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ADMINISTRATIVE LAW DAMAGES AND PUBLIC LAW COMPENSATION -
REMEDIES FOR ADMINISTRATIVE WRONGDOING

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I INTRODUCTION

First, I consider the traditional remedies available in the judicial review context, and Administrative law is, in general terms, concerned with the lawful exercise of functions and powers by administrative bodies, particularly state agencies and public authorities. In recent years there has been a proliferation of autonomous and quasi-autonomous administrative bodies. Those bodies exercise a wide range of administrative powers, which gives rise to an increased likelihood that any wrongful or improper conduct by such bodies may cause individuals to suffer loss or disadvantage. The scope for unlawful conduct to occur and damage to result is wider than ever.

The underlying theme of the paper is that the courts have blurred the distinct nature of This paper examines the availability of monetary compensation, or damages, to ameliorate or address the consequences of administrative wrongs. The courts have long since assumed a supervisory jurisdiction, judicial review, over the decisions, functions and procedures of public authorities and governmental institutions. Further, over the last thirty years the general principles by which administrators are bound have been articulated thoroughly.

It is accepted that administrators and decision makers must act consistently with the relevant principles of natural justice, and in accordance with the law (for example, by interpreting applicable regulatory provisions correctly). While the principles of natural justice are settled, and much has been written about the scope and availability of review, the remedies for addressing administrative wrongdoing have received little attention.

An important issue for English-derived legal systems in the last few decades has been whether damages are available to individuals who suffer losses by unlawful administrative action. The general position throughout the common law jurisdictions is that the unlawfulness of an administrative act, without more, does not give rise to any remedy in damages.

This paper addresses the availability of administrative law damages, the overlap between administrative law principles and the law of torts, and the recent innovation of 'public law compensation' under the New Zealand Bill of Rights Act 1990.

First, I consider the traditional remedies available in the judicial review context, and discuss the availability of administrative law damages. Secondly, I discuss the relationship between the administrative law remedies and principles and tort liability. I will deal in particular with tort liability for ultra vires conduct, the distinction between public and private law concepts, and the torts of negligence and misfeasance in a public office. Thirdly, and perhaps most importantly, I will examine the impact of the New Zealand Bill of Rights Act 1990 and the new remedy of public law compensation.

The underlying theme of the paper is that the courts have blurred the distinct nature of the applicable principles and remedies. If monetary remedies are to be available in administrative law, rather than tort, it is better that they be provided for specifically in statute rather than through the back door of the Bill of Rights.

II ADMINISTRATIVE LAW REMEDIES

A *Administrative Law and the State*

Unlike Continental jurisdictions, the common law has not developed a coherent concept of "the state". Birkinshaw observes that the term "state" has no precise meaning or separate legal identity in English-derived legal systems.¹

In New Zealand, as in Britain, there has been little attention paid to the distinctive character of public authority. Nor has there been significant attention paid to the state as a political concept or as a legal institution with responsibility for regulating matters of public concern.²

Instead of a developed and defined concept of state, our constitutional law has the concept of the Crown. The concept of the Crown is a term of art in constitutional

¹ P Birkinshaw *Grievances, Remedies and the State* (2 ed, Sweet & Maxwell, London, 1994) 9.

² Above, n 1, 10.

law.³ In the absence of a concept of the state in British constitutional law, "the Crown" can be used to represent the state itself.⁴

In New Zealand, the Crown represents the executive government. In the Public Finance Act 1989, for example, "Crown" is defined to mean Her Majesty the Queen in right of New Zealand and includes all Ministers of the Crown and all departments, but does not include Officers of Parliament, Crown entities or state-owned enterprises. In short, the Crown is the legal personification of the state and of central government itself.⁵

The definition of the Crown, the state, and of bodies which exercise public functions is a fundamental one. First, whether an organisation or entity is part of the Crown has important consequences in terms of the accessibility and operation of Crown privileges and immunities.⁶ A second issue is whether a particular body or decision maker is subject to review at common law or through the exercise of a statutory power or statutory power of decision pursuant to the Judicature Amendment Act 1972.

Equally important is whether a person or body is subject to the provisions of the New Zealand Bill of Rights Act 1990. Section 3(a) of the New Zealand Bill of Rights Act provides that the Bill applies to acts done by the legislative, executive and judicial branches of government. As noted earlier, "the Crown" is synonymous with the

³ *Town Investments v Department of Environment* [1978] AC 359, 398 (HL) per Lord Simon of Glaisdale.

⁴ P Joseph *Constitutional and Administrative Law in New Zealand* (Law Book Company, Sydney, 1993) 490. In *Town Investments* their Lordships noted that the confusion which can arise when one speaks of the Crown rather than "the government" or "the state". The House of Lords held that the executive actions of Ministers, Parliamentary secretaries, and civil servants, are acts done by "the Crown" in the fictional sense in which the term is used in English public law. Joseph, at 490, himself warns of the terminological trap of attributing legal personality to "the government" rather than "the Crown" or "the state":

The Crown is, legally and in fact, the embodiment of executive Government. It is an historical emanation from kingship that has evolved in accordance with "as Lord Simon put it [*in Town Investments*] the "contemporary situation" but it is "the Crown" not "the Government" that has legal existence.

⁵ P Joseph "The Crown as a legal concept (i)" [1993] NZLJ 126 at 128. But for a contrasting view see D Mathieson QC "Does the Crown have Human Powers?" (1992) 15 NZULR 117 at 121-123.

⁶ For a discussion of Crown privileges and immunities generally see Reaich "The Corporatisation of the Crown" (unpublished LL.M. research paper, VUW, 1997) 27-32.

executive branch of government. While the question of who is the Crown can often be unclear, the Bill of Rights Act does not require that a person or body necessarily fall within the umbrella of the Crown to be subject to the operation of the Act.⁷

It suffices to observe that the two areas - judicial review and the prerogative remedies, and the Bill of Rights Act - are broadly related but discrete. It does not necessarily follow that because a body is susceptible to review it is also caught by the Bill of Rights. In the absence of a mature and coherent body of precedent under the Bill of Rights Act, which articulates the availability of Bill of Rights remedies, there is a risk that the distinct jurisprudential bases of the two will be overlooked. This distinction assumes particular significance when considering the availability of monetary compensation for administrative wrongdoing.

It is important to recognise at the outset that, while judicial review may be a potent means of regulating or scrutinising administrative action, it is but one of the possible avenues by which such conduct may be challenged.⁸

⁷ Section 3(b) of the Act states that the Bill of Rights applies to acts done "by any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law". There is a considerable degree of overlap between the persons and bodies who are amenable to review, whether at common law or pursuant to the Judicature Amendment Act 1972, and those to whom the New Zealand Bill of Rights Act 1990 applies. Nonetheless, they are not co-extensive. For example, an incorporated society may well exercise the statutory powers of decision for the purpose of the Judicature Amendment Act 1972. Yet, such an association may not necessarily exercise a public function for the purposes of s3(b) of the Bill of Rights Act.

⁸ *McGechan on Procedure* (Brookers, Wellington, 1997) para JA02. The authors observe that there are a large number of different means by which the course of administrative action may be influenced or checked other than judicial review proceedings. They include pursuing other legal remedies such as actions in contract, tort, or pursuant to other statutory provisions such as the Commerce Act 1986, the Consumer Guarantees Act 1993, the Fair Trading Act 1986, and related legislation. There are also a large number of independent statutory offices which may influence or review administrators. For example, the Privacy Commissioner and the Human Rights Commissioners have important and extensive powers under their respective legislation. There is also the important avenue of Parliament and its committees. Individual members of Parliament and the thirteen sectoral select committees play an important part in reviewing, regulating and influencing the exercise of administrative powers. Depending on the issue, the Citizens Initiated Referenda Act 1995 may also be utilised in an effort to influence a body's practices. Further Parliamentary avenues include requests to minority or opposition political parties or figures, and interest groups.

The Ombudsmen also have an important role in the provision of access to official information for the purposes of the Ombudsmen Act 1975, the Official Information Act 1982 and the Local Government Official Information and Meetings Act 1987. Other avenues of influence or review include the media and alternative dispute resolution options such as mediation, conciliation and arbitration.

Not only should [judicial review] be seen as only one avenue for a remedy, [but] it should also be seen for what it really is. For the most part, judicial review is essentially a procedural mechanism invoked on a reactive basis to check the legality of the administrative action impugned with limited remedial flexibility. ... [D]epending on context, there may well be more appropriate means of checking or, better still, influencing the course of administrative action.

As Palmer has observed, it is often the case that "[to] ask for court decisions about public law is like closing the stable door after the horse has bolted".⁹ Clearly, judicial review is only one way of checking unlawful administrative action. The choice of which option is appropriate in particular circumstances will be determined largely by the outcome or remedy which is sought, the degree of control the parties wish to exert over the process, and in particular the speed, expense and accessibility of the process.¹⁰

B Judicial Review

Before turning to the common law remedies at administrative law, and the effect of the Judicature Amendment Act 1972 it is necessary to consider briefly the nature and scope of review itself. Taylor identifies a number of fundamentals of judicial review. It is helpful to consider those fundamentals in order to appreciate the nature of the remedies which accompany them. The principles may be summarised as follows.¹¹

- (1) Judicial review is the product of the common law. As such, it reflects the separate assessments by the courts of what is needed for the good of society to control, supervise or oversee the activities of government-related authorities,

⁹ Rt Hon Sir Geoffrey Palmer "The New Public Law: Its Province and Function" (1992) 22 VUWLR 1, 9.

