PUTTING IT RIGHT?

MONETARY REMEDIES FOR BREACHES OF PATIENTS’ RIGHTS

Royden Hindle

“[T]he assessment of compensation for an injury or loss, which is neither physical nor financial, presents special problems for the judicial process, which aims to produce results objectively justified by evidence, reason and precedent. Subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress, depression and so on, and the degree of their intensity are incapable of objective proof or of measurement in monetary terms. Translating hurt feelings into hard currency is bound to be an artificial exercise.”

[1]. We are all broadly familiar with the content of the ‘Code of Patients’ Rights’, including for instance the rights to be treated with respect, to dignity and independence, to be free of sexual and financial coercion, to have services of an appropriate standard, to be fully informed, to make informed choices, and so on. It is also common knowledge now that consumers of health care services can enforce the rights they have under the Code in a number of ways, including by pursuing the perpetrator(s) of any breach for monetary compensation.

[2]. But what does that mean in real life? What benchmarks are there when it comes to trying to work out how much money is needed to put any given problem right? Have the awards that have been made in the context of the Health and Disability Commissioner Act 1994 thus far been about right? Or do they need some basic re-calibration?

[3]. This paper has three objectives. One is to give those who do not regularly have to consider these questions a glimpse of what has been happening in respect of damages under the HDC Act. A second is to provide those who do have some knowledge of the topic with what I hope is a comprehensive collection of the awards that have been made, perhaps to be useful as a resource for future reference. The third is to generate some discussion

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2 Vento v The Chief Constable of West Yorkshire Police [2002] EWCA Civ 1871 at [50].

3 Properly referred to as the ‘Health and Disability Commissioner (Code of Health and Disability Services Consumers’ Rights) Regulations 1996’ (SR 1996/78).
about the awards themselves: are they too much? Too little? About right? More importantly, how would we know?

**The damages jurisdictions**

[4]. The Human Rights Review Tribunal⁴ has had jurisdiction to deal with cases under the HDC Act since the Code came into force in 1996. The Tribunal also has jurisdiction under the Privacy Act 1993 (including but not limited to the Health Information Privacy Code⁵) to deal with cases relating to health information.⁶ Awards compensating for emotional harm in the case of an infringement of the rights conferred by the Privacy Act are an obvious benchmark for awards under the HDC Act, and so need to be considered as well as the cases that have come under the HDC Act itself.

[5]. Both the HDC Act and the Privacy Act empower the Tribunal to award damages for breaches of the standards they impose. Claimants can ask for compensation as a result of direct financial loss and/or lost benefits, but in practice the majority of cases in which damages have been awarded involve claims for what I will call ‘emotional harm’ - encompassing ‘humiliation, loss of dignity and/or injury to feelings’ (which is the formula used in the relevant sections of both the HDC Act and the Privacy Act).

[6]. Under the HDC Act, the Tribunal also has power to award punitive damages in cases where the conduct at issue was in ‘flagrant disregard’ of the rights of the aggrieved person.⁷

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⁴ ‘the Tribunal’.
⁵ ‘the HIPC’.
⁷ Section 57(1)(d) HDC Act.
[7]. The monetary limit of the Tribunal’s jurisdiction is the same as that of the District Court, i.e., up to $200,000.

**Cases under the Code**

[8]. I begin with the cases that have been decided under the Code. In the first 6 years after the Code came into force there were just three cases taken in the Tribunal. All of them gave rise to appeals to the High Court⁸ and, in one case, on to the Court of Appeal.⁹

[9]. The statistics have improved since then, at least a bit. In the period from July 2002 to date the Tribunal has issued a total of 49 decisions in respect of some 36 separate cases under the Code¹⁰ - which works out at a very rough average of 5 decisions in about 4 cases per annum. In that period there have been two appeals.¹¹

