THE ALLURE OF "RIGHTS TALK": *BAIGENT'S CASE* IN THE COURT OF APPEAL

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In *Simpson* v *Attorney-General [Baigent's Case]*[1] a majority of the Court of Appeal (Cooke P, Casey J, Hardie Boys J and McKay J; Gault J dissenting) held that a breach of the New Zealand Bill of Rights Act 1990 gives rise to a new civil cause of action in public law which lies directly against the Crown and may attract a remedy in the form of an award of monetary compensation. The decision has already been applied by the Court of Appeal in a companion case decided on the same day.[2]

By abandoning the traditional principle that the civil liability of the Crown is governed by the same law as applies to private citizens, the Court has created a special regime of public civil liability of highly uncertain scope. The decision in *Baigent's Case* has wide-ranging implications, not only for the law of civil remedies but also for the relationship between the judiciary and parliament.

THE BACKGROUND

The case involved a claim for damages arising out of the unlawful execution of a valid search warrant by the police. The plaintiffs alleged that the police had continued, unreasonably and in bad faith, to search Mrs Baigent's house after they realised that her address had been mistakenly specified in the warrant and that the police target (a suspected drug dealer) had no connection with the premises. Mrs Baigent was not at home when the warrant was executed. However the pleadings alleged that Mrs Baigent's son and a neighbour both told the police that they had the wrong address. The son produced his passport as proof of his identity, and telephoned his sister, who was a barrister. The sister told the detective constable that he had the wrong address and that the search was unlawful. It was alleged that the detective replied: "We often get it wrong, but while we are here we will have a look around anyway."

The plaintiffs (the executors of the late Mrs Baigent's estate, and her son) sued the Attorney-General on behalf of the Crown, claiming damages pursuant to a number of causes of action: negligence by the police in procuring the issue of the search warrant; trespass to land and to goods; abuse of process (or misfeasance in a public office); and infringement of the right conferred by s21 of the Bill of Rights Act 1990 to be "secure

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1 [1994] 3 NZLR 667.

2 *Auckland Unemployed Workers' Rights Centre Inc* v *Attorney-General* [1994] 3 NZLR 720.

against unreasonable search or seizure". In the High Court, all the claims were struck out as disclosing no reasonable cause of action. While s6(1)(a) of the Crown Proceedings Act 1950 makes the Crown vicariously liable for torts committed by the police, ss 6(1) and 6(4) allow the Crown to rely on any defence or immunity available to its servant or agent, and the police were held to be protected from liability by special statutory immunities granted to police officers executing search warrants.[3] In any event, s6(5) of the Crown Proceedings Act was held to present a complete bar to any vicarious tort action against the Crown. That subsection provides:

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

THE DECISION

The Court of Appeal was unanimous in holding that while the action for negligence must fail (malice being an essential element of an action for procuring the issue of a search warrant), the remaining orthodox tort actions should be reinstated. The Court held that neither the particular statutory immunities in favour of the police nor s6(5) of the Crown Proceedings Act protects action taken in bad faith,[4] and since the alleged facts supported an arguable case of bad faith the remaining tort actions based on the vicarious liability of the Crown should stand. Since the broad terms of s6(5) are clearly capable of excluding vicarious liability for a "purported" execution of a search warrant even if conducted in bad faith, the decision is noteworthy for this reason alone.

But the real importance of the case lies in the decision of the majority of the Court to reinstate the independent civil claim for infringement of the right conferred by s21 of the Bill of Rights Act 1990. Since the Crown's liability is characterised as a direct liability in public law founded on the

3 The Police Act 1958, s39 protects police officers from liability for acts done "in obedience to" any process issued by any court; and the Crimes Act 1961, s26(3) and 27 confer immunity in respect of action taken while "executing" a warrant.

4 In fact a majority of the Court seem to favour the view that the immunities from personal liability conferred on individual police officers by the Police Act and the Crimes Act (supra n3) do not provide protection against "unreasonable" conduct, even if taken honestly and in good faith. Hardie Boys J (at 694) and Gault J (at 714) clearly take this position, while Casey J (at 688-9) and McKay J (at 716) equally clearly hold that the police are protected as long as they act in the bona fide belief that they are executing the warrant for the purpose for which it was issued. Cooke P does not make his position entirely clear in *Baigent's Case,* but in *Auckland Unemployed Workers' Rights Centre Inc* v *Attorney-General,* supra n2 at 725, he appears to endorse the view of Hardie Boys and Gault JJ, observing that individual police officers would be personally liable in tort "for unreasonableness in the conduct of the search resulting in trespass or false imprisonment", although the Crown would be protected from vicarious liability for their actions by s6(5) of the Crown Proceedings Act if the officers had acted in good faith.
Gault J alone took the extreme position that even the vicarious immunity of the Crown under s6(5) of the Crown Proceedings Act was lost if the police acted "unreasonably" although in good faith: see infra p198.

Bill of Rights itself rather than a vicarious liability in tort for the acts of individual Crown servants or agents,[5] it is unaffected by any statutory immunities from suit enjoyed by individuals, and is untouched by s6(5) of the Crown Proceedings Act. By this means the Crown is strictly liable for any official search branded as "unreasonable" even if conducted entirely honestly and in good faith, and the immunity which s6(5) provides in respect of actions in tort is entirely circumvented.

