IN THE SUPREME COURT OF NEW ZEALAND

SC 120/2009
[2011] NZSC 110

	BETWEEN	ATTORNEY-GENERAL Appellant
	AND	MERVYN CHAPMAN Respondent
Hearing:	6–7 December 2010	
Court:	Elias CJ, McGrath, William Young, Gault and Anderson JJ	
Counsel:	D B Collins QC Solicitor-General, C J Curran and B L Orr for Appellant R E Harrison QC, A J McKenzie, K H Cook and P N Allan for Respondent	
Judgment:	16 September 2011	

JUDGMENT OF THE COURT

A The appeal is allowed and the matter remitted to the High Court.

B Question (a) is answered as follows:

> **The Court does not have jurisdiction to hear and determine the respondent's claim for public law compensation for alleged breaches by the judiciary of ss 25 and 27 of the New Zealand Bill of Rights Act 1990 occurring in the course of determining his criminal legal aid application and his appeal against conviction.**

C There will be no order for costs.

REASONS

ELIAS CJ

[1] A right without a remedy is "a vain thing to imagine", as Holt CJ recognised in 1704.[1] That rights are vindicated through remedy for breach is fundamental to the rule of law. Since enactment of the New Zealand Bill of Rights Act 1990, the provision of effective remedy for breach of the "human rights and fundamental freedoms" affirmed in the Act has been the responsibility of the courts.[2] At issue in the present case is whether New Zealand domestic law prevents damages being awarded, when they would afford effective remedy, if the breach of rights is caused by judicial action.

[2] What is effective remedy for Bill of Rights breach differs according to the particular breach and its circumstances. To date, the remedies ordered in New Zealand have included exclusion of evidence,[3] stay of proceedings,[4] directions to administrative and judicial bodies,[5] development of the common law to achieve consistency with the Bill of Rights Act,[6] and damages.[7] In large part such remedies have been adapted for the enforcement and protection of rights from "[t]he ordinary range of remedies".[8] But the courts have recognised that the Act requires "development of the law when necessary" by the courts if they are not to fail in the duty to give a remedy where rights have been infringed.[9]

[3] In 1994 one such development by the Court of Appeal recognised a public law claim for damages against the State in circumstances where claims in tort under the vicarious liability of the executive branch of the government established by s 6 of the Crown Proceedings Act 1950 for the torts of its servants (in that case, police

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1 *Ashby v White* (1703) 2 Ld Raym 938 at 953, 92 ER 126 at 136 (KB).
2 See *R v Goodwin* [1993] 2 NZLR 153 (CA) at 191 per Richardson J; also "A Bill of Rights for New Zealand: A White Paper" [1984–1985] I AJHR A6 at 22–23.
3 See, for example, *R v Te Kira* [1993] 3 NZLR 257 (CA).
4 See, for example, *Martin v Tauranga District Court* [1995] 2 NZLR 419 (CA).
5 As in *Bakker v District Court at Te Awamutu* HC Hamilton CP35/99, 6 August 1999 per Tompkins J.
6 See *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [111] per Gault P and Blanchard J and at [229] per Tipping J.
7 See *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429.
8 *Simpson v Attorney-General* [*Baigent's case*] [1994] 3 NZLR 667 (CA) at 676.
9 Ibid.

officers) were the subject of qualified immunities.[10] The claim for damages first accepted in *Simpson v Attorney-General* [*Baigent's case*][11] and *Auckland Unemployed Workers' Rights Centre Inc v Attorney-General*[12] was held to be a direct one against the State for breach of the Bill of Rights Act, not a vicarious claim for civil wrongs by its servants, and was therefore unaffected by the immunities.[13]

[4] The direct public law remedy does not substitute the State for the public officials who would, in the absence of some form of immunity, otherwise be responsible in tort. It is distinct from private law remedies,[14] and is available for denial of rights rather than error in result or procedure which can be adequately corrected within the process in which it occurs. State remedial responsibility is appropriate for such denial of rights and is consistent with the obligations of the State under the International Covenant on Civil and Political Rights, which the New Zealand Bill of Rights Act was enacted to fulfil in domestic law.[15] Article 2(3) of the Covenant obliges the States party to it to provide an "effective remedy" in domestic law for breaches of rights "notwithstanding that the violation has been committed by persons acting in an official capacity".[16]

[5] The direct remedy was endorsed by the Law Commission when it was asked to review *Baigent*.[17] It has been applied in cases since 1994, including by this Court in *Taunoa v Attorney-General.*[18] The number of cases in which public law damages have been sought from the State since 1994 is small, suggesting that early

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10 Under the Police Act 1958, s 39, and the Crimes Act 1961, ss 26 and 27.

11 *Simpson v Attorney-General* [*Baigent's case*] [1994] 3 NZLR 667 (CA).

12 *Auckland Unemployed Workers' Rights Centre Inc v Attorney-General* [1994] 3 NZLR 720 (CA).

13 Gault J, dissenting on the direct claim in public law, would have read down the scope of the immunities, in application of s 6 of the New Zealand Bill of Rights Act 1990: see *Baigent* at 714–715.

14 Ibid, at 677 per Cooke P.

15 New Zealand Bill of Rights Act 1990, long title. New Zealand law must be construed, where possible, to give effect to its international obligations: *Hamed v R* [2011] NZSC 101 at [36]; *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44 (CA) at 57.

16 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976), art 2(3)(a).

17 Law Commission *Crown Liability and Judicial Immunity: A Response to* Baigent's *case and* Harvey v Derrick (NZLC R37, 1997) at 35.

18 *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429. *Baigent* damages were also referred to favourably in *Lai v Chamberlains* [2006] NZSC 70, [2007] 2 NZLR 7 at [66] (see also fn 138).

predictions of a flood of claims to vex the administration of justice are well astray, as such predictions usually are.[19]

[6] The Attorney-General does not seek to argue in the present appeal that this Court should reconsider the availability of a direct monetary remedy against the State in circumstances such as those in *Baigent* and *Taunoa*. But he maintains that such cases are distinguishable because they concerned breaches by officials, for which the executive branch of government is properly responsible and in respect of which the Crown is the appropriate defendant. In the present case the breaches in issue were ones committed by the judicial arm of government. The Attorney-General contends that the Crown is not liable under the public law remedy adopted in *Baigent* for acts of the judicial branch of government and that domestic law has no concept of liability of the State for wrongs beyond the liability of the Crown for its servants. He argues that direct liability for judicial breaches of rights would undermine judicial independence and the common law immunity of judges, themselves constitutional principles. In any event, it is said that the Attorney-General, as a member of the executive branch of government, is not the appropriate defendant in any such claim.

[7] The appeal comes before the Court on preliminary questions of law which would prevent the possibility of a public law claim against the State for judicial breaches of the New Zealand Bill of Rights Act. We are not asked to determine whether public law damages would be appropriately awarded to Mr Chapman in this case. That may well depend on an assessment at trial as to whether he has already obtained adequate remedy through the criminal justice processes.

[8] In summary, and for the reasons more fully developed in what follows, I consider that it would be contrary to the scheme and purpose of the New Zealand Bill of Rights Act if those deprived of rights through judicial action are denied the opportunity to obtain damages from the State, where an award of damages is necessary to provide effective remedy. Under the Act, all branches of the government, including the judicial branch, are bound to observe and protect the

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[19] This was also the view expressed by the Law Commission: see *Crown Liability and Judicial Immunity* at 20–21 and 68.

rights affirmed.[20] A gap in remedy for judicial breach is contrary to the obligation of the State to provide effective remedy in domestic law. Excluding remedy for judicial breaches would leave a large remedial hole because many of the rights affirmed in the Act are afforded principally within judicial process through discharge of judicial function. They include in particular the "[m]inimum standards of criminal procedure" contained in s 25 and the "[r]ight to justice" contained in s 27. If breaches through judicial act are irremediable, such rights are undermined.

[9] Those whose rights have been breached by judicial act would have a claim under the First Optional Protocol to the International Covenant on Civil and Political Rights to which New Zealand is a party. The incongruity and inconvenience of permitting an international remedy but not a domestic one was a factor in the reasoning of two of the Judges in *Baigent* in granting a remedy against the State.[21] Although in that case the breaches were those of the executive branch of government, the incongruity would be as marked in the case of judicial breach.

[10] I do not consider that the reasoning in *Baigent* permits exclusion of the direct remedy against the State for cases arising out of judicial breach. Acceptance of the argument for the Attorney-General would therefore undermine the reasons in *Baigent*, even though its formal overruling is not sought.

[11] In *Maharaj v Attorney-General of Trinidad and Tobago (No 2)* the Privy Council granted a direct remedy by way of damages for judicial breach of constitutional rights of due process.[22] *Maharaj* was applied by all Judges in the majority in *Baigent*.[23] I would continue to apply it in New Zealand because I think the approach is consistent with the obligations imposed under the New Zealand Bill of Rights Act and is supported by international and comparative case law. Nor, for reasons I explain further below, do I accept the view that *Maharaj* has been

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20 New Zealand Bill of Rights Act 1990, s 3(a).

21 *Baigent* at 691 per Casey J and 700 per Hardie Boys J.

22 *Maharaj v Attorney-General of Trinidad and Tobago (No 2)* [1979] AC 385 (PC). *Maharaj* was mentioned in the White Paper preceding the passage of the New Zealand Bill of Rights Act 1990: see "A Bill of Rights for New Zealand: A White Paper" [1984–1985] I AJHR A6 at 115.

23 *Baigent* at 677 per Cooke P, at 692 per Casey J, at 700 per Hardie Boys J, and at 718 per McKay J.

effectively overruled by subsequent Privy Council decisions.[24] More importantly, I do not accept there are good policy reasons for making an exception in the general remedial response for denial of rights for those attributable to judicial action.

[12] The approach suggested on behalf of the Attorney-General limits and distorts remedial options by permitting the correction of judicial breach only through the judicial process in which it occurs (as through appeal) or through established collateral challenge (as in judicial review of inferior courts), while excluding a remedy in damages. That is contrary to the approach taken to date in New Zealand case law, which has preferred to look to the full range of remedies in tailoring a response to give effective and appropriate remedy in the circumstances.[25]

[13] Nor, as is explained in what follows, do I consider that judicial immunity is properly engaged in a direct remedy against the State for damages, any more than the statutory and common law immunities of the police in *Baigent* were engaged in the direct remedy there granted against the State. The common law immunity of judges (the scope of which may indeed require reconsideration for conformity with the New Zealand Bill of Rights Act in a case where it is put in issue)[26] has no application to, and should not be extended to shield, the distinct liability of the State for public law remedy for breaches of rights.

[14] I refer throughout to the public law damages recognised in *Baigent* as being claimed against "the State". That is the term used in *Maharaj*[27] and it was used by most of the judges in *Baigent*,[28] sometimes interchangeably with "the government" or "the Crown". It was submitted by the Attorney-General that, while such terminology may be accurate for the Constitution of Trinidad and Tobago (under which the claim in *Maharaj* was brought), New Zealand domestic law knows no such concept as "the State". It is also part of his argument that references in the Bill

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[24] Contrary to the view taken by William Young J in *Brown v Attorney-General* [2005] 2 NZLR 405 (CA) at [127]–[132] and [142] and referred to in the judgment of McGrath and William Young JJ at [159].

[25] See *Baigent* at 676 per Cooke P; see also the comments of Richardson J in *Martin v Tauranga District Court* [1995] 2 NZLR 419 (CA) at 427–428.

[26] As Gault J in *Baigent* considered was necessary in respect of the statutory immunity of police officers, in the light of s 6 of the New Zealand Bill of Rights Act: see *Baigent* at 714–715.

[27] See, for example, *Maharaj* at 397.

[28] *Baigent* at 677 per Cooke P, at 691 per Casey J, at 697 per Hardie Boys J, and at 718 per McKay J.

of Rights Act and in the Crown Proceedings Act to "the Crown" are properly to be understood as references to the executive branch and that there is no procedure by which "the State" can be called to account in New Zealand courts. I consider this position is contrary to the rule of law. For the reasons given below, I am of the opinion that within the constitutional space in which the Bill of Rights Act and the Crown Proceedings Act both operate, "the Crown" means "the government of New Zealand" or "the State". The Crown, so understood, is subject to law and enjoys no procedural immunity in the courts.[29] Because, however, in other contexts, the expression "the Crown" is often used of the executive branch alone,[30] I use the term "the State" to make it clear that, in the Bill of Rights context, "the Crown" extends to all three branches of the government of New Zealand described by s 3(a). Similarly, to avoid confusion, I refer throughout to the appellant as "the Attorney-General", rather than speaking of the Crown (as is sometimes accurate where the Attorney-General is a party). The New Zealand constitution and New Zealand legislation make the Attorney-General the appropriate defendant in proceedings for remedy arising out of breach by the judicial arm of government.

A "fundamentally flawed and unlawful" system

[15] As a "[m]inimum standard of criminal procedure", everyone convicted of an offence has the right under s 25(h) of the New Zealand Bill of Rights Act 1990 "to appeal according to law to a higher court". As part of the "[r]ight to justice" every person is entitled under s 27(1) of the New Zealand Bill of Rights Act 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". On the basis determined by the Privy Council in *R v Taito*,[31] it seems well arguable that Mervyn Chapman was denied both the right to appeal and the right to the observance of the principles of natural justice when the Court of Appeal in October 2000, in

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29 It may claim privilege in a limited category of cases (for example, what was once known as Crown privilege or public interest immunity, as discussed in *Choudry v Attorney-General* [1999] 3 NZLR 399 (CA)), but that is not the same as a total immunity from monetary damages in the courts, which the Attorney-General's argument in the present case would provide, at least in cases of judicial breach.

30 Such as in criminal prosecutions of indictable offences.

31 *R v Taito* [2003] UKPC 15, [2003] 3 NZLR 577.

accordance with its then practice in criminal appeals, refused him legal aid and, in consequence, dismissed on an ex parte basis his appeal against convictions on four offences of sexual violation and indecencies.[32]

[16] In *Taito* the Privy Council held that the ex parte procedure was contrary to the legislation governing appeals and the right to appeal contained in s 25(h) of the New Zealand Bill of Rights Act. The ex parte decisions by which appeals were dismissed were described by Lord Steyn, delivering the opinion of the Privy Council, as "purely formalistic or mechanical acts involving no exercise of judicial judgment".[33] No reasoned decision preceded dismissal of the appeals, as was required. The review procedure adopted by the Court was "from inception irredeemably flawed".[34] Circulation of written notes between the judges failed to "satisfy minimum requirements of judicial adjudication by an appellate Court for the taking of a decision effectively determining an appeal as of right".[35] Nor, looking "globally" at the practice, did the process meet the requirements of natural justice.[36] Decisions that the appeals "were in truth unmeritorious" could "only be made after observance of procedural due process. Unfortunately, the system failed this basic test."[37] The Privy Council felt also "driven to the conclusion" that the practice of the Court had a discriminatory effect because those denied representation were also denied copies of the transcript of the summing-up, which deprived the appellants of the ability to exercise effectively their rights to appeal:[38]

> This could not have happened in the case of legally represented appellants.

[17] The practice distinguished in effect between rich and poor. Altogether, the Privy Council considered that the system "operated arbitrarily":[39]

> Certainly, it was contrary to fundamental conceptions of fairness and justice. The appellants were entitled to the observance of the principles of natural justice or fairness. In the landmark case *Ridge v Baldwin* Lord Morris of Borth-y-Gest observed about the principles of natural justice "here is

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32 *R v Finlayson* CA186/00, 19 October 2000.
33 At [14].
34 At [17].
35 At [18].
36 At [19].
37 Ibid.
38 At [20].
39 Ibid (footnotes omitted).

> something basic to our system: the importance of upholding it far transcends the significance of any particular case".

[18] The appeals having been dismissed "pursuant to a fundamentally flawed and unlawful system", the Privy Council upheld the appellants' "systemic challenges to the system under which their appeals were dismissed".[40] As a result, it held that the dismissal of all such appeals was "of no force or effect".[41]

[19] Mr Chapman was not one of the appellants in *Taito*, but his appeal was dismissed in October 2000 under the ex parte procedures.[42] He had been sentenced to six years' imprisonment following his convictions and was serving that sentence when he brought a second appeal through the extraordinary process afforded after *Taito* to appellants whose appeals had been dismissed ex parte.[43] On the second appeal in November 2003, Mr Chapman's convictions were quashed.[44] He was released on bail pending retrial. Although a rehearing of the charges was ordered, the prosecution was unable to proceed and Mr Chapman was discharged under s 347(1) of the Crimes Act 1961 in July 2004.

The appeal

[20] Mr Chapman has filed proceedings in the High Court claiming "public law compensation" for breach of the rights secured to him by ss 25 and 27 of the New Zealand Bill of Rights Act. The Attorney-General, named as defendant in the proceedings, was successful in obtaining orders in the High Court under rr 418 and 419 of the High Court Rules transferring into the Court of Appeal the questions of law as to the availability of public law damages for judicial breaches of the Bill of Rights Act.[45] Transfer into the Court of Appeal was found by Chisholm J in the High Court to be appropriate on the basis that the Crown argument, distinguishing *Baigent* and not following *Maharaj*, was consistent with views expressed in the Court of Appeal by William Young J in *Brown v Attorney-General*[46]

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40 At [21] and [23].
41 At [14].
42 *R v Finlayson* CA186/00, 19 October 2000.
43 *R v Smith* [2003] 3 NZLR 617 (CA).
44 *R v Finlayson* CA228/03, 28 November 2003.
45 *Chapman v Attorney-General* HC Christchurch CIV-2006-409-1409, 19 March 2008.
46 *Brown v Attorney-General* [2005] 2 NZLR 405 (CA) at [142].

and applied by Fogarty J in *McKean v Attorney-General*,[47] a decision then under appeal which could be heard in the Court of Appeal concurrently with the questions of law removed into that Court in the present case.

[21] In the Court of Appeal the questions, slightly recast, were answered to reject the Attorney-General's contentions.[48] Similarly, in the Court of Appeal in *McKean*,[49] heard by the same panel as the present appeal, the decision in the High Court was overturned. In Mr Chapman's case, the Court of Appeal held unanimously that public law compensation was, in principle, available for judicial breaches of the New Zealand Bill of Rights Act, notwithstanding the subsequent overturning of his convictions. It also held that the Attorney-General was the proper defendant in such proceedings and that the Attorney-General could not in the proceedings claim the immunity that attaches to judges. The Court of Appeal declined to be drawn on whether public law compensation was an appropriate remedy in the case, taking the view that it was not appropriate to answer such a question "in the abstract".[50]

[22] In rejecting the contention for the Attorney-General that *Baigent* damages should be confined to remedy of breaches only by the executive, the Court of Appeal held that there was nothing in the decision in *Baigent* to suggest that the principles there applied related only to breaches of the Bill of Rights Act by the executive branch of government:[51]

> Indeed, quite to the contrary, the statements made in that case were general statements about the need for there to be effective remedies for breaches of the Bill of Rights …. If the majority Judges in *Baigent's Case* considered that there was effectively a carve-out exception for judicial acts then it would have been expected that they would have made that explicit. To the contrary, the fact that three of the majority Judges relied on the fact that the judiciary is subject to the Bill of Rights under s 3 might rather suggest that those Judges considered compensation would be available for judicial breaches.

[23] Such restriction of the remedy was considered by the Court of Appeal to be inconsistent with the *Auckland Unemployed Workers' Rights Centre* case, which

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47 *McKean v Attorney-General* [2007] 3 NZLR 819 (HC).
48 *Attorney-General v Chapman* [2009] NZCA 552, [2010] 2 NZLR 317.
49 *McKean v Attorney-General* [2009] NZCA 553.
50 At [109].
51 At [68].

concerned not only the execution of a warrant by the police but also its unlawful issue by a Registrar, exercising judicial powers. The Court also accepted that the Crown argument would exclude the judiciary in part from the overall operation and application of the Bill of Rights Act, a result it considered would be contrary to s 3(a) of the Act.[52] And it identified "major practical problems in any event" if judicial breaches were excluded from the remedy, because of overlapping responsibilities between the judiciary and the executive in the administration of justice.[53]

[24] The Attorney-General appeals with leave to this Court.

