ATTORNEY-GENERAL v CHAPMAN: NEGATING EFFECTIVE REMEDIES FOR JUDICIAL BREACH OF THE BILL OF RIGHTS

In *Attorney-General v Chapman* [2012] 1 NZLR 462, a divided Supreme Court has ruled out all prospect of a *Baigent* damages remedy for breach by the judicial branch of the New Zealand Bill of Rights Act 1990 ("judicial BORA breach"). In doing so, the three majority Judges, McGrath, William Young and Gault JJ, overturned a unanimous Court of Appeal judgment to the contrary[1] and the trend of both judicial and academic authority, since *Baigent.*[2]

Background to the *Chapman* case

The *Chapman* decision is the second successive occasion on which the Supreme Court has, over a strong dissent from the Chief Justice, elected significantly to restrict the scope of the *Baigent* remedy as originally formulated. In the earlier case, *Taunoa v Attorney-General*,[3] the Supreme Court considerably narrowed the scope of the *Baigent* damages remedy by reducing its status from that of primary remedy to one of second if not last resort, subordinate to the now primary remedy of declaration of BORA breach. Such a declaration is now, apparently, expected to provide individuals whose human rights have been violated with a sufficient sense of vindication.[4]

Reading the lead majority judgment of McGrath and William Young JJ with whom Gault J concurred ("the majority"), one gains the impression that an attempt to extend the scope of *Baigent* has been rejected. It will be argued that a more accurate way to describe the ultimate outcome is that the majority decision creates a radical and ultimately unnecessary extension and application of common law judicial immunity (of an individual Judge when personally sued) to State liability for human rights breach. This extension of immunity for the direct benefit of the New Zealand State - not to mention the judiciary itself - flies in the face of not only the reasoning adopted by the Judges who heard and determined *Baigent* and the companion case of *Auckland Unemployed,*[5] but also directly applicable international human rights obligation and jurisprudence.

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[1] [2010] 2 NZLR 317.
[2] *Simpson v Attorney-General [Baigent's case]* [1994] 3 NZLR 667.
[3] [2008] 1 NZLR 429.
[4] For a detailed criticisms of the approach adopted in *Taunoa*,, see my New Zealand Law Society seminar paper, "Civil and Criminal Remedies for Breach of the Bill of Rights", in "Using the Bill of Rights and Civil and Criminal litigation" (NZLS Intensive, July 2008).
[5] *Auckland Unemployed Workers' Rights Centre Inc v Attorney-General* [1994] 3 NZLR 720.

Declaring at the outset my interest as counsel for Mr Chapman, it will come as no surprise if I proclaim my support for the reasoning and approach of Elias CJ, which Anderson J adopted in a separate judgment.

The point which ultimately reached the Supreme Court involved preliminary questions of law which had been removed directly into the Court of Appeal for argument owing to a perceived divergence of judicial opinion. The largely undisputed background facts of the case really could not have been much closer to home, so far as the Supreme Court itself was concerned. Mr Chapman's situation was that of a former *Taito* category appellant.[6] That is to say, his original conviction appeal to the Court of Appeal had been dismissed under the unlawful *ex parte* system for dealing with appeals by applicants for criminal legal aid operated by the then Judges of the Court of Appeal, which the Privy Council had found to have been a "fundamentally flawed and unlawful system". This had continuously operated "contrary to fundamental conceptions of fairness and justice".[7]

When Mr Chapman was allowed a second appeal, some three years after his first appeal had been wrongfully dismissed, that appeal succeeded. His conviction was overturned and a new trial directed. However, the Crown elected not to proceed with a re-trial and he was ultimately discharged without conviction. Mr Chapman then sought to sue for damages, alleging that the *ex parte* appeal system and in particular the dismissal of his first appeal (by a Court comprising Thomas, Blanchard and Tipping JJ) had breached his rights under ss 25 and 27(1) of the Bill of Rights to a fair criminal process and in particular appeal against conviction.

