

# UPPING THE ANTE: NEW ACTORS AND THE EVOLVING NATURE OF PRIVACY ACT JURISPRUDENCE IN NEW ZEALAND

*Gehan Gunasekara\* and Niveet Singh\**

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*This article examines emerging trends in New Zealand's Privacy Act 1993 (the Act) litigation emanating from the Human Rights Review Tribunal (the Tribunal), which adjudicates cases brought under the Act. The Tribunal can award a range of remedies including damages, injunctions and declarations but in recent years it has also developed other remedies, such as training orders, aimed at remedying systemic privacy failures within agencies. The legitimacy of these is assessed against the backdrop of legislative lethargy in implementing parallel recommendations for law reform aimed at similar mischiefs. The article surveys all cases brought before the Tribunal (in its privacy jurisdiction) over a ten-year period from 2007 until 2016 inclusive. Brief comparison is made with Tribunal awards for discrimination under its non-privacy jurisdiction. The article also examines the reasons for a significant increase in the average amount of damages in recent years, especially in the Tribunals' privacy jurisdiction. Contributing factors to this include the changing nature of the types of dispute and the defendants involved as well as the discretion afforded to the Tribunal. Whilst the Tribunal has significantly modified its approach, other significant influences have included a recent increase in the number of private sector defendants. The Tribunal's substantive jurisprudence as to the nature of the obligations contained in the Act's privacy principles has also continued to evolve thereby vindicating New Zealand's principles-based data privacy regime.*

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## **I INTRODUCTION**

New Zealand's principles-based data privacy legislation, the Privacy Act 1993 (the Act), and the specialist tribunal for litigation brought under it, the Human Rights Review Tribunal (the Tribunal), has undoubtedly helped New Zealand to adapt to threats to privacy from rapidly changing social

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\* Associate Professor of Commercial Law, University of Auckland.

\* BCom, University of Auckland, recipient of a University of Auckland summer scholarship, which enabled the research for this article to be undertaken.

norms and technologies. Does this flexibility, however, lead to the inevitable criticism that justice varies according to the "chancellor's foot"? This was the question starkly raised by counsel in one case appealed from the Tribunal to the High Court:<sup>1</sup>

The appellant's argument is that since the appointment of Mr Haines QC as the new Chair of the Tribunal it has lifted its award of damages. The appellant says this lift is inconsistent with High Court authority, and that it is beyond the Tribunal to do that.

This article examines whether the Tribunal's approach to remedies under the Act has changed by studying litigation brought before it in the five years preceding the appointment of its current chairperson and contrasting this with the litigation in the five years after his appointment. Moreover, the article explores whether broader trends are evidenced in the two periods surveyed, such as the nature of defendants, types of conduct complained of and types of plaintiffs bringing the complaints. The article also examines trends in the success rates of litigation and other factors affecting the outcomes such as the extent and nature of legal representation for the parties.

In addition, it will be seen that the nature of remedies, other than damages, awarded against defendants by the Tribunal has markedly changed. One such remedy is an order that requires offending agencies to undertake comprehensive training programmes on compliance with the Act under the supervision of the Privacy Commissioner. Such orders are not restricted to flagrant privacy breaches as occurred in a celebrated case involving a Facebook post of a cake, the use of which by a previous employer resulted in a damages award of \$168,000, the highest such award to date.<sup>2</sup> Another type of order is that, when access to information is sought under the Act,<sup>3</sup> a specific performance order that defendants make the information available is commonly granted as opposed to granting only damages for the inconvenience, humiliation or injury to feelings from not having access to it.

The article discusses the legitimacy of these developments against the backdrop of law reform proposals for the Act.<sup>4</sup> It will be seen that the Tribunal has been able to address many of the systemic privacy issues identified by the Law Commission as needing legislative change through amplifying the requirements of the existing principles-based rules. The article examines whether there are limits to how far this process can extend.

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1 *Chief Executive of the Ministry of Social Development v Holmes* [2013] NZHC 672, [2013] NZAR 760 at [126].

2 *Hammond v Credit Union Baywide* [2015] NZHRRT 6.

3 Privacy Act 1993, s 6, principle 6.

4 Law Commission *Review of the Privacy Act 1993: Review of the Law of Privacy Stage 4* (NZLC R123, June 2011) [*Law Commission Report*].

## II SCOPE AND METHODOLOGY OF THE STUDY

This study was guided by previous research on Tribunal jurisprudence in New Zealand. An early article explored the relative paucity of monetary awards due to the alternative dispute resolution and conciliation mechanisms provided by the Act,<sup>5</sup> whilst another highlighted the principles of the Act that were most litigated as well as the nature of the defendants.<sup>6</sup> Subsequent research drew attention to the reality that most litigation in the Tribunal occurred between parties already engaged in some manner of dispute not involving privacy.<sup>7</sup>

Although the data gathered for the present article may, therefore, be contrasted with these earlier efforts, the goal of the present research differs significantly from them. In particular this article seeks to establish whether the application of the Act has reached a new stage of maturity where more serious contraventions are punished appropriately while, at the same time, the nature of defendants, their privacy awareness, as well as the steps taken by them towards compliance with the Act prior to the complaint that led to the litigation, are all factored into the tailoring of remedies awarded.

In order to make such an assessment the research identified all the decisions of the Tribunal under the Act, as opposed to its parallel jurisdiction under other legislation,<sup>8</sup> between 2007 and 2016. The study therefore included 69 substantive cases before the Tribunal. This excluded preliminary or interlocutory rulings, strike-out applications and applications for costs where claims were discontinued. In line with the earlier research, cases from the Tribunal that were further appealed to the High Court or the Court of Appeal were only counted once to avoid double-counting.

These 69 cases were, however, further segmented into two distinct periods: first, between 2007 and the end of 2011 and, second, between 2012 and 2016. In the first five-year period the chairperson of the Tribunal was Royden Hindle. In the second five-year period this was Rodger Haines QC.<sup>9</sup> The former oversaw 28 substantive cases and the latter 41 cases.

Analysis of these contrasting periods allowed statistics to be calculated which amongst other things evaluated the success rates of litigation in each period, the proportion of cases that were self-funded or brought by individuals, in addition to classification of the defendants as public or private

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5 Katrine Evans "Show Me the Money: Remedies under the Privacy Act" (2005) 36 VUWLR 475.

6 Gehan Gunasekara and Erin Dillon "Data Protection Litigation in New Zealand: Processes and Outcomes" (2008) 39 VUWLR 457.

7 Gehan Gunasekara and Alida Van Klink "Out of The Blue? Is Litigation Under The Privacy Act 1993 Addressed Only at Privacy Grievances?" (2011) 17 *Canta LR* 229.

8 Human Rights Act 1993; and Health and Disability Commissioner Act 1994.

9 Rodger Haines QC took over as chairperson and presided over some interlocutory matters in the latter part of 2011 but no substantive decisions were given under him as chairperson until March 2012. See *Lochead-MacMillan v AMI Insurance Ltd* [2012] NZHRRT 5.

sector and the conduct they engaged in. Lastly, the remedies awarded, monetary or otherwise, in the two periods are contrasted and a brief comparison is attempted with the remedies that were awarded by the Tribunal in its parallel non-privacy related jurisdiction,<sup>10</sup> but detailed examination of these cases is beyond the scope of the present article.

### **III NATURE OF DEFENDANTS AND THEIR ALLEGED CONDUCT**

More cases came before the Tribunal in the five years that Haines has been chairperson than under the previous five years when Hindle was chairperson: 41 as opposed to 28. This provided ample material for analysis. It is worth noting that previous studies of litigation under the Act have demonstrated the predominance of public sector agencies as defendants.<sup>11</sup> This pattern continued during Hindle's period, with 79 per cent involving the public sector and 21 per cent concerning the private sector.

During Haines' period there has been, on the other hand, a marked change in the nature of the defendants. Public sector defendants accounted for only 54 per cent whilst private sector defendants constituted 46 per cent. This narrowing of the gap between sectors may explain, at least partly, the types and extent of remedies awarded in the latter period surveyed in this article.