¹⁰ *McGechan on Procedure*, above, note 8, para JAIntro02.

¹¹ G Taylor, *Judicial Review A New Zealand Perspective* (Butterworths, Wellington, 1991), 3.

rather than reflecting the direct will of Parliament on who should do what. In exercising such a supervisory jurisdiction the courts are, in broad terms, implementing the will of the public. The legitimacy of the court's exercise of such a function is dependent on public confidence being maintained.

- (2) The courts in the context of common law and judicial review have no mandate to substitute their own views for those of other areas of government on what is a desirable course of conduct.
- (3) The courts should only express a view on what has been done by other parts of government where the courts have at least an equal level of expertise in doing so.
- (4) In exercising such a supervisory jurisdiction the courts are, in broad terms, implementing the will of the public. The legitimacy of the court's exercise of such a function is dependent on public confidence being maintained.

C The Traditional Remedies and the Judicature Amendment Act 1972

In general terms, the courts may intervene in a decision making process by government related authorities, or other bodies of a public nature, if the decision or decision making process is in excess of that body's power or outside its jurisdiction; procedurally unfair, or flawed in the sense that it is based on an incorrect view of the facts; there has been an error of law; the body in question has acted unreasonably or irrationally; there is actual or apparent bias; or irrelevant matters have been taken into account.

Whereas the scope of the New Zealand Bill of Rights Act 1990 is determined by section 3, the sources of power which are subject to judicial review at common law are not prescribed in statute. The power of review itself is an inherent power of the High Court. There are a number of different sources of power or authority which may be subject to the supervisory review jurisdiction of the courts. They include, statute, the prerogative, certain common law powers of the Crown, and even the powers of individuals and other legal persons.

resources budgeted for the operations of government, and
 Report of the Controller and Auditor-General on
 Governance Issues in Crown Entities (Office of the Controller and Auditor-General, Wellington,
 November 1996).

The Judicature Amendment Act 1972 provides a statutory procedure in relation to “statutory powers”. Non-statutory public powers are reviewable at common law and are not affected by the Judicature Amendment Act 1972.¹² Just as the Judicature Amendment Act did not repeal the existing law as to the prerogative writs neither was it intended to broaden the grounds on which a court could grant relief. However, the 1972 Act did widen substantially the nature of the relief that the courts could grant once an applicant had established his or her grounds and provided a simpler procedure by which that relief could be obtained.¹³

Judicial review is available in respect of the inferior statutory courts, such as the District Court and its divisions, domestic tribunals and other public decision making bodies, government departments and public servants, statutory authorities, state owned enterprises, Crown entities,¹⁴ companies in respect of their constitutions under the Companies Act 1993, local government rules and bylaws, and certain rules of incorporated and unincorporated societies.

C The Traditional Remedies and the Judicature Amendment Act 1972

The traditional prerogative remedies of the common law were not superseded by the enactment of the Judicature Amendment Act 1972. Part VII of the High Court Rules provides for the extraordinary remedies. They consist of the prerogative writs, or orders, of mandamus, certiorari and prohibition, the prerogative writ of quo warranto

¹² Above, n 8, para JAIntro.03.

¹³ *Re Royal Commission on Thomas Case* [1980] 1 NZLR 602, 615-616.

¹⁴ In the case of Crown entities, they are owned by the Crown but possess separate legal identities. The powers and functions of the entities are usually set out in the legislation creating them. There are presently some 2700 Crown entities, all but one hundred of which are school boards of trustees. Crown entities spend roughly two thirds of the resources budgeted for the operations of government, and control in excess of \$17,000 million in assets. *Report of the Controller and Auditor-General on Governance Issues in Crown Entities* (Office of the Controller and Auditor-General, Wellington, November 1996).

(that is, an order for removal from office) and the equitable remedy of injunction. Each of the prerogative writs has a lengthy history.¹⁵

The old writ of mandamus developed to enable a court to secure the performance of a public duty. Rule 623(1) of the High Court Rules provides that any person may apply to the High Court to compel performance of a public duty by any inferior court, tribunal or person. The effect of a writ of mandamus is similar to that of a mandatory injunction. Mandamus is, in essence, an order that a duty be performed.

The old writ of certiorari has the effect of quashing an action brought before the court on judicial review.¹⁶ The writ applies when an application is made to the court to review all or part of a determination made by an inferior court, a tribunal, or by a person exercising a statutory or prerogative power, or a power that affects the public interest. In its traditional form, the court was empowered to quash or set aside the decision in question. Rule 626 of the High Court Rules provides for the new power to correct any errors of law, defects or informalities in the decision or to direct the tribunal or person to reconsider his decision or order in light of the court's findings.

Closely related to the writ of certiorari is that of prohibition, which features similar principles to those applying in certiorari. The difference is that whereas certiorari has retrospective effect, an order of prohibition operates to prevent the making or enforcement of a decision or order which is outside the jurisdiction of the decision maker. The effect of an order of prohibition is to stop the inferior court, tribunal or person from exercising a jurisdiction that they are not by law empowered to exercise. An order for prohibition has a similar effect as a prohibitive injunction. The key difference between the orders of certiorari and prohibition, and mandatory and prohibitive injunctions, is that the former are restricted to bodies which have a duty to act judicially.

¹⁵ See "The Prerogative Writs: Historical Origins" in Appendix 1, *De Smith's Judicial Review of Administrative Action*, (4 ed, Stevens & Sons Limited, London, 1980) 584.

¹⁶ G D S Taylor, *Judicial Review: A New Zealand Perspective*, (Butterworths, Wellington, 1991) 43.

The High Court Rules also provide for the remedy of injunctions in the judicial review context.¹⁷ Rule 624 of the High Court Rules empowers the High Court to grant an injunction restraining the threatened or actual breach of a duty imposed upon any inferior court, tribunal or person. Injunctions have traditionally been categorised as private law remedies, but have long been used against the unauthorised action of governmental and public bodies.¹⁸ As a public law remedy, injunctions enable individuals to restrain breaches of public law rights without having to show an action in tort, contract, or otherwise.

The Judicature Amendment Act has not displaced the operation of the prerogative writs. Nonetheless, the 1972 Act is primarily concerned with the availability of remedies in judicial review proceedings. With the sole exception of habeas corpus, all of the remedies available under the Act are discretionary.

The Act itself was designed to address the severe procedural limitations imposed on litigants by the traditional procedures for judicial review. Section 4(1) of the Act provides that the High Court may grant any relief that the applicant would be entitled to in any of the proceedings for mandamus prohibition, certiorari, declaration, or injunction. The Act expressly provides, in section 4(3A) that the availability of remedies is discretionary. The High Court may, instead of or in addition to those remedies direct that the defendant reconsider and determine the whole or any part of the matter which is subject to review. The underlying ethos of the Act was to improve the accessibility and application of the remedies available to litigants.

Yet neither the Judicature Amendment Act 1972, nor the traditional remedies, deal with the question of damages. Damages are simply monetary compensation for a wrong. They have long been the basic common law remedy for causes of action in

¹⁷ It should be noted that the rules for injunctions in the context of judicial review are distinct from those which apply to the equitable remedy of injunction.

¹⁸ *De Smith's Judicial Review of Administrative Action* (4 ed, Stevens & Sons Limited, London, 1980), 429-434.

tort and contract.¹⁹ Where a litigant wishes to seek damages, he or she must advance an independent cause of action upon which such a claim can properly be founded. The High Court cannot order an award of damages when determining an application for review in the absence of such a substantive cause of action

III THE AVAILABILITY OF DAMAGES FOR ADMINISTRATIVE WRONGDOING

A *The Traditional View*

An important issue for English-derived legal systems in the last few decades has been whether damages are available to individuals who suffer losses by unlawful administrative action. The general position throughout the common law jurisdictions is that the unlawfulness of an administrative act, without more, does not give rise to any remedy in damages.

That rule was consistent with the long-standing proposition that the Crown was immune from liability in tort, as the King or Queen could do no wrong. The position was reversed by section 17 of the Crown Proceedings Act 1950, which provides that in any proceedings against the Crown or to which the Crown is a party the Court may give such appropriate relief as the case may require. The Crown certainly does not enjoy any presumptive immunity from the remedy of damages.

Further, the unavailability of damages reflected the distinction between review and appeal. Where the court is reviewing the procedure of a decision rather than the substance, a substantive remedy – such as damages – is said not to be appropriate. The prerogative writs in essence enable the courts to compel or restrain certain conduct by the decision maker or body in question. The rôle of the courts was to identify any flaws in the decision, process, or conduct in question and then to refer the matter back to the decision maker to deal with on a proper footing. The courts have emphasised that, in review, they are concerned primarily with form and procedure rather than the substance of the matter. That is at the heart of the distinction referred

¹⁹ P W Hogg, *Liability of the Crown*, (2 ed, Carswell, Toronto, 1989) 17.

to above between review and appeal. Again, the remedies available in the two types of proceedings have been distinct also.

