THE RIGHT TO THE RESIDUAL LIBERTY OF A PERSON IN INCARCERATION: CONSTITUTIONAL AND COMMON LAW PERSPECTIVES

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ABSTRACT
To what extent does the law protect the liberty of a person in lawful incarceration? This question arises at the backdrop of the importance the common law and modern constitutions attach to the right to personal liberty. Simply put, does a prisoner enjoy the right to residual liberty under the constitutional and common law systems where the prison authorities have imposed restraints not permitted by the law authorising incarceration in the first instance? The answers to these questions elicit a sharp division. Canadian and South African courts operating a Charter of Rights and Freedoms and a Bill of Rights respectively have held that the right to residual liberty exists. Yet, in spite of the emphasis English courts place on the right to personal liberties, they deny the existence of the right to residual liberty of a prisoner. Recent cases from the now defunct House of Lords and the Court of Appeal show that actions for damages based on the violation of that right fail in English courts unless the plaintiff can link the alleged wrongful act to an existing tort. That notwithstanding, a plaintiff who bases his claim on the tort of false imprisonment is bound to fail but if he alleges misfeasance in public office and goes further to prove the high threshold of that tort, his action might succeed.

I INTRODUCTION
Broadly speaking, the right to liberty encompasses not only freedom from unauthorised physical restraint; it embraces all the freedoms available to the individual to use and enjoy his faculties in all lawful ways.¹ In effect, liberty represents literally all the substantive individual rights entrenched in the Bill of Rights in modern constitutions. Defined in its narrow compass, it means freedom from all restraint except as justly imposed by law. In that sense, it characterises ‘freedom from restraint, under conditions essential to the equal enjoyment of this same right by others; freedom regulated by law’². The common law thus places high premium on the liberty of the person and the courts guard it jealously.

It has long been established in English law that every detention is prima facie unlawful and that it is for the persons directing imprisonment to justify their act.³ So, too, in South African law, any interference with physical liberty

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² Ibid.
³ Per Lord Atkin, Liversidge v Anderson [1942] AC 205, 245; Allen v Wright (1838) 8 C & P 522.

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is prima facie wrongful\(^4\) and, it is fair and just to require the person causing the interference to justify its legality.\(^5\) There is therefore a presumption of liberty at common law as under the jurisprudence of the European Court of Human Rights.\(^6\) Again, as the most precious civil right,\(^7\) the right to liberty is of such fundamental importance that ‘the courts should strictly and narrowly construe general statutory powers whose exercise restricts fundamental common law rights and/or constitutes the commission of a tort’.\(^8\) Since these principles applied at common law, surely, they must operate, ‘with equal, if not greater force, under the Constitution’.\(^9\)

On the other hand, a ‘prisoner’, is ‘one who is deprived of his liberty. One who is kept against his will in confinement or custody in a prison, penitentiary, jail, or other correctional institution, as a result of conviction of a crime or awaiting trial.’\(^10\) Imprisonment, therefore, is the antithesis of liberty. But it has never been in doubt that notwithstanding loss of liberty, a prisoner as a member of the human family is not without rights. Such prisoner enjoys and continues to enjoy those rights that are compatible with physical restraint, for instance, the right to procedural fairness in disciplinary proceedings,\(^11\) the right to communicate\(^12\) and to vote.\(^13\) He enjoys the right to privacy under the human rights regime although he would be unable to claim damages for such infringement in English common law, there being no corresponding tort of invasion of privacy in that system.\(^14\) This is because of the requirement that liability can only be imposed in English law if the alleged wrongful act can

\(^4\) See, for example, *Bentley v McPherson* 1999 (3) SA 854 (E) 857; *Robbertse v Minister van Veiligheid en Sekuriteit* 1997 (4) SA 168 (T) 172; *Moses v Minister of Law and Order* 1995 (2) SA 518 (C) 520; *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A) 153; *Masawi v Chabata* 1991 (4) SA 764 (ZH); During *NO v Boesak* 1990 (3) SA 661 (A) 673–4.

\(^5\) Per Rabie CJ, *Minister of Law and Order v Hurley* 1986 (3) SA 586 (A) 589; *Minister van Wet en Orde v Mathoba* 1990 (1) SA 280 (A) 284 per Grosskopf JA.

\(^6\) *Iljikov v Bulgaria* (Application no 33977/96 of 26 July 2001, ECtHR) paras 84 & 85; *Saadi v UK* (2008) 47 EHRR 17 paras 69 & 72. In *Medvedev v France* (Application no 3394/03 of 29 March 2010) para 80, the Grand Chamber held that ‘where deprivation of liberty is concerned it is particularly important that the general principle of legal certainty be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic and/or international law be clearly defined …’


\(^10\) Note 1 above 1194.


\(^12\) Kearney v Ireland [1986] IR 116.

\(^13\) *Hirst v United Kingdom (No 2)* (2005) BHRR 441; *Minister of Home Affairs v NICRO* 2005 (3) SA 280 (CC).

be linked to a nominate tort. Again, if the alleged breach amounts to an abuse of office or misfeasance in public office, the plaintiff must prove material damage in order to succeed in a tort action.¹₅

Being a person already in jail or in custody awaiting trial, does the prisoner enjoy any residual right to liberty capable of being protected by law? If so, what type of liberty and in what circumstances? For instance, can a prisoner claim a right not to be detained in inhuman or degrading conditions, or for that matter, not to be subjected to torture or any other inhuman treatment? In other words, if a person’s liberty is already lawfully restrained, are there further restraints that could constitute an infringement of the prisoner’s right to personal liberty in a constitutional sense upon which the prisoner could apply for compensation as the appropriate relief? Alternatively, can such prisoner claim damages for false imprisonment in tort or unlawful detention in delict?

This article investigates the legal response to the foregoing questions. Consequently, it focuses on two emerging scenarios. Naturally, the discussion starts with the concept of residual liberty, which originated from the generous and purposive interpretation of the constitutional guarantee of liberty in the Canadian Charter 1982 by the Supreme Court of Canada.¹⁶ Arising from that is the claim for constitutional damages, which represents the first scenario for our discussion. While the dictum of the Court of Appeal of New Zealand appears to suggest that the prisoner might have an alternative cause of action under the Bill of Rights Act 1990,¹⁷ the Supreme Court of New Zealand had no hesitation in upholding the prisoners’ rights to human dignity in Taunoa


¹⁶ R v Miller (1985) 24 DLR (4) 9 (SCC).

¹⁷ The question before the Court of Appeal in W and W v Attorney General [2010] NZCA 139 paras 222 & 229 was whether an inmate who was lawfully detained in an institution under the control of the superintendent could maintain an action for false imprisonment where the nature of the detention changed from that which normally applied to secure detention which was unreasonable in the circumstances. The Court of Appeal of New Zealand, like the House of Lords did not adopt the approach of the Supreme Court of Canada in Miller. Rather, it preferred the reasoning in Hague and Bennett v Superintendent, Rimutaka Prison [2002] 1 NZLR 616 (CA) para 62. It was held in the latter that a writ of habeas corpus should not be issued in a case where the conditions of a prison inmate’s detention were altered, even though the alteration was unlawful. Following the judgment of Lord Jauncey in Hague, the Court of Appeal held that a change to the conditions on which an inmate was being detained either by segregation, reclassification or transfer to another institution did not create a new detention under the statute as to raise the issue of violation of s 23(1) of the New Zealand Bill of Rights Act 1990. So, too, an unlawful treatment of an inmate while in detention would not render the detention unlawful. The remedy, according to the Court of Appeal, ‘is the cessation of the unlawful element, not the cessation of the detention’. Ellen France J for the court held that the actions of the staff at Epuni Boys Home in placing Paul in secure detention, and thus subjecting him to more intrusive detention than was warranted, would not have amounted to false imprisonment. Paul might probably have had a judicial review remedy if he had applied timeously, or a claim for breach of either s 9 or s 23(1) of the Bill of Rights Act as in Taunoa. Another possibility, as Miller J found at the trial (White v Attorney General HC Wellington CIV-1999-485-85/2001, 28 November 2007) was an action by Paul for breach of a duty of care owed to him by the superintendent.
v Attorney General. In this category of constitutional claims, is included the South African Constitutional Court decision in Zealand v Minister of Justice and Constitutional Development which endorses the existence of the prisoner’s residual right to liberty in the constitutional and common law spheres.