THE MAJORITY'S REASONING

The majority of the Court placed great weight on the decision of the Privy Council in *Maharaj* v *Attorney-General of Trinidad and Tobabo (No 2)*.[6] Section 6(1) of the Constitution of Trinidad and Tobago provided that any person who alleged infringement of a right guaranteed by the Constitution may "without prejudice to any other action with respect to the same matter which is available . . . apply to the High Court for redress". A majority of the Judicial Committee led by Lord Diplock (Lord Hailsham dissenting) held that this provision created a novel form of "liability in the public law of the state"[7] which attracts a civil remedy in the form of an award of monetary compensation. Since the claim for breach of a constitutional right lay directly against the state in public law and was not a vicarious private law action in tort, it was unaffected by the Crown immunity provision corresponding to s6(5) of our Crown Proceedings Act.

However the New Zealand Bill of Rights Act 1990 lacks two critical features of the document considered in *Maharaj,* and the decision is readily distinguishable. First, the New Zealand Bill of Rights contains no general enforcement or remedial provision empowering the courts to provide appropriate redress for infringement of the protected rights. Standing alone, this may not have presented an insurmountable obstacle. The Court of Appeal pointed out that the Supreme Court of Ireland has asserted the power to grant appropriate remedies (including awards of compensation) for violation of constitutional rights despite the absence of an express remedies provision on the ground that the framers of a supreme law guaranteeing fundamental rights must have intended to confer a general power of enforcement on the courts.[8] Similarly, the fact that the United States Constitution contains no remedies clause has not deterred the Supreme Court from granting civil remedies for breach of constitutional

5 Hardie Boys J considered that, if necessary, a non-tortious statutory foundation for this new head of Crown liability could be found in s3(2)(c) of the Crown Proceedings Act 1950 which refers to: "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."

6 [1979] AC 385.

7 Ibid at 399.

8 Eg *Byrne* v *Ireland* [1972] IR 241.

rights, although the action is treated as a private law action in tort which is subject to statutory and common law immunities.[9]

However the New Zealand Bill of Rights Act 1990 is not an entrenched supreme law like the Constitutions of Ireland and the United States. It was enacted as an ordinary statute, capable of repeal or amendment by a simple majority vote in Parliament. In fact the Act does not even carry the force of an ordinary statute. Section 4 instructs the courts that even *prior* enactments are not to be held to be impliedly repealed or revoked, or in any way invalid, ineffective or inapplicable by reason of inconsistency with the Bill of Rights Act. Since the apparent purpose of s6(5) of the Crown Proceedings Act 1950 was to immunise the Crown from all known forms of non-contractual civil liability in respect of the execution of judicial process, judicial implication of a novel remedial jurisdiction derived from the Bill of Rights itself solely in order to defeat that intention would surely amount to holding s6(5) ineffective or inapplicable by reason of inconsistency with the Bill of Rights Act, and therefore run contrary to the clear direction contained in s4 of the Act.

The dissenting judge, Gault J, accepted the force of this argument. However the other members of the Court were not so deterred. Stated in broad terms, their reasoning proceeds as follows:

1. The rights and freedoms affirmed by the Bill are basic human rights which are "fundamental to a civilised society".[10] The courts are therefore justified in adopting a "straightforward and generous",[11] "liberal, purposive",[12] "rights-centred"[13] approach to interpretation of the Bill.

2. The purpose of the Bill is revealed by its long title which declares that the Act is:
   (a) To affirm, protect and promote human rights and fundamental freedoms in New Zealand; and
   (b) To affirm New Zealand's commitment to the International Covenant on Civil and Political Rights.

   Judicially enforceable remedies are necessary in order to ensure that the affirmed rights are "protected" and "promoted". This conclusion is reinforced by reference to the International Covenant, Article 2(3) of which requires each state party to ensure that persons whose rights are violated "shall have an effective remedy". Traditional common law remedies would often prove ineffective because the Bill does not impose "duties" capable of founding a tort action for breach of statutory duty,[14] and some of the rights receive no recognition at all under exist-

9 *Bivens* v *Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 US 388 (1971); *Carlson* v *Green,* 446 US 14 (1980).
10 [1994] 3 NZLR 667 at 691 per Casey J.
11 Ibid at 676 per Cooke P.
12 Ibid at 691 per Casey J.
13 Ibid at 702 per Hardie Boys J.
14 Ibid at 697 per Hardie Boys J.

ing private law doctrine. In any event, common law remedies "will often be so uncertain or ringed about with Crown immunity as to render them of little or no value".[15] While the courts could always make a declaration that rights have been infringed, such a remedy would be "toothless",[16] and reduce the Bill to "no more than legislative window-dressing".[17] The rights affirmed by the Bill are "intended to have substance and to be effective",[18] and this requires provision of adequate judicial remedies to redress violations.

3. The omission of an express remedies provision was "probably not of much consequence".[19] The legislative history of the Bill of Rights Act was equivocal and of little value.[20] It did not indicate an intention by Parliament to confine the courts to existing common law remedies. The best interpretation was that Parliament was content to leave it to the courts to provide appropriate remedies for breach of the protected rights and "inclusion of a statement to that effect in the Act was unnecessary".[21]

4. The "fundamental" nature and international dimension of the affirmed rights are more important than the legal form in which they are declared. Consequently the reasoning of foreign courts interpreting entrenched constitutional guarantees of human rights is fully applicable to the New Zealand Bill of Rights Act. Hardie Boys J concluded:[22]

> Enjoyment of the basic human rights are the entitlement of every citizen, and their protection the obligation of every civilised state. They are inherent in and essential to the structure of society. *They do not depend on the legal or constitutional form in which they are declared.* The reasoning that has led the Privy Council and the Courts of Ireland and India to the conclusions reached in the cases to which I have referred . . . is in my opinion equally valid to the New Zealand Bill of Rights Act if it is to have life and meaning.