The New Zealand Bill of Rights Act 1990

[25] The New Zealand Bill of Rights Act is enacted "to affirm, protect, and promote human rights and fundamental freedoms in New Zealand" and "to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights".[54] It applies to "acts done by the legislative, executive, or judicial branches of the Government of New Zealand", and to persons or bodies performing public functions or powers.[55] Other legislation must be applied by the courts, even if inconsistent with provisions of the Bill of Rights Act (if it cannot be interpreted consistently with the rights and freedoms in application of s 6).[56] But, otherwise, the rights and freedoms in the Bill of Rights Act may be subject only to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".[57] The New Zealand Bill of Rights Act is constitutional legislation[58] which is intended to permeate New Zealand law.[59] For present purposes, it is of importance to stress that acts done in the exercise of the authority of the judicial branch of the

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52 At [78].
53 At [79].
54 New Zealand Bill of Rights Act 1990, long title.
55 Section 3.
56 Section 4.
57 Section 5.
58 See, for example, *R v Te Kira* [1993] 3 NZLR 257 (CA) at 277 per Thomas J. And see Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) at 3.
59 Cooke P noted that "[t]he Bill of Rights Act is intended to be woven into the fabric of New Zealand law": *R v Goodwin* [1993] 2 NZLR 153 (CA) at 156.

government of New Zealand are explicitly subject to the Bill of Rights Act, as equally as acts done in the exercise of the authority of the executive branch.

[26] The New Zealand Bill of Rights Act contains no specific enforcement provisions. Judicial vindication of rights was however foreshadowed by the White Paper that preceded enactment of the Bill of Rights Act. Its proposals for remedy, including by way of judicial review of legislation, were not adopted in the legislation as enacted. But the policy of judicial enforcement, subject only to the strictures provided by ss 4 and 5, remains implicit in the Act in a number of ways: through its confirmation of "rights" (for which the rule of law requires remedy); in its explicit subjection of the actions of the judicial branch of government to the Act (which includes the discharge of its remedial responsibilities);[60] and in the purposes described in the long title, which include both the promotion, as well as the affirmation and protection, of human rights and fundamental freedoms, and affirmation of "New Zealand's commitment to the International Covenant on Civil and Political Rights" (which requires States party to the Covenant to provide "effective remedies" for breaches of rights[61]). More generally, vindication of right in a society based on the rule of law must ultimately be able to be achieved by claim of right to the courts.

[27] In early cases under the New Zealand Bill of Rights Act, the Court of Appeal accepted the responsibility of the New Zealand courts to provide effective remedy for breaches of the Act.[62] The damages remedy granted in *Baigent*[63] was pursuant to this wider responsibility. The appropriateness of judicial remedy, including a remedy in damages, was not questioned by the Law Commission in its report on *Baigent's* case. Indeed, while acknowledging that the Bill of Rights Act contains no express

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60 In s 3.

61 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976), art 2(3)(a).

62 *R v Goodwin* [1993] 2 NZLR 153 (CA) at 191 per Richardson J; *R v Te Kira* [1993] 3 NZLR 257 (CA) at 283 per Thomas J; *Baigent* at 677 per Cooke P, at 691 per Casey J, at 702–703 per Hardie Boys J, at 707 and 711 per Gault J, and at 718 per McKay J.

63 And later granted in respect of judicial breach in *Upton v Green (No 2)* (1996) 3 HRNZ 179 (HC), a decision upheld by the Court of Appeal: *Attorney-General v Upton* (1998) 5 HRNZ 54 (CA).

remedies clause, the Law Commission pointed out that "failure by the courts to recognise the rights would have made the Act toothless":[64]

> Just as the European Court of Justice has created remedies to give effect to the rights established by the EEC treaty ... so the New Zealand courts have given effect to the Act and to aspects of the International Covenant which the Act affirms.

[28] The obligation to provide effective remedy has been acted on by the courts in the many cases in which evidence has been excluded, proceedings have been stayed, or administrative or judicial decisions have been set aside for non-compliance with rights, as well as in the few cases where monetary recompense has been ordered as necessary to provide an effective remedy. It is an approach that is not challenged by the Attorney-General in the present appeal.

[29] The redress of human rights was said by Cooke P in *Baigent* to be in "a field of its own".[65] The courts, he thought, would "fail in our duty" to protect and promote human rights and fundamental freedoms in New Zealand if they failed to provide "an effective remedy", including in appropriate cases a compensation remedy.[66] Although the affirmation of human rights "as part of the fabric of New Zealand law" meant (subject to ss 4 and 5) that "[t]he ordinary range of remedies will be available for their enforcement and protection", the Act was not properly treated "as if it did no more than preserve the status quo": it required "development of the law when necessary".[67] The remedy developed in *Baigent*, in explicit application by the majority of the Court of Appeal of the approach taken by the Privy Council in *Maharaj*, was not a form of vicarious liability for tort or other private law wrong. The other Judges in the majority in *Baigent*, Casey, Hardie Boys and McKay JJ, expressed similar views to Cooke P. All pointed to the fact that Parliament, in enacting s 3, had made it clear that the judicial branch of government was bound to observe the rights and freedoms contained in the Bill of Rights Act.[68] All took the view that the public law remedy of damages was one against the

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64 Law Commission *Crown Liability and Judicial Immunity* at 16.
65 At 677.
66 At 676.
67 Ibid.
68 At 691 per Casey J, at 702 per Hardie Boys J, and at 718 per McKay J.

Crown.[69] And all relied explicitly on the reasoning of the Privy Council in *Maharaj* as applicable to the approach to vindication of rights under the New Zealand Bill of Rights Act.[70]

[30] In this connection, it should be noted that, while it has been common to refer to damages against the State for Bill of Rights breach as "compensation", effective remedy may require consideration in appropriate cases of whether purely compensatory damages are adequate to vindicate the public right and deter future denials of right.[71] In such public law remedy, the focus is on vindication of human rights.[72] That, as Thomas J pointed out in *Dunlea v Attorney-General*, may be contrasted with the general "loss-centred approach to damages".[73] In *Attorney-General of Trinidad and Tobago v Ramanoop*, the Privy Council declined to limit public law damages to compensation, citing Thomas J in *Dunlea* with approval.[74]

[31] The distinctness of the public law claim also makes it inappropriate to treat it as a backstop to other private law causes of action, available only where there is no other available claim. I agree with Thomas J in *Dunlea* that, if accepted, such view would "represent a major and retrograde inroad into the principle established in *Baigent's Case*".[75] With him:[76]

> I prefer to accept that *Baigent's Case* established a new remedy for a violation of the Bill of Rights and that the key question which arises is not whether a remedy is available for that violation, but whether the existing private law remedies are adequate to provide an effective remedy for such a violation.

[32] A New Zealand report to the United Nations Committee on Human Rights (in carrying out the international obligations under the Covenant the Bill of Rights Act is

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69 At 691–692 per Casey J, at 702 per Hardie Boys J, and at 718 per McKay J.

70 At 692 per Casey J, at 700 per Hardie Boys J, and at 718 per McKay J.

71 As discussed in *Vancouver (City) v Ward* 2010 SCC 27, [2010] 2 SCR 28 at [28]–[30] and in *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 at [109].

72 *Baigent* at 676 per Cooke P, at 692 per Casey J, at 697 per Hardie Boys J, and at 717 per McKay J. Both Hardie Boys and McKay JJ cite *Ashby v White* (1703) 2 Ld Raym 938 at 953, 92 ER 126 at 136 (KB) for this proposition.

73 *Dunlea v Attorney-General* [2000] 3 NZLR 136 (CA) at [68].

74 *Attorney-General of Trinidad and Tobago v Ramanoop* [2005] UKPC 15, [2006] 1 AC 328 at [16].

75 At [53].

76 At [57].

enacted to fulfil in domestic law) has cited the remedies provided by the courts, including the *Baigent* damages remedy, as domestic fulfilment of its international obligations.[77] That is not necessarily inconsistent with the argument for the Attorney-General on the appeal. He maintains that it is inappropriate that monetary compensation be available for judicial breach only. The policy reasons he advances for this exception concern the independence of judicial function and the appearance of impartiality, the implications for judicial immunity of *Baigent* damages for judicial breaches of rights, and the public interest in finality of litigation (which, it is suggested, may be eroded by collateral challenges based on Bill of Rights breaches). Before dealing with these policy reasons in their own terms, it is necessary to refer to the general remedial approach adopted by the courts, which as is later indicated, I consider would be distorted if the arguments for the Attorney-General were accepted.

The authorities

[33] I agree with the view of the Court of Appeal in the present case that the exclusion of public law damages for breaches attributable to judicial act is not consistent with the reasons given in *Baigent* and *Auckland Unemployed Workers' Rights Centre.* While only McKay J explicitly referred to breaches by all branches of government,[78] the other judgments cannot in my view fairly be read as suggesting an exceptional limitation. Nor is such limitation consistent with the adoption by all Judges in the majority of the reasoning in *Maharaj*, in which judicial conduct was the foundation of the constitutional damages ordered. Lord Diplock, delivering the judgment of the Board, made it clear that the remedy was distinct from vicarious liability for tortious liability of the judge:[79]

> 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 …

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[77] *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Fourth Periodic Report of States Parties due in 1995: New Zealand* CCPR/C/NZL/2001/4 (2001) at [12]–[19].

[78] *Baigent* at 718.

[79] *Maharaj* at 399.

[34] I consider that the reasoning adopted by the majority in *Baigent* applies equally to acts of the judiciary. Attempts to distinguish *Baigent* according to the ratio of the case are unconvincing and, in any event, arid.

[35] Direct public law damages against the State in respect of judicial breaches of the Bill of Rights Act were treated by the Court of Appeal in *Rawlinson v Rice* as available as a more straightforward remedy than the claim being pursued by the appellant for breach of statutory duty and misfeasance in public office.[80] The personal claim against the Judge was not struck out but there was an indication by Crown counsel that a settlement with the Crown was open on the direct public law claim.[81] In *Upton v Green (No 2)*, Tompkins J awarded the plaintiff public law damages for breach of natural justice and fair trial rights.[82] The award was upheld on appeal.[83] It is suggested that the force of these decisions is diminished because the Crown in both cases conceded liability lay for public law damages on the basis of *Baigent*. But all three were reasoned decisions which are entitled to respect. Indeed, the concessions themselves indicate that until recently the view that *Baigent* damages were available for judicial breaches, as in *Maharaj*, was not generally doubted.

[36] Such availability seems to have been assumed by Richardson J in *Martin v Tauranga District Court.*[84] No attempt was made to separate out judicial and non-judicial breach in his reasons, although the case concerned breach of the right to trial without undue delay, in which it is difficult to see that matters of judicial responsibility played no part. In *Harvey v Derrick*, Cooke P, in referring to the *Maharaj* claim against the State, remarked that "a mere judicial error in interpretation of the law would not give rise to such an action",[85] indicating his view that the *Maharaj* remedy (which did not lie for mere error) was available in respect of judicial breach of rights. I am unable to read this statement as other than an

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80 *Rawlinson v Rice* [1997] 2 NZLR 651 (CA) at 663 per McKay J, at 664 per Barker J, and at 667 per Tipping J.
81 Described at 663.
82 *Upton v Green (No 2)* (1996) 3 HRNZ 179 (HC).
83 *Attorney-General v Upton* (1998) 5 HRNZ 54 (CA).
84 *Martin v Tauranga District Court* [1995] 2 NZLR 419 (CA) at 427–428.
85 *Harvey v Derrick* [1995] 1 NZLR 314 (CA) at 322.

acceptance that *Baigent* damages lie for judicial breach.[86] That the direct liability recognised in *Baigent* is available in respect of judicial conduct was assumed by three judges of this Court in *Lai v Chamberlains*[87] and by a unanimous Court in *R v Williams* (where, again, trial delay was in issue in circumstances where some shared responsibility between the executive and judicial branches of government was likely).[88] These assumptions are not of course greatly persuasive in themselves, but they indicate that upholding the Court of Appeal in the present appeal does not overthrow expectations. And it seems to confound the view that, if the Court of Appeal judgment is upheld, the system will be vexed with unmeritorious collateral challenges to convictions and judgments. The view taken of *Baigent*, before recent second thoughts, did not open floodgates.

[37] Nor has it been found necessary in other comparable jurisdictions where the point has arisen to except judicial breaches from the remedy of damages available against the State. In Canada the matter appears to have arisen for consideration in one first instance decision only, *R v Germain*.[89] There, the Judge applied *Maharaj*, affirming that monetary compensation was available in respect of judicial breach as "part of the armory of remedies that may be just and appropriate when there has been an infringement of a right guaranteed by the Charter".[90] The remedy of compensation was not, however, sought by the accused in the case.[91]

[38] The availability of a remedy in damages is also consistent with the refusal of the Supreme Court of Canada to adopt rules for exclusion of public law damages based on the identity of the defendant or the nature of the right in *Vancouver (City) v Ward.*[92] In that case the Supreme Court rejected a categorical approach. It favoured, rather, assessment of whether such remedy was appropriate in context, taking into account the existence of alternative remedies and "good governance" considerations (such as the distorting impact on administration of awards of damages).[93] I find it

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86 Compare the view of McGrath and William Young JJ that the case is neutral: at [131]–[135].
87 *Lai v Chamberlains* [2006] NZSC 70, [2007] 2 NZLR 7 at [66] and [74] per Elias CJ, Gault and Keith JJ.
88 *R v Williams* [2009] NZSC 41, [2009] 2 NZLR 750 at [18].
89 *R v Germain* (1984) 53 AR 264 (ABQB).
90 At [31].
91 At [32].
92 *Vancouver (City) v Ward* 2010 SCC 27, [2010] 2 SCR 28.
93 At [33].

difficult to imagine that any such "good governance" considerations (in any event, one factor only in the approach of the Supreme Court of Canada)[94] pull against liability in the case of the judicial obligation to observe the fundamental rights and freedoms contained in the Bill of Rights Act. Although the Canadian Supreme Court has yet to confront the issue of public law damages for judicial breach directly, the rejection of exclusion of remedies according to type of defendant and type of right does not suggest categorical exclusion of damages for judicial breach where they are otherwise appropriate.

[39] In the United Kingdom, damages for human rights breach are provided for in the Human Rights Act 1998. The remedy is available for judicial acts not taken in good faith, and for judicial acts in good faith if "to compensate a person to the extent required by Article 5(5) of the Convention".[95] Although remedy is governed by statute and the European Convention, public law damages for judicial breach have not apparently been considered to be inconsistent with fundamental principle, as is urged by the Attorney-General in the present appeal.

[40] Revision seems to have been prompted in New Zealand by the suggestions in *Brown* and *McKean* that *Maharaj* has been effectively overruled by the Privy Council[96] and the suggestion that the Law Commission in its report on *Baigent's* case had pointed out that the ratio of *Baigent* was narrower than had been previously believed.[97] I do not accept that *Maharaj* has been effectively overruled, and explain why shortly. Nor do I attach the same significance to the Law Commission report. Ultimately, however, neither of these propositions is determinative in the view that the remedy of public law damages (which is accepted to be available in New Zealand law for breaches of the Bill of Rights Act) should not exclude breaches caused by judicial conduct. The reasons of legal policy and principle against such exception being made in my view clearly outweigh the

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94 At [38]–[39].

95 Human Rights Act 1998 (UK), s 9(3). Article 5(5) of the European Convention on Human Rights provides that there is enforceable right of compensation for any victim of an arrest or detention that has contravened that person's right to liberty and security of person.

96 *Brown v Attorney-General* [2005] 2 NZLR 405 (CA) at [127]–[132], referred to in *McKean* (HC) at [32].

97 *McKean* (HC) at [35].

counter-arguments put forward based on judicial function, judicial immunity, and finality in litigation, for reasons I deal with in [48]–[77].

[41] *Maharaj* has been directly in issue in three subsequent Privy Council cases and is referred to, without disapproval, in a fourth.[98] In each of the three in which a claim of damages for judicial breach was in issue, the claim for damages was declined on the basis that the legal order had in fact provided remedy through appeal processes.[99] Nothing in the decisions of the Privy Council in those cases throws doubt on the reasoning which permits public law damages for judicial breaches. Indeed, in *Hinds v Attorney-General of Barbados*, Lord Bingham stressed of the direct public law damages remedy against the State that:[100]

> It would be undesirable to stifle or inhibit the grant of constitutional relief in cases where a claim to such relief is established and such relief is unavailable or not readily available through the ordinary avenue of appeal. As it is a living, so must the Constitution be an effective, instrument. But Lord Diplock's salutary warning remains pertinent: a claim for constitutional relief does not ordinarily offer an alternative means of challenging a conviction or a judicial decision ...

[42] In *Forbes v Attorney-General of Trinidad and Tobago*, Lord Millett applied Lord Diplock's stricture that the remedy was not available simply for error able to be corrected in the appellate process:[101]

> [I]t is only in rare cases where there has been a fundamental subversion of the rule of law that resort to constitutional redress is likely to be appropriate. However the exceptional case is formulated it is clear that the constitutional rights to due process and the protection of the law do not guarantee that the judicial process will be free from error. This is the reason for the appellate process.

[43] The third case, *Independent Publishing Co Ltd v Attorney-General of Trinidad and Tobago* was, like *Maharaj*, a case of wrongful committal for contempt

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98 It has been directly in issue in *Hinds v Attorney-General of Barbados* [2001] UKPC 56, [2002] 1 AC 854; *Forbes v Attorney-General of Trinidad and Tobago* [2002] UKPC 21; and *Independent Publishing Co Ltd v Attorney-General of Trinidad and Tobago* [2004] UKPC 26, [2005] 1 AC 190. It is referred to without disapproval in *Attorney-General of Trinidad and Tobago v Ramanoop* [2005] UKPC 15, [2006] 1 AC 328.

99 See *Hinds* at [19]; *Forbes* at [18]; and *Independent Publishing* at [92].

100 At [24].

101 At [18].

of court.[102] After *Maharaj*, however, a statutory right of appeal for such cases (lacking in *Maharaj*, where correction was only eventually obtained after special petition to the Privy Council) had been enacted. Lord Brown expressly accepted that in the *Maharaj* circumstances, where there was no form of redress provided by the legal system, it was appropriately characterised as unfair. By contrast, in the case of *Independent Publishing*, release on bail was secured within four days of the committal.[103] In those circumstances, the Privy Council considered that the remedy of damages was not appropriate.[104] Because of the appeal provision, Lord Brown also suggested it was no longer necessary to maintain the original distinctions made in *Maharaj* between fundamental breaches of natural justice, mere procedural irregularities and errors of law.[105] As indicated at [72] below, the remedial approach adopted in New Zealand law for Bill of Rights breach makes such classifications unnecessary where there are breaches of rights identified in the Act. But I do not read Lord Brown's remarks as indicating any doubt about the principle established in *Maharaj*, and applied in *Baigent*, that direct public law remedy in damages is available when necessary to provide effective remedy for judicial breach.

[44] In none of these three Privy Council cases is the availability of damages for breach of rights which are not able to be adequately corrected within existing process doubted. Indeed, all three cases apply *Maharaj*.

[45] The fourth Privy Council case, *Attorney-General of Trinidad and Tobago v Ramanoop*, concerned breaches by the police. There is nothing in the judgment to suggest that it treated *Maharaj* of doubtful authority. At issue was whether the damages remedy was confined to compensation or could, rather, be used to deter future misconduct and mark the court's emphatic denunciation of the breaches of rights. In holding that the damages remedy was not confined to compensation, the Privy Council confirmed the importance of the direct claim for damages against the State as a remedy in vindication of rights.[106]

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102 *Independent Publishing Co Ltd v Attorney-General of Trinidad and Tobago* [2004] UKPC 26, [2005] 1 AC 190.
103 At [88].
104 At [92]–[94].
105 At [93].
106 At [18]–[20].