[10]. The small number of cases is not a bad thing – certainly one would certainly hope that the sorts of situations that come to the Tribunal for this kind of adjudication are not commonplace. Furthermore many health care disciplines have their own professional bodies and distinct accountabilities in the forms of codes of ethics and practice, breach of which can lead to disciplinary proceedings in the Health Practitioners’ Disciplinary Tribunal¹² under the Health Practitioners’ Competence Assurance Act 2003.¹³

[11]. Even so, for those who provide services within the definition of ‘health services’ in s.3 of the HDC Act and for whom there is no clear professional affiliation or disciplinary pathway

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⁹ Harrild v Director of Proceedings [2002] NZAR 513 (High Court); [2003] 3 NZLR 289 (Court of Appeal).
¹⁰ The difference being accounted for by cases in which more than one decision is issued – e.g., a decision on the merits, followed by a later decision on costs.
¹² ‘the HPDT’.
¹³ Health professions covered under the Health Practitioners’ Competence Assurance Act include chiropractors; dentists; dieticians; clinical dental technologists; dental hygienists; dental therapists; medical laboratory technologists; medical radiation technologists; medical practitioners; midwives; nurses, occupational therapists; optometrists; dispensing opticians; osteopaths; pharmacists; physiotherapists; podiatrists; psychologists.
when a breach of standards is alleged, proceedings in the Tribunal under the Code may be the only avenue for redress of any kind when things go wrong. Examples have included acupuncturists; counsellors; people working in rest homes or with the disabled; and massage therapists (although that is not to suggest that the Code does not apply to members of the more organised professions as well). In addition, and in all cases, it is the Human Rights Review Tribunal that has first instance jurisdiction to award compensation for breaches of the Code.

**HDC Act Compensation**

[12]. The Tribunal’s powers to make remedial orders are set out at ss. 54 and 57 of the HDC Act. The Tribunal can issue a declaration that the action of the defendant is in breach of the Code; make an order restraining the defendant from continuing or repeating any breach; award damages; order the defendant to redress any loss suffered; or grant such other relief as the Tribunal thinks fit. On the subject of damages, the Tribunal can make awards in respect of pecuniary loss; the loss of a benefit (whether or not of a monetary kind); humiliation, loss of dignity, and injury to the feelings of the aggrieved person; and any action of the defendant that was in flagrant disregard of the rights of the aggrieved person.

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14 In *Director of Health and Disability Proceedings v Leighton* [2006] NZHRRT 28 social worker was found to be answerable under the Code when providing health services; also see the preliminary decision in that case namely *Director of Health and Disability Proceedings v KBM* [2005] NZHRRT 27.

15 E.g., *Director of Health and Disability Proceedings v Huang* [2003] NZHRRT 35; *Director of Health and Disability Proceedings v Fan* [2005] NZHRRT 2; and *Director of Health and Disability Proceedings v Fan* [2005] NZHRRT 3.

16 E.g., *Director of Health and Disability Proceedings v Peters* [2007] NZHRRT 1 and *Director of Health and Disability Proceedings v Mogridge* [2007] NZHRRT 27.


20 E.g. *Director of Proceedings v Gray* [2003] NZHRRT 8 (general medical practitioner); *Director of Health & Disability Proceedings v Marks* [2005] NZHRRT 37 (psychiatrist); *Director of Health & Disability Proceedings v Rawiri* [2007] NZHRRT 25 (pharmacist); *Director of Health & Disability Proceedings v Wilson* [2008] NZHRRT 1 (general medical practitioner); *Director of Health & Disability Proceedings v TMC* [2008] NZHRRT 6 (general medical practitioner).
[13]. The power to award a declaration is invoked in most cases. Sometimes there are issues of restraint to be considered. But by far the most commonly awarded remedy is that of damages to compensate for ‘humiliation, loss of dignity and/or injury to feelings’.

