Samuel Charles Schofield

"Baigent": A Public Law Cause of Action for the Bill of Rights

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ABSTRACT

The text of this paper (excluding footnotes etc) comprises approximately **11,000** words

The Paper examines the recent decision of the Court of Appeal in Simpson v Attorney General (the "Baigent" case). It provides an analysis of the decision drawing out the major themes. The paper focus's on the Court's decision to create a new public law cause of action based upon the Bill of Rights. Analysing it contrast to the dissenting approach favoured by Gault J. The later part of the paper contrasts the direct liability approach of the majority with the problems of vicarious liability, using the United States constitutional tort as a model.

The aim is to highlight the features of the Baigent cause of action, drawing attention to the specific remedial goals that are obtainable with such a cause of action. It possets the advantage of the majority decision is not only simplicity certainty but effectiveness. These advantages will need to be fully understood for future development of the cause of action.

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" Baigent " : A Public Law Cause of Action for the Bill of Rights

With its decision in *Simpson v Attorney-General (The "Baigent" case)* [1] the Court of Appeal has created a new cause of action based upon the New Zealand Bill of Rights Act 1990.[2] It is arguably its most far reaching Bill of Rights decision to date. Previous remedial action based upon the Bill of Rights has been confined to 'defensive' relief. Where rights have been infringed in the context of criminal procedure, the Court has developed the rule of prima facia exclusion of evidence.[3] This has been characterised as using protected rights as a shield, where the remedy is designed to ward off, or make ineffective, government actions which breach those rights.[4] With the creation of the *Baigent* cause of action, the Court has forged a judicial sword, allowing citizens to actively attack government actions and seek a remedy where rights have been breached.

An affirmative use of protected rights, raises questions which strike at the heart of civil rights jurisprudence.[5] It is here that the court will be most openly involved in weighing questions of policy and principle, while giving consideration to its legitimate role within the constitution. Thus the decision of the Court in *Baigent* presents an unprecedented scrutiny of the role of the Bill of Rights in the New Zealand legal framework. In a somewhat indirect

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[1] Unreported, Court of Appeal, C.A. 207/93, 29 July 1994 (Cooke P, Hardie Boys, Casey, McKay JJ, & Gault J (dissenting in part)) [hereinafter "*Baigent*"].
[2] Herein after the "Bill of Rights" or the "Bill".
[3] *Noort v MOT; Curren v Police* [1992] 1 NZLR 260 [1990-92] 1 NZBORR 97; *R v Goodwin* [1993] 2 NZLR 153 [1990-92] 3 NZBORR 214,
[4] W E Dellinger "Of Rights and Remedies the Constitution as a Sword" (1972) 85 Harvard LR, 1532.
[5] See Dellinger above n. at 1533.

reference made within his decision, Gault J captured the unique nature of the issue that was before the Court. In relation to past decisions involving the Court's application of the Bill of Rights he comments "...[t]he focus in those cases ... was on the appropriate principles of interpretation rather *than upon the status of the Act* ..."[6] [emphasis added]. Indeed the importance of the *Baigent* decision is not only in creating the new public law remedy, but in the recognition of the elevated position of the Bill of Rights in the legal stratum.

The focus of this paper will be on the nature of the cause of action that the Court of Appeal has adopted. In that it lies in public law rather than tort, and fixes directly upon the Crown. It is intended to show the Court has adopted a far sighted means of delivering an effective remedy. The paper divides into three parts. The first part looks at the decision of the Court, drawing out the reasoning and the underlying themes. The second part of the paper looks at the form of the action in public law, by contrasting it to the existing tort law approach advocated Gault J. The final part of the paper examines the advantages of direct liability of the Crown, as opposed to the vicarious liability that would arise under tort law remedies. This part of the paper draws heavily, as a contrast, on North American commentators and the United States system of "constitutional torts". The overall theme of the paper are the benefits obtained by through the Court's adoption of the *Baigent* cause of action. Those of certainty, simplicity and effectiveness.

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[6] At p 7.

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Part One: The *Baigent* Decision

A) The Background

Baigent came before the Court of Appeal on the matter of a striking out application granted by a Master of the High Court.[7] Before the case had come to trial the Attorney-General had successfully sought to have claims struck out against him as disclosing no cause of action. The decision of the Master had been upheld on appeal in the High Court,[8] and now arose before the Court of Appeal. Actions had been brought against the Crown not only in tort, but also under a separate claim based on s.21 of the New Zealand Bill of Rights Act 1990, protecting against "unreasonable search and seizure".

The case as pleaded involves the execution of a warrant containing a mistaken address. The police had intended to search the premises of a suspected drug dealer. They had obtained information the suspect was operating from a house on the main road of a Wellington suburb. The particular suburb had two main roads, and although police knew the number of the house, confusion arose as to which was the correct road. Based on misunderstood or mistaken customer

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[7] *Baigent v Attorney-General* [1990-92] NZBORR 400 (Master Williams QC),

[8] *Baigent v Attorney-General* Unreported, 15 July 1993, High Court, Wellington Registry, CP No. 850/91 (Greig J.)

information provided by the Hutt Valley Energy Board,[9] the police obtained a warrant to search the appellant's property. It shared the same house number as the correct address, but was on the alternate of the two roads. Upon arriving on the property the police were informed by both a neighbour and the son of Ms Baigent that they had made some sort of mistake. The officer in charge was spoken to over the telephone, by the appellant's daughter, a Wellington barrister. When she informed him that the search was unlawful it is alleged he replied, "we often get it wrong, but while we are here we will look around anyway". The police proceeded with the search.

As well as the 'unreasonable search' claim based on the Bill of Rights, multiple actions where claimed in tort. The Crown claimed immunity from these actions because of the extensive protection provided to an officer exercising a warrant. It was because of this extensive protection that the appellant had based a claim on the Bill of Rights. This is, it was claimed, an action lying in public law, outside of the immunity provisions which protect only against tort actions. Thus the Court had to decide whether the Bill of Rights gave rise to its own cause of action.

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B) Actions in Tort

The claims made in tort present the law as it was pre-*Baigent*. As the bridesmaid to the Court's decision reached on the Bill of Rights, these claims provided the foundation required for the eventual findings. It was given the limited availability of these conventional causes of action that the Court looked to a claim based directly on the Bill of Rights. The following section of this

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[9] The second defendant was not at issue in these proceedings. However, it raises interesting questions of privacy and breach of contract, based on the grounds that an Energy Board employee provided the information to the police despite the absence of a warrant or legal process

paper will be concerned with examining the Court's reasoning in dealing with these claims.

The appellant alleged there were four heads of tort liability; negligence in procuring the warrant, misfeasance in a public office/abuse of process and trespass of both property and goods. The only claim which was found wholly untenable, by all the judges of the Court of Appeal, was the claim based on negligence. It was rejected on the grounds an action will not lie for procuring the issue of a search warrant unless there is malice or absence of reasonable probable cause.[10]

Immunity provisions

Of the three tort actions the Court allowed to stand, availability had to be reconciled with the extensive immunity that acts to limit liability, where a warrant is being exercised. There are two broad categories of immunities. The first of these extends immunity to the individual officer. The second, while affording no protection to the officer, prevents the Crown being held tortiously liable by breaking the vicarious link.

