USING HUMAN RIGHTS LAW IN LITIGATION: REMEDIES FOR BREACH OF THE NEW ZEALAND BILL OF RIGHTS ACT 1990

THE NEW ZEALAND EXPERIENCE - RECOGNISING RIGHTS WHILE WITHHOLDING MEANINGFUL REMEDIES

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This paper addresses the topic of remedies for breach of the New Zealand Bill of Rights Act 1990 ("BORA"). It is mainly concerned with civil remedies for BORA breach. The criminal context is briefly touched on in order to provide further context relevant to the overall conclusion of the paper, summed up in its subtitle, above.

In large measure this paper is a tale of three big cases: **Baigent**,[1] **Taunoa**,[2] and **Chapman**.[3] It is also a tale of the increasing judicial conservatism at appellate level in this country, by contrast with the old-style liberals of the Cooke Court that decided **Baigent**. And perhaps ultimately, it a tale of the influence of a single Judge[4] who, having dissented outright in **Baigent**, ultimately (and indeed, from retirement) managed to have the last word.

Before proceeding any further, I must for the sake of transparency declare an indirect interest in the **Baigent** decision, and a direct interest (as counsel) in **Chapman**. You will not see my name as counsel if you refer to the law report of **Baigent**. I appeared as counsel in the companion case, **Auckland Unemployed Workers' Rights Centre v Attorney-General**, the report of which follows **Baigent** in the NZLR. The two cases were argued together and ruled on concurrently. I like to think that my arguments were influential in the **Baigent** decision itself.

Indeed, I entertain a conspiracy theory about why **Baigent** became the lead decision while my case did not. It was Lord Cooke, presumably sensing that history was being made, who when delivering judgment added the "**Baigent's Case**" title to what until then had been listed simply as "**Simpson v Attorney-General**". Obviously, a landmark decision called "**the Auckland Unemployed Workers' Case**", or "**Auckland Unemployed**", would have lacked *gravitas*. So that explains – to my satisfaction - why **Baigent** became the leading judgment.

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[1] **Simpson v Attorney-General [Baigent's Case]** [1994] 3 NZLR 667 (CA).
[2] **Taunoa v Attorney-General** [2008] 1 NZLR 429 (SC).
[3] **Attorney-General v Chapman** [2012] 1 NZLR 462 (SC).
[4] The Honourable Justice Sir Thomas Gault.

In both **Baigent** and **Auckland Unemployed**, Police entry on private property in reliance on a search warrant was in issue. In the former case the powers conferred by the warrant had arguably been abused, and in the latter case the warrant had been held invalid. Claims in tort and also for direct breach of BORA were pleaded. The Crown denied the BORA breach claim, and also relied on various statutory immunities including s 6(5) of the Crown Proceedings Act 1950. So far as the direct claims for BORA breach were concerned, their availability was upheld at Court of Appeal level (Gault J dissenting). The majority held that a claim for BORA breach lay directly against the Crown regardless of any statutory immunities which might exclude liability in tort or immunize individual police officers taking part in an unlawful search under warrant.

The Crown's argument opposing a BORA remedy – led by the then Solicitor-General, now Justice Sir John McGrath - was founded on the absence of any express provision for remedies in the Bill of Rights. The original 1985 White Paper, "A Bill of Rights for New Zealand", had included an express remedy, but this had not been carried forward into the legislation. This was said to demonstrate lack of intention to provide a damages remedy.

The majority Judges rejected that argument. They placed considerable weight on the existence of New Zealand's obligations under international human rights covenants, in particular Article 23(3) of the International Covenant on Civil and Political Rights ("ICCPR"), which reads:

> *Each State Party to the present Covenant undertakes:*
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> *(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committee by persons acting in an official capacity;*
>
> *(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;*
>
> *(c) To ensure that the competent authorities shall enforce such remedies when granted.*

Two of the Judges, Hardie Boys and McKay JJ,[5] also made reference to and relied on famous dictum of Holt CJ in **Ashby v White**[6], encapsulated in the maxim *ubi jus, ibi remedium*:

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[5] Above, 697, 717.
[6] (1703) 2 Ld Raym 938, 953 – 4; 90 ER 1188, 1189.

> *If the Plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; [for] want of right and want of remedy are reciprocal … Where a new act of parliament is made for the benefit of the subject, if a man be hindered from the enjoyment of it, he shall have an action against the person who so obstructed him.*

The majority Judges followed the leading Privy Council case of **Maharaj v Attorney-General of Trinidad and Tobago (No. 2)**.[7] **Maharaj** is instructive because it upheld a claim for compensation for loss of liberty without due process in breach of a constitutional guarantee, brought about by a judicial act, namely committal of a lawyer for contempt of court. Lord Diplock for the majority emphasised (at p 399):

> *... 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 ... 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 ... ..*

A reading of the majority judgments in **Baigent** shows that their Honours saw the existing remedy of exclusion of prosecution evidence for BORA breach as but one of the forms of "effective remedy" available. Monetary "compensation" could be another such remedy. Cooke P summed the position up as follows:[8]

> *Section 3 also makes it clear that the Bill of Rights applies to acts done by the courts. The Act is binding on us, and we would fail in our duty if we did not give an effective remedy to a person whose legislative reaffirmed rights have been infringed. In a case such as the present the only effective remedy is compensation. A mere declaration would be toothless. In other cases a mandatory remedy such as an injunction or an order for the return of property might be appropriate ...*

The **Baigent** remedy is therefore a public law remedy **against the state itself** for breach of a right affirmed in the BORA. As such, it is discretionary, by contrast with common law damages remedies.

In the wake of **Baigent**, **Martin v Tauranga District Court**[9] extended the scope of the remedy to include stay of criminal prosecutions for undue delay. This is a remedy not readily granted, but nonetheless available in an appropriate case.

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[7] [1979] AC 385.
[8] Above, 676 – 7. See also per Casey J at p 692; per Hardie Boys J at p 703; and per McKay J at p 718.
[9] [1995] 2 NZLR 419.

These can properly be seen as Judge-made remedies. Later developments have added to the mix two narrow and specific statutory remedies for BORA breach. In 2001 the Human Rights Act 1993 was amended to add a new Part 1A, dealing with "Discrimination by Government, related persons or bodies, or persons or bodies acting with legal authority".[10] In essence what Part 1A does is to import into the Human Rights Act the right to freedom from discrimination on prohibited grounds[11] affirmed by s 19 of the Bill of Rights, in relation to those "public actors" with which s 3 of the Bill of Rights deals. Part 2 of the Human Rights Act no longer applies in relation to alleged discrimination by such public actors, subject only to specified exceptions.[12]

The truly significant feature of Part 1A of the Human Rights Act is that it applies not only to executive and judicial acts and omissions, but also to "enactments"; that is, legislative acts and omissions.[13] Special provision is made in relation to remedies in cases alleging breach of Part 1A, in particular to deal with cases where the alleged breach of Part 1A involves "an enactment, or an act or omission authorised or required by enactment or otherwise by law" (s 92B). The remedies available from the Human Rights Review Tribunal in such cases include a "declaration of inconsistency".[14]

The Part 1A remedy for breach of s 19 of the Bill of Rights can be seen as of considerable constitutional significance, in that within its limits it empowers the Tribunal to declare statutory provisions to be discriminatory on one or more of the prohibited grounds. As the Part 1A remedy is being separately addressed by Peter Barnett, I say no more about it.