Amongst these private sector defendants were companies,<sup>12</sup> self-employed individuals,<sup>13</sup> a funeral home,<sup>14</sup> lawyers,<sup>15</sup> and medical practitioners.<sup>16</sup> One theme that emerged was that significant damages awards have been made against private sector defendants who failed to respond in a timely manner or at all to information requests by individuals.<sup>17</sup> The Act requires, amongst other things that an agency receiving an information privacy request must within 20 working days make a decision on whether to make the information available in addition to communicating this decision and whether any charge for supplying it is to be imposed.<sup>18</sup> Failure to adhere to these requirements can have

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10 Human Rights Act, s 92I; and Health and Disability Commissioner Act, s 54.

11 Gunasekara and Van Klink, above n 7.

12 See for example *Taylor v Orcon Ltd* [2015] NZHRRT 15.

13 See for example *Director of Human Rights Proceedings v Hamilton* [2012] NZHRRT 24.

14 *Hale v Chester Burt Funeral Home Ltd* [2012] NZHRRT 10.

15 See for example *Director of Human Rights Proceedings v Schubach* [2015] NZHRRT 4.

16 See for example *Waxman v Pal* [2016] NZHRRT 28.

17 Privacy Act 1993, s 6, principle 6. See *Director of Human Rights Proceedings v INS Restorations Ltd* [2012] NZHRRT 18; *Director of Human Rights Proceedings v Hamilton*, above n 13; and *Director of Human Rights Proceedings v Valli & Hughes* [2014] NZHRRT 58.

18 Section 40.

detrimental consequences for the requester and lead to not insignificant remedies against the agency concerned.

In *Director of Human Rights Proceedings v Valli & Hughes*, for instance, the plaintiff, a relatively young and inexperienced employee, made several requests for personal information in relation to his individual employment agreement, pay slips and wages, which were ignored.<sup>19</sup> On the bankruptcy of the defendant, the plaintiff discovered that the Inland Revenue Department (IRD) had no record of his employment, no tax having been paid to it. As a result, when the plaintiff subsequently received the unemployment benefit he remained uncertain and concerned about his new tax liability with the IRD and future employment. In addition to specific performance the Tribunal awarded \$20,000 in damages.<sup>20</sup>

Another flagrant contravention, in a commercial context, was *Director of Human Rights Proceedings v INS Restorations Ltd*.<sup>21</sup> Proceedings were brought by the sole shareholder and director of a company who, discovering that without her knowledge her shares and directorship had been transferred to another, addressed a request to the company for access to all of the personal information held by the company about her.<sup>22</sup> Although the request was not complied with, her name reappeared in the register before the day of the hearing.<sup>23</sup> The plaintiff had clearly been manipulated by her former partner who, whilst being an undischarged bankrupt, had operated as a "shadow director" of the company. In assessing the damages the Tribunal stated:<sup>24</sup>

... the circumstances of fraud make the facts particularly serious and we have determined in this case that \$20,000 is the appropriate figure to reflect the unique facts. ... timely compliance with the request for personal information would have facilitated an early end to the apparent manipulations.

Likewise, *Lothead-MacMillan v AMI Insurance Ltd* concerned a request for information about the plaintiffs collected in connection with their insurance claim.<sup>25</sup> The Tribunal held that the defendant, which the Tribunal noted according to its website was at the time the largest wholly New Zealand owned fire and general insurance company, failed to comply with statutory time limits,<sup>26</sup>

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19 *Director of Human Rights Proceedings v Valli & Hughes*, above n 17.

20 For a wider discussion of privacy issues concerning employment see Paul Roth "Employment Law" [2016] NZ L Rev 646.

21 *Director of Human Rights Proceedings v INS Restorations Ltd*, above n 17.

22 At [1]. The requested information included the share transfer form, the notice of resignation as director and the corresponding Board resolutions.

23 At [1].

24 At [67].

25 *Lothead-MacMillan v AMI Insurance Ltd*, above n 9.

26 See Privacy Act, s 40.

amounting to an interference with privacy.<sup>27</sup> Somewhat disturbingly, it emerged that the defendant's branch manager had believed that acceptance of the insurance claims would dispose of the need for the information to be provided, despite the plaintiffs making subsequent information requests.<sup>28</sup>

This indicates, perhaps, a lack of knowledge of the most basic of the Act's requirements. The existence of erroneous beliefs by the defendant that, first, personal information could be withheld until the payment of professional fees and, second, that accounting information and records were not personal information, were likewise evidenced in *Director of Human Rights Proceedings v Hamilton*,<sup>29</sup> where significant damages were awarded against an accountant.<sup>30</sup>

It will be shown below in Parts VI and VII that the Tribunal's approach has changed in the respective periods where Hindle and Haines have been its chairpersons. The changes may at least partly be explained by the egregious nature of contraventions as well as the parties responsible for them in the 2012–2016 period. These differences undoubtedly presented an opportunity for the Tribunal to greatly augment the remedies awarded to plaintiffs. It is significant, for instance, that three of the four cases where the Tribunal ordered training orders as a remedy were against private sector defendants. Whether consciously or otherwise the factors at play where a defendant is providing services for profit may differ from where the defendant is a public sector agency carrying out its functions.

By comparison, the previous five years under Hindle as chairperson contained few cases that were substantially aligned in most respects with the examples above, especially those involving requests for information. Most tended to feature public sector defendants.<sup>31</sup> One exception was *Director of Human Rights Proceedings v QD*, involving a medical practitioner who improperly withheld information from a patient, wrongly assuming that doctor-patient confidentiality overrode the Act.<sup>32</sup> The relatively modest damages award of \$7,500 was further reduced to \$5,000 by the High Court.<sup>33</sup>

The sole decision from the earlier period that was difficult to reconcile with the later cases was *Director of Human Rights Proceedings v Grupen*.<sup>34</sup> Here, a significant contravention of principle 6

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27 Section 66(3).

28 *Lothead-MacMillan*, above n 9, at [7].

29 *Director of Human Rights Proceedings v Hamilton*, above n 13.

30 \$20,000 in damages was awarded in addition to \$7,500 in costs.

31 See for example *Holmes v Commissioner of Police* [2009] NZHRRT 20 at [12]–[13]. Costs of \$5,500 were awarded against the plaintiff who had stubbornly refused to accept an apology and financial settlement from the defendant, instead putting it to the expense of a defended hearing.

32 *Director of Human Rights Proceedings v QD* [2010] NZHRRT 3 at [55].

33 *C v Director of Human Rights Proceedings* HC Auckland CIV-2010-404-1662, 6 September 2010.

34 *Director of Human Rights Proceedings v Grupen* [2010] NZHRRT 22.

occurred when a client sought information held by his lawyer relating to his affairs. The information – which included access to the lawyer's diary entries concerning the plaintiff – was needed by the client in connection with a dispute over the lawyer's fees. Despite the diary being lost,<sup>35</sup> and there being no reasons to have withheld the information contained in it,<sup>36</sup> the defendant behaved in an obstinate manner from the beginning through asserting to the plaintiff that the information was not personal information covered by the Act and then sticking to this position.<sup>37</sup> The damages of \$8,500 awarded against the defendant were significantly less than in comparable cases in the later period where plaintiffs' requests for information had not been taken seriously.<sup>38</sup> Some possible reasons for the discrepancies are explored further below.

Significant contraventions of the Act, besides denial of access to information, have also featured private sector actors during Haines' tenure as chairperson of the Tribunal. The Act imposes obligations on agencies that hold personal information to ensure it is accurate, up-to-date, complete, relevant and not misleading before using it having regard to the purposes for which it is likely to be used.<sup>39</sup> One of the most important spheres of application of this rule is where debt collection and credit reporting are concerned.

*Taylor v Orcon Ltd* was such a case.<sup>40</sup> The defendant, a major telecommunications provider, had demonstrated serious failures within its internal client management processes – with the left hand being ignorant of what the right hand was doing<sup>41</sup> – as well as extremely poor customer relations.<sup>42</sup> These shortcomings led to the Act being contravened when a disputed debt of \$50, which turned out not to be owed in the first place, resulted in the plaintiff, a soldier on deployment with the New Zealand Army, being unable to find rental accommodation for his family or obtain finance to help with relocation.<sup>43</sup> The Tribunal stated the mischief in stark terms as follows:<sup>44</sup>

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35 At [4].

36 At [44]–[45].

37 At [17].

38 At [59]–[64].

39 Privacy Act, s 6, principle 8.

40 *Taylor v Orcon Ltd*, above n 12.

41 At [9]. The customer was told their service was being blocked for non-payment of the account but no service was at the time in fact being provided.

