[118].
76 *Industry House* (n 68) [118] emphasis in the original.
77 *Industry House* (n 68) [119]–[120].

This conceptual point aside, the majority of the court in *Industry House* could have strengthened its reasoning in another respect. The majority could have, and perhaps should have, been clearer on the role of precedent in cases dealing with constitutional damages. An intuitive question that readers of the case may raise is why this case is so much different to the endemic and/or egregious violations in *Kate*. On the one hand, there are *Kate*-like factors mentioned as ancillary considerations in *Industry House's* majority decision. On the other hand, there is a clear departure from a broad interpretation of *Kate* insofar as the primary availability of constitutional damages is concerned.

The separate judgment of Jaftha J explains it better: *Kate* was incorrectly decided to the extent that it subtly attempted to override *Fose* and *Olitzki* on constitutional damages as a non-punitive remedy of last resort, except if there are some exceptional circumstances (like the delay and urgency in *Modderklip*) that justifies the award.[78] This separate judgment's explanation is probably the best justification for the majority's decision not to follow the outcome of *Kate* in *Industry House*. If the majority wanted to keep *Kate's* principles alive in totality, a much more nuanced exercise in distinguishing the facts would have been necessary. On my analysis, the effect of the majority decision in *Industry House* is that *Kate's* rule on the primary availability of constitutional damages as a remedy is overridden (or at least pacified) by implication.

Strangely, still, *Kate's* principles related to the endemic nature of rights violations and the state's egregious conduct are notionally kept afloat by the majority in *Industry House*, but now only in an ancillary capacity. What that will mean practically is less clear. What obfuscates matters is that these *Kate* factors are not applied meaningfully in the majority decision in *Industry House*.[79] I would argue that we either need to throw *Kate* out completely (conceptually, probably the best result) or we need much clearer guidance from the Constitutional Court on how *Kate's* factors might inform our reasoning on awards for constitutional damages (potentially opening us up to more confusion).

These problems aside, one thing that is certain after *Industry House* is that alternative remedies play a major role in cases dealing with constitutional damages.

78 *Industry House* (n 68) [133].

79 A similar critique is levelled by Joshua Davis, 'Emptying the Remedial Toolbox: Thubakgale, Residents, and Constitutional Damages' (2023) 13 Constitutional Court Review 221, 242–243.

3.10 *Thubakgale*

Two months after the judgment in *Industry House* was handed down, in December 2021, the Constitutional Court decided *Thubakgale*.[80] The basis for the claim was the breach of a court order related to the housing right (a socio-economic right) found in section 26 of the Constitution.

The majority of the court,[81] held that constitutional damages are fundamentally compensatory in nature, which means that a victim must show 'an injury or damage' that requires corrective justice.[82]

Again we are told that if an alternative remedy vindicates a victim's right effectively constitutional damages would not be appropriate,[83] especially when such a remedy has already been granted to the victim.[84] So, if legislation has been enacted to give effect to a right (or presumably if the common law does the same) it is not open to the victim to pursue a claim based on pure constitutional law.[85] This part of the judgment fits comfortably in the line of *Olitzki*, *Jayiya*, *Mboweni*, and *Industry House*.

Moreover, constitutional damages cannot be claimed as a veiled attempt at enforcing a court order and/or punishing the state for non-compliance with such an order, which is well-established law after *Fose*.[86]

On a holistic reading of the judgments, it may be notionally possible to bring a claim for constitutional damages based on a breach of socio-economic rights,[87] but what such a test case would look like is left to our imaginations.[88]

In terms of general principles, there are no brand-new rule revelations made by the majority in *Thubakgale*. Perhaps a disappointing aspect of the judgment

80 *Thubakgale v Ekurhuleni Municipality* 2021 JDR 3200 (CC).

81 The substance of the majority judgment must be pieced together reading the overlap of Jaftha J's judgment (in which Mogoeng CJ and Tshiqi J concurred) and Madlanga J's judgment (Mhlantla J concurring), which constitutes the 5/9 majority.

82 *Thubakgale* (n 80) [162].

83 *Thubakgale* (n 80) [163].

84 *Thubakgale* (n 80) [180].

85 *Thubakgale* (n 80) [178]–[179].

86 *Thubakgale* (n 80) [188]–[194].

87 Madlanga and Mhlantla JJ are clear in *Thubakgale* (n 80) [196] that the door is not completely shut to claim constitutional damages for socio-economic rights violations, even though they would not make such an award on the facts before them. Majiedt J (Khampepe J, Theron J, and Tlaletsi AJ concurring) would have awarded constitutional damages here for breach of socio-economic right, as is apparent at [31], [70]. Contrariwise Jafta J (with Mogoeng CJ and Tshiqi J concurring) would never allow a claim for constitutional damages rooted in socio-economic rights enforcement, at [121].

