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PUBLIC LAW COMPENSATION AND THE NEW ZEALAND BILL OF RIGHTS ACT 1990

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This paper examines the principles set out in *Simpson v Attorney General* (known as *Baigent's case*) and its companion case of *Auckland Unemployed Workers Rights Centre Inc v Attorney General* which held that a person alleging a breach of the rights affirmed by the New Zealand Bill of Rights Act 1990 might be entitled to monetary compensation for that breach notwithstanding the absence of a remedies clause in the Act itself. The paper examines the decision of the court in *Baigent's case*, the ambit and application of the Act and the possibility of a wide application to persons and bodies exercising public functions, duties or powers and the nature of any compensation that might be awarded. The paper also considers developments in New Zealand Law since the decision of the Court of Appeal in *Baigent's case* and compares developments in New Zealand law with those in other common law jurisdictions, notably Ireland, Canada and the United States.

The text of this paper (excluding contents page, footnotes and bibliography) comprises approximately 14,500 words.

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1. Introduction

The New Zealand Bill of Rights Act was enacted in 1990. The Act had been a long time in gestation as the White Paper had been released in 1985. The Act was significantly different to that proposed by the White Paper. It was originally proposed that the Act would be supreme law and that it would be entrenched so that no provision could be repealed or amended unless the proposal was passed by a majority of 75% of the members of the House of Representatives.

The draft New Zealand Bill of Rights as set out in the White Paper also contained a remedies provision modelled on s 24(1) of the Canadian Charter of Rights and Freedoms.

When the Act was passed into law there was a significant dilution of the original proposals. It was merely another act and was not supreme law. It was not entrenched. It did not contain a remedies clause. In a paper considering the Act published shortly after it was passed Professor Paciocco noted that

> "When it was finally passed, the New Zealand Bill of Rights Act 1990 had been sapped of most of its vitality, debilitated by concerns relating to the preservation of parliamentary sovereignty and the appropriate role of judicial review."[1]

Consequently there were questions as to whether the Act created a new or express right in itself or whether it was merely supportive of existing causes of action in tort and further whether, in the absence of an express remedies clause, it was possible to obtain damages for breach of the provisions of the Act and if so, what type of damages were available.

In *Simpson v Attorney-General*[2] (known as *Baigent's case*) and *Auckland Unemployed Workers' Rights Centre Inc v Attorney-General*[3] the Court of Appeal held that a person alleging a breach of the rights affirmed by the Act might be entitled to monetary compensation

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1 "The New Zealand Bill of Rights Act: Curial cures for a debilitated bill: [1990] NZ Rec. Law Rev. 353

2 [1994] 3 NZLR 667 (CA)

3 [1994] 3 NZLR 720 (CA)

for that breach thereby defeating the statutory immunity provisions the crown would otherwise be able to rely on and in effect, putting back into the Act, the remedies clause which Parliament had removed.

In a draft report prepared by the Law Commission in April, 1996[4] the Law Commission considered whether Parliament should abolish the *Baigent* remedy by legislation. They concluded it should not. The Law Commission acknowledged that one reason of principle supporting abolition was that the *Baigent* ruling flouted Parliament's intent but said if that was so, it was not necessarily an argument for legislating against the remedy saying

> "The provision of an appropriate remedy is a critical aspect of giving reality to the Bill. Without appropriate remedies, the Bill would not be what the executive proposed and Parliament purported to enact: a statement of fundamental rights of New Zealanders, constraining the power of the State (in the absence, of course, of overriding legislation) and enforced by the courts. Appropriate remedies - including the rejection of evidence, the ordering of habeas corpus, the terminating of a trial, the declaration of illegality, the award of a monetary remedy - are all essential means of emphasising that the State is subject to the law."[5]

2. ***Baigent's Case***

Briefly the facts of *Baigent's case* were that a party of police armed with a search warrant went to an address in Korokoro in Lower Hutt. The police thought they were going to the address of a known drug dealer named O'Brien but the property was owned and occupied by Mrs. Baigent and her family who had no connection with O'Brien or drug dealing. The allegations were that the police on realising they had made a mistake decided to proceed with the search with a detective in charge of the party of police saying to a Wellington barrister, who happened to be the daughter of Mrs. Baigent, that "we often get it wrong, but while we are here we will have a look around anyway".

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4 "Crown liability: *Baigent's case* judicial immunity" - Law Commission 1 April, 1996

5 N4, P 24

The plaintiff commenced proceedings for negligent procurement of a search warrant, trespass, abuse of process and for breach of the New Zealand Bill of Rights Act claiming damages under that head as well as the actions founded in tort. The claim under the Act was struck out and the matter came on for review before Greig J. He dismissed the application for review saying at page 24 of his judgment

> "In my opinion any cause of action based on the Bill of Rights and its breach, where as here the conduct complained of is an action of an individual official exercising or purporting to exercise his authorised function and is in any event conduct which can readily fit into existing categories and types of tort such as trespass, nuisance, negligence and so on, will sound in tort and not in some new and separate nomination of public law."[6]

The plaintiffs appealed to the Court of Appeal. If Greig J.'s decision was affirmed then the Crown was protected by s 6(5) of the Crown Proceedings Act 1950 which protected it from liability in respect of the execution of judicial process by police officers. Execution of a search warrant issued by a judicial officer came within the scope of "judicial process". In the Court of Appeal Cooke J. was not concerned at the absence of a remedies provision in the Act saying "In other jurisdictions compensation is a standard remedy for human rights violations. There is no reason for New Zealand jurisprudence to lag behind."[7] He relied on the long title of the Act and the affirmation of New Zealand's commitment to the International Covenant on Civil and Political Rights ("the International Covenant") by which each state undertook to ensure an effective remedy for violation of rights and to develop the possibilities of judicial remedy. Cooke P (as did Hardie Boys J) believed that the remedies clause was not carried forward into the legislation from the White Paper at it was too closely associated with the idea of supreme law overriding Parliament.

Casey J. also relied on s 2(3) of the International Covenant and a covenant contained therein guaranteeing an effective remedy for breach of rights. He accepted that the act had a right-

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6 *Baigent v Attorney-General* (High Court, 15-7-93; Greig J., Wellington CP 850/91)

7 N2, P 676

centred approach and that it was to be given a generous interpretation. His view of the act was that Parliament did not intend "it to be what most would regard as legislative window-dressing, of no practical consequence, in the absence of appropriate remedies for those whose rights and freedoms have been violated".[8]

In a wide ranging judgment Hardie Boys J. considered jurisprudence from other jurisdictions, notably Ireland, which has a written constitution guaranteeing fundamental rights but which contains no provision for remedy for infringement and the United States and noted that "This Court has been consistent in the view that the terms of the covenant and the terms of the Bill of Rights Act itself require a rights-centred response to infringements."[9] and that although in some cases a remedy such as the exclusion of evidence will be sufficient where, in other cases, no such remedy is available then monetary compensation was an appropriate and effective remedy. Hardie Boys J echoed Casey J's comments saying "It is not likely to be accepted that a statute expressing the fundamentals of a civilised society be little more than sounding brass or tinkling cymbal."[10] McKay J. also emphasised the need for an effective remedy saying

> "What is more difficult to comprehend, however, is that Parliament should solemnly confer certain rights which are not intended to be enforceable either by prosecution or civil remedy, and can therefore be denied or infringed with impunity. Such a right would exist only in name, but it would be a misnomer to call it a right, as it would be without substance. The maxim ubi jus ibi remedium, where there is a right there is a remedy, has a long history."[11]

There was one dissenting judgment, namely that of Gault J. His Honour was of the view that the Act was to augment existing 'traditional' remedies rather than establish a new cause of action with remedies thereunder. He said "In my view the preferable approach is to regard the Bill of Rights Act as part of the law of the country to be read with, and not separate from, the

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8 N2, P 691

9 N2, P 702

10 N2, P 693

11 N2, P 717

existing law."[12]

One consequence of the remedy being found as being one in public law rather than private law was that the cause of action was directly against the Crown so that the various statutory immunities were rendered nugatory. Liability of the Crown was not through the vicarious liability of its servants but rather direct. The immunities granted the Crown under section 6(5) of the Crown Proceedings Act 1950 were by-passed.

The court saw the crown as a guarantor of the rights and freedoms set out in the Bill of Rights Act. This view of the crown as a guarantor of the Act was put at its highest by Hardie Boys J and McKay J in their judgments. Hardie Boys J observed that the Act was "A commitment by the Crown that those who in the three branches of the Government exercise its functions, powers and duties will observe the rights that the Bill affirms"[13] while McKay J noted that the Crown, as the legal embodiment of the State, was bound to create an effective remedy for violation of rights. The Law Commission in its report noted this view of the Crown as a general guarantor takes the matter further than a public law imposition of direct liability and means that the Crown, in the sense of central government, is liable for breach of the provisions of the Bill of Rights Act per se even although it may not have been the wrongdoer at all.[14] This presumably might mean that if a state owned enterprise or entity such as New Zealand Post caused a breach of the Act then an action might be able to be maintained not only against the transgressor but against the Crown itself as the guarantor of the rights protected by the Act. The Law Commission in its report noted that this concept might create difficulty for claims for non monetary relief such as an injunction or a declaration in situations where the Crown could not direct or control the body against whom relief was also sought.