42 At [10]. The customer was ridiculed, not taken seriously and not allowed to speak to a manager.

43 At [45].

44 At [44].

A creditor who instructs a debt collection agency knows not only there is a good chance that legal debt recovery proceedings will follow, but also that the claimed debt will be registered with a credit reporting agency such as Veda ... . In legal proceedings there is opportunity to challenge the claim before a court or tribunal skilled in the adjudication of disputes and bound by the rules of fairness. At a minimum a hearing of the dispute can be required. None of these protections apply when a credit reporting agency provides a credit rating. The request for a credit rating and the response occurs without notice to the person inquired about, without their knowledge and without an opportunity to be heard. There is little or no practical recourse when a person's credit rating is reported in negative terms and there is no right of appeal. The right to request correction of credit information under the Credit Reporting Privacy Code is most often an ex post facto exercise and the individual affected may not even know an adverse credit report has been provided ...

The damages award of \$25,000 was unsurprising given these circumstances. *Taylor v Orcon Ltd* is discussed further below in relation to the success rates of litigation in the Tribunal.

### ***A The Challenge of Social Media***

By far the most significant case to have thus far come before the Tribunal and the first to involve social media was *Hammond v Credit Union Baywide*, the "cake icing" case mentioned at the outset.<sup>45</sup>

In this case, the plaintiff and a colleague had been amongst the best-qualified and talented employees at Baywide, which led senior managers who felt threatened by them to persecute them. Ironically, one of the concerns that had been raised by the plaintiff was Baywide being put at legal risk for non-compliance with the Privacy Act amongst other legal requirements.<sup>46</sup> After resigning, the plaintiff iced a cake expressing her feelings towards her employer at a private function for a former colleague who had resigned before her. She then uploaded its image onto her Facebook page, with privacy settings limiting access to it to her friends.

Baywide, however, responded to news of the private function through its human resources manager coercing a junior employee, who happened to be a Facebook friend of the plaintiff's, to allow access to her Facebook profile in order that a screenshot of the expletive-laden cake could be obtained. This image was then widely circulated to recruitment agencies throughout the region, damaging the plaintiff's future employment prospects, in addition to being circulated internally.<sup>47</sup>

Furthermore, Baywide applied economic pressure on the plaintiff's new employer – a subcontractor to Baywide – to fire her under the 90-day trial period term that had been included in her

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45 *Hammond*, above n 2. For a detailed discussion of the legal issues raised by the case for both employment and privacy law see Roth, above n 20, at 668.

46 *Hammond*, above n 2, at [13] and [127].

47 At [45] and [54]. The junior employee felt compelled to resign shortly thereafter, the employer bullying therefore resulting in the loss of three employees: at [43].



employment agreement, although in the event she left of her own accord so as not to cause undue financial and personal hardship to her new employer.<sup>48</sup> The plaintiff, who had held a senior position at Baywide, struggled to find employment for a considerable time thereafter and was ultimately able to work only at a much lower level, which was humiliating and demeaning, personally and professionally.<sup>49</sup> In addition, she had been unable to approach recruitment agencies due to Baywide's actions, being forced to approach employers directly, and had been uncertain on each occasion whether the screenshot of the cake had been disclosed to them.<sup>50</sup>

These facts were undoubtedly taken into account in the Tribunal's unprecedented award of \$168,000 in damages against Baywide,<sup>51</sup> as it was stated that the case is "arguably the most serious to have come before the Tribunal to date".<sup>52</sup> It was material also that Baywide had initially obfuscated as to its conduct when the Privacy Commissioner investigated the case and their eventual apology was found to be insincere.<sup>53</sup> The Tribunal also made specific orders restraining future conduct as well as requiring retraction of the messages with the screenshots to all those to whom they had been sent,<sup>54</sup> a formal apology<sup>55</sup> and, most important of all, that a training programme be implemented by Baywide, at its own expense and under the Privacy Commissioner's supervision, for staff as to their obligations under the Privacy Act.<sup>56</sup> The lawfulness of the latter order as well as the appropriateness of the unprecedented damages award are considered at greater length in the discussion in Part VI as to the evolving nature of remedies in the Tribunal.

Three key aspects in *Hammond* warrant further discussion. First, no contravention of principles 1 to 4 (known collectively as the Act's "collection" obligations) were found to be actionable due to the difficulties in establishing a causative link between the way in which the screenshot was obtained and the harm that resulted to the plaintiff.<sup>57</sup> The Tribunal referred to previous authority that, whilst

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48 At [53].

49 At [55].

50 At [54].

51 At [189]. The award under s 88(1) of the Privacy Act was made up as follows: \$38,000 for lost income, \$15,000 for legal expenses, \$16,000 for career regression and the largest element, \$98,000 for humiliation, loss of dignity and injury to feelings. However, no formal costs were awarded as the plaintiff had represented herself.

52 At [179].

53 At [179].

54 See Privacy Act, s 85(1).

55 Section 85(1)(d).

56 *Hammond*, above n 2, at [189]; and see Privacy Act, s 85(1)(d)–(e).

57 At [134]; and s 6.

inferences that harm resulting from a breach may be made, these could not be automatic.<sup>58</sup> The reputational damage to the plaintiff could, for argument's sake, have occurred through communications between the defendant and recruitment agencies independent of the screenshot. Despite this, Professor Roth has commented that the Tribunal's approach is somewhat perplexing as, undoubtedly, the screenshot was the mischief from which all the others followed.<sup>59</sup> Subsequent to *Hammond*, the Tribunal itself has adopted a more relaxed approach to causation in *Taylor v Orcon Ltd*.<sup>60</sup> This is analysed in Part V.

It is therefore worthwhile to consider, within the constraints of the present article, if any of these collection obligations may have been breached, or when an employer might in general terms be able to argue its conduct was warranted. It suffices to say that principles 1 to 4 deal with the legitimacy, manner and fairness of the means by which the information is acquired. For example, principle 2 does not allow information about an individual to be collected from persons other than that individual with some exceptions; whilst principle 1 forbids information from being collected in the first place where it is unconnected with a function or activity of the agency that seeks to collect it.

In this context, Roth has noted the power imbalance that normally prevails between the parties in the employment arena as well as the legitimate interests an employer might have that often need to be balanced against the privacy expectations of employees.<sup>61</sup> Indeed the courts have long recognised that conduct outside the workplace that brings the employer into disrepute can be a legitimate concern of employers.<sup>62</sup>

In assessing the applicability of this principle in the social media environment, however, any judgment ought properly to consider whether the information was collected prior – for example whilst evaluating a prospective employee – during or after the employment relationship. Clearly, the further one moves from either end of this spectrum the less able an employer will be to argue the collection is necessary. On the facts of *Hammond*, though, no suggestion had been made that the screenshot was necessary for any legitimate purpose of the employer, it being instead motivated by hostility to the plaintiff with the intention of harming her.<sup>63</sup>

On the other hand, in assessing the severity of emotional harm suffered by the plaintiff, as a consequence of the defendant's breach of principle 11 through disclosure of the screenshot, the

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58 *Winter v Jans* HC Hamilton CIV-2003-419-854, 6 April 2004 at [33]–[34].

59 Roth, above n 20, at 670.

60 *Orcon*, above n 12.

61 Paul Roth "Jurisdictional Options: the Human Rights Track" (paper presented to New Zealand Law Society Employment Law Conference, Auckland, October 2008) at 134.

62 See *Smith v Christchurch Press Company Ltd* [2001] 1 NZLR 407 (CA) at [21].

63 *Hammond*, above n 2, at [180].

Tribunal did take into account the bullying of the employee who had been forced to access her own Facebook page on the manager's computer.<sup>64</sup> In part, this enabled it to distinguish it from the previous highest award under this category.<sup>65</sup> Harm to the coerced employee could not, of course, also be considered to be harm to the plaintiff, particularly as the Tribunal had expressly chosen not to express any opinion as to whether the obtaining of the screenshot constituted a contravention of the Act.

A more sanguine reading of the Tribunal's assessment of harm where the screenshot is concerned, might, on the other hand, see it as referring to the egregious nature of the information that was disclosed in breach of principle 11. The fact the information had been obtained through betrayal of friendship in the first place undoubtedly exacerbated the injury to the plaintiff. In a similar vein, despite the unavailability of exemplary damages under the Act,<sup>66</sup> the Tribunal stated:<sup>67</sup>

The award of damages is to compensate for humiliation, loss of dignity and injury to feelings, not to punish the defendant. The conduct of the defendant may, however, exacerbate (or, as the case may be, mitigate) the humiliation, loss of dignity or injury to feelings and therefore be a relevant factor in the assessment of the quantum of damages to be awarded for the humiliation, loss of dignity or injury to feelings.