Police immunity

In the first of these broad categories of immunities, the Crown relied on sections 26 and 27 of the Crimes Act 1961, and section 39 of the Police Act

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[10] *Everett v Ribbands* [1952] 2 QB 198, 205, *Reynolds v Commissioner of Police of the Metropolis* [1985] 1 QB 881.

1958.[11] The provisions of the Crimes Act prevent criminal or civil liability arising from the execution of a warrant.[12] The Police Act, section 39, prevents an action lying against any member of the police acting "in obedience to the process" of executing the warrant. The Court agreed that these provisions only protect acts done under the warrant's authorisation, therefore they only "afford protection for those actions that are reasonably necessary for the execution of the warrant."[13] Cooke P observed:[14]

> naturally the law does not allow a search warrant to be executed in an unreasonable manner ... [f]or present purposes it is enough to state as a general proposition that in the particular circumstances the execution must be in good faith, reasonable and fair.

The liability of the police for trespass and abuse of process, would therefore require a finding at trial that the officers had acted unreasonably and in bad faith. In commenting on the facts as pleaded, there was general agreement that the police actions did not amount to malice, they could however give rise to a finding of want of good faith. It was concluded that although the warrant was procured in good faith, by continuing with the search after realising that a mistake had been made, it was not a bona fide exercise of the warrant.[15] Thus if the facts were established at trial, the police would be unable to seek shelter under these immunity provisions. Crown liability would then depend upon whether immunity could prevent vicarious liability.

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[11] Hardie Boys J, p 5, dismissed two of these provisions as not being applicable in this case, where the warrant at issue was not invalid. Stating of s. 39 of the Police Act, "its purpose is plainly to protect an officer executing an invalid process", and s. 27 of the Crimes Act protects against "a warrant without jurisdiction".

[12] "Justified" as defined in section 2 of the Act.

[13] McKay J, p 6, seemed to require a higher standard of unreasonable conduct, unlike the objective test adopted by the other members of the Court, he formulated a subjective standard where the officer is not protected if *"he knows* [his conduct] is beyond the scope or purpose of the warrant"(emphasis added).

[14] As per Cooke P, p 5.

[15] Cooke P, p 8, defining malice as, "actuated by ill-will or other improper motive". See also Casey J, p 6,14, Hardie Boys J, p 4, McKay J, p 2, Gault J did not comment on point.

Crown immunity

The Crown receives an extensive immunity from section 6(5) of the Crown Proceedings Act 1950. This lies in the second category of immunities, those which protect the Crown from liability by breaking the vicarious link. The provision reads:

> No proceedings shall lie against the Crown by virtue of this section in respect of anything done or omitted to be done by any person while discharging or purporting to discharge any responsibilities of a judicial nature vested in him, or any responsibilities which he has in connection with the execution of judicial process.

The contentious issue before the Court was the extent of immunity this provision provides where a police officer is exercising a warrant. The Court was asked by the appellant to read section 6(5) as not protecting an unreasonable search or seizure, consistent with section 21 of the Bill of Rights.[16] At this point Gault J departs from the majority finding of the Court. Focusing on the meaning of 'purporting to discharge', as contained in section 6(5), he held that:[17]

> ... consistency with s 21 of the Bill of Rights Act requires that a person cannot be regarded as acting in the discharge or purported discharge of such responsibilities if acting maliciously or if engaged in an unreasonable search.

Gault J was the only judge to adopt this conclusion. In the majority view the "plain meaning" of the subsection could not be read down. Hardie Boys J summed up the line taken by the majority when he said: "What was done need

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[16] S 6 of the New Zealand Bill of Rights Act states: "Whenever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning".

[17] At p 26.

not have been reasonable in manner or scope, for the subsection clearly contemplates unauthorised action".[18] Thus under existing tort law, situations could arise where the Crown is able to avoid liability, even though the wrongdoing clearly breaches the Bill of Rights. It was this inconsistency between the current law and the Bill of Rights, that acted as a springboard for the majority finding a cause of action based on the Bill. The difference between Gault J and the majority in their interpretation of section 6(5), reflects the differences on the Bill of Rights issue. In all the judgements, there was a common agreement on the importance of providing an effective remedy where rights have been breached. For Gault J however, the answer lay in amending existing law where at all possible.[19] For the majority, an effective remedy was provided by creating a new public law cause of action.

C) The Nature of the Bill of Rights

It is proposed to look first at the reasoning of the majority. The dissent of Gault J is examined in depth at the end of this part of the paper.

The Status of the Bill of Rights

The availability of remedies under the Bill of Rights has so far lacked critical judicial discussion. In cases involving the criminal process, the courts have allowed evidence to be excluded, however to base a positive cause of action upon the Bill requires a more careful scrutiny of its width and breadth. The Bill

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[18] At p 10, similarly Casey J, p 14, commented: "The phrase 'discharging or purporting to discharge' conveys the meaning of actually discharging the responsibilities; or of intending or professing to do so". Cooke P, p 8, held while the subsection could not protect the Crown from liability for the bad faith execution of a search warrant: "[I]t would be strained, in my opinion, to go further and hold that s. 6(5) does not cover an unreasonable execution of a search warrant carried out in good faith".

[19] The dissent of Gault J is discussed at length below, see "Gault's Dissent".

itself is silent as to any remedial scheme. In the decision in Baigent much of the Court's time was spent of the Bill of Rights issue was considering whether the Act founds its own cause of action. The general focus was on the intention of parliament, this seemed to cluster around three main themes, the effect of the absence of a remedial clause; the purpose of the act as in its long title; general principles of interpretation.

The Absence of a remedial scheme

The Canadian Charter of Rights and Freedoms[20] contains a provision conferring on courts of competent jurisdiction an unfettered power to remedy a breach of the Charter.[21] A court may apply any such remedy as it considers "appropriate and just in the circumstances". The New Zealand Bill of Rights contains no such equivalent in its present form. However the original White Paper draft of the Bill of Rights contained a clause which was almost identical to the provision used in the Charter.[22] Thus in *Baigent,* when determining the intent of Parliament, the Court not only had to grapple with the absence of a remedial clause but the fact that one that had been removed.

The exact reason for the omission remains unclear. Hardie Boys J provided the most extensive review of the matter. The relevant extrinsic aids proved of little help, Hardie Boys J observed: "The history here is far from unequivocal".[23] He suggested a possible explanation for the omission, a view subsequently endorsed by Cooke P. In its original draft form the proposed law would have given courts the power to strike down statutes. Considerable

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[20] Constituition Act, 1982, Part 1, Canadian Charter of Rights and Freedoms. [Hereinafter "the Charter"].
[21] Section 24(1) of the Charter.
[22] Article 25, *A Bill of Rights for New Zealand, A White Paper* (1985, Department of Justice).
[23] Hardie Boys J, at p 14. The explanatory note to the 1989 Bill includes, "Action that violates those rights and freedoms will be unlawful. The Courts might enforce those rights in different ways in different contexts", cited by Cooke P, at p 13.

negative reaction lead to the redrafting of the Bill in its present form. It is possible that remedial clause was removed in the move away from supreme entrenched law, being seen as instrumental to this power.[24] In the end, with only an indeterminate motive for the absence of a remedies clause, the Court did not put much store in its omission.[25]