The final step in this process of reasoning is critical. It amounts to an assertion that Parliament, despite deliberately enacting the Bill as an ordinary statute, nevertheless intended it to carry a higher constitutional status. In my view, that conclusion cannot be justified.

There can be no quarrel with the Court adopting a liberal "purposive" approach to interpretation of the Bill of Rights Act. Section 5(j) of the Acts Interpretation Act 1924 requires every statute to be construed liberally so as to give effect to the object of the Act "according to its true in-

15 Ibid at 699 per Hardie Boys J.
16 Ibid at 676 per Cooke P.
17 Ibid at 691 per Casey J.
18 Ibid at 718 per McKay J.
19 Ibid at 676 per Cooke P.
20 Ibid at 699 per Hardie Boys J.
21 Ibid at 718 per McKay J.
22 Ibid at 702 (emphasis added). To similar effect, see Cooke P at 677 and Casey J at 691.

tent, meaning and spirit", and many of the rights affirmed by the Bill are expressed in such broad terms that a strictly literal interpretation is clearly inappropriate. Judicial commitment to ensuring that an Act functions as Parliament intended requires that it be read in its full context, and the overall structure or "scheme" of the statute is obviously important. The legislative history of an enactment may also shed valuable light on what the lawmakers were trying to achieve by it. This is particularly so in New Zealand where legislation is passed by majority vote in a single legislative chamber dominated by a governing party subject to strict party discipline. Considered statements made in the House of Representatives by the responsible Minister explaining a Bill's intended scope and effect can fairly be regarded as representing the view of a majority of Parliament.

In recent years the New Zealand courts have responded to this reality by abandoning past practice and allowing reference to a wide range of extrinsic evidence of legislative intent, including the *Hansard* record of parliamentary debates.[23] However the courts have tended to be very selective in their use of *Hansard* and other legislative history. While such extrinsic evidence of Parliament's intention is readily employed to confirm an interpretation already favoured by the court,[24] where it indicates an interpretation inconsistent with that preferred by the court it tends to be treated as inconclusive and of little help.[25] The judgments in *Baigent's Case* provide further examples of this.

Having committed themselves to an overtly purposive approach to interpretation, the courts are surely obliged to apply that approach faithfully. In my view, the history, legal form, and overall structure of the New Zealand Bill of Rights Act 1990 demonstrate beyond doubt that Parliament did not intend the rights contained in the Bill to carry a higher "constitutional" status, and in particular, did not intend to confer power on the courts to enforce those rights through a new regime of public civil liability untouched by existing statutory immunities.

The decision to enact the Bill of Rights as an ordinary Act of Parliament is of critical importance. The Draft Bill originally proposed in the 1985 Government White Paper *A Bill of Rights for New Zealand*[26] took the form of an entrenched supreme law that would empower the courts to strike down inconsistent legislation, and included a wide remedies clause (Article 25) authorising the courts to redress violations of rights by granting "such remedy as the court considers appropriate and just in the circumstances". The Commentary on the Draft Bill indicates that the drafters believed that even in the case of an entrenched supreme bill of rights, an

23 See generally J F Burrows, *Statute Law in New Zealand* (Butterworths, Wellington, 1992) 134-143.

24 See the examples cited by J F Burrows, ibid at 137-138.

25 Eg *New Zealand Maori Council* v *Attorney-General* [1987] 1 NZLR 641 at 658-659; *TV3 Network Ltd* v *Eveready New Zealand Ltd* [1993] 3 NZLR 435 at 439-440, 445.

26 Government Printer, Wellington, 1985.

express provision was required in order to empower the courts to go beyond their existing remedial jurisdiction.[27]

The Draft Bill met with overwhelming public opposition. The Parliamentary Select Committee to which the White Paper was referred for investigation received 431 submissions. Of these, only 35 supported the Draft Bill or even the concept of a bill of rights, while 243 were wholly opposed to the proposal.[28] The Select Committee concluded that "New Zealand is not yet ready, if it ever will be, for a fully fledged Bill of Rights along the lines of the White Paper draft".[29] It explained:[30]

> The power given to the judiciary by the White Paper draft was the principal reason for opposition to the proposal. The main thrust of that argument concerned the redistribution of power that was thought to entail from elected representatives of the people who were directly accountable to them to the judiciary who were appointed and held office until their retirement.