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12 N2, P 711. His Honour had already developed his argument in his judgment in *R v Goodwin* (1992) 9 CRNZ 1 (CA) at p 58 where he said "Upon further consideration I would prefer to avoid fashioning additional remedies as to the admissibility of evidence where rules already exist. The Bill of Rights Act, at least in part, affirms existing law and existing rules should continue to apply unless they are inconsistent or inadequate. Rules as to evidence unlawfully obtained and evidence of non-voluntary statements are well established and have not been shown to be unsatisfactory. Merely because the underlying rights long recognised and protected by these rules are affirmed is no jurisdiction for adopting a whole new band of rules as to admissibility. The existing rules are flexible enough in their application to accommodate the new emphasis on the fundamental rights. Of course where there are no existing rules the Courts will need to devise new ones appropriate to the rights. This should be done by analogy to existing rules."

13 N2, P 702

14 N4, P 18

The argument that the Bill of Rights Act imposed on the Crown a commitment in the nature of a guarantee is difficult to reconcile with the failure of Parliament to elevate the Bill of Rights to the status of supreme law and entrench it as was originally intended. By contrast the constitutions of the various West Indian states examined by the Privy Council in *Maharaj v Attorney-General of Trinidad and Tobago (No 2)*[15] a decision heavily relied on by the majority judges in *Baigent's case*, were far more wide-ranging in their scope. The New Zealand Bill of Rights Act 1990 affirmed human rights and fundamental freedoms in New Zealand and New Zealand's commitment to the International Covenant. The constitution of Trinidad and Tobago specifically prevented any law or act of Parliament from abrogating, abridging or infringing any of the rights or freedoms in the constitution. Other West Indian constitutions, as their Lordships noted, were similar[16] and after examining the various constitutions and in particular the provisions limiting the power of Parliament to enact legislation affecting or abrogating the constitutionally guaranteed rights Lord Diplock said

> "It is their Lordships' clear view that the protection afforded was against contravention of those rights or freedoms by the state or by some other public authority endowed by law with coercive powers. The chapter is concerned with public law, not private law."[17]

Consequently the Crown or the State under the constitution of Trinidad and Tobago and the other West Indian Islands did provide some general guarantee or commitment to the rights protected by those documents. The failure of the New Zealand Bill of Rights Act to include similar guarantees or commitments and the notion of a document affirming existing rights and rights guaranteed by New Zealand acceding to the International Covenant appears far less compelling. This is especially so when one considers section 4 of the Act which provides that where there is an inconsistency between a provision of the Bill of Rights Act and any other legislation the provisions of the other legislation override those of the Bill of Rights Act. It is difficult to see how the Crown can be described as a guarantor. After all, the existing rights which the Act affirmed were seen as private law rights against which the Crown had, in many

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15 [1978] 2 ALL ER 670

16 Above N15 at P 676 where there was reference to the constitution of Jamaica

17 N15 at P 677

cases, the benefit of statutory immunities or the immunities of the prerogative.

The decision, not unexpectedly, attracted considerable academic interest and some academic criticism. In a detailed analysis of the history of the legislation leading to the enactment of the Bill of Rights Act and of the decision in *Baigent* itself Professor Smillie saw the Court of Appeal's reliance on the absence of remedies clauses in constitutional documents such as the constitutions of Ireland and the United States as examples of countries where the courts have not hesitated to impose remedies including damages as being distinguishable as those countries' constitutions are entrenched as supreme law and the New Zealand Bill of Rights Act 1990 is not.[18] Professor Smillie noted, somewhat acerbically

> "Ultimately, the decision of the majority in *Baigent's case* rests on a simple assertion that the courts are the ultimate guardians of human rights and they must enforce those rights regardless of Parliament's intention. This has no more foundation in legal or democratic principle than Sir Robin Cooke's controversial assertion that some common law rights 'lie so deep that not even Parliament could override them'."[19]

Further Professor Smillie considered that the government might abolish the *Baigent* cause of action by statute, a suggestion which, as has been seen, has been rejected by the Law Commission.

3. Ambit of the Act

The object of the Act is described in its long title as being an Act "to affirm, protect and promote human rights and fundamental freedoms in New Zealand" and to affirm New Zealand's commitment to the International Covenant, an international covenant under the auspices of the United Nations ratified by New Zealand in 1978. Although not entrenched the Act was given wide scope with section 3 providing that it applies to acts done -

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18 J.A. Smillie - "The Allure of "Rights Talk": *Baigent's case* in the Court of Appeal", (1994) Otago L.Rev 188

19 Above N18, P 197

"(a) By the legislative, executive, or judicial branches of the government of New Zealand; (b) by any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law."

The scope is extended further by section 27 which provides as follows:

"(1) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations or interests protected or recognised by law.

(2) Every person whose rights, obligations or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has a right to apply, in accordance with law, for a judicial review of that determination."

In its early years the Act was primarily a tool of criminal practitioners most useful in the area of exclusion of evidence against an accused person. However now that *Baigent's case* has clearly established the right to seek monetary compensation for breach of the Act the usefulness of the Act as a tool in civil litigation has been recognised and a number of proceedings have been commenced against the Crown and public bodies. The majority of civil proceedings are against the police. In the draft report prepared by the Law Commission in April, 1996[20] it was noted that since *Baigent's case* 37 sets of proceedings have been filed in which breach of the Bill of Rights are alleged and damages claimed. Of those proceedings 29 were against the police.

Section 3 of the Act appears as it was originally drafted in the White Paper in 1985. After the White Paper was published in April, 1985 it was referred to the Justice and Law Reform Committee of Parliament for examination and was there the subject of numerous public

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20 See N4 at appendix A, P 1

submissions. The principal objection to the draft bill as set out in the White Paper was that it was seen to transfer power from parliament to the judiciary with Mr. Graham, now Minister of Justice, observing in the introductory debate on the Bill that "In its final deliberations the select committee stated 'the power given to the judiciary by the White Paper draft was the principal reason for opposition to the proposal'."[21]

It is interesting to note that in the parliamentary debate on the second reading of the Bill Sir Geoffrey Palmer, then Prime Minister, in summarising section 3 of the Bill referred only to the scope of remedies applying to acts done by the legislative, executive or judicial branch of the New Zealand government and omitted completely the potentially wider scope of application contained in section 3(b) saying

> "Fifth, the Bill is not a charter for law suits. Its provisions do not apply as between private citizens, citizens will not be able to invoke its provisions in order to sue one another. The Bill applies only between the citizen and *one of the three branches of government*, that is to say, the legislative branch of this parliament, particularly the executive branch and the judicial branch. Sixth, the Bill creates no new legal remedies for Courts to grant. The Judges will continue to have the same legal remedies as they have now, irrespective of whether the Bill of Rights is in issue." (*Emphasis added*).[22]

Section 3 was not modelled on the Canadian Charter of Rights and Freedoms. Section 32 of the Charter limits the application of the Charter to bodies similar in scope to section 3(a) of the New Zealand Bill of Rights Act.[23]

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21 (1988) 508 NZPD 13041

22 (1990) 510 NZPD 3450

23 Section 32 of the Canadian Charter of Rights and Freedoms reads:

> **32. - (1) Application of Charter**
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> This Charter applies
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> (a) To the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
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> (b) To the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Potentially the scope of section 3(b) of the Act appears wide and capable of reaching beyond public bodies. The limits of the jurisdiction have not been considered but the Courts have shown that they are willing to entertain Bill of Rights arguments in commercial situations. For example the decision of McGechan J in *Federated Farmers of NZ (Inc) v NZ Post Limited*[24] suggests there is scope for use of the New Zealand Bill of Rights Act in the scrutiny of commercial decisions. In that case Federated Farmers and a number of other plaintiffs challenged the decision of NZ Post to increase the rural delivery service fee. NZ Post Limited was a private company incorporated under the Companies Act 1955 with all shares owned by the government but was the successor to a Department of State. The plaintiff farmers who were the senders and intended recipients of test letters were said to be persons who possessed the right to freedom of expression under section 14 of the New Zealand Bill of Rights Act 1990 which in the plaintiffs' pleading were stated as "including the freedom to receive information and opinions in the form of postal articles addressed to them". It was claimed that NZ Post had unlawfully restricted the right to freedom of expression of the plaintiffs and accordingly the plaintiffs sought a declaration that the defendant, NZ Post, was in breach of section 14 of the act.