[46] The Law Commission, as I have already indicated, supported the *Baigent* remedy.[107] It pointed out that *Baigent* itself was concerned with breaches by the executive branch of government.[108] Although acknowledging that Tompkins J in *Upton v Green (No 2)* had applied it to judicial breaches, the Law Commission recommended legislation to bar the remedy in public law damages against the State in respect of judicial breaches.[109] That was a recommendation not acted on by Parliament. If accepted, it would have achieved the exception of judicial breach that the Attorney-General seeks to have the Court impose in this case. The Law Commission's reasons for suggesting this exception, despite its emphasis on equality and rule of law justifications for the general remedy,[110] are the policy reasons of the availability of adequate rights of appeal, the need to achieve finality in litigation, and the undesirability of judges being embroiled in litigation about their own conduct.[111] These reasons of policy are urged upon the Court on behalf of the Attorney-General and are arguments I deal with under the next heading.

[47] I make here two immediate comments in relation to the Law Commission report. The present case appears outside those contemplated by the Law Commission where "adequate rights of appeal" provide sufficient remedy.[112] It is the respondent's claim that he was denied appeal through what Lord Millett might have described as a "fundamental subversion of the rule of law".[113] On the language of the Privy Council in *Taito*, it cannot be said on this preliminary hearing that such characterisation will prove extravagant. (Whether the breach has been sufficiently vindicated is a question for trial.) The second point is that the Law Commission did not suggest that judicial immunity provides an existing legal impediment to the direct claim for public law damages; that is why it recommended a legislative bar.

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107 Law Commission *Crown Liability and Judicial Immunity* at 28–29.
108 At 32.
109 At 52–54.
110 At 6.
111 At 46 and 52.
112 At vii, 46 and 52.
113 *Forbes* at [18].

Public law damages and effective vindication

[48] The question of monetary remedy for judicial breach of the New Zealand Bill of Rights Act is one aspect only of the overall remedial response developed by the courts. Thus in *Martin* Richardson J suggested that the availability of damages following *Baigent* allowed remedies to be tailored to the circumstances of particular breach.[114] In the case of undue delay, for example, a direction for expedited hearing and an award of damages might be more appropriate remedy than stay in cases where the fairness of any ensuing trial is not affected by the delay. In the case of unreasonable search and seizure the exclusion of evidence (then the prima facie remedy) might be less appropriate than a remedy of damages unless, "weighing all public interest considerations, monetary relief is not adequate to vindicate the right breached".[115] Since then, the enactment of s 30 of the Evidence Act 2006 may make retention of remedial alternatives to exclusion of evidence important in assessing the proportionality of exclusion, and the balancing required by the section.

[49] "Effective remedy" is remedy tailored to the particular case. Consideration of the full range of responses is appropriate in identifying effective remedy. Exclusion of the possibility of a remedy in damages against the State for judicial breach means that the courts are hampered in response for one type of case. The options that Richardson J was able to contemplate would then be limited in respect of breach by the judicial branch of government. As a result, the courts may be pushed to alternative remedies, such as exclusion of evidence or stay of proceedings, in cases where damages would be the more appropriate vindication of right.

[50] In a number of cases where the infringement of right is in circumstances which also constitute an existing tort or wrong in administrative law, recourse to standard civil processes and remedies (adapted as necessary to vindication of rights) may have provided effective remedy. As already indicated, effective remedy will in some cases be able to be achieved within the legal process in which the breach occurred, as where evidence improperly obtained by the police or obtained under invalid judicial warrant is excluded from admission as evidence. In many cases

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114 *Martin* at 427–428.
115 At 427.

where there has been a breach of fair trial rights, correction on appeal within the same proceeding will be effective remedy.

[51] These, it should be noted, are themselves public law remedies, not achieved against those individuals who have acted unlawfully but provided in vindication of the obligations of the State and to prevent the courts being co-opted into perfecting breaches of rights, contrary to s 3, as through the admission of evidence obtained in breach.[116] If these remedial options are not however available or are insufficient for effective vindication, the obligation of the courts may be to provide a direct remedy in public law, as *Baigent* recognised. Although in that case monetary remedy was considered to be the only practicable response, in other cases the direct remedy may take another form, such as a declaration.[117]

[52] The public law damages recognised in *Baigent* enable the court to provide a remedy in cases where denial of rights has caused harm for which compensation is appropriate or where other remedies available are insufficient to vindicate the right breached in fulfilment of the non-compensatory functions of such damages.[118] The remedy is important in permitting appropriate redress in the context of the particular case.

The consequence of a "carve-out" for judicial breach

[53] Effective vindication of the rights and privileges affirmed in the New Zealand Bill of Rights Act would be seriously deficient if judicial breach of the significant rights to criminal procedure were excluded from the full range of remedies. In many cases, it will be difficult to separate out judicial breach of rights from breaches by other State actors, leading to arbitrary results and perhaps difficult questions of attribution or materiality.[119] So, for example, delay may be partly the result of judicial conduct and partly the result of executive conduct (whether of police or

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116 See generally *Television New Zealand Ltd v Rogers* [2007] NZSC 91, [2008] 2 NZLR 277 at [33].

117 See the Declaratory Judgments Act 1908, s 3. That Act is binding on the Crown: Crown Proceedings Act 1950, sch 1.

118 *Dunlea* at [64]–[68]; see also *Taunoa* at [107]–[108].

119 As the Court of Appeal noted in *Attorney-General v Chapman* [2009] NZCA 552, [2010] 2 NZLR 317 at [79]–[80].

prosecutors, or in the provision of court facilities); unreasonable search and seizure may result both from the granting of search warrants and their execution.[120] While *Maharaj* is generally viewed as a case concerning judicial breach (in the wrongful committal), it could equally well be seen, as is suggested by Lord Diplock's references to failure of the legal system[121] and as it was subsequently treated by the Privy Council,[122] as a legislative failure in the provision of appeal rights to enable the system to provide its own correction. Indeed, breach of human rights by officials or others properly within the responsibility of the executive, such as the police, may often be material to judicial outcomes.[123] The public law damages remedy acknowledged to be available in respect of such breaches may properly be claimed unless the claim is an abuse of process.[124] It is necessary to recognise that the distinction between judicial breach and breach by other State actors for the purposes of remedy may be elusive in practice and productive of arbitrary outcomes.[125]

Public law damages are not inconsistent with judicial immunity

[54] Judicial immunity is common law doctrine.[126] Although its existence is now acknowledged in statute,[127] its scope remains a matter of common law.[128] It serves not the private interests of judges but the public interest in protecting their impartiality in judging by removing threats which could undermine it. The immunity is not absolute. Indeed, as Richardson J has noted, absolute immunity would be destructive of the public interest because it would "undermine judicial

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120 *Auckland Unemployed Workers' Rights Centre* can be read as a case of mixed responsibility.

121 *Maharaj* at 399.

122 *Independent Publishing* at [88].

123 This is so, even though the police are largely independent from the executive by virtue of s 16 of the Policing Act 2008. (The Police Commissioner, while responsible to the Minister for some functions, must act independently of the Minister in the enforcement of the law and the investigation and prosecution of offences: Policing Act 2008, subs 16(2).)

124 This was adverted to in *Lai v Chamberlains* at [66].

125 For example, according to whether a warrant is issued by a judge or a registrar, or whether breach of fair trial rights is attributed to judicial or prosecutorial misconduct.

126 Cases often relied upon as authoritative statements of its scope include *Fray v Blackburn* (1863) 3 B & S 576, 122 ER 217 (KB) and *Sirros v Moore* [1975] QB 118 (CA). See the reliance on these cases in the judgment of Henry J in *Gazley v Lord Cooke of Thorndon* [1999] 2 NZLR 668 (CA) at 679.

127 Such as in s 119 of the District Courts Act 1947 (which extends to the judges of that Court the immunities possessed by High Court judges).

128 The case does not therefore engage s 4 of the New Zealand Bill of Rights Act, as Gault J, dissenting in *Baigent*, considered an important consideration in respect of the statutory police immunity: at 708.

responsibility", as well as giving "no weight at all to the public policy goals of tort and public law liability".[129]

[55] Whatever the bounds of judicial immunity, it is not engaged in the public law liability of the State for breaches of rights. Cooke P emphasised in relation to the direct public law liability recognised in *Baigent* that "the point of overriding importance" was that it was "not within the purview of any statutory exemption from liability".[130] If it is not within the purview of any statutory exemption, it is equally not within the purview of any common law exemption.

[56] It may be that the public interest in judicial immunity outweighs the public interest in effective remedy for breach of rights where the two conflict.[131] But in the present case, there is no conflict. The personal immunity of the judge from suit is not questioned. Rather, the argument for the Attorney-General is that the policies behind the common law's insistence on personal immunity of the judge for otherwise actionable wrongs also shield the Crown from liability for public law damages, should that remedy otherwise be appropriate vindication for judicial breach of rights. What is being suggested is a new immunity for the State, fashioned by reference to judicial immunity.

[57] Because immunities conflict with other important rule of law values, they are always regarded with suspicion. In *Darker v Chief Constable of the West Midlands Police*[132] the House of Lords affirmed that the public policy that those who suffer wrongs should have a remedy required existing immunities to be strictly confined. Lord Cooke, in his concurring judgment, described immunity as "in principle inconsistent with the rule of law":[133]

> ... but in a few, strictly limited, categories of cases it has to be granted for practical reasons. It is granted grudgingly, the standard formulation of the

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129 *Harvey v Derrick* at 326 per Richardson J.

130 *Auckland Unemployed Workers' Rights Centre Inc* at 724.

131 Not considered here is the scope of judicial immunity, a common law construct, which was not in issue on appeal. The scope of judicial immunity has not been reconsidered in the light of the New Zealand Bill of Rights Act. As Richardson J suggested in *Harvey v Derrick* at 325, ss 5 and 6 considerations would have to be taken into account in any post-1990 consideration of the scope of judicial immunity.

132 *Darker v Chief Constable of the West Midlands Police* [2001] 1 AC 435 (HL).

133 At 453.

> test for inclusion of a case in any of the categories being Sir Thaddeus McCarthy P's proposition in *Rees v Sinclair* [1974] 1 NZLR 180, 187, "The protection should not be given any wider application than is absolutely necessary in the interests of the administration of justice ...". Many other authorities contain language to similar effect.

[58] The immunity for the State here suggested is "in principle inconsistent with the rule of law". For the reasons that follow, I do not consider that such extension is necessary in the interests of the administration of justice. It is insufficiently connected with the purpose of maintaining impartiality in judging to warrant denial of remedy to those whose rights have been breached. Direct State liability for judicial breach of rights does not undermine the purposes for which personal judicial immunity is imposed. If exemption from liability is unnecessary, then given the adverse impact on rule of law values in the vindication of rights, I do not think it would conform with the Bill of Rights Act for such exemption to be created by act of the judicial branch of government.[134]

[59] State liability for public law damages is no more inconsistent with judicial immunity than it was with the statutory immunities of police officers in *Baigent.*[135] If the argument that direct remedy against the Crown would undermine the public policy in judicial immunity is sound, it applies equally to other immunities, including the immunities of the police officers in issue in *Baigent*, who are also independent (as are other officials exercising statutory powers). The rejection of the argument in *Baigent* (on the basis that the immunity was not engaged by a direct, non-vicarious, liability of the Crown) ought equally to apply in the case of direct liability for judicial immunity. The contention for the Attorney-General on this point is inconsistent with the reasoning in *Baigent*. And its acceptance would entail rejection of the reasoning in *Baigent*, even if it is not sought formally to overrule that case.

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134 The Law Commission recommended that a bar on damages against the State for judicial conduct be created only by means of legislative amendment: see Law Commission *Crown Liability and Judicial Immunity* at 53.

135 Police Act 1958, s 39. The Police Act provides protection for police doing anything "in obedience" to judicial process; under the provision, no member of the police is responsible for irregularities or want of jurisdiction in the issuing of the process. See also the immunity contained in the Crimes Act 1961, ss 26 and 27.

[60] The only relevance of judicial immunity or police immunity could be if the policies behind them (the bounds of which may themselves require reassessment in the light of the New Zealand Bill of Rights Act) provide sufficient basis for a new exception to the general remedy against the State recognised in *Baigent.* If effective vindication of the Bill of Rights Act requires the availability of a direct remedy in damages, as I have suggested, any such policy would have to be overwhelming to justify an exception conferring immunity from the general remedial response available to the courts in vindication of breaches of the Bill of Rights Act.

Underlying policy does not justify an extended immunity

[61] The reasons for the immunity of judges from personal liability are not self-evidently transposable to State liability for the actions of the three branches of government referred to in s 3(a). They are not so regarded in international legal thinking. The United Nations Basic Principles on the Independence of the Judiciary require personal immunity for judges.[136] But they expressly contemplate that disciplinary proceedings, rights of appeal, and claims for "compensation from the State" are not affected by judicial immunity from personal liability:[137]

> Without prejudice to any disciplinary procedure or to any right of appeal *or to compensation from the State*, in accordance with national law, judges should enjoy *personal immunity from civil suits for monetary damages* for improper acts or omissions in the exercise of their judicial functions.

[62] For its part, the European Court of Human Rights has drawn a distinction between the personal immunity from suit of judges and "the liability of the State to

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136 Basic Principles on the Independence of the Judiciary (adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan, 26 August–6 September 1985, endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985).

137 At art 16 (emphasis added). See also *Responsibility of States for internationally wrongful acts* GA Res 56/83, A/Res/56/83 (2001). Article 4 considers that the "conduct of any State organ shall be considered an act of that State under international law". The International Law Commission's commentaries on the Articles also note that State responsibility must be considered to be distinct from the responsibility of individuals comprising the State:

> ... Under many legal systems, the State organs consist of different legal persons (ministries or other legal entities), which are regarded as having distinct rights and obligations for which they alone can be sued and are responsible. For the purposes of the international law of State responsibility the position is different. The State is treated as a unity, consistent with its recognition as a single legal person in international law.

See *Report of the International Law Commission* 53rd sess, A/56/10 (2001) at 35.

compensate an individual for blameworthy delay" (attributable to the judiciary).[138] Such distinction compares to the approach taken in *Maharaj*.

[63] Nor is such an exception practicable in seeking to immunise from public law liability only breaches attributable to judicial conduct. In effect, the argument for the Attorney-General would seek to preclude questioning of judicial actions except through appeal, judicial review (where available in respect of the decisions of inferior courts),[139] or disciplinary procedure. This, it is said, is necessary to avoid the judges being vexed with litigation in which they might be asked to be witnesses (although s 74(d) of the Evidence Act would prevent their compellability). And it is said to be necessary to prevent judicial determinations, formally intact, being undermined by collateral challenge. It should be noted that while the denial of a *Maharaj* remedy would prevent a claim of right to compensation from the State, it is not suggested that it would prevent application to the executive branch of government for an ex gratia payment under administrative procedures established by the executive. Such payments, too, entail questioning of judicial conduct.

[64] The Attorney-General argues that there is additional policy in an exception to State liability based on judicial action. If the State is to be liable for judicial conduct, he suggests the independence and impartiality of the judges may be undermined in two ways: by the perception, if not the reality, that the executive will then have an incentive (in minimising its own risk) to encroach upon judicial function; and by a corresponding reluctance on the part of judges to risk responsibility for public liability. These arguments do not, in my view, pass muster.

[65] First, executive interference with judicial function is constitutionally illegitimate. The prospect of such interference is unthinkable. Such spectre, even if expressed as concerned with appearances rather than reality, should not be conjured up against the fundamental principle that rights must be remedied.[140]

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138 *McFarlane v Ireland* (2011) 52 EHRR 20 (Grand Chamber, ECHR) at [121].

139 As in the case of the denial of natural justice by the Visiting Justice in *McKean v Attorney-General* [2009] NZCA 553.

140 Compare *Kemmy v Ireland* [2009] IEHC 178, cited with approval by McGrath and William Young JJ at [198].

[66] Secondly, the argument that judges may be deflected from their duty is, as Lord Cooke pointed out in response to a similar claim in respect of the police in *Darker*,[141] the same argument rejected by Lord Reid in *Home Office v Dorset Yacht Co Ltd* when made in respect of the liability of public servants.[142] Lord Reid in that case expressed the conviction that "Her Majesty's servants are made of sterner stuff".[143] It would be a bad day for the rule of law if the same could not be said about Her Majesty's judges.

[67] I consider that these arguments of policy for limiting the application of *Baigent* and extending the immunity do not displace the principle that has "first claim" upon the courts: that wrongs are to be remedied.[144] Observance of that general principle is axiomatic where the wrong in issue is breach of the rights and freedoms contained in the New Zealand Bill of Rights Act. Provision of effective remedy is essential to discharge of the obligations imposed on the courts by s 3(a). In that context there is no occasion to create a new immunity for the State on the basis of the policies behind judicial immunity. They are not directly engaged. And none are sufficient in themselves or as combined to place a remedy in damages beyond the remedial jurisdiction of the courts when rights are breached.

[68] I would therefore resist this creeping immunity. It is "in principle inconsistent with the rule of law".[145] For the reasons given, I do not consider that such extension is necessary in the interests of the administration of justice. Immunity should not be extended beyond protection of individual judicial officers from personal claims.

No inconsistency with New Zealand's reservation to art 14(6) of the ICCPR

[69] Nor is the availability of a *Baigent* damages remedy against the State inconsistent with New Zealand's reservation to art 14(6) of the International

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141 *Darker* at 452.
142 *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 (HL).
143 At 1033.
144 *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 (CA) at 663; see also *Lai v Chamberlains* at [35]; and *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [69].
145 *Darker* at 453.

Covenant on Civil and Political Rights, as has been suggested.[146] Article 14(6) requires a person wrongly convicted to be "compensated according to law". Such remedy addresses error in result, rather than the fundamental denial of rights looked to by *Maharaj* or breach not remediable within existing process looked to by *Baigent.* It seeks to create a domestic entitlement to compensation for wrongful conviction rather than a claim for an effective remedy for Bill of Rights breach otherwise not vindicated. A direct public law claim will not "ordinarily offer an alternative means of challenging a conviction or a judicial decision", as Lord Bingham recognised in *Hinds.*[147] The reservation to art 14(6) does not therefore inhibit the public law damages remedy recognised in *Baigent.*

Collateral challenge and finality of litigation

[70] The emphasis placed on the need to avoid collateral challenge of judicial determinations, as already indicated, seems to me to be overblown. Objections that proceedings for vindication of rights are "collateral" or contrary to a public interest in the finality of court decisions suggest more rigidity in the legal system than is accurate. Collateral challenge by way of judicial review lies against decisions of inferior courts. Removal of the common law immunity of barristers in New Zealand now permits the questioning of outcomes in determined proceedings unless the suit is abusive.[148] Disciplinary proceedings against judges[149] and administration of the ex gratia compensation payments systemised in New Zealand by procedures established by Cabinet also entail questioning of judicial determinations. But since these are avenues of redress explicitly exempted from the United Nations principles on judicial immunity,[150] it suggests that the policy behind judicial immunity is seen, internationally at least, to be satisfied by the narrower objective of protecting judges from personal liability.

[71] A blanket exclusion for breach attributable to judicial action also overreaches because it prevents a claim for public law damages even if there is no collateral

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146 See McGrath and William Young JJ at [199]–[201] and William Young J in *Brown* at [136].
147 *Hinds* at [24].
148 *Lai v Chamberlains* at [68].
149 Under the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004.
150 Basic Principles on the Independence of the Judiciary, art 16.

challenge to an existing determination. That could arise, for example, in circumstances where a breach of rights is not material to the court decision but still requires remedy. It could occur where appeal has corrected an erroneous determination, but the correction does not constitute in the circumstances effective remedy for the breach of right. That is indeed the position claimed here. Claims for damages for breach of rights may not entail collateral challenge to a subsisting conviction or judgment at all. Where they do, the claim may often, but will not invariably, amount to abuse of process. Where such claim is an abuse of process, it can be directly confronted on the basis set out in *Hunter v Chief Constable of the West Midlands Police*[151] and applied by this Court in *Lai v Chamberlains.*[152] Where it is not (perhaps because the claim for damages does not impugn a subsisting conviction), there is no arguable basis upon which to deny an effective remedy. It should be noted that arguments for denial of a remedy in damages in respect of criminal procedural rights are based less on the policies behind judicial immunity than on the view that vindication of rights in the criminal justice system must be limited to the remedies available through the criminal justice processes. I consider it inconsistent with authority on the availability of damages for breach of rights (as explained at [33]–[47]). And I consider there is no occasion to impose further restriction than is inherent in the remedy itself.[153] It would be to treat those tried for criminal offences as not entitled to vindication of rights on the same basis as others.