Mr Chapman's claim of judicial BORA breach therefore stood on very strong legal and factual foundations. There could be no disputing a characterisation of the judicially-devised system which had effectively deprived him of his first appeal, as involving a serious breach of his human rights. Moreover, his claim for damages in no way involved any attack on his earlier criminal conviction, whether direct or collateral. That conviction had already been set aside, and he sought no redress so far as the process which had led to his original conviction was concerned.

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[6] *R v Taito* [2003] 3 NZLR 577 and see also *R v Smith* [2003] 3 NZLR 617.
[7] See further per Elias CJ at [15] – [19].

All that said, *Baigent* and indeed the leading Privy Council decision of *Maharaj*[8] were not binding on the Supreme Court, and no-one could possibly quarrel with the Court deciding on the basis of first principles. But the majority did not in fact decline to follow *Baigent* and the companion case of *Auckland Unemployed*. On the contrary, the majority recognised them as "leading judgments which have rightly been taken as relevantly settling the law in New Zealand": at [96]. They added:

> "If those cases (and the associated jurisprudence) did establish state liability for judicial breaches of the Bill of Rights Act, that would tell strongly – indeed we think decisively – in favour of Mr Chapman's right to seek public law compensation."

However, as the majority also noted (at [97]), "the reality is that the case also turns on a policy judgment [in relation] to systemic public interest considerations, the most important of which is judicial independence".

The focus of this piece is the questions of principle at stake. However, given the majority's expressed willingness to follow precedent in favour of a *Baigent* damages remedy for judicial BORA breach if such existed, it is appropriate to address the precedent question first.

What did *Baigent* and *Auckland Unemployed* decide?

At the start of their discussion of this issue, the majority acknowledge the need to identify what was decided in both *Baigent* and *Auckland Unemployed*, and indeed "the associated jurisprudence". The majority judgments in *Baigent* are noteworthy first of all for their strong reliance on article 2(3) of the International Covenant on Civil and Political Rights ("ICCPR"). This binds New Zealand as a State Party, in particular to "ensure that any person whose rights or freedoms are herein recognised are violated shall have an effective remedy...". Secondly, the majority in *Baigent* expressly approved of the majority judgment in *Maharaj*, in particular the following well-known statements of Lord Diplock:[9]

> "... no change is involved in the rule that a judge cannot be made personally liable for what he has done when acting or purporting to act in a judicial capacity. The claim for redress under section 6(1) for what has been done by a judge is a claim against the state for what has been done in the exercise of the judicial power of the state. This is not vicarious liability; it is a liability of the state itself. It is not a liability in tort at all; it is a liability in the public law of the state, not of the judge himself..."

[8] *Maharaj v Attorney-General of Trinidad and Tobago (No 2)* [1979] AC 385.
[9] Above, at 399.

Baigent itself concerned Police actions in the execution of a search warrant – that is, executive action. *Maharaj* plainly involved State liability for a judicial breach of Constitutional guarantee. That leaves for consideration *Auckland Unemployed*. If the exercise to be undertaken is a search for the *ratio decidendi* of both *Baigent* and *Auckland Unemployed*, what then did *Auckland Unemployed* actually decide? The majority address this question only briefly (at [125]), noting that the case involved a claim concerning a search warrant issued by a District Court Deputy Registrar (unarguably a judicial function). The majority quote only the final sentence of the following passage from the judgment of Cooke P (at 724; emphasis added):[10]

> "There is the difference from *Baigent* that in the present case the search warrant **is alleged** to have been invalid. (Indeed it has been so found by a District Court Judge.) I think that **unlawfulness in the** obtaining or **issue of the warrant** would certainly be an important factor and might be decisive, as to **liability under** ss 21 and 22 [BORA]."

My own reading of *Auckland Unemployed*, not to mention long standing view as counsel for the appellant plaintiffs in that case (which ultimately settled), is that the plaintiffs' pleaded claim for "judicial" BORA breach was there being expressly addressed, and permitted to go forward. That was certainly the view adopted by the Court of Appeal in *Chapman*, and likewise Elias CJ.[11]

To revert to the approach of the majority in *Chapman*, their analysis in fact proceeds (at [125]) by devoting a single, brief paragraph to an entirely inconclusive discussion of the effect of *Auckland Unemployed*. They then immediately revert to discussing what was decided in *Baigent*, reading down the language of the majority judges in that case as necessarily applying only "to breaches by the executive branch" (at [128] – [129]). Thus the majority in *Chapman*, having undertaken to determine what *Baigent* and *Auckland Unemployed* **together** decided – and indeed, to accept that as the law of New Zealand if it stood for liability under BORA for judicial breach of rights – in truth conveniently skirt over and ultimately ignore the supposedly critical issue of what the two cases combined should be taken to have decided.