The defendant denied that NZ Post was exercising a "public function" in its rural delivery service and also pleaded section 5 of the act, reasonable limitations. That latter plea succeeded but McGechan J determined that the defendant company fell within section 3(b) of the Act saying

> "I would not necessarily regard it as part of the 'executive' branch of the 'government of New Zealand' within s 3(a), given the context provided by s 3(b). The question more naturally arises under s 3(b) itself. Clearly, NZP is a 'personal body' (it is an incorporated company). ...I have no difficulty regarding mail handling as a 'public function'. It is carried out for the public, in the public interest, and moreover by a company which while technically a separate entity presently is wholly owned and ultimately controlled by the crown: a 'state owned enterprise'. For Bill of Rights purposes and as an ordinary use of

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24 Unreported, 1 December, 1992, High Court, Wellington Registry, CP661/92

language NZP can and should be regarded as exercising 'public functions'."[25]

The willingness of the judiciary to adopt a liberal interpretation of the application of the Act can be seen from earlier comments in cases such as *Ministry Of Transport v Noort*; *Police v Curran*[26] where Hardie Boys J said

> "Thus there is no reason to deny s 23(1)(b) that generous and purposive interpretation that the nature of this statute, apparent from its long title, demands for all its provisions. While not a constitutional document, it is none the less an affirmation and a means of promoting principles which are fundamental to every constitutional instrument. Each of its provisions should be construed and applied with that in mind."[27]

And where also Cooke P said in the same case

> "Next, any reading of the 1990 Act brings out its special characteristics. Some have already been noticed. Two more should be mentioned. First the statement in Part II of civil and political Rights in broad and simple language. No doubt that is to emphasise the importance which Parliament attaches to their clear expression. It calls for a generous interpretation suitable to give individuals the full measure of the fundamental rights and freedoms referred to."[28]

Similar statements had been made by Cooke P in *R v Te Kira*[29] where he said

> "I am convinced that in interpreting and applying the Bill of Rights Act the Courts must strive to avoid the danger of becoming verbose and evolving fine distinctions. A Bill of Rights should be interpreted generously and simply, no matter whether or not it is

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25 Above N24 at PP 54-55

26 (1992) 8 CRNZ 114

27 Above N26 at PP 141-142

28 Above N26 at PP 131-132

29 [1993] 3 NZLR 257 (CA) at 261

entrenched. Moreover its impact has to be worked out gradually: those who seek from the Courts hard and fast and comprehensive formulae at this stage may not be familiar with the lessons of international experience."

(a) *Employment law cases*

Bill of Rights arguments have been well received in employment law with one commentator noting that

> "...the specialist legal institutions constituted under the Employment Contracts Act 1991, the Employment Tribunal and Employment Court, frequently take a robust approach..."[30]

The act has been applied in cases involving Crown Health Enterprises such as *Laboratory Workers v Capital Coast Health*[31] and *Capital Coast Health v New Zealand Medical Laboratory Workers Union Inc*[32] but also there are obiter dicta remarks of Goddard CJ in *Radio Horowhenua Limited v Bradley*[33] which purport to apply the Act to private sector employers. In that decision His Honour said, with reference to the New Zealand Bill of Rights Act, that

> "The Act applies only to persons having public law responsibilities but it is now well settled that employers are such persons."[34]

Dr Roth in his article in the Bill of Rights Bulletin suggests that this approach is "far too broad".[35] At least one other judge of the Employment Court would appear to support that

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30 Dr Paul Roth "The New Zealand Bill of Rights Act in Employment Law" Bill of Rights Bulletin, Issue No.3, June, 1995, 34

31 [1994] 2 ERNZ 93

32 [1995] 2 ERNZ 305 (CA)

33 [1993] 2 ERNZ 1085

34 N33 at P 1097

35 N30 at P 35

proposition as in *Zinck v Sleepyhead Manufacturing Company*[36] Colgan J accepted that Bill of Rights arguments were inappropriate in an action by an employee against a corporate employer not exercising any public function, power or duty. There appears to be a clear divergence of views as to the ambit of the Act between at least two judges of the Employment Court.

The use to which arguments under the Bill of Rights have been put in employment cases can be seen in the recent Court of Appeal decisions in *Capital Coast Health v New Zealand Medical Laboratory Workers Union Inc*[37] and in *NZ Fire Service Commission v Ivamy*[38]. Both cases involved an attempt to reconcile section 12 of the Employment Contracts Act 1991, which provided that employers or employees in negotiating for an employment contract may chose to be represented by a bargaining agent, with sections 14 and 17 of the New Zealand Bill of Rights Act which respectively provide for freedom of expression and freedom of association. In both cases employers, in conducting negotiations with trade unions, had appealed over the head of the union directly to the union's members by distributing literature to the members in an attempt to influence the course of negotiations with the union.

In the *Capital Coast Health* case Hardie Boys J said

> "...It is a matter in each case of striking a balance between the competing rights of the parties - those of the employer under s 14 of the Bill of Rights Act, and those of the employee under s 12 of the ECA [**Employment Contracts Act 1991**, *emphasis added*]. It is not a case of one prevailing over the other, but of both being given sensible and practical effect. That can be done by allowing s 12 to speak for itself. I do not think that its meaning is greatly assisted by devising tests..."[39]

The court then considered each communication to see what the purpose of the communication

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36 [1995] 2 ERNZ 448

37 Above N33

38 [1996] 2 NZLR 587 (CA)

39 N32 at P 320

was, principally as to whether it was an attempt to undermine the authority of the other bargaining agent and on that factual basis determined whether individual communciations were in breach of the Employment Contracts Act.

In *NZ Fire Service Commission v Ivamy* the employer had communicated directly with the union's members at a sensitive point in the bargaining process by distributing by courier an information pack to it's employees. Justice Goddard in the Employment Court had granted an injunction restraining the employer from communicating directly with the employees in breach of s 12(2) of the Employment Contracts 1991. The appeal was allowed and the injunction was discharged but the minority, who would have upheld Justice Goddard's order, were Lord Cooke and Justice Thomas who regarded the distribution of the information pack to the union members by the employer as being a breach of the Employment Contracts Act notwithstanding the right to freedom of expression in s 14 of the Bill of Rights Act. Thomas J in his dissenting judgment tried to strike the balance Hardie Boys J referred to in the *Capital Coast Health* decision by saying

> "It therefore needs to be stressed that, while the right of freedom of expression and the right to freedom of association, out of which collective bargaining arises, may influence the interpretation of s 12(2), freedom of expression cannot be permitted to lead to an interpretation or application of the section which would defeat the objective of enabling collective bargaining to operate in terms of the act. The statutory requirements of the act must prevail. ...I regard the conduct of the commission, including the information pack distributed to its employees, as being so blatently a breach of s 12(2) that it cannot be saved by reference to the commission's right to freedom of expression."[40]

By contrast, Gault J, for the majority (who included Richardson P and Henry J) held that s 12(2) of the Employment Contracts Act, the right to choose a bargaining agent and to have the other party recognise the authority of that agent in negotiations, had to be given a meaning "consistent with the rights and freedoms contained in the Bill of Rights Act (s 6) which included the freedom of expression which extends to "the freedom to seek, receive and impart

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[40] N38 at P 613

information and opinions of any kind and any form".[41]

The issue of employers appealing directly to union members over the head of union negotiators in negotiations for an employment contract also arose in *Airways Corporation of New Zealand Limited v Airline Pilots Association IUW*[42] before the same court in the Court of Appeal as in *NZ Fire Service Commission*. In the decision Thomas J was with the majority with Lord Cooke providing the only dissenting judgment and saying that *Capital Coast* allowed an employer to correspond with members of a union directly by providing factual information but nothing futher. The information provided by the employer to the union's members included an assessment of the proposals of both the employer and the union.

These cases are interesting both for the restrictive approach taken by Lord Cooke in reading down the right to freedom of expression in favour of the right of association to the more permissive approach of the majority of the Court of Appeal to Hardie Boys J's reference of the need to strike a balance between the two Acts. They are also illustrative of the tension that can occur between competing rights and freedoms under the Bill of Rights Act.

(b) *A comparison with judicial review?*

Is it possible then when considering the ambit of the act and its possible application to private sector companies or bodies to draw a comparison with the type of bodies subject to judicial review?

In New Zealand the mechanism of judicial review is often determined by section 4 of the Judicature Amendment Act 1972 which refers to the "exercise, refusal to exercise or proposed or purported exercise by any person of a statutory power". Other mechanisms for review are the Declaratory Judgments Act 1908 and various provisions of the High Court Rules.

The width of the power of judicial review was illustrated in the well known case of *Finnigan*

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41 N38 at P 599

42 [1996] 2 NZLR 622 (CA)

v New Zealand Rugby Football Union[43] where the Court of Appeal determined that two members of rugby football clubs which were members of the Auckland Rugby Union which itself was affiliated to the New Zealand Rugby Football Union had standing to commence proceedings to review a decision of the council of the New Zealand Rugby Football Union to accept an invitation to send an All Black team to South Africa in 1985. Cooke P who delivered the judgment of the Court of Appeal took note of the importance of the Rugby Union's decision in the days of heated argument over sporting ties with South Africa saying "the decision affects the New Zealand community as a whole..." and

> "While technically a private and voluntary sporting association, the Rugby Union is in relation to this decision in a position of major national importance for the reasons already outlined. In this particular case, therefore, we are not willing to apply to the question of standing the narrowest of criteria that might be drawn from private law fields. In truth the case has some analogy with public law issues. This is not to be pressed too far. We are not holding that, or even discussing whether, the decision is the exercise of a statutory power - although that was argued. We are saying simply that it falls into a special area where, in the New Zealand context, a sharp boundary between public and private law cannot realistically be drawn."[44]

Clearly the courts have extended judicial review to private organisations whose decisions have wide public interest and effect.