Long Title

As an interpretative aid, emphasis was placed on the Long Title to the Act. This states its purpose as:

> An act-
>
> (a) To affirm, protect and promote human rights and fundamental freedoms in New Zealand; and
>
> (b) To affirm New Zealand's commitment to the International Covenant on Civil and Political Rights

The Long Title was used to introduce two considerations, firstly as to the intended scope of the Bill, and secondly by introducing international concerns. It was considered that the use of the phrase "affirm, protect and promote", indicated parliament intended the Bill to play an active role in the constitution.[26] This conclusion was further supported from an analysis of New Zealand's obligations under the International Covenant on Civil and Political Rights.[27] Article 2(3)(a) of the Covenant, provides a State Party must make available an "effective remedy" where rights have been breached. The State

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[24] Hardie Boys J, at p 14.
[25] Cooke P, at p 10, concluded it was "probably not of much consequence".
[26] It was equated with the Irish term "vindicate" which has been used to uphold a remedy under the Irish constitution, Cooke P, at p 11; Casey J, at p 17; McKay J, at p 7.
[27] 999 UNTS 171. Entered into force 16 December 1966 [Hereinafter "the Covenant"]

Party is also obliged to "develop the possibilities of judicial remedy" under Article 2(3)(b). There was general consensus that an Act which purports to affirm commitment to the Covenant must necessarily involve an effective remedy when breached. It was also noted that New Zealand ratified the Optional Protocol to the Convention in 1989,[28] Casey J commented:[29]

> The Act reflects Covenant rights, and it would be a strange thing if Parliament, which passed it one year later, must be taken as contemplating that New Zealand citizens could go to the United Nations Committee in New York for appropriate redress, but it could not obtain it from our own Courts.

It was recognised by the Court, decisions taken by the Human Rights Committee of the United Nations, under the Optional Protocol, indicate that compensation is a vital part of an effective remedy.[30]

General principles

The Court found it unlikely that parliament intended a Bill of unenforceable rights. Reliance was placed on the old legal maxim *ubi jus ibi remedium*, where there is a right there is a remedy.[31] McKay J commented that it was difficult to comprehend that: "Parliament should solemnly confer certain rights which are not intended to be enforceable either by prosecution or civil remedy, and can

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[28] 999 UNTS 302. New Zealand accession date, 26 August 1989.

[29] At p 18. Hardie Boys J, at p 16, expressed a similar sentiment: "Citizens of New Zealand ought not to have to resort to international tribunals to obtain adaquate remedy for infringement of Covenant rights this country has affirmed by statute"

[30] Among others, *Mbenge v Zaire* Communication No 16/1977 *Selected Decisions of the Human Rights Committee* Vol 2, p 76, and *Acosta v Uruguay* Communication No 110/1981 *Selected Decisions of the Human Rights Committee* Vol 2, p 148.

[31] *Ashby v* White 2 Ld Raym 938, 953.McKay J tracing its pedigree as far back as the Statute of Westminster II in 1285.

therefore be denied or infringed with impunity."[32] Similar concerns were expressed that the Bill should not be mere "legislative window-dressing".[33] Hardie Boys J stated: "It is not lightly to be accepted that a statute expressing the fundamentals of a civilised society should be little more than sounding brass or tinkling cymbal."[34]

The reasoning in this part of the Court's decision seems uncontroversial. Even Gault J, did not disagree that where there was a breach of the right there should be an effective remedy. It was at the next stage of the inquiry that Gault J dissented, differing over the means of delivering an effective remedy. It is perhaps a worthwhile to pause here to draw out a theme of the majority reasoning, one that differs markedly from Gault J.

As has been stated this case involves questions which strike at the heart of the Bill of Rights in the legal framework. New Zealand's Bill of Rights is unique in many respects. Most obviously in its mode of passage as an ordinary statute. Unlike many examples of constitutional protection of rights, the Bill is not entrenched and contains its own limitations. Section 4 of the Bill circumscribes a court's power in its application to other enactments. A court is prohibited from declining to apply an enactment on grounds of inconsistency with the Bill or alternatively from applying the doctrine of implied repeal.[35] Added to this the Bill lacks an express remedial provision. There seems ample weight for finding only a narrow scope of application for the Bill. However, as a guiding policy behind the decision of the majority, the emphasis is upon the fundamental importance of the rights protected in the Bill. In previous Bill of Rights cases this has lead the Court to adopting a broad and purposive approach, applying as a remedy the prima facia exclusion of evidence in criminal procedure.[36] In the majority decisions in *Baigent,* this approach was

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[32] At p 6.
[33] At p 17.
[34] At p 2.
[35] Section 4(b) and 4(a) respectively.
[36] *Noort v MOT,* above n 3, p 139 as per Cooke P; p 151 as per Richardson J; *R v Goodwin*, above n 3, p 290, as per Richardson J: "A statement of

taken a step further by looking at the importance of the subject matter, rather than the form of the Bill of Rights. Hardie Boys J said:[37]

> Enjoyment of the basic human rights are the entitlement of every citizen, and their protection the obligation of every civilised state. They are inherent in and essential to the structure of society. *They do not depend on the legal or constitutional form in which they are declared.* (emphasis added)

A similar statement was made by Casey J:[38]

> The rights and freedoms affirmed are fundamental to a civilised society and justify a liberal and purposive interpretation of the Act, even though it has not been constitutionally entrenched and has the same status as ordinary legislation.

As a window into the reasoning of the majority, these passages capture the underlying principles. These principles were implicitly in operation, when the majority adopted a public law cause of action, as a means of providing an effective remedy.

D) A New Public Law Cause of Action

Once it was decided that there should be a remedy for a breach of the Bill the question turned to the form it should take. During the course of their judgements, cases where cited from an extraordinarily wide range of jurisdictions. As diverse as Ireland, Canada, India, the United States, and Sri Lanka, and from such international tribunals as the Human Rights Committee of the United Nations and the Inter-American Court of Human Rights. The

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fundamental human rights would be a hollow shell and the enactment an elaborate charade if remedies were not available for breach."

[37] At p 21.

[38] At p 17.

leading precedent however, comes from the Privy Council decision in *Maharaj v Attorney-General of Trinidad and Tobago*.[39] This was a case decided under the Trinidad constitution, where a judge had arbitrarily used his powers of committal for contempt of court. An immunity provision identical to 6(5) of the Crown Proceeding Act 1950, protected the Crown from the vicarious liability arising through the judge in tort. The Board decided that an action does not lie vicariously against the Crown, but is a direct public law liability.[40] Therefore the action was not prevented by tort immunities. This reasoning was adopted by the majority in *Baigent.* As it applied to the case at hand, it meant the action would lie against the Crown, based directly on the Bill of Rights, regardless of the existing tort immunities.

A jurisdictional view of the Cause of action

An interesting jurisdictional question arises out of upholding the direct liability of the Crown. From what jurisdiction does the direct liability of the Crown emanate? Does the Bill of Rights act to directly limit Crown immunity? Civil proceedings against the Crown, those other than for judicial review, criminal proceedings or prerogative writs, are actionable under the Crown Proceedings Act 1950.[41] The Act moderates the traditional Crown immunity from civil proceedings, where only crown servants could be sued.[42] It provides grounds for Crown liability on which potentially a Bill of Rights action could be based. If an action were to lie in tort it would be brought pursuant to section 6 of the Crown Proceedings Act. [43] This provision allows the Crown to

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[39] [1978] 2 All ER 670. See also *Thornhill v Attorney General of Trindad and Tobago* [1981] AC 61(PC); *Societe United Docks v Government of Mauritius* [1985] AC 585 (PC).