88 Tentative test cases are mentioned in passing by Sandra Liebenberg, 'The Art of the (Im)possible? Justice Froneman's Contribution to Designing Remedies for Structural Human Rights Violations' (2022) 12 Constitutional Court Review 137, 148.

is that the majority does not follow the *Industry House* formula for determining whether constitutional damages ought to be awarded, which makes the judgment subject to criticism in terms of how the law was applied and how the dispute is ultimately resolved by the Court,[89] but that is beyond the present discussion which is focused on more abstract legal principles.

3.11 *The True Extent of the Uncertainty*

A systematic investigation into the South African national appeal-level court case law shows that there is probably no radical uncertainty and/or conceptual chaos reigning in the realm of constitutional damages, contrary to what 'Two Fellows' suggests. Even if we ignore, for a moment, the most recent instalments in the constitutional damages story, *Industry House* and *Thubakgale*, the main contentious point leading up to *Komape* was whether constitutional damages could only be claimed as a remedy of last resort.

While *Kate* seemed to fling the floodgates open on that question, subsequent judgments (even those by the Supreme Court of Appeal that decided *Kate* in the first place) made it clear, though by implication, that *Kate* was overzealously decided insofar as the consideration of alternative remedies was concerned. I must accordingly disagree with the view put forward in 'Two Fellows' that there is a 'lack of proper approach' to the interface of common-law damages and constitutional damages.

Since the decision in *Industry House*, we do have some more concrete guidance on navigating the labyrinth even though some of us might want to refine some of the systematics of that case's majority judgment.

In my view, the law is by and large capable of being read in a critically constructive manner that leads to an internally consistent and reconcilable result – as I am about to argue.

4 Proposed Way Forward: A Three-Step Approach

Above, I have explained my reading of the ten cases from our national appeal-level courts that deal with constitutional damages. Weaving together my analysis of the cases conducted above, I take the view that we can approach the doctrine of constitutional damages in the following step-by-step way, that ensures some degree of coherence in the jurisprudence. In this construction,

89 See Davis (n 79) 245–246. The most solid critique of the application in this case is done by Sfiso Bernard Nxumalo, 'The Analytical Reasoning Defects in Thubakgale' (2023) 13 Constitutional Court Review 255–289.

there are three basic steps to the constitutional-damages enquiry, each containing a sub-set of principles.

4.1 *Step 1: Identify the Right(s), Parties, and Breach(es)*

Section 38 of the Constitution requires appropriate relief when rights are infringed. Relief can only be appropriate if an effective remedy is provided.[90] The appropriateness and effectiveness of a remedy is naturally dependent on the facts and circumstances of the case.[91]

In this regard, as a logical starting point, it must be established that the victim was entitled to the right in question which was unlawfully violated and that the wrongdoer bore a correlative duty to respect, protect and/or fulfil that right.[92]

4.2 *Step 2: Identify all Possible (Alternative) Remedies*

The availability of alternative effective remedies weighs against an award for constitutional damages.[93] In fact, it weighs very strongly against such an award.[94] Reading the case law holistically, we can consider remedies like (but not limited to) statutory damages (or other statutory relief), administrative law review, interdicts, and common-law damages.

4.3 *Step 3: Evaluate the Options and Decide*

We are required to determine which remedy is *most* appropriate and effective in the particular case.[95] There are three general rules and one overarching exception in this regard.

As a general rule, constitutional damages would not be most appropriate or effective if a statutory claim for damages exists and would fully vindicate the victim's rights.[96]

As a general rule, constitutional damages would not be most appropriate or effective instead of common law damages where the latter remedy notionally exists and would fully vindicate the victim's rights,[97] because the common law (including common-law damages) can constitute appropriate effective

90 *Fose* (n 21) [69].
91 *Fose* (n 21) [60].
92 *Mboweni* (n 55) [6], [10]–[14], [18]–[19].
93 *Olitzki* (n 37) [38]–[40].
94 *Industry House* (n 68) [104].
95 *Industry House* (n 68) [118].
96 *Jayiya* (n 39) [9]; *Thubakgale* (n 80) [178]–[179].
97 *Mboweni* (n 55) [21]–[22].

relief, especially when the common law is infused with constitutional spirit.[98] Constitutional damages also cannot be claimed as a top-up on a successful award for common-law damages that has fully and successfully vindicated the rights of a victim, because that would serve no effective purpose.[99]