The elasticity of the boundary of judicial review was emphasised by Cooke P in *Burt v Governor-General*[45] where an application for judicial review of the Governor-General's refusal to exercise the royal prerogative of mercy was held to be non-justiciable. His Honour held that might not always be so saying

> "While accepting that it is inevitably the duty of the court to extend the scope of common

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43 [1985] 2 NZLR 159

44 N38 at P 179

45 [1992] 3 NZLR 672

law review if justice so requires, we are not satisfied that in this field justice does so require, at any rate at present."[46]

In an article entitled "*Judicial Review of State-Owned Enterprises at the Crossroads*"[47] Mai Chen noted that the courts have over the last few years been divided as to whether to subject state owned enterprise decisions to judicial review but that the recent decision of the Court of Appeal in *Auckland Electric Power Board v Electricity Corporation of New Zealand*[48] in holding that the actions of Electrocorp in terminating an interim agreement with the Auckland Electric Power Board for the supply of electricity was not reviewable signalled the end of an expansive approach to judicial review. Ms Chen contrasted the reluctance of the courts to subject commercial decisions to judicial review with the approach of the courts in Bill of Rights cases and their broad and purposive interpretation of the New Zealand Bill of Rights Act and concluded "Thus, in general, the scope of actions that can be challenged under the BORA [New Zealand Bill of Rights Act 1990] will be broader than under section 4 of the JAA [Judicature Amendment Act 1972]."[49]

In *TV3 Network Limited v Eveready New Zealand Limited*[50] Cooke P held that TV3 Network Limited came within section 3(b) of the Bill of Rights Act as the television company was a licensed television broadcaster under the Broadcasting Act 1989 so that, even although it was a private company, it performed a public function imposed on it pursuant to law. Clearly it fell within the ambit of section 3(b) of the Bill of Rights Act. Mai Chen, in her article noted[51] the obiter dicta remarks of Cooke P in *Sharma v ANZ Banking Group*[52] as indicative that banks

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46 N39 at P 683

47 Mai Chen "Judicial review of state-owned enterprises at the crossroads" (1994) 24 VUWLR 51

48 Unreported, 8 September, 1993 Court of Appeal, CA 45/93

49 Above N41 at P 75

50 [1993] 3 NZLR 435 (CA)

51 Above N41 at P 76

52 (1992) 6 PRNZ 386 at 390 where His Honour opined "It is perhaps not inconceivable - we say no more - that, if the appellant and his wife were to consolidate their proceedings and jointly to sue the bank and others on an allegation of unreasonable search or seizure within the meaning of the Bill of Rights (s 21 New Zealand Bill of Rights 1990) or infringement of their or their family's rights to privacy under the common law, some cause of action might be established. That is a grey and perhaps a developing area into which we

might be subjected to the act. It seems clear that banks would be subject to the act and so liable to an action for damages for breach of the provisions of the Bill of Rights Act. They would clearly fall within the definition of section 3(b) as exercising a "public function"... "by or pursuant to law". The Bank of New Zealand is constituted under its own Act (Bank of New Zealand Act 1988) and the other trading banks are registered under the provisions of the Reserve Bank of New Zealand Act 1989.

Clearly the ambit of the Act is wide. It does not only apply between the citizen and one of the three branches of government. It applies to a wide range of public bodies, to private companies exercising public power such as crown health enterprises and state owned enterprises and even to private enterprises such as banks, privately owned television stations and other privately owned institutions exercising public functions or power. McGechan J had no difficulty in the *Federated Farmers v New Zealand Post Limited* case[53] in finding that New Zealand Post Limited, a private company, was exercising a public function in mail handling. banking, insurance transactions, rail passage, radio broadcasting and the like would also clearly be deemed to be an exercise of a public function. The list would clearly be extensive. Given the purposive and active way in which the courts have shown they are prepared to interpret the provisions of the New Zealand Bill of Rights Act 1990 the scope and ambit of the act is clearly very wide and possibly more useful to plaintiffs than traditional remedies such as judicial review.

Consequently in considering whether a person or body falls within section 3(B) of the Bill of Rights Act the approach has to be whether the act complained of amounts to a 'public' function, power or duty and if so, whether it is confirmed or imposed, on the person or body exercising it by or pursuant to law, by statute or otherwise.

4. The Concept of Public Law Compensation

The majority judgments in *Baigent's case* felt that compensation against the state for breaches

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do not venture further for the purposes of the present judgment."

53 Above N24

of affirmed human, civil or political rights is a public law remedy and not a form of vicarious liability for tort. The Court of Appeal in *Baigent's case* followed the Privy Council decision in *Maharaj v Attorney-General of Trinidad and Tobago (No.2)*.[54] In that case a barrister in the West Indies was gaoled for seven days for contempt of court by a judge. There was a constitutional right not to be deprived of liberty save by due process of law and subsequently it was found that there had been a failure of natural justice as before making the order imprisoning the barrister the Judge had not told him plainly enough what he had done to enable him to explain or excuse his conduct. Lord Diplock found that the claim was not one in private law against the judge or against the state for the actions of the judge but rather was one in public law saying at page 679 of the judgment:

> "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, which has been newly created by section 6(1) and (2) of the Constitution."[55]

The court noted that as the barrister had long since served his sentence of imprisonment the only practical form of redress was monetary compensation even although there was no express provision for monetary compensation in the constitution.

The court considered what type of compensation might be available. Lord Diplock noted

> "The claim is not a claim in private law for damages for the tort of false imprisonment, under which the damages recoverable are at large it would include damages for loss of reputation. It is a claim in public law for compensation for depravation of liberty alone. Such compensation would include any loss of earnings consequent on the imprisonment and recompense for the inconvenience and distress suffered by the appellant during his

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54 N15

55 N15, P 679

incarceration."[56]

As exemplary damages were not claimed the court did not express a view as to whether monetary compensation for breach of an affirmed right under the constitution of the Island state could include an exemplary punitive award. However there are indications from cases which have reached the Privy Council from the West Indies that exemplary damages are not available although the issue is still open. For example in *Reynolds v Attorney-General for St Christopher, Nevis & Anguilla*[57] the appellant had been detained for some weeks during a state of emergency. He subsequently sued for damages for false imprisonment and for compensation for breach of his constitutional right not to be subjected to unlawful detention. The respondent had been awarded $18,000.00 which included an unspecified sum in the award as exemplary damages. The award was upheld by the Privy Council as capable of accruing under the tort of false imprisonment although they accepted a submission from counsel for the Attorney-General that exemplary damages would not have been available had the action been founded solely on the breach of the constitutional provision. However as the constitution of St Christopher , Nevis & Anguilla specifically allowed traditional remedies to co-exist with an action under the remedies provision of the constitution their Lordships were content to dismiss the Attorney-General's appeal.

Similarly in *Jaundoo v Attorney-General of Guyana*[58] where land had been compulsorily taken from the appellant without compensation in breach of the constitution of Guyana the Privy Council held that as the road was nearly complete the only form of compensation could be a money payment to the appellant as compensatory damages for the loss caused her by the Government's actions. Damages were viewed as being solely compensatory.

Exemplary damages were described by Lord Devlin in *Rookes v Barnard*[59] as being "...essentially different from ordinary damages. The object of damages in the usual sense of the

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56 N15, P 680

57 [1980] AC 637

58 [1971] AC 972

59 [1964] 1 All ER 367

term is to compensate. The object of exemplary damages is to punish and deter."[60] Lord Devlin described one of the categories in which exemplary damages could be awarded as being where conduct was oppressive, arbitrary or by way of an unconstitutional action by servants of the government. The Privy Council in *Maharaj* clearly saw public law compensation as being essentially compensatory with exemplary damages being available in private law actions alone although as noted the Privy Council did not need to determine the point as exemplary damages were not claimed in that case. Their Lordships' decision in *Reynolds v Attorney-General*[61] also emphasises that the Privy Council sees exemplary damages as limited to private law actions for damages for false imprisonment, misfeasance in public office and other traditional tort claims.

Although the issue has not yet been determined by the Privy Council the indications given by their Lordships would, it is suggested, carry considerable weight with the New Zealand Courts. The Court of Appeal in *Baigent's case* drew heavily on their Lordships' judgment in *Maharaj* and in earlier Bill of Rights decisions on the judgment of the Privy Council in *Minister of Home Affairs v Fisher*[62] where their Lordships held that a constitution should be construed with less rigidity and more generosity than other acts. This latter decision was relied on by both Richardson J and Cooke P in *Ministry of Transport v Noort; Police v Curran*[63] and also by Cooke P in his judgement in *R v Goodwin*[64].

Exemplary damages are available, as will be seen, in the Canadian jurisdiction for claims under the Canadian Charter of Rights and Freedoms. However Canadian courts appear to have adopted a private rather than public law approach to claims under the Charter, although as with much other Canadian law on the Charter, the subject is characterised by uncertainty with conflicting decisions either way.