The second and much more difficult scenario to comprehend is that represented by the attitude of the English courts whereby claims for public law damages has been strenuously resisted both at common law and under the Human Rights Act. Developments in that jurisdiction therefore necessitate an inquiry into how the English common law has responded to the matter. Unfortunately, the first impression is that the House of Lords’ decisions in this regard do not bring clarity to the discussion. In simple terms, their lordships have made it clear on occasions that prisoners do not enjoy a right to residual liberty in English law. At the same time, English precedents are immersed in some controversy as exemplified by the following: (a) the conflicting decisions in Ex parte Hague and Ex parte Evans (No 2); (b) the dissent of Lord Steyn in Munjaz; and (c) the recent Court of Appeal judgment in Prison Officers Association v Iqbal. Again, with the Court of Appeal decision in Karagozlu v Commissioner of Police of the Metropolis, the plaintiff seeking justice in English courts is thrown to the bewildering world of misfeasance in public office riddled, as it were, with the difficulties of proving the elements of bad faith, malice or fraud. Ultimately, the prisoner cannot enjoy in English law what has been recognised elsewhere as residual liberty without discharging the burden of proving deliberate or dishonest conduct on the part of the prison authorities. These decisions will be discussed in greater detail below.

18 [2008] 1 NZLR 429 (SC).
19 2008 (4) SA 458 (CC).
20 Prior to Zealand, there was the case of Tobani v Minister of Correctional Services NO [2000] 2 All SA 318 (SE) 326, where the plaintiff had claimed compensation for non-patrimonial loss in the form of the insult, indignity, and suffering caused by the wrongful acts of the prison authorities for his detention beyond the date he should have been lawfully held. The plaintiff had been detained in prison from 23 March 1998 until 28 July 1998 when the charge against him was withdrawn. He was not released from prison until 17 February 1999 owing to some technical procedural irregularities in the prison to which the plaintiff personally contributed. Froneman J held that to some degree, the plaintiff was the author of his continuing misfortune. His failure to bring his plight to the attention of the defendants prolonged the affront on his human dignity.
21 Wainright v Home Office [2004] 2 AC 406 (HL); Chief Constable of Hertfordshire v Van Colle [2008] 3 All ER 977 (HL); Mitchell v Glasgow City Council [2009] 2 WLR 481 (HL).
22 R v Deputy Governor of Parkhurst Prison, Ex parte Hague [1991] 3 All ER 733 (HL); Munjaz, R (on the application of) v Ashworth Hospital Authority [2006] 4 All ER 736 (HL).
23 Ibid.
24 R v Governor of Brockhill Prison, Ex parte Evans (No 2) [2000] 4 All ER 15 (HL).
25 Note 22 above.
26 [2010] 2 All ER 663 (CA).
27 [2007] 1 WLR 1881 (CA).
28 Raymond v Money [1983] AC 1, 10 per Lord Wilberforce; Taunoa (note 18 above) para 97 per Elias CJ.
II THE CONCEPT OF RESIDUAL LIBERTY

The familiar issues of infringements of the rights of the arrested, detained or accused persons systematically guaranteed in the Constitution of the Republic of South Africa, 1996, abundantly espoused in decided cases and analysed in academic texts, are outside the province of this inquiry. In any event, the complainant, subject of this discussion, would have long passed those stages. Indeed, he has gone through the judicial process and is now serving a term in prison custody. So, the focus is on the narrow issue of residual liberty traceable to the judgment of the Supreme Court of Canada in *R v Miller* and recently described as a ‘logical and useful one’ by Lord Steyn.

The concept of residual liberty arose in the context of an application for habeas corpus to test the validity of a particular form of confinement in a penitentiary. Following a disturbance in the penitentiary, respondent inmate was transferred to another institution and placed in administrative segregation in a ‘Special Handling Unit’. This unit was reserved for particularly dangerous inmates and was characterised by a more restrictive confinement and the loss of several privileges or amenities enjoyed by the general inmate population. Respondent in *R v Miller* was advised that he had been placed there because of his participation in the disturbance, but was never given the opportunity to confront the evidence of his involvement in the incident.

In a unanimous judgment delivered by Le Dain J, it was held that confinement in a special handling unit or in administrative segregation as in *Cardinal* was a form of detention distinct and separate from that imposed on the general inmate population. Such confinement was in fact a new detention...
of the inmate, purporting to rest on its own foundation of legal authority. It involved a significant reduction in the residual liberty of the inmate. It was that particular form of detention or deprivation of liberty, which was the object of the challenge by habeas corpus. It is release from that form of detention that is sought. There was, therefore, no reason in principle, in view of the nature and role of habeas corpus, why that remedy should not have been available to challenge the validity of such a distinct form of detention in which the actual physical constraint, as distinct from the mere loss of certain privileges, was more restrictive or severe than the normal one in an institution.

In so deciding, the Court did not hold that habeas corpus should lie to challenge any and all conditions of confinement in a penitentiary or prison, including the loss of any privilege enjoyed by the general inmate population. But that it should lie to challenge the validity of a distinct form of confinement or detention in which the actual physical constraint or deprivation of liberty, as distinct from the mere loss of certain privileges, is more restrictive or severe than the normal one in an institution.\(^{35}\) Granted that \textit{Miller} was not a claim for damages but one in which a wrongfully detained or unlawfully imprisoned person sought to obtain his release from illegal incarceration, the concept of residual liberty therein enunciated is the foundation upon which the answers to the questions posed in this article can be sought constitutionally and at common law.

III  \textbf{THE CONSTITUTIONAL CONTEXT}

Residual liberty is not listed in the rights guaranteed in the South African Constitution. For instance, it is not specifically mentioned in s 12(1) or any other part of the Constitution.\(^{36}\) It does not therefore have a separate constitutional existence in that narrow sense. It is a construct analogous to the protection of the right to liberty in its primary essence. In determining whether the complainant/prisoner has been deprived of his residual liberty arbitrarily or without just cause, resort must be had to the generic meaning attached to these terms under the legal system. It also follows that residual liberty, like the basic guarantee of the right not to be deprived of liberty arbitrarily or without just cause, must have both substantive and procedural protective angles.\(^{37}\) Thus, whether a detention or confinement is arbitrary turns on the nature and extent of the departure from the substantive and established procedural standards.

\(^{35}\) Per Le Dain J, \textit{Miller} (note 33 above) para 35.

\(^{36}\) In terms of s 12(1): ‘Everyone has the right to freedom and security of the person, which includes the right – (a) not to be deprived of freedom arbitrarily or without just cause; (b) not to be detained without trial; (c) to be free from all forms of violence from either public or private sources; (d) not to be tortured in any way; and (e) not to be treated or punished in a cruel, inhuman or degrading way’.

\(^{37}\) See per Langa CJ, \textit{Zealand} (note 19 above) para 33; \textit{S v Coetsee} 1997 (3) SA 527 (CC) para 158 per O’Regan J; \textit{De Lange v Smuts NO} 1998 (3) SA 787 (CC) para 18 per Ackermann J. See also per Parker J in \textit{Alexander v Minister of Justice} [2005] NAHC 137 para 69.
‘Arbitrary’ means ‘capricious or proceeding merely from the will and not based on reason or principle’. Therefore, a detention is arbitrary ‘if it is capricious, unreasoned, without reasonable cause: if it is made without reference to an adequate determining principle or without following proper procedures’. In effect, the touchstones of arbitrariness are ‘inappropriateness, injustice and lack of predictability’. Or, more specifically, ‘lawful detentions may also be arbitrary, if they exhibit elements of inappropriateness, injustice, or lack of predictability or proportionality’. Any detention, confinement or imprisonment that fits into the above definitions necessarily exceeds the lawful limits of the detention, confinement or imprisonment and, so, must be unlawful and unconstitutional.