The second aspect in *Hammond* that merits discussion is the Tribunal's approach to the defendant's submission that the plaintiff lacked "clean hands" through breaching her duty of fidelity to it (the employer) by uploading the photograph to her Facebook page.<sup>68</sup> This raised the interesting issue as to whether the defendant could avail itself of any existing exceptions in principle 11 that would countenance the disclosure of the screenshot. In addressing the issue, the Tribunal offered the following obiter statement:<sup>69</sup>

The point which appears to have been lost on NZCU Baywide is that Principle 11 is about the responsibilities of the agency which has collected the personal information. The restrictions attach to the agency. Principle 11 does not permit (or condone) the disclosure of personal information on the grounds there has been supposed misconduct on the part of the individual.

In the first place, the Tribunal found there had in fact been no misconduct by the employee as the context in which the words on the cake were expressed vindicated their use.<sup>70</sup> This finding has some resonance with statements by the Employment Court that words and conduct must be taken in their

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64 At [181].

65 This was the \$40,000 awarded in *Hamilton v The Deanery 2000 Ltd* [2003] NZHRRT 28.

66 See Evans, above n 5.

67 *Hammond*, above n 2, at [170].

68 At [161].

69 At [162].

70 At [163].

context, viz, words which on their own may appear to indicate misconduct may take on an entirely different meaning when seen in their context – when for instance both parties to a communication were aware of the facts it relates to.<sup>71</sup>

It should be noted, also, that the Act does not contain any counterpart to employment legislation whereby the extent to which an employee contributed to the situation that gave rise to the personal grievance may be taken into account when deciding the nature and extent of remedies to be provided.<sup>72</sup> In addition, the exceptions to principle 11 of the Act are tightly drawn with the only possible exception that could have been invoked in the circumstances of *Hammond* being a belief on reasonable grounds that the source of the information is a publicly available publication.<sup>73</sup> Although this was only tangentially dealt with by the Tribunal, through the comment that once a disclosure contravening principle 11 of the Act has been proven the burden to show that an exception applied<sup>74</sup> shifted to the defendant,<sup>75</sup> it is worth further examination in the context of the present article. The term "publicly available publication" is defined as follows:<sup>76</sup>

... a magazine, book, newspaper, or other publication that is or will be generally available to members of the public; and includes a public register ...

It is questionable whether the Facebook post, accessible to 150 friends, falls into this category. The number of friends would be fairly typical of most Facebook users in the position of the plaintiff. It has been argued that the function of social networks is not to give public access to individual's information but rather to allow individuals to share their information with only those they choose.<sup>77</sup> That may be so, but the nature of digital media, which facilitates replication and distribution of information, might transform a private post into a publication. The courts have pointed to social media such as Facebook being qualitatively different to other communications.<sup>78</sup> On the other hand, even a private conversation between friends in a bar can nowadays be recorded by a stranger on a device and

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71 See for example *Booth v Big Kahuna Ltd* [2014] NZEmpC 134, [2014] ERNZ 295 at [65].

72 Employment Relations Act 2000, s 124.

73 Privacy Act, s 6, principle 11(b).

74 See s 87.

75 *Hammond*, above n 2, at [190].

76 Privacy Act, s 2.

77 Gehan Gunasekara and Alan Toy "'My-Space' or Public Space: The Relevance of Data Protection Laws to Online Social Networking" (2008) 23 NZULR 191 at 203. For a different perspective see Paul Roth "Data Protection Meets Web 2.0: Two Ships Passing in the Night" (2010) 33 UNSWLJ 532; and Paul Roth "Employment Law" [2014] NZ L Rev 453 at 478–479.

78 *Hook v Stream Group (NZ) Pty Ltd* [2013] NZEmpC 243, (2013) NZELR 427 at [29]; and *Senior v Police* [2013] NZHC 357, [2013] NZFLR 356 at [6].

broadcast to millions instantaneously. Thus, the divide between the digital and physical world may be more imagined than real.

It is therefore suggested that the correct approach must be a case by case assessment of whether the belief, as to the source being a publicly available publication, was reasonable. In the case of *Hammond*, any such belief could not be said to have been reasonably held as the employer had resorted to coercion to obtain a screenshot of the publication and had been unable to obtain it readily as might a member of the public.<sup>79</sup> Furthermore, no evidence was adduced before the Tribunal that the picture was widely available to members of the public in the region or, indeed, within professional circles prior to the defendant circulating it.

The third and final aspect of *Hammond* to be considered is the basis on which damages were awarded by the Tribunal. Roth has argued that the award of monetary damages for the "loss of any benefit",<sup>80</sup> in respect of the pressure applied to the plaintiff's new employer to dismiss her, did not involve a breach of principle 11 as it was not a consequence of the defendant's disclosure of "information that the employer did not already know".<sup>81</sup> This is because the new employer had seen the physical cake prior to seeing its screenshot and was already cognisant of the information contained in it.<sup>82</sup> Once again, however, a more sanguine view might regard the disclosure of the defendant's opinions concerning the Facebook picture and its cautions to the new employer as amounting to a disclosure of new information about the plaintiff,<sup>83</sup> thereby vindicating the Tribunal's conclusion if not its reasoning as to this aspect.

*Hammond* is no doubt an exceptional case, but the employer's "high-handed and impulsive reaction" to the icing on the cake led, in the Tribunal's words, to "the infliction of serious harm not only on Ms Hammond but also on itself, its staff, its image and reputation".<sup>84</sup> The case highlights in stark terms deficiencies in the private sector in training employees as to the Act's requirements, a frequent refrain in the cases catalogued for this article.

## ***B Jurisprudential Developments***

The cases contained in the most recent period surveyed by this article raise several novel jurisprudential issues that suggest the principles-based rules in the Act are capable of evolution in order to address the matters brought before the Tribunal. Some of these have concerned the application

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79 See *The Sensible Sentencing Group Trust v The Human Rights Review Tribunal* [2014] NZCA 264 at [33].

80 Privacy Act, s 88(1)(b).

81 Roth, above n 20, at 671.

82 *Hammond*, above n 2, at [140]–[141].

83 At [140].

84 At [188].

of new technologies; *Hammond* is an example of litigation under the Act about the use of social media. Similarly, *Armfield v Naughton* was a case involving an acrimonious dispute between two neighbours over the defendant's use of several CCTV cameras that had been aimed at and had collected information about the plaintiff.<sup>85</sup> The cameras were ostensibly used in connection with the defendant's bed and breakfast business,<sup>86</sup> but were deliberately used in such a way to make the plaintiff believe his wife and children were being recorded. When the plaintiff, who was unsure as to the defendant's motives, asked for access to the digitally stored content, he was rebuffed with the response "not without a search warrant".<sup>87</sup>

*Armfield* therefore engaged the Act's collection principles,<sup>88</sup> as well as the right to access personal information.<sup>89</sup> The Tribunal referred to the linkages between these. For instance the "information asymmetry" meant those under surveillance had no way of knowing if limits on the extent of it were being observed absent their right to access the data.<sup>90</sup> It did not, however, require the Tribunal to address the "domestic affairs" exemption,<sup>91</sup> as the defendant had accepted the cameras were being used in connection with his business and not for his personal, family or household purposes.<sup>92</sup>

The Tribunal therefore had to deal with some fundamental conceptual features of the Act in applying it to the circumstances of the dispute. The question of "collection", for instance, is fundamental to the first four principles. The Tribunal adopted the submission of the Privacy Commissioner to the Law Commission;<sup>93</sup> it concluded that:<sup>94</sup>

The Act does not limit the term "collect" other than to exclude receipt of unsolicited information. The meaning of "collect" must therefore be ascertained from the text and purpose of the Privacy Act.

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85 *Armfield v Naughton* [2014] NZHRRT 48.

86 One of the cameras, for example, provided a view of Mt Taranaki beyond the plaintiff's home, which was streamed live to the bed and breakfast website to provide a real-time picture of the mountain: at [8].

87 At [12].

88 Privacy Act, s 6, principles 1–4.

89 Section 6, principle 6.

90 *Armfield*, above n 85, at [56].