The second of the two statutory remedies for BORA breach is s 30 of the Evidence Act 2006 which deals with the exclusion of "improperly obtained evidence". This provision is discussed later.

By the mid 1990s, it seemed that a lasting legacy of the Cooke-era Court of Appeal jurisprudence would be an over-arching **Baigent** remedy for BORA breach, having as its

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[10] For detailed discussion, refer to my article "The New Public Law: A New Zealand Perspective" (2003) 14 Public Law Review 41, 42 – 45.

[11] That is, those contained in s 21 of the Human Rights Act. These are sex; marital status; religious belief; ethical belief; colour; race; ethnic or national origins; disability; age; political opinion; employment status; family status; and sexual orientation.

[12] See Human Rights Act, s 21A; also section 20J(3). The exceptions in respect of which Part II of the Human Rights Act will apply to a public actor are ss 21 – 35 (dealing with discrimination in employment); ss 61 – 64 (relating to racial disharmony and social harassment) and s 66 (relating to "victimisation"). See also ss 20J(2) and 21A(1).

[13] Refer to the definition of "act" in 2 and s 20L. "Enactment" is not defined in the Human Rights Act, but the s 29, Interpretation Act 1999 definitions of "enactment" and "regulations" will apply.

[14] Refer to ss 92J and 92K.

purpose in both the civil and criminal spheres the provision of an "effective" and thus substantive remediation of the infringement of BORA right - as against merely declaring, without more, that a breach had occurred. This "rights-centred" approach, as it was often then called, reflected the unique status of the BORA and the significant international obligations which lay behind it. However, the prospect of any such legacy proved both misconceived and relatively short-lived, in both the civil and criminal spheres. That leads in to a necessarily extended analysis of both **Taunoa** and **Chapman**.

CIVIL REMEDIES FOR BORA BREACH POST-TAUNOA

Taunoa: Introduction

Taunoa occupies 124 pages of law report. I have analysed it at length elsewhere.[15] Briefly, **Taunoa** concerned a claim by five prisoners who sought and had been awarded compensation for their treatment under a regime operated by the Department of Corrections between 1998 and 2004 to manage very difficult and dangerous prisoners. This was initially known as the Behaviour Modification Regime and later as the Behaviour Management Regime ("BMR"). Its key features included the following:

- Segregation of the prisoners for lengthy periods involving "the substantial isolation of each prisoner in a separate cell for all but one or two hours of the day, with loss of conditions", effectively constituting solitary confinement.

- During the first and most severe of the BMR's six phases, only one hour per day allowed outside of the relatively small individual prison cell, and a denial of the ability to take exercise in the yard, progressing ultimately in the final phases to an entitlement to two yards of two hours per week.

- Loss of numerous privileges including smoking, wearing of personal clothes, television, hobbies, personal radios and stereos, educational programmes, severe limitations on access to telephones, overall resulting in the withdrawal from the prisoner of almost every form of stimulating activity ordinarily made available to sentenced prisoners.

[15] Refer to my paper, "Remedies for Breach of the BORA: Backsliding on **Baigent**", NZLS Intensive, "Using the Bill of Rights in Civil and Criminal Litigation", July 2008.

- The prisoners were continuously subjected to routine and generally unnecessary strip-searching, in breach of the requirements of s 21K(4) of the Penal Institutions Act.

- Prisoners were deprived of both institutional safeguards and natural justice in relation to their placement on the BMR and also their treatment while under it, in breach of the Penal Institutions Regulations and their entitlement to natural justice in accordance with s 27(1) BORA. This included an absence of medical and psychological assessment and screening to determine suitability of prisoners to be subjected to the BMR and an absence of monitoring of the health of prisoners on the regime by a medical officer, contrary to the Penal Institutions Regulations and the United Nations Standard Minimum Rules for the Treatment of Prisoners.

The BMR was held to have been illegal in terms of the Penal Institutions Act and Regulations and to have breached natural justice by denying disciplinary due process to the prisoners. The majority of the Supreme Court (Elias CJ dissenting) ultimately held that it breached s 23(5) BORA which provides that everyone deprived of liberty shall be treated with humanity and respect for the inherent dignity of the person; but did not breach s 9, the right not to be subjected to torture or cruel, degrading, or disproportionately severe treatment or punishment. I have elsewhere criticised that conclusion,[16] but do not need to dwell on it in the present context.

The judgments in **Taunoa** separately discuss the principles governing the **Baigent** remedy and the appropriate level of damages award in each individual case. The Crown had argued by way of cross-appeal that a declaration of breach (of s 23(5)) was all that was needed to vindicate the breach of rights. The Court was unanimous in rejecting that contention, but ultimately differed as between the members over the appropriate approach to and quantum of an award in the individual case.

Taunoa: Re-writing the Principles Governing the Baigent Remedy

The leading judgment dealing with the principles governing the **Baigent** remedy is that of Blanchard J, with whom Tipping, McGrath and Henry JJ expressly concurred.[17] Blanchard J begins by noting that the Crown had "realistically" not argued that the "landmark decision" in

[16] See footnote 15 above.
[17] Para [299] per Tipping J; para [373] per McGrath J; para [385] per Henry J.

Baigent was wrong.[18] Rather, the argument had been directed to a need for consideration of the circumstances in which "the remedy which has come to be known as **Baigent** damages"[19] should be awarded and the quantum of awards fixed.

Blanchard J begins by engaging in an extended review of the **Baigent** judgments and the subsequent relatively few New Zealand decisions, followed by an examination of public law damages for breach of human rights in other common law jurisdictions and international human rights bodies. His Honour noted that the weight of authority was to the effect that damages for human rights breaches are a subsidiary remedy, not approached or awarded in the same way as private law claims.[20]

Following upon this analysis, Blanchard J dealt at length with the question of the "appropriate remedy" in the following terms (emphasis added):

> *[253] The Court **must provide an effective remedy**. The primary task is to **find overall a remedy or set of remedies which is sufficient to deter any repetition** by agents of the state **and to vindicate the breach** of the right in question.*
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> ...
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> *[255] **In undertaking its task the Court is not looking to punish** the state or its officials. For some breaches, however, unless there is a monetary award there will be insufficient vindication and the victim will rightly be left with a feeling of injustice. In each case the Court may exercise its discretion to direct payment of a sum of monetary compensation which will further mark the breach and provide a degree of solace to the victim which would not be achieved by a declaration or other remedy alone. **This is not done because a declaration is toothless; it can be expected to be salutary**, **effectively requiring compliance for the future** and standing as a warning of the potentially more dire consequences of non-compliance. But, by itself or even with other remedies, a declaration may not adequately recognise and address the affront to the victim.*
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> …
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> *[256] **It may be entirely unnecessary or inappropriate to award damages if the breach is relatively quite minor or the right is of a kind which is appropriately vindicated by non-monetary means**, such as through the exclusion of improperly obtained evidence at a criminal trial. **It may also be unnecessary if a damages award under another cause of action has adequately compensated the victim**, especially so where that award has a component of aggravated damages. In such a case there is*

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[18] Para [231].