In 21st century South African adjudicative landscape, and to some extent in Canada, the courts no longer hide under the inadequacy of the common law to provide redress where a constitutional right has been violated but no relief exists. This much is clear from the jurisprudence of the Constitutional Court and the Supreme Court of Canada. Factors underpinning contemporary constitutional rights adjudication in South Africa can briefly be stated. First, to the extent that the existing law fails to provide appropriate relief, ie the effective remedy contemplated by s 38 of the Constitution, the courts must ‘forge new tools’ and ‘shape innovative remedies’ to achieve the goals set by the Constitution which, inter alia, are to promote the values that underlie an open and democratic society based on human dignity, equality and freedom. Second, in interpreting the Bill of Rights, the courts are bound to have regard to the spirit, purport and objects of the Bill of Rights. It is in the spirit of this s 39(2) mandate that the Constitutional Court urged the courts to develop the common law in order to provide that remedy which the common law

38 Per Tindall J, Beckengham v Bopksbury Licensing Board 1931 TPD 280, 282. Again, as Muller AJ put it in Djama v Government of Namibia 1993 (1) SA 387 (NmH) 394: ‘It will be arbitrary to detain a person if such detention is not authorised by law’. Thus, finding no arbitrariness in the arrest of the plaintiff by the agents of the state in Lielezo v Minister of Home Affairs [2010] NAHC 1 para 18, Parker J held that they had a good reason for his arrest. Furthermore, the arresting officer informed the plaintiff promptly in the language he understood the grounds for the arrest within the meaning of arts 11(1) & (2) of the Constitution of Namibia 1990.
39 Per Richardson J, Neilson v Attorney General [2001] 3 NZLR 433 (CA) para 34.
40 Per McGrath J, Zaoui v Attorney General [2004] NZCA 228 para 86. See also Fok Lai Ying v Governor in Council [1997] 3 LRC 101.
42 Although Canada does not have constitutional provisions similar to those in the South African Constitution, the Supreme Court has maintained this progressive approach and has advanced Canadian constitutional jurisprudence in the process. One illustration of this trend is the rejection of the English common law principle of public interest immunity enjoyed by the police when carrying out their investigative duties and, in its place, the enunciation of the law of negligent police investigation – Hill v Hamilton-Wentworth Regional Police Services Board (2007) 285 DLR (4th) 620 (SCC). The other example concerns the principles surrounding the award of constitutional and public law damages in Canada – Vancouver (City) v Ward [2010] 2 SCR 28 (SCC). See C Okpaluba ‘The Development of Charter Damages Jurisprudence in Canada: Guidelines from the Supreme Court’ (2012) 23 Stellenbosch LR 55.
43 Per Ackermann J, Fose v Minister of Safety and Security 1997 (3) SA 786 (CC) para 69.
44 Constitution ss 7(1) & 39(1).
previously failed to provide.\textsuperscript{45} So, quite apart from the law of police liability and bureaucratic negligence\textsuperscript{46} and the law of vicarious liability incorporating state liability for deliberate and intentional wrongdoing including criminal conduct of a servant,\textsuperscript{47} the protection of the residual right of a prisoner as discussed in this article is a product of this trend.\textsuperscript{48}

It is equally important to trace, albeit briefly, the background that gave rise to the attitude of the courts in New Zealand towards the protection of human rights in their daily adjudication notwithstanding that there is no written Constitution in that country far less one entrenching a Bill of Rights. Uninhibited, however, the New Zealand Court of Appeal in \textit{Simpson v Attorney General [Baigent’s case\textsuperscript{49}]} found it expedient to interpret the New Zealand Bill of Rights Act 1990 using a ‘rights-based’/‘value-laden’ approach, thus treating the Act as if it were a constitutional instrument.\textsuperscript{49} It is equally true that the Supreme Court of New Zealand in \textit{Taunoa\textsuperscript{50}} (also discussed below) is a consolidation of sorts of the principles set out in \textit{Baigent’s Case}.\textsuperscript{51}

In light of the foregoing, one approaches the ensuing analysis bearing in mind that as much as England and New Zealand operate their respective polities without written constitutions; they both have human rights instruments in the form of legislative enactments; and yet, in both common law countries, the judicial approach to the protection of the rights of the individual based on these instruments, completely differs. While the New Zealand courts interpret their Bill of Rights Act in line with a progressive international human rights approach, the courts in England are yet to break away from the stranglehold of the common law in interpreting and applying the Human Rights Act 1998. These features briefly outlined above underlie the differing experiences of prisoners in the respective jurisdictions covered in this article, as well as the jurisprudence from respective courts insofar as the protection of the right to the residual liberty of a prisoner is concerned. In further elaborating on our discussion, the article begins with a consideration of the \textit{Zealand case} from South Africa.

\textsuperscript{45} \textit{Carmichele v Minister of Safety and Security} 2001 (4) SA 938 (CC).
\textsuperscript{46} See, for example, \textit{Minister of Safety and Security v De Lima} 2005 (5) SA 575 (SCA); \textit{Minister of Safety and Security v Rudman} 2005 (2) SA 680 (SCA); \textit{Carmichele v Minister of Safety and Security} (2) 2004 (2) SA 133 (SCA); \textit{Minister of Safety and Security v Hamilton} 2004 (2) SA 216 (SCA); \textit{Van Eeden v Minister of Safety and Security (Women’s Legal Centre Trust, as amicus curiae)} 2003 (1) SA 389 (SCA); \textit{Minister of Safety and Security v Van Duivenboden} 2002 (6) SA 431 (SCA).
\textsuperscript{47} See \textit{K v Minister of Safety and Security} 2005 (6) SA 419 (CC). It was held in \textit{F v Minister of Safety and Security} 2012 (1) SA 536 (CC) paras 2–3 & 53 that the state’s obligation to protect citizens and the corresponding trust that the public is entitled to place in the police service suggests a normative basis for holding the state delictually liable for the criminal acts of police officers, provided that a sufficiently close link is established between the misconduct and the perpetrator’s employment as police officer.
\textsuperscript{48} \textit{Zealand} (note 19 above).
\textsuperscript{49} See \textit{Simpson v Attorney General [Baigent’s case\textsuperscript{49}] [1994] 3 NZLR 667 (CA) 677 & 703.
\textsuperscript{50} Note 18 above.
\textsuperscript{51} C Okpaluba & PC Osode \textit{Government Liability: South Africa & the Commonwealth} (2010) paras 3.2.1.2.2 & 17.4.2.
(a) The Zealand case

The narrow question for determination at the Constitutional Court in Zealand was whether the detention of Z between 23 August 1999 and 30 June 2004 as a sentenced prisoner in the maximum-security prison was unlawful, for the purpose of a claim for delictual damages? On 23 August 1999, Z – who had been sentenced to a term of imprisonment and detained in the maximum-security prison – was successful in his appeal in that his conviction and sentence were set aside. The registrar of the High Court, however, negligently failed to issue a warrant for his release, or to otherwise inform the prison authorities of the outcome of the appeal. It was not disputed that the registrar was negligent; nor was it in doubt that had the prison authorities been duly informed of the changed circumstances they would have transferred Z to the awaiting-trial wing of the prison pending his trial on the second set of charges against him. Since that did not happen, Z remained in detention in the maximum-security block where he shared space with convicted and sentenced prisoners. There was another facet to the bungling in this case.

After several postponements in the second set of charges, a magistrate, on 11 October 2001, ordered that Z be released on warning. Again, the relevant form containing the order of the magistrate was not issued. The prison authorities maintained that the order was a mistake on the part of the magistrate and continued to detain Z as an awaiting-trial prisoner in connection with those charges pending against him. Even then, the prison authorities continued to hold Z in that same maximum-security wing until 8 December 2004, the day he was eventually released. He was therefore held illegally and arbitrarily for more than five years after his sentence and conviction were set aside upon successful appeal.

The High Court held that Z’s detention from 23 August 1999 until 9 December 2004 was unlawful. The Supreme Court of Appeal unanimously upheld the trial court decision to the extent that the continued detention was unlawful and Synders AJA described it ‘as an extreme example of violation of the rights of the respondent’ and ‘a disgrace to the administration of justice’. The Court was however split on the issue of the commencement of the illegality of the detention. Synders AJA, for the majority, held that only part of the detention was unlawful. He rejected the defendant’s argument and held that the empowering provisions of the relevant legislation were not complied with hence the requirement of constitutional legality was not met. Nevertheless, the respondent’s release on warning was not lawfully cancelled or set aside by a higher tribunal. Z was therefore unlawfully detained from 11 October 2001 to 30 June 2004.