[14]. What does that really mean? One explanation that is often referred to appears in Proceedings Commissioner v O’Neil where the High Court said of the phrase ‘injury to feelings’:

“The feelings of human beings are not intangible things. They are real and felt, but often not identified until the person stands back and looks inwards. They can encompass pleasant feelings (such as contentment, happiness, peacefulness and tranquillity) or be unpleasant (such as fear, anger and anxiety). However a feeling can be described, it is clear that some feelings such as fear, grief, sense of loss, anxiety, anger, despair, alarm and so on can be categorised as injured feelings. They are feelings of a negative kind arising out of some outward event. To that extent they are injured feelings.”

[15]. As with any head of damages, if there is to be an award of compensation for emotional harm then it must be supported by evidence of some sufficient kind – not just to establish the fact of emotional harm, but also to try to put some boundaries around the quantification of any award. The Tribunal does not always find harm simply by inference from the ‘who did what to whom’ facts. Furthermore, although it can be difficult for a defendant to contest a plaintiff’s account as to how s/he has been upset by an infringement of the Code, the Tribunal has not accepted any and all evidence of that kind unquestioningly or uncritically. As in any contested area of fact, if there is independent

21 E.g., Director of Human Rights Proceedings v Fan, supra note 15.

22 Proceedings Commissioner v O’Neil [2001] NZAR 59. The case also established that ‘injury to feelings’ is different from, and not to be interpreted ejusdem generis with, ‘humiliation’ and ‘loss of dignity’. Question: how does one deal with a case where there has been an innocuous breach, but the plaintiff got really, really, really angry? Or a case in which there has been an egregious breach but the plaintiff is a stoic who has come through the experience on a reasonably even emotional keel?

23 But note that in Marks the Court of Appeal makes it clear that where a claim is brought by a representative for the estate of a deceased person, then harm will have to be inferred - see esp. para [67] in which the Court suggests that matters such as humiliation, loss of dignity and injury to feelings are ‘not wholly subjective’. Fixing damages for that kind of harm in the case of a deceased plaintiff has the potential to be challenging.
evidence (such as the report of a psychologist, or even just the account of others who have observed the plaintiff’s reaction) then that can be important.\textsuperscript{24}

[16]. As the passage at the beginning of this paper suggests, assessing damages for emotional harm is not an easy exercise. As the Judge in that case went on to say:

\textit{“Translating hurt feelings into hard currency is bound to be an artificial exercise. As Dickinson J said in Andrews v Grand & Toy Alberta Ltd (1978) 83 DLR 452 at 457 – 456 … there is no medium of exchange or market for non-pecuniary losses and their monetary evaluation}

\textit{‘… is a philosophical and policy exercise more than a legal or logical one. The award must be fair and reasonable, fairness being gauged by earlier decisions; but the award must of necessity be arbitrary or conventional. No money can provide true restitution.’}

Although they are incapable of objective proof or measurement in monetary terms, hurt feelings are nonetheless real in human terms. The courts and tribunals have to do the best they can on the available material to make a sensible assessment, accepting that it is impossible to justify or explain a particular sum with the same kind of solid evidential foundation and persuasive practical reasoning available in the calculation of financial loss or compensation for bodily injury.”\textsuperscript{25}

[17]. To date nine awards have been made under the HDC Act to compensate for emotional harm:

<table>
<thead>
<tr>
<th>Case</th>
<th>Award</th>
<th>Summary</th>
<th>2011 Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Proceedings Commissioner v O’Neil [2001] NZAR 59</td>
<td>$20,000</td>
<td>Compensation for grief suffered by parents of a baby who died as a consequence of inadequate management of the birth process by midwife.</td>
<td>$32,000</td>
</tr>
<tr>
<td>DH&amp;DP v SLD [2004] NZHRRT 19</td>
<td>$10,000</td>
<td>Failure to comply with relevant standards; sexual relationship between a therapist and client. Note award was by consent</td>
<td>$13,500</td>
</tr>
<tr>
<td>DH&amp;DP v A (Huang) [2004] NZHRRT 51</td>
<td>$6,500</td>
<td>Acupuncturist; treatment while patient unnecessarily undressed; some unnecessary intimate touching</td>
<td>$8,775</td>
</tr>
<tr>
<td>DH&amp;DP v DG (Fan) [2005] NZHRRT 3</td>
<td>$5,000</td>
<td>Acupuncturist; lack of informed consent to intimate treatment</td>
<td>$6,500</td>
</tr>
</tbody>
</table>

\textsuperscript{24} Although a case under the Privacy Act rather than the HDC Act, see \textit{EFG v Police} [2005] NZHRRT 48 at [103].