Nevertheless, the Select Committee recommended enactment of a Bill of Rights as an ordinary statute. This would meet the principal objection to the White Paper draft concerning transfer of power from parliament to the courts. The express remedies clause was omitted from the Committee's draft proposal, and its belief that a statutory Bill would not be "judicially enforceable" prompted it to recommend inclusion of some "social and economic rights".[31] The Committee saw a statutory Bill of Rights serving three purposes. First, it "could have great educative and moral value".[32] Secondly, it "could give guidance to the courts about the interpretation of legislation in the light of the rights set out in the Bill of Rights".[33] This purpose was achieved by s6 of the Bill as enacted, which provides: "Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning." Thirdly, the Bill could strengthen existing processes for administrative and parliamentary scrutiny of proposed legislation by providing standards against which Bills could

27 The Commentary, ibid p115, explains that the value of such a provision "appears in cases such as *Maharaj* v *Attorney-General of Trinidad and Tobago (No 2)* [1979] AC 385". It continues:

> What Article 25 does mean is that if a court finds that a person's rights or freedoms under the Bill have been infringed, but there is no existing or adequate remedy available, the court will be able to grant any remedy which it considers appropriate and just in the circumstances. For example, it may mean an award of damages against the State for an infringement of someone's rights and freedoms where no such damages would be payable at present.

28 *Interim Report of the Justice and Law Reform Select Committee Inquiry into the White Paper – A Bill of Rights for New Zealand,* 41 P 2nd Sess, p8.

29 *Final Report of the Justice and Law Reform Select Committee on a White Paper for a Bill of Rights for New Zealand* (1988) 3.

30 Ibid at 2-3.

31 Ibid at 4. This recommendation was not adopted.

32 Ibid at 3.

33 Idem.

be measured and tested. To this end, s7 of the Act requires the Attorney-General to bring to the attention of Parliament any Bill which appears inconsistent with the Bill of Rights.[34]

The parliamentary debates on the Bill confirm this limited view of its intended function. Moving the introduction of the Bill, the Prime Minister, Rt Hon Geoffrey Palmer, declared:[35]

> The New Zealand Bill of Rights . . . will encapsulate the role of Parliament as a guardian of fundamental rights and freedoms in New Zealand. In that sense the Bill is very much a parliamentary Bill of Rights.

Nevertheless the National Party Opposition strongly opposed the Bill, its leader expressing concern that "even an unentrenched Bill of Rights – a Bill that is not superior law – will be used by the courts to write new law".[36] In an attempt to allay such fears, s4 was inserted prior to the second reading to make it clear that the Bill would not affect the validity of prior inconsistent legislation. At every stage of the Bill's passage the Prime Minister emphasised the limited interpretive role envisaged for the courts. The Bill would merely provide the courts "with a new legal instrument that can aid their interpretation when they are in doubt as to the way to interpret legislation passed by the Parliament".[37] In other words, the Bill was seen as a further interpretive aid that would sit (perhaps rather uncomfortably[38]) alongside s5(j) of the Acts Interpretation Act 1924. The primary purpose of the Bill of Rights Act was to check the power of the executive by "encouraging enhanced parliamentary awareness in the context of proposed legislation . . . . In providing a benchmark for judging the Government's actions the greatest significance of the Bill will be before the implementation of a new policy".[39]

The deliberate omission from the 1990 Act of the wide remedies clause included in the White Paper draft posed an obvious problem for the majority of the Court of Appeal. Their explanation is not convincing.

34 The Committee also recommended that Standing Orders of the House of Representatives be amended to establish a special Select Committee charged with examining all bills and regulations for consistency with the Bill of Rights. While no such Parliamentary committee has been established, an analogous function is performed by the Legislation Advisory Committee which reports to the Minister of Justice (and through him to the Cabinet Legislation Committee) on proposed legislation. See Report No 6 of the Legislation Advisory Committee, *Legislative Change: Guidelines on Process and Content* (revised edition 1991) para 38.

35 (1989) 502 New Zealand Parliamentary Debates 13038.

36 Ibid at 13046 per Hon J B Bolger.

37 (1990) 510 New Zealand Parliamentary Debates 3760.

38 See *Flickinger* v *Crown Colony of Hong Kong* [1991] 1 NZLR 439, 440-441 where the Court of Appeal suggests that s6 of the Bill of Rights Act may require a court to depart from a long established judicial interpretation of the meaning and intent of a particular statutory provision. Does this mean that the object and purpose of a particular enactment can suddenly change?

39 (1990) 510 New Zealand Parliamentary Debates 3450-3451 per Rt Hon Geoffrey Palmer PM. See also, to similar effect, ibid at 3760.

Cooke P and Hardie Boys J both conceded that the remedies clause was not carried forward "because it was seen as associated with the White Paper concept of a supreme law overriding Acts of Parliament".[40] In other words, Parliament did not intend the 1990 Act to confer new powers on the courts. However Cooke P continued: "Be that as it may, it would not be a sound technique in interpreting the 1990 Act to give dominant influence to a package of previous draft proposals that were never enacted".[41] In his view, the "most cogent" extrinsic evidence of parliamentary intent was a rather cryptic statement in the Explanatory Note to the Bill, which was repeated by the Prime Minister in his introductory speech, to the effect that without statutory authority delegated government action that violates the Bill of Rights will be unlawful and "the courts might enforce those rights in different ways in different contexts".[42] Hardie Boys J chose to rely on a report prepared by the Department of Justice for the Parliamentary Select Committee after the first reading of the Bill, which advised that a remedies clause was unnecessary because "the courts were able to determine themselves whether a remedy should be given".[43]

Inexplicably, the Court overlooked the clearest expression of the government's intention regarding availability of judicial remedies for violation of the rights contained in the Bill. Moving the second reading of the Bill, the Prime Minister responded to continuing Opposition and public concern by taking pains to "spell out what the Bill does not do".[44] He then proceeded to emphasise:[45]

> [T]he Bill creates no new legal remedies for courts to grant. The judges will continue to have the same legal remedies as they have now, irrespective of whether the Bill of Rights is an issue.