52 Jonathan Zealand v The Minister of Justice and Constitutional Development (unreported) SECLD case no 3968/05, 22 June 2006.
53 Minister of Justice and Constitutional Development v Zealand 2007 (2) SACR 401 (SCA) para 21.
54 Farlam & Combrinck JJA concurring.
Ponnan JA’s dissent on this point was subsequently endorsed by the Constitutional Court. Ponnan JA held that the appeal ought to fail in its entirety because any greater encroachment upon the liberty of Z, as an awaiting-trial prisoner, than was necessary to secure his attendance in court or as required by the prison rules for the disciplinary management of the prison constituted an infringement on his personal rights. Accordingly, the treatment of Z after 23 August 1999 was illegal. His liberty was curtailed in a manner significantly more excessive than was usual for awaiting-trial prisoners. The effect was to subject him to punishment and not merely to detain him pending trial. The illegality in his continued confinement as a sentenced prisoner is undoubted. It, thus, follows that an action must lie against those who caused him to be subjected to that treatment:

This is precisely the basis of his claim … It is not a claim for unlawful imprisonment, or deprivation of all liberty, within the context of actio iniuriarum. One is not concerned with the validity of the remand orders and one is not concerned with whether the respondent should have awaited trial in the Regional Court case in custody, on bail or on warning … What is alleged … is that negligence on the part of the Registrar of the High Court resulted in certain injurious consequences amounting, in sum, to his continued detention as a convicted prisoner.

The Constitutional Court held that Z’s detention after his successful appeal until his further charge was withdrawn was unlawful. Unlike the majority of the Supreme Court of Appeal, Langa CJ emphasised the distinction between an awaiting-trial prisoner and a convicted prisoner, thus approving Ponnan JA’s approach. It followed that the deprivation of freedom inflicted upon the appellant was undoubtedly ‘without just cause’ in terms of s 12(1)(a) of the Constitution. Furthermore, the fact that the deprivation was in no way rationally connected to an objectively-determinable purpose must mean that it was also ‘arbitrary’ within the meaning of that provision.

Langa CJ concluded that in detaining the appellant as a sentenced prisoner in maximum security, the state failed to comply with the substantive component of the s 12(1)(a) right. The only possible legal basis on which to justify any deprivation of the applicant’s freedom at all was the fact that he was awaiting trial in the first case. That, however, was insufficient to justify treating him as if he were convicted and sentenced. This additional encroachment on the appellant’s liberty was undoubtedly greater than was necessary to secure his attendance at trial. Moreover, other awaiting trial prisoners of his class in detention at the same institution were not subjected to the same treatment. This harsher, differential treatment was therefore a form of punishment.

The court held that, as was the case in the matter before it, an unjustifiable
breach of section 12(1)(a) of the Constitution was sufficient to establish wrongfulness for the purposes of a delictual claim for damages.

(b) Loss of human dignity

In *Taunoa*, the appellants/prisoners were held in solitary confinement, which included physical segregation, strip searches and denial of medical care for being particularly disruptive, difficult and dangerous prisoners. They contended that they were victims of cruel, degrading or disproportionately severe treatment or punishment in terms of s 9 of the New Zealand Bill of Rights Act 1990. What happened to them on BMR (Behaviour Management Regime), it was contended, was more than a failure to treat them with humanity and with respect to human dignity. BMR was a programme based on principles of behaviour modification, involving deterrence of undesirable behaviour and incentives for desired behaviour. It involved the progression of a difficult inmate from an initially highly controlled environment through increasingly less restrictive phases, each with a minimum and maximum duration. The High Court awarded the appellants damages on the ground that the BMR applied to the prisoners was in breach of s 23(5) of the Act, which demands that ‘everyone deprived of liberty be treated with humanity and with respect for their inherent dignity’.

The Court of Appeal confirmed the finding of breach of s 23(5) in respect of all prisoners and held further that the placement on the regime of one of the appellants (Lofts) constituted disproportionately severe treatment contrary to s 9 of the Act prohibiting torture or cruel treatment.

The Supreme Court of New Zealand was unanimous in holding that a prisoner enjoyed those residual rights that were not taken away by mere fact of their imprisonment, and, in particular, the right to human dignity. The Court was therefore clear in its judgments that the prisoners were entitled to be compensated for the infringement of their rights under s 23(5) of the Act as the BMR fell well short of the proper standards of hygiene required for a person living in one place for 22 to 23 hours per day. The members of the Court were however divided on the alleged breaches of s 9.
Elias CJ was alone in holding that the conditions under which they were held was in breach of s 9 of the New Zealand Bill of Rights Act 1990 in that the collective treatment imposed on inmates on BMR ‘fell well below standards that befits a human being’ and compelled a finding of breach of s 9 of the Act in that they suffered from cruel, degrading or disproportionately severe treatment. The Chief Justice held that the BMR conditions were not inherent in the sentences of imprisonment imposed on the prisoners. Surely, the terms of their imprisonment did not include departures from the minimum standards set by prison regulations in respect of exercise, rehabilitative programmes, hygiene, and usual conditions. Described by the trial judge as a ‘punitive’ regime, the programme was imposed and administered without the observance of natural justice, as would have been required for imposition of disciplinary penalties. The breach of these rights were ‘truly grave’ in any circumstances. According to the Chief Justice, the conditions coupled with the extended periods of confinement were conditions well below those inherent in lawful confinement. They transgressed minimum standards imposed to protect prisoner welfare. They deprived the prisoners of the protection of the law.

On his part, Blanchard J did not find that there was a breach of s 9 in the cases of the other prisoners except the first appellant (Mr Taunoa). With particular reference to the first appellant, he held that the extensive loss of conditions consequent upon his unlawful segregation, and the various breaches by the prison authorities of the regulations, fell on him most severely given the time he was on BMR. According to Blanchard J, to inflict an unlawful regime with the features of BMR on a prisoner for as long as two years and eight months was conduct on the part of a New Zealand government department that must be regarded as outrageous and indecent. The courts below therefore erred in failing to recognise that the conduct of the prison authorities towards Mr Taunoa over a long period constituted a breach of s 9. Accordingly, his treatment was disproportionately severe and, in particular, the continuance of the clearly unlawful routine strip searching over such a period became degrading. The crux of Blanchard J’s holding on the sections in question is captured as follows:

It is therefore apparent that ‘disproportionately severe’, appearing in s 9 alongside torture, cruelty and conduct with degrading effect, is intended to capture treatment or punishment which is grossly disproportionate to the circumstances. Conduct so characterised can, in my view, when it occurs in New Zealand, be fairly called ‘inhuman’ in the sense given to that term in the jurisprudence under art 7 of the ICCPR. That leaves to s 23(5) the task, couched as a positive instruction to the New Zealand Government, of protecting a person deprived of liberty and therefore particularly vulnerable (including a sentenced prisoner) from conduct which lacks humanity, but falls short of being cruel; which demeans the person, but not to an extent which is degrading; or which is clearly excessive in the circumstances, but not grossly so.\(^\text{68}\)

\(^{65}\) Taunoa (note 18 above) para 95. Contra per Blanchard J paras 212 & 215.
\(^{66}\) Ibid para 96.
\(^{67}\) Ibid para 218.
\(^{68}\) Ibid paras 176 & 177.
In concurring with Blanchard J, except in the case of the first appellant, Tipping J held that the Department of Corrections did not breach s 9. But, Tipping J had no doubt that the whole saga of BMR was an unfortunate chapter in the administration of New Zealand prisons, for, not only ‘did the BMR have inherently unlawful features, its operation substantially impinged on the right of all the appellants to be treated, as required by s 23(5), ‘with humanity and with respect for the inherent dignity of the person’.’69 Further, Tipping J held that with respect to the length of time that the first appellant spent on the BMR, the lack of facilities, and the strip searching, the three in combination can fairly be described as cruel treatment or punishment. According to Tipping J, ‘[i]f a person lawfully in prison, the concept of cruel treatment or punishment denotes conduct which causes physical or mental damage or distress substantially beyond what is inherent in the confinement and the legitimate restraint and disciplining the person concerned’.70 Thus, either individually or cumulatively, the features of the first appellant’s case did not amount to treatment or punishment, which was cruel within the meaning of s 9. The reason being that those concerned were not motivated by a desire to inflict physical or mental distress on the first appellant and there was none of that in his case. Further, it is not probable that properly informed citizens would regard the treatment as being out of all proportion or excessive as to shock the national conscience.71 Although the strip searches72 were not particularly intrusive as to infringe s 9 protections, they were a significant element of the breach of the appellant’s rights under s 23(5).73