In contrast to civil law jurisdictions, the common law recognises no dedicated remedy in damages for administrative wrongdoing.²⁰ Lord Wilberforce stated the position as follows.²¹

In truth, when the Court says that an act of administration is voidable or void but not ab initio this is simply a reflection of a conclusion, already reached on unexpressed grounds, that the Court is not willing in casu to give compensation or other redress to the person who establishes the nullity. Underlying the use of the phrase in the present case, and I suspect underlying most of the reasoning in the Court of Appeal, is an unwillingness to accept that a subject should be indemnified for loss sustained by invalid administrative action. It is this which requests examination rather than some supposed visible quality of the order itself.

In more developed legal systems this particular difficulty does not arise. Such systems give indemnity to persons injured by illegal acts of the administration. ... there is clearly an important principle here which has not been elucidated by English law, or even brought into the open.

²⁰ The French legal system, in contrast, developed a body of substantive law prescribing the rights and duties of the Republic, both as an arbiter of the rights and duties which exist between subjects inter se, and in respect of the Republic itself as an interested party to a grievance. The *droit administratif* developed by the Conseil D'Etat provides for a remedy in damages for wrongful administrative action. A damages remedy is available both in cases of fault, and where there has been no fault at all on the part of the public authority or administrator.

McElroy argues that the French law developed to recognise not only that the state should function according to the public interest, but that regard must be had to the unequal nature of the relationship between the state and the citizen. This appears to have been on the basis that state activity is conducted in the interest of the community as a whole. A corollary of which is that the burdens of state activity should be shared by the community rather than falling more heavily on certain individuals. The state is obliged to make redress for any losses which state action may entail for those individuals, whether fault is involved or not. In doing so, the state acts as an insurer of social risk.

Whereas the French law was based upon deductive reasoning from broad principles of general application, the common law grew on a case by case basis from the writs issued by the Royal courts. The remedies available from those courts was in the form of the prerogative writs, which concerned the exercise of power by or on behalf of the Sovereign against the subject. There was no remedy of monetary damages available from those courts, although certainly by the 19th century the courts recognised that monetary damages were available for wrongs committed by one subject against another: R G McElroy "A Remedy in Damages for Administrative Wrongdoing" [1983] NZLJ 9,11

²¹ *Hoffmann-La Roche v Secretary of State* [1975] AC 295, 359 (HL).

Nor is there in New Zealand, or similar jurisdictions, a general statutory liability for administrative and public law wrongs. Instead, damages remain a private law remedy.

There is not a general principle of liability in tort for causing loss through an invalid administrative action. As I will discuss later, the pattern of the development of the law of torts has been to adapt existing torts to deal with the problem of compensating those who suffer loss arising from faults in the administrative decision making process.²² Notwithstanding the dramatic increase in the number of administrative bodies exercising an expansive range of powers, with the greater likelihood of unlawful administrative action, damages are not available as a remedy upon an action for judicial review.

The position was dealt with by Woodhouse J in *Takaro Properties Limited (In Receivership) v Rowling* in the Court of Appeal as follows.²³

I have said that in the present state of the law (although it may well be developing in the area) an invalid administrative act or decision is still incapable, by itself, of supporting a civil law claim for damages. The relevant facts must give rise, independently of the invalidity, to a remedy in damages that is already recognised by the civil law in general.

Over the centuries specific writs, or orders, were developed to enable litigants to seek remedies from the Crown. The nature of the remedy depended entirely on the writ sought, which was itself encumbered by complex procedural requirements. The remedies themselves were in the nature of preventing or compelling certain conduct rather than by way of compensating for losses suffered.

²² D Baker "Maladministration and the Law of Torts" (1985) *Adelaide LR* 207, 208.

²³ [1978] 2 *NZLR* 314 at 326.

B The Current Position

The rapid development of administrative law since the 1960s has not been accompanied by a coherent or principled assessment of the appropriate remedies to address administrative wrongdoing. While there have been improvements to the procedural rules by which the traditional remedies may be accessed, the position set out by Woodhouse J in 1978 remains the law.

There has, however, been some dissatisfaction with that position. Woodhouse J himself observed that the law in that area was still developing, although the common law has not progressed greatly since 1978. While the door had been left open for developments in the nature of granting damages on review in the dicta of Woodhouse J in *Takaro's case*, and by Cooke J as he then was in *Stininato v Auckland Boxing Association (Incorporated)*,²⁴ such developments did not eventuate.

One illustrative example, at first instance, is *Manson v New Zealand Meat Workers Union*.²⁵ In that case, the plaintiffs were members of a Trade Union Committee which administered a hardship fund. There had been an investigation into the affairs of the fund following allegations that money had been misappropriated in breach of Union Rules. The Union's Management Committee resolved to expel the plaintiffs from the Union for their alleged mismanagement of the fund. The expelled members then sought review under the Judicature Amendment Act 1972 alleging breach of the rules of natural justice. Their statement of claim also sought damages in the context of the application for review.

Master Hansen, as he then was, referred to the long established practice under the 1972 Act of precluding additional substantive relief from applications for review. The Master held that applications for review are different from applications for the

²⁴ [1978] 1 NZLR 1 (CA).

²⁵ [1990] 3 NZLR 615. *Whare County Council* [1993] 3 All ER 353 (HL).

extraordinary remedies in Part VII of the High Court Rules. There was, therefore, no basis upon which damages could be ordered in review proceedings and the cause of action was struck out.

More recently, in England, the House of Lords upheld the long established position that the breach of a public law right does not of itself give rise to a claim for damages. Lord Browne-Wilkinson delivered the unanimous speech in the following terms.²⁶

It is important to distinguish such actions to recover damages, based on a private law cause of action, from actions in public law to enforce the due performance of statutory duties, now brought by way of judicial review. The breach of a public law right by itself gives rise to no claim for damages. A claim for damages must be based on a private law cause of action. The distinction is important because a number of earlier cases (particularly in the field of education) were concerned with the enforcement by declaration and injunction of what would now be called public law duties. They were relied on in argument as authorities supporting the plaintiffs' claim for damages in this case.

The House of Lords held that private law claims for damages can be classified into four different categories. Actions for breach of statutory duties simpliciter (that is, actions for breach which arise irrespective of carelessness); actions based solely on the careless performance of a statutory duty in the absence of any other common law right of action; actions based on a common law duty of care arising either from the imposition of the statutory duty or from the performance of it; and misfeasance in public office.

IV TORT LIABILITY AND ADMINISTRATIVE WRONGDOING

A *Tort Remedies*

The primary common law remedy for civil, tortious wrongdoing has for centuries been monetary compensation. This is based on the fundamental premise that torts

²⁶ *X (Minors) v Bedfordshire County Council* [1995] 3 All ER 353 (HL).

cause harm and that remedies must be available to address such harm.²⁷ Whereas the common law courts saw remedies in terms of money, the courts of equity had a range of equitable remedies such as injunction.²⁸

Beck²⁹ observes that the purpose of a monetary remedy is two-fold: to impose a sanction on the wrongdoer, and to return to the plaintiff the equivalent of what has been lost because of the tortious conduct.

The monetary sum awarded by the Court to the victim of a tort is known as damages. Damages are also awarded for a breach of contract, but the method of calculation is different. In the main, tort damages are intended to compensate the victim ...

Confusion sometimes results from the use of the terms "damage" and "damages". Damage refers to the loss suffered by the plaintiff as a result of the defendant's tortious act. Damages, on the other hand, refer to the monetary award made by the Court against the defendant, generally as compensation for the damage suffered by the plaintiff.

Damages are also available against the Crown. The general principle in the Crown Proceedings Act 1950 is that the Crown is subject to the general law of the land in the same way as are private individuals. Section 12(1) of the 1950 Act provides that all proceedings against the Crown are to be dealt with in the same way as are proceedings between private subjects.³⁰

²⁷ Note also the availability of exemplary damages to punish high handed or contumelious conduct: *Taylor v Beere* [1982] 1 NZLR 81. See also B Brown and R Dobson *Damages* (NZLS Seminar, March 1997).

²⁸ Of course, in New Zealand the courts have always been able to exercise both common law and equitable jurisdiction since the enactment of the Supreme Court Ordinances 1841 and 1844.

²⁹ A Beck "Remedies", *The Law of Torts in New Zealand*, (2 ed, Law Book Company, Sydney, 1997) 1203-5.

³⁰ Underlying both the English and New Zealand legislation was the Diceyan proposition of equality before the law. The theory underlying that proposition is that the government or state should not only be subject to the law, but should be subject to the *same* law as applies to private citizens. A corollary of the proposition is that the state is subject to an independent judiciary, who can be trusted to ensure that the government will be held liable in respect of anyone who suffers loss as a result of illegal government action.