[40] Above n, p 677.

[41] "Civil Proceedings" as per s 2 definition.

[42] P Hogg *Liability of the Crown* (2 ed, Carswel Co Ltd, Toronto, 1989) 80; S.Todd (ed) *The Law of Torts in New Zealand* (The Law Book Co, Sydney, 1991) at 194

[43] The section defines the liability of the Crown in tort.

be vicariously liable, through the personal liability of a crown official. However the nature of the Baigent action is direct liability.

There was little explicit discussion in the majority decisions as to the source of jurisdiction for direct liability. Hardie Boys J suggested that while such a claim may certainly be brought under s 3(2)(c) of the Crown Proceedings Act, an action may be altogether independent of that Act.[44] The later approach is more straightforward. The Bill of Rights expressly binds the Crown, as such it may be seen as creating its own grounds for government liability, not depending for existence upon the Crown Proceedings Act.[45] Thus the Bill of Rights like the Crown Proceedings Act, provides grounds of assault on Crown immunity. The consequences of a jurisdiction emanating from the Bill of Rights may be that courts will take a limited view as to when that jurisdiction can be ousted. This would be consistent with the wide and purposive approach taken by the Court of Appeal thus far. It may however highlight a disparity in the court's jurisdiction when it is obliged to apply an inconsistent enactment.[46] It is not inconceivable where a court is so bound, it may be put in the position of having to apply the inconsistent enactment and offset the harm through a monetary award of damages for the breach of rights.

Procedural matters

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[44] Hardie Boys J, at p 11. S 3(2)(c) allows a claim against the Crown based , "... under any act which is binding on the Crown, and for which there is not another equally convenient or more conveniant remedy against the Crown."

[45] S 5(k) of the Acts Interpretation Act 1924 provides; "No provision or enactment in any Act shall in any manner affect the rights of Her Majesty, her heirs or successors, unless it is expressly stated therein that [Her Majesty] shall be bound thereby".Section 3 of the Bill of Rights expressly states it application to the Crown.

[46] Section 4, see above text "General Principles"

Although Baigent involved a claim for monetary redress, in opening up the new cause of action the Court indicated that a full range of remedies will be available.[47] In his judgement Cooke P, outlined the procedure which should be followed for a Bill of Rights claim.[48] He envisaged that cases would generally be heard before a judge rather than a trial by jury. To avoid double recovery under a concurrent cause of action, other awards would have to be taken into account. Alternatively, and for simplicity, a global award could be made under the Bill of Rights and nominal or concurrent awards on any other successful causes of action. Compensation should include not only physical and intangible harm but a reflection of the gravity of the breach and the need to emphasise the importance of the rights and deter breaches. Hardie Boys J added to this that the emphasis must be on the compensatory and not the punitive element, "the objective is to affirm the right, not punish the transgressor".[49]

On the issue of quantum, in this case where there was no physical harm or lasting consequences, $70,000 was sought. Cooke P commented that without having heard argument on the point, he could only give an indication to the trial court that an award of "somewhat less" would be sufficient vindication. The founding of a new cause of action which might give rise to substantial damages, raises major questions concerning the Accident Compensation system. Where physical injury results, for example, the relationship between a Bill of Rights action and the Accident Rehabilitation and Compensation Insurance Act 1992, will need to be established. On its face, this new action will lie outside of any ACC claim - a major development. Future developments will also include the need to develop a jurisprudential approach for the selection of the appropriate remedy. Matters of Quantum will also have to be resolved, for what will often be intangible harm.

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[47] As per Cooke P at p 11 and 12, Casey J at p 20, Hardie Boys J at p 22 and McKay J at p 7.
[48] At p 15-16.
[49] At p 22.

E) Gault's dissent

Early on in his judgement, Gault J observed there were two competing ways the Court could interpret the Bill of Rights Act.[50] Firstly, as a constitutional document which gives rise to a cause of action lying directly against the state. Secondly, as an ordinary statute, not creating any new causes of action, but as declaration of principles, aiding in the interpretation of existing law. Where the majority found the Bill could and should support its own cause of action, Gault J dissented. In his view the Bill should be treated as a; "... formal identification of principles or ideas already operating in the law to a significant extent".[51]

Gault's adoption of this later alternative reflects the importance he placed on the enacted form of the Bill. In common with the majority he concluded that the purpose of the Bill was to affirmatively protect the rights and freedoms. His departure from the majority view centred on a differing account of the underlying parliamentary intent. He concluded there was the underlying presumption when the Bill was enacted, that existing law was sufficient to fulfil the intended purposes of the Act.[52] In support of his dissent he looked to the form in which the Bill was enacted. He noted it was passed as an ordinary statute, not as entrenched or supreme law, as first proposed. Attention was given to the prescribed limitations within the Bill, and the absence of a remedial scheme if rights are breached. He then went on to contrast this with the purpose of the Bill, not only in protecting rights in New Zealand but affirming the Crown's international obligation to provide an effective remedy. He concluded that when the Bill was passed there was a presumption that existing law met these requirements, and that it does not create any new independent causes of action.

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[50] At p 3.
[51] At p 14.
[52] At p 3, 9.

The emphasis placed by Gault J, on the enacted form of the Bill and his resulting findings, differs considerably from the approach and conclusions of the majority. For the majority the decision was guided by the substance of the Bill, one of fundamental rights and freedoms, rather than its statutory form. This can be contrasted with the view of Gault J where he said: "In the absence of entrenched supreme law there is no imperative to accord greater status to the rights affirmed in the Act."[53]

It may be unfair to characterise the decision of Gault J as attributing less importance to the rights and freedoms in the Bill. Like the majority, he stressed the importance of providing an effective remedy where rights have been breached, he differed however in the form which a remedy should take. It should be noted that he was the only judge willing to read down section 6(5) of the Crown Proceedings Act 1950. It may be speculated Gault's approach is based on a more reserved outlook on the role of the judiciary. He was the only judge to comment the legitimate role of the court. After deciding that the Bill was passed with the presumption that existing law could provide an effective remedy he commented: "It would be entirely consistent with the constitutional role of our Courts, where it is open on the proper construction of the Act, to validate the presumption on which it was enacted".[54]

This difference in approach from the majority is reflected in the respective treatment of the precedents. The majority applied the *Maharaj* case as authority for a public law cause of action, Gault J distinguished the case on two grounds. He contented that, unlike the New Zealand Bill of Rights, the case involved a constitution with an express remedies clause. The second ground he applied to all the precedents, reflecting his view of the Bill. In stark contrast to the majority view, he distinguished the New Zealand document: "the New Zealand Bill of Rights Act is not a constitution such as were under

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[53] At p 19.
[54] At p 10.

consideration in the authorities just referred to."[55] He thus rejected the majority view opting instead for his 'existing law' approach.