Maharaj **remains good law**

[72] In *Maharaj*, Lord Diplock limited the public law damages claim to denial of fundamental constitutional rights of natural justice, not able to be effectively remedied through appeal.[154] The development of remedies through New Zealand case law for Bill of Rights Act breaches has preferred to tailor remedies in contextual assessment of what is effective, rather than through adoption of a more categorical approach according to classification of the failure of process.[155] There may be no difference in application. Breach of natural justice or the minimum standards of

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151 *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 (HL).

152 *Lai v Chamberlains* at [64]–[72].

153 Whether the remedy contemplated in *Maharaj* is too restrictive in the application of the New Zealand Bill of Rights Act is not something we are called upon to consider.

154 *Maharaj* at 399.

155 See, for example, *Martin* at 427–428 per Richardson J.

criminal procedure provided for in the Bill of Rights Act is not likely to justify an award of public law damages against the State unless it fails to be adequately remedied by correction within the legal processes in which it occurs, as through appeal. Such error is properly characterised as fundamental denial or failure of the legal system to protect human rights. But it would be unwise to suggest that public law damages could never be appropriate short of such failure. I would prefer to disclaim such omniscience and leave the circumstances in which damages may properly be awarded for future cases, in which they can be assessed against the discipline of facts. Line-drawing may be difficult in some cases, a point made by Lord Hailsham, dissenting in *Maharaj*. (He allowed, however, that the distinction between fundamental denial and error was valid "as a logical concept".)[156] On this preliminary application based on the denial of rights of appeal through the ex parte process (necessitating correction following similar petition to the Privy Council as in *Maharaj*), I do not find it difficult to determine that the claim to damages is well arguable.

[73] Lord Hailsham dissented in *Maharaj* on the basis of the meaning of the provision for redress in the Constitution of Trinidad and Tobago (which he considered was a procedural provision under which only existing remedies could be obtained).[157] It is not necessary to consider the basis of the dissent for the purposes of the present appeal because the provisions and purpose of the New Zealand Bill of Rights Act were clearly a departure intended to be transformative of New Zealand law. For the reasons adopted in *Baigent* and as is conceded (except in relation to judicial breaches), it permits effective remedy to be provided by public law damages against the State.

[74] Lord Hailsham did however go on to point out some "inconveniences" which would follow if the section in issue had conferred a right of damages "in circumstances like the present".[158] Two are matters of policy also urged upon the Court by the Attorney-General as here supporting exclusion of the *Baigent* remedy: the difficulty of drawing the line between "mere judicial error and a deprivation of

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156 At 410.
157 At 406–409.
158 At 409.

due process as in the instant appeal" (only the second providing a remedy in damages);[159] and the unfairness of such different treatment, given that the consequences for the individuals might be equally grave.[160]

[75] Three points should be made immediately about these inter-related criticisms. In the first place, Lord Hailsham made it clear that, had he been of the view that the section conferred a right of claim against the State, these "inconveniences" could not deter allowing it.[161] As the *Baigent* remedy against the State is accepted to be available in New Zealand, such policy reasons in the present case would have to justify not a new remedy, but an exception to an established one. For the reasons given at [48]–[71] I do not consider they do so. Secondly, the contextual assessment of effective remedy adopted in New Zealand cases, already referred to,[162] is an approach which permits some correspondence to be maintained, if appropriate, between correction of error and remedy of fundamental rights and freedoms. That goes some distance to meet Lord Hailsham's concern about inequality of outcome as between those who are affected by "mere judicial error" and those affected by breach of fundamental rights. To the extent that effective remedy reflects the "extra dimension" that fundamental rights have been breached, however, difference in outcome is entirely proper.[163]

[76] In many cases of judicial breach of rights, effective remedy will be obtained through the same processes as are available to correct error.[164] Unexceptional delay may not give rise to a remedy in damages. Such unexceptional delay may be regarded as one of the prices of citizenship:[165] as Lord Diplock made clear in *Maharaj*, infallibility of process is not to be expected, but rather a system that complies with rights.[166] In some cases, particularly those where denial of right is exacerbated by delay in correction, formal correction may not be adequate to

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159 At 409–410.
160 At 410.
161 At 409.
162 Above at [48]–[49].
163 As Thomas J rightly emphasised in *Dunlea* at [67], approved and followed on this point by the Privy Council in *Ramanoop* at [16].
164 *Harvey v Derrick* at 322 per Cooke P, citing *Chokolingo v Attorney-General of Trinidad and Tobago* [1981] 1 WLR 106 (PC).
165 *Arthur JS Hall & Co v Simons* [2002] 1 AC 615 (HL) at 747–748 per Lord Hobhouse.
166 *Maharaj* at 399.

vindicate the right. In such cases further remedy by way of damages against the State cannot be foreclosed if effective remedy is to be obtained.

Public law damages are available for judicial breach of the Bill of Rights Act

[77] The countervailing arguments are unconvincing when weighed against the imperative for effective remedy for breaches of all rights by those bodies within s 3(a) of the New Zealand Bill of Rights Act. I consider there is no basis in the text and structure of the New Zealand Bill of Rights Act for an exception for breaches attributable to judicial action. Such liability in cases where damages provide an effective remedy is consistent with existing authority, in New Zealand and in other jurisdictions. Parliament, although invited to do so by the Law Commission, has not changed what was seen to be the existing legal exposure of the State. State liability for breaches by the judicial branch accords with international human rights determinations and is not inconsistent with international protections for judicial immunity. The public law liability of the State does not affect the law of judicial immunity or undermine the policies upon which it is based. The exclusion of judicial breaches from remedy in damages is inconsistent with the principle of equality and the rule of law, as the Law Commission acknowledged and as both Lord Cooke and Richardson J in the passages cited in [54] and [57] recognise is the effect of immunity. Insufficient justification for such result is available in relation to the public law liability of the State.

Liability of the State represented by the Attorney-General

[78] "The Crown" has different meanings according to context.[167] Throughout the judgments in *Baigent* there is reference both to "the Crown" and "the State" as the party liable for public law damages.[168] In my view, *Baigent* is properly seen as affirming a general compensatory remedy against the State (comprising the three branches of government) for deprivation of rights. Such approach is consistent with

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167 See Janet McLean "'Crown Him with Many Crowns': The Crown and the Treaty of Waitangi" (2008) 6 NZJPIL 35 at 58: "There is no single or simple answer to 'who is the Crown generally' .... The common law itself contains distinct and competing versions of the Crown ...".

168 For references to "the State", see *Baigent* at 677 per Cooke P, at 691 per Casey J, at 697 per Hardie Boys J, and at 718 per McKay J. For references to "the Crown" see, for example, at 690 per Casey J, at 702 per Hardie Boys J, and at 718 per McKay J.

the text and scheme of the Bill of Rights Act itself. It is consistent with the White Paper which preceded the enactment of the Bill of Rights Act. And it is consistent with the judgments in *Baigent* and *Auckland Unemployed Workers' Rights Centre*. It is also consistent with the treatment of the Crown in the Crown Proceedings Act 1950, making the Attorney-General the appropriate defendant under s 14 of that Act. These points I now address.

[79] Following the enactment of the Crown Proceedings Act, it is a bold submission that there is no concept of the State in New Zealand law. The suggestion made in submissions on behalf of the Attorney-General that under the common law constitution of New Zealand that historical position cannot be overcome unless, as in the case of the Constitution of Trinidad and Tobago, there is a break with the Crown under a new constitutional order is hardly compatible with the terms of the Crown Proceedings Act or the New Zealand Bill of Rights Act. Under s 3 of the New Zealand Bill of Rights Act, "the Government of New Zealand" includes its "legislative, executive, [and] judicial branches".[169] As the language used in the judgments in *Baigent* indicates, the terms "State" and "the Crown" are used as equivalent.

[80] As its long title provides, the Crown Proceedings Act was enacted:

> to consolidate and amend the law relating to the civil liabilities and rights of the Crown and officers of the Crown, and to civil proceedings by and against the Crown.

[81] The Act applies to all civil proceedings as defined. It defines "the Crown" to mean "Her Majesty in right of Her Government in New Zealand".[170] "Officer", in relation to the Crown, includes all servants of her Majesty and Ministers of the Crown:[171]

> but does not include the Governor-General, or any Judge, District Court Judge, Justice of the Peace, Community Magistrate, or other judicial officer.

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169 That this provision is thought to encapsulate the State is confirmed by the White Paper, which in its commentary on this section at [10.20] says that "... Bills of Rights are thought of as documents which restrain the great powers of the State."

170 Crown Proceedings Act 1950, s 2(1).

171 Ibid.

[82] This definition suggests that, without explicit exclusion, the judiciary and the Governor-General would have been within the term "[s]ervants of Her Majesty". It suggests that the Crown, as defined, covers all aspects of Her Majesty's government in New Zealand, including the judicial authority of the State.[172] On that basis, and as Mr Harrison QC suggested in argument, "Her Majesty in right of Her Government in New Zealand" includes the three branches of government described in s 3 of the New Zealand Bill of Rights Act: the Queen in Parliament ("the legislative branch ... of the Government of New Zealand"); the Queen's Ministers and servants ("the executive branch ... of the Government of New Zealand"); and the Queen's Judges ("the judicial branch ... of the Government of New Zealand").[173]

[83] Under s 3(2) of the Crown Proceedings Act 1950, any person "may enforce as of right, by civil proceedings taken against the Crown for that purpose in accordance with the provisions of this Act ... any of the following causes of action":

> (c) Any cause of action, in respect of which a claim or demand may be made against the Crown under this Act or under any other Act which is binding on the Crown, and for which there is not another equally convenient or more convenient remedy against the Crown:
>
> (d) Any cause of action, which is independent of contract, trust, or tort, or any Act, for which an action for damages or to recover property of any kind would lie against the Crown if it were a private person of full age and capacity, and for which there is not another equally convenient or more convenient remedy against the Crown:

[84] The terms of the Bill of Rights Act (which applies to acts of the legislative, executive, and judicial branches of government) make it clear that the Crown, as defined in the Crown Proceedings Act, is bound by the Bill of Rights Act. And the terms of s 5 of the Crown Proceedings Act indicate that, where an Act is binding on the Crown, liability of the Crown through the courts is envisaged. The Bill of Rights Act damages remedy recognised in *Baigent* is one against the Crown, for which there is no other convenient remedy, making procedure under the Crown Proceedings Act appropriate.

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172 The Crown on this view is distinct from the individuals that comprise the Crown: see *In re M* [1994] 1 AC 377 (HL), where Lord Templeman notes at 395 that "... judges enforce the law against the Crown as executive and against the individuals who from time to time represent the Crown."

173 The Constitution Act 1986 also outlines the constituent parts of the State in New Zealand: the executive, legislature, and judiciary (in Parts 2–4).

[85] Section 6 provides for the liability of the Crown in tort, excluding in s 6(5) liability in respect of anything done or omitted to be done by someone purporting to exercise judicial function or execute judicial process. Again, the specific exclusion of judicial function would not have been necessary unless the judicial function of the State is otherwise generally within the concept of the Crown.

[86] Section 27(3) of the New Zealand Bill of Rights Act, under the heading "[r]ight to justice" makes it one of the rights and freedoms affirmed that:

> (3) Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.

[87] The term "Crown" is used nowhere else in the Act. In its terms, s 27(3) affirms as a human right the principle of equality between State and individual.[174] Section 27(3) was enacted in the form proposed in the White Paper. The commentary in the White Paper notes that the provision does not correspond closely with provisions of the Canadian Charter (which provided something of a pattern for its proposals) or the International Covenant.[175] It was however:[176]

> ... designed to give constitutional status to the core principle recognised in the Crown Proceedings Act 1950: that the individual should be able to bring legal proceedings against the Government, and more generally to engage in civil litigation with it, without the Government enjoying any procedural or jurisdictional privileges. This is central to the rule of law.
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> In many cases the substantive powers, rights and responsibilities of the State and the individual will necessarily differ and that will affect the result of litigation. The paragraph is not designed to alter this, but with that inevitable difference (which may run over into some aspects of the procedure), the provision declares the right of the individual to take legal disputes with the Crown to court and to have the case dealt with in terms of the process to be followed essentially in the same way as in private litigation.
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> Again the phrase "according to law" will enable the right to be regulated by legislation (at the moment the Crown Proceedings Act 1950) and by the common law. This could if necessary be invoked to uphold the law of public interest immunity. However, it is not thought that this law – it was formerly called Crown privilege but this is inaccurate – would in any event be affected. It relates, as its name now indicates, to the public interest in protecting certain very limited information from disclosure in court

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174 See Law Commission *Crown Liability and Judicial Immunity* at 6–7.

175 "A Bill of Rights for New Zealand: A White Paper" [1984–1985] I AJHR A6 at 111.

176 At 111–112.

> proceedings, and has no necessary connection with proceedings by or against the State.

[88] The Bill of Rights Act therefore affirmed, through ss 3 and 27, that in the constitutional context, the concept of "the Crown" or "the Government" or "the State" (the terms are used interchangeably in the White Paper passage quoted above) refers to all three branches of the government.

[89] Part II of the Crown Proceedings Act provides for the procedure to be adopted when the Crown brings or defends civil proceedings. Under s 12(1) all civil proceedings which may be taken by or brought against the Crown under the Act may be "commenced, heard, and determined in the same Court and in like manner in all respects as in suits between subject and subject". The method of making the Crown a party to proceedings is contained in s 14. Where no other procedure is prescribed by legislation, proceedings may be instituted against the appropriate government department (if it may be sued), or against any appropriate "officer of the Crown" (a term defined to exclude judges) or against the Attorney-General "if there is no such appropriate Department or officer ...".[177]

[90] Bill of Rights Act damages against the Crown are damages sought against "Her Majesty in right of her Government in New Zealand", for which there is no appropriate department or officer responsible. The Crown Proceedings Act therefore authorises the issuing of such proceedings against the Attorney-General.

[91] Nor is the concept of "control" useful in determining when the State is responsible through the Attorney-General for breaches of rights. The police, in their constabulary functions, and officials, in exercising statutory powers conferred upon them, are also independent of direction by the executive, and yet it is accepted that the Attorney-General is the appropriate defendant in such cases.

[92] In conclusion, under the New Zealand constitution, the State is the Crown.[178] Although it may be common to use the short-hand "Crown" to refer to the executive in some contexts (especially in the prosecution of serious offences), in the

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177 Crown Proceedings Act 1950, s 14(2).

178 As noted by McKay J in *Baigent* at 718, holding the Crown to be "the legal embodiment" of the State.

constitutional context in which both the Crown Proceedings Act and the New Zealand Bill of Rights Act operate, the term is correctly used of the State as a whole, embracing the three branches of government. Claims against the State for breach of its obligations under the New Zealand Bill of Rights Act are properly brought against the Attorney-General, as authorised by s 3(2)(c) of the Crown Proceedings Act.

Outcome

[93] Whatever the difficulties with cases at the margin, I consider that Mr Chapman's claim is within the scope of the direct public law liability of the State for breach of rights. In *Maharaj*, the damages remedy was appropriate because correction on appeal (except through special petition of the Privy Council) was not available within the legal system of Trinidad and Tobago. In respect of the appellants subject to the *Taito* procedures, rights of appeal and fundamental natural justice were held by the Privy Council to have been effectively denied by the judicially-adopted processes followed. Whether Mr Chapman received effective vindication of the breach of his rights through his second appeal is a question for determination following the hearing of his claim. So too is the question whether an award of damages is appropriate to provide him with effective vindication. My answers to the preliminary questions of law would enable his claim to go forward for determination on its merits. I would dismiss the appeal.

McGRATH AND WILLIAM YOUNG JJ

Overview

[94] We accept that when the Court of Appeal dismissed Mr Chapman's conviction appeal under the pre-*Taito*[179] ex parte procedure, it breached Mr Chapman's rights to an appeal and to natural justice under ss 25(h) and 27(1)[180] of the New Zealand Bill of Rights Act 1990. In issue now is whether Mr Chapman

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179 *R v Taito* [2003] UKPC 15, [2003] 3 NZLR 577.

180 In this respect we do not share the doubts expressed by Anderson J, see [222] below. We do not consider that s 27 is superfluous in the criminal context given s 25(a). Nor do we consider that the scope of s 27(1) is controlled by s 27(2).

has a viable claim against the Attorney-General for compensation under the Bill of Rights Act for those breaches or whether such claim is precluded by the same principles which would exclude a direct claim by Mr Chapman against the Judges who dealt with his case.

[95] Preliminary questions directed to the availability and appropriateness of public law compensation were answered by the Court of Appeal in a way which permits Mr Chapman's claim to go to trial. In particular, the Court considered that principles of judicial immunity were not engaged by the claim.[181]

[96] The conclusions of the Court of Appeal were very much based on the view that the judgments in *Baigent*[182] and *Auckland Unemployed Workers' Rights Centre*[183] (along with the subsequent cases referred to) provided authority for the proposition that the state is liable for judicial breaches of the Bill of Rights Act. This Court is, of course, not bound by those decisions. That said, however, *Baigent* and *Auckland Unemployed Workers' Rights Centre* are leading judgments which have been rightly taken as relevantly settling the law in New Zealand.[184] If those cases (and the associated jurisprudence) did establish state liability for judicial breaches of the Bill of Rights Act, that would tell strongly – indeed we think decisively – in favour of Mr Chapman's right to seek public law compensation. Mr Harrison QC also strongly argued that Mr Chapman's entitlement to pursue his claim is supported by the Privy Council judgment in *Maharaj (No 2)*.[185] On his argument, we would be departing from well established principles if we were to conclude that Mr Chapman's claim is precluded by judicial immunity.

[97] We consider that *Baigent* (and the other New Zealand cases relied on) do not establish that public law compensation can be sought from the Attorney-General for judicial breaches of the Bill of Rights Act. And although we accept that

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181 *Attorney-General v Chapman* [2009] NZCA 552, [2010] 2 NZLR 317 at [100]–[101].

182 *Simpson v Attorney-General* [*Baigent's case*] [1994] 3 NZLR 667 (CA).

183 *Auckland Unemployed Workers' Rights Centre Inc v Attorney-General* [1994] 3 NZLR 720 (CA).

184 Parliament has implicitly recognised the existence of the *Baigent* cause of action in the definition of a money claim for the purposes of limitation. See s 12(2)(c) of the Limitation Act 2010.

185 *Maharaj v Attorney-General of Trinidad and Tobago (No 2)* [1979] AC 385 (PC) [*Maharaj (No 2)*].

Maharaj (No 2) supports Mr Harrison's argument we do not see this as being of controlling significance. But although we will engage with the cases relied on by Mr Harrison – and in some detail – the reality is that the case also turns on a policy judgment. Judicial immunity gives effect to systemic public interest considerations, the most important of which is judicial independence. As we will explain, allowing a claim of this kind to proceed would be as inimical to those public interest considerations as allowing a personal claim against judges. Given this and our view that there is no particular need for the provision of financial remedies for judicial breaches of the Bill of Rights Act, we conclude that the claim is not available.

The factual background

[98] On 18 May 2000, Mr Chapman (then known as Mervyn Finlayson) was sentenced to six years' imprisonment for sexual offending against a nine-year-old boy. He appealed against his convictions. Legal aid was declined and his appeal was dismissed ex parte as it was then called, that is without an oral hearing (see *R v Finlayson*[186]).

[99] The procedures which had been applied to Mr Chapman's appeal had been applied to such appeals generally in the Court of Appeal for a number of years. They were later held by the Privy Council in *Taito* to have been unlawful and in breach of the Bill of Rights Act. Although Mr Chapman was not one of the *Taito* appellants, he was subsequently granted a new appeal in accordance with the processes established following *R v Smith.*[187] At this point, Mr Chapman was released on bail.