B Tort Liability and Ultra Vires Conduct

One area in which the law of tort intersects with administrative law is where conduct by public authorities is alleged to be in excess of their power. Ultra vires action on the part of a public authority or statutory body may not give rise to an actionable tort, but may still cause injury or loss. The tort of misfeasance in a public office is dealt with in detail below. For present purposes it suffices to note that a number of common law jurisdictions have developed an action for a malicious exercise of statutory power.

The leading case is the decision of the Supreme Court of Canada in *Roncarelli v Duplessis*³¹ Mr Roncarelli was a Jehovah's Witness who owned a restaurant in Montreal. He had held a liquor license for many years. During a period in the mid 1950s the provincial Government had arrested many Jehovah's Witnesses for their religious activities. Mr Roncarelli posted bail for several of them.

The response of the defendant, who at the time was both Premier and Attorney-General of Quebec, was to direct the manager of the Provincial Liquor Commission to cancel the plaintiff's liquor license on the ground that he had been providing bail for people arrested for distributing prohibited literature. The applicable legislation provided the Liquor Commission with a power to cancel liquor licenses at its discretion, which it did.

Mr Roncarelli sued the Attorney-General for damages for confiscated liquor, loss of profit and damage to reputation. The defendant argued that he had acted in good faith, and that he had only made a recommendation to the Commissioner. The majority of the Supreme Court of Canada held that the Liquor Commission had not exercised a discretion in deciding to cancel the license but had followed the defendant's orders. The majority held that the defendant's direction went beyond the scope of his office and was ultra vires, wrongful and improper and awarded damages. In essence the excess of jurisdiction founded liability.

³¹ (1959) 16 DLR (2d) 689.

Roncarelli's case provides a useful example of the interrelationship between administrative law and the law of torts. A further example of the interaction between ultra vires and negligence may be found in *Home Office v Dorset Yacht Company Limited*.³² In that well known case the House of Lords held that the Home Office was liable for damage done by Borstal trainees who escaped custody. Lord Reid observed that when Parliament confers a discretion on a decision maker or a public authority there will often be errors of judgment in exercising that discretion. His Lordship went on to observe that:

... Parliament cannot have intended that members of the public should be entitled to sue in respect of such errors. But there must come a stage when the discretion is exercised so carelessly or unreasonably that there has been no real exercise of the discretion which Parliament conferred. The person purporting to exercise his discretion has acted in abuse or excess of his [or her] power. Parliament cannot be supposed to have granted immunity to persons who do that.

It can be seen that liability in negligence for the exercise of a discretion can be closely related to ultra vires principles.³³

Yet the necessity for a link between the administrative wrong and a cause of action in tort demonstrates the dependence on tort for monetary compensation for administrative wrongdoing. Without more, a mere administrative error or oversight will not sound in damages even if it results in loss being sustained. Fogarty³⁴ observes, in the context of scrutinising the legality of administrative conduct, that even a favourable finding on administrative or public law grounds will not, as a direct consequence, result in any financial redress to compensate for loss suffered because of

³² [1970] AC 1004, 1031.

³³ H W R Wade, *Administrative Law*, (6 ed, Sweet & Maxwell, London) 765.

³⁴ J Fogarty QC and E Wylie, *Hot Topics in Administrative and Public Law* (New Zealand Law Society Seminar, May 1995), 17.

the invalid or improper conduct. Fogarty asserts that this lacuna "can cause significant discontent in itself".

Similarly, Barton³⁵ observes that the main emphasis of administrative law is on the lawfulness of the exercise of powers by public bodies. He adds that in judicial review proceedings the plaintiff seeks either to have some decision or action invalidated and quashed, or to ensure that some public duty is carried out. Yet Barton notes that sometimes that remedy will not be enough.³⁶

As many lawyers will know from their experience, clients who have suffered loss as a result of invalid administrative action feel and express, often in colourful language, a very strong sense of injustice over the difficulty and frequently the inability to obtain some appropriate redress for the loss that they have sustained. Their bitterness is often compounded by the realisation that their taxes are supporting the defendant who, if a public official, suffers no financial loss and little personal inconvenience or frustration in connection with the administrative actions that are called into question.

Barton identifies five well-settled heads of tortious liability which affect public authorities and officials in the exercise of their statutory powers.³⁷

- (1) The intentional torts such as trespass, wrongful arrest, false imprisonment, and trespass to the person.
- (2) Torts which arise out of the wrongful interference with property. These torts include detinue and conversion.
- (3) The economic torts such as inducement of breach of contract, intimidation, and conspiracy.

³⁵ G Barton, "Damages in Administrative Law", in G D S Taylor (ed) *Judicial Review of Administrative Action in the 1980s*, (Butterworths, Wellington, 1986) 123.

³⁶ Above, n 35, at 147.

³⁷ Above, n 35, 123-125.

- (4) The tort of breach of statutory duty.
- (5) The broad tort of negligence.

In general terms, a public official or public authority is liable where the action in question is ultra vires and falls into one of the tort categories above. Conduct which would otherwise be tortious, but which is validly exercised pursuant to a statutory power (and is intra vires) are not actionable in tort. There is a two stage test. First, the impugned conduct must be ultra vires or illegal, and secondly, the action or conduct must be of a tortious character.

C Private/Public Law Distinction

There is a clear overlap between private and public law concepts which permeates all the actions discussed in this paper, whether by way of judicial review, in tort, and under the New Zealand Bill of Rights Act 1990. The absence of express and precise rules as to the availability and application of the various actions causes some complexity. Unlike the civil law's *droit administratif*, the law of administrative wrongdoing and public liability is not coherent. It has developed on a piecemeal basis. But for all that, the law has evolved readily to the changing role of the state in recent decades.

There remains a distinction between private and public law concepts. That there is some overlap between the two was recognised by the House of Lords in the recent case of *Stovin v Wise*³⁸ when it held that private law liability can depend on public law concepts. McElroy makes the point as follows.³⁹

³⁸ Lord Cooke of Thorndon "The Struggle for Simplicity in Administrative Law" in G Taylor (ed) *Judicial Review of Administrative Action in the 1980s* (Dunedin, Wellington, 1980) at 12-13.

³⁸ [1996] 3 WLR 388.

³⁹ McElroy "A Remedy in Damages for Administrative Wrongdoing" [1983] NZLJ 9, 13.

Historically, the tort of negligence has served as a "bridge" whereby the Courts used a remedy of private law to achieve the remedy of damages in the area of public law. It has served its purpose to achieve the ends of justice, but in certain cases it places on a plaintiff a burden of proof of negligence, which can be unjust to the private citizen when the cause of the injury is state, executive or administrative action deliberately undertaken, purportedly *for the public good*. [My emphasis]

While administrative law principles and the law of torts share certain similarities, they are distinct. As Lord Cooke observed, writing extra-judicially, "the grounds for judicial review and negligence liability have some common ancestry, but they are not to be confused".⁴⁰ Equally, the remedies available in the two areas are distinct have served different purposes.

Both judicial review and tort share a common law heritage, being developed by the common law courts of record over many centuries. The remedies of certiorari and prohibition in particular developed to fill gaps in circumstances where causes of action in tort (such as assault or trespass, for example) were unavailable for jurisdictional reasons.⁴¹ Certiorari dates back to at least the thirteenth century, and was used for a number of purposes other than review. It seems that the wider application of the remedy gradually diminished as private law and public law concepts became somewhat more distinct, and judicial review itself emerged in its own right.⁴²

⁴⁰ Lord Cooke of Thorndon "The Struggle for Simplicity in Administrative Law" in G Taylor (ed) *Judicial Review of Administrative Action in the 1980s* (Butterworths, Wellington, 1986) at 12-13.

⁴¹ See P Craig *Administrative Law* (2 ed, Sweet & Maxwell, London, 1989) 381-382.

⁴² See in particular L Jaffe and E Henderson "Judicial Review and the Rule of Law – Historical Origins" (1956) 72 LQR 345 at 350-355.

D Negligence

An important New Zealand example of the application of traditional tort principles to a public defendant is *Takaro Properties Limited (In Receivership) v Rowling*.⁴³ In that case the Court of Appeal confirmed the strike out of the breach of statutory duty cause of action by the High Court, but held that it was arguable in the circumstances that the Minister owed a common law duty of care to the company. The Court recognised the essentially public law environment in which the relevant decisions were made. The plaintiffs were required to establish civil liability based upon some existing tort, independently of any public law error.

Richardson J, as he then was, observed in his judgment that this was an area of the law of torts where private law liability for invalid administrative conduct could not be stated in a wholly precise way. That said, His Honour thought it clear that proof of an ultra vires act on the part of a Minister or public official was not itself sufficient foundation for an action for damages. Invalidity was not the test of fault nor of liability. In order for damages to sound in tort, the plaintiff must establish an act or omission under some recognised head of liability.

In the substantive proceedings, the Court of Appeal held that while the Minister had acted honestly he had not taken reasonable care to establish the extent of his powers before coming to a decision. The High Court decision was overturned, and substituted for a finding of negligence, and an award of \$300,000.00 damages.