McGrath J, similarly concurring with Blanchard J on his application to the first appellant of the interpretation of ss 9 and 23(5), held that there was no doubt that the harsh treatment of the appellant were significant departures from standards necessary to maintain the proper standard of dignity and respect for the humanity of imprisoned persons in the New Zealand context. It was thus held that the conduct was deplorable, particularly because it involved persons who were especially vulnerable to the mistreatment. While the harm caused was intangible, the anxiety, frustration and general suffering of Mr Taunoa were real. In his case, although the treatment continued for a very long time, it involved none of the wider elements of brutality or added cruelty by prison officials that would certainly, in the New Zealand context, elevate

69 Ibid para 276.
70 Ibid para 282. In Peters v Marksman [2001] 1 LRC 1, the physical acts ordered by the superintendent of prisons against the applicant included torture, inhuman and degrading treatment, corporal punishment, solitary confinement, continuously detaining the prisoner in iron-clad leggings and handcuffs for several months were held to be contrary to s 5 of the Constitution of St Vincent and the Grenadines 1979. There was no mention of the existence of the law of residual liberty. 71 Ibid para 292.
72 Compare in Canada where strip searches – R v Caslake (1998) 155 DLR (4) 19; R v Golden (2001) 207 DLR (4) 18; pat-down search of the person – R v Mann (2004) 241 DLR (4) 214; R v Clayton & Farmer (2007) 281 (4) 1; whether pursuant to arrest or while in detention, are often treated as being in violation of the protection guaranteed by s 8 of the Canadian Charter 1982. See the recent case of Vancouver (City) v Ward [2010] 2 SCR 28 (SCC) para 61. Also see Okpaluba (note 42 above) para 4.1.
73 Taunoa (note 18 above) paras 283 & 284.
its character above the threshold. The conclusion, therefore, is that, even when the three aspects are considered cumulatively, along with the time he spent on the regime, the overall gravity of his treatment does not reach the level of harshness required to amount to cruel, degrading or disproportionately severe treatment or punishment under s 9. Its proper classification is that the treatment of Mr Taunoa breached his rights to be treated with dignity and humanity under s 23(5) of the Bill of Rights Act. In that category, having particular regard to the duration of the mistreatment of Mr Taunoa, it was a very serious case of its kind.  

IV REJECTION OF THE CONCEPT AND SEARCH FOR A TORT

The protection of the right to the security of the person and his property is the most elementary and fundamental purpose of the common law. Yet, contemporary English case law in this area appears to represent two contrasting scenarios. One supports a false imprisonment approach, while the other denies the existence of the concept of residual liberty and its unenforceability through the tort of false imprisonment. The problem encountered by the claimants in Hague and Munjaz is similar to that faced by the appellants in Wainright whose claim for a right to privacy failed for want of a nominate tort.

(a) False imprisonment

The tort of false imprisonment was, and still is designed to protect the violation of the right to personal liberty, freedom of movement and unwarranted physical restraint. It is designed to protect ‘the infliction of bodily restraint

74 Per McGrath J, Taunoa (note 18 above) para 362. On the approach the Court should take when determining whether in the circumstances, s 9 was breached, Henry J (paras 383–4) was in general agreement with the substance of the views expressed by Tipping J. On the issue whether that section was breached in respect of the prisoner or any of them, Henry J was not persuaded that in any individual case the conduct complained of could properly be classified as coming within the contemplation of s 9. He was, again, prepared to adopt the reasons of Tipping J with regard to Mr Taunoa.

75 Deyalsingh J of the High Court of Trinidad and Tobago held in Bastien v Kirpalani’s Ltd (1979) HCA no 861 of 1975 (unreported) that: ‘It is clear from the authorities that to constitute false imprisonment there must be a restraint of liberty … a taking control over or possession of the plaintiff or control of his will. The restraint of liberty is the gist of the tort. Such restraint need not be by force or actual compulsion. It is enough if pressure of any sort is present which reasonably leads the plaintiff to believe that he is not free to leave or if the circumstances are such that the reasonable inference is that the plaintiff was under restraint, even if the plaintiff was himself unaware of such restraint. There must in all cases be an intention by the defendant to exercise control over the plaintiff’s movements or over his will, and it matters not what means are utilized to give effect to this intention. The circumstances of each case have to be considered and these circumstances will, of course, vary and sometimes vary considerably from case to case. In each case the question is: “On the facts as found, did the defendant exercise any restraint upon the liberty of the plaintiff?” It is a question of fact, turning sometimes on an isolated link in the chain of circumstances, and the authorities, with rare exceptions, are helpful only on the general principles laid down’. See also the following Australian cases: Myer Stores Ltd v Soo [1991] 2 VR 597 (AD) 599 & 625 per Murphy & McDonald P; Williams v Minister, Aboriginal Land Rights Act 1983 (1994) 35 NSWLR 497 (CA) 512; Cubillo v The Commonwealth (2000) 103 FCR 1 para 1150.
which is not expressly or impliedly authorised by law.\footnote{76} Under the common law, false imprisonment or unlawful detention, as it is known in the South African law of delict, is a tort of the trespass family. It does not require proof of fault or special damage\footnote{77} nor does it lend itself to a causation test.\footnote{78} The ‘law attaches supreme importance to the liberty of the individual and if he suffers a wrongful interference with that liberty it should remain actionable even without proof of special damage’. At least four Law Lords including Lord Steyn expressed the opinion in \textit{R v Governor of Brockhill Prison, Ex parte Evans (No 2)},\footnote{80} that false imprisonment is a tort of strict liability. For instance, a person may be imprisoned without his knowing it.\footnote{81} What is essential is that there be imprisonment that cannot be justified in law. Nor would the arresting authority be exonerated from liability simply because the arresting officer had a reasonable suspicion that the respondent had been guilty of committing an indictable offence without telling the respondent that this was the ground of his arrest.\footnote{82} Accordingly, the tort of false imprisonment has been said to be one of the most ‘important constitutional safeguards of the liberty of the subject against the executive’.\footnote{83}

Thus, when a claim for false imprisonment is made in respect of a good faith, but mistaken and unlawful attempt by an administrative decision-maker to apply the law, courts are forced to choose between two ‘stark alternatives’.\footnote{84} The conflict of interests arising thereby raise two questions: (a) whether a claim for damages by the individual who has been wrongfully detained should be upheld; or (b) whether, the fact that the detention was made bona fide, and in reasonable reliance on the law, would justify the defendant’s conduct, thereby forecloses liability.\footnote{85} The approach of the courts at common law has been summarised by Kirby J as follows:\footnote{86}

\begin{itemize}
  \item \footnote{76} WVH Rogers, \textit{Winfield & Jolowicz on Tort} 18 ed (2010) 4–5.
  \item \footnote{77} Per Lords Dyson, Walker & Lady Hale, \textit{Lumba v Secretary of State for the Home Department} [2011] 2 WLR 671 (UKSC) paras 64, 181 & 212; \textit{Trevorrow v State of South Australia (No 5)} [2007] SASC 285 para 993.
  \item \footnote{78} Indeed, Lord Dyson held in \textit{Lumba} (note 77 above) para 62 that: ‘The introduction of a causation test in the tort of false imprisonment is contrary to principle both as a matter of the law of trespass to the person and as a matter of administrative law. Neither body of law recognises any defence of causation so as to render lawful what is in fact an unlawful authority to detain, by reference to how the executive could and would have acted if it had acted lawfully, as opposed to how it did in fact act. The causation test entails the surprising proposition that the detention of a person pursuant to a decision which is vitiated by a public law error is nevertheless to be regarded as having been lawfully authorised because a decision to detain could have been made which was not so vitiated. In my view, the law of false imprisonment does not permit history to be rewritten in this way’.
  \item \footnote{79} \textit{Murray v Ministry of Defence} [1988] 1 WLR 692, 703A per Lord Griffiths.
  \item \footnote{80} Per Lords Slynn, Browne Wilkinson, Steyn & Hope, \textit{Ex parte Evans (No 2)} (note 24 above) 18f, 19h, 20e & 24d, respectively.
  \item \footnote{81} Meering v Grahame-White Aviation Co Ltd (1919) 122 LT 44 (CA) 53–4 per Atkin LJ; per Lord Griffiths \textit{Murray v Ministry of Defence} [1988] 2 All ER 521, 528.
  \item \footnote{82} Christie v Leachinsky [1947] AC 573 (HL) 588 per Viscount Simon.
  \item \footnote{83} \textit{R v Governor of Brockhill Prison; Ex parte Evans (No 2)} [2001] 2 AC 19, 43; per Fullagar J, \textit{Trobridge v Hardy} (1955) 94 CLR 147, 152.
  \item \footnote{84} \textit{Cowell v Corrective Services Commission (NSW)} (1988) 13 NSWLR 714, 717.
  \item \footnote{85} Per Kirby J in \textit{Ruddock v Taylor} (2005) 222 CLR 612 para 139.
  \item \footnote{86} Ruddock \textit{ibid} para 140.
\end{itemize}
In the absence of statutory provisions clearly affording immunity or defence to the administrator, the result must favour the individual whose rights have been violated.  