[100] On the rehearing, with legal aid, the appeal was allowed, the convictions quashed and a new trial was directed (see *R v Finlayson*[188]). The appeal succeeded on the point that during the jury's deliberations and at the jury's request, the Judge had replayed the video of the complainant's evidence, but had not put any balancing material to the jury. This was not one of the grounds of the original appeal but as a

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186 *R v Finlayson* CA186/00, 19 October 2000 per Thomas, Blanchard and Tipping JJ.
187 *R v Smith* [2003] 3 NZLR 617 (CA).
188 *R v Finlayson* CA228/03, 28 November 2003.

similar argument had succeeded in the Court of Appeal in *R v S*[189] – a case decided some two months before the ex parte dismissal of his appeal – it is likely, although not inevitable, that the point would have been picked up if Mr Chapman had received legal aid and there had been an oral hearing.

[101] As it turned out, there never was a retrial. The videotape of the complainant's police interview had been lost and the complainant, who was by then 16 years old, did not want to go through another trial and give evidence in person. The upshot was that Mr Chapman was discharged under s 347 of the Crimes Act 1961.

[102] Although the minutiae of these facts are not critical to the issues which we have to determine, they illustrate some of the imponderable issues which litigation of this kind gives rise to. If Mr Chapman's appeal had been heard properly the first time around, would he or the Court have picked up the point upon which the case was ultimately resolved in his favour in November 2003? If this point had been picked up and the appeal allowed, would there have been a retrial? Obviously the sooner a retrial was directed, the more likely it would have been to proceed. And if there had been a retrial what would the verdicts have been? It is clear that any public law compensation Mr Chapman might hope to receive would be moderate (and considerably less than the $400,000 he is seeking). It is also reasonably clear that the court would not seek to resolve definitively the counterfactual questions just posed. Any award would thus not be calculated so as to compensate him for being in prison for three years too long, but would instead be vindicatory of his appeal rights. But in assessing the need for such an award (and its quantum if any), what account should be taken of the reality that those rights had already, at least to some extent, been vindicated when his appeal was heard in accordance with law?

The removal of preliminary questions of law to the Court of Appeal

[103] Four preliminary questions of law were removed to the Court of Appeal for determination (see *Chapman v Attorney-General*[190]). These questions were slightly

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189 *R v S* CA215/00, 28 August 2000.

190 *Chapman v Attorney-General* HC Christchurch CIV-2006-409-1409, 19 March 2008.

reformulated by the Court of Appeal so that the questions actually addressed in the judgment under appeal were in these terms:

(a) Does the Court have jurisdiction to hear and determine a claim for public law compensation for alleged breaches of ss 25 and 27 of the Bill of Rights occurring in the course of determining a criminal legal aid application and an appeal against conviction where a plaintiff's conviction has subsequently been quashed on appeal and a retrial ordered?

(b) If the answer to (a) is "yes", is public law compensation an appropriate remedy in such proceedings?

(c) If the answer to (a) and (b) is "yes", is the Attorney-General the proper defendant in such proceedings where the alleged breaches of the Bill of Rights were committed by a Registrar and Judges of this Court when determining a criminal legal aid application and an appeal against conviction?

(d) If the answer to (c) is "yes", is the Attorney-General entitled to the benefit of the same immunities as the persons who committed the alleged breaches?

The approach of the Court of Appeal's judgment

[104] The Court of Appeal approached these questions under four headings:

(a) Is Bill of Rights compensation an available remedy?

(b) Is the Attorney-General the proper defendant?

(c) Does the Attorney-General have the benefit of judicial immunities?

(d) Is Bill of Rights compensation an appropriate remedy?

[105] Under the first heading, the Court of Appeal addressed and rejected submissions by the Solicitor-General that the proper remedy for judicial error in the criminal process is judicial correction within the criminal process itself and that there can be no further review by way of civil proceedings for compensation. In doing so, the Court proceeded on the basis that the judiciary were as much subject to the Bill of Rights Act as the executive, and that there was no exception for judicial acts.

[106] The Court analysed carefully the reasoning in *Baigent* and *Auckland Unemployed Workers' Rights Centre*. Reference was also made to the later cases *Harvey v Derrick*[191] (which dealt with events which had arisen before the enactment of the Bill of Rights Act), *Upton v Green (No 2)*,[192] *Rawlinson v Rice*,[193] *Taunoa v Attorney-General*,[194] and *R v Williams*.[195] The Court also discussed the Law Commission's report, *Crown Liability and Judicial Immunity: A Response to* Baigent's *case and* Harvey v Derrick.[196] The Law Commission had recommended legislation to make it clear that there could be no claims against the Crown for judicial breaches of the Bill of Rights Act.

[107] The Court of Appeal saw the cases to which we have just referred as supporting the view that public law compensation could be available for judicial breaches of the Bill of Rights Act. In reaching this view the Court was much influenced by the fact that *Maharaj (No 2)*, which supports the availability of public law compensation for judicial breaches, was cited with approval in *Baigent*. For this reason, the Court saw the argument that *Maharaj (No 2)* has been effectively over-ruled by other Privy Council decisions as beside the point. In any event it concluded that in the respects which are material in the present context, specifically the right to public law compensation directly from the state, *Maharaj (No 2)* had not been over-ruled.[197]

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191 *Harvey v Derrick* [1995] 1 NZLR 314 (CA).

192 *Upton v Green (No 2)* (1996) 3 HRNZ 179 (HC), affirmed in *Attorney-General v Upton* (1998) 5 HRNZ 54 (CA).

193 *Rawlinson v Rice* [1997] 2 NZLR 651 (CA).

194 *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429.

195 *R v Williams* [2009] NZSC 41, [2009] 2 NZLR 750.

196 Law Commission *Crown Liability and Judicial Immunity: A Response to* Baigent's c*ase and* Harvey v Derrick (NZLC R37, 1997).

197 At [88].

[108] The Court was particularly influenced by art 2(3) of the International Covenant on Civil and Political Rights (the ICCPR) and the international law principle under which a state is responsible for the actions of all branches of government including the judiciary. The Court also considered it significant that the Law Commission's recommendations for legislation had not been acted on.

[109] As well, the Court considered that excluding the actions of the judiciary from Bill of Rights Act compensation:

> [78] ... would involve excluding, in part, the judicial branch from the overall operation and the "application" of the Bill of Rights, contrary to s 3, which states that the Bill of Rights applies (without qualification) to the three branches of government under s 3(a).

[110] The Court dealt with the other issues in the case briefly.

[111] It saw the Attorney-General as the appropriate defendant:

> [94] We accept Mr Harrison's submission that the Bill of Rights compensation remedy, as outlined in *Baigent's Case*, is properly characterised as a direct public law remedy available against the state. It is not a remedy against the Crown narrowly defined as constituting only the Executive branch of government. As the first law officer of the Crown, the Attorney-General is the obvious defendant. We are not, however, to be taken as holding that the Attorney-General is the proper defendant for breaches by public bodies set out in s 3(b) of the Bill of Rights. We leave that point open.

In this, it saw no threat to judicial independence:

> [96] We do not consider that the payment of compensation by the state for breaches of the Bill of Rights by judicial officers threatens judicial independence. Awards of compensation will, in light of the principles in *Taunoa*, generally be moderate. Other judicial decisions in the criminal justice arena have a much greater capacity to be a cost to the public purse, such as the ordering of a retrial. Moreover, as noted above at [78], it would be inappropriate for the judiciary to exclude one form of Bill of Rights remedy for breaches committed by judicial officers. Such an action could in fact harm public confidence in the judiciary.

[112] It rejected the argument that the claim in this case was barred by judicial immunity principles:

> [100] It is clear from *Baigent's Case* that the Bill of Rights compensation remedy is against the state and that the state does not have the benefit of the

> immunities enjoyed by individuals. In our view, this includes judicial immunities, as is clear from the passage from *Maharaj* approved by the majority in *Baigent's Case*: see above at [42]. See also Hardie Boys J's comments in *Auckland Unemployed* that the action (which included a challenge to the actions of the judicial officer issuing the warrant) would not be barred by Crown immunity: see above at [47]. The Attorney-General therefore does not have the benefit of judicial immunities.
>
> [101] We consider that judicial immunity would nevertheless apply to the individual judicial officers involved. As noted by the Law Commission, as the public law remedy identified in *Maharaj* is a remedy against the state, the absolute immunity granted to judges would prevent an action against such judges personally for breach of the Bill of Rights: at [157]. See also Cooke P's comments in *Harvey v Derrick* referred to at [48] above. Moreover, the principle of judicial immunity is fundamental to ensuring that judicial independence is preserved. The underlying reasons for the principle were outlined by Woodhouse J in *Nakhla v McCarthy* [1978] 1 NZLR 291 (CA) at 294:
>
> > It lies in the right of men and women to feel that when discharging his judicial responsibilities a judge will have no more reason to be affected by fear than he [or she] will allow himself to be subjected to influences of favour.
>
> In our view, the judicial immunity which will apply to the individual judicial officers involved in a breach of the Bill of Rights sufficiently protects the principle of judicial independence.

[113] It was not prepared to determine whether compensation would be an appropriate remedy in Mr Chapman's case. This it saw as an issue which would have to be determined at trial.

Narrowing the issues

[114] The structure of the judgment of the Court of Appeal suggested separate consideration of (a) the question of whether public law compensation is available for breach of "fair trial" rights and (b) the narrower question of whether judicial immunity principles preclude public law compensation for judicial breaches of fair trial rights. As is apparent from our discussion of the judgment, however, the way in which the reasoning proceeds did not preserve much distinction between those two questions, albeit that in substance both questions were answered in favour of Mr Chapman.

[115] In *Brown v Attorney-General*[198] William Young J (in a separate judgment which was not joined by the other members of the Court) concluded that public law compensation was not available for breach of fair trial rights. In that judgment, he was addressing the first of the two issues just identified. In the judgment currently under appeal, the Court of Appeal took a different approach. Given that we see the extent of what was decided in *Baigent* and judicial immunity as the decisive considerations in this case, we need not determine which of the two approaches just mentioned is correct.

[116] We also propose to address only in passing, and now, the appropriateness of the claim being prosecuted against the Attorney-General. If the state is required to provide public law compensation for judicial breaches of the Bill of Rights Act, the courts would have to be able to identify an appropriate defendant. We are not able to think of anyone other than the Attorney-General who could adequately represent the state; this despite legal uncertainties as to the juristic nature of the state in domestic law and the constitutional awkwardness of the Attorney-General being sued for the actions of judges (given his or her membership of the executive).[199]

What was decided in *Baigent, Auckland Unemployed Workers' Rights Centre* and the associated jurisprudence?

Baigent and *Auckland Unemployed Workers' Rights Centre*

[117] In *Baigent*, the Court of Appeal held that a plaintiff who alleged a breach of her rights by the police had a direct, rather than vicarious, cause of action against the Crown, for which an award of damages would be an available remedy. The four Judges in the majority delivered separate judgments. Each approached the issue of the availability of damages as a remedy for breach of protected rights as a question of interpretation of the Bill of Rights Act. They decided that it was implicit in the legislation that there was a public law cause of action against the Crown, untouched

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198 *Brown v Attorney-General* [2005] 2 NZLR 405 (CA).

199 In saying this we make it clear that we have not addressed who the appropriate defendant would be in relation to claims for public law compensation in relation to the actions of other official bodies, such as local authorities.

by the immunities for vicarious liability in tort, for which damages were an available remedy.

[118] The line of reasoning in each of those judgments reflected a common and consistent approach to remedies. First, the Judges emphasised the importance of the long title as a guide to interpretation of the Bill of Rights Act's provisions affirming rights and freedoms.[200] The long title said it was an Act "to affirm, protect, and promote human rights and fundamental freedoms in New Zealand". While it naturally followed that ordinary judicial remedies were available for the enforcement and protection of rights, the strength of this expression of the Act's purpose required that the courts develop the current law where necessary rather than simply preserve the status quo.[201]

[119] The long title also said it was an Act "to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights". Each of the Judges in the majority in that respect referred to art 2(3) in which:

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

The strength of the expression of this international obligation, in particular its reference to ensuring effective remedies and the right to development of judicial remedies, was emphasised by each Judge.

[120] The second common feature in the reasoning of each majority judgment was the central provision in the Bill of Rights Act for its application:

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200 New Zealand Bill of Rights Act 1990, s 2.

201 At 676 per Cooke P, at 691 per Casey J, at 699 per Hardie Boys J and at 717 per McKay J.

> **3 Application**
>
> This Bill of Rights applies only to acts done—
>
> (a) by the legislative, executive, or judicial branches of the Government of New Zealand; or
>
> (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 common approach of the majority to what this provision required was expressed by Cooke P:[202]

> Section 3 of the New Zealand Act makes it clear that the Act binds the Crown in respect of functions of the executive government and its agencies. It "otherwise specially provides" within the meaning of s 5(k) of the Acts Interpretation Act 1924. Section 3 also makes it clear that the Bill of Rights applies to acts done by the Courts. The Act is binding on us, and we would fail in our duty if we did not give an effective remedy to a person whose legislatively affirmed rights have been infringed. In a case such as the present the only effective remedy is compensation. A mere declaration would be toothless.

[121] Hardie Boys J saw s 3(a) as a commitment by the Crown that the three branches of government exercising its functions, powers and duties would observe the rights that the Bill affirms. He said it was both implicit in and essential to that commitment that the courts would comply with protected rights in discharging their duties and, in doing so, were able to give effective remedies where rights were infringed.[203] McKay J also saw s 3 as relevant to the issue of remedies for breach and said:[204]

> It is the Crown, as the legal embodiment of the state, which is bound by the International Covenant to ensure an effective remedy for the violation of fundamental rights. Parliament has affirmed those rights in order to affirm New Zealand's commitment to the International Covenant, but by a statute which applies only to acts by the legislative, executive or judicial branches of the government, or by any person or body in the performance of a public function, power or duty: s 3. Where a right is infringed by a branch of government or a public functionary, the remedy under the Act must be against the Crown.

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202 At 676.
203 At 702.
204 At 718.

[122] The fourth common theme in the majority judgments in *Baigent* was their reliance on an aspect of the majority judgment of the Privy Council in *Maharaj (No 2)*.[205] In the course of addressing concerns that allowing a claim for redress against the state arising from the exercise of judicial powers to commit a person to prison for contempt of court would subvert judicial immunity, Lord Diplock, in delivering the majority judgment for the Privy Council, identified the special characteristics of the cause of action against the state:[206]

> ... no change is involved in the rule that a judge cannot be made personally liable for what he has done when acting or purporting to act in a judicial capacity. The claim for redress under section 6(1) for what has been done by a judge is a claim against the state for what has been done in the exercise of the judicial power of the state. This is not vicarious liability; it is a liability of the state itself. It is not a liability in tort at all; it is a liability in the public law of the state, not of the judge himself, which has been newly created by section 6(1) and (2) of the Constitution.

[123] This analysis of the cause of action was adopted in *Baigent* by the majority Judges. Hardie Boys J also discussed decisions of final appellate courts in Ireland and India which recognised that claims for liability for contravention of rights were against the state itself in public law and not in tort.[207]

[124] Gault J, who dissented, also approached the issue of availability of damages as one of statutory interpretation, but reached a different result. He decided that it was inconsistent with s 4 of the Bill of Rights Act to fashion a new cause of action in order to circumvent statutory immunities. Where existing law did not provide effective remedies for breaches of rights, the courts should look to modifying and developing those remedies, including by separate right of civil action, adopting a flexible approach and having regard to s 6 of the Act.[208] That course, however, was unnecessary in the circumstances of *Baigent* as, if the plaintiff could establish that the police acted unreasonably in instituting or carrying out the alleged searches, the Crown should not be able to rely on statutory immunities and existing law could provide a remedy.[209]

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205 *Maharaj v Attorney-General of Trinidad and Tobago* (No 2) [1979] AC 385 (PC).
206 At 399.
207 At 700–701.
208 At 708 and 711.
209 At 715.

[125] The *Auckland Unemployed Workers' Rights Centre* case involved a claim concerning a search warrant issued by a deputy Registrar of a court on application by the police. Mr Harrison submitted that the Court accepted that the deputy Registrar was exercising a judicial function in issuing the warrant. In that context Cooke P observed:[210]

> I think that unlawfulness in the obtaining or issue of the warrant would certainly be an important factor, and might be decisive, as to liability under ss 21 and 22.

[126] Passages in the judgments of the majority in *Baigent*, already cited, have been seen by the Court of Appeal in this case as indicating that *Baigent* stands for the proposition that the *Baigent* public law cause of action against the Crown lies in respect of infringements by persons acting on behalf of any branch of government or exercising public functions.[211] McKay J's judgment,[212] in particular, is relied on as supporting this reading of *Baigent*. In saying that "[w]here a right is infringed by a branch of government or a public functionary, the remedy under the Act must be against the Crown", McKay J appears to envisage that the public law cause of action may be brought against the Crown for breaches by any persons bound to comply with protected rights under s 3(a) and (b) of the Act.

[127] McKay J relies on the breadth of the language of s 3 of the Bill of Rights Act and on Lord Diplock's judgment in *Maharaj (No 2)* for his wider view. The other Judges in the majority acknowledge that the obligation imposed by s 3(a) to comply with protected rights extends to those in the judicial branch of government but do not go further, at least explicitly. We therefore have difficulty with the Court of Appeal's conclusion that the other judgments also support a wide view of the scope of direct Crown liability, which would cover breaches by the judicial branch. Judgments must be read in the light of the facts in the cases in which they are delivered[213] and *Baigent* only involved breaches of rights by the police. And as Lord Halsbury LC famously said:[214]

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210 At 724.
211 At [44] and [72].
212 See the passage at 718 cited at [121] above.
213 Rupert Cross and JW Harris *Precedent in English Law* (4th ed, Clarendon Press, Oxford, 1991) at 43.
214 In *Quinn v Leathem* [1901] AC 495 (HL) at 506.

> ... every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found.

[128] On this principle, the general language used by the other three Judges would not be taken as having wider application than to breaches by the executive branch. McKay J also relied on that aspect of Lord Diplock's judgment for the majority in *Maharaj (No 2)*,[215] which characterised rights to claim redress for breaches of certain provisions in the constitution of Trinidad and Tobago as creating a public law cause of action rather than a private law one. *Baigent*, in adopting this analysis, makes clear that claims under the new cause of action it recognised are brought in public law and directly against the Crown. That is because the cause of action is not based on vicarious liability, nor does it lie in tort. It involves direct liability of the Crown under public law. But these characteristics of the cause of action, which Lord Diplock originally identified, do not provide assistance in deciding whether such public law claims may be brought against the Crown for breaches of rights by any branch of government or any person or body exercising public power. In New Zealand, that could only be so if it is implicit in the Bill of Rights Act that the Crown is a guarantor of all breaches of rights by those bound under s 3(a).

[129] We are satisfied that, in the context of the facts assumed in *Baigent*, the judgments of Cooke P, Casey and Hardie Boys JJ cannot be read as holding that the Crown's liability extends to all infringements by those bound to comply with the Act under s 3. The Court of Appeal considered that our interpretation would be contrary to s 3(a) as it would require the partial exclusion of the judicial branch of government from the overall operation and application of the Act. But Cooke P saw the effect of s 3(a) as being to require the Court to give remedies that were effective to vindicate infringed rights.[216] On this approach, the judiciary's obligations under the Bill of Rights Act are not lessened as there are extensive remedies, within the justice system, available for judicial breach and we shall later explain how they are effective in vindicating rights under the Bill of Rights Act. Nor does the dissenting judgment of Gault J (who did not accept that the Act impliedly created a new cause

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[215] McKay J at 718 citing *Maharaj (No 2)* at 396 and 399. See [122] above for the latter.

[216] *Baigent* at 676.

of action) support the wider liability proposition. McKay J's judgment is obiter on the point and the view of a single judge.

The subsequent case law

[130] The Court of Appeal also considered that case law subsequent to *Baigent* strengthened the view that its ratio was that the Crown was guarantor of compliance of those bound under s 3(a). A number of these cases call for further consideration.

[131] The first is *Harvey v Derrick*,[217] in which a District Court Judge was sued in tort. Although the judgment was delivered after that in *Baigent*, the events in issue occurred prior to the enactment of the Bill of Rights Act. At the time, the judges of that Court did not have full immunity and could be liable in civil proceedings for acts outside of jurisdiction. Section 193(1) of the Summary Proceedings Act 1957 at the time read:

> **193 No action against District Court Judge or Justice unless act in excess of jurisdiction or without jurisdiction —**
>
> (1) No action shall be brought against any District Court Judge or Justice for any act done by him, unless he has exceeded his jurisdiction or has acted without jurisdiction.