⁴³ [1978] 2 NZLR 314. The then Minister of Finance, Rowling, had refused consent under the Capital Issues (Overseas) Regulations 1965 to a proposal whereby a Japanese corporation would refinance the plaintiff company. The company pursued judicial review proceedings in which the Chief Justice held that the Minister had acted in excess of his powers when he refused his consent under the 1965 Regulations. The Court found that the Minister's main ground for refusing the consent was his wish that the land the company owned at Te Anau revert to New Zealand interests. The Court ordered the Minister to reconsider the exercise of his discretion and determine the matter according to law.

However, by then the Japanese corporation had lost interest in the proposal and the plaintiff company was in receivership. The plaintiffs sued for damages on five separate causes of action. They included allegations of malice, breach of statutory duty, negligence, ultra vires and invalidity. The High Court struck out the causes of action for breach of statutory duty, negligence and invalidity. That decision was then appealed to the Court of Appeal.

On appeal to the Privy Council, the decision of the High Court was restored on the basis that the plaintiff had not established a breach of the alleged duty. Lord Keith, delivering the advice of the Judicial Committee, held that the character of the claim was novel.⁴⁴

So far as their Lordships are aware, it has never previously been held that where a Minister or Governmental agency mistakes the extent of its powers and makes a decision which is later quashed on the ground of excess of statutory powers or of an irrelevant matter having been taken into account, an aggrieved party has a remedy in damages for negligence.

In summary, it seems that the relationship between negligence and ultra vires remains opaque. Phegan⁴⁵ observes that there are at least two possibilities by which the ultra vires concept can play a part in actions for damages. First, ultra vires may be used to expose a public authority to liability under some independent tort of action. Secondly, and more controversially, the ultra vires concept may itself serve as a basis of liability. Authority for the latter proposition is derived almost entirely from *Roncarelli's* case.

More recently, the New Zealand High Court dealt with the relationship between negligence and administrative law in *Gregory v Rangitikei District Council*.⁴⁶ McGechan J said that the public law element of the Council's position alone, without additional tortious behaviour, was insufficient to found liability sounding in damages. In reaching that conclusion the Court relied on the judgment of Richardson J in

⁴⁴ [1987] 2 NZLR 700, 708 (PC).

⁴⁵ C Phegan "Damages for Improper Exercise of Statutory Powers" (1980-82) 9 Sydney LR 93, 95-99.

⁴⁶ [1995] 2 NZLR 208. This was a damages claim by a disappointed tenderer against the defendant Council as vendor. The Council owned a property on the road between Taihape to Napier, and in 1975 had promised an adjoining land owner that he would be offered it first should the Council ever decide to sell it. In 1990 the plaintiff had also registered an interest in buying the property and submitted a tender when the property was put up for sale later that year. The plaintiff was the highest tenderer for the land but all tenders were declined when the Council learned of its 1975 letter and proceeded to sell it to the adjoining land owner. The plaintiff then sued under causes of action for contract, fair trading and judicial review.

Takaro, while noting “the door left ajar” by Cooke J in *Stininato’s* case. Damages were not available for any unknowing breach of statutory duty and no allegations that such a breach of duty amounted to a tort in its own right had been pleaded. Further, as declaratory relief would be futile (as the property had already passed in to the hands of the buyer) no relief by way of judicial review was available.

It seems that on the strength of *Gregory’s* case the position in New Zealand is that damages are not available in the context of judicial review, in the absence of any independent causes of action in tort. This orthodox view is consistent with that taken by the courts in England, Canada and Australia.

E Maladministration / Misfeasance in a Public Office

Uniquely among torts, the tort of misfeasance in a public office is available only against public defendants. There has been uncertainty about the very existence of the tort. Barton, writing in 1986,⁴⁷ observed that the tort was imperfectly defined, and quoting de Smith,⁴⁸ was “not firmly anchored in English case law”.

Yet Todd, writing in 1997,⁴⁹ said that the tort of misfeasance in a public office is “an ancient and well established tort whose existence is recognised in recent cases in a number of Commonwealth jurisdictions”. Certainly in New Zealand, the existence of the tort is undisputed. The basic premise seems clear also. If a public officer does something, or abuses his or her office, and thereby causes injury to another person, then an action in tort may be taken against that public officer.⁵⁰

⁴⁷ G Barton, above, n 35, 126.

⁴⁸ Evans (ed) *de Smith's Judicial Review of Administrative Action* (4 ed, London, 1980) 339.

⁴⁹ S Todd, *The Law of Torts in New Zealand* (2 ed, Law Book Company, Sydney, 1997) 1010.

⁵⁰ The five elements of the offence are that the defendant must be a public officer; the defendant must have acted in the exercise or purported exercise of his or her public office; the defendant must have acted with ill will or malice towards the plaintiff, and knowing that he or she was acting invalidly in

The tort is significant because of its unique public law component, and its blend of tortious principles, public law concepts, and essentially private law remedies. The “public” element of the tort is fundamental, as one does not commit the tort of misfeasance by exercising one’s own private law rights in a malicious manner.⁵¹ The tort exemplifies the common law tradition of restraining those who use positions of dominance or power to obtain some improper benefit or sanction.

In the recent New Zealand case of *E v K*⁵² the tort was pleaded against a social worker (“the public officer”) of two adopted children who claimed to have experienced sexual abuse at the hands of their foster parents. The plaintiffs alleged that the social worker’s failure to carry out her statutory duties when investigating the abuse complaints amounted to the tort of misfeasance in public office. The defendant applied to strike out that cause of action, together with the breach of statutory duty and negligence causes of action.

Morris J struck out all three causes of action. In respect of the tort of misfeasance in public office His Honour held that the plaintiffs had not established that the social worker was a public officer for the purposes of the Children and Young Persons Act 1974. This was because the social worker owed no statutory duty to the public, and the plaintiffs had failed to establish a prerequisite for the tort.

Morris J placed particular emphasis on the “public” element of the tort and took a narrow view of the meaning of “public officer”. As for the scope of the duty, His Honour held that the plaintiff must be owed a duty by the defendant not to abuse his or her statutory powers, and that the defendant acted with malice or with knowledge that he or she was acting in excess of his or her power, with knowledge of the

doing so; the public officer must owe a duty to the plaintiff; and, the plaintiff must suffer damage as a result of the misfeasance.

⁵¹ Brown and Dobson *Damages* (NZLS Seminar, March 1997) 61.

⁵² [1995] 2 NZLR 239.

consequences. A person could not be liable in tort for misfeasance in a public office for the malicious exercise of ones own private law rights.

The restrictive view of the High Court in *E v K* can be contrasted with a number of appellate decisions in both New Zealand and overseas. For example, the English Court of Appeal held in the recent case of *Elgouzouli-Daf v Commissioner of Police*⁵³ that prosecutors of the Crown Prosecution Service were public officers for the purpose of the tort. Similarly, in the New Zealand cases of *Garrett v Attorney-General*⁵⁴ and *Simpson v Attorney-General*⁵⁵ sworn members of Police have been held to be public officers.⁵⁶

While the cases emphasise that the tort of misfeasance in a public office is unique in its public law nature, it is very clearly a tort nonetheless. In order to succeed, a plaintiff must establish not only that the defendant was a public officer, and that the impugned conduct was performed in the exercise of that public office, but that there was knowledge of invalidity or malice, a duty to the plaintiff, and damage.

Dealing with the mental element first, Anderson J observed in *Garrett v Attorney-General*,⁵⁷ at first instance, that the tort of misfeasance in public office consisted of a

⁵³ [1995] 2 WLR 173 at 181.

⁵⁴ [1993] 3 NZLR 600.

⁵⁵ [1994] 3 NZLR 667.

⁵⁶ Other examples of public officers from the cases include prison officers: *Racz v Home Office* [1994] 2 AC 45; Councilors in local authorities and local authority employees: *F v Wirral Metropolitan Borough Council* [1991] 2 All ER 648; and Ministers of the Crown: *Takaro Properties Limited v Rowling* [1978] 2 NZLR 314 (CA).

⁵⁷ [1993] 3 NZLR 600, 603. The plaintiff had sued the Attorney General on behalf of the Commissioner of Police alleging that the Police had failed to properly investigate a complaint of rape by a Constable at the Kaitaia Police Station. Significantly, the rape was alleged to have occurred in 1988, well before the enactment of the New Zealand Bill of Rights Act 1990. Anderson J held that the Police were not immune from such a claim, and observed that the "long standing policy" of judicial reluctance to intervene in the Police decision making process by way of public law remedies was losing rigidity.

public officer causing damage to a plaintiff by either a deliberate act or omission activated by malice or a deliberate act "knowingly in excess of official powers in circumstances where such officer knew or ought reasonably to have foreseen that the deliberate conduct would cause damage to the plaintiff". The High Court held that "malice" could involve more than personal ill will or spite, and extended to corrupt or improper motives.