<table>
<thead>
<tr>
<th>Case</th>
<th>Year</th>
<th>Award</th>
</tr>
</thead>
<tbody>
<tr>
<td>DH&amp;DP v CO (Peters)</td>
<td>2006</td>
<td>$15,000</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Sexual relationship between counsellor and client</td>
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<tr>
<td></td>
<td></td>
<td>$18,750</td>
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<tr>
<td>DH&amp;DP v Mogridge</td>
<td>2007</td>
<td>$30,000</td>
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<tr>
<td></td>
<td></td>
<td>Three complainants. Sexual relationship between counsellor and two complainants; the third complainant (husband of one of the female complainants) was also a client of the counsellor.</td>
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<tr>
<td></td>
<td></td>
<td>$36,000</td>
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<td></td>
<td></td>
<td>$18,000</td>
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<tr>
<td></td>
<td></td>
<td>$6,000</td>
</tr>
<tr>
<td>DH&amp;DP v O'Malley</td>
<td>2009</td>
<td>$20,000</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Caregiver for intellectually disabled young man – sexualised behaviours and oral sex with the young man’s girlfriend while the young man was present</td>
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<td></td>
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<td>$22,000</td>
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<tr>
<td>DH&amp;DP v Kaur (No. 3)</td>
<td>2009</td>
<td>$3,500</td>
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<tr>
<td></td>
<td></td>
<td>Caregiver for elderly patient failed to report having dropped her with significant injury resulting. Note this was a claim by a secondary victim before the Court of Appeal decided Marks.</td>
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<td></td>
<td></td>
<td>$3,850</td>
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<tr>
<td>DH&amp;DP v Nikau</td>
<td>2010</td>
<td>$30,000</td>
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<tr>
<td></td>
<td></td>
<td>Caregiver for patient with mental health issues inappropriately taking ‘gifts’. Note that in addition to this award for emotional harm, there was also an award of $50,000 to reflect the value of the items that had been taken from the patient, and also an award of another $20,000 to punish for the conduct at issue: $100,000 all up.</td>
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<td></td>
<td></td>
<td>$31,500</td>
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</tbody>
</table>

[18]. Note that I have tried to give the older awards a present day value, albeit it very roughly. The final column calculates and adds simple interest for each whole year since the award was made at 5% pa.

[19]. The average, for those who are interested, is just under $18,000 (or in my very rough 2011 dollars, just under $22,000) – but note that in six of the nine cases there was evidence of inappropriate sexualised conduct. Indeed I am not sure that this cohort of cases really says anything very useful about compensation for emotional harm resulting from a breach of the Code where there has been no sexualised behaviour by the defendant. Of the three cases where there was no such conduct one (Nikau) concerned an egregious breach of trust by the caregiver of a very vulnerable individual, and another (Kaur) involved assessing compensation for harm suffered by a secondary victim. The third is O’Neil, which again is an extreme case at very least in terms of the emotional harm that was being compensated for.

**Damages to punish**

[20]. Section 57(1)(d) of the HDC Act empowers the Tribunal to award damages where the defendant’s action was in flagrant disregard of the plaintiff’s rights under the Code. In the past, this provision has often been thought of in terms of a power to award exemplary damages, and parallels...
have been drawn with the power that the courts have to award damages of that kind in tort cases. Specifically, reference has been made to the opinion of their Lordships in *A v Bottrill* in which the Privy Council held that intentionality is not a necessary element before an award of exemplary damages can be made:

“There may be the rare case where the defendant departed so far and so flagrantly from the dictates of ordinary or professional precepts of prudence, or standards of care, that his conduct satisfies this test even though he was not consciously reckless.”