No award of damages was made in *Baigent's case* as the claim reached the Court of Appeal

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60 N52, P 407

61 Above N51

62 [1980] AC 319

63 Above N26 at PP 122 and 132

64 (1992) 9 CRNZ 1 PP 18, 26

by way of appeal against a successful striking out action. Further since *Baigent's case* there has been no award of damages or monetary compensation by a court in New Zealand for breach of the provisions of the Bill of Rights Act. The judgments in *Baigent's case* are, however, of considerable interest for their individual views on the issue of damages or compensation. It seems clear from all of the judgments that the award of damages for breach of the act will be discretionary. Hardie Boys J's views echoed those of Lord Diplock when in *Baigent's case* he said "In the assessment of the compensation the emphasis must be on the compensatory and not the punitive element. The objective is to affirm the right, not punish the transgressor."[65]

Casey J emphasised the discretionary nature of the remedy while Cooke P said "...I think that it would be premature at this stage to say more than that, in addition to any physical damage, intangible harm such as distress and injured feelings may be compensated for; the gravity of the breach and the need to emphasise the importance of the affirmed rights and to deter breaches are also proper considerations; but extravagant awards are to be avoided."[66]

Support for Cooke P's proposition that the remedy should not merely be compensatory but should also be awarded to emphasise the importance of the rights in the Bill of Rights Act and to deter future breaches can be drawn from *Ashby v White*[67] in which the dissenting judgment of Chief Justice Holt was subsequently upheld in the House of Lords. The defendant in the case was the Returning Officer who had refused to admit the plaintiff's vote in an election for members of Parliament. The defendant succeeded in the initial trial for various reasons including a failure to show actual hurt or damage. In his dissenting judgment Holt CJ said "If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it" and "want of right and want of remedy are reciprocal".[68] Holt CJ held that hindering a man in his

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65 N2, P 703 They were also a re-affirmation of views he expressed in his judgment in *R v Te Kira* [1993] 3 NZLR 257 (CA), at 276 where he said "The Court's duty to uphold the rights affirmed by the Act requires it to make an appropriate response where there has been a breach. The response is and should be seen as itself an affirmation, a vindication, of a right that is fundamental to all citizens, and not simply as punishment of the officer for breach or as compensation to the person affected, who may be unworthy of much consideration"

66 N2, P 678

67 (1703) 2 LD. Raym. 938, 92 E.R. 126 (K.B.)

68 N60, P 136

right amounted to damage and the need to deter public officers from failing to observe constitutional rights meant that damages were available to the plaintiff. The decision was relied on by several of the Judges in *Baigent's case*, notably McKay J who cited extracts from Holt CJ's judgment saying "The common sense of that decision applies equally to the New Zealand Bill of Rights Act."[69] *Ashby v White* has been held to provide for damages without proof of actual loss for invasion of an absolute right.[70]

Nevertheless, in common law, damages are generally only available to redress consequential injury or loss flowing from the violation of a right. Interference with a right, without proof of actual injury is generally not compensatable other than by nominal damages. The common law position is stated in *McGregor on Damages* as being[71] "the proper approach is to regard an *injuria* or wrong as entitling the plaintiff to a judgment for damages in his favour even without loss or damage, but where there is no loss or damage such judgment will be for nominal damages only."[72]

Cooke P's observation that "the need to emphasise the importance of the affirmed rights and to deter breaches" is clearly an indication that awards are not to be seen as being solely compensatory and that awards akin to exemplary damages in private law actions may be available. However, in *Martin v District Court at Tauranga*[73] Richardson J when discussing the proposition whether the prima facie remedy for breach of some provisions of the Bill of Rights Act should be money damages said "But the objective is to vindicate human rights, not

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69 N2, P 717

70 See *Embrey v Owen* (1851) 6 Exch. 353 at 368 where Barron Parke said "Actual perceptible damage is not indispensable as the foundation of an action; it is sufficient to shew the violation of a right, in which case the law will presume damage."

71 H. McGregor - "McGregor on Damages" 15th Edition, 1988, paragraph 398

72 McGregor also regards the application of *Ashby v White* in support of the proposition that the law presumes or implies damages in every invasion of a legal right as well as to justifying an award of damages without proof of actual loss as being flawed saying "In support of this rationale is often cited Holt C.J.'s famous dictum in *Ashby v White*: "Injury imports a damage, though it does not cost the party one farthing." This approach is only confusing. In the first place it explains nothing because it is a fiction, as those cases where there is clear evidence of no loss show. In the second place it becomes confused with a very different type of case where the law is said to "presume damage"." (at paragraph 398)

73 (1995) 12 CRNZ 509 (CA)

to punish or discipline those responsible for the breach".[74] Richardson J appears to be firmly with those who would allow damages to be only compensatory in nature and not punitive or deterrent. But the point is still open.[75]

Cooke P also emphasised the necessity to avoid any element of double recovery so that if damages were to be awarded on private law causes of actions not based on the Bill of Rights Act the damages must be allowed for in any award of compensation under the Act. Cooke P also suggested that "A legitimate alternative approach, having the advantage of simplicity, would be to make a global award under the Bill of Rights Act and nominal or concurrent awards on any other successful causes of action."[76] This approach was approved by McKay J in his judgment where he emphasised that a claim for breach of the provisions of the Bill of Rights Act could co-exist with traditional tort remedies but that "The same damages may be recoverable by either route."[77] McKay J also emphasised the discretionary nature of the remedy.

The type of compensation that might be awarded has been considered in *Jackson v The Attorney-General*[78] where a claim was brought by a headmaster who had lost his position as a result of publicity arising from his appearance before Justices of the Peace on an unopposed bail application before he had the opportunity of taking legal advice. After his appearance he was able to instruct a solicitor who obtained a name suppression order but there had already been publicity which led to the loss of his job. He claimed, inter alia, for compensation for past and future loss of his salary and for general damages for loss of employment opportunity and

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74 N60, P 540

75 Dr. Rodney Harrision QC in his chapter entitled "The Remedial Jurisdiction for Breach of the Bill of Rights" published in *Rights and Freedoms*, Grant Huscroft and Paul Rishworth, Brookers, 1995, 401 says at P 427 that "The emphasis on compensation and in particular the passage from Hardie Boys J set out above may tend to suggest that exemplary damages are not available by way of compensation for breach of the Bill of Rights. It would, however, be wrong to interpret the decision in *Baigent's case* as ruling out awards of exemplary damages by way of remedy. ...the exemplary damages question should, therefore, be seen as still very much an open one." He also ventures what he describes as "necessarily tentative opinions" that consequential financial losses such as loss of income during a period of arbitrary detention can be compensated for and that, adopting a "rights-centred" approach, breach of the right per se is compensatable without further proof of damage.

76 N2, P 678

77 N2, P 718

78 High Court, 20-11-95; Tompkins J, Auckland CPA 2/95

status as well as for exemplary damages. The case came before the court on a pre-trial application for determination of a point of law. The court accepted that a claim could include a claim for loss of future earnings and employment opportunities. The court did not deal with the issue as to whether exemplary damages could be claimed, although crown counsel based his argument on the thesis that in any claim for public law compensation founded on a breach or breaches of the act exemplary damages were not recoverable and neither, he submitted, were damages for future economic loss or loss of opportunity.

In his judgment in *Baigent's case* Cooke P clearly stated that monetary compensation for breach of the Bill of Rights Act is not "pecuniary damages" within the meaning of the Judicature Act 1908, section 19A. He said "That section is referring to common law damages, not public law compensation."[79] That meant that there was no prima facie right to trial by jury in claims in civil proceedings where Bill of Rights relief is sought. Casey J also accepted the trial was to be by way of judge alone as did Hardie Boys J. However one other consequence of the court holding that monetary compensation for breach of the Bill of Rights is not "pecuniary damages" is that a claim for such compensation would not amount to "proceedings for damages" in terms of the bar on civil proceedings for damages arising from personal injury covered by the accident compensation scheme. Section 14(1) of the Accident Rehabilitation and Compensation Insurance Act 1992 bars proceedings for damages arising directly or indirectly for personal injury covered by the accident compensation legislation. It has been suggested by several commentators that where the personal injury is caused by a breach of the Bill of Rights then the bar on proceedings for damages contained in section 14 of the Accident Rehabilitation and Compensation Insurance Act can be avoided by suing for compensation for breach of the Bill of Rights Act.[80]

One difficulty, however, is that the civil rights protected by the Bill of Rights Act are somewhat limited in scope being essentially those covered by sections 8 to 11 which include the right not to be deprived of life, the right not to be subjected to torture or cruel treatment and rights in

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79 N2, PP 677, 678

80 See for example John Miller - "Seeking Compensation for Bill of Rights Breaches", Human Rights Law and Practice, Vol 1, March, 1996, 211 at 212 and Dr. Rodney Harrison QC - "The New Remedy in Damages for Breach of the Bill of Rights", Auckland District Law Society, September, 1994, at p 9.5

relation to medical or scientific experimentation and the right to refuse to undergo medical treatment. Consequently the scope to mount a claim for damages for personal injury under the guise of the Bill of Rights Act is not particularly great and is most likely to be of benefit to the estates or relatives of deceased persons suing where the deceased's life has been lost as a result of negligence of one of the class of persons covered by the act.

Cooke P, Hardie Boys and Casey J refer to the remedy as "compensation". McKay J refers to "damages or monetary compensation". The distinction seems to be made to emphasise the divide between the concepts of common law damages and public law compensation.