[19] In **Baigent**, Cooke P, Casey J and Hardie Boys J all described the monetary remedy as involving "compensation" rather than "damages". This was consistent with the terminology used in **Maharaj**, above. The **Taunoa** judgments generally refer (without elaboration) to damages rather than compensation. In law, there is a difference between the two. See the discussion in Harrison: The Remedial Jurisdiction at p 425 – 6. One ramification, addressed by Cooke P (at p 677 – 8; Hardie Boys J concurring), is that if the monetary remedy is regarded as "compensation", it can be characterised as not involving "pecuniary damages" in terms of section 19A of the Judicature Act and thus as not carrying a **right** to trial by civil jury. See further Butler & Butler, p 1005 – 6. Whatever the reasons for the change in terminology, the **Baigent** monetary remedy will for the sake of conformity be referred to as "damages" from this point on.

[20] Para [243].

nothing to be gained by way of vindication by adding a nominal sum for the Bill of Rights Act breach.

[257] ***In other cases****, however, non-Bill of Rights Act damages may not be available, since* ***the only actionable wrong done to the plaintiff is the Bill of Rights Act breach. Then a restrained award of damages may be required if without them other Bill of Rights Act remedies will not provide an effective remedy.***

[258] ***When, therefore, a Court concludes that the plaintiff's right as guaranteed by the Bill of Rights Act has been infringed and turns to the question of remedy, it must begin by considering the non-monetary relief which should be given, and having done so it should ask whether that is enough to redress the breach*** *and the consequent injury to the rights of the plaintiff in the particular circumstances,* ***taking into account any non-Bill of Rights Act damages which are concurrently being awarded to the plaintiff. It is only if the Court concludes that just satisfaction is not thereby being achieved that it should consider an award of Bill of Rights Act damages. When it does address them, it should not proceed on the basis of any equivalence with the quantum of awards in tort****. In this respect I would adopt the approach in Greenfield and Fose. The sum chosen must, however, be enough to provide an incentive to the defendant and other state agencies not to repeat the infringing conduct and also to ensure that the plaintiff does not reasonably feel that the award is trivialising of the breach.*

[259] But equally, it is to be remembered that ***an award of Bill of Rights Act damages does not perform the same economic or legal function as common law damages or equitable compensation; nor should it be allowed to perform the function of filling perceived gaps in the coverage of the general law, notably in this country in the area of personal injury. In public law, making amends to a victim is generally a secondary or subsidiary function****. It is usually less important than bringing the infringing conduct to an end and ensuring future compliance with the law by governmental agencies and officials, which is the primary function of public law. Thus the award of public law damages is normally more to mark society's disapproval of official conduct than it is to compensate for hurt to personal feelings.*

[260] The fixing of levels of Bill of Rights Act damages is far from an exact science. There is no scale of damages to which a Judge can resort. ***A figure must be chosen with which responsible members of New Zealand society will feel comfortable taking into account all the circumstances****, including the nature of the infringed right, the nature of the breach, the effect on the victim and the other redress which has been ordered.*

...

[261] In determining whether a measure of damages should form part of the remedy in a particular case the Court should begin with the nature of the right and the nature of the breach. ***Some rights are of a kind where a breach is unlikely to warrant recognition in monetary terms. Breaches of natural justice, for example, are likely to be better addressed by a traditional public law means****, such as ordering the proceeding in question to be reheard. But breaches of some rights of a very different character will inevitably demand a response which must include an award of damages whether in tort or under the Bill of Rights Act.*

...

> *[262] **The level of the monetary sum should also reflect the other ways in which the state has acknowledged the wrongdoing:** whether, and with what speed, it has brought to an end the wrongful conduct and put in place measures to prevent reoccurrence; and whether it has publicly apologised to the victim in appropriate terms.*
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> *...*
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> *[264] The fixing of the level of the monetary sanction for an individual plaintiff is the most difficult issue. The amount should not be so small as to seem derisory. **An award of nominal damages benefits neither the victim nor society**. It may appear to trivialise the breach. And if damages are customarily set at very low amounts those who have suffered from a breach of their rights may not consider it worth their while undergoing the stress, and perhaps also meeting the cost, of pursuing a claim.*
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> *...*
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> *[265] On the other hand, as can be seen from the foregoing survey of the authorities, **internationally awards of damages of this kind do not generally approach the level of damages in tort and can best be described as moderate in amount. That, it seems to me, is the right approach in New Zealand, although obviously we should judge what is moderate according to New Zealand conditions.***

Various points arise out of this extended analysis. First, the **Baigent** requirement of an "effective remedy", drawn from Article 23(3) of the ICCPR, is reaffirmed. The reference to an "overall … remedy or set of remedies" shows that the flexibility of response which the majority Judges in **Baigent** envisaged is also to be retained. To the requirement that the **Baigent** remedy in the individual case be both appropriate and effective, Tipping and McGrath JJ would each add the requirement that the remedy be a "proportionate response" to the breach in question.[21]

Secondly, the status of the remedy of declaration of breach of right as a sufficient remedy in and of itself is significantly upgraded. The **Baigent** emphasis on monetary compensation as the only "effective remedy" in cases lacking a criminal law context - with Cooke P in particular dismissing a "mere declaration [as] toothless" – is explicitly rejected. Instead, a declaration of breach alone "can be expected to be salutary, effectively requiring compliance for the future".[22]

Thirdly, the awarding of damages can be said to have ceased to be a primary remedy for breach of the BORA. It has in effect become a form of discretionary ancillary relief. This necessarily follows from Blanchard J's injunction to consider first what non-monetary relief should be given; then ask whether that is enough to redress the breach and consequent injury

[21] See paras [300], [367]. This is consistent with earlier authority.
[22] See also paras [300] per Tipping J and [368] per McGrath J.

to the rights of the plaintiff; and only if that is not the case – if "just satisfaction is not thereby being achieved" – is the Court to consider an award of damages for the breach of right. A sequential approach is also at least implicit in the judgments of Tipping and McGrath JJ.[23] A secondary status is also inherent in the "mop-up" role now assigned for BORA damages. An award is only to be contemplated after taking into account any other private law damages concurrently being awarded to the plaintiff.[24]

Fourthly, the discussion at para [261] set out above suggests that we may ultimately end up with the rights in the BORA divided into those breach of which may result in a damages award, and those which will not. Blanchard J's statement that "some rights are of a kind where a breach is unlikely to warrant recognition in monetary terms" is a step in that direction. That is in contrast with the **Baigent** majority judgments, which regarded compensation for breach as an appropriate primary remedy, of general application even if not inevitably granted. Arguably anticipating the **Chapman** ruling, breaches of natural justice were specifically mentioned by Blanchard J as "likely to be better addressed by a traditional public law means" such as a rehearing of the proceeding.