As a general rule, even if statutory and common law remedies do not exist, constitutional damages as punitive damages (explicitly or implicitly so claimed) are not regarded as appropriate or effective.[100]

However, the first two general rules can be overridden if it would be 'manifestly unjust or unreasonable' to expect the victim to pursue an alternative remedy.[101] It is not unjust or unreasonable if the statutory or common-law elements for liability are merely tricky or inconvenient to prove.[102] From the case law, it is apparent that constitutional damages may be awarded, even if other effective and/or alternative remedies notionally exist if the floodgates of litigation would not be flung open arbitrarily and:

- the dispute between the parties has been unnecessarily protracted by the wrongdoer and an urgent resolution is now required;[103]
- constitutional damages are able to balance the constitutional interests of the parties involved and third parties better than any other remedy;[104]
- constitutional damages provide effective relief and it is the best remedy that would not amount to a micromanagement of government affairs in breach of separation of powers;[105]
- the law of civil procedure (sometimes mixed with the substantive rules for common-law liability) stand in the way of victims effectively vindicating their rights at common law;[106]
- there has been a flagrant violation of the victim's rights, which amounts to an intentional and egregious violation of the victim's dignity-as-inherent-worth triggering the need for aggravated damages as a means to vindicate the right to dignity in a sense unique to what the common law has to offer;[107]
- there is evidence that constitutional damages would be the most effective remedy to deter future rights violations, probably in cases of endemic

98 *Fose* (n 21) [58], [60].
99 *Fose* (n 21) [67].
100 *Fose* (n 21) [70]; *Komape* (n 64) [59], [63]; *Thubakgale* (n 80) [188]–[194].
101 *Industry House* (n 68) [105].
102 *Industry House* (n 68) [110].
103 *Modderklip* (n 42) [59].
104 *Modderklip* (n 42) [58].
105 *Modderklip* (n 42) [60]–[64].
106 *Ngomane* (n 61) [24]–[25].
107 *Kate* (n 48) [33]; *Ngomane* (n 61) [27].

and/or systemic breaches, without depleting state funds unnecessarily;[108] and/or
– any other good (roughly) analogous reason.

4.4 *In Defence of the Three-Step Approach*

The three-step approach that I have proposed is geared towards painting a coherent picture of the national appeal-level court case law on constitutional damages. It is admittedly not the only way to make sense of the extant case law, but it surely engages the precedent more robustly than what was done in 'Two Fellows' and eases some of the conceptual concerns that arise from the majority judgment in *Industry House*.

The practical utility of my proposal aside, the three-step approach is also theoretically defensible. I would describe this approach as being transformative and in line with the broader doctrine of constitutional adjudicative subsidiarity.

The South African Constitution has long been described as a transformative one – a document that was introduced with the aim to change law (and society) from a culture of authoritarianism to one of the justified uses of power where the values of equality, dignity and freedom are properly realised.[109]

Karl Klare, seen as the founding father of this jurisprudential paradigm in South Africa, explained that transformative constitutionalism is not about 'revolution' in the ordinary sense of the word where we would radically throw out all existing laws and replace them with all things new.[110] It would at most be revolutionary in the sense that the underlying value-base of our law was displaced.[111] There were some obviously oppressive laws related to segregation that had to go immediately because of that *Grundnorm* revolution, but the remainder of the law would be subject to a slow and steady critical review.[112] At the same time, transformative constitutionalism does not involve passive conservation of laws merely for the sake of upholding age-old legal tradition. Transformative constitutionalism also involves something more than mere reform, hence the use of the word 'transformative' in relation to the South African brand of constitutionalism.

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108 *Olitzki* (n 37) [42]; *Industry House* (n 68) [103], [119]–[120].

109 The classical text being Karl E Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14(1) SA J on Human Rights 146, 150.

110 Klare (n 109) 150.

111 See e.g., Lourens WH Ackermann, 'The Legal Nature of the South African Constitutional Revolution' (2004) 4 New Zealand LR 633.

112 For example, ss 2, 39(3), 172, and item 2(1) of Schedule 6 of the 1996 Constitution makes it clear that this would be an ongoing process of legal change.

In light of this basic description of transformative constitutionalism, a transformative methodology or approach to law could be described like this:[113]

> [W]e mean an approach to legal problems informed by the values and aspirations of the Bill of Rights and specifically by the constitutional aspiration to lay the legal foundations of a just, democratic, and egalitarian social order. Transformative legal methodology brings these values to bear on a context-sensitive view of the case seen in the light of all pertinent ethical and socio-economic considerations, as best these can be determined. Transformative methodology is attentive to the values of stability, predictability, and administrability. At the same time, the solutions it generates are not eternal; its results are always understood to be 'provisional', that is, as always being open to reconsideration and contestation as experience progresses, understanding deepens, and/or circumstances change.