91 Privacy Act, s 56.

92 *Armfield*, above n 85, at [30].

93 *Law Commission Report*, above n 4, at [2.84].

94 *Armfield*, above n 85, at [44].

It further developed this by stating that such a purposive approach led to a meaning that included "gathering together",<sup>95</sup> and that:<sup>96</sup>

A narrowing of the protection of the Privacy Act to those circumstances in which information is received and then only by soliciting in the sense of "to ask for" would be inconsistent with the promotion and protection of personal privacy.

This statement is laudable as it demonstrates, for example, the ability of key concepts contained in the Act to be adapted to evolving technologies such as the Internet of Things and Big Data. The Tribunal further interpreted the statutory exclusion of "unsolicited information" narrowly,<sup>97</sup> concluding it was:<sup>98</sup>

Information which comes into the possession of the agency in circumstances where the agency has taken no active steps to acquire or record that information.

Accordingly, such exclusion would not apply to any automated system of surveillance, including CCTV, where steps have been taken to set up the system of collection. The same would be the case where, say, an employer installs software that allows an employee's keystrokes to be logged or even a simple radio-frequency identification (RFID) system that tracks employees' entry and egress to a building or movements within it.

In applying the Act to the facts, the Tribunal held that in order to comply with principle 1 the information collected by an agency must be both connected with a lawful function of the agency and reasonably necessary for that purpose.<sup>99</sup> It further held that application of this principle substantially overlapped with principle 4, which protects against unfair collection of information when it intrudes to an unreasonable extent on the affairs of the individual concerned.<sup>100</sup>

The Tribunal found both principles to be contravened at least where the positioning of some of the cameras was concerned, as they collected footage that was not connected with the defendant's legitimate operations without using masking technology that obscured members of the plaintiff's

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95 At [44].

96 At [44].

97 Privacy Act, s 2(1).

98 *Armfield*, above n 85, at [44].

99 At [60].

100 At [60].

family.<sup>101</sup> Likewise, principle 6 had been contravened as the refusal to comply with the plaintiff's information request, without reasons, did not amount to a "decision" concerning the request.<sup>102</sup>

*Holmes v Housing New Zealand Corp*, on the other hand, was a case that raised systemic issues as to the operation of the Act and is therefore undoubtedly of wider significance for the interpretation of the privacy principles.<sup>103</sup> It concerned a vulnerable beneficiary caught between two state agencies each of which wished to collect information from him for different purposes. This led to the predicament where the plaintiff was put in the position of losing a benefit if he failed to agree to information provided to one agency for its purposes being also shared with the other agency.<sup>104</sup>

In observing that principle 1 was an "overarching" principle from which the others flowed and ought, therefore, to be given a "broad and purposive interpretation",<sup>105</sup> the Tribunal had to again consider the concept of "collect" as the agency had not, in fact, collected the information complained of since the plaintiff had, instead, chosen to forego the benefit. Referring to the seminal OECD Guidelines,<sup>106</sup> the Tribunal concluded:<sup>107</sup>

... collection is not an event (ie receipt of the data) but a process for the collection of data. That process must be in place, *prior to the receipt of the data* ...

Crucially, the Tribunal found that principle 1 could have application for an agency prior to the actual receipt of personal information.<sup>108</sup> It further observed that other collection principles contained in the Act could likewise be engaged.<sup>109</sup> It was thus found that principle 1 was engaged in this instance because a state institution had set up a system for collecting personal information from an identifiable class of persons that sought to collect information that was not reasonably necessary for the defendant agency's legitimate purposes.<sup>110</sup>

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101 At [64]–[65]. The Tribunal observed that, despite the defendant claiming to have studied both the Act and the Privacy Commissioner's CCTV Guidelines, "little had been understood or learnt" as the cameras were installed in an uncommunicative and confrontational manner: at [27].

102 At [73]. See Privacy Act, ss 40(1) and 44.

103 *Holmes v Housing New Zealand Corp* [2014] NZHRRT 54.

104 At [49].

105 At [71].

106 OECD "Guidelines on the Protection of Privacy and Trans-border Flows of Personal Data" (2013) <[www.oecd.org](http://www.oecd.org)>.

107 *Holmes*, above n 103, at [75] (emphasis added).

108 At [76].

109 At [77]. See also Privacy Act, s 6, principle 3(2).

110 At [82] and [114].



Despite the Tribunal citing the opinion of Stephen Penk,<sup>111</sup> that the generally-worded and imprecise statements of principles over more prescriptive rules risks uncertainty,<sup>112</sup> it can be seen in *Holmes* that the Tribunal was nonetheless able to adapt them in order to address systemic failings within an agency. In this regard, the principles-oriented architecture of the Act can be said to be superior to more prescriptive rules that risk technological obsolescence.<sup>113</sup> Furthermore, *Holmes* vindicates the Law Commission's recommendation to retain the principles-based approach and existing framework,<sup>114</sup> whilst reforming the Act through empowering the Privacy Commissioner to address systemic issues through issuing compliance notices.<sup>115</sup>

#### ***IV NATURE OF PLAINTIFFS***

The research conducted for this article followed, in part, the methodology of earlier studies that have explored the varied contexts in which litigation under the Act was brought.<sup>116</sup> These contexts again revealed that most of the disputes brought before the Tribunal in the period of the current survey were linked to pre-existing disputes between the parties not involving privacy, or to pre-existing relationships that had broken down for one reason or another. Eighty-one per cent of the cases fell into this category whilst 19 per cent could not be identified with any certainty as being so linked and were therefore catalogued as being contextually connected with privacy alone. There was little, if any, difference in this trend between the Hindle and Haines Tribunals. A related inquiry was the specific nature of the disputes that led to the cases before the Tribunal. These categories are represented in the diagram below.

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111 At [80].

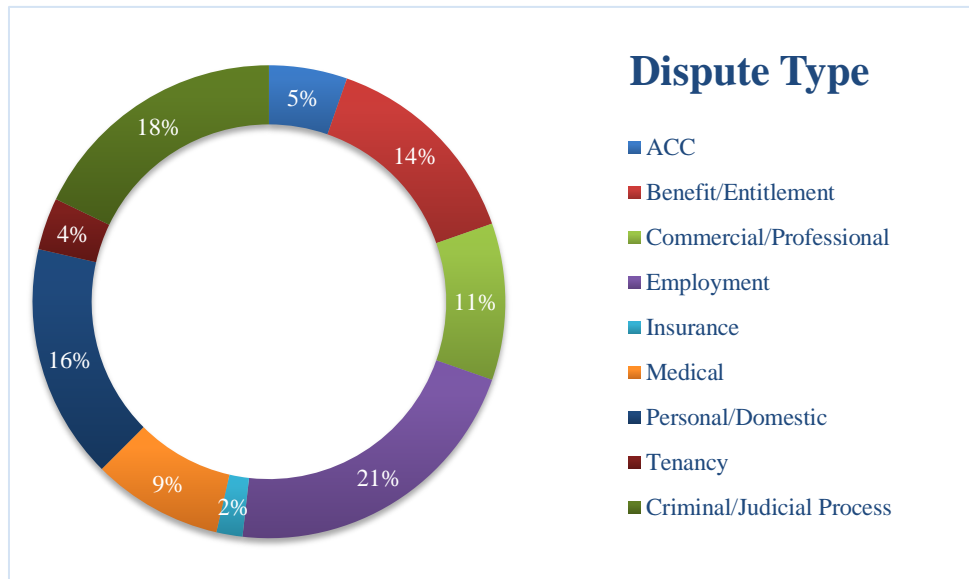
112 Stephen Penk "The Privacy Act 1993" in Steven Penk and Rosemary Tobin (eds) *Privacy Law in New Zealand* (Brookers, Wellington, 2010) 49 at 55.

113 Gunasekara and Toy, above n 77.

114 *Law Commission Report*, above n 4, at 2.10.

115 At ch 6 and R63. The proposals have been accepted by the New Zealand Government: see Cabinet Paper "Reforming the Privacy Act 1993" (13 March 2014) at [59].