Fifthly, an award of damages is virtually ruled out in cases where the breach "is relatively quite minor" or where "the right is of a kind which is appropriately vindicated by non-monetary means". Even where the breach is sufficiently serious, the majority see such awards as needing in principle to be "restrained" or "moderate", judged by New Zealand standards.[25] Ominously, Blanchard J concludes by referring to Cooke P's comment in **Baigent** that, for a brief but serious invasion of the plaintiff's rights with no physical harm or lasting consequences, "an award of somewhat less than $70,000 would be sufficient vindication". His Honour rejects this as "being pitched far too high for the relatively transitory, though deliberate breach of Mrs Baigent's rights".[26] Even more ominously, Blanchard J describes the awards (of $16,000 and $18,000) in **Dunlea v Attorney-General**[27] as being "too high as public law damages, although they may have been justified in a tort claim".[28]

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[23] See paras [300], [305]; [386], [372].
[24] On the inter-relationship between BORA and common law damages, see also paras [304], [318], [323] per Tipping J.
[25] Contrast paras [318] – [319] per Tipping J; [370] per McGrath J. Elias CJ at [109] did not consider that the adjective "moderate" assisted the inquiry, pointing to Privy Council authority recognising that substantial damages may be necessary in particular circumstances.
[26] See para [274]; also para [301] per Tipping J.
[27] [2000] 3 NZLR 136.
[28] See further para [240] per Blanchard J, where he describes the awards as being for the unlawful detention of two men by the Police for about 15 minutes, and for an unlawful search of one of them.

This restrictive approach to quantum is bolstered by two *ex cathedra* statements that "[i]n public law damages cases, "making amends to a victim is generally a secondary or subsidiary function", and that "the award of public law damages is normally more to mark society's disapproval of official conduct than it is to compensate for hurt to personal feelings". This is stated by comparison with tort law, where the plaintiff/victim is the focus.[29]

However, this approach entirely begs the question why victims of human rights abuses should be in a less favoured position than other wronged plaintiffs. The contrary argument is at least equally tenable.[30] At the very least, as articulated in the previous New Zealand authorities, any analogous entitlement by way of damages in tort could and should be seen as providing an appropriate starting point.[31] The majority's approach therefore represents a significant shift in approach, away from providing "effective" compensation **for the victim of the breach of human rights**. In other words, meeting society's perceived needs arising out of the breach and its consequences is now given priority, or at any rate significantly greater prominence.

The sixth point is directly related to that just made. It seems that – as with the prior assessment whether the s 9 right has been breached – at least some members of the Court felt unable to fix a **Baigent** damages award without first achieving some (presumably innate) sense of inner satisfaction that it would meet with society's approval. The chosen figure is to be one "with which responsible members of New Zealand society will feel comfortable taking into account all the circumstances". Why there should be any need for a touchstone of society's approval when it comes to human rights and their vindication, but no such need when awarding damages for (say) a breach of contract, is not made clear.[32] Obviously, the days of the maxim *fiat justitia ruat caelum*[33] are long gone.

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[29] See also paras [318] per Tipping J; [385] per Henry J.

[30] As argued by Thomas J in his dissenting judgment in **Dunlea v Attorney-General**, above, [66] - [67], [71] – [72], [75], [80] – [83].

[31] Refer Butler & Butler, p 987 – 91.

[32] Butler & Butler (Dr Andrew and Dr Petra Butler, "The New Zealand Bill of Rights Act: A Commentary" (2005)) describe at p 1014 the "political storm" raised by the awards in **Taunoa** at first instance, culminating in the passage of the Prisoners' and Victims' Claims Act 2005 (discussed at p 1001). The majority judges in **Taunoa** can scarcely have been unaware of the outraged public and political reaction to the first instance awards.

[33] Translated as "Let justice be done, though the heavens fall". Lord Mansfield used the maxim in the course of his celebrated decision in **Somersett's Case**, holding slavery could not be countenanced under English law.

Finally, it would seem that the traditional heads of compensatory damages at common law may be recoverable by way of **Baigent** remedy, although this remains a matter of the Court's discretion.[34] Tipping J at para [322] states the position in the following terms:

> *Everything relevant to compensating for what the plaintiff has suffered as a result of the breach is potentially available here. Economic loss clearly qualifies, as does compensation for non-economic or intangible damage or detriment. Nothing should be allowed under any head which is covered by the Accident Compensation legislation,*[35] *but otherwise compensation for all loss or damage, direct or indirect, is potentially capable of playing a part in the remedial package.*

Taunoa: Fixing the Level of Individual Awards

The final aspect of the **Taunoa** appeals concerned the appeal and cross-appeal relating to quantum of individual awards. The Chief Justice for her part and in company with the Court of Appeal would not have interfered with the individual awards made by the High Court. Indeed, she was of the view that in three of the five cases, the awards were on the conservative side. The remaining four Judges were in agreement that each of the four damages awards which were the subject of appeal to the Supreme Court was excessive and required to be reduced, but in some cases differed amongst themselves as to the extent of the reduction. Under this scenario the higher figures, when taken together with Elias CJ's support for the original awards, carried the day.[36]

The following table summarises the ultimate position in respect of the five prisoners:

Prisoner	**Circumstances**	**Original Award**	**Ultimate Outcome/Award**
Gunbie	6.5 weeks BMR	$2,000	Left untouched/$2,000
Kidman	3 months BMR	$8,000	Reduced to $4,000 (unanimous majority decision)
Tofts	3 months BMR + psychiatric injury	$25,000	No Crown appeal/not increased
Robinson	12 months BMR	$40,000	Reduced by Blanchard and McGrath JJ to $20,000 (Tipping and Henry JJ would have reduced to $15,000)

[34] See paras [255] per Blanchard J; [301], [303], [318], [323] per Tipping J; [366] per McGrath J.
[35] Tipping J footnotes **Wilding v Attorney-General** [2003] 3 NZLR 787 (CA) at [14] – [18]. See also **Falwasser v Attorney-General** [2010] NZAR 445 at [79] – [97].
[36] Refer paras [4], [10] and [118] per Elias CJ.

Taunoa	32 months BMR	$65,000	Reduced by Blanchard and McGrath JJ to $35,000 (Tipping and Henry JJ would have reduced to $25,000)

Overall, under the majority approach to assessment of the appropriate damages awards, the Crown received brownie points both for not actually intending to cause the prisoners harm – the utter recklessness of Corrections as to that likely consequence apparently being treated as of no significance – and for putting a stop, when faced with the High Court outcome, to an illegal regime involving serious violation of prisoners' human rights which it had operated over a six year period. By contrast, the quantum of the prisoners' awards was diminished, because they **succeeded** in obtaining a declaration of breach of their rights, and because as prisoners, they were due some serious privation anyway.

This overall outcome and the levels of individual award tabled above were presumably seen by Blanchard, Tipping, McGrath and Henry JJ as involving (to paraphrase Blanchard J) "moderate" awards, not "so small as to seem derisory", but nonetheless at levels with which responsible members of our society would "feel comfortable".

A View from the Real World

However, those of us who as litigators contemplate seeking redress on behalf of clients wronged by conduct in breach of the BORA must operate in the real world of limited litigation budgets and client legal aid repayment obligations. In that context, the irresistible conclusion is that the sums ultimately awarded are so small as to be derisory. Major litigation against the Crown, with all the resources of the state financial and otherwise at its disposal, cannot responsibly be run in pursuit of such pathetic stakes.