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26 *A v Bottrill* [2003] 2 NZLR 721, at para [26].
[21]. The Tribunal has awarded damages under s.57(1)(d) in five cases now:

<table>
<thead>
<tr>
<th>Case</th>
<th>Award</th>
<th>Summary</th>
<th>2011 Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>DH&amp;DP v DG (Fan)</td>
<td>$2,000</td>
<td>An acupuncturist failed to obtain informed consent to a procedure during the course of which he touched the complainant’s genitalia. She suffered significant humiliation and embarrassment as a result.</td>
<td>$2,600</td>
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<tr>
<td>[2005] NZHRRT 3</td>
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<tr>
<td>DH&amp;DP v CO (Peters)</td>
<td>$8,000</td>
<td>A counsellor entered into a sexual relationship with a vulnerable client who was afterwards left feeling distressed to the point of being suicidal.</td>
<td>$10,000</td>
</tr>
<tr>
<td>[2006] NZHRRT 36</td>
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</tr>
<tr>
<td>DH&amp;DP v Mogridge</td>
<td>$20,000</td>
<td>This case involved three separate complainants, all with claims against the same defendant. The defendant was a counsellor who had persuaded the two female complainants to enter into sexual relationships with him. In the most severe case the Tribunal described the defendant’s conduct towards the complainant as having involved ‘sustained sexual abuse’. The third complainant was the husband of the second of the female complainants. He (the third complainant) had gone to see the defendant for assistance with his concerns about his relationship with his wife – who, unknown to the complainant – was engaging in sex with the defendant.</td>
<td>$24,000</td>
</tr>
<tr>
<td>[2007] NZHRRT 27</td>
<td>$10,000</td>
<td></td>
<td>$12,000</td>
</tr>
<tr>
<td></td>
<td>$8,000</td>
<td></td>
<td>$9,600</td>
</tr>
<tr>
<td>DH&amp;DP v O’Malley</td>
<td>$10,000</td>
<td>A caregiver for an intellectually challenged young man encouraged the young man to engage in games of a sexual nature, and to watch pornography. He also persuaded the young man’s girlfriend to take part in sexualised activities with him when the young man was present, and was abusive to her when she later refused. The young man’s progress towards independent living was significantly delayed as a result, and his humiliation was such that he attempted suicide.</td>
<td>$11,000</td>
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<tr>
<td>[2009] NZHRRT 1</td>
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</tr>
<tr>
<td>DH&amp;DP v Nikau</td>
<td>$20,000</td>
<td>A caregiver for a vulnerable person who had a long history of mental illness accepted ‘gifts’ from the complainant over a period of about three months, amounting to something over $55,000 in total value. There was no basis on which the ‘gifting’ could have been justified: to give one example only, at several points the defendant was given the plaintiff’s EFTPOS card to use. On one occasion she used it to buy herself over $2,400 worth of clothing. There were also cash ‘gifts’. The evidence satisfied the Tribunal that the defendant’s conduct was difficult to distinguish from the crime of theft, and that the complainant had been victim of financial exploitation in breach of Right 2 of the Code. The Tribunal also accepted there had been a breach of Right 4(2), the right to services that comply with legal, professional, ethical and other relevant standards.</td>
<td>$21,000</td>
</tr>
<tr>
<td>[2010] NZHRRT 26</td>
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</table>

Note that in addition to this award, there was also an award of $50,000 to reflect the value of the items that had been taken from the patient, and also an award of another.
[22]. A notable feature of the award in *Director of Health & Disability Proceedings v DG (Fan)* was that the Tribunal accepted that the touching had not been a deliberate act for sexual gratification. Even so:

“... it is difficult to think that the defendant’s touching of the complainant’s vagina and the spreading her labia could have been purely accidental. In the end we have concluded that what the defendant did to the complainant in this respect was a flagrant breach of her rights under the Code, including but not limited to her rights to be treated with respect, and to have services that comply with accepted professional and ethical standards. No matter how anxious the defendant may have been to communicate the breathing and contraction exercises that he wanted the complainant to learn, he had no business to touch her vagina with his hand or to use his fingers to spread her labia as he did. ... To use the language of the authorities, we find the defendant’s conduct in this respect to have been outrageous. We do not consider that the award of compensatory damages we have made is sufficient to express adequately the unacceptability of what he did.”

[23]. In the *Nikau* case the Tribunal said:

“The Tribunal has exercised this power [i.e., the power to award damages for a flagrant breach of rights] on a number of occasions now. In doing so it has often referred to A v Bottrill for the proposition that damages of the kind being considered can be awarded in appropriate cases even if the conduct giving rise to the claim was not intentional. However the Supreme Court has since considered the topic of exemplary damages at common law in *Couch v Attorney-General*\(^28\). ... It may well be that it will be necessary in future to pay closer attention to any similarities and/or differences between exemplary damages at common law and damages of the kind contemplated by s.57(1)(d) of the Act.”

[24]. There is at very least a shift in terminology coming. In future these kinds of awards by the Tribunal will no longer be called exemplary damages. Whether there will be any substantive change in approach remains to be seen, although the recent decision of the Court of Appeal in *Seimer v Stiassny & Anor*\(^29\) suggests not.

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\(^28\) *Couch v Attorney-General* [2010] NZLR 149.
\(^29\) *Seimer v Stiassny & Anor* [2011] NZCA 106. The case concerned damages in a defamation case, but the Court drew attention to s.28 of the Defamation Act and the use of the words ‘flagrant disregard of the rights of the plaintiff’. It held that gives rise to a statutory test, which is not to be conflated with the common law relating to exemplary damages.
Awards under the Privacy Act

[25]. As noted, another source of awards that might serve as a benchmark in this area are those for emotional harm suffered as a result of breaches of Privacy Act rights. Awards for emotional harm under the Privacy Act have been far greater in number than under the HDC Act, and so it must suffice to attach a table of the Privacy Act awards (Appendix A).

[26]. The average, for those who are interested, is just under $6,500 (or in my very rough 2011 dollars, just under $9,000).

[27]. There are a few cases that warrant mention, if only because they come particularly close to the doctor/patient relationship:

[a].  \textit{W v P} (1999): A doctor gave a mother information about her adult daughter’s medical condition. The relationship between mother and daughter was severely damaged. The doctor was acting out of concern for mother (who was also his patient), but was ignorant of provisions of Act. He did however know that the mother/daughter relationship was volatile. The plaintiff said that after the disclosure her mother had refused to have anything to do with her, as had two of her siblings; that she had gained a lot of weight; that her academic progress had been compromised; that she had been depressed; and that she had had counselling. She was awarded $3,000 (say $4,800 in 2011 dollars);

[b].  \textit{Hamilton v The Deanery} (2003): A healthcare institution fell into disagreement with the plaintiff, who was a well-known identity in the fashion world. Over a period of time it released to the media, to agencies such as the Immigration Department, and to others, personal and medical information about the plaintiff including such things as her current address, and information about her alcohol addiction problems and possible drug taking. Some of the information went onto the internet. On one occasion the defendant wrote to lawyers acting against the plaintiff in an overseas defamation action discussing the results of urine tests given by the plaintiff. The plaintiff suffered significant and very public humiliation over a prolonged period as a result, and was awarded $40,000 (say $56,000 in 2011 dollars);