Judges against whom judgment was entered for acting in excess or without jurisdiction were, however, entitled to indemnity from the Crown to the full amount of the judgment.[218]

[132] A majority held that on the pleadings it was arguable that the Judge had been remiss in issuing a warrant committing the plaintiff to prison for breach of orders in respect of outstanding fines, to the extent that he went outside his jurisdiction. The Judge's application to strike out the claim against him was dismissed. At the conclusion of his judgment, Cooke P made some observations concerning the Bill of Rights Act and the public law cause of action:[219]

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217 *Harvey v Derrick* [1995] 1 NZLR 314 (CA).

218 Under s 196A of the Summary Proceedings Act 1957.

219 At 322. The emphasis in this passage and that cited from Richardson J's judgment was added by the Court of Appeal in the judgment the subject of the present appeal: see [48]–[49].

> It should be added that the present judgment does not touch or call for any opinion on the possible availability of action against the state for breach of the unreasonable search or seizure provisions of the New Zealand Bill of Rights Act 1990, s 21. *If available, such an action would not lie against the individual judicial officer and would not be based on vicarious liability.* On that subject reference may be made to *Simpson v Attorney-General [Baigent's Case]* [1994] 3 NZLR 667; *Maharaj v Attorney-General of Trinidad and Tobago (No 2)* [1979] AC 385; and *Chokolingo v Attorney-General of Trinidad and Tobago* [1981] 1 All ER 244, which brings out that a mere judicial error in interpretation of the law would not give rise to such an action. (emphasis added)

[133] And after discussion of public interest considerations favouring judicial immunity, Richardson J said:[220]

> Those public policy concerns have to be weighed against the public interest in providing remedies for those aggrieved by the exercise of judicial power. Traditional tort policy would require every Judge to exercise reasonable care to ensure that he or she does only what he or she is empowered to do. During the last 40 years and reflecting perceived social needs and a balancing of the moral claims of both parties, common law Courts have expanded the potential tort liability of professional and occupational groups. *Public law also provides remedies and in company with many other societies New Zealand has experienced an increasing focus on rights. The conduct of Judges is amenable to the Bill of Rights guarantees, which include liberty of the person (s 22) and the right to natural justice (s 27); and ss 5 and 6 necessarily involve weighing the rights of the individual injured by judicial error against judicial immunity considerations. The Judges themselves are in a particularly sensitive position as arbiters of the bounds of their own judicial immunity.* (emphasis added)

[134] In the passage cited, Cooke P's preface to his careful observations concerning the public law cause of action makes plain that his judgment is not deciding whether the cause of action is available where judicial officers breach citizens' rights to be free from unreasonable search and seizure. Otherwise, what he says is little more than a reiteration of certain features and limits of the public law cause of action when it applies. We do not agree with the Court of Appeal's view that these obiter remarks indicate "an acceptance by the courts ... of the availability of Bill of Rights compensation for judicial acts".[221] Richardson J's observations do not directly address *Baigent*, in which he did not sit, but his reference to public law remedies clearly includes the *Baigent* cause of action. In observing that judicial conduct is "amenable to the Bill of Rights guarantees" he is pointing out that judges are bound by the Bill of Rights Act which, of course, s 3(a) clearly stipulates. In referring to

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220 At 324–325.

221 See [77] of the Court of Appeal judgment.

ss 5 (Justified limitations) and 6 (Interpretation consistent with Bill of Rights to be preferred), Richardson J is reminding us that determining the scope of a statutory immunity for judges in any context may require consideration of whether that would be a justified limitation on rights and whether the statute can be given a meaning consistent with rights. This, and the acknowledgement of the sensitive position the judiciary are in, outlines the approach Richardson J later takes in interpreting the statutory provision conferring immunity.

[135] In our view, Richardson J is not expressing any opinion as to the scope of the *Baigent* cause of action. This passage of his judgment also addresses the force of policy concerns over judicial immunity, an important matter to which we shall return.

[136] In *Rawlinson v Rice*,[222] the plaintiff asserted that a non-molestation order had been made against him by the defendant District Court Judge without jurisdiction and in breach of natural justice. He sued, in tort, for misfeasance in public office and breach of statutory duty. The plaintiff did not bring a claim for Bill of Rights Act compensation because of concerns that this would preclude him seeking a jury trial. In the Court of Appeal, the Crown accepted it would be liable for breach of s 27 of the Bill of Rights Act (natural justice) but not the other claims. It was prepared to negotiate a settlement. The Court of Appeal said that there was therefore a straightforward cause of action available to the plaintiff by which he would receive appropriate compensation either by settlement or from the Court.[223] Accordingly, the concession by the Crown and its acceptance by the Court do not carry much persuasive force as to the true ratio of *Baigent*. In the circumstances, the case did not require any analysis of the decision in *Baigent* or the scope of the cause of action it identified.

[137] In *Attorney-General v Upton*,[224] the plaintiff was awarded Bill of Rights Act damages of $15,000 by the High Court for breach of natural justice and fair trial rights. On appeal the award was upheld. No issue was taken in either Court over the

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222 *Rawlinson v Rice* [1997] 2 NZLR 651 (CA).
223 At 662–663 per McKay J. See also Barker J at 664 and Tipping J at 667–668.
224 *Attorney-General v Upton* (1998) 5 HRNZ 54 (CA).

availability of public law compensation for breach of rights. This judgment accordingly also does not carry persuasive force as to the true ratio of *Baigent*.

[138] Two judgments of this Court were referred to by the Court of Appeal in the judgment appealed from. The first of these judgments was *Lai v Chamberlains.*[225] The reasons of Elias CJ, Gault and Keith JJ acknowledge that remedies for error in criminal proceedings can sometimes be obtained outside the criminal justice system. Subsequently, the judgment refers to ex gratia payments made by the state and public law claims including for breach of the Bill of Rights Act. These comments, however, are made in the context of an appeal in which the central issue concerned barristerial immunity. The different nature of the functions of judges did not call for consideration in that judgment. That difference was recognised by Tipping J in his separate judgment.[226] Accordingly, we do not regard the observations in the joint judgment in *Lai v Chamberlains*[227] as providing guidance on whether Crown liability for breaches of rights protected by the Bill of Rights Act extends to those breaches through judicial actions. Nor, again because of the different context, do we regard anything said in the judgment of this Court in *R v Williams* as providing relevant guidance.[228]

[139] Nevertheless, the Court of Appeal makes a valid point in saying that the Crown failed to put in issue on appeal the availability of Bill of Rights Act damages for judicial breach in 1997 and 1998 in *Rawlinson v Rice* and *Attorney-General v Upton* respectively.

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225 *Lai v Chamberlains* [2006] NZSC 70, [2007] 2 NZLR 7.

226 Tipping J said that the judiciary's "duties, and their need for protection in the interests of doing justice in the particular case, cannot be equated with the position of barristers": *Lai v Chamberlains* at [157].

227 In particular at [66] and [74].

228 *R v Williams* [2009] NZSC 41, [2009] 2 NZLR 750, in particular at [18].

The report of the Law Commission

[140] It was the Law Commission which, having been asked by the government to consider issues related to Crown liability under the Bill of Rights Act, first expressed the view that the true ratio of *Baigent* was narrower than the Crown had accepted:[229]

> 94 Statements in *Baigent's* case can be, and have been, read as indicating that the Crown is, in a sense, a total guarantor of the Bill of Rights Act. In particular, McKay J stated that where "a right is infringed by a branch of government or a public functionary, the remedy under the Act must be against the Crown" (718). On this reading, any breach of the Act might be the subject of proceedings or a remedy against the Crown, either alone or against the wrongdoer as well; and regardless of whether the Crown (essentially Ministers and departments – see para 6) had anything to do with the matter at all.
>
> 95 We reject this as the correct statement of principle to emerge from *Baigent*, which imposed direct liability on the Crown on the grounds of breach by an element of the executive in terms of s 3(a). We do not consider that such a broad principle of Crown residual liability can be justified. (citations omitted)

[141] The Law Commission reasoned that there were major difficulties with the general guarantor proposition in respect of non-monetary relief. Declaratory relief against the Crown could be ineffective if the government had no power of control over the persons or body who had acted in breach of rights. The same difficulty could be encountered in criminal proceedings.[230]

[142] As well, the Law Commission pointed out that art 2(3) of the International Covenant on Civil and Political Rights, which ensures those whose rights have been violated have a remedy, requires a remedy to be available within the state's constitutional processes. It is not necessary that it be against the state party in every case.[231]

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229 Law Commission *Crown Liability and Judicial Immunity: A Response to* Baigent's c*ase and* Harvey v Derrick (NZLC R37, 1997).

230 At [96].

231 At [97]. See also Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) at 820.

[143] Finally, the Law Commission observed:

> 98 ... it would be inconsistent with the structure of government worked out over our nation's history – especially in the last 10 years – for the Crown to have a general responsibility under the law to ensure that all who are subject to the Bill of Rights Act comply with it, and also to have a correlative duty to pay monetary compensation for breach.

[144] The Commission here particularly had in mind considerations of financial autonomy of many public bodies outside of government, but the factor has equal application to the judiciary as an independent branch of government.

[145] In rejecting the narrower view of *Baigent*, the Court of Appeal came back to the general language in which the majority Judges had justified and framed the new cause of action, saying:[232]

> [68] ... While *Baigent's Case* concerned the actions of the police, there is nothing in that decision that suggests that the principles enunciated relate only to breaches of the Bill of Rights by the Executive. Indeed, quite to the contrary, the statements made in that case were general statements about the need for there to be effective remedies for breaches of the Bill of Rights ... If the majority Judges in *Baigent's Case* considered that there was effectively a carve-out exception for judicial acts then it would have been expected that they would have made that explicit. To the contrary, the fact that three of the majority Judges relied on the fact that the judiciary is subject to the Bill of Rights under s 3 might rather suggest that those Judges considered compensation would be available for judicial breaches.

The difficulty we have with this line of reasoning is that it was not necessary for the Court in *Baigent* to address breaches of rights resulting from judicial acts. Judicial breaches raise particular constitutional questions relating to judicial independence which did not arise in the context of the police actions being considered in *Baigent*. Lord Diplock in *Maharaj (No 2)* had not regarded these considerations as persuasive[233] but there is nothing in the majority judgments to indicate agreement with the Privy Council on that point. In the absence of any consideration of how such a cause of action might impact on the effective discharge of the judicial function generally and in particular judicial independence, it is impossible to regard the wider view favoured by the Court of Appeal as that decided on in *Baigent*.

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232 *Attorney-General v Chapman* [2009] NZCA 552, [2010] 2 NZLR 317.

233 At 399–400. The European Court of Human Rights likewise draws a distinction between personal judicial immunity and state liability to compensate an individual for blameworthy delay attributable to judges in criminal proceedings: *McFarlane v Ireland* (2011) 52 EHRR 20 (Grand Chamber, ECHR) at [121].

Indeed, like the Law Commission, we consider the narrow proposition to be the true ratio of *Baigent*.

Maharaj (No 2)

[146] The human rights provisions of the Constitution of Trinidad and Tobago, both as it was during the events the subject of *Maharaj (No 2)* and since, are structured and expressed very differently from our Bill of Rights Act. As well, that Constitution provides expressly for remedies where there has been (or is likely to be) a contravention of those provisions.[234] But we do not see the differences in wording between that Constitution and our Bill of Rights Act as a basis for distinguishing *Maharaj (No 2)*. That judgment therefore provides support for the argument advanced by Mr Harrison. There are, however, issues as to how substantial that support is.

[147] For present purposes, the two critical features of *Maharaj (No 2)* are that:

(a) the Judge who found Mr Maharaj guilty of contempt had not adequately explained to him the nature of the alleged contempt; and

(b) his only right of appeal was to the Privy Council.

The failure of the Judge to put Mr Maharaj adequately on notice of the charge he faced was held to be a breach of fundamental rules of natural justice.[235] The second consideration – the non-availability of a direct right of appeal to the Court of Appeal of Trinidad and Tobago – was not stressed as much in *Maharaj (No 2*) as it has been in the later jurisprudence of the Privy Council. Under this jurisprudence, Mr Maharaj's entitlement to challenge his contempt conviction and sentence collaterally (that is in his constitutional relief claim) has been justified on the basis that he did not have a right to appeal to the Court of Appeal.

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234 The Constitution of the Republic of Trinidad and Tobago, s 14 (formerly s 6).

235 *Maharaj v Attorney-General of Trinidad and Tobago (No 2)* [1979] AC 385 (PC) at 391.

[148] The events which led up to the committal of Mr Maharaj are not discussed at any length in *Maharaj (No 2)*. They are, however, fully recorded in the earlier judgment of the Privy Council, *Maharaj (No 1)*,[236] which resulted in the quashing of the conviction for contempt. The Judge had acted in an overbearing and unreasonable way towards Mr Maharaj and his clients and Mr Maharaj responded at a hearing in chambers by asking the Judge to disqualify himself from dealing with any cases in which Mr Maharaj was engaged. He explained to the Judge that this was on the basis of his "unjudicial conduct". The Judge declined the invitation. The next day, when the Judge rejected a very reasonable request from Mr Maharaj, the latter repeated in open court what he had earlier said in chambers. The Judge then put this question to Mr Maharaj:

> Are you suggesting that this Court is dishonestly and corruptly doing matters behind your back because it is biased against you?

Mr Maharaj responded by saying:

> I do not think this is the right place to answer that question. I do not think the question arises. But I say you are guilty of unjudicial conduct having regard to what I said yesterday.

[149] There was then the following critical exchange:

> [The Judge:] Mr Maharaj, you are formally charged with contempt of court and I now call upon you to answer the charge. [Mr Maharaj:] I am asking to have an adjournment to retain a lawyer. [The Judge:] Application refused. [Mr Maharaj:] I am not guilty. I have not imputed any bias or anything against your Lordship. [The Judge:] Mr Maharaj, do you have anything to say on the question of sentence? [Mr Maharaj:] I want to consult Dr Ramsahoye to whom I have spoken about this matter and as a result of whose advice I appealed in the other matters. [The Judge:] 7 days simple imprisonment.

[150] The sealed order, the form of which was presumably settled by the Judge, recited that the contempt was the statement by Mr Maharaj that the Judge had been guilty of "unjudicial conduct". In his subsequent written reasons the Judge said that Mr Maharaj had made a "vicious attack on the integrity of the Court". It is clear both from this and the question asked of Mr Maharaj that the Judge considered that the "unjudicial conduct" assertion was an attack on his integrity.

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[236] See *Maharaj v Attorney-General for Trinidad and Tobago* [1977] 1 All ER 411 (PC) [*Maharaj (No 1)*].

[151] In allowing Mr Maharaj's conviction appeal, the Privy Council in *Maharaj (No 1)* concluded that the contempt conviction had been premised on an at least implicit finding that Mr Maharaj had impugned the Judge's integrity, and that the Judge had not made it clear to Mr Maharaj that this was what he was accused of. The judgment went on:[237]

> Had the judge given these particulars to the appellant, as he should have done, the appellant would no doubt have explained that the unjudicial conduct of which he complained had nothing to do with the judge's integrity but his failure to give the appellant's clients a chance of being heard before deciding against them.

[152] It is true that the Judge did not make it crystal clear to Mr Maharaj that the charge of contempt he faced was based on the Judge's assumption that he had challenged the integrity of the Court. That said, however, the question the Judge had earlier asked Mr Maharaj made it reasonably clear that he considered his integrity had been challenged. Mr Maharaj's denial of having imputed "bias or anything" suggests that he understood that the charge of contempt related back to the question which had preceded it. Given this and the very abrupt course that events actually took, it is not very plausible to assume that the outcome would have been very different if the Judge had been more explicit when he put the charge to Mr Maharaj, perhaps along the lines of:

> Mr Maharaj, you are formally charged with contempt of court *in that you have impugned my integrity* and I now call upon you to answer the charge.

And had the Judge put the charge in those terms but then gone on to imprison Mr Maharaj, the latter would have been the victim of an injustice, which, in practical terms, would have been no less gross than what he actually suffered.

[153] In *Maharaj (No 2)* the majority drew a distinction between correctable errors of fact, law and even jurisdiction for which public law compensation could not be sought and breaches of "fundamental rules of natural justice" for which a claim could be made against the state.[238] Lord Hailsham, in his dissenting judgment, predicted that this distinction would almost certainly give rise to what he described

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[237] At 416.
[238] At 399.

as "a new, and probably unattractive branch of jurisprudence",[239] a comment which we see as justified by the facts of *Maharaj*. Whether the Judge's failure to be precise was in itself fatal to the process,[240] and, if so, whether it was a breach of fundamental rules of natural justice (rather than correctable error), involved issues of degree upon which reasonable minds might, and indeed did, differ.[241] There is no obvious rational basis for determining how a particular error should be classified.

[154] As well – and as Lord Hailsham also pointed out – from the view point of the person who has been imprisoned as a result of judicial error, the classification of that error will be of limited practical moment. On the approach of the majority, Mr Maharaj's entitlement to compensation turned not on the reality that he had been wrongly imprisoned but rather on a process issue. Of course, in New Zealand, cases of wrongful conviction and imprisonment can be addressed substantively under the ex gratia scheme.

[155] The second of the relevant considerations referred to in [147] is also open to challenge.

[156] In order to understand this challenge, a little more narrative and some dates are necessary. Mr Maharaj was sentenced on 17 April 1975. On the same day, he issued the proceedings which were eventually determined in *Maharaj (No 2)* and he was released on bail. These proceedings were dismissed on 23 July 1975 by Scott J. This was primarily on the ground that they involved a collateral attack on the judgment of a High Court judge but Scott J also concluded that the formulation of the charge of contempt against Mr Maharaj had been sufficiently precise. So Mr Maharaj's bail was revoked and he was required to serve the balance of the sentence. Mr Maharaj then appealed to the Court of Appeal but before this appeal

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239 At 406.

240 There were, after all, many grounds upon which the conviction appeal could have been allowed, most obviously that the Judge had been plainly wrong in concluding that Mr Maharaj was guilty of contempt.

241 The first instance Judge, Scott J, who heard the constitutional relief claim concluded that Mr Maharaj had been adequately put on notice of the charge against him. By the time the appeal against that judgment was heard, the Privy Council judgment allowing the conviction appeal (*Maharaj (No 1)*) had been delivered. So the Court of Appeal of Trinidad and Tobago's starting point was that inadequate notice had been given but even from this starting point, a majority concluded that the inadequacy was not a breach of Mr Maharaj's rights. The relevant chronology is set out below from [156] and detailed in *Maharaj (No 2)* at 391–392.

was heard, he had successfully challenged his conviction and sentence in the Privy Council: *Maharaj (No 1)*. This was pursuant to special leave to appeal which he obtained on 18 February 1976. The appeal was heard 26 and 27 July 1976 and judgment was delivered on 11 October 1976. The next step in the process was that the Court of Appeal of Trinidad and Tobago heard and determined Mr Maharaj's appeal against the judgment of Scott J in April 1977. That Court accepted that there was jurisdiction to grant relief in relation to judicial contravention of constitutional rights but, by a majority, held that the failure to formulate the charge precisely was not a breach of Mr Maharaj's constitutional rights. The appeal against that judgment, *Maharaj (No 2)*, was heard by the Privy Council in December 1977 and judgment was delivered on 27 February 1978.

[157] Against this background the unavailability of a direct appeal to the Court of Appeal of Trinidad and Tobago from the contempt conviction and sentence was of doubtful relevance. An appeal to the Privy Council would presumably have been more expensive than an appeal to the Court of Appeal but, on the narrative of events we have given, would be likely to be heard and determined more quickly. There is nothing in the material to suggest that Mr Maharaj was unable to afford an appeal. In 1976 and 1977, he prosecuted two appeals to the Privy Council at both of which he was represented by, amongst others, a senior London silk. As it turned out, he obtained bail the day he was sentenced and there was enough time between 17 April 1975 (when he was sentenced, briefly imprisoned and then released on bail) and 23 July 1975 (when his claim for constitutional relief was denied) to have obtained leave to appeal to the Privy Council. Had he actually obtained leave during this period, his bail would almost certainly have continued until the determination of the appeal. In any event, there is nothing in the material to suggest that there was any legal impediment to him obtaining bail pending his appeal to the Court of Appeal from the judgment of Scott J.