There is moreover, I suggest, a double standard operating here. No one suggests that a contracting party damaged by a breach of contract should rest content with a declaration to that effect, or even with a mandatory order which brings the breach to an end. The financial losses suffered during the period of contractual breach remain recoverable in law, even if the defaulting party resumes performance of the contract. No one would argue that an apology mitigates or reduces an award of damages in a commercial setting. So why should it when human rights are at stake? Surely it is not too cynical to suggest that, like most tort (or contract) claimants, what the wronged prisoners most wanted out of their litigation was money in the hand representing respectable compensation for their ordeals. While (to quote

Mick Jagger) "you can't always get what you want", particularly in litigation, the narrow and niggardly approach adopted by the majority Judges in **Taunoa** both devalues human rights and at the same time disincentivises litigation seeking to enforce them.

Nor can the overall outcome in **Taunoa** be rationalised or restrictively distinguished for the future on the basis that it involved claims by hardcore sentenced prisoners – a class inherently unlikely to qualify as the beneficiaries of judicial munificence – rather than law-abiding citizens. The injunction that damages awards be "moderate", coupled with the criticism in the leading judgment of Blanchard J of previous awards to law-abiding citizens in the low tens of thousands, virtually demands that trial Judges make awards in the $0 - $10,000 range for the usual run of cases involving breach of human rights which can be expected to arise in this country.

The **Taunoa** combination of an emphasis on declaration as the primary remedy coupled with the insistence that damages awards be "moderate" plainly has the potential to render pursuit of **Baigent** claims uneconomic. This is to some extent recognised by Tipping J,[37] who held out the prospect that indemnity costs might be awarded in favour of a successful plaintiff, as part of the provision of an "effective remedy".

However, holding out the possibility that indemnity costs might ultimately be awarded to victims of BORA breach does no more than convey the message that they may graciously be permitted to "break even", in the event that their claim succeeds but is held not to merit an award of damages.

At the end of the day, as already observed, the Judges in **Taunoa** were faced with a choice between competing approaches to assessment of **Baigent** damages awards. **Baigent** itself can properly be read as encouraging realistic levels of compensation for Bill of Rights breach. The approach of Cooke P in **Baigent** and the dissenting judgment of Thomas J in **Dunlea v Attorney-General**[38] had been referred to with approval in a recent Privy Council judgment.[39] Rather than adopt that line of authority, the Court in **Taunoa** (other than Elias CJ) opted to follow English, Canadian and South African decisions which relegated the damages remedy to a secondary and ineffectual role. While that may conceivably be a tenable approach in jurisdictions where meaningful tort awards can be obtained – particularly

[37] At [334]; see also Blanchard J at [249] and McGrath J at [368].
[38] Above, footnote 30.
[39] See **Taunoa** paras [241], [249] – [250] per Blanchard J. See also para [109] per Elias CJ; **Attorney-General (Trinidad and Tobago) v Ramanoop** [2006] 1 AC 328, [18] – [19]; **Merson v Cartwright** [2005] All ER (D) 411, [18].

for acts of official brutality causing physical injury – this is not true of New Zealand. That unique feature of our legal system should have encouraged the Supreme Court to develop the remedy of compensatory damages for breach of the BORA,[40] rather than emasculate it.

Given the very clear message emanating from **Taunoa**, it is not surprising that subsequent BORA damages awards have been few and meagre.[41] There appear to be only two cases at High Court level where damages for BORA breach have been awarded post-**Taunoa**. In **Falwasser v Attorney-General**,[42] the plaintiff had had pepper spray used on him by two police officers on 65 occasions over a 20 minute period, while in an (already) disturbed state and securely locked in a police cell. Damages of $30,000 were awarded for breach of his s 23(5) BORA right to be treated with humanity and respect while deprived of liberty. In **Van Essen v Attorney-General**,[43] the plaintiff was awarded $10,000 damages for unreasonable search of his properties in breach of his s 21 BORA rights. In each case the Crown strongly argued that a declaration of breach alone should be a sufficient "effective remedy".

THE CHAPMAN DECISION: LOPPING OFF THE JUDICIAL BRANCH FROM THE BAIGENT REMEDY

In **Chapman**, a divided Supreme Court ruled out all prospect of a **Baigent** damages remedy for breach of the BORA by the judicial branch ("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[44] and the trend of both judicial and academic authority, since **Baigent**.

Background to the Chapman case

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. But a more accurate assessment is that the majority decision creates a radical and unnecessary extension of common law judicial immunity (that of an individual Judge, when personally sued) to cover State liability for human rights breach. This

[40] Contrast **Donselaar v Donselaar** [1982] 1 NZLR 97, 107, 116.
[41] It would appear that most frequently, BORA damages claims are brought by sentenced prisoners, and run foul of the Prisoners' and Victims' Claims Act 2005. See for example **Vogel v Attorney-General** (discussed at call to footnote 73, below); **Reekie v Attorney-General** [2012] NZHC 1867 (and see now **Reekie v Attorney-General** [2014] NZSC 63); and **Forrest v Attorney-General** [2012] NZCA 125 ($600 damages awarded for two strip searches of prisoner, subject however to the operation of the Act).
[42] Above footnote 35.
[43] [2013] NZHC 917.
[44] [2010] 2 NZLR 317.

extension of immunity for the direct benefit of the New Zealand State – and the indirect benefit of the judiciary - 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**, but also directly applicable international human rights obligation and jurisprudence.

Recording again my continuing 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.[45] 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".[46]

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

[45] **R v Taito** [2003] 3 NZLR 577 (PC) and see also **R v Smith** [2003] 3 NZLR 617 (CA).
[46] See further per Elias CJ at [15] – [19].

aside, and he sought no redress so far as the process which had led to his original conviction was concerned.

All that said, **Baigent** and indeed the leading Privy Council decision of **Maharaj**[47] 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 main focus of this paper will be 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 relevantly decide?

At the start of their discussion of this issue, the majority in **Chapman** acknowledge the need to identify what was decided in both **Baigent** and **Auckland Unemployed**, and indeed "the associated jurisprudence". The emphatic reliance by the majority in **Baigent** on Article 2(3) of the ICCPR has already been noted, as has the majority's express approval of the passage from the judgment in Lord Diplock in **Maharaj** concerning State liability for judicial breaches of rights quoted earlier in this paper.

As we have seen, **Baigent** 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

[47] **Maharaj v Attorney-General of Trinidad and Tobago (No 2)**, above.

warrant issued by a District Court Deputy Registrar (unarguably a judicial function). The majority selectively quote only the final sentence of the following explicit passage from the judgment of Cooke P (emphasis added):[48]

> *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.[49]

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 damages 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 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

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[48] At p 724. 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**.

[49] See per Elias CJ at [22] – [23], [33] – [34].

J.[50] 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.[51]

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.[52] 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.[53] 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 [54]- 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 entitled to determine the issues in terms of fundamental principle. The arguments in favour of 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.