116 Gunasekara and Van Klink, above n 7.

**Graph 1 (total number of cases = 56)<sup>117</sup>**

It is apparent that disputes with some connection to employment accounted for the lions' share,<sup>118</sup> although criminal law and matters connected with judicial processes were not far behind. The next largest category was labelled personal and domestic as it included many matters within the domestic or family sphere including disputes involving neighbours,<sup>119</sup> school boards,<sup>120</sup> and children and young persons.<sup>121</sup> As was expected, matters arising from benefits and entitlements also featured prominently.<sup>122</sup> For example, in one instance a delay in responding to an information request had led

<sup>117</sup> Human Rights Review Tribunal cases, 2007–2016.

<sup>118</sup> Some of the cases in this area overlapped with other categories but an assessment was made as to the nature of the dispute irrespective of where it emanated from. For example *Waxman v Pal* [2016] NZHRRT 28 concerned a doctor who was caught moonlighting in contravention of her employment agreement, resulting in termination, but this was classified as being related to employment rather than medical. Compare *Director of Human Rights Proceedings v QD*, above n 32.

<sup>119</sup> *Armfield*, above n 85.

<sup>120</sup> *Steele v Board of Trustees of Salisbury School* [2012] NZHRRT 20.

<sup>121</sup> *Z v Commissioner of Police* [2010] NZHRRT 12.

<sup>122</sup> See for example *NG v Commissioner of Police* [2010] NZHRRT 16.

to a plaintiff's visitor's visa being endangered; this demonstrates the crucial role played by information rights in this area.<sup>123</sup>

Even though litigation involving commercial and professional dealings was only fifth overall, as represented in the diagram, these cases are becoming increasingly prominent. The remainder were matters in relation to medical information, accident compensation (ACC), insurance and tenancy. The relative paucity of cases featuring ACC probably reflects significant improvements made by that organisation as to its information processing practices following a major independent review.<sup>124</sup> An exception in this regard was *Geary v Accident Compensation Corporation*, where \$20,000 in addition to \$18,000 in costs was awarded to the plaintiff whose request for information had been refused on spurious grounds.<sup>125</sup>

A number of plaintiffs in both periods of this study could be described as being vexatious in the broadest sense, although in only one instance were attempts made to have an individual formally declared as such.<sup>126</sup> Many of these were cases where a litigant had been unsuccessful, in a forum other than the Tribunal and in relation to a matter other than contravention of the Act, but were now seeking to continue the conflict through means of the Act. Indeed many of the litigants were individuals with considerable experience in dealing with government agencies and reasonably familiar with the laws they operated under. This is a factor the courts have said must now be taken into account, especially when determining what is a "reasonable" standard for giving assistance to a person making an information request.<sup>127</sup> As illustrated by the litigant in question:<sup>128</sup>

... by quoting and distinguishing between what he was entitled to under the Privacy Act, under the Official Information Act, and under the Ombudsmen Act. He was not a hapless beneficiary in need of help. On the contrary, he was and is an intelligent, well-informed beneficiary, who has argued familiarity with various statutes which provide him remedies.

One individual was responsible for five substantive proceedings before the Tribunal.<sup>129</sup> In one instance, despite a declaration in his favour being made, costs of \$5,500 were awarded against him due to the defendant having been put to the expense of a defended hearing despite a reasonable

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123 *Koso v Chief Executive, Ministry of Business, Innovation and Employment* [2014] NZHRRT 39.

124 KPMG and Information Integrity Solutions *Independent Review of ACC's Privacy and Security of Information* (Privacy Commissioner and Accident Compensation Corporation, 22 August 2012).

125 *Geary v Accident Compensation Corporation* [2013] NZHRRT 34.

126 *Reid v New Zealand Fire Commission* [2008] NZHRRT 8 at [2].

127 *Holmes*, above n 1, at [78]–[79].

128 At [78].

129 Gordon Henry Holmes.

settlement offer having previously being made.<sup>130</sup> Another was responsible for at least six none of which were successful.<sup>131</sup> Furthermore, a clear trend that emerged in the Tribunal during the period of Haines' tenure has been the articulation of "standards to be expected of a litigant",<sup>132</sup> contravention of which constitute grounds for denial of a remedy even where the technical elements for a contravention of the Act are present.

For example, in *Rafiq v Commissioner of Inland Revenue* it was found that:<sup>133</sup>

The repeated, calculated and wholly unjustified attacks which Mr Rafiq has made on virtually all persons who have had dealings with him are serious. We find that his behaviour is properly described as an "exceptionally egregious" breach of the standards to be expected of a litigant and for that reason declaratory relief is to be denied.

Likewise, in *Steele v Board of Trustees of Salisbury School* declaratory relief was denied as the plaintiff's communications with the other party had been made in aggressive and offensive terms and had contained unfounded allegations.<sup>134</sup>

In several of the cases in both periods, however, were instances where unsuccessful plaintiffs had large costs rulings made against them. One such case was *Cameron v Police*.<sup>135</sup> Thus, it will be noted there are significant disincentives to plaintiffs who choose to use the Act in order to perpetuate a campaign of abuse as well as those with legitimate grievances who spurn reasonable attempts at conciliation in order to "have their day in court".

## **V SUCCESS RATE FOR PLAINTIFFS AND ITS RELATIONSHIP TO REPRESENTATION**

In the ten-year period covered by this article, 55 per cent of claims were unsuccessful in the Tribunal.<sup>136</sup> This marks a slight improvement overall of success rates for litigants over the period covered in the most recent previous study.<sup>137</sup> However, this does not reveal the entire picture as there was a marked increase in success rates in the five years after Haines became chairperson.

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<sup>130</sup> *Holmes v Commissioner of Police*, above n 31.

<sup>131</sup> *Rafiq v Commissioner of Inland Revenue* [2012] NZHRRT 12.

<sup>132</sup> *Geary v New Zealand Psychologists Board* [2012] NZHC 384 at [108].

<sup>133</sup> *Rafiq*, above n 131, at [49].

<sup>134</sup> *Steele v Board of Trustees of Salisbury School*, above n 120, at [56].

<sup>135</sup> *Cameron v Police* [2010] NZHRRT 11. The Tribunal stated at [14]: "The fact that Mr Cameron refused to settle at that time and on those terms should operate to significantly increase the ultimate award".

<sup>136</sup> Success denotes a remedy of one kind or another awarded under the Privacy Act, s 85.

<sup>137</sup> *Gunasekara and Van Klink*, above n 7, at 234.

Notably, in this regard, only 32 per cent of claims succeeded in the five-year period during which Hindle was chairperson. By contrast, 68 per cent were unsuccessful in this period. During the five years to date since Haines became chairperson, however, 54 percent of claims were successful. It can be seen therefore that the majority of litigants can now expect to be successful. It is also striking that this trend is at variance with prevailing success rates of litigation observed by earlier studies of litigation in the Tribunal.<sup>138</sup>

The relationship of success rates to representation, however, was by far the most revealing aspect discerned from the data gathered by the study. Representation, in this context, encapsulated several categories and differed from where say the plaintiff appeared in person before the Tribunal to advance his or her claim.<sup>139</sup> These included legal representation, "McKenzie-friends" as well as those cases brought on their behalf by the Director of Human Rights Proceedings (DHRP), which obviously would be legal in nature.

The data reveals that representation makes a noticeable difference as to success rates but that in the most recent five-year period it can be seen to overwhelmingly improve the chances of success especially where legal representation is involved. Put another way, in the Tribunal during Haines' tenure to date, a litigant with legal representation has an 85 per cent chance of success. This compares with 42 per cent under the comparable period of Hindle's tenure.

The two sets of tables below compare the two periods as far as the effect of representation is concerned.

**Table 1 (total number of cases = 14)**<sup>140</sup>

Success Rate with Representation: Hindle Tribunal	Number of Cases	Percentage Value
Successful	6	43%
Unsuccessful	8	57%

**Table 2 (total number of cases = 20)**<sup>141</sup>

Success Rate with Representation: Haines Tribunal	Number of Cases	Percentage Value
Successful	15	75%
Unsuccessful	5	25%

138 See Gunasekara and Dillion, above n 6; and Gunasekara and Van Klink, above n 7.

139 See for example *Fehling v South Westland Area School* [2012] NZHRRT 15.

140 Human Rights Review Tribunal cases, 2007–2011.

141 Human Rights Review Tribunal cases, 2012–2016.

Linked to these trends it is pertinent to observe also a declining trend regarding the proportion of cases brought before the Tribunal due to referral by the Privacy Commissioner through the DHRP.<sup>142</sup> These referrals have slowed to a trickle with only two each in the years 2015 and 2016,<sup>143</sup> and many of the successful claims before the Tribunal have been those brought and funded by individuals, including *Hammond* itself. As seen above, these individuals were more likely to be successful when they were supported by representation, with legal representation having the greatest impact.