The "narrow view" of the *ratio* of *Baigent* (standing alone) adopted by the majority in *Chapman* was not without previous (minority) support. But the rejoinder to that proposition is – as the

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[10] Reference should also be made to the passages of the judgment of Hardie Boyes J at p 728/19 – 28, 728/38 – 31, and 729/21 – 38, addressing the plaintiffs' claims based on the unlawful issuing of the search warrant. Of the remaining judges in *Auckland Unemployed*, Casey J agreed with Cooke P and Hardie Boyes J, McKay agreed with Hardie Boyes J and Gault J maintained his earlier dissent in *Baigent*.

majority acknowledged – that one must look at the overall precedent effect of both *Baigent* and *Auckland Unemployed* combined. Even viewing the reasoning and approach of the majority judges in *Baigent* in isolation, it has been commonly regarded as recognising a damages liability **of the State** for judicial BORA breach. Such damages have been ordered at High Court level on at least two occasions, one of those indeed involving William Young J.[12] There were also significant *dicta* at appellate level acknowledging the existence of the damages remedy for judicial BORA breach and/or affirming the continuing authority of *Maharaj* on this point.[13]

Also highly significant (while glossed over by the majority in *Chapman*) is the overall Crown response to *Baigent* and *Auckland Unemployed*, and a roughly contemporaneous judgment addressing the immunity from suit of District Court Judges.[14] These brought about a formal reference to the Law Commission, which reported in favour of retaining the *Baigent* damages remedy, except in the case of judicial BORA breach.[15] The Law Commission proposed two legislative responses, one extending the personal immunity from suit of District Court Judges and the other "to prevent actions against the Crown (or judges themselves) for breaches of the Bill of Rights Act". The clearcut and highly significant Legislative response to those recommendations was to enact the first recommendation, while completely disregarding the second.

Having regard to the foregoing matters – all of which are addressed in depth in the judgment of Elias CJ at [10] – [14] and [29] – [47] – the approach of the majority insofar as it relies on precedent (or a lack of it) is less than satisfying. As noted, the major concerns here are the failure to come to grips with the precedent effect of *Auckland Unemployed* and the failure to acknowledge the previous judicial consensus – apart from William Young J [16]- recognising the availability of the damages remedy for judicial BORA breach.

However, none of this is in any way to deny that the Judges in *Chapman* were ultimately required to determine the issues in terms of fundamental principle. The arguments in favour of

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[11] See per Elias CJ at [22] – [23], [33] – [34].
[12] See *Upton v Green (No2)* (1996) 3 HRNZ 179 award held on appeal (1998) 5 HRNZ 54; *Small v Attorney-General*, High Court, Christchurch Registry, CP No 157/99, Young J, 5 May 2000.
[13] See especially *Rawlinson v Rice* [1997] 2 NZLR 65 (CA), *Lai v Chamberlains* [2007] 2 NZLR 7, [66], [74], (SC), including footnoted discussion, and *R v Williams* [2009] 2 NZLR 750, [80] (SC).
[14] *Harvey v Derrick* [1997] 1 NZLR 314 (CA).
[15] Law Commission Report, "Crown Liability and Judicial Immunity – a response to *Baigent's* Case and *Harvey v Derrick"* (May 1997).
[16] In his judgment in *Brown v Attorney-General* [1005] 2 NZLR 405, William Young J had already nailed his colours to the mast, in terms of opposition to any damages remedy for judicial BORA breach.

imposing a State liability for judicial BORA breach had already been fully articulated in *Baigent* and *Auckland Unemployed*, and have earlier been touched upon. What principled reasons therefore led the majority to refuse to make available a compensation remedy in cases where the BORA breach was that of the judiciary rather than the executive? An affirmative justification for that conclusion is essential, if only because under s 3(a) the BORA applies equally to all three branches of government, including the judiciary.