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[50] 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.
[51] 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).
[52] **Harvey v Derrick** [1997] 1 NZLR 314 (CA).
[53] Law Commission Report, "Crown Liability and Judicial Immunity – a response to **Baigent's** Case and **Harvey v Derrick**" (May 1997).
[54] 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.

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**,[55] the majority Supreme Court 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 the interest in finality did not require any additional **blanket** protection, in the form of barristerial immunity.[56]

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

[55] 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.

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

Crown (or the State) is the appropriate defendant,[57] 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 BORA, and the consequences of that breach. In many if not most instances, the rights and wrongs of any earlier litigation[58] 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 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

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[57] 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.

[58] 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.

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[59] 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.*

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.

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[59] 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].

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'".[60]

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.[61] 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[62] is surely unanswerable:

> *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

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[60] **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].
[61] Refer Evidence Act 2006, s 74 and Elias CJ at [36].
[62] At [224]. See also per Elias CJ at [66].

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**.[63]

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.

[63] Human Rights Committee, 21 June 2007 at paras 9.3 and 9.4 especially. See further, Human Rights Committee, General Comment No. 32 (CCBR/G/GC/32) of 23 August 2007, paras 2 – 3, 45, 48, 49 (Article 14(5)). Under European Community law the leading cases are **Kobler v Republic Osterreich** [2004] QB 848, [30] – [33], [39] – [43] and [48] – [50] (European Court of Justice) and **El-Masri v The Former Yugoslav Republic of Macedonia** Application No 39630/09, Judgment 13 December 2012 at [251]ff, especially [255] – [261] (European Court of Human Rights).

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.[64] That is scarcely intellectually satisfying reasoning, and certainly of no comfort to those in Mr Chapman's situation.

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**[65] 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

[64] See in particular at [195] – [197], [206].
[65] Above footnote 52.

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**[66] and the House of Lords case of **Jain v Trent Strategic Health Authority**.[67] 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 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"?

As already noted, a reading of the final section of the majority judgment[68] 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

[66] [1990] 2 NZLR 209.
[67] [2009] 1 AC 853.
[68] At [198], [204] – [206] in particular.

words of Elias CJ[69]) "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 ...".[70]

In **Attorney-General v Leigh**,[71] 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 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.[72] The Supreme Court's approach in **Leigh** is entirely consistent with that approach, but the majority's approach in **Chapman** is in stark

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[69] At [56].
[70] See especially at [128] and [193].
[71] [2012] 2 NZLR 713.
[72] 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.

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**[73] 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 monetary compensation for the breach of the prisoner's rights, but concluded that this remedy was directly precluded by statute.[74]

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

[73] [2013] NZCA 545, leave to appeal refused [2014] NZSC 5.
[74] At [68], [72], [75], [78] and [82].

precisely what those cases actually decided, or (to put it another way) precisely what propositions His Honour, originally and even to this day,[75] 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. [76] At international law, in terms of this country's obligations under the ICCPR, the final word on the matter is yet to be delivered.[77]

REMEDIES (OTHER THAN DAMAGES) FOR BREACH OF THE BILL OF RIGHTS IN A CIVIL LAW CONTEXT

This paper is not concerned with utilisation of BORA-based arguments in a statutory interpretation context or in a judicial review context. Other contributors address these issues. The inquiry at this point concerns the potential in civil cases for the grant of a **Baigent** remedy other than damages, in civil litigation generally. By definition, we are here talking about civil litigation against or at any rate in relation to a public actor bound by section 3 to observe the BORA.[78]

Procedural Issues

As a preliminary point, it should not be assumed in procedural terms that a **Baigent** remedy can simply be plucked out of the air in the course of some existing proceeding, be it civil or criminal in nature. In **Belcher v Chief Executive of the Department of Corrections**,[79] the Court of Appeal had earlier ruled in the course of an appeal against an extended supervision order made by the High Court under the Parole Act 2002 that it lacked jurisdiction to make a declaration of inconsistency in those proceedings. Distinguishing an earlier interlocutory ruling given in the **Taunoa** litigation,[80] the Supreme Court stated in **Belcher** (at para [8]):

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[75] At [211] Gault J prefaces his short substantive reasons by reaffirming his **Baigent** dissent.
[76] For a trenchant criticism of the majority decision, refer to P A Joseph "Constitutional Law" [2012] NZ Law Review 515 at 519 – 527.
[77] Mr Chapman has made a formal complaint to the Human Rights Committee under the Optional Protocol to the ICCPR, to which the New Zealand Government is yet to respond.
[78] It remains an unresolved question whether the only possible defendant to a **Baigent** claim is the Crown rather than the individual public actor concerned. For the present, it seems that the Crown in the person of the Attorney-General is a necessary, but perhaps not the sole, defendant in civil proceedings. See the author's chapter on The Remedial Jurisdiction for Breach of the Bill of Rights in "Rights and Freedoms", Eds Huscroft & Rishworth, Brookers 1995, p 416 – 421; **Innes v Wong (No. 2)** (1996) 4 HRNZ 247; Butler & Butler p 1001 – 4.
[79] [2007] NZSC 54.
[80] **Taunoa v Attorney-General** [2006] NZSC 95.

> *In the present proceeding the issue, namely the application of the relevant aspect of the Parole Act to Mr Belcher's circumstances, was before the High Court. Relief in the form of a declaration [of inconsistency] could, if otherwise available, have been granted by that Court and accordingly the Court of Appeal was not precluded from considering that question. It would not thereby have been exercising an originating jurisdiction.*

The lesson to be drawn from these cases is that a **Baigent** relief claim where viable should be advanced, and if possible expressly pleaded, at first instance. Even where the appellate court has power to amend the original pleadings in the course of an appeal, there is always a very real prospect that amendment will not be permitted.[81]

A possible additional hurdle for BORA breach claims has been introduced by an amendment in July 2013 to the State Sector Act 1988. Section 86(1) now reads:

> *Public Service chief executives and employees are immune from liability in civil proceedings for good-faith actions or omissions in pursuance or intended pursuance of their duties, functions or powers.*

Section 86(2) refers the reader to s 6 of the Crown Proceedings Act 1950, sub-section (4A) of which now reads:

> *Despite certain Crown servants being immune from liability under section 86 of the State Sector Act 1988, -*
>
> *(a) a court may find the Crown itself liable in tort in respect of the actions or omissions of those servants; and*
>
> *(b) for the purpose of determining whether the Crown is so liable, the court must disregard the immunity in section 36.*

These provisions are briefly discussed in a recent Law Commission Issues Paper.[82] The problem is that s 86(1) purports on its face to confer a blanket immunity "from liability in civil proceedings" when the acts or omissions have been taken in good faith. By contrast, the form of Crown liability preserved by s 6(4A) of the Crown Proceedings Act relates only to Crown liability "in tort". As we have seen, BORA damages liability is not a liability in tort. Presumably no narrowing of the current scope of **direct** Crown liability for BORA breach was intended, but it remains to be seen whether one has indirectly been created.

Prohibitory and Mandatory Orders

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[81] As indeed occurred in **Taunoa**, where the appellants attempted to seek a different form of relief and were not allowed to do so.