The Court of Appeal held that it was insufficient merely to show foreseeability of damage caused by a knowing breach of duty by a public officer. The plaintiff was required to prove a conscious disregard for the interests of those affected by the decision or conduct in question. Blanchard J, delivering the judgment of the Court, held that the plaintiff's case had been bound to fail on the evidence, and that the trial Judge had not misconducted himself.

Of most interest for present purposes is the Court of Appeal's dicta concerning the nature of liability and the availability of remedies for wrongdoing by public officials. In terms of remedy, the Court of Appeal observed that improper conduct by public officials may result in remedies in negligence or for breach of statutory duty. The Court also alluded to the availability of a remedy as established in *Simpson v Attorney-General [Baigent's case]*.⁵⁸

A remedy by way of judicial review may also be available to prevent the interests of a citizen being threatened or to provide relief if they are damaged. Parliament sometimes also establishes a right to compensation when powers are used to promote public interests, for instance in human or animal health.

The Attorney-General had applied to strike out the proceedings on the basis that they disclosed no cause of action. Anderson J agreed that the statement of claim was defective but held that it was not irretrievable. At trial, the case was heard before a civil jury which found that although the Police's initial investigation had not been carried out properly, that failure had not been motivated by malice (which was defined as acting or failing to act through an improper motive, at the applicant's expense). The plaintiff then appealed to the Court of Appeal arguing that there had been various defects in the trial.

⁵⁸ [1994] 3 NZLR 667.

While recognising the apparently broad availability of remedies for maladministration the Court stressed that the intentional tort of malfeasance in a public office should not be allowed to overflow its banks and cover the unintentional infliction of damage. The public policy justification contended for doing so was that in many cases public officials can be taken to be aware of the consequences of breaking the law, and can be taken to have intended the damage they caused. However, where public officials do not realise the consequences of their conduct they are unlikely to be deterred from exceeding their powers by any expansion of the tort. The following dicta from *Garrett* is of particular interest.⁵⁹

In any modern society administration of central or local government is complex. Overly punitive civil laws may oftentimes deter a commonsense approach by officials to the use or enforcement of rules and regulations. We prefer to err on the side of caution and not to extent the potential liability of officials for causing unforeseen damage. To do so may have a stultifying effect on governance without commensurate benefit to the public.

It is arguable that the Court of Appeal's reticence in *Garrett's* case reflects some judicial unease at the prospect of enlarging the scope of liability on the part of public authorities and officials. *Garrett* can be contrasted with earlier New Zealand cases which gave greater prominence to providing effective remedies to private individuals who suffered at the hands of public power.

As noted earlier, the issue of *Baigent* compensation did not arise in *Garrett's* case. It was, however, dealt with both in *Baigent* itself and *Whithair v Attorney-General*.⁶⁰ The tort of misfeasance in public office was pleaded as the third cause of action in *Baigent*. Cooke P observed that the Court's views on the causes of action in tort were of limited practical importance, given that the Bill of Rights cause of action was sustained. That said, the majority of the Court of Appeal held that if individual police officers had acted in bad faith in the course of a search, they would have been liable in

⁵⁹ Above, n 54, 350.

⁶⁰ [1996] 2 NZLR 45.

tort for misfeasance, although it was very doubtful whether the absence of reasonable cause alone would be enough.

The effect of section 6(5) of the Crown Proceedings Act 1950 was that the Crown was not vicariously liable for torts committed in the execution of a search warrant unless bad faith was established. But the Court of Appeal refused to strike out that cause of action, but observed that it would not succeed without proof of bad faith.

The relationship between the New Zealand Bill of Rights Act 1990 and the tort of misfeasance in public office was considered more closely by the Chief Justice in *Whithair v Attorney-General*.⁶¹ The two material questions for the High Court in that case were first, could the tort of misfeasance in public office be founded on an allegation amounting to negligence or unreasonableness in an administrative law sense; and secondly, did damages lie for a breach of a right preserved by the New Zealand Bill of Rights Act in the absence of any pleading of conscious violation of, or reckless indifference to, the plaintiff's rights under that Act?

In answer to the first question Eichelbaum CJ observed that the boundaries of the necessary conduct and intention on the defendant's part for the purposes of establishing a tort were not settled. The Chief Justice said that it had been thought that malice was an essential ingredient to the tort, but there was now authority that an invalid act performed with knowledge of the invalidity would suffice. What remained unclear was whether an allegation amounting to negligence or administrative law unreasonableness would suffice. The Court had regard to the dicta in *Baigent* that it was "highly doubtful" whether the absence of reasonable cause, alone, would suffice for liability. The mere fact of some misfeasance, and consequential damage, did not suffice for liability.

⁶¹ Above, n 60, 45. The plaintiff had been arrested at Paraparaumu on a Friday evening and detained at the Porirua Police Station until the following Monday, when he was bailed by Justices of the Peace. The plaintiff sought damages for false imprisonment, misfeasance in public office and breaches of the Bill of Rights. The basis of the claim was that the Police had wrongly fettered their discretion by adopting a policy that Police bail would not be granted in cases of domestic violence.

In terms of the Bill of Rights Act question, the Crown submitted that a plaintiff could only claim damages for breach of the provisions of the Bill of Rights Act where there was "conscious or reckless indifference" to the plaintiff's rights. Alternatively, the Crown argued that there would be a defence to such a claim if the person breaching a right was acting in good faith. The High Court held, however, that the appellate authority by which it was bound gave no hint that the plaintiff was required to establish anything other than a simple breach of the right in question.

The learned Chief Justice added the following observation.⁶²

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

The High Court refused to fetter the availability of the Bill of Rights remedy. It is perhaps ironic that the High Court relied heavily on the absence of any legislative intent to limit the availability of a remedy, where that remedy itself was neither expressly enacted nor contemplated by Parliament in the first place.

Such criticism aside, the tort of misfeasance or abuse of public office is well established in New Zealand law, and in other jurisdictions. There are only a small number of New Zealand cases in the last decade in which it has been advanced successfully as a cause of action. While it is a useful addition to the armoury of a prospective litigant the tort does not obviate the need for effective and accessible remedies for administrative wrongdoing.

For all its close relationship with administrative law and public law compensation, misfeasance in a public office is governed by normal tort principles such as

⁶² [1996] 2 NZLR 45, 53

foreseeability and remoteness of harm, the existence of a duty of care to the plaintiff, and damage. It will not suffice for liability sounding in damages for a party to show that there has been some procedural irregularity or other ground for review.

The 1990 Act was passed as an ordinary statute. It had originally been proposed in the future development and application of the tort in New Zealand is at best uncertain. On the one hand, there is a considerable overlap between the tort of misfeasance and negligence. On the other, the development of the novel remedy of public law compensation pursuant to the Bill of Rights is likely to overshadow the tort of abuse of public office. There would be few, if any, situations in which the tort was available exclusively. Given that there are at present no recognised defences available to the Crown or those exercising public functions once a breach of the Bill of Rights has been established, there is a powerful incentive for litigants to prefer seeking Bill of Rights compensation than attempting to make out the tort. After decades of haphazard development the tort, in New Zealand at least, may well lapse into desuetude. Todd makes the point as follows.⁶³

[The Court of Appeal] has fashioned out of [the Bill of Rights] a civil cause of action against the state for compensation for loss occasioned by breach of the human rights and freedoms laid down by the Act. Increasingly reliance on this cause of action seems likely, as does the demise of the action for misfeasance.

V THE IMPACT OF THE NEW ZEALAND BILL OF RIGHTS ACT 1990

A Background

The New Zealand Bill of Rights Act 1990 was enacted on 28 August 1990, and came into force 28 days later. The preamble to the Bill of Rights records that its purpose was twofold. First, to affirm, protect, and promote human rights and fundamental freedoms

⁶³ Above, n 49, 1010. (1) *Adams on Criminal Law* (Brookers, Wellington, 1992) 10.1.03.04.

in New Zealand: and second to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights.⁶⁴

The 1990 Act was passed as an ordinary statute. It had originally been proposed in the Government's 1985 White Paper that an entrenched Bill of Rights should be enacted. Ultimately, however, the Bill of Rights which finally emerged was unentrenched, and in that respect without any special constitutional significance. A further limitation on the Bill of Rights' potential was the inclusion of section 4, which provides that other enactments were not affected by inconsistency with the Bill. Section 4 arguably gives the Bill of Rights a lower status compared with other legislation, given that while other enactments can impliedly repeal earlier inconsistent legislation, the Bill of Rights cannot.⁶⁵

Section 6 of the Bill of Rights provides that wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in the Bill, that meaning is to be preferred to any other. Further, subject to section 4, the rights and freedoms affirmed in the Bill are subject only to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

It is helpful, for present purposes, to set out in full sections 3 and 27 of the Bill of Rights Act.

3. Application - This Bill of Rights applies only to acts done

- (a) By the Legislative, Executive, or Judicial branches of the Government of New Zealand or;
- (b) By any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

⁶⁴ The Bill of Rights itself contains three parts. Part I, "General Provisions" contains operational provisions dealing with the application of the Bill, its effect on other statutes, and certain duties imposed on the Attorney-General. Part II, "Civil and Political Rights" sets out the substantive rights affirmed by the Bill. Part III, "Miscellaneous Provisions", provides that any rights of freedoms not mentioned in the Bill are not abrogated or restricted by their omission, and that, as far as practicable, legal persons enjoy the rights in the Bill.