A likely explanation for the more recent success rates of litigants could be the Haines Tribunal's more relaxed attitude towards causation, which may have been at play earlier but was first explicitly articulated in the *Orcon* decision.<sup>144</sup> In this seminal decision, the Tribunal pointed to the reality that harm is "seldom the outcome of a single cause",<sup>145</sup> citing the leading text on torts by Stephen Todd.<sup>146</sup> This led to the Tribunal stating that:<sup>147</sup>

It is not necessary for the cause to be the sole cause, main cause, direct cause, indirect cause or "but for" cause. No form of words will ultimately provide an automatic answer to what is essentially a broad judgment.

In this respect, the Tribunal expressly disapproved of the opinions of the Privacy Commissioner's investigating staff who were found to have applied an "unrealistically high" causation standard "at odds" with the language and purpose of the Act.<sup>148</sup>

Finally, previous studies of privacy litigation in the Tribunal have found that only in a few instances have the courts shown a willingness to interfere with the Tribunal's discretion in awarding remedies.<sup>149</sup> The role played by the High Court with regards to the types and legitimacy of remedies awarded in the time frame of the present research is discussed below in relation to the evolving nature of remedies. However, it is worth noting that the success rate of appeals to the High Court was very

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142 Privacy Act, s 77(3).

143 Privacy Commissioner *Annual Report 2016* (Office of the Privacy Commissioner, 2016).

144 *Orcon*, above n 12.

145 At [60].

146 Stephen Todd (ed) *The Law of Torts in New Zealand* (6th ed, Thomson Reuters, Wellington, 2013) at [20.2.02].

147 *Orcon*, above n 12, at [61].

148 At [63]. The Commissioner had required the plaintiff to establish that the presence of the *Orcon* default on his credit report was the reason for his inability to obtain both accommodation and a loan.

149 Gunasekara and Dillon, above n 6, at [18].

small in the period of this study with only five being partially successful with no Tribunal decisions being reversed in their entirety.<sup>150</sup>

## **VI NATURE OF REMEDIES AWARDED**

Under the Act, the Tribunal is able to award one or more of five types of remedies being declaratory, injunctive, monetary, specific performance as well as the catch-all "other relief".<sup>151</sup> The current period under study revealed that declarations were most prevalent followed by damages and then other remedies such as performance orders. However, a discernible trend was an increase in both performance orders and other relief such as training orders. The specific statutory bases for these were not always articulated with clarity.

For instance, *Armfield* involved not only a declaration and damages under s 85(1) of the Act, but also involved the defendant having to undertake a number of specific actions. These were first to make adjustments to the surveillance cameras either physically or through the use of masking software. Secondly, the defendant had to provide the plaintiff with specific information as to the purposes and nature of information collected as required by principle 3 of the Act and this was to be repeated in the event of any changes to the surveillance system. Finally, there was an order requiring destruction of information already collected and written confirmation of it to the plaintiff and their lawyer.<sup>152</sup> Roth has criticised the requirement to comply with the notice requirements in principle 3(1)(a)–(g) as being redundant since the Tribunal had already ordered that no further filming of the plaintiff's property was allowed.<sup>153</sup>

This criticism may have some substance, although a broad reading of principle 3 might, in some circumstances, extend to notification that information had ceased to be collected. Also, the order here was prospective in case any change occurred. In any event, it is noteworthy that the Act was instrumental in restoring communication between the parties and was seen to be capable – in terms of remedies – of providing ongoing reporting obligations where needed.<sup>154</sup> There can be little doubt, in this case, that the Act is sufficiently wide to encapsulate these types of remedies.

Likewise, a significant trend that was evidenced in the period during Haines' tenure was the award of specific performance in relation to making information available when it had been requested. There

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150 See for example *C v Director of Human Rights Proceedings*, above n 33.

151 Privacy Act, s 85(1).

152 *Armfield*, above n 85, at [107].

153 Paul Roth *Privacy Law and Practice* (looseleaf ed, LexisNexis) at [PVA 85.6].

154 *Armfield*, above n 85, at [98].

were seven such orders in this period compared to none in the previous five years.<sup>155</sup> During the earlier period, where information was found to have been improperly withheld, damages tended to be awarded for loss of benefits as well as injury to feelings in addition to declaratory relief.<sup>156</sup> This is especially curious as in some of these cases having access to the information had been of crucial importance to the litigants involved.<sup>157</sup>

On the other hand, the recent trend where the Tribunal has made training orders, under the power to require a defendant to "perform any acts specified in the order with a view to remedying the interference" as well as the catch-all "other relief as the Tribunal thinks fit", raises serious questions as to its jurisdiction.<sup>158</sup> Such orders, witnessed in *Hammond* have been made where the defendant had evidenced a lack of awareness as to the obligations required of it under the Act.<sup>159</sup> The orders inevitably require the organisation and its staff to undergo a training programme, at its own expense, in conjunction with the Privacy Commissioner.<sup>160</sup> They have been made in four cases,<sup>161</sup> all of which were within the 2012–2016 period.

Roth notes that the Human Rights Act 1993 was amended in 2001 to make explicit provision for the making of training orders,<sup>162</sup> but that the provision does not apply to proceedings under the Act.<sup>163</sup> The obvious lack of jurisdiction to make such orders was successfully challenged in the High Court in *Holmes*.<sup>164</sup> The Court accepted two grounds of challenge, the first being the natural justice argument that "once the Tribunal was considering the possibility of finding systemic failure, it should have given the department an opportunity to submit evidence to refute it".<sup>165</sup>

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155 Although in one case during this earlier period, the High Court ordered a limited amount of previously withheld documents to be released: see *Reid v Crown Law Office* HC Wellington CIV-2008-485-1203, 21 April 2009.

156 See for example *Director of Human Rights Proceedings v Gruppen*, above n 34.

157 See for example *Director of Human Rights Proceedings v QD*, above n 32; and *Shahroodi v Director of Civil Aviation* [2011] NZHRRT 6.

158 Privacy Act, ss 85(1)(d)–(e).

159 *Hammond*, above n 2, at [185].

160 In one instance, the defendant was required to attend a workshop at their own expense run by the Office of the Privacy Commissioner: *Director of Human Rights Proceedings v Crampton* [2015] NZHRRT 35.

161 *Hammond*, above n 2; *Taylor v Orcon Ltd*, above n 12; *Crampton*, above n 160; and *Deeming v Whangarei District Council* [2015] NZHRRT 55.

162 Human Rights Act, s 92I(3)(f).

163 Privacy Act, s 89. See also Roth, above n 153, at [PVA 85.6].

164 *Holmes*, above n 1.

165 At [95].



The second substantive ground, however, was that the power conferred by the Act to make orders "remedying the interference", as well as the catch-all "other relief",<sup>166</sup> are not intended to apply in respect of prospective conduct in relation to individuals other than the plaintiff, as the orders were "designed to provide relief to the aggrieved individual".<sup>167</sup> Indeed, earlier High Court authority on the catch-all provision had emphasised that it is:<sup>168</sup>

... to deal with incidental and ancillary matters. It should not be interpreted as an open cheque to provide any relief which the Tribunal after the hearing has concluded ... determines might be appropriate.

It may be that the omission from the 2001 amendments of the specific power to make training orders in the Act was inadvertent. There may also be circumstances – say where the plaintiff has an ongoing relationship with the agency in question – where the making of such orders under the generic provisions in the Act discussed above is merited. The ongoing issuance of the remedy in the cases that have followed the High Court's decision in *Holmes* is, however, problematic. Possible explanations as to why further challenges have not occurred may be due to the fact that the majority of defendants concerned were private sector agencies, together with the adverse publicity that may occur should an agency demonstrate a lack of willingness to undertake training where its procedures have been shown to be deficient.