[158] Mr Maharaj was well deserving of compensation but, at least in an ideal world, such compensation should have been based on, and addressed, the substance of the injustice which he suffered – something which, as we have pointed out, is possible under the New Zealand ex gratia compensation scheme. In the presumed absence of such a scheme in Trinidad and Tobago, the majority judgment in

Maharaj (No 2) focused on process rather than substance and rested on what we see as impractical and illogical distinctions between (a) fundamental and other process errors and – at least as subsequently interpreted – (b) appeals to the Privy Council and appeals to other courts.

[159] The Privy Council subsequently limited the effect of *Maharaj (No 2*) by refusing to countenance constitutional redress claims involving collateral attack on decisions which are susceptible to a local appeal.[242] While we do not regard the distinction between appeals to the Privy Council and other appeals as logical, we nonetheless consider it unsurprising that the Privy Council has sought to confine the scope of the majority judgment in *Maharaj (No 2)*. And given the extension of appeal rights in the Caribbean, this refusal means that *Maharaj (No 2)* is now practically irrelevant, a point made clear in *Independent Publishing*.[243] There the Board noted:

> [93] Now that rights of appeal exist, ... their Lordships see little reason to maintain the original distinctions made in *Maharaj (No 2)* ... between fundamental breaches of natural justice, mere procedural irregularities and errors of law – distinctions which in any event were never very satisfactory for the reasons given by Lord Hailsham.

The considerations for and against state liability for judicial breaches of the Bill of Rights Act

Preliminary observation

[160] Given our conclusion that the present case is not controlled by what was said in *Baigent* and the other judgments to which we have referred, we are required to review the considerations for and against state liability for judicial breaches of the Bill of Rights Act. In doing so, we will examine and determine whether the considerations that persuaded the majority in *Baigent* that there was a direct cause of

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242 See *Hinds v Attorney-General of Barbados* [2001] UKPC 56, [2002] 1 AC 854; *Forbes v Attorney-General of Trinidad and Tobago* [2002] UKPC 21; and *Independent Publishing Co Ltd v Attorney-General of Trinidad and Tobago* [2004] UKPC 26, [2005] 1 AC 190.

243 *Independent Publishing Co Ltd v Attorney-General of Trinidad and Tobago* [2004] UKPC 26, [2005] 1 AC 190. Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, Wellington, 2005) suggest that the Privy Council, in this and other cases, has effectively overruled *Maharaj (No 2)* as general authority in favour of constitutional redress for time spent in prison following an unfair trial process. See [27.6.5] and [27.12.19].

action for breach of rights by officers of the executive branch also apply to breaches of rights by judges acting in that capacity. This requires us to consider whether, and contrary to the view expressed by the Privy Council in *Maharaj (No 2)*,[244] the particular characteristics of the judicial function and the importance of maintaining judicial independence from extraneous influences on decision-making provide a basis for distinguishing *Baigent* and holding that in that context there is no public law cause of action against the Crown.[245]

Judicial immunity at common law

[161] It is convenient first to examine the present law as to judicial immunity and the reasons that underlie it. At common law the judges of superior courts have always had immunity from suit. In *Nakhla v McCarthy*,[246] the Court of Appeal held that the immunity was absolute in respect of actions taken in the discharge of judicial responsibilities, involving execution of judicial functions, as opposed to individual acts not done in the course of office. Such actions were outside the judges' jurisdiction and not protected by immunity within which judges must act. In 1999, the Court of Appeal confirmed the wide scope of common law judicial immunity in *Gazley v Lord Cooke of Thorndon*.[247]

[162] The precise limits of jurisdiction are not of great significance in the case of judges of the three superior courts who have authority to determine the limits of their respective jurisdictions. This authority presents what Keith J has described as an "almost impossible obstacle" to bringing proceedings against a judge.[248]

> Members of such a Court are protected as long as they are acting in the bona fide exercise of their office and in the belief that they have jurisdiction.

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244 At 399.

245 *Maharaj (No 2)* decided that compensation was an available remedy for breach of constitutionally protected rights to natural justice resulting in a loss of liberty. Subsequent Privy Council decisions (see fnn 242 and 243 above) confine that proposition by holding that the fairness of the whole legal system, including appeal rights, must be considered before deciding if rights are breached.

246 *Nakhla v McCarthy* [1978] 1 NZLR 291 (CA).

247 *Gazley v Lord Cooke of Thorndon* [1999] 2 NZLR 668 (CA).

248 Ibid, at 685.

[163] When, in 1994, in *Harvey v Derrick*,[249] the Court of Appeal recognised that the scope of the statutory immunity of District Court judges turned on whether the judge had acted in excess of jurisdiction or without jurisdiction, the Court considered what that entailed. Richardson J took a restrictive approach to the scope of a judge's jurisdiction:[250]

> ... the nature and degree of the wrongful conduct may take the acts of the Judge outside jurisdiction. The proper exercise of judicial responsibility requires that the Judge act with integrity and competence. A cushion of immunity provides appropriate protection against error. Absolute immunity would undermine judicial responsibility and give no weight at all to the public policy goals of tort and public law liability. As the word "excess" indicates it is a matter of degree. In extreme circumstances the Judge's conduct may so egregiously overstep the mark as to take the resulting decision beyond any colour of authority. While purporting to act in a judicial capacity a Judge who acts in bad faith or is grossly careless or indifferent to the performance of responsibilities can properly be characterised as acting without jurisdiction or in excess of jurisdiction.

[164] Cooke P agreed.[251] Their approach reflected the view that the legislative purpose was to permit cases alleging seriously neglectful conduct, which caused harm to citizens, to be tried and redress to be available if conduct distorting judgment was proved. The protection for the judges was their right to be indemnified.

[165] The Court of Appeal's decision meant that the position of District Court judges differed notably from that of the judges of courts above the District Court in the hierarchy. This was because, unlike the judges of the higher courts, they were not given authority to determine their jurisdiction. This distinction no longer applies by reason of amendments to the District Courts Act 1947[252] and it is difficult to discern any principled reason supporting it. Given the nature of their role and functions the policy reasons supporting the immunity apply equally to the judges of the District Court as they do to those of the higher courts.

[166] We will discuss these policy considerations in some detail later in these reasons but it is appropriate to summarise them briefly at this point. Allowing claims

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249 *Harvey v Derrick* [1995] 1 NZLR 314 (CA).
250 At 326.
251 At 321.
252 Discussed below at [174].

against judges would provide an opportunity for disappointed litigants to harass those who had decided cases against them. It would also provide an opportunity for such litigants to put in issue the correctness of, and thus collaterally attack, earlier judgments. Given that around half of all litigants are likely to be dissatisfied (and sometimes irrationally) with decisions made by judges, there would be many who would take up such opportunities. In this context, allowing claims to be made against judges would:

(a) have the tendency to distract judges from their duty to deal with cases dispassionately;

(b) result in judges spending time responding to suits against them, causing much wastage of judicial time;

(c) discourage judicial recruitment; and

(d) by permitting collateral attack, undermine the finality of judgments.

The principles of judicial immunity are the result of a balancing exercise. On the one hand there is the problem of a disappointed litigant with a genuine grievance but no remedy. On the other hand there are the undesirable consequences of permitting claims against judges. The response of the courts in cases such as *Nakhla* and *Gazley* has been to allow the latter consideration to trump the former.

[167] The appropriateness of the absolute nature of this response, however, has been challenged.

Should judicial immunity should be qualified?

[168] There is academic support for the view that absolute immunity is not necessary for judicial independence[253] and that a litigant who does not find a

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[253] Bruce Feldthusen "Judicial Immunity: In Search of an Appropriate Limiting Formula" (1980) 29 UNBLJ 73; Abimbola Olowofoyeku *Suing Judges: A Study of Judicial Immunity* (Clarendon Press, Oxford, 1993) at 194–195 and 200–201; BV Harris "Remedies and Accountability for Unlawful Judicial Action in New Zealand: Could the Law be Tidier?" [2008] NZ Law Rev 483.

complete remedy for unlawful actions by any judge in a successful appeal or judicial review proceeding should, at least in extreme cases, be able to seek a compensatory remedy. Professor Harris has suggested that adequate protection of judicial independence could be achieved by a partial immunity which did not extend to wrongful acts involving proved malice, bad faith, gross negligence or recklessness, arguing that the greater the degree of fault of the judge, the more deserving the victim is of a remedy.[254] Judges would on this basis be immune for merely negligent actions. If this approach to immunity were coupled with a full indemnity from the Crown for judges for the amount of any judgment and costs incurred, it would closely reflect the position District Court judges were in at the time *Harvey v Derrick* was decided.

[169] There are, however, as is generally acknowledged, practical problems with such an approach.[255] In particular, there are difficulties in defining the threshold for partial liability in precise terms. Breach of a standard based on bad faith, gross negligence or recklessness is easy to allege and accordingly susceptible to fictitious allegations. As well, as the Supreme Court of the United States has observed:[256]

> Few persons sufficiently irritated to institute an action against a judge for his judicial acts would hesitate to ascribe any character to the acts which would be essential to the maintenance of the action.

[170] Fictitious allegations against judges of malice and similar conduct are also difficult to refute without having to go to trial. It would not be easy under a regime of partial immunity to protect the judiciary by interlocutory processes from harassment through unjustified actions by determined disgruntled litigants.

[171] The other view of the degree of immunity necessary to give effect to protection for the independence of judges appears in the Universal Declaration on the Independence of Justice.[257] This provides:

> 2.02 Judges individually shall be free, and it shall be their duty, to decide matters before them impartially, in accordance with their assessment

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254 Harris at 515.

255 See Olowofoyeku at 205 and Harris at 514–516.

256 In *Bradley v Fisher* 80 US 335 (1871) at 348 per Field J.

257 Universal Declaration on the Independence of Justice (the Montreal Declaration), unanimously adopted at the First World Conference on the Independence of Justice, Montreal, 10 June 1983.

> of the facts and their understanding of the law without any restrictions, influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.
>
> ...
>
> 2.24 Judges shall enjoy immunity from suit, or harassment, for acts and omissions in their official capacity.

[172] The first passage quoted from the Montreal Declaration states unequivocally the necessary duties of judges and characteristics of the environment in which they work that are necessary to secure independence in a justice system. The second passage addresses the scope of the immunity that the Declaration sees as necessary. In extending to all legal proceedings and, it seems, to harassment generally, it is controversial.[258] The need for an absolute rather than partial judicial immunity, however, reflects the traditional view of the courts that general exposure of judges to the threat of lawsuits for judicial errors will create pressure for defensive judicial behaviour and in the long run will be more harmful to independent adjudication than accepting that there will be very rare cases where no adequate remedy is available for judicial wrongdoing.

[173] In New Zealand, the Law Commission reported on judicial immunity issues in response to *Harvey v Derrick* and *Baigent* in 1997.[259] Its view was that the public interest in avoiding collateral attacks on the work of the higher courts in subsequent proceedings justified the continuation of their common law immunity.[260] The decision-making process of the District Court, its increased jurisdiction and the quality of representation and argument in that Court, persuaded the Commission to recommend that its judges should have the same absolute civil immunity as the judges of the higher courts in the system.[261]

[174] In accordance with the Law Commission's recommendation, legislation providing for the immunity of judges of the District Court and other equivalent courts was amended so that the immunity of those judges now coincides with that of

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258 Olowofoyeku at 194 suggests that it preserves not an independent but an imperial judiciary.

259 Law Commission *Crown Liability and Judicial Immunity: A Response to* Baigent's c*ase and* Harvey v Derrick (NZLC R37, 1997).

260 At [161].

261 At [162]–[164].

the judges of the High Court.[262] Parliament did not adopt the further recommendation that legislation explicitly provide that a remedy for breach of rights not be available in respect of judicial conduct.[263] The failure to implement this recommendation indicates no more than that Parliament has left it to the courts to decide whether the remedy is available for those breaches. On the other hand, the legislative extension of the personal immunity of judges of the New Zealand courts, putting them all on the same footing with absolute rather than partial immunity, must be taken for the present to have resolved issues concerning the appropriate scope of personal immunity enjoyed by New Zealand judges.

Vicarious liability of the state for the actions of judges

[175] Because the judges of the superior courts have always been immune from suit, there could be no question of the Crown (or the state) being vicariously liable for their actions. Judges of inferior courts, however, did not, until recently, enjoy an immunity as broad as that of superior court judges and, as is apparent from our earlier discussion, there are many cases in which such judges have been exposed to suit. As far as we are aware, however, there is no case in which it has been successfully asserted that the Crown (or state) was vicariously liable for the actions of such judges. Indeed, we think it clear that the Crown's vicarious liability in tort does not extend to acts of persons discharging functions of a judicial nature.[264] Unlike those in the executive branch, the judiciary are not employees or agents of the Crown. The independence of the judiciary from the executive branch, within a constitution that reflects the separation of powers, has long been seen as inconsistent with judges being employees or agents of the Crown who act on its behalf.[265] Nor has the Crown otherwise been seen as having the type of relationship with the judges that would cause vicarious liability to be involved.[266]

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262 District Courts Act 1947, s 119, as amended by s 7 of the District Courts Amendment Act 2004. The same provision was made for judges of the Employment Court and Maori Land Court and Associate Judges of the High Court.

263 Law Commission *Crown Liability and Judicial Immunity* at [154] and [158].

264 Crown Proceedings Act 1950, s 6(5).

265 MPA Hankey "The Constitutional Position of the Judges" (1932) 48 LQR 25.

266 Harris at 497.

Are the principles supporting judicial immunity applicable to claims against the state for judicial breaches of the Bill of Rights Act?

[176] The immunity of suit enjoyed by judges is not in itself fatal to the claims advanced by Mr Chapman. That this is so is illustrated by *Baigent*. There the Court of Appeal recognised a right of action in public law against the Crown for breaches of protected rights by the police. The Court held that, the liability of the Crown being direct, statutory immunities applying to the individuals involved were not an answer to the claim.

[177] We also accept that the consideration that Parliament decided to extend personal judicial immunity to judges of the District Court does not necessarily support a wider governmental immunity from suit in respect of wrongful judicial acts so as to preclude claims for compensation against the Crown under a public law cause of action such as that brought by Mr Chapman.

[178] Fundamentally in issue is whether the Bill of Rights Act, and the courts' duty to fashion remedies identified in *Baigent*, enable such a direct action to be brought for breaches of protected rights by judges. It is in the context of this issue that the policies which have led the common law to recognise, and Parliament to confirm, personal judicial immunity in New Zealand provide additional considerations to those addressed in *Baigent* which must be evaluated.

[179] In its report *Crown Liability and Judicial Immunity*, the Law Commission referred to the policy justifications for personal judicial immunity:

> 138 The reasons for the protection accorded by judicial immunity include:
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> - promoting the fearless pursuit of the truth;
> - ensuring that the judicial function is fairly and efficiently exercised without improper interference;
> - safeguarding a fair hearing in accordance with natural justice, which should reduce the prospect of error;
> - promoting judicial independence;
> - achieving finality in the litigation in accordance with the essential principle of res judicata, except insofar as the law

> provides for appeal or permits review (collateral challenge should not be able to avoid that principle or widen the opportunities for appeal and review); and
>
> - there exist adequate rights of appeal against, and rehearing and review of, the decision itself (as opposed to proceedings against the person taking the decision), with related powers to delay the effect of any judgment or penalty while the processes are pending.
>
> 139 Different weight can be and is given to these reasons. The more general rationale for immunity is that, in exposing judges of the superior courts to liability to suit, the costs of prevention would be greater than the value of the cure.

[180] Both the specific and general reasons given are relevant to whether a remedy of public law damages is available under the Bill of Rights Act for breaches of rights by judges acting in that capacity. In that context the desirability of achieving finality, promoting judicial independence and the availability of existing remedies for breach, including through the appellate process, are of principal importance and we confine our discussion to them.

[181] The threat to achieving finality in the outcome of litigation that arises from permitting collateral litigation against judges personally was referred to by Fisher J in his dissenting judgment in *Harvey v Derrick*:[267]

> A powerful case should be demanded before allowing aggrieved litigants to relitigate their cases by suing their presiding Judges. Compared with other public officials, Judges are peculiarly exposed to the emotional, to the aggrieved, and to the litigious. A Judge's daily diet is to make choices which are momentous and emotive for the parties concerned. The results will be contrary to the wishes and expectations of exactly half the participants. If only a minuscule proportion brought actions against Judges, the effect upon legal and judicial life would be significant. The original case would usually need to be traversed again before it would be possible to assess the propriety of the Judge's conduct and its consequences. The simplicity of the present case is atypical. Malicious prosecution cases illustrate the time and complexity which is usually entailed. For those disappointed with the original result it would be a heaven-sent opportunity to re-try the case before another tribunal. Nor would the probability that in the end most claims would prove to be unmeritorious be much consolation to judicial defendants caught up in the process. I am conscious of the dangers of exaggerating the floodgates argument. There have been few cases in New Zealand so far. However, there can be fashions in litigation. The possibility that unjustified suits could increase should not be entirely dismissed from consideration.

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[267] At 337.

[182] The law discourages relitigation by aggrieved parties of issues determined by the courts, other than by appeal. The policy of the law in that respect is in part concerned to protect the public who were involved, including other parties and witnesses, from the stress and expense of unwelcome continuing involvement in court process concerning the same issues. If civil actions against the government could be maintained on the ground that the judge breached the plaintiff's rights, collateral challenges would plainly be brought with the same consequences identified by Fisher J. Those affected, who were directly involved in the earlier litigation, would justifiably feel they were not being properly protected from harassment by the justice system. Along with the wider public observing such collateral proceedings, they might well lose confidence in the effective functioning of the rule of law in our society. This is perhaps the strongest reason for the law to provide personal immunity for judges and, if it is to be effective in achieving finality, an institutional immunity is also necessary, protecting the government or anyone else from the bringing of collateral action for breach of rights in the course of the judicial process involved, so that public confidence in the fair and effective administration of justice can be retained.

[183] We do not accept that the reasons for this Court's decision in *Lai v Chamberlains*[268] dispensing with barristerial immunity answer these legal policy concerns. As a majority of this Court then observed, all cases of immunity require a public policy justification that is sufficient to outweigh the public policy that citizens should be able to seek vindication for wrongs.[269] No such policy justification was identified in *Lai v Chamberlains* as the role of barristers in the justice system did not justify the degree of protection that continuing the immunity to that professional group would give.[270] That case did not require examination of the policy considerations pertinent to the present case. Achieving finality of judicial process is of particular importance in the public interest in enabling the judiciary to discharge its constitutional duty to maintain the fair and effective administration of justice.

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268 *Lai v Chamberlains* [2006] NZSC 70, [2007] 2 NZLR 7.
269 At [1] per Elias CJ, Gault and Keith JJ.
270 At [157] per Tipping J.

[184] The second reason listed by the Law Commission as justifying personal judicial immunity, that is of particular importance in the present context, is the need to promote and, we would add, protect judicial independence. The independence of the judiciary from the other branches of government is its main distinguishing characteristic as a branch of government. In discharging its obligations under s 3(a) of the Bill of Rights Act, the judiciary must always act and be seen to act independently of extraneous influences, in particular those of the executive branch. The independence of the judiciary is essential to the proper performance of its duties and an integral part of its constitutional function.

[185] If the executive government became liable in damages for judicial breaches of rights, it is likely that members of the public engaged in or observing litigation would become concerned that the prospect of future litigation to this end might distract the judge from acting in an entirely independent way. They would see the right of action as exposing a judge to pressure, by indirect means, to act in a way that minimises the risk of claims based on government liability. There is a risk that public confidence in the effective administration of the law will be eroded.