⁶⁵ Hon B Robertson (ed) *Adams on Criminal Law* (Brookers, Wellington, 1992) 10.1.03,04.

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

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

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

Section 3 is of particular importance as it determines whose conduct is subject to the Act. Its effect is to restrict the responsibilities and obligations of complying with the Bill of Rights to the three branches of government and those persons or bodies who perform public functions, powers or duties pursuant to law. Conversely, all legal persons within New Zealand enjoy the benefits of the rights contained in the Act.

A corollary of the express statutory affirmation of the various rights contained in the Bill of Rights is the imposition of obligations or responsibilities on those to whom the Act applies. The rights in Part II in the Act can be grouped into specific and general rights. The specific rights include the rights of persons charged, minimum standards of criminal procedure, rights concerning unreasonable search and seizure, electoral rights and so on. The general rights include freedom from discrimination, freedom of movement, freedom of expression, the freedom of religion and so forth.

In order to establish a breach of such a right, a person would first have to establish that the person or body whose conduct is impugned is one of the three branches of government, or is performing a public function. Second, the breach of the right in question must be established on the facts. Thirdly, the right in question must be assessed to determine whether or not the conduct in question constitutes a breach, or is subject to a reasonable limit prescribed by law, as can be demonstrably justified in a free and democratic society. The final step is then to look at the question of the appropriate remedy.⁶⁶

⁶⁶ Above, n 65, Ch 10.4.02.

The Bill of Rights does not contain an express remedies clause. Such a clause had been proposed in the 1985 White Paper, but was removed from the draft Bill on the basis that the Bill was not intended to create new legal remedies. The Justice and Law Reform Committee which had considered the White Paper had recorded the substantial public opposition to the courts being given greater powers than they then possessed (particularly that of striking down legislation), which was considered to be an undesirable redistribution of power from Parliament to the judiciary.⁶⁷

Instead, the Select Committee considered that the primary purposes of the Bill would be threefold: to provide guidance to the court in interpreting ambiguous legislation; to have a moral and educative value; and to enhance Parliamentary scrutiny of proposed legislation.⁶⁸

The absence of a remedies clause can be contrasted with s24(1) of the Canadian Charter of Rights and Freedoms. Section 24(1) provides that "anyone whose rights or freedoms, as guaranteed by [the] Charter, have been infringed or denied may apply to a Court of competent jurisdiction to obtain such remedy as the Court considers appropriate and just in the circumstances". Further, the then Prime Minister, Rt Hon Sir Geoffrey Palmer, who had been the architect of the White Paper and the Bill as introduced, said in *Hansard* that:⁶⁹

... the Bill creates no new legal remedies for Courts to grant. The Judges will continue to have the same legal remedies as they have now, irrespective of whether the Bill of Rights is an issue.

⁶⁷ As is well known, the Bill did not receive substantial public interest or support. The White Paper had received a hostile response, and the Justice and Law Reform Committee's interim report on the Bill was at best equivocal. Of the 431 submissions received by that Committee, more than half were overtly opposed to the Bill and only 91 offered support or qualified support for its provision: C McVeigh and J Pike *Criminal Law and Procedure After the Bill of Rights Act 1990* (NZLS Seminar, Wellington, 1995), 2. See in particular G Huscroft and P Rishworth (editors) *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (Brooker's, Wellington, 1993).

⁶⁸ Final Report of the Justice and Law Reform Select Committee on a White Paper for a Bill of Rights in New Zealand (1988) AJHR 2-3.

⁶⁹ 510 NZPD 3460.

Others, however, suggested that the potential of the Bill of Rights was considerably greater. Rishworth, writing in February 1990, argued that the Bill of Rights had considerable potential. He referred to the then prevalent assumption that the Bill would have little impact. While the New Zealand Bill did not enable the courts to strike down legislation, as in some other jurisdictions, Rishworth predicted that the new Bill could make a "real difference" to existing law in practice, and criminal procedure in particular. Referring to the experience in Canada, he observed that:⁷⁰

Much depends on the approach which Judges take to [the Bill] and this in turn can depend upon Judges' perception of the importance of the Bill as judged by its mode of enactment and public opinion.

The Bill of Rights was enacted as one of the last measures of the fourth Labour Government in September 1990. While the Bill had been criticised robustly by the National opposition, and by the future National Minister of Justice and Attorney-General,⁷¹ the Bill remained untouched by the incoming Government. The Bill of Rights came before the Court Appeal only two months later in *Flickinger's* case.⁷²

In that case the Court of Appeal held that while the Bill of Rights was not the supreme law, it should be applied generously to give full effect to the rights it enshrined. The early cases dealt primarily with the right to legal advice,⁷³ excess breath alcohol procedures,⁷⁴ search and seizure, arrest and admissibility of admissions.⁷⁵

⁷⁰ PT Rishworth "The Potential of the New Zealand Bill of Rights" [1990] NZLR 68, 72.

⁷¹ Rt Hon D A M Graham, and Rt Hon P C East QC.

⁷² *Flickinger v Crown Colony of Hong Kong* [1991] NZLR.

⁷³ *R v Kirifi* [1992] 2 NZLR 8.

⁷⁴ *Noort and Curren v Ministry of Transport* [1992] 1 NZLR 743.

The courts very quickly developed a range of effective remedies to deal with breaches of the Bill of Rights.⁷⁶ Even so, the main influence which was predicted by commentators was the influence of the Bill of Rights on other legislation. While the Bill provides that other legislation is not invalidated or rendered inapplicable because of inconsistency with the Bill, interpretations consistent with the Bill of Rights are to be preferred to any other meaning (sections 4 and 6). What was much less clear was the scope for any remedy for the breach of any right. Writing in 1992, Burrows observed that:⁷⁷

Whether a remedy of damages would ever lie against one who infringed a right in the Bill is more doubtful. The tort of breach of statutory duty is unpredictable, but most of the rights in the Bill are not phrased with sufficient precision for one to be able to say with confidence that breach of them constitutes that tort.

Burrows went on to observe that it was too early at the time of writing to make confident assertions as to the range of remedies which might be available.⁷⁸ That caution was fully justified, in light of events only a few months earlier, in October 1991, when several police constables had executed a search warrant at 16 London Road in Lower Hutt, a property belonging to a Mrs Baigent.

⁷⁵ *R v Goodwin (No. 2)* [1993] 2 NZLR 390 and *R v Te Kira* [1993] 3 NZLR 257.

⁷⁶ The first to appear was the prima facie exclusion rule which provides for the inadmissibility of evidence obtained in breach of the Bill of Rights Act. The courts have also been prepared to stay prosecution proceedings where there has been undue delay in obtaining a fixture or where there is a risk that there would not be a fair trial. The courts have also been prepared to quash, or strike out, counts in an indictment on the same basis.

⁷⁷ J Burrows *Statute Law in New Zealand* (Butterworths, Wellington, 1992) 332.

⁷⁸ Above, note 77, 332.

B PUBLIC LAW COMPENSATION

The facts of *Simpson v Attorney-General (Baigent's case)*⁷⁹ are well known. The plaintiffs sought damages under various causes of action, including breach of the right under the Bill of Rights Act to be secure from unreasonable search and seizure. The plaintiffs had pleaded that the Police had unlawfully searched Mrs Baigent's house in violation of section 21 of the Act. The Crown argued that the execution of the search warrant was a judicial process and that it was protected by the statutory immunity available to the Crown under section 6(5) of the Crown Proceedings Act 1950. The majority of the full bench of the Court of Appeal held that, on the facts alleged, the Crown was directly liable for the conduct of the Police.

Cooke P, as he then was, affirmed the striking out of the first cause of action, alleging negligence in the application for the search warrant. The President expressed no opinion about the cause of action for trespass, and indicated that the third cause of action, for misfeasance in public office, would not succeed without proof of bad faith on the part of the Police. *Baigent's case* turned on the alleged breach of the Bill of Rights Act.⁸⁰

The learned President addressed the issue of compensation for breaches of the rights and freedoms contained in the Act at some length. His Honour observed that in other jurisdictions compensation was a standard remedy for human rights violations, and that there was no reason for New Zealand jurisprudence to lag behind. His Honour dismissed the Crown's submission that monetary remedies were unavailable given the deletion of the original remedies clause contained in the draft Bill. Instead, the Court referred to Article 2(3) of the International Covenant on Civil and Political Rights under

⁷⁹ [1994] 3 NZLR 667.

⁸⁰ On the same day as the judgment in *Baigent's case* was delivered, the Court of Appeal issued its judgment in *Auckland Unemployed Workers' Rights Centre Incorporated v Attorney-General*. In that case the High Court had struck out causes of action against the Attorney-General in respect of the Commissioner of Police for breaches of the Bill of Rights Act arising out of the search of "the Peoples Centre" in April 1992. The majority of the Court of Appeal held that all the causes of action pleaded for breach of the Bill of Rights Act should be allowed to stand. The majority confirmed that such claims were public law claims which lay directly against the state, rather than being based on vicarious liability. The Court also confirmed the view expressed in *Baigent* that consistency was the accepted approach to basic human rights mandated a remedy in all the circumstances.

which New Zealand had undertaken to ensure an effective remedy for violation of those rights.