The three-step approach proposed in this article complies with all the subcomponents of a transformative methodology. In the three-step approach, the holistic social, economic, and political context of a given dispute is highlighted as being fundamentally important. Simultaneously, the systematic steps in this approach aim to provide some type of stability, certainty and administrability so that litigation does not become a totally uncertain tombola gamble. The factors that we consider in the proposed method do not comprise a closed list, showing that we should be open to allow our understanding of this area of the law to deepen as new cases and issues come to the fore. Most importantly, though, this method is constitutionally aspirational.

An objector might at this point raise the concern that the three-step approach, and the case law that it relies upon, places too much emphasis on non-constitutional sources of law and does not take seriously the supremacy of the Constitution. So, the objector would say, the approach is not constitutionally aspirational as required for a transformative methodology.

My response would be that the three-step approach proposed here ought to be read alongside the doctrine of constitutional adjudicative subsidiarity. Subsidiarity is labelled as a transformative angle of approach to navigating one's way out of the labyrinth of legal norms (sources) in South African law.[114] It

113 Dennis M Davis and Karl Klare, 'Transformative Constitutionalism and the Common and Customary Law' (2010) 26(3) SA J on Human Rights 403, 412.

114 The pioneering work on subsidiarity in South Africa is Lourens du Plessis, '"Subsidiarity": What's in the Name for Constitutional Interpretation and Adjudication?' (2006) 17(2)

is a doctrine of wide reach that addresses the normative relationship between the Constitution, statutes, common law, and customary law more generally.[115]

At the heart of the doctrine is a belief that statutes, common, and customary law can all give effect to constitutional rights. For example, if we accept for a moment that the Constitution (and constitutions generally) simply provides the scaffolding for a functional democracy, we cannot expect the Constitution to do everything for us.[116] Faced with that sobering truth, parliament can draft statutes in a way that aims to give greater detailed substantive content to a constitutional right. While that statute does not deserve to be treated as if it is the supreme law, it can still have serious constitutional flair and commitment that leads to constitutional aspirations being achieved. This is especially so if we bear in mind that we are enjoined to interpret all legislation in a way that is constitutionally compliant and best promotes constitutional values, that legislation can provide meaningful content to our rights.[117] To the extent that legislation could show thoughtful democratic deliberation and the legislature's commitment to providing specialised solutions to unique problems, it makes sense for us to give effect to constitutional rights through statutes before we turn to the common or customary law of old.[118]

Similarly, if the common law or customary law are engaged in ways that promote constitutional spirit, those formally non-constitutional sources of law could shine in substantive constitutional grandeur, whenever legislation does

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Stellenbosch LR 207, 215. A thorough exposition of subsidiarity and its practical implications for the discipline of property law was first conducted by AJ van der Walt, 'Normative Pluralism and Anarchy: Reflections on the 2007 Term' (2008) 1 Constitutional Court Review 77; later incorporated into AJ van der Walt, *Property and Constitution* (PULP 2012).

115 Subsidiarity has been applied in various legal disciplines. In property law, see: ZT Boggenpoel, 'Can the Journey Affect the Destination? A Single System of Law Approach to Property Remedies' (2016) 32(1) South African J on Hum Rts 71; later incorporated into ZT Boggenpoel, *Property Remedies* (Juta 2017). In administrative law see: Melanie Murcott and Werner van der Westhuizen, 'The Ebb and Flow of the Application of the Principle of Subsidiarity – Critical Reflections on Motau and My Vote Counts' (2015) 7 Constitutional Court Review 43. In delict, see: Emile Zitzke, 'Constitutional Heedlessness and Over-Excitement in the Common Law of Delict's Development' (2015) 7 Constitutional Court Review 259; CJ Visser, 'Adjudicative Subsidiarity, the "Horizontality Simpliciter" Approach and Personality Rights: Outlining an Integrated and Constitutional Reading Strategy to the Law of Personality (2022) 55 De Jure 124.

116 See generally Stu Woolman, 'Understanding South Africa's Aspirational Constitution as Scaffolding' (2015–2016) 60(2) NY Law School LR 283.