Clearly the legislative history of the Bill of Rights Act does not support the view that Parliament intended to confer new enforcement powers on the courts. In fact the whole point of enacting the Bill as an ordinary statute was to confine the courts to their existing jurisdiction.

The Court's use of the long title to the Bill is also unpersuasive. The purpose of the 1990 Act is to place ultimate responsibility for "protecting" and "promoting" human rights squarely on Parliament – not the courts – and the ultimate sanction for violation is to be political rather than legal. As to the International Covenant, while para (a) of Article 2(3) requires state parties to provide "an effective remedy" for violations of rights, para (b) makes it clear that such remedy need not be judicial in nature. In any case, reference to a treaty in the long title of an Act cannot override the plain terms of the Act itself and s4 makes it clear that

40 Supra n1 at 677 per Cooke P. See also Hardie Boys J at 699.
41 Ibid at 677.
42 Idem.
43 Ibid at 699.
44 (1990) 510 New Zealand Parliamentary Debates 3449.
45 Ibid at 3450.

all inconsistent enactments (including those which exclude judicial remedies) take priority over the Bill of Rights Act.

Finally, it is necessary to ask: In what sense are the rights and freedoms contained in the Bill "fundamental"? One glaring omission from any list of fundamental rights "inherent in and essential to the structure of"[46] New Zealand society is the set of rights vested in the Maori people by the Treaty of Waitangi 1840. Yet while Article 4 of the original White Paper Draft Bill would have affirmed the rights of Maori under the Treaty this proision was omitted from the 1990 Act, apparently because the Treaty rights were seen as too important (or fundamental?) to be included in an ordinary statute.[47] The rights and freedoms that are affirmed in the Bill comprise an odd collection. Some (eg the criminal procedure rights set out in ss 23-26) restate in identical or similar terms protections already provided at common law or by statute. Others are limited by reference to such vague qualifiers as "unreasonable" (s21), "arbitrarily" (s22), and "disproportionately" (s9). Others again (eg the rights provided by ss 13-18 to freedom of thought, expression, religion, assembly and movement) are declared in such sweeping unqualified terms that they merely express broad moral ideals. Clearly these rights are not intended to be treated as absolutes. Where two affirmed rights conflict one or both must be compromised. But Parliament also contemplates that an affirmed right may be compromised by an individual legal entitlement that was not deemed sufficiently "fundamental" for inclusion in the Bill, since s28 provides: "An existing right or freedom shall not be held to be abrogated or retricted by reason only that the right or freedom is not included in this Bill of Rights or is included only in part". Further, an affirmed right may also be compromised by reference to broad utilitarian concerns relating to overall public welfare, since s5 provides that the rights contained in the Bill are subject to such "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". Finally, and crucially, s4 declares that inconsistent *prior* enactments (which include lawfully made regulations) override the Bill of Rights. These are not characteristics one would normally associate with truly fundamental rights intended to carry a higher constitutional status.

Ultimately, the decision of the majority in *Baigent's Case* rests on a simple assertion that the courts are the ultimate guardians of human rights and they must enforce those rights regardless of Parliament's intention. This has no more foundation in legal or democratic principle than Sir Robin Cooke's controversial assertion that some common law rights "lie so deep that not even Parliament could override them".[48]

46 Supra n1 at 702 per Hardie Boys J.

47 See *Final Report of the Justice and Law Reform Committee,* supra n29 at p4.

48 *Taylor* v *New Zealand Poultry Board* [1984] 1 NZLR 394, 398. For comment, see John L Caldwell, Judicial Sovereignty – A New View" [1984] NZLJ 357. See also, Sir Robin Cooke, "Fundamentals" [1988] NZLJ 158, 163-164.

THE DISSENTING JUDGMENT

The dissenting judgment of Gault J provides little cause for comfort. After a careful analysis of the history and structure of the Bill of Rights Act he concludes, correctly, that since the Bill was deliberately enacted as an ordinary statute without an express remedies clause the constitutional cases relied on by the majority are inapplicable, and that the court has no warrant to create a new public law action solely to circumvent the statutory immunity from tort liability conferred on the Crown by s6(5) of the Crown Proceedings Act 1950. He observed: "That would be, in effect, to disregard s4 of the Bill of Rights Act".[49] However, like the majority, Gault J presumes that Parliament "must have contemplated that they [the rights affirmed in the Bill] could be enforced and their violation appropriately remedied'.[50] Where the present law does not provide an adequate remedy, the law must be modified and developed by analogy with existing actions and remedies. Where an "action in the nature of tort for a monetary remedy"[51] is required a civil action will lie for breach of the statutory duties imposed by the Bill of Rights Act. This action would be a private law action and therefore subject to any relevant statutory immunities.[52] However the practical significance of this is immediately removed by Gault J's extraordinary interpretation of the immunity provisions. He concludes that all the statutory immunities, including s6(5) of the Crown Proceedings Act, can be read down so that the protection conferred is conditional upon powers of search being exercised not only in good faith but also "reasonably". This result, he says, is "dictated by the interpretation direction in s6 of the Bill of Rights Act".[53] While it is possible that an unlawful search may nevertheless be held "reasonable",[54] such cases must surely be rare indeed, and the practical effect of Gault J's interpretation is to render s6(5) of the Crown Proceedings Act ineffective contrary to s4 of the Bill of Rights Act. Even Sir Robin Cooke considered Gault J's interpretation to be unacceptably "strained".[55] So while Gault J dissented on the main point of principle his approach leads to the same result. Indeed in one important respect — his preparedness to use s6 of the Bill to read down inconsistent statues — his approach is more radical than that of the majority.