The final parts of this paper will be spent looking at the issues which arise from the choice of the form of the majority cause of action. Two important highlights flow from the majority decision in *Baigent*. Firstly by basing a cause of action directly on the Bill of Rights, a claim is removed from the vagaries of tort doctrine. As a source of contrast use is made of the existing law approach advocated by Gault J. Looking at the problems encountered by using tort doctrines in Bill of Rights remediation. The second part of this analysis focuses on the advantage of direct liability over the alternative vicarious model of tort liability. As a source of contrast use will be made of the United States system of "constitutional torts".

Part Two: Existing Tort Law v Public Law

In the view of Gault J actions already existing in law are not merely sufficient but the legitimate way for the courts to protect the Bill of Rights. As a summary of his approach, he states where existing law provides an effective remedy, that is all that is needed: "Where it does not, an effective remedy is to be available either by modification or development of the existing law or,

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[55] At p 7.

where that is not possible, by separate right of civil action[for breach of stautory duty]".[56]

Gault J provides as examples the rights to freedom of movement, to be secure against unreasonable search and seizure, and not to be arbitrarily arrested or detained, as being protected by the torts of false imprisonment, malicious prosecution, assault and trespass. [57] It is undoubtable that many of the rights protected in the Bill are within the ambit of current causes of action. [58] It has been suggested that only the most of extreme of cases will fall outside of currently available remedies.[59] Some rights however have no equivalent in the common law,[60] for example the right to peaceful assembly, freedom of association, freedom of thought, religion and belief, and freedom from discrimination. Here Gault J suggests that existing law may be modified or alternatively there could be an action for a breach of statutory duty.[61]

The modification of existing law introduces complexity and uncertainty to a Bill of Rights claim. As observed by Casey J, the formal protection of civil and political rights is something new in or legal pantheon.[62] The Bill is a rare example in our constitution, by providing explicit undertakings in the

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[56] At p 12.

[57] New Zealand Bill of Rights Act 1990 ss 18, 21 and 22 respectively. Cited by Gault J at p 16. Examples from Todd, above n 42, at 924.

[58] See Todd above n 42, at 924; Justice and Law Reform Comittee *Inquiry into the White Paper - A Bill of Rights for New Zealand* (2nd Sess, 41 Parl, 1987) para 10.184; P Rishworth "The Potential of the New Zealand Bill of Rights" [1990] NZLJ 68, 72; J F Burrows *Statute Law in New Zealand* (Butterworths, Wellington, 1992) 335-336; D Paciocco "Remedies for Violations of the New Zealand Bill of Rights Act 1990" in D Paciocco and P Rishworth *Essays on the New Zealand Bill of Rights Act 1990* (Legal Research Foundation, Auckland, publication no 32, 1992) p 45

[59] D. Paciocco, above n, p 45, he cites the experience of the Canadian Charter in support.

[60] Some equality rights do receive protection from statute, for example in the Human Rights Commission Act 1977, see Gault J p 16.

[61] Available against the Crown pursuant to s 3(2)(c) of the Crown Proceedings Act 1950, above n 44, it allows a cause of action against the Crown under any Act to be binding on the Crown, Gault J, at p 20.

[62] At p 18.

relationship between state and citizen. In itself possibly this is not enough to distinguish it from current private law. Both Bill of Rights actions and private law involve balancing the competing interests of various parties in society, in accordance with a particular conception of the good life.[63] However civil and political rights protect a set of interests that are different and not traditionally those interests protected in common law redemption. Traditional interests can be broadly classified as the protection of property rights, personal safety and economic security.[64] The 'existing law' approach of Gault J, in applying current tort actions to Bill of Rights cases, requires a change in the focus in the interests protected. Changes would not only be necessary to the available causes of action, and their application to the Crown but in relation to damages may also entail changes to remedial principles.

As a means of protecting constitutional interests the use of existing law appears unnecessarily cumbersome. Current heads of tort seem particularly untuned when applied to Bill of Rights concerns. At one point, for example, Gault J suggests for breaches of civil and political rights, the expansion of the growing common law tort of protecting injured feelings.[65] Using the tort in this manner may conceivably lead to a situation where peaceful assembly is being protected on the grounds of 'injury to feelings'. As a rationale, this falls a good way short of grasping the importance or significance of the right. Similar considerations are raised in the extension of established causes of action, the traditional protected interests may not be on parity with Bill of Rights interests. For example, using trespass to cover claims of unreasonable search and seizure. The particular wrongdoing the right is aimed at, is not the invasion of property rights, but the abuse or misuse of government power to achieve these ends.

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[63] As an adherent to this position see A Petter "Private Rights/ Public Wrongs: The Liberal Lie of the Charter" (1988) 38 U Toronto L J 278.
[64] Kercher & Noone *Remedies* (2 ed, The Law Book Co Ltd, Sydney, 1990) 80-81.
[65] At p 19.

A) Breach of Statutory Duty

The alternative to applying currently available causes of action, Gault J suggests, is where appropriate use breach of statutory duty. As an area of law, the tort has been described as one of the least principled in the books.[66] For an action to succeed under the tort, the plaintiff must show the statute puts a clear duty on the defendant personally, owing to the plaintiff, and the damage caused by the breach was of a kind that the statute was designed to prevent.[67] Beyond these broadly worded principles, cases provide only minimal guidance, the hunt for implicit duties being heavily reliant on policy grounds.[68] Arguably with a little creative judicial law making, the tort may be all things to everyone. Thus Hardie Boys J, in *Baigent*, rejected the tort as unsuitable on grounds that the Bill of Rights does not impose sufficiently clear duties.[69] Gault J on the other hand saw it as a viable means of plugging the gaps in the existing tort law approach. The indeterminate nature of the action, perhaps in itself renders it inappropriate for Bill of Rights claims. The focus of a claim should be on the merits of remedial action, rather than the contents of an uncertain doctrine. If the majority view in *Baigent* can be charactered as judicial legislation it seems the tort of breach of statutory duty is an equally nebulous area of law. Dickson J of the Supreme Court in Canada, in declaring the tort not a part of Canadian

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[66] Todd, above n 42, p 327.

[67] Todd, above n 42, p 340-41. Paciocco, above n 58, p 71, suggests with the last requirement of contemplated damage, exemplary damages may be excluded, with the focus being on the compensation for injury. As an alternative view, because the Bill of Rights protects against abuse of government power, it may be that exemplary damages are awards within the contemplation of the statute.

[68] Todd, above n 42 at 336.

[69] At p 11-12, "And while it may truely be said that the converse of a right is a duty to observe it, that simple proposition is not enough to found the tort of breach of statutory duty."

law, called the search for parliamentary intent a "bare faced fiction".[70] The direct liability approach adopted in *Baigent* has the advantage of simplicity and certainty. Beyond this, a breach of statutory duty is grounded in tort, further encountering the general problems which must be met in any tort claim against the Crown.

B) Crown Liability in Tort

There are two problems with the scope of tort liability of the Crown. Firstly, tort liability arises only vicariously on the Crown, based on the personal liability of an official, the implications of this are gone into at length below.[71] Secondly, there are a number of limitations on Crown liability in tort. Not only are there are numerous sources of immunity which protect government officials,[72] but restrictions are placed upon the vicarious liability of the Crown itself. Both of these types of immunities were at issue in *Baigent*, and a deciding factor in finding a cause of action based in public law, free from immunities. Hardie Boys J commenting on the scope of existing actions in common law said: "... [T]hese will often be so uncertain or ringed with Crown immunity as to render them of little value".[73] To be able to provide a consistency in redress for Bill of Rights claims, wherever these immunities are encountered they will have to be read down. Section 6 of the Bill of Rights allows a court to give an enactment a meaning consistent with rights contained in it. However any such interpretation needs to be reconciled with section 4 of the Bill, requiring that a court must not decline to apply or make invalid or

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[70] *R v Saskatchewan Wheat Pool* (1983) 143 D L R 464, 478.