Wrongful imprisonment is a tort of strict liability. Lack of fault, in the sense of absence of bad faith, is irrelevant to the existence of the wrong.

The reason according to Kirby J is because:

the focus of this civil wrong is on the vindication of liberty and reparation to the victim, rather than upon the presence or absence of moral wrongdoing on the part of the defendant.

A plaintiff who proves that his or her imprisonment was caused by the defendant therefore has a prima facie case. At common law it is the defendant who must then show lawful justification for his or her action.

In effect:

[t]he heavy burden placed on the defendant, at least in contrast to some other torts, is explicable in two senses. First, the onus on the defendant to establish a lawful justification is mitigated to some extent by the fact that a plaintiff must prove that the defendant was a direct cause of the injury, as well as prove the existence of the requisite intent. Secondly, the principal function of the tort is to provide a remedy for ‘injury to liberty’. It is not, as such, to signify fault on the part of the defendant.

With this background, we may now consider whether English law, indeed, protects the injury to liberty of the prisoner in the context of this discussion.

(i)  Ex parte Hague

The House of Lords rejected the concept of residual liberty when in R v Deputy Governor of Parkhurst Prison, Ex parte Hague it was confronted with the question whether two convicted prisoners lost their residual liberty when they were confined in seclusion in the prison environment. They alleged that the prison officers had breached the legislation regulating the conduct of prisons by placing one in segregation and the other in a ‘strip cell’ where his clothes were taken from him. Lord Bridge held that it was erroneous for the Court of Appeal to have reasoned that a prisoner’s ‘right to liberty’ was totally abrogated or partially retained in the form of a ‘residual liberty’. This is because to ‘ask at the outset whether a convicted prisoner enjoys in law a “residual liberty”, as if the extent of a citizen’s right to liberty were a species of right in rem or a matter of status, is to ask the wrong question.’ Accordingly, the concept of ‘residual liberty’ as a species of freedom of movement within...
the prison enjoyed a legal right which the prison authorities cannot lawfully restrain is to say the least ‘illusory’. To hold a prisoner entitled to damages for false imprisonment on the ground that he had been subject to restraint upon his movement which was not in accordance with Prison Rules would be: in effect, to confer on him under a different legal label a cause of action for breach of statutory duty under the rules. Having reached the conclusion that it was not the intention of the rules to confer such a right, I am satisfied that the right cannot be asserted in the alternative guise of a claim to damages for false imprisonment.

Lord Bridge denied that any action could arise for false imprisonment or breach of statutory duty for loss of liberty in the circumstances. He considered that there could be possible action in negligence. The logical solution to the problem being that:

[I]f the conditions of an otherwise lawful detention are truly intolerable, the law ought to be capable of providing a remedy directly related to those conditions without characterising the fact of the detention itself as unlawful. I see no real difficulty in saying that the law can provide such a remedy. Whenever one person is lawfully in the custody of another, the custodian owes a duty of care to the detainee. If the custodian negligently allows, or fortiorti, if he deliberately causes, the detainee to suffer in any way in his health he will be in breach of that duty. But short of anything that could properly be described as a physical injury or an impairment of health, if a person lawfully detained is kept in conditions which cause him for the time being physical pain or a degree of discomfort which can properly be described as intolerable, I believe that could and should be treated as a breach of the custodian’s duty of care for which the law should award damages.

Agreeing with Lords Bridge and Jauncey, Lord Ackner held that an otherwise lawful imprisonment cannot become unlawful by reason only of the conditions of detention, thereby providing a prisoner with a potential action for the tort of false imprisonment. Although a prisoner has no residual liberty vis a vis the governor of the prison, he held that such a prisoner would have an action against a fellow prisoner who locked him in some confined space. His Lordship was not prepared to accept, as a matter of principle, that a person lawfully deprived of part only of his liberty, cannot sue in tort for false imprisonment, if unlawfully deprived of the residue or balance of that liberty. He, however, held that a person lawfully held in custody who is subjected to intolerable conditions, must, of course, have a remedy against his custodian including: (a) an action in tort against a prison authority for damages for negligence where, for example, the intolerable conditions cause him to suffer injury to his health; (b) where the facts fit, an action in tort for damages for assault; (c) where malice can be established, an action for misfeasance in the exercise of a public office; and (d) the termination of such conditions by judicial review.

Lord Jauncey found nothing in the provisions of the Prison Act 1952 to suggest that Parliament intended thereby to confer on prisoners a cause of

95 Ibid 744b-c.
96 Ibid 744f-g-h.
97 Ibid 746d-f/g.
98 Ibid 746j-747a-c/d.
action sounding in damages in respect of a breach of those provisions. The exception is that if the prisoner suffered in health as a result of segregation contrary to the rules he would in all probability have a right of action in negligence against the prison authorities. He however emphasised that this conclusion does not leave a prisoner without a remedy if the rules were broken to his detriment. For instance, the prisoner may complain to the governor or board of visitors under rule 8(1) of the Prison Rules and in the event of a complaint to the latter a report may be made to the Secretary of State under s 6(3) of the Act. He may also challenge any administrative decision of the Secretary of State or the governor, which he considered to contravene the provisions of the Act or the rules by judicial review proceedings:

In the case of a continuing wrong done to him a prisoner could expect that a hearing in judicial review proceedings could be obtained with little delay. These public law remedies are additional to any private law remedies which would be available to him such as damages for misfeasance in public office, assault or negligence.

Then, Lord Jauncey adverted to the question whether there were any circumstances in which a convicted prisoner committed to a prison in terms of s 12 of the Prison Act 1952 could sue the prison authorities for damages for false imprisonment? Answering that question in the affirmative in the case of Weldon, the Divisional Court postulated two circumstances where it could be possible, namely: where the prisoner has been deprived of his residual liberty without reasonable cause and in bad faith, and where the prisoner has been subjected to intolerable conditions of detention. Lord Jauncey rejected the proposition that a prisoner lawfully confined in prison had, as against the governor, residual liberty which could be protected by private law remedies. For, although the prisoner could sue for damages, if he was assaulted by a prison officer or if he was negligently cared for and thereby sustained injury to his health, but he does not have such residual liberty, vis a vis the governor, such as could amount to a right protectable in law. Finally, he held, a prisoner lawfully committed to prison is subject to the Prison Act 1952 and the Prison Rules 1964. His whole life is regulated by the regime. He has no freedom to do what he wants, when he wants. His liberty to do anything is governed by the prison regime and he had no residual liberty. Placing one prisoner in a strip cell and segregating the other no doubt altered the conditions under which they were detained but it did not deprive them of any liberty, which they had not already lost when initially confined.

(ii) Contrasting Ex parte Evans (2)

The claim here was for damages for false imprisonment in respect of an additional 59 days served in prison as a result of the miscalculation of her

99 Ibid 751b-c.
100 Ibid 752a-b.
101 Ibid 752g/h-j.
102 Ibid 753a-b.
103 Ibid 755g/h-j.
The calculation was made by the governor in accordance with Home Office guidance which was based on a clear line of Divisional Court decisions on the proper construction of s 67 of the Criminal Justice Act 1967. The question was whether the governor was liable to compensate the respondent for false imprisonment, the point being a novel one as there was:

no English authority which directly addresses the precise question before the House. The law knows no tort special to prisons and prisoners. The question has to be resolved within the contours of the general principles governing the tort of false imprisonment.¹⁰⁴

Unlike in Hague, the House of Lords in Evans found that the ingredients of false imprisonment were made out.

It was held that where the executive could no longer support the lawfulness of a detention, the person detained was entitled to recover compensation for false imprisonment.¹⁰⁵ That tort was one of strict liability and its consequences could not be escaped even by showing that a defendant had acted in accordance with the view of the law which, at the time, was accepted by the courts to be correct.¹⁰⁶ The belief that the detention was lawful because it was calculated on the basis of court rulings was not justification sufficient to absolve the governor from liability. He was obliged to release the prisoner on the date calculated by him in the manner laid down by statute as the responsibility for any error in the calculation laid with him, not the court that imposed the sentence.¹⁰⁷ Since their Lordships held that the case satisfied the ingredients of false imprisonment, they did not consider whether the issue of residual liberty arose or whether it was necessary to consider what would have been the position under art 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950.