\footnotesize{30 \textit{W v P} (CRT Decision 2/99).  
[c]. Director of Human Rights Proceedings v QD (2010)\textsuperscript{32}: A doctor was given information by one patient about another (the patients were a wife and husband who were involved in a difficult marriage break up). The doctor agreed to hold the information given by the husband and to keep it secret from the wife, and later the doctor refused to disclose the information about wife when asked by her to do so. Significant humiliation was found to have been suffered. Although that finding was not overturned on appeal, the Tribunal’s award of $7,500 was reduced to $5,000;\textsuperscript{33}

[d]. SC v Auckland District Health Board (2011)\textsuperscript{34}: The Tribunal assumed (but did not decide) there had been a breach of Principle 8 relating to the accuracy of information that was disclosed about the plaintiff. On the assumption that the principle had been breached, the Tribunal indicated the award that would be made if the breach of principle 8 were to be established would have been $6,000.

[28]. In the end, everything depends on the facts in the particular case, most importantly including the evidence which describes show how the plaintiff was actually affected by what took place. Generalisations are always dangerous in this area, but my sense of this survey of the cases suggests that likely range of damages for emotional harm suffered when the Code is breached probably starts at about $5,000 (for cases in which a reasonably low level of upset is found), and for ‘ordinary’ cases probably begins to reach a ceiling at about $12,000 or thereabouts – unless, of course, there is particularly compelling evidence to suggest a far greater award.

Comment

[29]. Let us assume that my sense of the cases is more or less accurate. Is that level of damages enough? Is it too much? How would we know?

[30]. Consider:

\textsuperscript{32} Director of Human Rights Proceedings v QD [2010] NZHRRT 3.
\textsuperscript{33} C v Director of Human Rights Proceedings (Auckland High Court, CIV 2010-404-001662, 6 September 2010). One difficulty now is to know how to approach the assessment of damages under ss.85(1)(c)/88(1)(c) of the Privacy Act against the backdrop of an award of (say) $5,000 in present day value in the Winter v Jans case for harm that was found to have been insignificant, and an award of $5,000 in C for harm that was found to be significant, while at the same time bearing in mind the point made by Hammond J in relation to the awards in this Tribunal that there is “…a strong concern at the Bar and amongst trial judges to have what might be described as a ‘scale more certain’ and a concern on the part of appellate courts to see that there is an appropriate range. However there is the concurrent difficulty of keeping that range current, and not operating as an unduly artificial ceiling.” See note 25 supra.
\textsuperscript{34} SC v Auckland District Health Board [2011] NZHRRT 8.
[a] In *Mouat v Clarke Boyce*\(^{35}\) the High Court awarded $25,000 in 1992 as general damages for the stress of uncertainty suffered by an elderly lady who faced the possibility of losing her home as a result of the negligence of her solicitors (although in the end as far as I know she did not lose the home). In my 2011 dollars that would be $48,750.

[b] In the *O’Neil* case the High Court upheld an award of $20,000 that had been made by the Tribunal (in 1999) for emotional harm suffered by the parents of a baby who died at birth when a midwife failed to meet standards required by Code. In my 2011 dollars that amounts to $32,000;

[b] In *R v Eade*\(^{36}\) an award of general damages was made in 2000 to compensate a complainant for depression suffered after her therapist had a sexual relationship with her. In that case the District Court used *Mouat v Clarke Boyce* as its benchmark. The District Court considered that the harm established was significantly greater than in *Mouat* and compensatory damages were fixed at $40,000\(^{37}\) (say $62,000 in 2011);

[c] *L v Robinson*\(^{38}\) was the case of a patient who had an history of mental illness and with whom the defendant (her doctor) had a sexual relationship. The claim was brought in negligence, not under the Code. In assessing damages the High Court observed:

> "Assessment of the appropriate measure of damages for the harm suffered by the plaintiff is extremely difficult. To my mind defamation awards are of no assistance because they constitute a special category. Mr Hodson has drawn my attention to the very recent decision of Brickell v Attorney-General (2000) 5 NZELC 96,077 in which the Court was required to assess damages for pain, suffering and loss of amenity. I agree with the comments of McGechan J concerning the application of overseas awards, lump sum allowances under the original accident compensation legislation or Employment Court awards for unjustified dismissal. There does not appear to be any direct precedent for a claim of this nature. But as Thomas J noted in Bloxham v Robinson (1996) 7 TCLR 122 at p.150 with reference to damages for mental distress, it has been held time and time again that difficulty in assessing damages must not deter the Courts from making the best assessment possible on the evidence. This is one of those situations mentioned by Thomas J where it is necessary to resort to the "ball park" approach. Nevertheless, it is also necessary to keep in mind the comment of Tipping, J in Andrews v Parceline Express Ltd [1994] 2 ERNZ at p398 (to which Thomas J also made reference) that: ‘While the type of damage for which the compensation is awarded is real, a sense of proportion must be maintained.’"

\(^{35}\) *Mouat v Clarke Boyce* [1992] 2 NZLR 559.

\(^{36}\) *R v Eade* (Unreported, Auckland District Court, NP 3604/97, 12 May 2000 per Judge Robinson)

\(^{37}\) In addition an award of aggravated damages was also fixed in the sum of $27,500.

\(^{38}\) *L v Robinson* [2003] 3 NZLR 499
The High Court awarded $50,000 in 2002 (say $72,500 in 2011).

[d] In more recent litigation relating to weather-tightness issues, the High Court is now routinely making awards of general damages to compensate for the stresses of having a leaky home in the order of $25,000\(^{39}\). Joint owners get the award individually (i.e., two owners will get $25,000 each) and even owners who do not actually occupy the premises have been awarded sums of $15,000.

[e] To be deliberately provocative, consider also the outcome in the *Seimer v Stiassny*\(^{40}\) litigation: the following awards of damages in defamation (admittedly for what was described as the worst case of defamation in the British Commonwealth) were upheld: $650,000 for general damages, $150,000 in aggravated damages and $25,000 in exemplary damages - $825,000 all up.\(^{41}\)

[31]. I am sure that there are many other points of comparison – for example, cases in the Employment Relations Authority; or as under the New Zealand Bill of Rights Act 1990 (not to mention those under the Tribunal’s other jurisdictions under the Human Rights Act); in respect of cases under the Health and Safety in Employment legislation; and so on. It is not possible to canvass all potential benchmarks here.

[32]. I suggest that the general level of awards by the Tribunal to compensate for emotional harm deserves a long hard look.\(^{42}\) I recognise that has the potential to be a big piece of work: after all, in a rigorous re-calibration exercise the awards that have been made to date are not a sufficient reason to continue making awards at about that level. Even so, my sense is that if the tragic facts of a case like *O’Neil* were to be repeated, the likelihood is that they would (and probably should) attract a far higher award today - even on a present value basis - than was fixed in 1999.

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\(^{39}\) For example, see *Body Corporate 188529 & Ors v North Shore City Council & Ors* (No.4) (‘Sunset Terraces’) per Heath J; *Body Corporate 189855 & Ors v North Sore City & Ors* (‘Byron Ave’) per Venning J; *Body Corporate 183523 & Ors v Tay & Associates Ltd* per Priestly J; *Body Corporate 185960 & Ors v North Shore City & Ors* (‘Kilham Mews’) per Duffy J; *White & Anor v Rodney District Council & Ors* (Woodhouse J).

\(^{40}\) Supra note 29.

\(^{41}\) Of course I realise that damages in defamation are conceptually and historically different from any statutory right to claim damages for emotional harm, and that defamation damages include an element of compensation for loss of reputation that can be characterised as a property right. Even so, it is a matter of putting a figure on what is essentially intangible harm and so I suggest it is still a fair question to ask: why does our society award damages to a plaintiff in the *Seimer* case $825,000, and a complainant in the position of those in the *O’Neil* litigation $32,000 (on a rough present value).

\(^{42}\) See also Hammond J, ‘Beyond Dignity’, supra note 25.