The majority saw three matters as "of principal importance", namely "the desirability of achieving finality, promoting judicial independence and the availability of existing remedies for breach, including through the appellate process": at [180]. It was the majority's assessment and characterisation of these factors which they saw as warranting the creation of a new "state immunity" for judicial BORA breach.

Finality of litigation outcomes

The related goals of requiring disappointed litigants to pursue their dissatisfaction with judicial rulings by means of appeal or review (where available), and protecting the finality of litigation outcomes achieved by this means, have always been important justifications for the absolute immunity of Judges at common law, when sued personally. There are obvious dangers in permitting dissatisfied litigants to embark on unrestrained collateral attack of adverse outcomes by suing the presiding Judge. However, even in relation to judicial immunity, there are powerful arguments, touched on by the majority at [168] – [174], that a relaxation of absolute in favour of qualified immunity might well suffice to achieve these goals.

While judicial immunity and barristerial immunity give rise to different accountability considerations, both have traditionally been justified by reference to the interests of finality in litigation and the avoidance of collateral attack by litigants dissatisfied with criminal or civil litigation outcomes. In *Lai v Chamberlains*,[17] the majority judges were of the view that the public interest in the finality of litigation (both criminal and civil) is sufficiently protected by applying and if necessary developing the abuse of process doctrine and related principles. Thus

[17] The majority of the Supreme Court considered in depth and ultimately rejected "floodgates"-type arguments based on these factors, considering they were insufficient reasons for declining to remove an outmoded and functionally unnecessary immunity from suit of barristers.

the interest in finality did not require any additional **blanket** protection, in the form of barristerial immunity.[18]

The majority in *Chapman* begin by noting that the law discourages re-litigation by aggrieved parties of issues determined by the Court, other than by appeal. The policy justification for this is said to be "in part concerned to protect the public who are involved, including other parties and witnesses, from the stress and expense of unwelcome continuing involvement in court processes concerning the same issues": at [182]. However, once it is accepted that the Crown (or the State) is the appropriate defendant,[19] there will ordinarily be no continuing involvement, far less expense, for "other parties and witnesses" in the case of a *Baigent* claim for judicial BORA breach. The issue in such a claim is by definition judicial conduct and alleged breach of the Bill of Rights, and the consequences of that breach. In many if not most instances, the rights and wrongs of any earlier litigation[20] giving rise to the alleged judicial BORA breach will not be directly at issue. Thus many if not most viable judicial BORA breach scenarios, Mr Chapman's claim included, would not involve collateral attack on a subsisting previous trial outcome. And protection of the legitimate interests (if any) of former parties and witnesses in any previous prosecution or litigation from abusive claims should be easily achievable, by application of the abuse of process doctrine.

The majority's postulated need to "protect the public who are involved" – as an end in itself – therefore not only resiles from the *Lai v Chamberlains* acceptance of the abuse of process doctrine as an effective and adequate safeguard of the public interest in the finality of litigation. It proceeds on major false assumptions as to the likelihood in practice that such protections will be required in cases involving claims against the State for judicial BORA breach. Moreover, the majority cite no authority in support of the contention that protection of members of the public (as distinct from the interests of individual Judges) is a dominant legal value, in the present context.

Despite these flaws in approach, the majority see protection of "those affected, who were directly involved in the earlier litigation ... from harassment by the justice system" as "perhaps

[18] See especially at [90] – [91], and more generally at [28] – [23], [59] – [61], [66], [74], [162] – [168] and [219] – [221].

[19] Although the appellant argued in *Chapman* that the Attorney-General representing the "Crown" was not an appropriate defendant in a *Baigent* claim for judicial BORA breach, that argument was unanimously rejected: see at [78] – [92] per Elias CJ, [116], [205] for the majority.

the strongest reason for the law to provide personal immunity for Judges and, if it is to be effective in achieving finality, an institutional immunity is also necessary … so that public confidence in the fair and efficient administration of justice can be retained": at [182]. Against that, one may well ask, what about the damage to public confidence when redress is refused outright for well-founded claims that justice has been administered neither fairly nor effectively?