[186] If such claims are permitted, judges will be pressed by the defendant government to be witnesses in proceedings brought as a result of their actions. The Law Commission rightly recognised that it was undesirable for judges to have to give evidence concerning their conduct.[271] We agree with the Solicitor-General that such a prospect would also in itself give rise to a perception that judges may come under pressure in their decision-making if they believe they may be questioned concerning it at a later stage. It could well also impact on the willingness of qualified lawyers to accept appointment. In this area public perceptions of the independence of the judiciary are important. As Woodhouse J put this point in *Nakhla*:[272]

> It lies in the right of men and women to feel that when discharging his judicial responsibilities a judge will have no more reason to be affected by fear than he will allow himself to be subjected to influences of favour.

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[271] At [155].
[272] At 294.

[187] There are aspects of the Chief Justice's dissenting judgment which, to us, illustrate the reality that allowing this claim to proceed may well be the thin edge of what in the end would be a rather large wedge. For instance, if the Court were to accept, as she does, that claims of this kind may be brought, the *Maharaj (No 2)* limits, resting as they do on what we see as an unsustainable distinction, would soon be abandoned. Such abandonment is contemplated by her.[273] As well, if public law compensation for judicial breach is available, it would be a small step to conclude that the principles of judicial immunity in relation to private law claims against judges should be reconsidered, as she also suggests.[274] A very similar concern was expressed by Lord Hailsham in *Maharaj (No 2)*.[275]

[188] It would be unwise to assume that claims in relation to judicial conduct would be rare. This was certainly the view of Fisher J in *Harvey v Derrick*.[276] Even now it is not unknown for disaffected litigants to issue proceedings against judges, despite such claims being untenable. Repeated and hopeless recall applications are a regular feature of litigation. There is also the occasional personal harassment of judges. All of this suggests that there will be no shortage of potential plaintiffs if litigation in relation to judicial conduct is held to be permissible.

[189] What would be the impact of this on judges? We do not know for sure but judges are human and some are more risk averse than others. It would be speculative to assume that there will be no impact on behaviour. Judicial immunity principles rest on premises which include the risk to judicial independence of allowing personal claims. Judges facing such claims would, in the ordinary event, be entitled to be indemnified by the state. This was the position when claims could be advanced against District Court judges who were therefore not at financial risk if sued. But the fact that such claims could be brought against District Court judges was nonetheless inimical to judicial independence as the Law Commission and later the legislature recognised when judicial immunity principles were extended to District Court judges.

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273 At [72].
274 At [13].
275 At 409.
276 See above at [181].

[190] Allowing such claims to proceed would be detrimental in other respects to the effective exercise of judicial function. As the defendant to such a claim, the executive government would be required to defend actions brought in relation to judicial conduct. This will involve judges necessarily co-operating with the state in the defence of such actions. To an outside observer, the executive government will appear to be defending the judge and the judge will be helping the government. Making the Attorney-General, a member of the executive government, financially responsible for judicial actions would imply that judges were acting on behalf of the executive government when exercising judicial functions. The perceptions associated with all of this would be damaging to judicial independence. Constitutionally the government may not interfere with judicial process without breaching conventions. If, however, the executive becomes liable to compensate for judges' constitutionally wrongful acts, that is likely to bring political pressures, direct and indirect, for accountability of the judges to the executive and what the Law Commission called "corresponding Crown powers of control".[277] Such a consequence would be highly detrimental to independence of the judiciary and its effective functioning.

[191] In *McKean v Attorney-General*[278] Fogarty J identified this factor as a particularly important reason why it would be unsatisfactory to adopt the broader ratio for liability in *Baigent*. He also saw this as the answer to Lord Diplock's rejection in *Maharaj (No 2)* of the proposition that recognition of state liability to compensate for judicial wrongful acts would undermine the public policy considerations supporting judicial immunity.[279] We agree with Fogarty J on both these points.[280]

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277 At [47].

278 *McKean v Attorney-General* [2007] 3 NZLR 819 (HC) at [34].

279 See *Maharaj v Attorney-General of Trinidad and Tobago (No 2)* [1979] AC 385 (PC) at 399, where he considered fears that allowing compensation in respect of judicial conduct would subvert the long established rule of public policy that a judge cannot be made personally liable in court proceedings for anything done by him in the exercise or purported exercise of his judicial functions were "exaggerated".

280 The Court of Appeal dismissed an appeal against the High Court judgment in *McKean*, but without referring to this point (*McKean v Attorney-General* [2009] NZCA 553).

[192] All in all, allowing compensation claims for judicial breach of the Bill of Rights Act would be as inimical to judicial independence as permitting claims to be advanced against judges personally.

[193] The final reason supporting judicial immunity that is of relevance to a governmental immunity from liability for acts of judges is the existence within the justice system of adequate rights of appeal, rehearing and review. The importance of this factor is that it goes to whether there are already effective remedies available within the criminal and civil justice processes. In the written submissions, the Crown argued that the appellate system provided for effective vindication of protected rights and also deterred breaches by judges at trial. Furthermore, as the Law Commission pointed out:[281]

> In the case of judges and others exercising decision-making power, the continued integrity of the decision-making process and concern for personal reputation are critical spurs to the exercise of best judgment. So, too, are the careful processes of adjudication. There is, further, the prospect of being overturned on appeal or review.

[194] The Crown also referred to other remedies for breach of rights identified in the Law Commission's report:[282]

> Judicial immunity must be seen in context. There is a range of remedies available to those aggrieved, which reinforces the responsibility and accountability of judges. They include:
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> - rejection of evidence (eg, evidence obtained under an unlawful warrant) or stay of proceedings (eg, for delay);
> - appeal against, review of, or rehearing of, decisions;
> - civil proceedings in respect of actions of judicial officers not taken in the exercise of their judicial functions;
> - criminal prosecution in respect of the corrupt exercise of judicial functions; and
> - removal processes for serious judicial misbehaviour or incapacity.

[195] Since the Law Commission reported there have been two further developments in remedial protection. The most significant systemically is the

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281 At [62].
282 At [140].

establishment of the Supreme Court of New Zealand and a right of appeal with leave to that Court on the grounds that it is necessary in the interests of justice to hear and determine a proposed appeal.[283] This provides accessibility to appellate review of the Court of Appeal that was not available at the time of the respondent's first appeal. There is accordingly now a much greater likelihood that judicial error in the Court of Appeal will be more speedily corrected on appeal. Secondly, the enactment of the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004 has created a regime for investigating complaints against judges and addressing them according to the Commissioner's view of their seriousness.

[196] In response, Mr Harrison emphasises that the decided cases make plain that, at times, including he says this case, remedies are only belatedly provided and do not always fully address the harm suffered.

[197] The way this appeal has been argued before us precludes us from considering the adequacy of relief obtained by the respondent. But it is fair to point out that the decision of the Court of Appeal in *R v Smith*[284] took corrective steps. As a result of them, the respondent obtained a remedy through the rehearing of his appeal and early release pending that rehearing. Eventually, for extraneous reasons, the charges were dropped.

[198] In *Baigent*, Cooke P and Hardie Boys J emphasised that the obligation that s 3(a) of the Bill of Rights Act imposed on the judiciary was to give an effective remedy to those whose rights were infringed.[285] That was not so in the case of Mrs Baigent where there was no question of exclusion of evidence and a declaration would be "toothless".[286] But in the present case, there are extensive remedies in the judicial process, including, at the present time, remedies by way of appellate review of the judgments of the Court of Appeal. This is not to say that such remedies will invariably be effective. There can be situations where wrongly convicted persons may have inadequate remedies because of high public policy considerations.[287] But,

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283 Supreme Court 2003, s 13.
284 *R v Smith* [2003] 3 NZLR 617 (CA).
285 See [120] and [121] above.
286 At 676.
287 As McMahon J pointed out in *Kemmy v Ireland* [2009] IEHC 178.

in deciding whether the *Baigent* cause of action should be extended to judicial breaches of rights, the high degree of general effectiveness of remedies in the justice system is highly relevant. Also relevant is the possibility that the effectiveness of existing remedies in the appellate process may be reduced if the rules of trial fairness must also be used to determine entitlements to compensation. There could be changes in judicial practice that disadvantage criminal appellants.[288]

[199] In considering whether the Bill of Rights Act contemplates government liability for judicial breaches we must also refer to art 14(6) of the International Covenant:

> When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

New Zealand's reservation to this provision reads:

> The Government of New Zealand reserves the right not to apply article 14(6) to the extent that it is not satisfied by the existing system for ex gratia payments to persons who suffer as a result of a miscarriage of justice.

[200] The government has set up a compensation system to deal with exceptional cases. Under Cabinet guidelines, compensation is paid in certain cases where a person has served all or part of a sentence of imprisonment before having the conviction quashed on appeal, without order for retrial, or having received a pardon.[289] Innocence must be demonstrated on the balance of probabilities. Decisions are made on the advice of a Queen's Counsel instructed by the Minister of Justice for the purpose.

[201] As the Law Commission has pointed out, it is fundamental to the rule of law that determinations of rights are made by the judiciary, not the executive.[290] The ex gratia scheme of compensation by government decision for those wrongfully

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288 As pointed out by William Young J in *Brown v Attorney-General* [2005] 2 NZLR 405 (CA) at [142](b).

289 Under s 407 of the Crimes Act 1961.

290 At [184].

convicted accordingly does not fill gaps left in the criminal justice system by the limits of available remedies. That area is, however, addressed by the government's reservation to art 14(6). While it may be said that the provision is concerned with compensation for wrongful convictions rather than with effective remedies for breaches of rights,[291] there is clearly significant overlap between the two concepts. Importantly, art 14(6) also covers the position of those whose convictions have been reversed. The reservation confines the scope of the international obligation and limits the extent to which that provision in the Covenant can clarify the scope of the public law action under the Bill of Rights Act.

[202] Furthermore, as Professor Harris has also observed, when it is available:[292]

> The ex gratia payment may also facilitate judicial accountability. Such a payment will be likely to weigh heavily with the responsible judge even though the payment is directly by the Crown. The payment is likely to come to the attention of the public through the media exposure that will be associated with the making of the ex gratia payment.

Conclusion

[203] In *Baigent*, the majority held that it was implicit from the Bill of Rights Act's purpose of affirmation and promotion of rights and freedoms that New Zealand courts would develop the remedies for breach of rights to the extent necessary. The courts were bound to give effective remedies for breaches and, in the context of *Baigent*, that required compensation.

[204] Judicial immunity is now conferred by a combination of the common law and statute law. For the reasons we have outlined, we hold that the public policy reasons which support personal judicial immunity also justify confining the scope of Crown liability for governmental breaches of the Bill of Rights Act to actions of the executive branch. Such liability should not be extended to cover breaches resulting from the actions of the judicial branch. This does not, of course, mean that judicial immunity itself is being extended. Rather it is a recognition that the public law cause of action against the Crown, held in *Baigent* to be implicit in the Bill of

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[291] As the Chief Justice points out at [69].
[292] Harris at 511.

Rights Act, would not appropriately be extended to cover the breaches of the judicial branch. As discussed, the desirability of finality in litigation and the importance of judicial independence and public confidence in that independence are here of particular importance. Relevant also is the extensive protection against judicial breach afforded by the justice system and in particular the current appellate process.

[205] Together these factors justify in the public interest a different approach from the public law cause of action recognised in *Baigent* in relation to executive government breaches of rights. We would add that it is implicit that when the cause of action applies, as in *Baigent*, and monetary compensation is an available remedy, the Crown is liable. We are not persuaded by the Solicitor-General's argument that there is no concept of the state in New Zealand domestic law. However, having examined the contention that *Baigent* damages should apply to judicial breaches, we are satisfied that step is unnecessary. It would be destructive of the administration of justice in New Zealand and ultimately judicial protection of human rights in our justice system.

[206] But the main reason why we reject the extension of the *Baigent* cause of action is because we consider it is unnecessary under the New Zealand court structure to provide financial remedies for breaches of the Bill of Rights Act by the judicial branch of government. The particular circumstances of Mr Chapman's claim, which of course arose under the former regime, do not persuade us that his case warrants a different approach.

The position of the Registrar

[207] When the respondent first appealed against his conviction to the Court of Appeal, he applied for legal aid. That application was refused by the Registrar of that Court in the exercise of statutory powers. The respondent sought a review and the Registrar's decision was confirmed. As indicated, the appeal was then dismissed without hearing.[293]

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[293] See [98] above.

[208] The respondent's pleading attributes responsibility for the way the appeal was dealt with to the Registrar as well as the Judges involved and also says the Registrar had been made aware of the defects in the ex parte system for dealing with appeals. This raises the question of whether, and if so to what extent, the Registrar, who is a public servant, is protected. The Court of Appeal did not need to address this point and we received only limited argument on it or the position of other officers or employees of the executive branch referred to in the pleadings. To the extent that the Registrar's actions were superseded by decisions of judges, or give effect to what they have decided, there can plainly be no right to Bill of Rights Act compensation. This kind of distinction is difficult to make but it calls for an exercise of judgment commonly undertaken by the courts. In case this aspect of the case requires further consideration, we refer the proceeding back to the High Court.

Disposition

[209] The Court of Appeal held that, as the questions on appeal were predicated on judicial breaches of the Bill of Rights Act, it should answer them solely on that basis.[294] We take the same approach. In the terms of question (a), we hold that the Court does not have jurisdiction to hear and determine the respondent's claim for public law compensation, for alleged breaches by the judiciary of ss 25 and 27 of the Bill of Rights Act, occurring in the course of determining his criminal legal aid application and his appeal against conviction. Question (a) is answered accordingly and in consequence questions (b), (c) and (d) do not require an answer.

[210] The result is that the Crown's appeal is allowed and the matter remitted to the High Court. There will be no order for costs.

GAULT J

[211] Again I am not persuaded of the need to set aside or displace long-established principles of our law by invoking the New Zealand Bill of Rights Act 1990. I have previously set out in my dissenting judgment in *Simpson v Attorney-General*

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[294] *Attorney-General v Chapman* [2009] NZCA 552, [2010] 2 NZLR 317 at [5]–[7].

[*Baigent's case*][295] my views on the status to be accorded the Bill of Rights Act in our legal framework. At the level of this Court, I need not depart from them.

[212] In any event, I do not consider that the judgments of the majority in *Baigent's case* decided that breaches of rights by those acting on behalf of the judicial branch of government can give rise to the direct public law action against the Crown. In considering whether such a cause of action should lie, there must be taken into account what is necessary for the effective exercise of the judicial function, in particular maintenance of judicial independence.

[213] I consider that the independence of the judiciary and its concomitant principle of judicial immunity are fundamental elements of our constitutional structure. They are not to be interpreted away by importing a different context. The immunity with which this case is concerned is, in any event, of a different order of importance from that in *Baigent's case*.

[214] On these matters, and whether the *Baigent* cause of action should apply in respect of breaches of rights by judges, I am content to express agreement with the reasons and decision in the joint judgment of McGrath and William Young JJ.

[215] The attempt to circumvent the immunity by designating the Attorney-General as defendant does not change the true nature of the claim, nor would it (if allowed) make the proceeding any less a claim in respect of acts in the discharge of judicial duties.

ANDERSON J

[216] I agree with the Chief Justice's conclusion that Mr Chapman's claim is within the scope of the direct public law liability of the State, which I prefer to refer to as the Crown. I am generally in agreement with the Chief Justice's reasons but there are some matters I wish specifically to comment upon.

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[295] *Simpson v Attorney-General* [*Baigent's case*] [1994] 3 NZLR 667 (CA).

[217] First, I place considerable emphasis upon the following reservations expressed by the Judicial Committee of the Privy Council in *Maharaj v Attorney-General of Trinidad and Tobago (No 2)*: [296]

> [N]o human right or fundamental freedom … is contravened by a judgment or order that is wrong and liable to be set aside on appeal for an error of fact or substantive law, even where the error has resulted in a person's serving a sentence of imprisonment. The remedy for errors of these kinds is to appeal to a higher court. Where there is no higher court to appeal to then none can say there was error. The fundamental human right is not to a legal system that is infallible but to one that is fair.

[218] Their Lordships indicated that only procedural error, amounting to a failure to observe one of the fundamental rules of natural justice, could constitute a relevant infringement of rights. It is, I think, implicit in their Lordships' reasons that even such an error would not found liability if it were one capable of correction by an appellate court. The Judicial Committee also indicated that an error giving rise to public law liability would be a rare event.[297] I believe that will be and should be the case in New Zealand, with the establishment of the Supreme Court and the greatly improved access to justice that entails. Further, the administration of legal aid at appellate levels has been much improved since the time when Mr Chapman first tried to appeal to the Court of Appeal.

[219] Mr Chapman's claim is based on breaches of fundamental rules of natural justice which were not effectively capable of correction by a higher Court, the Judicial Committee of the Privy Council, because he was incarcerated, without legal learning and unfunded for legal representation.

[220] I am not troubled by concerns about collateral challenges to court decisions or rulings. As the reasons in *Maharaj* show, Crown liability for judicial acts is narrow in scope and will be rare in occurrence. Even though a person may have served a period of imprisonment before impugned judicial decisions or verdicts were corrected on appeal, that will not import Crown liability if such person obtained, or reasonably could have invoked, the benefit of the appeal rights affirmed by s 25(h) of the New Zealand Bill of Rights Act 1990. Once the constrained scope for public

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296 *Maharaj v Attorney-General of Trinidad and Tobago (No 2)* [1979] AC 385 (PC) at 399.
297 Ibid.

law liability, prescribed by the Judicial Committee in *Maharaj*, is understood, the likelihood of collateral challenge is negligible. The courts, in applying the Judicature Amendment Act 1972 and considering the prerogative writs, have contained abusive collateral challenges. In my view there is a greater risk of such abuse in consequence of the abolition of barristerial immunity[298] than by recognising Crown liability in the extraordinary circumstances envisaged by the Judicial Committee in *Maharaj*.

[221] It is open to Mr Chapman to claim that he did not get the benefit of s 25 because, although he eventually had his conviction properly reviewed on appeal, his right to it was unduly delayed. In my view it is unquestionable that, by virtue of s 25(a) and (b), the appeal right must be exercisable without undue delay. That is not to say, however, that in the present case the period of delay ought properly to be measured from the date the Court of Appeal dismissed Mr Chapman's appeal. It may be necessary to identify a later date as the commencement of undue delay.

[222] The claim invokes ss 25 and s 27 of the New Zealand Bill of Rights Act but I very much doubt whether s 27 is directed at breaches of natural justice in respect of criminal process. That is dealt with in s 25(a), it being inconceivable that the right to a fair and public hearing by an independent and impartial court would not imply the necessity for natural justice. However Mr Chapman's claim rolls up the whole appeal process, including the conduct of the Registrar of the Court of Appeal, and it is, no doubt, prudent to call both sections in aid in this case.

[223] I turn now to the issue as to whether recognising Crown liability for judicial acts of the nature and effect complained of by Mr Chapman might, or might seem to, derogate from judicial independence. If there were any such risk I would not countenance Crown liability. The immunity of judges from being sued is one of the most important ways in which judicial independence is protected. A judicial system that is institutionally independent and a judiciary whose members are individually independent are fundamental to the rule of law and the welfare of a nation and its people.

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[298] See *Lai v Chamberlains* [2006] NZSC 70, [2007] 2 NZLR 7.

[224] It is the solemn and ineluctable duty of the judicial and the executive branches of government, often exemplified, to protect judicial independence. The proposition that judicial independence might be or might seem to be compromised, if in certain extraordinary circumstances the Crown might be held liable for judicial acts, rests on assumptions of potential or seeming timidity on the part of judges and constitutional delinquency on the part of the executive. The timidity is apprehended, not because judges could be personally liable, which they cannot be, but because it might be thought that a judge could possibly be influenced in making a decision by a wish not to upset the government or out of anxiety for his or her reputation. Having for more than 40 years seen judges in action and having been a judge for more than 24 years, I have no such apprehension. The best way of maintaining confidence in the judiciary is for it to emphasise the rights affirmed by the Bill of Rights Act. As to possible delinquency on the part of the executive, I take the view that the more the rule of law and the rights affirmed by the Bill of Rights Act are proclaimed, protected and vindicated, the lesser the risk of unconstitutional conduct by any branch of government.

[225] I would dismiss the appeal.

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