[82] Law Commission, "A New Crown Civil Proceedings Act for New Zealand", April 2014, Issues Paper 35 at p 26 – 27.

Following **Taunoa**, declaration of breach stands as the primary **Baigent** remedy. In addition to damages, Cooke P in **Baigent** referred to the possibility that "a mandatory remedy such as an injunction or an order for return of property might be appropriate".[83] However, the occasions on which a mandatory or prohibitory order is likely to be granted will be few, given the faith expressed by the **Taunoa** judges in the efficacy of declaration as a remedy.[84]

Declarations of Inconsistency

A specific form of declaratory relief, which as the law stands is available in principle, is the "declaration of inconsistency". The postulated effect of a declaration of inconsistency is to pronounce that a particular statutory provision, properly interpreted, is inconsistent with a specific BORA right or rights. It may therefore be conceived of as a backstop remedy, sought against the possibility that a statutory provision is held to take effect notwithstanding inconsistency with the BORA.[85]

In a civil context at any rate, relief by way of a declaration of inconsistency should be expressly pleaded (usually in the alternative to any other relief sought). However, even where (or if) the remedy is available in principle, the preferred approach is to identify the inconsistency (if any) in the Court's reasons for judgment, without going so far as to make a formal declaration to that effect.[86]

The curial declaration of inconsistency is yet another form of relief for BORA breach where initial judicial enthusiasm for a specific remedy has subsequently cooled. In **Moonen v Film and Literature Board of Review**,[87] the Court of Appeal considered that s 5 of the BORA "necessarily involves the Court having the power, and on [appropriate] occasions the duty, to indicate that although a statutory provision must be enforced according to its proper meaning, it is inconsistent with the Bill of Rights, in that it constitutes an unreasonable limitation on the relevant right …". In **R v Poumako**,[88] the Court was so concerned about provisions of the Criminal Justice Act 1985 which increased maximum sentences of imprisonment in home invasion murder cases with apparent retrospective effect that a declaration of inconsistency

[83] Above, [676]. For discussion of the restriction on injunctions against the Crown imposed by section 17 of the Crown Proceedings Act 1950, see the discussion in "Rights and Freedoms" above, at p 418 – 419.
[84] There is a parallel in modern-day judicial review litigation, where declaratory relief against the Crown is usually seen as sufficient, unless there is a particular outcome or decision which requires quashing by way of certiorari.
[85] The "controversial" jurisprudence relating to the remedy of declaration and inconsistency is dealt with in Butler & Butler at p 1017 – 27.
[86] For example **Belcher v Chief Executive of the Department of Corrections**, footnote 79 above, [6].
[87] [2000] 2 NZLR 9 (CA) at [19] – [20].
[88] [2000] 2 NZLR 695 (CA).

was seriously considered by the majority.[89] In **Zaoui v Attorney-General**,[90] Williams J was of the view that **Moonen** and **Poumako** together confirmed the existence of jurisdiction to make a declaration of inconsistency.

As we have seen, Part 1A of the Human Rights Act confers on the Human Rights Review Tribunal an express statutory jurisdiction to make a declaration of inconsistency. However, that jurisdiction is limited to complaints of discrimination contrary to s 19 BORA, while a curial declaration of inconsistency would not be so limited. It is arguable that the express conferral of a limited statutory jurisdiction on the Tribunal should not be seen as inconsistent with the existence of a curial jurisdiction.[91] Indeed, it can be argued that the fact that the Legislature has been willing to confer jurisdiction to make declarations of inconsistency on a Tribunal lends support to the constitutional propriety of the superior Courts (at least) making such declarations, in appropriate cases. However, at least one leading academic writer[92] considers that the prospects of such declarations being held to be available are receding.

A further and more acute question is whether a "stand alone" curial declaration of inconsistency may be obtained. That would involve the scenario where the applicant for relief effectively concedes that the meaning and effect of the statutory provision in question are clear, and effectively seeks a declaration that the provision is inconsistent with the BORA, *simpliciter*. In a case currently before the High Court, **Taylor and others v Attorney-General**,[93] the plaintiff prisoners are seeking a declaration that the provisions of s 80(1)(d) of the Electoral Act 1993 that disqualify from voting prisoners who are serving a sentence of imprisonment are inconsistent with the BORA, in particular the right of "every New Zealand citizen" to vote conferred by s 12. The Attorney-General has applied to strike out the claim as "unavailable" on variety of grounds, including lack of jurisdiction to grant a "stand alone" declaration, and considerations of "comity" as between the Courts and the Legislature. Judgment has now been reserved.

Costs

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[89] Thomas J, in the minority, would have made a formal declaration of inconsistency (at [42], [67], [68], [70] and [107]).
[90] [2004] 2 NZLR 339 (HC).
[91] The provisions of Part 1A expressly do not affect s 19 of the Bill of Rights: see Human Rights Act, ss 20J(4), 21B(2) and 92J(4).
[92] Claudia Geiringer, "Implied Declarations of Inconsistency" (2009) 40 VUWLR 619. Compare A S Butler, "Judicial Indications of Inconsistency: A New Weapon in the Bill of Rights Armoury" [2000] NZ Law Review 43. In the 2014 edition of his text "Constitutional and Administrative Law in New Zealand" Professor Joseph at p 1286 opines that "The courts have turned their back on declarations of inconsistency".
[93] High Court, Auckland Registry, CIV-2013-404-4141.

Under a regime which relegates damages awards to a secondary position and keeps them low in any event, obtaining meaningful awards of costs becomes of critical importance for plaintiffs who would seek to advance a **Baigent** claim. Apart from two glancing references by Blanchard and McGrath JJ,[94] the only discussion of costs in **Taunoa** is the following passage in the judgment of Tipping J (at [334]; emphasis added):

> *I mention finally that when appropriate in cases of this kind, the court may award solicitor and client costs to a successful plaintiff* ***as an ingredient of its provision of an effective remedy****. Whether that should be done will depend on the overall circumstances of the case and the elements of the remedial package otherwise provided.*

The emphasised words are of considerable significance, because they show that Tipping J was not merely referring to the prospect of an award of indemnity costs pursuant to rules of court such as Rule 48C of the High Court Rules.[95] Given the seriously limited potential in the wake of **Taunoa** for meaningful damages awards, a focus on awarding of costs - as part of **Baigent** relief and so as to depart from ordinary costs rules - has become even more critical.[96]

Finally, if all else fails, the Bill of Rights dimension can and should be relied on by an unsuccessful **Baigent** relief claimant to deflect the impact of any costs claim advanced by the successful defendant. In **Wong v Registrar of the Auckland High Court,**[97] Duffy J halved a potential scale 2B costs award against the unsuccessful plaintiff having regard to the Bill of Rights dimension.

Other Forms of Relief

Ultimately, because the nature of the requisite "effective relief" for the particular breach of the particular right in question is at large and not constrained by the traditional heads of relief, the exercise of counsel's ingenuity could well be warranted in an appropriate case. In **Taunoa** there was a belated attempt to seek "a general inquiry into the BMR" as an additional **Baigent** remedy. The Supreme Court declined to enter upon this exercise.[98] The law report contains (at p 434 – 5) an interesting summary of counsel's submissions in support

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[94] See **Taunoa** at paras [249], [368].