Furthermore, it simply does not follow from the postulated need to provide personal immunity for Judges that an institutional immunity is also necessary "to be effective in achieving finality". To reason in this way is to gloss over the plain fact that a new and expanded, indeed blanket, immunity from suit is being created and made available to the State across the board, even in cases where "finality" is not under challenge nor even at issue – as in the *Chapman* case itself.

Promoting judicial independence

The majority also saw as of particular importance in the present context, the need to promote and protect judicial independence: at [184]. The majority reasoned that if "the executive government[21] became liable in damages for judicial breaches of rights, it is likely that members of the public engaged in or observing litigation would become concerned that the prospect of future litigation to this end might distract the judge from acting in an entirely independent way": at [185]. That in turn was seen as producing a "risk" that public confidence in the effective administration of the law will be eroded. Furthermore, the prospect of Judges being "pressed by the defendant government to be witnesses in proceedings brought as a result of their actions" would likewise "give rise to a perception that judges may come under pressure in their decision-making if they believe they may be questioned concerning it at a later stage", and indeed "could well also impact on the willingness of qualified lawyers to accept appointment": at [186].

As well as voicing a concern based on "likely" public perceptions producing "a risk that public confidence in the effective administration of the law will be eroded", the majority proceed to query "the impact of this on judges", opining (at [189]):

> "We do not know for sure but judges are human and some are more risk averse than others. It would be speculative to assume that there will be no impact on behaviour."

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[20] Indeed, there may well have been no earlier "litigation" as such. Search warrant cases and the facts of *Harvey v Derrick*, above, illustrate the point.

[21] However, the liability in question is not in fact that of the executive government, but of the State or Crown as an entity, as the majority itself recognised at [116] and [205].

The majority therefore postulate, if the judicial BORA breach remedy is made available, potential threats to judicial independence both as perceived by the public and as personally experienced by Judges (and also candidates for judicial office).

The majority cite no surveys or evidence to support their concerns, which with all due respect are no more than speculations so far as any public perception of the judiciary is concerned. In assessing their validity we can surely proceed on the premise that individual Judges will not knowingly or deliberately engage in BORA breach. If so, the prospect that members of the public observing litigation, even if (remarkably) imbued with the necessary legal knowledge of the existence of the potential head of liability, would in fact entertain doubts about individual judicial independence, actual or apparent, is to say the least far-fetched. Nor could any such hypothetical public doubts be regarded as reasonably apprehended. After all, the established test when addressing claims of public perception of an appearance of possible lack of judicial independence or impartiality addresses what a **fair-minded and informed** lay observer might **reasonably** apprehend in that regard. And amongst the things that the hypothetical lay observer must be taken to understand "is that a Judge is expected to be independent in decision making and has taken the judicial oath to 'do right to all manner of people after the laws and usages of New Zealand without fear or favour, affection or ill will'".[22]

Leaving aside any public perception and looking to the Judges themselves, it is surely not satisfactory to take into account mere speculation that the existence of a *Baigent* damages remedy for judicial BORA breach might influence some Judges, or deter potential candidates for judicial office. The prospect of Judges being called upon to give evidence in defence of their decisions can only be regarded as remote. Judges are not compellable witnesses.[23] In practice most judicial business is transacted in writing and/or observed by others. And ultimate correction of error committed by the individual Judge – in one way or another – simply "goes with the territory". The counter to this line of argument provided by Anderson J in his dissenting judgment[24] is surely unanswerable:

[22] *Saxmere Co Ltd v Wool Disestablishment Co Ltd* [2010] 1 NZLR 35 (SC), [3] – [8]. See also *Siemer v Heron [Recusal]* [2012] 1 NZLR 293, [14].
[23] Refer Evidence Act 2006, s 74 and Elias CJ at [36].
[24] At [224]. See also per Elias CJ at [66].