(iii) Persistent rejection in subsequent cases

More recently,¹⁰⁸ Lord Steyn criticised the approach in Hague and urged that it should not be applied to the relationship between a detained patient and the managers of a mental hospital. He approved of the reasoning of the Supreme Court of Canada in Miller. In line with that reasoning, where solitary confinement of a prisoner is unlawfully and unjustly superimposed upon his prison sentence, the added solitary confinement can amount to ‘prison within a prison’ and capable of constituting a material deprivation of residual liberty.¹⁰⁹

¹⁰⁴ Per Lord Steyn, Ex parte Evans (No 2) (note 24 above) 20c/d-e.
¹⁰⁵ Lord Steyn (note 93 above) 21a/d-c, adopted as representing ‘the traditional common law view’, the long-standing opinion of Lord Atkin who had said in Eshughbayi Eleko v Officer Administering the Government of Nigeria [1931] AC 662, 670 that ‘no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a court of law’. See also per Lord Steyn, Boddington v British Transport Police [1998] 2 All ER 203, 227.
¹⁰⁷ Per Lord Hope, Ex parte Evans (No 2) (note 83 above) 19, 26g-j & 27c-d.
¹⁰⁸ In Munjaz (note 22 above).
¹⁰⁹ Ibid para 42.
Again, *Hague* was decided before the coming into effect of the Human Rights Act 1998, hence Lord Steyn described it as having been cast in the lexicon of the old law. *Hague* excluded a remedy for intolerable prison conditions on the basis of false imprisonment and breach of statutory duty. Whereas ‘the remedies depend so heavily on the supply of resources by government that it is hard to imagine that a duty of care in tort would ever be adequate to provide a remedy for those who are condemned to live in [inhuman and degrading] conditions’.

Furthermore:

> In *Hague* Lord Bridge observed: ‘In practice the problem is perhaps not very likely to arise’. It is not to be assumed that in 2005 such conditions do not sometimes occur in our prisons. Under domestic law *Hague* effectively denies prisoners any effective remedy for a breach of their residual liberty. Even in respect of convicted prisoners *Hague* should no longer be treated as authoritative. *A fortiori* *Hague* should not be applied to the relationship between a detained patient and the managers of the hospital. After all, unlike prisoners who committed crimes of their own volition, mentally disordered patients are not guilty of any legal or moral culpability.

In spite of the protestations of Lord Steyn and the judgment of the European Court of Human Rights in *Bollan v United Kingdom*, which he cited in support, the other members of the House repudiated his views on residual liberty. The issue in *Bollan* was whether the decision of the prison officers to leave Angela Bollan in her cell until lunchtime – a period of less than two hours – in itself disclosed an unjustified and unlawful deprivation of her liberty within that prison. Although this was a weak case, the Court did not exclude the possibility that measures adopted within a prison may disclose interference with the right to liberty in exceptional circumstances. This case did not rule out as a matter of principle the concept of residual liberty. It was not suggested that the prisoner in *Munjaz* was subjected to seclusion when he should not have been. Nor was it suggested that the Ashworth policy properly applied, gave rise to any direct violations of the European Convention on Human Rights, let alone to any breach of domestic law. Rather, it was contended that the prison authorities were not permitted to have their own different policy towards seclusion. To that extent, the concept of residual liberty and thus, *Hague*, did not feature prominently in the judicial deliberations in *Munjaz*.

However, Lord Bingham made it clear that the approach to residual liberty, which has prevailed in Canada does not reflect the jurisprudence of the European Court for which he had no regret. The fact being that improper use of seclusion may found complaints under art 3 or art 8, whereas art 5(4)

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110 Ibid para 42. See also D Feldman *Civil Liberties and Human Rights in England and Wales* 2 ed (2002) 440.
111 [1992] 1 AC 58, 166C.
112 Per Lord Steyn, *Munjaz* (note 22 above) para 42.
113 Application no 42117/98 (unreported).
114 For a discussion of the Ashworth Policy on seclusion see Regina v Ashworth Hospital Authority (now Mersey Care National Health Service Trust) ex parte *Munjaz* (FC) [2005] UKHL 58, [2005] 3 WLR 793 (HL) paras 13–7.
provides that a successful challenge should result in an order that the detainee be released, not in an order that the conditions of his detention be varied. Their Lordships held that the Ashworth policy was incompatible with arts 3, 5 and 8 of the European Convention. The method of detention of patients in hospitals of the Ashworth type was found to be incompatible with the Convention. Lord Bingham noted that art 5 may avail a person detained in an institution of an inappropriate type, it could not, however, support a complaint directed to the category of institution within an appropriate system. Surely, art 5(4) cannot be read as enabling a lawfully detained prisoner to challenge his prison category. In any event, the Ashworth policy, properly applied, would not permit a patient to be deprived of any residual liberty to which he is properly entitled: seclusion must be for as short a period and in conditions as benign as will afford reasonable protection to others who have a right to be protected.

The false imprisonment claim in Prison Officers Association v Iqbal (Rev 1) arose in a different context. Could such a claim lie against prison officers who took unlawful strike action which resulted in a prisoner, who would otherwise have been permitted by the prison governor to leave his cell for the purpose of working, exercise and health care, being confined to his cell? The claimant was a serving prisoner whose prison routine of being allowed out of his cell for some six hours for work, exercise and health care did not happen because the Prison Officers Association were on strike. The governor decided that since very few prison officers reported for duty on the day, the prisoners should remain in their cells throughout that day. The prisoner brought a claim for false imprisonment on the basis that his daily routine at the prison, established under the authority of the governor, was interrupted in that he was locked in his cell all day owing to the wrongful refusal of the prison officers to work at the prison. It was argued before the Court of Appeal that the act of the prison officers amounted to a false imprisonment for which the defendant was responsible. It was common cause that as a person lawfully in prison by virtue of the Prisons Act 1952 the claimant could have no claim against the governor arising out of his confinement in his cell on the relevant date.

Adopting the principle crisply presented in Street on Torts, Lord Neuberger MR held that false imprisonment will normally result from some positive act of a defendant which deprived the plaintiff of his liberty. Or, as he put it, the defendants, as a general principle, are not to be held liable in tort for the results of their inaction, in the absence of a specific duty to act, a duty which would normally arise out of the particular relationship between the claimant and the defendant. According to Lord Hoffmann, the ‘distinction, between

117 Affirming the Court of Appeal, R (Munjaz) v Mersey Care NHS Trust [2004] QB 395 para 70.
118 Bouamar v Belgium (1989) 11 EHRR 1; Aerts v Belgium (1998) 29 EHRR 50.
119 Ashingdane v United Kingdom (1985) 7 EHRR 528.
120 Munjaz (note 22 above) para 30.
121 [2010] 2 WLR 1054 (CA).
122 Per Lord Neuberger MR, ibid para 1.
124 Iqbal (note 121 above) para 21.
causing something and merely providing the occasion for someone else to cause something, is one with which we are familiar in the law of torts. On the other hand:

Such a hard and fast distinction between action and inaction may seem arbitrary to some people, but it is not unprincipled, and, while it may lead to apparent injustice in particular cases, it does help to ensure a degree of clarity and certainty in the law. However, a general rule such as that propounded by Lord Goff in Smith v Littlewoods Organisation Ltd, Maloco v Littlewoods Ltd and applied by the majority of the Court of Appeal in Herd v Weardale Steel, Coal and Coke Co can often, perhaps inevitably, be said to beg the question at issue when it is relied on in a particular case.

In the present case, the withdrawal of their labour by the prison officers did not directly lead to the claimant being confined in his cell on the day in question; the confinement resulted from the governor’s decision. False imprisonment must result from a direct act of the defendant which deprives the claimant of his liberty. Here, the strike may have caused, indeed foreseeably caused, the governor to decide not to let the claimant out of his cell on that day, but that is a different thing. Of course, it must have been apparent to the officers that it was likely, indeed probably inevitable, that, as a result of the strike, prisoners would enjoy less freedom of movement within the confines of the prison than if there had been no strike. The failure of the prison officers to work at the prison, while it might have been a breach of their employment contracts, involved no positive action on their part, and that failure was not the direct cause of the claimant’s confinement.