[71] See text below, "Part Three".

[72] For example, a variety of protection is extended to police under the Crimes Act 1961 and Police Act 1958. At Common law there is the immunity of Judges of superior courts *Miller v Hope* (1824) 2 Sh.Sc.App., and in s. 193 of the Summary Proceedings Act 1957, a limited immunity for District Court Judges.

[73] At p 14.

ineffective, an inconsistent provision. In *Baigent* the majority refused to read down the "plain meaning" of section 6(5) of the Crown Proceedings Act 1950. Thus an action in tort faces the uncertainty and possible circumvention of liability introduced by various shields of immunity.

Another aspect of Crown liability is the general limitation placed upon its scope by Section 6(1) of the Crown Proceedings Act 1950. This section actually allows the liability of the Crown in tort but only so far as "if it were a private person of full age and capacity." The Bill of Rights applies only to acts of Crown, extending Bill of Rights modifications of tort to private law requires careful consideration. In *Baigent*, Hardie Boys J cited the inappropriateness of extending the tort universally, as one of the grounds for refusing to modify abuse of process to cover the negligent procuring of a search warrant.[74] While a court may find a way to get around this provision, it adds complexity and uncertainty.

C) The Availability of Monetary Compensation in Tort

Using traditional tort damages to compensate for a Bill of Rights claim raises its own set of problems. The Bill of Rights requires compensation for different interests than traditionally protected in tort. There is also the question of whether tort law has the machinery to cope with these changes. The traditional focus of tort compensation is on the tangible harm caused to the victim. The rationale of tort damages is to put the plaintiff in the same position had the wrongdoing not occurred.[75] This presents something of an obstacle to grounding Bill of Rights liability in tort. Attempts to correlate money with injury suffered, on this basis, appears strained in relation to breaches of civil

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[74] See above text, "Part One: Actions in Tort".Hardie Boys J, at p 4.
[75] *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 at 39 per Lord Blackburn.

rights not resulting in actual physical damage.[76] In particular where the harm flowing from breaches of rights is completely nonpecuniary. For example, a denial of a right to free speech or peaceful assembly seems difficult to quantify in monetary terms. In theories that advocate compensating for breaches of civil rights per se, the focus shifts from making the victim 'whole', to the wider societal interests at stake.[77] An award is made on the basis of the inherent value of the right to society, accentuating the underlying moral norms.[78] The rationale moves beyond pure compensation of the individual, to compensation for benefits received by all society in upholding the rights. If a right can be violated at will, without remedial consequences, it may be argued it is not a right at all.[79] Thus the focus of compensation in Bill of Rights law calls for a wider ambit than just tangible harm. This was recognised in *Baigent* where it was said that an award could be made to "emphasise the importance of the right".[80]

Of non-compensatory damages in tort, the court may award either nominal or exemplary damages.[81] Nominal damages in a Bill of Rights claims achieve little. They posses no deterrent value, other than the stigma or inconvenience of being sued, and do little to vindicate the right. Making exemplary damages the work horse of Bill of Rights claims also present difficulties. Exemplary damages are awarded where there is an oppressive or high handed abuse of the victims rights.[82] The award is not linked to the actual harm caused and instead

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[76] B Friedman "When Rights encounter Reality: Enforcing Federal Remedies" (1992) 65 SCLRev 735, 742.
[77] See, eg, M L Pilkington "Damages as a Remedy for Infringement of The Canadian Charter of Rights and Freedoms" (1982) 62 Can Bar Rev 517, 538.
[78] P Shuck *Suing Government: Citizens Remedies for Official Wrongs* (Yale University Press, New Haven, 1983) 24
[79] W M Hohfield "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23 Yale LJ 16, 30-34,where Hohfield would classify this as a "privilege" rather than a right in the strict sense.
[80] Cooke P, at 15, similar statements were made by; Hardie Boys J, at 22, and Casey J, at 20.
[81] Kercher and Noone, above n 64, at 177
[82] *Rookes v Barnard* [1964] AC 1129 at 1226. *Auckland City Council v Blundell* [1986] 1 NZLR 732.

focuses on the conduct of the wrongdoer. In relation to claims for Bill of Rights, this focus may prove inappropriate. The award requires on behalf of the wrongdoer, either malice, wilfulness or as a minimum standard, recklessness,.[83] This may effectively deny a deserving Bill of Rights claimant damages where rights have been infringed negligently or otherwise. A further difficulty with exemplary damages is that a claim is unable to survive the death of the applicant. Section 3(1) of the Law Reform Act 1936 prevents the claim for exemplary damages passing with the estate.[84] When compounded with the effect of Accident Compensation legislation preventing compensatory damages the effect is particularly insidious. As a worse case scenario it could arise that a victim deprived of their right to life can receive no Bill of Rights compensation.

Tort law is weighed heavily by doctrines which restrict the scope of Crown liability or prevent adequate redress. Making torts available which encompass Bill of Rights interests is cumbersome and may prove unnecessarily restrictive. An effective 'existing law' approach would require a high degree of creative law making, which if not always result an effective remedy, would certainly serve to muddy current doctrines. As a process in itself it diverts attention from the real issue on the merits of granting a remedy. Hardie Boys J commented:[85]

> While it may be argued that conventional common law doctrines must needs be developed in accordance with the spirit and intendment of the Bill of Rights, that would at best be a piecemeal approach, conducive to much uncertainty.

The new cause of action adopted in *Baigent,* by lying outside of the confines of tort, provides something of a clean slate. It possess the advantages of simplicity, certainty and overall effectiveness.

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[83] Todd, above n 42 at 872; Kercher and Noone, above n 64, at 363.
[84] *Re Chase* [1989] 1 NZLR 325.
[85] At 12.

Part Three: Direct Crown Liability v Vicarious Liability

A large part of the rationale for finding a new public law cause of action was that the Bill of Rights was seen as imposing direct obligations on the state. Alternatively, the Court could have followed the reasoning of Gault J, using pre-existing law, or adopted a model similar to the United States 'constitutional tort'. For either of the two, supporting a successful action would involve first finding an official who would be liable, Crown liability would then depend on establishing a vicarious link. From the *Baigent* model with a direct obligation imposed upon the state, elements of uncertainty are introduced in two areas. Firstly the difficulty of establishing the individual liability and then the resulting vicarious link. Secondly by introducing the interests of the liable official into the already complex equation of balancing the interests of the individual with those of the wider interests that the Crown represents.