Two further aspects are raised by the decision in *Holmes*. First, the Court disposed of the argument that the Tribunal was not at liberty to award damages in excess of those sought by the plaintiff by advertent to the non-technical nature of the jurisdiction, distinguishing in this regard cases from the employment arena,<sup>169</sup> whilst emphasising the fact that applicants before the Tribunal frequently lacked legal representation or advice.<sup>170</sup> Secondly, in regard to the discretion afforded to the Tribunal and its chairperson as to damages – raised at the outset of this article – the Court stated as follows:<sup>171</sup>

We do not agree ... that the Tribunal must always take its lead from the High Court. The High Court sits as an appeal Court. The Tribunal is dealing with a much higher number of cases. We see no reason why the Tribunal, at first instance, cannot come to the conclusion that the time has come for a recalibration of the level of awards against which there should be some consistency.

Whether such a recalibration has occurred and its extent are the focus of the next section.

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166 Privacy Act, s 85(1)(d)–(e).

167 *Holmes*, above n 1, at [100].

168 *BHP New Zealand Steel Ltd v O'Dea* (1997) 4 HRNZ 456 (HC) at 478.

169 *McCulloch and Partners v Smith* CA133/03, 3 December 2003.

170 *Holmes*, above n 1, at [108].

171 At [129].

## VII HAS THE TRIBUNAL'S APPROACH TO REMEDIES CHANGED?

As will be now be obvious, significant changes can be seen to have taken place in the Tribunal during the periods examined in this study.

In terms of damages, there has been a noticeable upward trend in the recent period. The table below represents the range, mean and median figures for the five years while Hindle was chairperson.

**Table 3 (total number of cases = 7)<sup>172</sup>**

<b>Damages Awarded: Hindle Tribunal</b>	
Range	\$3,500 to \$10,000
Mean	\$5,812.50
Median	\$6,000

By comparison, the figures for the Haines era represent a startling change. Although the range is extended at both ends, the addition of *Hammond* results in the mean being \$21,782 and the median \$16,000. A better assessment, however, may be made with the removal of *Hammond* on the basis that it is an outlier. The table below represents the range, mean and median figures excluding *Hammond*.

**Table 4 (total number of cases = 17)<sup>173</sup>**

<b>Damages Awarded: Haines Tribunal (excluding Hammond)</b>	
Range	\$400 to \$25,000
Mean	\$13,181
Median	\$15,000

It is apparent that, even excluding the outlier, the mean has doubled and the median has more than doubled. The discussion above has highlighted the changing nature of defendants as well as their conduct as being one possible determinant for this trend. The Tribunal has been less forgiving in relation to private sector defendants than public sector ones, especially where the former have shown a lack of awareness or a blithe attitude towards the obligations contained in the Act. Public sector

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<sup>172</sup> Human Rights Review Tribunal cases, 2007–2011.

<sup>173</sup> Human Rights Review Tribunal cases, 2012–2016.

defendants, however, were more likely to have available one or more exceptions, especially when resisting requests for information.<sup>174</sup>

Nonetheless, the assessment highlights differences in the Tribunal's attitudes as to the relative harms stemming from privacy breaches as contrasted with the breaches of other human rights obligations. In order to do this, the present study made a brief foray to examine the remedies – especially where damages and training orders are concerned – in the Tribunal's parallel human rights jurisdiction.

This comparison showed that, first, in the five-year period studied that Hindle was chairperson of the Tribunal, 29 cases arose in the aforementioned jurisdiction. Damages were awarded in five (the mean being \$46,500 with the median at \$30,000) and training orders in one. The damages were around eight times the average damages that were awarded in the same time frame under the privacy jurisdiction.<sup>175</sup>

During the five-year period to date that Haines has been chairperson of the Tribunal it has presided over 37 cases in the parallel non-privacy jurisdiction with damages being awarded in eight and training orders in four. The mean was \$45,046 and the median was \$28,266. This means that the awards under the non-Privacy Act jurisdiction are now around three and a half times the amounts awarded under the Privacy Act jurisdiction, excluding the outlier of *Hammond*. Taken in this context, the upward trend in the Privacy Act jurisdiction where damages are concerned is thus unexceptional.

Similarly, a brief survey of training orders as a remedy in the Tribunal during the comparable period reveals that only one such order was made during Hindle's tenure,<sup>176</sup> whereas four have been made by the Tribunal under Haines' tenure to date in the parallel non-Privacy Act jurisdiction. In the Haines Tribunal, however, four training orders have also been made under the Privacy Act jurisdiction as outlined above. Leaving aside the legality of the training orders under the Act, this shows consistent treatment of defendants who have shown a lack of awareness as to their obligations under statutes such as the Act, the Human Rights Act 1993, and the Health and Disability Commissioner Act 1994.

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174 The most commonly used exception for resisting an information request was s 29(1)(a) followed by s 27(1)(c) of the Privacy Act. By comparison the most cited exceptions with regard to alleged contraventions of principle 11 were principle 11(a), (d) and (e)(i) of the Privacy Act, s 6.

175 The average damages under the Privacy Act being \$5,812.

176 *EN v EIC* [2010] NZHRRT 9.

On the other hand, it may be premature to say that the amount awarded in *Hammond* was completely out of proportion with human rights awards other than for breach of the Act,<sup>177</sup> as awards in the parallel jurisdiction have more recently also been larger.<sup>178</sup>

The analysis above in comparing the privacy and non-privacy jurisdictions has revealed some interesting data concerning the awards made by the Tribunal. First, during Hindle's tenure the Tribunal has made relatively larger awards of damages in the non-privacy area whilst being more tentative in its awards of damages and other relief in favour of plaintiffs in litigation under the Act.

In comparison, the Tribunal under Haines has been more consistent in its awards in both areas especially in relation to training orders, whilst being more sympathetic towards privacy claims, which are clearly being treated – if the averages are taken into account – as more akin to claims of discrimination under the human rights jurisdiction. This illustrates, more than anything else that the law in this area is governed by discretion rather than being purely rules-driven.

Finally, it is clear that, in the more recent period, the Tribunal has regarded technical contraventions, especially where access to information is concerned,<sup>179</sup> as more serious than previously, relying on the Act's strict procedural rules.<sup>180</sup> The stricter approach may be justified due to the reticence in implementing the Law Commission and Cabinet recommendations that the Privacy Commissioner ought to be empowered, in the first instance, to make enforceable decisions concerning access to information.<sup>181</sup>

### **VIII CONCLUSION**

This article has investigated the changing nature of New Zealand's Privacy Act jurisprudence against the backdrop of prolonged delays in implementing changes to the Act as well as the extent of discretion held by the Human Rights Review Tribunal on the outcomes of litigation before it. It has found that discretion played a significant role alongside other significant trends including the recent growth in the number of private sector defendants before the Tribunal, including some large corporate actors. The article has demonstrated that litigation involving the Privacy Act has affected nearly all sectors and professions, suggesting that data privacy can no longer be seen as a specialist topic of little relevance to mainstream legal practice.

Moreover, the discretion afforded to the Tribunal to provide appropriate remedies, including the award of higher damages, has not, on the whole, been interfered with by courts of law. Thus, the

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177 See for example Roth, above n 20, at 671–672.

178 *MacGregor v Craig* [2016] NZHRRT 6.

179 Privacy Act, s 6, principle 6.

180 Section 40. See also *Hamilton*, above n 13.

181 *Law Commission Report*, above n 4, at [R56]; and Cabinet Paper, above n 115, at [80].

Tribunal has been able to adapt to changing societal expectations regarding privacy. The research has found, in this regard, that higher privacy awards can be seen as playing "catch-up" to awards in the Tribunal's non-Privacy Act jurisdiction.

The Tribunal has to an extent also been able to address the legislative deficit through ordering specific performance as a remedy in relation to providing access to personal information, as opposed to ex post damages for improperly withholding it. In so doing, the Tribunal can be seen to have recognised the utility of personal information as being a vital currency for individuals in the digital age. Likewise, in the last ten years, the Tribunal has further refined and developed New Zealand's principles-based data privacy framework through expounding on the nature of information collection and its application to systems within organisations as well as technologies such as CCTV. A more nuanced approach to causation further illustrates the Tribunal's appreciation of the way in which personal information now shapes individuals' lives.

Finally, the article has found that, despite the existence of the principles-based substantive privacy architecture, the rules-based nature of the remedies provided by the Act constitutes a significant impediment to the development of remedies for systemic privacy failures. Although the principles-based specialist privacy jurisprudence in New Zealand has been shown to be governed to a large extent by discretion, the formalism of rules still to some extent inhibits flexibility. Reducing this formalism can only be achieved through law reform. The Tribunal has shown itself willing to act to address the needs of New Zealand's changing society. The rest is up to Parliament.