THE IMPLICATIONS OF THE DECISION

The practical implications of the majority view in *Baigent's Case* are far-reaching and uncertain.

First, what is the precise nature and purpose of an award of compensation against the Crown, and how is it to be assessed? The new action is

49 Supra n1 at 708.
50 Ibid at 706.
51 Ibid at 712.
52 Ibid at 713.
53 Ibid at 715.
54 *R* v *Jefferies* [1994] 1 NZLR 290.
55 Supra n1 at 674.

not an action in tort, and we are told that the remedy of monetary compensation is not "pecuniary damages" so that there is no prima facie right to jury trial under s19A of the Judicature Act 1908.[56] The civil action for breach of the Bill of Rights is a novel form of "public liability of the state" which can be maintained only against the Crown. It is not available against the individual state agents responsible for the breach: their liability remains confined to tort and subject to common law limitations and statutory immunities. We are told that the purpose of the direct action against the Crown is to "vindicate" and "affirm" the protected rights: "The objective is to affirm the right, not punish the transgressor."[57] In fact, the state of mind of the individual transgressor seems irrelevant to the Crown's liability. In view of this one might expect the direct action against the Crown to take the form of a *per se* liability, entitling the victim as of right to a modest, almost nominal, compensatory award designed solely to vindicate the right and publicly mark the infringement. Such award would be separate from, and additional to, any common law damages awarded in parallel tort actions against the individuals responsible for the infringement and the Crown in its vicarious capacity.

Clearly this is not what the Court of Appeal has in mind. There is no automatic right to a compensatory award for breach of the Bill of Rights. The court's role is to ensure that an "adequate" remedy is available to vindicate the right, and the choice of remedy lies entirely within the discretion of the judge. So where criminal procedure rights are infringed "[t]he exclusion of evidence will often be amply sufficient vindication".[58] Casey J explains further:[59]

> What is [an] adequate [remedy] will be for the Courts to determine in the circumstances of each case. In some it may be that already obtainable under existing legislation or at common law: in others, where such remedies are unavailable or inadequate, the Court may award compensation for infringement, or settle on some non-monetary option as appropriate.

Sir Robin Cooke adds that in some cases "a mandatory remedy such as an injunction or an order for return of property might be appropriate",[60] indicating that the courts' remedial jurisdiction is completely unconfined.

Where a monetary award is deemed to be appropriate, its assessment seems to be entirely at large. Cooke P observes merely that:[61]

> [I]n addition to any physical damage, intangible harm such as distress and injured feelings may be compensated for; the gravity of the breach and the need to emphasise the importance of the affirmed rights and to deter breaches are also proper considerations; but extravagant awards are to be avoided.

56 Supra n1 at 677-678 per Cooke P.
57 Ibid at 703 per Hardie Boys J.
58 Idem.
59 Ibid at 692.
60 Ibid at 676. Compare Crown Proceedings Act 1950, s17.
61 Ibid at 678.

This suggests that a compensatory award under the Bill of Rights action may, in the courts' discretion, embrace all the heads of damage available in tort: compensation for actual physical harm and intangible mental suffering, aggravated damages arising out of the manner of the breach; and the reference to a deterrent function suggests that an exemplary component may also be appropriate.[62] However, there is apparently no need for the court to quantify and justify its award under any of these separate heads, since Cooke P observes: "I am disposed to think that any Bill of Rights award will be usually best made globally, with no breakdown into the different elements taken into account."[63] Further, when concurrent actions in tort also prove successful, it is appropriate "to make a global award under the Bill of Rights and nominal or concurrent awards on any other successful causes of action".[64] In any event, there must be no "double recovery". It seems that the quantum of such "global" awards may be quite substantial. While Cooke P indicated that "for a brief but serious invasion of the plaintiffs' rights such as may have occurred here, where no physical harm or lasting consequences seem to have ensued, an award of somewhat less" than the $70,000 claimed "would be sufficient vindication on all or any causes of action",[65] it is significant that the claim of $70,000 was not rejected out of hand as being wholly unreasonable.

It seems that the new action on the Bill of Rights is seen as a complete substitute for the tort liability of the Crown and its individual officers. It is capable of serving all the traditional functions of tort liability, but is subject to none of the common law and statutory limitations that confine the power of the court in respect of both the incidence of tort liability and the heads of actionable damage. The courts' discretion to distinguish deserving from undeserving claimants of government compensation is complete. It is hard to justify judicial creation of such a unique and unfettered jurisdiction.