A) Vicarious Crown liability

With the advent of the Crown Proceedings Act 1950 the Crown can, with limited exceptions, be held vicariously liable as if it were an ordinary

employer.[86] Crown liability attaches where a wrongful act is committed by an employee, in a proximate relationship, and where the wrongdoing arises in the course of his or her employment.[87] The proximate relationship is typically satisfied where the wrongdoer is a crown servant but it may in some circumstances include an independent contractor.[88] For the Crown to incur liability the employee must also be acting in the course of employment. Although not precisely defined, this has been given a wide interpretation, including actions expressly forbidden by the employer and to some degree, intentional wrongdoing incidental to duties.[89] Vicarious liability is a strict liability. Before it can attach to an employer, such as the Crown, there must first be an employee who is found personally liable. Liability therefore depends on establishing not only the personal liability of the employee, but the requisite relationship between the Crown and the employee, and that the wrongdoing has arisen out of this relationship. There are certain limits specifically placed on the extent of the Crown's vicarious liability. Section 6(5) was at issue in *Baigent*, it protects anyone exercising or purporting to exercise judicial process.[90] The majority held that an action would not lie unless the crown servant were acting in bad faith. Gault J was prepared to read this section down which would be necessary if the 'existing law' approach was to be maintained.

B) Vicarious Liability in Practice

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[86] Section 6(1), as if it were "a private person of full age and capacity".
[87] Todd, above n 42,at 790; P Hogg, above n 42, at 86.
[88] Vicarious liability for independant contractors will only arise when the duties carried out by the contractor have, by statute or contract, been placed upon the Crown as employer. See Todd, above n 42, p 799.
[89] Todd, above n 42, p 806-810; K Sandstrom "Personal and Vicarious Liability for the Wrongful Acts of Government Officials: An Approach for Liability Under the Charter of Rights and Freedoms" (1990) 24 UBCL Rev 229, 240- 241
[90] See above text, Part One, 'Crown Immunity'.

Conceptually vicarious liability is a somewhat artificial construct. When applied to the Crown it is particularly strained. It relies on the fiction of finding an official personally liable, where in reality the actor's power is indistinguishable from his or her position.[91] In complex government organisations it may be impossible to attach individual responsibility to any one official. Where the infringement is the result of a number of government actions or decisions the responsible official may not always be apparent. The resulting search for individual liability will not only be time consuming but detrimental to the victims chances of recovery.[92] For example, in a prison situation if the inmates were subjected to inhuman treatment (section 10, Bill of Rights) the Crown may escape liability and a victim left with no remedy, if the party responsible can not be proved liable. Such a search diverts the court's attention from the real issue of providing a remedy for the breach.[93] In contrast to the direct liability approach of the majority in *Baigent,* Crown liability would be established merely by proving the responsible party was acting under a public power, whether individually identifiable or not.[94]

C) The "Side Effects" of Personal Liability

The biggest potential difficulty of using vicarious liability in Bill of Rights claims is the extra interests that come with the need to first establish personal liability. When Crown liability depends upon finding the personal liability of an official, it must be decided whether the official should be liable in the circumstances. Thus a new set of policy considerations are added to the

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[91] SK McCallum "Personal Liability of Public Servants: An Anachronism" (1984) 27 Pub Admin 611, 616.
[92] K Sandstrom, above n 89, at 243.
[93] CR Wise "Suits Against Federal Employees for Constitutional Violations: A Search for Reasonableness" (1985) 45 Pub Admin Rev 845 852.
[94] Scope of liable persons defined in s 3 NZ Bill of Rights Act 1990.

equation. As a result a degree of immunity may be given to the official in an effort to avoid the undesirable consequences of personal official liability.

There are two main reasons for a finding of immunity from personal liability. The first is based on notions of justice. It may not be considered appropriate to find liability, in an individual capacity, where the actor is merely carrying out the duties of the government. This would be particularly so where the actor is unable to control the causes of a breach or does not have the capacity to rectify it.[95] The second reason is the over-deterrent effect it may have on future government action. While it may be a desirable remedial goal to deter future breaches of the Bill of Rights, the process of establishing personal liability may have a "chilling" effect on the good faith execution of an official's public duties.[96] It is in the wider interests of society to have a government which is vigorous in its decision making, and not hampered by the fear of personal liability.[97] For example judicial immunity is founded on the idea of encouraging independent judicial decision making, free from the threat of liability.

D) US Approach personal liability and qualified immunity

In the United States constitutional actions against a federal official may be brought under a *Bivens*. This constitutional tort action can be distinguished from vicarious liability in that the doctrine of sovereign immunity means the ultimate remedy lies against the personal official. However vicarious liability similarly involves the finding of official liability. As has been shown the same considerations, involving personal liability, are applied to actions which result in vicarious liability. The aim of this part of the paper is two fold. Firstly to show how the doctrine of qualified and absolute immunity have been developed in the united states system to the detriment of those victims of

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[95] C B Whitman "Constitutional Torts" (1980) 79 Michigan L Rev 5 at 56.
[96] Dellinger, above n 4, p 1535.
[97] P Shuck, above n 78, p 21, sees it as a trade off between the desire to deter future breaches and a need for vigorous decision making.

constitutional violations. Secondly to highlight the dangers of averting attention from the interests of the victim. The experience in the United States highlights the difficulty of balancing the interests of an official with those of providing an effective remedy. The ultimate end of this examination is to highlight the advantages of direct government liability.

Perhaps the jurisdiction cited with the longest history of civil and political rights is the United States. The United States operates under a duel system of state and federal government liability. For persons acting under colour of state authority, liability arises under section 1983 of the United States Code.[98] The section remained largely ineffective until the 1961 Supreme Court decision in *Monroe v Pape*.[99] Where the recovery of monetary compensation for breaches of constitutional rights, was allowed against state officials.[100] By placing the jurisdiction in the federal courts, relief became more accessible. Previously applicants had to exhaust remedies at a state level, which often subject to local pressures, led to limited success.[101] A corollary to section 1983 did not exist for constitutional breaches by federal officials until 1971. In the landmark decision of *Bivens v Six Unknown Named Agents of the Federal Bureau of Narcotics*[102] the Supreme Court decided an action would lie against federal officials, based directly upon the fourth amendment to the Constitution.[103] Similar to the Court's dilemma in *Baigent*, the United States constitution does not contain a remedies clause, thus making it necessary to infer remedies

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[98] 42 USC s 1983 (1982). Although its current codification was in 1982, its origins date back to the Civil Rights Act of 1871 ch 22, s 1, 17 Stat 13. It reads:
Every person who under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the juridiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

[99] 365 US 167 (1961)

[100] Above n 171-187.

[101] Pilkington, above n 77, at 521.

[102] 403 US 388 (1971)

[103] Extended to the claims under the fifith amendment, *Davis v Passman* 442 US 228 (1979), and eigth amendment, *Carlson v Green* 446 US 14 (1980).

directly. The resulting "constitutional tort" was a mirror of section 1983, with liability lying against federal officials.[104] That liability does not extended vicariously to the federal government, the doctrine of sovereign immunity prevents claims unless there is a derogation of immunity by express statutory authority.[105] In reality however, the federal government indemnifies successful claims against its officials.[106] The nature of the *Bivens* action varies from the model adopted by the Court of Appeal in *Baigent* in that it lies as a private action. However like *Baigent*, claims do not depend on existing heads of tort. *Bivens* allowed new heads of tort, based directly on the Constitution. Thus for example the claimant in *Bivens,* was seeking compensation for unreasonable search and seizure and not for trespass to person or property.