117 Ss 39(2) and 172 of the Constitution make this clear.

118 A point made eloquently in *Gcaba v Minister of Safety and Security* 2010 (1) SA 238 (CC) [56].

not adequately regulate the dispute in question.[119] Michael Bishop therefore writes the following:[120]

> In some sense, every award of delictual damages where the right asserted is also a constitutional right – such as dignity, bodily integrity, privacy or freedom of expression – is a constitutional remedy. Why? Because the indirect constitutional remedy serves to cure the violation of a constitutional right. The Court first enunciated this proposition in *Fose*…

If the three-step approach that I proposed here is understood against this backdrop, it should be clear that the call is for the Constitution to infiltrate every source of law in meaningful ways. This would ensure that constitutional spirit is a unifying theme that holds our law together.[121] In my view, this does more for constitutional supremacy and a human rights culture than allowing statutes, common and customary law to develop along non-constitutional lines parallel to a system of 'pure' constitutional delicts.[122] This is surely what a transformative approach to the constitutional-damages enigma should be about.

With this said, the three-step approach is not overly rigid in giving way to statutory and common-law claims, because of the justice and reasonableness overrides that allow direct access to constitutional damages in limited circumstances.

A final objection against this reading may be that 'Two Fellows' has provided a better polycentric solution called the cautionary-precautionary-relaxed-complementary approach. The key difficulty that the 'Two Fellows' approach faces is that it is fraught with terminological and conceptual uncertainty, making the gist of the proposal difficult to understand. It also provides very little practical guidance on how anyone ought to navigate their way out of the damages maze.

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119 Ss 8(3), 39(2) and 173 show that this is part of our constitutional design.

120 Michael Bishop, 'Chapter 9: Remedies' in Stu Woolman and Michael Bishop (eds) *Constitutional Law of South Africa* (Juta, 2008) 151.

121 This relates to the 'single system of law' theory, based on *Pharmaceutical Manufacturers Association of SA: In Re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) [44].

122 Zitzke (n 36) 437–439. Cf Kika (n 35) ch 8 who argues that constitutional supremacy is better protected if common law and statutes may be always circumvented when claiming constitutional damages. However, the weakness in Kika's proposal (at 169–171) is that the substantive elements of a common-law delict (or something very similar to it) would nevertheless have to be considered before constitutional damages could be awarded, which might leave readers wondering whether nomenclature matters at all.

Their approach is cautionary in the sense that judges must balance being broadminded and being conservative,[123] but no further guidance is given in this regard. We are also told that the approach should be 'precautionary' in that constitutional damages should not be awarded as a mechanism by which the state would be punished for bad behaviour.[124] Perhaps 'non-punitive' would have been a better descriptor here and would align with *Fose's* case mentioned above. The approach promoted in 'Two Fellows' is also 'relaxed' in the sense that the requirements for liability imposed at common law should not be followed dogmatically but the 'substance' of the remedy must be placed at the centre of the enquiry. What this would mean in a practical sense is wholly unclear, even upon a charitable reading of the proposed solution.[125] Finally, the 'Two Fellows' approach is labelled as complementary, 'without following a rigid or blind precedent. In other words, the award of constitutional damages should be needs-based.'[126] However, in my view, if we read the precedent with the necessary care, that would do better for legal stability and, as I have shown above, it does not result in any type of injustice. In fact, the precedent at our disposal is principally concerned with reasonableness and justice.

Overall, 'Two Fellows' misses critical detail in the existing case law and does not systematise the law in any meaningful way. It would also be quite a challenge to justify their view coherently against the backdrop of constitutional adjudicative subsidiarity.

5 Conclusion

In this article I have shown the historical point of origin of the dual streams of damages in South African law. A careful analytical reading of the case law on constitutional damages in our national appeal-level courts reveals that there is some coherence in the principles that our courts have laid down leading up to this moment. In that regard, I provided a principled roadmap for litigators, courts, and academics to consider when thinking through constitutional

123 Batchelor and Makore (n 1) 217.

124 Batchelor and Makore (n 1) 218. It should be noted that this same call for a precautionary approach is contradictorily criticised at 234 as being inadequate.

125 Batchelor and Makore (n 1) 231 make some attempt at ironing out the purposes of common-law damages versus constitutional damages, but the reasoning is thin and the authority for that line of reasoning is doubtful. An article in footnote 113 is incorrectly cited as coming from the African Journal of Nephrology whose readership would surely not be interested in constitutional damages.

126 Batchelor and Makore (n 1) 239.

damages disputes and issues. The three-step approach that I derived from case law is largely consistent with the broader constitutional theory on adjudicative subsidiarity. This approach effectively balances stability and change, which lie at the heart of a constitutionally transformative approach to legal problems.

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Biographical Note

Emile Zitzke (LLB, LLD) is an Associate Professor at the University of the Witwatersrand School of Law. His research focuses on the interaction between delict, human rights, and critical jurisprudence. This piece was written while he was a Glasgow Law Fellow in 2024.