5. Is only one Remedy Available?

In *Baigent's case* there could be no other remedy but compensation. No criminal charges followed the search and so there was no evidence to suppress or criminal prosecution to stay or dismiss. The issue of more than one remedy did not arise. Monetary compensation could be the only remedy.

The emphasis in *Baigent's case* was, however, very much on the need for an effective remedy, particularly having regard to New Zealand's obligations under article 2(3) of the International Covenant whereby each State party had undertaken, inter alia, to ensure an effective remedy for violation of rights.

In *Baigent's case* Cooke P noted that the New Zealand act did not have an express provision about remedies but said "The ordinary range of remedies will be available for their enforcement and protection."[81]

The ordinary range of remedies would include stay of proceedings, exclusion of evidence in criminal cases, declarations, injunctions and in appropriate cases monetary compensation. There is nothing in the words used by Cooke P to indicate that the court had in mind that only one remedy of the range of remedies would be available to a person whose rights had been

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81 N2, P 676

infringed. The emphasis is on providing an effective remedy and if it transpires that more than one remedy is required then there would appear to be no good reason for any limitation to a sole remedy.

Martin v District Court of Tauranga[82] was a case where the Court of Appeal considered an application for a stay of proceedings for delay in bringing an accused person to trial. The appellant (the application had been unsuccessful in the High Court before Blanchard J) had been arrested on charges of sexual violation in December, 1992 but as at May, 1994, when the application was made to the District Court at Tauranga, had not been brought to trial although a trial date had been allocated for some weeks later. There had been earlier trial dates allocated but they had been either unilaterally abandoned by the Crown for inadequate reason or had not been able to proceed because of unavailability of courts or judges. The case was an example of systemic delay abetted by a crown solicitor's unilateral decision to cancel a scheduled trial date.

The court accepted that the appellant's right under the New Zealand Bill of Rights Act to be tried without undue delay (section 25(b)) had been breached and then considered what remedy was available. It held that a stay of proceedings was the appropriate remedy. Neither Cooke P or Hardie Boys J favoured letting the trial proceed but compensating the appellant by an award of damages with Hardie Boys noting the problems that might pose saying "That has conceptual problems. It would of necessity be after trial and the notion of an award of damages to a person who has been found guilty presents some difficulty."[83]

The court noted the Canadian position as represented by *R v Moran*[84] that a stay of proceedings was not the only remedy for infringement of the right but the Court was reluctant to consider any other remedy. Richardson J in his judgment said "The choice of remedies should be to the values underlying the particular right. The remedy or remedies granted should be proportional

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82 N65

83 N65, P 542

84 (1992) 71 CCC (3d) 1

to the particular breach and should have regard to other aspects of the public interest."[85]

It is clear that the court will, in appropriate instances, consider more than one remedy. The emphasis would appear to be on proportionality to the particular breach. Consequently in criminal cases where evidence has been obtained in breach of the Bill of Rights Act, prima facie, exclusion of that evidence would appear to be the remedy proportional to the breach and has been the remedy commonly adopted by the courts.[86] Although the court in *Martin v District Court at Tauranga* indicated that a stay was the effective remedy for systemic delay it is conceivable that an abuse of the rights guaranteed by the act or delay might be so gross as would entitle a court to deal with the criminal prosecution by exclusion of evidence or stay of proceedings and also award damages if the particular breach required that degree of proportionality.

Clearly the range of remedies, the appropriateness of one remedy or more than one remedy is related to the particular breach so that it is also conceivable in civil proceedings for there to be injunctions and declarations as well as monetary compensation.

6. Developments in New Zealand Law since *Baigent's Case*

The most significant development has been the decision of Eichelbaum CJ in *Whithair v Attorney-General*[87] which clarified the question as to whether a claim could be maintained against the Crown for mere breach so that it was unnecessary to show that the infringer was negligent, reckless or perhaps malicious in infringing the plaintiff's rights.

The issue did not arise in *Baigent's case* as were the allegations there to be proved there could be no question that the breach there was other than deliberate and in 'bad faith'.

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85 N65, P 540

86 As for example in *R v Kirifi* [1992] 2 NZLR 8 (CA) where Cooke P said "It seems to us that, once a breach of s 23(1)(b) has been established, the trial judge acts rightly in ruling out a consequent admission unless there are circumstances in the particular case satisfying him or her that it is fair and right to allow the admission into evidence."

87 [1996] 2 NZLR 45

Whithair had been arrested on a Friday afternoon on a charge of male assaults female and was refused police bail because of a policy directive in the local police district to refuse bail to persons charged with what were classified as domestic violence offences. The police arrested him in Paraparaumu and transported him on the Friday evening to Porirua but did not arrange for a court in Porirua to be convened the following morning to hear a bail application or alternatively transport him to Wellington where a court was sitting.

On the criminal charge Whithair was dealt with in the Porirua District Court. He pleaded guilty and was given a discharge under s 19 of the Criminal Justice Act. He commenced proceedings against the police for false imprisonment, misfeasance in a public office and damages for breach of the New Zealand Bill of Rights Act. The relevant provisions of the Act that were said to have been breached were s 23(3) (right of an arrested person to be brought as soon as possible before a Court or competent tribunal) and s 22 (the right not to arbitrarily detained). The Court of Appeal had earlier in *R v Greenaway*[88] stated that the effect of s 23(3) of the New Zealand Bill of Rights Act was that the police were obliged to advise an arrested person of his right to seek bail and that a special sitting for that purpose could be arranged for a Saturday if the arrested person required it. The court left open the question as to whether the police were obliged to transport the arrested person to another court if a bail hearing could not be arranged in the court in which the information had been laid. In *Whithair* Eichelbaum CJ said that the provisions of the New Zealand Bill of Rights Act and analogous provisions in the Crimes Act 1961 meant that a technical approach to the question of venue needed to be avoided on considering the issue of bail. His Honour said that if a defendant wished to have the opportunity to seek bail the obligations of the police included bringing that person before another court if reasonably practical to do so, if the court before which the defendant would otherwise have been brought was not sitting or available to sit at the relevant time.

On the more important issue as to whether damages lie for mere breach His Honour said:

> "Sitting as I am at first instance, for me the most powerful indicator is that notwithstanding the separate consideration given to the question of remedy in the several

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88 (1994) 12 CRNZ 103

judgments in *Simpson's* case there is not so much as a hint that the plaintiff had to establish any element additional to proving a breach of the right in question."[89]

He further observed:

> "I of course must accept (and can do so without difficulty) the conclusion that notwithstanding the absence of any express provision, the legislature must have intended that the Courts should work out appropriate remedies for breaches of the New Zealand Bill of Rights Act. Where no other appropriate response is available, damages for the breach is seen as the proper remedy. The argument however is that the Courts are to circumscribe the remedy with some addition requirement. I am unable to see a principal basis for that, in the absence of any trace of a legislative intention to that effect.[90]

In a review of the decision in the Bill of Rights Bulletin Tracey Hawe said

> "The Court affirmed that a claim for damages does not require conscious violation of rights, bad faith, or reckless indifference to a person's rights by the State. All government agencies whose actions may impinge upon the rights of people under the act should take note of this, as the potential for damages claims may grow accordingly."[91]

7. Other Jurisdictions

(a) *Ireland*

Ireland has a written constitution which guarantees fundamental human rights. However no remedies clause for breach of those rights is contained in the constitution. In *Baigent's case* Hardie Boys J referred to cases from a number of jurisdictions including Ireland noting that the absence of a remedies clause had "not prevented the Courts from developing remedies,

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89 N13, P 57

90 N13, P 57

91 Tracey Hawe - Bill of Rights Bulletin, Issue No. 3, June, 1996, P 50

including the award of damages, not only against individuals guilty of infringement, but against the state itself.[92]

The Irish Constitution contains in articles 40 to 44, a body of provisions described as "fundamental rights". The constitution creates the basic institutions of the Irish state. Article 40.3 provides:

> "1 The state guarantees in its laws to respect, and so far as practicable, by its laws to defend and vindicate the personal rights of the citizen.
>
> 2. The state shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name and property rights of every citizen."

Consequently the State acts as a guarantor of the rights guaranteed to the people of Ireland under the Irish Constitution.

The leading case, which holds that an action lies by an individual for breach of his or her constitutional rights, is *Meskell v Coras Iompair Eireann*[93] where a number of trade unions entered into an agreement with an employer whereby the employer would discharge its existing employees and only re-engage them if they agreed to become members of the respective trade unions. The plaintiff was not re-employed by the defendants as he refused to accept the element of compulsion to join one of the unions. It was held that this amounted to an attempt by the defendants to coerce the plaintiff to abandon his right of disassociation and that was a violation of the fundamental law of the State and accordingly was unlawful. Walsh J. said

> "It has been said on a number of occasion in this Court, and most notably in the decision in *Byrne v Ireland* that a right guaranteed by the constitution or granted by the constitution can be protected by action or enforced by action even though such action

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92 N2, P 701

93 [1973] IR 121

> may not fit into any of the ordinary forms of action in either common law or equity and that the constitutional right carries within it its own right to a remedy or for the enforcement of it."[94]

In *Conway v Irish Teachers Organisation*[95] the Irish Supreme Court held that damages for breach of the rights guaranteed by the Irish constitution can include punitive or exemplary damages with Finlay CJ saying they were intended:

> "...to mark the court's particular disapproval of the defendant's conduct in all the circumstances of the case and its decision that it should publicly be seen to have punished the defendant for such conduct by awarding such damages, quite apart from its obligation, where it may exist in the same case, to compensate the plaintiff for the damage which he or she has suffered."[96]

In *Conway's* case Findlay CJ held that damages could also be:

(1) Ordinary compensatory damages.