[95] For a more extensive, albeit out-of-date discussion of costs as a remedy for breach of the Bill of Rights, see "Rights and Freedoms", above, p 428 - 429. Note also the discussion of the place of costs in Bill of Rights cases in **Attorney-General v Udompun** [2005] 3 NZLR 204, [186] – [187], [222] – [224], and **Wong v Registrar of the Auckland High Court and Attorney-General**, High Court, Auckland Registry, CIV 2007-404-5292, 3 March 2008, Duffy J, [20] – [26], [31] – [33].

[96] In both **Falwasser** (footnote 35 above) and **Van Essen** (footnote 43 above), indemnity costs were ultimately awarded on top of the damages awards. See **Van Essen v Attorney-General** [2013] NZHC 2016.

[97] Above.

[98] Refer paras [103] – [104] per Elias CJ; [222] – [228] per Blanchard J.

of this head of relief. While it seems likely that only a minority of Bill of Rights claims could possibly merit such lateral thinking, the prospects of fashioning unconventional forms of relief, particularly where systemic breach of the Bill of Rights is alleged, should not be overlooked.

REMEDIES FOR BORA BREACH IN THE CRIMINAL CONTEXT

Post-**Baigent**, a range of remedies was developed to address BORA breach in a criminal law context. These include stay or dismissal of prosecution on the grounds of undue delay likely to prejudice a fair trial, reduction of sentence where the BORA breach is not otherwise remedied and conviction results, and perhaps also – by analogy with civil claims -, declaration of BORA breach or indeed a "declaration of inconsistency".

The most important and commonly-arising remedy for BORA breach in a criminal law context remains the exclusion of prosecution evidence. The Cooke-era Court of Appeal had settled on the prima facie exclusion rule where prosecution evidence had been obtained by means of a significant (non-trivial) BORA breach. Such evidence was to be excluded, unless the Crown could show good reason for it to be admitted.[99]

However, Lord Cooke had barely departed the Court of Appeal – to the House of Lords – when judicial doubts began to be expressed.[100] Ultimately, a seven-Judge Court of Appeal[101] overturned the prima facie exclusion rule in **R v Shaheed** [2002] 2 NZLR 377, substituting what came to be known as the "**Shaheed** balancing test".

The **Shaheed** balancing test was explicitly formulated with a view to making exclusion of evidence obtained by means of BORA breach more difficult – and thus less likely to occur – than had been the case under the previous *prima facie* exclusion rule. The leading judgment of Blanchard J identified six considerations to be taken into account when carrying out the balancing exercise. **Shaheed** comes with a strong dissent from Elias CJ and was the subject of academic criticism. The significance of the development in the present context is that it represents yet another calculated rejection and diminution of the original **Baigent**/Cooke-era Court of Appeal response to remedying breach of BORA-protected rights.

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[99] **R v Kirifi** [1992] 2 NZLR 8; **R v Goodwin** [1993] 2 NZLR 153.
[100] Refer Butler & Butler, above, p 1034
[101] Comprising Richardson P, Gault, Blanchard, Tipping, McGrath and Anderson JJ; with Elias CJ in dissent.

Section 30 of the Evidence Act 2006 is now the dedicated remedy addressing exclusion of prosecution evidence obtained in consequence of BORA breach.[102] Section 30, too, requires a balancing exercise to be conducted having regard to a list of factors, some but not all of which have been borrowed from the **Shaheed** list of mandatory considerations.

However, s 30 is not exclusively a BORA remedy. It applies in respect of "improperly obtained" prosecution evidence, defined (by s 30(5)) as meaning evidence obtained in breach of any enactment or rule of law by a person to whom s 3 BORA applies; or in consequence of an inadmissible statement made by a defendant; or "unfairly".

Section 30 codifies the law governing the exclusion of all kinds of improperly obtained evidence, without differentiating between categories of illegality or unfairness. The fact that the evidence in question has been obtained in breach of BORA, rather by means of some illegality or unfairness falling short of the BORA breach, is no longer central to the analysis. The only reference to the BORA in s 30 is by way of defining those "public actors" whose breach of an enactment or rule of law may result in evidence being "improperly obtained". Section 30(3) refers to "the importance of any right breached by the impropriety" as one amongst a number of other matters to which the Court **may** have regard when carrying out the "balancing process". But that cannot be said directly or exclusively to emphasise or elevate BORA rights within the scheme of s 30..

Viewed in a historical context, s 30 of the Evidence Act can be seen as representing a further watering down of the status of the BORA, in relation to a critical set of remedies for BORA breach, namely those concerned with exclusion of prosecution evidence. While no doubt carrying its own "law reform" logic, having the same overall balancing test applicable to all categories of improperly obtained evidence, and prescribing an even longer list of factors to be considered than was contemplated by **Shaheed**, not only involves a lowering of the standing of BORA breach as meriting an exclusionary response. It also increases the number of hoops through which a case for exclusion of evidence must jump, before exclusion is seen as warranted.

CONCLUSIONS

It is my personal belief that, as with individuals, a judicial system should ultimately be judged by what it **does**, rather than what it **says**. Over nearly twenty-five years of BORA, a

[102] The leading case is **Hamed v The Queen** (2011) 25 CRNZ 326 (SC).

lot has been said by our Judges. BORA rights, particularly the safe and easy ones such as freedom of expression, have received a very large measure of recognition. A great deal of substantive law, much of it good law, has been established – although arguably we still do not have a satisfactory concept of "discrimination".

But what we do in practice, in response to breaches of rights, seems to me critical. That is the point at which our judiciary, after an outstanding initial start, has in my opinion faltered – indeed, regressed.

Early on, I referred to Article 23(3) of the ICCPR and the injunction which it contains "to develop the possibilities of judicial remedy" for violation of recognised rights and freedoms. Comparing our beginnings with where we have ended up on the remedies front, the "possibilities of judicial remedy" have been significantly curtailed, rather than developed, as Article 23(3) mandates. Overall, that represents a systematic shortcoming on the part of our appellate judiciary.

On 18 October 1991, Police entered the late Mrs Baigent's property under a search warrant which named the wrong address, a mistake which they very quickly realised. Despite that, they apparently told Mrs Baigent's daughter – now a respected Wellington criminal lawyer – "We often get it wrong, but while we are here we will have a look around anyway". They then searched briefly, finding nothing and causing no damage, and departed. Lord Cooke, whom few would dispute as the greatest Judge this country has ever produced, considered that in those circumstances if proved at trial, a "mere declaration would be toothless", and that an award of "something less than $70,000" would be sufficient vindication. Sir Michael Hardie Boys, an outstanding Judge and subsequently Governor-General, was of the view that "monetary compensation is the appropriate and proper, **indeed the only effective**, remedy".[103]

Today in light of **Taunoa** and current trends, I doubt that the BORA breach at issue in **Baigent** would result in an award of damages, at all. Indeed, it might not even secure the discretionary remedy of declaration. That is, in my humble opinion, a depressing conclusion.

Rodney Harrison QC
25 June 2014

[103] **Baigent** at p 503 (emphasis added).