> "The proposition that judicial independence might be or might seem to be compromised, if in certain extraordinary circumstances the Crown might be held liable for judicial acts, rests on assumptions of potential or seeming timidity on the part of judges and constitutional delinquency on the part of the executive. The timidity is apprehended, not because judges could be personally liable, which they cannot be, but because it might be thought that a judge could possibly be influenced in making a decision by a wish not to upset the government or out of anxiety for his or her reputation. Having for more than 40 years seen judges in action and having been a judge for more than 24 years, I have no such apprehension. The best way of maintaining confidence in the judiciary is for it to emphasise the rights affirmed by the Bill of Rights Act."

Existing alternative remedies for judicial BORA breach

The majority judgment at [193] – [202] examines a range of available remedies for judicial BORA breach, including rights of appeal, rehearing and review. Others, such as rejection of evidence, criminal prosecution (for judicial corruption!), removal processes for serious judicial misbehaviour or incapacity and *ex gratia* compensation for wrongful conviction, are also canvassed.

It cannot be denied that alternative remedies to *Baigent* damages will frequently be available and, when available, may well in case of judicial BORA breach be more appropriate, indeed more effective and adequate.

However, in the case of executive BORA breach the fact that such alternative remedies are available and may provide an effective remedy has never told against the existence of the *Baigent* damages remedy, only its availability in the circumstances of the individual case. Under the present law as laid down in *Taunoa,* if other available remedies (whether also pursued or not) provide an effective remedy for BORA breach, the damages remedy will be declined. There is no reason in principle why the same should not be true of cases of judicial BORA breach. Indeed, international law obligations which motivated the majority in *Baigent* and *Auckland Unemployed* outright dictate that no such distinction is in principle available.

Aside from the strong statements to this effect in *Baigent* itself, the position at international law is clear cut. As a matter of international human rights law, judicial acts, both those involving individual decisions and those of a systemic nature, have the potential to give rise to liability in the event of breach of individual rights. It is settled law that the liability is that of the State Party, rather than an individual Judge or Judges. Indeed, the New Zealand State has itself been

held answerable for judicial breach of individual rights under the ICCPR, in *Communication No.1368/2005: EB v New Zealand.*[25]

The majority for their part rely on "the extensive protection against judicial [BORA] breach afforded by the justice system and in particular the current appellate process" (at [204]) to argue that the "step" of "extending" the *Baigent* damages remedy to judicial breaches is "unnecessary". Indeed, "it would be destructive of the administration of justice in New Zealand and ultimately judicial protection of human rights in our judicial system": at [205]. The majority's view that it is "unnecessary under the New Zealand Court structure" to provide such a remedy is referred to (at [206]) as the "main reason" for its conclusion. Whatever one's view of what is or is not "necessary", the claimed "destructive" consequences for the administration of justice, of the provision of a remedy which is both required and recognised at international law, appear both overstated and without foundation.

Furthermore, the majority premise that other justice system remedies and in particular appellate remedies will if pursued automatically provide an effective remedy for BORA breach is patently flawed. The facts of the *Chapman* case itself demonstrate the point. At no point did the justice system ever acknowledge, far less in any way redress, the serious breach of Mr Chapman's human rights, in particular the consequent delay and associated loss of liberty for the period when he was denied his appeal rights in accordance with law. The majority seek to meet that complaint by arguing (at [198]) that their point is not that appellate remedies "will invariably be effective". Thus there can be situations where wrongly convicted persons "may have inadequate remedies because of high policy considerations". (However, these considerations appear to be no more than the other arguments relied on by the majority, so the point is circular.)

In relation to Mr Chapman, the burden of the majority's argument appears to be that, because the system under which his denial of rights occurred was subsequently reformed, it is a sufficient answer to his claim that he was denied an effective remedy that the present system would now provide him with one.[26] That is scarcely intellectually satisfying reasoning, and certainly of no comfort to those in Mr Chapman's situation.

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[25] Human Rights Committee, 21 June 2007 at paras 9.3 and 9.4 especially. Under European Community law the leading case is *Kobler v Republic Osterreich* [2004] QB 848, [30] – [33], [39] – [43] and [48] – [50].
[26] See in particular at [195] – [197], [206].