(b) Misfeasance in public office

In the face of the difficulty encountered in seeking redress by way of common law tort actions against government, especially negligence, litigants in the past two decades have tended to go the misfeasance in public office route. The frequency of misfeasance actions in recent times has removed it from the class of doubtful or miscellaneous torts, such as abuse of process or injurious
falsehood,\textsuperscript{134} to a full-fledged tort in the English legal system. Even in that setting, litigants do not have a smooth sail. They must prove fraud, bad faith, malice or intention to harm them by public officers; these being the essential ingredients of that tort.\textsuperscript{135} Thus, unlawful conduct in the exercise of public functions may be a public wrong, but ‘absent some awareness of harm there is no basis on which to conclude that the defendant has breached an obligation that she or he owes to the plaintiff, as an individual’\textsuperscript{136}

It has already been observed in \textit{Hague} that the misfeasance cause of action might be the proper route to take in ventilating a breach of residual liberty in the present context. Indeed, it was confirmed by the Court of Appeal in \textit{Iqbal}. It was there held that it accorded both with principle and with practicality to limit claims by prisoners who were left locked in their cells by the inaction of prison officers to cases where the officers were guilty of misfeasance in public office.\textsuperscript{137} In that regard, ‘there was no reason why [a prison officer] should not be liable for misfeasance’ if he ‘deliberately and dishonestly refuses to carry out his duties such that the governor decides not to give a direct order to unlock the cells perhaps in order to avoid turmoil in the prison’.\textsuperscript{138} It seems therefore that the tort of misfeasance in public office also comes to the rescue of the litigant in this field as in others. It ensures: (a) that a prisoner who remains in his cell due to the unjustified action or inaction of a prison officer was not without a remedy in an appropriate case; and (b) a degree of practicality in that a prison officer is only liable for a ‘deliberate and dishonest’ conduct.\textsuperscript{139} Logically, therefore, it is the same role, which ‘deliberate and dishonest’ acts or omissions play as an exception\textsuperscript{140} to the public interest immunity enjoyed


\textsuperscript{135} It is important to note that South African law does not have a separate delict of misfeasance in public office but it recognise that deliberate, dishonest, malicious or fraudulent conduct where shown to have influenced performance of public duty must be considered serious as to constitute wrongfulness for the purposes of delictual liability – \textit{Minister of Finance v Gore NO} 2007 (1) SA 112 (SCA); C Okpaluba ‘Fraud, Bad Faith and Misfeasance in Public Office: \textit{GORE} in Comparative Perspective’ (2010) 19 Leshojo L1 1, 14–20.


\textsuperscript{137} \textit{Iqbal} (note 121 above) para 41. See also per Lord Bridge, \textit{Ex parte Hague} (note 22 above) 1991 3 All ER 733.

\textsuperscript{138} \textit{Iqbal} (note 121 above) para 42.

\textsuperscript{139} \textit{Iqbal} (note 121 above) para 42. See also \textit{Karagozlu v Commissioner of the Police of the Metropolis} (2007) 1 WLR 1881 para 50.

\textsuperscript{140} See, for example, \textit{Kuddus v Chief Constable of Leicestershire Constabulary} [2002] 2 AC 122 (HL); \textit{Akenzua v Secretary of State for the Home Department} [2003] 1 WLR 741 (CA).
by the police in the conduct of their investigative duties\textsuperscript{141} that they play in protecting the residual liberty of a prisoner in English law.\textsuperscript{142}

In so concluding, the Court of Appeal found support in its earlier decision in \textit{Karagozlu v Commissioner of Police of the Metropolis}.\textsuperscript{143} The appellant was a category D prisoner in an open prison who was transferred to a closed category B prison. The reason for his transfer was allegedly for his safety, which the claimant contended was based on false information provided by a police officer and maliciously passed on to the prison authorities ostensibly to harm him. He commenced an action against the police for damages for misfeasance in public office. The question was whether, on the assumed facts, the claimant had suffered damage for the purposes of the tort of misfeasance in public office. The Court had no doubt that in the light of \textit{Watkins}, loss or damage was an essential ingredient of the tort of misfeasance but the question it had to answer was: what amounts to damage for this purpose? The submission was that in \textit{Watkins}, the House of Lords was not called upon as the Court of Appeal in the instant case, to consider a situation such as where a person loses his freedom as a result of a dishonest abuse of power by a public servant such as the police officer in this case. The plaintiff had, therefore, suffered damage sufficient to entitle him to recover general damages for that loss of freedom.\textsuperscript{144}

The Court took the analogy of the torts of false imprisonment and malicious prosecution where, an unlawfully detained person who loses his freedom is thereby entitled to general damages.\textsuperscript{145} Indeed, in \textit{Thompson v Commissioner of Police of the Metropolis},\textsuperscript{146} the Court of Appeal went as far as laying down the guidelines for the directions to the jury in false imprisonment and malicious prosecution claims in respect of basic damages, aggravated damages and exemplary damages.\textsuperscript{147} The crucial issue was the loss of liberty, and the question turned on whether, on the assumption that those allegations were true, the plaintiff was in principle entitled to general damages for a further restriction on his liberty caused by his removal to a closed category B prison.\textsuperscript{148} The Court upheld the claimant’s appeal and held that the particulars

\begin{footnotesize}
\begin{enumerate}
\item This is the equivalent of the ‘something more’ requirement insisted upon by South African courts as a precondition for the imposition of liability against public authorities in claims for financial loss arising from the conduct of public functions – \textit{Telematrix (Pty) Ltd v\textsuperscript{a} Matrix Vehicle Tracking v Advertising Standards Authority of South Africa} 2006 (1) SA 461 (SCA); \textit{Steenkamp NO v Provincial Tender Board, Eastern Cape} 2007 (3) SA 121 (CC); 2006 (3) SA 151 (SCA); \textit{Minister of Finance v Gore NO} 2007 (1) SA 112 (SCA).
\item \textit{Ibid} para 24.
\item \textit{Roberts v Chief Constable of Cheshire Constabulary} [1999] 1 WLR 662.
\item \textit{[1998]} QB 498 (CA).
\item \textit{Ibid} 514-5.
\item See, for example, \textit{Ex parte Hague} (note 22 above); \textit{Racz v Home Office} [1994] 2 AC 45 (HL).
\end{enumerate}
\end{footnotesize}
of claim alleged relevant damage. The claim alleged damage special to the claimant and a significant loss of liberty occasioned by his transfer from open to closed conditions which constituted a form of material damage sufficient to found the cause of action for misfeasance in public office.\(^{149}\)

V Conclusion

If by way of judicial review, the prisoner can enforce those fundamental freedoms as are compatible with lawful incarceration or that restore his human dignity, it follows that such confinements, segregations or excessive regimentation outside the normal rules of lawful detention should similarly be protected by law. The denial of the right to the residual liberty of a prisoner by the House of Lords because it does not fit into the tort of false imprisonment is a contradiction of the time-honoured reverence paid to the right to personal liberty by common law courts. It is submitted that the Bill of Rights entrenched in written constitutions, including those enacted by legislation such as the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1998 (UK) are designed to afford maximum protection to personal liberties, primary as well as residual. To that extent, the judgments of the Supreme Court of Canada, the Constitutional Court of South Africa, and the Supreme Court of New Zealand reviewed in this article are in accord with this submission. There is no doubt that the pronouncements of these courts represent the correct approach to the interpretation of contemporary human rights instruments – constitutional as well as statutory. On the other hand, the attitude of the House of Lords is astoundingly the direct opposite. It is perhaps not surprising. Contemporary case law from that Court (and its successor, the Supreme Court of the United Kingdom) lends credence to the assertion that their Lordships interpret the remedies’ provisions of the Human Rights Act 1998 with the hindsight of the common law. In their view, the legislature did not intend through that Act to introduce any radical changes to the common law jurisprudence. This is fallacious for, it is clear that the provisions of the Human Rights Act are wider in its coverage than the limited protection available at common law. Again, even though they recognise that the Act should be interpreted purposively and generously as in the case of constitutional instruments, surprisingly, they have not approached the aspect of state liability and award of damages for the breach of rights protected in that Act with the commensurate judicial activism the progressive interpretive spirit demands.

149 Roberts (note 145 above) paras 53 & 54.