E) The Doctrine of qualified immunity

The rationale for the doctrine of qualified immunity is based on the need to balance the competing interests of avoiding the detrimental effects of personal liability, while allowing a claimant to seek a remedy. The practice of the Federal Government in indemnifying its employee's has lead some commentators to question whether a constitutional tort action has in reality such a harmful deterrent effect.[107] Ultimately though the law reflects the judicial perceptions, these being firmly of the view that official liability incurs a detrimental cost to vigorous decision making.[108] Thus the doctrine of qualified

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[104] *Bivens,*above n 99, p 395-97.
[105] Some commentators have argued that if the constitution is able to found an action then it should also effectively be able to pierce the soveriegn immunity. See, e.g. Dillinger, above n 4, p 1556.
[106] Eisenberg and Schwab "The Reality of Constitutional Tort Litigation"(1987) 72 Cornell L Rev 641, 686.
[107] See D J Meltzer "Deterring Constitutional Violations by Law Enforcement Officials: Plantiffs and Defendants as Private Attorney-Generals"(1988) 88 Colum L Rev 247, 284.
[108]. Eisenberg and Schwab, above n 106, p 651-52.

immunity has been introduced to mitigate these effects. It acts as more than merely a defence by providing actual immunity from suit.[109] The current test was expounded in *Harlow v Fitzgerald,*[110] where the Supreme Court adopted an objective test of good faith, disregarding the officials actual state of mind. A subjective element to the test, which had been required previously, was abandoned on the grounds of expediency, to allow claims to be decided at summary judgement without discovery.[111] It was held an official would have immunity unless he or she was acting in breach of "clearly established statutory or constitutional rights of which a reasonable person would have known".[112] The public policy against holding an official liable was dominant in the reasoning of the Court: "Where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken with independence and without fear of consequences."[113]

It can be seen that the doctrine of qualified immunity is essentially instrumental and not based on notions of justice.[114]

The scope of the doctrine is extremely wide, leading some commentators to criticise the Courts for making an award under the constitution almost impossible to achieve.[115] In 1985 an assessment of the 12,000 *Bivens* suits filed found only thirty had resulted in judgements for the plaintiffs, and only a

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[109] *Mitchell v Forsyth* 472 US 511 (1985).

[110] 457 U.S. 800 (1982).

[111] Above n, at 816-19. A subjective componant required not only a reasonable belief but that the official must act in good faith, *Pierson v Ray* 386 US 547 (1967), *Wood v Strickland* 420 US 308 (1975).

[112] Above n, at 818.

[113] Above n, at 816.

[114] S Nahmod "Constitutional Damages and Corrective Justice: A Different View" (1990) 76 Virginia LR 997, 1004. For a contrary view see JC Jefferies "Damages for Constitutional Violations: The Relation of Risk to Injury in Constitutional Torts" (1990) 75 Virginia LR 1461.

[115] See, eg, P M Rosen "The Bivens Constitutional Tort: An Unfulfilled Promise" (1989) 67 North Carolina Law Rev 337.

meagre four judgements had actually been paid out.[116] Contributing causes to this lack of availability have been identified as procedural impediments, like the difficulty in locating the liable official, or persuading a jury to find a federal employee personally liable. The major reason for the lack of success however, has been attributed to the Court's stringent doctrine of qualified immunity.[117] The problems of trying to balance two competing policies, protecting an official on the one hand and providing a remedy on the other, has effectively denied United States claimants. There is a growing body of commentators calling for a constitutional tort that lies directly against the Federal Government, specifically to alleviate this clash of interests.

Conclusions

Rights litigation opens up particular policy areas which effect not only the interests of the individual but systemic interests that lie in the society. The most evident interest is that of the individual in the need for compensation for a breach. The award may also embody some the wider remedial goals of deterring future breaches, or as a statement on the worth of the right. The systemic interests range from the need for vigorous performance of government tasks through to the overall considerations of who and how should the cost be borne. Not only is any award necessarily funded by the public

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[116] Written statement of John Farley, III, Director, Torts Branch, Civil Division, U.S. Department of Justice, to the Litigation Section of the Bar of the District of Columbia (May 1985). Cited in P M Rosen, above n at 343.
[117] Rosen, above n 115, p 343.

purse, but it may have a chilling effect on the good faith execution of public duties.

With the direct liability approach the Court has adopted in *Baigent,* the systemic costs have been minimised. There is no need to consider the impact of liability upon the official concerned as they are no longer part of the equation. Indemnity for a breach is a direct responsibility of the government owed to the aggrieved citizen. In adopting such an approach the deterrent effect of an award has been reduced, however this is arguably a matter best left to the government to rectify. The state institution can correct the official misconduct or error, as necessary. They will be in a better position to make changes to the system to ensure future compliance. There is still some room for personal official liability in egregious cases under the *Baigent* cause of action, as actions may still be brought in tort.[118]

The contrary line adopted by Gault J, where the interest of the victim will only be redressed through the liability of the individual officer, will lead to circumstances where it is not only unjust but undesirable to hold the individual officer liable.

The issue of a remedy must involve the balancing of this compensatory goal with wider interests. It is suggested that the form of the *Baigents* action, where the government is directly liable allows the greatest freedom to pursue this line.

A new public law cause of action is an appropriate break from traditional tort law. The Bill of Rights presents new interests, to which the existing tort law was not designed to cope. Crown liability in tort is not an unequivocal fact. Many officials are surrounded by immunity, and liability of the Crown itself is limited. If a claim is successful then it must be channelled into the appropriate area of tort damages to recover. An area that has difficulty coping with the non

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[118] Cooke P, p 15, states: "A legitimate alternative approach, having the advantage of simplicity, would be to make a global award under the Bill of Rights and nominal or concurrent awards on any other successful causes of action"

tangible harm that Bill of Rights actions will involve. In tort law the focus remains as much on the perpetrator of the breach as the victim themselves. As with the qualified immunity defence in the United States, a balancing of policy in tort need also protect the interest of the official, often to the detriment of the victim. If the 'existing law' approach of Gault J was adopted the success of future claims would depend as much on the merits of the case, as the ability to manipulate existing heads of law.

The Court has before it a clearly defined pathway to remedy violations of the Bill. It is a system that allows for the an effective remedy to be provided to the victim of a breach, without the limits and uncertainty of existing law. The issue of state of mind will no doubt be raised in future cases. Should the liability under a *Baigent* action be strict liability, once a breach of the right has been established? The United States test of qualified immunity has acted to effectively nullify the availability of a "constitutional tort" action. Their experience indicates that a state of mind requirement is based on a policy that is not present in the *Baigent* system of direct liability.[119] Arguably with the direct relationship between the citizen and state, the need to incorporate a state of mind requirement has been pre-empted, and any considerations of state of mind should go to quantum. The Bill itself contains limits to government liability. Some of the substantive rights have there own inherent limitations. For example, 'unreasonable search and seizure' and 'peaceful assembly'. Where the right is prescribed without an inherent limitation, the court may apply section 5 where necessary:

> **5. Justified limitations**- Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

If the primary goal is to provide a system with an effective remedy, the court has adopted the most efficient delivery method. It is submitted that in future

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[119] See *Harlow v Fitzgerald*, above n 107.

cases while the court may look to limit the scope of the rights, it should keep a clean avenue to a remedy once a breach has been established.

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r Schofield, Samuel
Folder Charles
Sc "Baigent