(2) Aggravated damages by reason of the way in which the wrong was committed, involving such elements as oppressiveness, arrogance or outrage, the defendant's conduct after the commission of the wrong and the conduct of the defendant in his defence.

(3) Punitive or exemplary damages.

In *Conway*, a case which involved actions on behalf of school children against the Irish National Teachers Organisation for damages for breach of the plaintiffs' constitutional right to an education, compensatory damages were rewarded reflecting missed educational opportunities, and exemplary damages of £1,500.00 per student were assessed, making a total of £100,000.00

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94 Above N78, P 133

95 [1991] 2 IR 305

96 N21, P 317

for the 70 plaintiffs involved.

In *Kennedy v Ireland*[97] damages in the sum of £20,000.00 for each of the first two plaintiffs and £10,000.00 for the third plaintiff were awarded in an action which concerned tapping of their telephones (the plaintiffs were all political journalists) by the Minister for Justice. The constitutional right breached was a right to privacy.

Consequently Irish courts are prepared to give substantial damages for breaches of constitutional rights. Furthermore remedies are not only against the state itself but also available against individuals who breach a plaintiff's constitutional rights. However some actual damage must be suffered and there do not appear to be damages for breach of a constitutional right per se, for example in *Meskell* the plaintiff was held entitled "to such damages as may, upon inquiry, be proved to have been sustained by him."[98] There is some academic disputation of this with it being stated "If violation of a constitutional right on its own does not afford a cause of action, the intrinsic value of the right is not secured."[99]

The action is seen as a private law action rather than one in public law. Liability of the State is seen as vicarious and not direct. In *Cooney v Ireland*[100], a case about mail censorship for prisoners Costello J held

> "The wrong that was committed in this case was an unjustified infringement of a constitutional right, not a tort; and it was committed by a servant of the State and accordingly Ireland can be sued in respect of it."[101]

Interestingly, the Irish courts seem to have adopted the dissenting judgment in *Maharaj* in support of their view that there is no direct liability of the state but rather vicarious liability for

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97 [1987] IR 587

98 N 77, P 136

99 T.A.M. Cooney & Tony Kerr - "Constitutional aspects of Irish Tort Law (1981) 3 DULJ 1 at 14

100 [1986] IR 116

101 N 84 at P 122

its servants' breach of the provisions of the constitution. In *Deighan v Ireland*[102] Flood J held that there was no liability on the part of the State because the judicial officer who had committed the wrong enjoyed judicial immunity.[103] Consequently Irish law, despite the absence of a remedies provision, has taken a proactive approach to issues of liability for breach of the constitution and to damages. Exemplary damages seem to be awarded on the same basis as they would be in tort which accords with the Irish view that the remedy is one in private law and not public law.

(b) *Canada*

The United Kingdom Canada Act 1982 by which the Canadian Constitution Act 1982 was passed contained a charter of rights and freedoms guaranteeing fundamental human rights and also rights for various minorities in Canada. The Charter has a specific remedies clause. It reads as follows:

> **"24- (1) Enforcement of guaranteed rights and freedoms**
>
> Anyone whose rights or freedoms, as guaranteed by this charter have been infringed or denied may apply to a Court of competent jurisdiction to obtain such remedy as the Court considers appropriate and just in the circumstances."

The Canadian courts have adopted a private law rather than public law approach although as Hardie Boys J noted in his judgment in *Baigent's case*[104] there appears to be some division of opinion on this.

Punitive or exemplary damages have been awarded. In *Crossman v R*[105] the court awarded

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102 [1995] 1 IRLM 88

103 This was the approach taken by Lord Hailsham in *Maharaj* where at page 687 of the judgment (see N15) he said "I must add that I find it difficult to accommodate within the concepts of the law a type of liability for damages for the wrong of another when the wrongdoer himself is under no liability at all and the wrong itself is not a tort or delict."

104 N2 at 702

105 [1984] 9 DLR (4th) 588

$500.00 punitive damages to a plaintiff who had been refused access to a lawyer by a policeman until after he had made a statement. Nothing incriminating was contained in the statement and as the plaintiff pleaded guilty in any event the taking of the statement for subsequent use in the proceedings was not in issue. There was no actual damage as a result of the interview as the plaintiff pleaded guilty. The court viewed the matter as being a tort committed by the police against the plaintiff and exemplary damages were available to vindicate the plaintiff's rights. In *Lord v Allison*[106] the same sum was awarded for a breach of the Charter where the police had used excessive force and in *Rollinson v Canada*[107] the court held that damages would be available together with exemplary damages for a serious and flagrant breach of the right to be free from unreasonable search and seizure.

However, the issue as to whether damages are available for breach of Charter rights per se is still not settled. In *Vespoli v The Queen*[108] the Federal Court of Appeal rejected a claim for damages for infringement of the Charter prohibition on unreasonable search and seizure on the grounds that it could "find in the record no solid evidence that the appellants really suffered as a consequence of the illegal seizures."[109]

A strong advocate for damages for breach of Charter rights per se has been the Canadian academic Marilyn Pilkington who in several articles has argued for a remedy in damages under the Charter to vindicate infringement of a constitutional right.[110] In an article entitled *"Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms"* she said

> "If an individual will not recover damages unless he can establish that the infringement of his rights resulted in some consequential injury, it is less likely that infringements of

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106 3 ECLR (2nd) 300

107 [1991] 3 F.C. 70

108 (1984) 84 D.T.C. 6489 (Fed.C.A.)

109 N104, P 6491

110 See Marilyn L. Pilkington - "Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms" (1984) 62 Can./Rev. 517 and "Monetary Redress for Charter Infringement" published in "Charter Litigation", Ed. Robert J. Sharp, Butterworths, 1987 at P 307

> constitutional rights will be pursued in the Courts. In these cases, the constitution will have been breached with impunity. ...where damages are employed as a constitutional rather than a common law remedy, they should be available not only to compensate for consequential losses but to redress the infringement of the right itself.[111]

In Canada there is division among the courts as to whether a conscious violation of the plaintiff's rights is necessary under the Charter before damages can be awarded. In *Stenner v British Colombia (Securities Commission)*[112] mere breach was said to be a defence to an allegation of a Charter violation with Spencer J in his judgment in the Supreme Court of British Colombia saying

> "In my opinion therefore the defence of good faith is available in this case to a claim for damages under s.24(1) and should be taken into account in deciding whether damages are an appropriate and just remedy to any claimed Charter breach."[113]

However that was not accepted in *Lewis v Burnaby School District*[114] or in *Guimond v Attorney-General of Quebec*[115]. *Lewis v Burnaby School District* was an earlier decision of the Supreme Court of British Colombia and Lander J, when considering the policy reasons underlying the good faith defence, said that they "should give way to the vindication of *Charter* rights"[116] and held that allowing public officials to rely on a good faith defence would deny a remedy to persons whose Charter rights had been infringed.

Canadian courts do not seem to be limited to one remedy when seeking to create an effective remedy. In *Persaud v Donaldson*[117] damages under the Charter, being the costs of a criminal

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111 N106, at P 539

112 (1993) 43A C.W.S. (3d) 1183

113 Above N108 at P 1234

114 (1992) 71 BCLR (2d) 183

115 [1995] 123 DLR (4th) 236

116 N111 at P 193

117 (1995) 25 OR (3D) (Ont. Gen. Div.)

trial, were awarded even although evidence obtained in breach of the Charter had been excluded in the course of the trial and the plaintiffs had been acquitted as a result. Charter damages were also available even when a stay of proceedings had been granted in *Moore v Ontario*.[118]

In their review of damages for breach of individual rights[119] Grant Huscroft and Paul Rishworth noted a number of cases where damages were held to be inappropriate as an additional remedy to ones already granted in criminal proceedings such as in *R v Young*[120] where costs were refused where evidence had already been excluded and where the court noted the accused's obvious guilt.

The emphasis in these cases seems to be on the need to fashion a remedy or remedies proportionate to the breach so that in some cases more than one remedy may be required while in others one remedy only will suffice.

Huscroft and Rishworth also note the unsettled nature of the law in Canada with contradictory decisions often found, some of which have been noted in this paper. They summarise the position in Canada by saying

> "It is surprising to find that the law of damages as a Charter remedy remains undeveloped, 13 years following passage of the Charter. Indeed, the insignificance of the damage remedy in Canadian Constitutional Law is reflected in the fact that the leading constitutional authority in Canada deals with its availability in one sentence."[121]

(c) *United States*

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118 (1990) 9 WCB 646

119 See "Damages for Breach of Individual Rights in the United States of America, Canada, Ireland, The Caribbean, India, Sri Lanka, the European Union and under the European Convention on Human Rights", January, 1996, (prepared for the Law Commission)

120 (1993) 12 OR (3D) 529 (Ont. CA)

121 N115, P 33

In the United States claims for breaches of the constitutional guaranteed human rights are seen as claims in private law or tort and not as claims in public law.