But the plain fact of the matter is that in any event, even under the present, "improved" system, it is clear that in certain categories of case, appellate and associated remedies simply cannot provide any remedy, let alone an effective remedy, for judicial BORA breach.

The obvious categories of case where appeal or subsequent review cannot provide an effective remedy are those where a loss of liberty or damage to property or economic interests takes immediate effect. *Ex parte* orders, including search and other warrants conferring enforcement powers, are a prime example. The facts of *Harvey v Derrick*[27] illustrate one situation where appellate and review remedies completely fail to provide effective compensatory redress for judicial BORA breach. In that case the plaintiff was arrested on a warrant issued by a District Court Judge for non-payment of fines. Grossly incorrect information had been provided to the Judge and in fact the plaintiff had not been in default of his payment obligations at all. The Judge issued a warrant for the plaintiff's imprisonment without hearing from him, in breach of express statutory provisions which gave him a right to be legally represented and heard before any warrant of commitment was made. The plaintiff, an innocent man, spent 21 days in prison before his release could be secured. Plainly, the judicial order securing his subsequent release provided no recognition of the earlier breach of rights, nor did it compensate for the period of wholly unwarranted imprisonment.

Further examples may be derived from the facts of *Ryan v Martin*[28] and the House of Lords case of *Jain v Trent Strategic Health Authority*.[29] In the latter case the defendant health authority successfully applied *ex parte* for an order cancelling the plaintiffs' registration as a nursing home. The statutory regime made no provision for a prompt review of the *ex parte* order, which was much later found to have been completely unjustified. In the meantime, the plaintiffs' business had been destroyed. On common law principles, the plaintiffs were denied a remedy in negligence. They were not able to rely on the Human Rights Act 1998 (UK), which was not in force at the time. However, a number of Lords including Lord Scott opined that an entitlement to financial redress for human rights breach would have been available under the Human Rights Act, had it been in force at the time.

Thus the majority's bald claim that a *Baigent* damages remedy for judicial BORA breach is "unnecessary" is unsustainable. Furthermore, for the majority to brush away obvious and telling

[27] Above footnote 14.
[28] [1990] 2 NZLR 209.
[29] [2009] 1 AC 853.

scenarios where such a remedy is indeed necessary to provide effective redress, on the basis that they are not contending that the remedies on which they base their argument "will invariably be effective", is untenable. Once it is acknowledged that the postulated existing remedies may be inadequate in some situations, and given that the recognised (BORA) principle is that an "effective remedy" for breach is required, how can it possibly then be plausibly claimed that the BORA damages remedy is "unnecessary"?

Conclusion

As noted at the outset, a reading of the final section of the majority judgment[30] suggests that the nub of the decision is to decline to **extend** the *Baigent* damages remedy to judicial BORA breach – an exercise of judicial caution rather than creativity. However, and to the contrary, the proper characterisation of what the majority have done in *Chapman* is to create (in the words of Elias CJ[31]) "a new immunity for the State, fashioned by reference to judicial immunity". That the majority's reasoning in truth involves the creation of a new state immunity by conscious extension of (personal) judicial immunity as such is in fact recognised by the majority judges themselves, by virtue of their explicit reasoning (outlined above) in support of and adoption of the proposition that "an institutional immunity is also necessary [to] protect ... the government ...".[32]

In *Attorney-General v Leigh*,[33] a judgment delivered by a differently-constituted Supreme Court on the same day as the *Chapman* judgment, the Court unanimously and in short order rejected an attempt to extend by analogy the (statutory) absolute privilege from suit in defamation in respect of statements in the House of Representatives, to Ministerial advisors briefing Ministers to enable them to provide the House with answers to questions raised in Parliament. The availability of qualified privilege was deemed sufficient.

Absolute privilege in defamation is, like judicial immunity, an immunity from being sued. In *Leigh* the Court noted that the effect of the asserted privilege would be to deprive citizens of their common law rights. In those circumstances, it was held that the "courts will be astute to

[30] At [198], [204] – [206] in particular.
[31] At [56].
[32] See especially at [128] and [193].
[33] [2012] 2 NZLR 713.

ensure that the claimed absolute privilege is truly necessary for the proper and effective functioning of Parliament"; that is, "necessary in the sense of essential": at [7].