Naturally, the new cause of action will prove extremely attractive to litigants. Section 3 of the Bill of Rights Act makes a wide range of public institutions and functionaries subject to the Act, and since many of the rights contained in the Bill receive no or incomplete recognition under existing private law, the new cause of action will expose the Crown to entirely new heads of civil liability. The practical ambit of the new compensatory remedy will turn on the courts' discretionary determination whether the existing general law provides an "adequate" alternative remedy to vindicate the infringed right. Inevitably, this process will expose serious anoma-

62 Compare *Maharaj* v *Attorney-General of Trinidad and Tobago (No 2)* [1979] AC 385, 400 where the majority of the Privy Council reserved its opinion as to whether compensation against the Crown to redress infringement of a Constitutional right can ever include an exemplary or punitive award. It seems unlikely that the prospect of an exemplary award against the state will serve to deter public functionaries from infringing the Bill of Rights.

63 Supra n1 at 678.

64 Idem.

65 Idem.

lies and raise the prospect of discriminatory treatment of similarly placed claimants.

For example, violation of some of the protected rights are likely to result in serious personal injury, and since public law compensation is not "damages",[66] presumably an action against the Crown is not barred by s14(1) of the Accident Rehabilitation and Compensation Insurance Act 1992. Discriminatory treatment of victims of personal injury can be avoided only by holding that the statutory right to accident compensation payments provides adequate vindication of the infringed right. But such a conclusion seems unconvincing when one considers that the revised accident compensation scheme provides only partial income-replacement benefits and makes no provision for lump sum awards for intangible mental suffering. Presumably the bulk of any "global award" made to the plaintiffs in *Baigent's Case* would be justified under this last head.

Claims against the Crown for breach of the right to freedom from discrimination conferred by s19(1) of the Bill of Rights Act will also give rise to problems of this kind. Section 19(1) provides: "Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993." The Human Rights Act provides its own special enforcement procedures and remedies and where they are available a court could be expected to find them adequate alternatives to a direct action against the Crown under the Bill of Rights Act. However s151(2) of the Human Rights Act 1993 exempts "the Government of New Zealand" from liability under that Act for violation of any of the "new" prohibited grounds of discrimination added by the 1993 Act, so that a public law action against the Crown for compensation under the Bill of Rights Act provides the only effective remedy for such infringements. But to grant such a remedy would not only expose the Crown to a liability it clearly sought to avoid, but also allow a privileged class of discrimination victims to bypass the cumbersome enforcement procedures set out in the Human Rights Act.

Claims based on breach of the right to "observance of the principles of natural justice" contained in s27(1) of the Bill of Rights Act[67] will raise similar problems. In most cases an opportunity to have an invalid decision set aside in review proceedings will provide an adequate remedy. But where the breach has caused irrecoverable financial loss a compensatory award against the Crown would seem to be the only effective way to vindicate the right. Yet a citizen who suffers the same loss from a decision that is invalid because of errors in substantive reasoning will have no such redress available. In order to avoid this anomaly the courts may be encouraged to extend the concept of natural justice to embrace glaring examples of

66 Supra n56.

67 S27(1) of the Bill of Rights Act 1990 provides: "Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law."

substantive "unfairness".[68] Perhaps, at the same time, the courts might grant the Crown an immunity against liability for minor procedural errors. Sir Robin Cooke has already recognised such an immunity where the conduct of judges is impugned, observing that "a mere judicial error in interpretation of the law" will not give rise to a direct action against the Crown for a resulting breach of the Bill of Rights Act.[69] Yet in *Baigent's Case* the state of mind of the police officers was treated as irrelevant to the Crown's direct liability under the Bill of Rights, and it seems anomalous that the Crown should be protected from direct liability for the consequences of carelessness by judges, but not police officers. Of course any judicially created defence to the action based on the Bill of Rights would have to be "justified" in terms of s5.

The decision in *Baigent's Case* may have implications for the conduct of Parliament itself. Section 3 of the Bill of Rights Act provides that acts of the "legislative branch" of government are subject to the provisions of the Bill. This phrase seems apt to include both the House of Representatives and its select committees. Can action taken by the House or its committees found an action against the Crown for breach of the Bill of Rights? Clearly s4 protects enacted legislation from challenge, and the Court of Appeal has held that it will not prevent a Minister from introducing a bill into Parliament.[70] But Parliament and its committees can deal with individuals in other ways that violate the Bill of Rights, most obviously by denying them the right to natural justice. It would be surprising if the existing right to petition Parliament for redress were found to provide a citizen with an effective alternative remedy in respect of a false allegation of serious wrongdoing made in the House or before a select committee.[71] One might think that any attempt to sue the Crown in respect of conduct in Parliament would be precluded by Article 9 of the 1688 Bill of Rights, which prevents debates or proceedings in Parliament from being "questioned" in any court. However Sir Robin Cooke has already expressed his view that the Bill of Rights of 1688 is an "enactment" within the meaning of s6 of the Bill of Rights Act 1990,[72] and its provisions are

68 See *Daganayasi* v *Minister of Immigration* [1980] 2 NZLR 130 at 149 per Cooke J.

69 *Harvey* v *Derrick*, CA 291/93, 24 August 1994.

70 *Te Runanga o Wharekauri Rekohu* v *Attorney-General* [1993] 2 NZLR 301, 307-308.

71 One commentator observes that the petition remedy is "ancient, slow and ineffective" and that "there has been no instance where a petition on this ground has received the top category of recommendation": Mai Chen, "Review of Standing Orders of Parliament. Society seeks check on Parliamentary Privilege within MMP Environment", Law Talk, October 1994, No 423, p12.