In 1961 the Supreme Court in *Munroe v Pape*[122] held that a plaintiff whose constitutional rights have been infringed by a person or persons acting under the colour of state law can bring a federal cause of action even where the state provided an adequate remedy through its common law or tort. In that case the plaintiff and his family, who were Negroes, had been subjected to a search that was clearly unreasonable by a large party of police. The plaintiff was then taken to a police station, interrogated for an unnecessarily long period of time and was not brought before a court at the first reasonable opportunity. The case was an important milestone in civil rights litigation because it meant that plaintiffs were not forced to sue in state courts where even although technically remedies might be available judges or juries were reluctant to give judgments for Negro plaintiffs. The cause of action was under section 1983 of a Civil Rights Act passed by Congress in 1871 during the reconstruction of the southern states following the American Civil War. Federal attempts to extend civil and political rights to newly emancipated Negroes were often frustrated by state officials in the states of the recently defeated Confederacy and so led Congress to pass the Civil Rights Act 1871.

After *Munro v Pape* there were a deluge of civil actions against state officials who acting under the guise of state laws were alleged to have deprived persons of their constitutional rights. In an article Professor Whitman noted:

> "In 1976, almost one of every three "private" federal question suits filed in the federal courts was a civil rights action against the state or local official.
>
> This explosion of actions has become a subject of considerable comment and consternation. Among those most concerned are many judges of the federal courts. During recent years federal judges have elaborated various doctrines that, in purpose or effect, discourage section 1983 litigants and dispose of specific cases: standing; exhaustion; immunity; abstention; interpretation of the 11th amendment; res judicata; as

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122 365 US 167

> well as close construction of the statutory language, of the scope of the constitutional rights, and of the elements of a cause of action. ...this doctrinal complexity has turned section 1983 litigation into an elaborate and often unpredictable game."[123]

In 1978 the Supreme Court circumscribed the right to obtain exemplary damages in *Carey v Piphus*[124]. In that case a number of students suspended from school without being given a hearing filed claims against school officials in a district of Illinois seeking declarations and injunctive relief together with actual and punitive or exemplary damages. The plaintiffs argued that they were entitled to punitive or exemplary damages for breach of their constitutional rights per se even if they could not prove actual damage. The court awarded the plaintiffs nominal damages not exceeding one dollar. The court followed traditional common law doctrines with Justice Powell, in a judgment of the court saying

> "Common-law courts traditionally have vindicated deprivations of certain "absolute" rights that are not shown to have caused actual injury through the award of a nominal sum of money. By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognises the importance to organise society that those rights be scrupulously observed; but at the same time, it remains true to the principle that substantial damages should be awarded only to compensate actual injury or, in the case of exemplary or punitive damages, to deter or punish malicious deprivations of rights."[125]

Munro v Pape and *Carey v Piphus* were examples of actions brought against state officials under a particular section of the Civil Rights Act 1871 for breach of constitutional rights. There is no analogous provision in the American Constitution for actions against federal officials who breach constitutional rights and so the courts developed a remedy in damages that could be

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123 Christina Whitman - "Constitutional Torts" 79 Mich. L. Rev. 5 at 6. And see also the authors of note, damage awards for constitutional torts: a reconsideration after *Carey v Piphus* (1980), 93 Harv. L. Rev. 966 at 972 where it is said "In making clear that section 1983 was created to provide a supplement to whatever relief might be obtained in State courts, the *Munro* decision opened the door for the explosion of civil rights litigation."

124 435 US 247 (1978)

125 N118, P 266

implied from the Constitution without a remedy needing to be enacted by Congress. The seminal case is the 1971 decision *Bivens v Six Unknown Named Agents of the Federal Bureau of Narcotics*[126] where a party of police in exercising a search warrant had virtually demolished a house. Damages were sought on the basis that the narcotics agents had contravened the plaintiff's constitutional rights by an unreasonable search. The Fourth Amendment to the United States Constitution provided a guarantee against unreasonable search and seizure but there was no remedies provision. In the decision Justice Brennan said:

> "That damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials should hardly seem a surprising proposition. Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty... Of course, the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequences of its violation. But "it is... well settled where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."[127]

Also, in his judgment Harlan J noted that on the assumption that Bivens was innocent the rule excluding evidence obtained by an unlawful search was simply irrelevant and so "For people in Bivens' shoes, it is damages or nothing."[128]

In 1980 in *Carlson v Green*[129] the court held that punitive damages were available in a *Bivens* type action with Brennan J saying[130]

> "Our decisions, although not expressly addressing and deciding the question, indicated punitive damages may be awarded in a *Bivens* suit. Punitive damages are 'a particular

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126 403 US 388

127 N120, P 626

128 N120, P 635

129 100 S.Ct. 1468 (1980)

130 N 123, at P 1473

remedial mechanism normally available in the federal courts,' ...and are especially appropriate to redress the violation by a government official of a citizen's constitutional rights. Moreover, punitive damages are available in a 'proper' section 1983 action..."

By a 'proper' section 1983 action the court meant an action where the plaintiffs could show actual damage. Grant Huscroft and Paul Rishworth in their survey of damages for breach of individual rights[131] say that this decision is the high water mark for *Bivens* actions and that they doubt if this case would be decided the same way now as the Supreme Court has since moved to restrict the availability of *Bivens* actions.

In subsequent decisions the Supreme Court in cases such as *Schweiker v Chilicky*[132] and *FDIC v Meyer*[133] limited the availability of *Bivens* type actions by expanding the caveats Brennan J placed on the action in *Bivens* itself, namely whether there were special factors counselling hesitation and where there was another effective remedy established by Congress.

8. Conclusion

As can be seen the New Zealand Courts have restored the vitality to the New Zealand Bill of Rights Act 1990 which Professor Paciocco complained[134] Parliament had removed.

This issue of what type of damages can be obtained in an action founded on *Baigent's case* has still to be resolved. Punitive damages are available in the Irish, Canadian and United States jurisdictions but there the issue of damages for breach of constitutional rights is treated as being a private law remedy rather than a public law one. Exemplary or punitive damages have been established as a remedy for tort violation in private law. It seems unlikely that the *Baigent* remedy will encompass punitive or exemplary damages given the indications in *Maharaj* and other Privy Council decisions that they are not available in public law damages claims.

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131 N113 at P 23

132 US 412, 101 LED 2d 370 (1988)

133 114 S. Ct 996 (1994)

134 See N1

However, notwithstanding some judicial reluctance to see damages as anything other than compensatory, damages may be available to vindicate the infringement of the right and to deter breaches as indicated by Cooke P in *Baigent's case*.[135]

There are of course many cases where there is little or no actual damage so that if damages were limited to being merely compensatory, plaintiffs in some cases, where no criminal charges resulted from the breach, would be without an effective remedy. If compensation as contemplated by Cooke P were able to be awarded it would be difficult to draw any meaningful distinction between exemplary or punitive damages available in tort actions and compensation made to vindicate rights or to deter breaches awarded as public law compensation. Indeed, Halsbury observes that while there is a distinction between the concepts of compensation and damages, the principles applicable to the measure of damages apply equally to the measure of compensation.[136]

This significance of the remedy being a remedy in public law rather than in private law means that the usual defences under the Crown Proceedings Act 1950 are no longer available. Given that the remedy is one by way of a direct claim against the Crown issues such as whether servants of the Crown were acting in the course of their employment are also irrelevant. The scope of the remedy was noted in an article by John Miller[137] where he observed:

> "In a bill of rights claim there is no question of vicarious liability and therefore the defence is normally raised by the crown against vicarious liability claims are ineffective. Also ineffective is the bar on damages claims in the accident compensation legislation."

The Act is now a potent weapon not only in the hands of criminal practitioners through its use in the exclusion of evidence but also in the ability to claim damages from government agencies for breach of ordinary rules of criminal procedure where other remedies are not available or for breach of the various rules of natural justice. The scope of the ability to claim for damages or

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135 N2, P 678

136 12 Halsbury's Laws of England (4th Edition) paragraphs 1103 and 1126

137 John Miller "Seeking Compensation for Bill of Rights Breaches" Vol 1, Human Rights Law and Practice at page 211

monetary compensation has been further extended by *Whithair v Attorney-General* and the potential for claims has grown accordingly.

In a recent article, Sir Ivor Richardson, now president of the Court of Appeal, referred to the flood of cases matching the Canadian experience. The impact of the act was dramatically illustrated by Sir Ivor's comment that

> "A further statistical reflection is that the volume of Charter cases has steadily increased in Canada and now constitutes one quarter of the Supreme Court of Canada's annual output of decided cases. That is about the same percentage as for Bill of Rights cases in the United States Supreme Court.[138]

The fact that damages are now clearly available for breaches of the Bill of Rights, even where there is no element of bad faith, means that the trickle of cases identified by the Law Commission as having been filed since *Baigent's case* may well turn into a flood.

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138 Sir Ivor Richardson - "Rights Jurisprudence - Justice for all, in "Essays on the Constitution" Ed P.A. Joseph, Brookers 1995 at P 71.

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