As in *Chapman* the Crown argued in *Leigh* that a failure to extend the immunity from suit would have a chilling effect on the governmental role in question. The Supreme Court dismissed the claimed risk as "inherently unlikely" and in any event insufficient. The Court also noted as significant the absence of material before the Court to suggest that problems for the proper functioning of Parliament would be caused in practice, noting that the postulated risk "seems more theoretical than real": at [21] – [22]. In marked contrast, the majority in *Chapman* were content to speculate.

It is settled law that immunities from suit need to be strictly confined and indeed given no wider application than is absolutely necessary.[34] The Supreme Court's approach in *Leigh* is entirely consistent with that approach, but the majority's approach in *Chapman* is in stark contrast. The majority's approach is to ask whether the damages remedy for judicial BORA breach is shown to be "necessary", rather than whether the new State immunity which their decision effectively creates is necessary (in the sense of essential) for the proper and effective functioning of the judicial system. This stands the proper enquiry on its head. All the more so, when the effect of the ruling will likely be to put New Zealand in breach of its international obligations as to the provision of an "effective remedy" for those whose human rights or freedoms are violated.

The "institutional" immunity erected by the *Chapman* decision creates a further apparent anomaly because it protects only **judicial** breach of human rights standards enshrined in the Bill of Rights. Yet if the same human rights standards are breached by a decision-maker who is as a matter of law required to "act judicially" outside of the Court system itself, the *Chapman* immunity would not appear to apply. Thus in *Vogel v Attorney-General*[35] the imposition on a sentenced prisoner by a Visiting Justice of a disciplinary punishment which exceeded the statutory maximum was held to breach s 23(5) of the Bill of Rights, requiring persons deprived of liberty to be treated with humanity and with respect for the inherent dignity of the person. The Court of Appeal directly addressed, and indeed would have contemplated, an award of

[34] Refer to Elias CJ at [57] – [58] and also *New Zealand Defence Force v Berryman* [2008] NZCA 392, [67] – [69]. In the same vein, reference may be made to the recent United Kingdom Supreme Court decision in *Jones v Kaney* [2011] 2 All ER 671, removing the traditional immunity from suit of expert witnesses in relation to their evidence given in Court.

[35] [2013] NZCA 545 (New Zealand Court of Appeal).

monetary compensation for the breach of the prisoner's rights, but concluded that this remedy was directly precluded by statute.[36]

Finally, it was and indeed remains most unfortunate that a matter of such major constitutional importance as the extent of remedies for judicial BORA breach has been determined by a divided Court, consisting of only three Permanent Judges. That arose by reason of the inability of Blanchard and Tipping JJ to sit, having regard to their previous involvement with Mr Chapman's first criminal appeal. In the event, a fundamental constitutional question with the potential to place New Zealand squarely in breach of its international human rights obligations has effectively been determined by the casting vote of an Acting Judge. Ironically, that Judge, Gault J, was the original sole dissenter in *Baigent* and *Auckland Unemployed*, and sole sceptic as to the need for the remedy for BORA breach which those cases established. Gault J's short concurring judgment will not satisfy those readers of the *Chapman* judgments who seek further persuasion as to the correctness of the position adopted by McGrath and William Young JJ. As a participant in *Baigent* and *Auckland Unemployed*, it would have been of more than passing interest to hear Gault J's own view of precisely what those cases actually decided, or (to put it another way) precisely what propositions His Honour, originally and even to this day,[37] is so steadfastly dissenting from.

Because the *Baigent* remedy is judge-made law, it inevitably falls to our Judges to determine whether it applies to their own activities when these breach the BORA. The Crown having fought so hard to establish the principle of judicial non-accountability in terms of *Baigent* which the Supreme Court has now upheld, domestically this worrisome outcome can be expected to stand. At international law in terms of this country's article 2(3) ICCPR obligations, that is by no means necessarily the final word on the matter.

Dr Rodney Harrison QC
2 May 2014

[36] At [68], [72], [75], [78] and [82].
[37] At [211] Gault J prefaces his short substantive reasons by reaffirming his *Baigent* dissent.