72 The Bill of Rights 1688 would seem to have a much stronger claim to higher constitutional status than the 1990 Act. The 1688 Bill took the form of a political compact by which the combined Convention Parliament changed the succession to the throne in favour of William and Mary of Orange on their acceptance of Parliament's declaration of the rights and liberties of the people. In contrast, the Bill of Rights Act 1990 was passed by a majority in the House of Representatives in the face of strong parliamentary opposition and without clear public support.

susceptible to being read down in a manner consistent with the rights and freedoms contained in the 1990 Act.[73]

Until now the impact of the Bill of Rights Act has been confined to the area of criminal procedure, the remedy sought being exclusion of incriminating evidence obtained through breach of protected rights. The cases that have reached the Court of Appeal have already exposed serious differences of view as to the content and scope of the procedural rights contained in the Bill, and the proper relationship between ss 4, 5 and 6 of the Act.[74] By now abandoning the traditional principle that the civil liability of the Crown is governed by the same law as applies to private citizens, and creating a special discretionary regime of public civil liability, the Court has provided an attractive forum for litigants to dispute the meaning and scope of the whole range of vague entitlements contained in the Bill. What constitutes "disproportionately severe treatment or punishment"?[75] What limitations can be read into the right "to refuse to undergo any medical treatment"?[76] How far do the rights to freedom of expression, assembly, association and movement extend?[77] What does the right to "manifest" one's "religion or belief" embrace?[78] What is the practical scope of the right "to adopt and to hold opinions without interference"?[79] These sorts of questions raise complex and controversial moral issues on which reasonable people hold strongly opposed views.

Until now our law has resolved these controversies by developing reasonably specific rules that can be applied by judges in a consistent and relatively neutral manner. *Baigent's Case* has changed all this, at least where government action is involved. Common law rules must be justified in terms of the Bill of Rights, and the prospect of statutory provisions being read down to conform with the Bill will always remain open. New Zealand judges will be drawn into making the kinds of overtly political and highly contentious value choices that so preoccupy their North American counterparts. This will be welcomed by barristers, and by judges committed to changing the law to conform with their perceptions of current values and needs. However it can only be bad for the judiciary as a whole and for the public at large. The controversial nature of the outcomes will inevitably expose the judges to increased public criticism, and fuel demands for greater accountability and a more open process of judicial appointment.

73 *Television New Zealand Ltd* v *Prebble* [1993] 3 NZLR 513, 523. On appeal *(Prebble* v *Television New Zealand Ltd* [1994] 3 NZLR 1) the Privy Council made no reference to this suggestion. In fact their Lordships treated Article 9 of the Bill of Rights 1688 as a "manifestation" of a wider principle that the courts "will not allow any challenge to be made to what is said or done within the walls of Parliament in performance of its legislative functions and protection of its established principles": [1994] 3 NZLR at 7.

74 See, eg, *Ministry of Transport* v *Noort* [1992] 3 NZLR 260; *R* v *Jefferies* [1994] 1 NZLR 290.

75 Bill of Rights Act 1990, s9.

76 Ibid, s11.

77 Ibid, ss 14, 16, 17, 18.

78 Ibid, s15.

79 Ibid, s13.

Finally, it is important to place the Bill of Rights Act 1990 in its wider political context. The idea of an entrenched constitutional bill of rights that would establish the courts as the ultimate guardians of human rights was only one of a number of proposals raised during the 1980s directed at checking the power of the executive branch of government. While the New Zealand public emphatically rejected any expansion of the courts' powers, it did embrace the idea of electoral reform and the next parliament will be elected on the basis of a system of proportional representation that promises to break the hold on power enjoyed for so long by the two major political parties.[80] The next government will almost certainly be a coalition, and controversial social legislation will be extremely difficult to pass. Any significant amendment to the Bill of Rights Act would certainly fall into this category. The likely political outcome is rather ironical: adoption of the constitutional reform favoured by the public will make it very difficult for parliament to deprive the courts of powers which they have arrogated to themselves contrary to the public will.

Surprisingly, the government has decided not to appeal the *Baigent* decision to the Privy Council. One can only assume that this is a political decision dictated by the current enthusiasm of the Prime Minister and some of his Cabinet colleagues for removing the right of appeal to the Privy Council as a first step along the road to severing all remaining links with the British Monarchy.[81] No doubt the government will consider amending the Crown Proceedings Act 1950 to abolish the *Baigent* cause of action. But even now it seems that such a corrective measure could not be assured of passage through Parliament. Already, the prospect of proportional representation has led to defections from the governing National Party and a weakening of internal party discipline, so that the Government can no longer rely on a clear majority in the House of Representatives. So we may yet find ourselves stuck with the consequences of this unfortunate decision.

80 See Electoral Act 1993.

81 Cabinet has asked the Solicitor-General to prepare a paper surveying the arguments for and against retention of a right of appeal to the Privy Council, and evaluating alternatives to it: see Law Talk No 424, 25 October 1994, pp 3-4. Interestingly, the New Zealand Law Society does not support abolition of the final right of appeal to the Privy Council at this time: Law Talk No 426, 21 November 1994, p 1. An Honours Advisory Committee has also been appointed to report on whether the British Honours system should be retained, and the Prime Minister has publicly supported a move to remove the Queen as head of state and establish New Zealand as a republic.