Interestingly, Cooke P observed that the Courts were bound by section 3 of the Act, in the exercise of its judicial functions.⁸¹

Section 3 also makes it clear that the Bill of Rights applies to acts done by the Courts. The Act is binding on us, and we would fail in our duty if we did not give an effective remedy to a person whose legislatively affirmed rights have been infringed. In a case such as the present the only effective remedy is compensation. *A mere declaration would be toothless...*

It is necessary to be alert in New Zealand to the danger that both the Courts and Parliament at times may give, or at least be asked to give, lip service to human rights in high-sounding language, but little or no real service in terms of actual decisions. If so, it is a natural tendency or temptation for those adjusting to Bill of Rights concepts, perhaps excusable on that account, but still to be guarded against. [My emphasis]

His Honour went on to observe that compensation awarded under the Bill of Rights Act was awarded against the state directly as a public law remedy, and was not a form of vicarious liability for tort. In doing so, His Honour cited with approval Lord Diplock's speech in the Privy Council in *Maharaj v Attorney-General of Trinidad and Tobago (No. 2)*⁸² in which His Lordship observed, that in the context of liability for wrongs made in a judicial capacity, it was not a vicarious liability, or a liability in tort at all. Instead, it is a liability in the public law of the state.

Gault J, dissenting, observed that Parliament had left the courts to deal with the consequences of conduct inconsistent with the Bill of Rights Act. His Honour referred to the absence of any remedies provision in the Bill. With the result that the Court faced two competing approaches to the issue of remedies. The first was that the rights affirmed in the Bill are in the nature of constitutional rights giving rise to a public law

⁸¹ [1994] 3 NZLR 667, 676.

⁸² [1979] AC 385, 399.

cause of action directly against the state for their breach. Such a cause of action would be separate from any other domestic law liabilities and would carry such effective remedies, including monetary compensation, as would be appropriate in any individual case. The second approach is that the Bill of Rights confers no new right to remedies beyond those available under the existing law.

Having considered the approach taken in other jurisdictions, Gault J found that the various authorities cited did not provide strong guidance as to the availability of remedies in the absence of any express enforcement provision. Further, Parliament had given little direct guidance on the issue which made attempting to divine its intention "a somewhat artificial exercise".⁸³

Gault J observed that monetary remedies were already available in tort. Alone of the full bench, Gault J considered expressly the adequacy of existing remedies as a criterion in determining whether the Courts should fashion a new remedy of public law compensation. His Honour did so in the following terms.⁸⁴

The provision of an action for monetary compensation may be appropriate in an area which the common law normally would regard as the field of torts and where existing torts are insufficient or not easily modified. In other areas that may not be appropriate. For example it seems probable that the drafters of the Act thought that administrative law adequately protects the right to natural justice in s27 of the Act. It is unlikely that they intended there should now be an action in tort for monetary compensation against a Tribunal denying that right, as opposed to the normal remedy of judicial review.

Where an action in the nature of tort for a monetary remedy is perceived as necessary it can be provided by the Courts consistently with the approach I have adopted. The basis

⁸³ [1994] 3 NZLR 667, 706.

⁸⁴ [1994] 3 NZLR 667, 712. Gault J's judgment also raised the interesting possibility of reviving the seemingly defunct cause of action of breach of statutory duty, apparently as an alternative to providing for an express pecuniary remedy for breaches of the statutory right to natural justice in s 27 of the Bill of rights.

for it can be found in the actions for misfeasance in a public office and breach of statutory duty.

His Honour found that if all the allegations in the plaintiffs' pleadings were proved then the existing torts would provide adequate remedies. Further, Gault J considered that the preferable approach was to regard the Bill of Rights Act as part of the law of the land, to be read with the existing law rather than distinguished from it. Gault J contended that the adequacy of existing remedies obviated the need to recognise a separate cause of action for breach of the Bill of Rights Act, sounding in damages or compensation.

Baigent's case has been followed in several later decisions, both at first instance and on appeal.⁸⁵ Damages, or more properly, public law compensation, have been ordered in a number of later cases. First, in *Upton v Green*⁸⁶ Tompkins J awarded the plaintiff \$15,000.00 following an alleged breach of the right to a fair and public hearing under section 25 of the Bill of Rights Act, and breach of natural justice under section 27. In that case, Upton alleged that he had been denied the opportunity to be heard prior to being sentenced by Judge Green in the Christchurch District Court. While Tompkins J could not conclude whether a lesser sentence would have been imposed had the plaintiff been heard fully His Honour was satisfied that compensation was appropriate given the reasonable possibility that the District Court Judge might have been persuaded to impose a lesser sentence had the plaintiff been heard.

A somewhat different approach was taken by the Timaru District Court in *Kerr v Attorney-General*⁸⁷ in which a member of a local gang was awarded the nominal sum of \$20.00 for breach of his right to freedom of movement, after the Police had stopped him from travelling along State Highway One. The very low level of the award was intended to reflect the absence of any loss attributable to the breach, as well as the Court's view that "damages" must reflect the general standing of the plaintiff in the community.

⁸⁵ See for example *Upton v Green* (1995) 2 HRNZ 305, *DM v Attorney-General* (1997) 10 PRNZ 633; *R v Grayson and Taylor* [1997] 1 NZLR 399; *Kerr v Attorney-General* (Unreported, Timaru District Court, 7 August 1996, NP 233/95); *Whithair v Attorney-General* [1996] 2 NZLR 45.

⁸⁶ (1995) 2 HRNZ 305.

⁸⁷ Unreported, Timaru District Court, 7 August 1996 NP 233/95.

Intriguingly, the Court held that the plaintiff should recover less than “a clearly decent and law abiding person”.

The approach in *Kerr* is open to question. It seems inconsistent with the reasoning for the Court of Appeal in *Baigent*, which was to provide a remedy to vindicate human rights. It is at best questionable whether the vindication of those rights depend necessarily upon the identity or character of the plaintiff. The Law Commission has observed that an award of \$20.00 was insufficient to provide any effective vindication of the right breached.⁸⁸

In an unreported decision of Tompkins J, the High Court held that claims for compensation for a breach of the Bill of Rights Act may, in certain circumstances, even extend to claims for future economic loss.⁸⁹

C THE NATURE OF THE REMEDY

As noted above, the New Zealand Courts have not been troubled by the absence of any remedies clause in the Bill of Rights Act. The provision of flexible and appropriate remedies, which culminated in *Baigent's* case, was foreshadowed in two earlier Court of Appeal decisions. In *MOT v Noort; Police v Curran*⁹⁰ Cooke P dealt directly with the absence of a remedial provision in the following terms.⁹¹

We have no counterpart of s23(1) and (2) of the Canadian Charter, which deal expressly with those matters [remedies and the exclusion of evidence]. This difference is probably

⁸⁸ NZLC R37 *Crown Liability and Judicial Immunity*, 24.

⁸⁹ *Jackson v Attorney-General* (Auckland High Court, 29 November 1995, CP 82/95). See also Hon B Robertson (ed) *Adams on Criminal Law* (Brooker's, Wellington, 1992) 10.22.01.

⁹⁰ [1993] 2 NZLR 260.

⁹¹ Above, n 90, 266.

not of much consequence. Subject to ss4 and 5, the rights and freedoms in Part II have been affirmed as part of the fabric of New Zealand law. The ordinary range of remedies will be available for their enforcement and protection.

That approach was endorsed by Richardson J, as he then was, in *R v Goodwin*.⁹² His Honour observed that while the Bill of Rights Act does not contain any express enforcement provision, the rights affirmed within the Bill would be no more than a “hollow shell”, and the Bill of Rights itself little more than “an elaborate charade” if remedies were not available upon breach. Richardson J held that the premise underlying the Bill of Rights is that the Courts would positively protect the rights and freedoms enacted by resort to appropriate remedies.⁹³

While the generous and rights-centred approach taken by the Court of Appeal in *Baigent* is consistent with the fundamental nature of the rights and freedoms set out in the Bill of Rights Act, the recognition and award of public law compensation is subject to criticism on a number of bases. Most importantly, there can be very little doubt that Parliament did not intend breaches of the Bill of Rights to sound in damages. It is at least arguable that the deletion of the draft remedies clause represented a rejection by the legislature of a novel monetary remedy.

Undoubtedly, the resort to the unprecedented award of compensation for breach of the Bill of Rights Act was a dramatic and surprising development. Todd observes⁹⁴ that the Court of Appeal has held that independently of any of the recognised causes of action in tort, contract, equity, or any of the laws of civil obligation, compensation can be awarded at public law for state interference with the rights set out in the Act. As Gault J observed

⁹² [1993] 2 NZLR 153.

⁹³ Above, n 92, at 191-192.

⁹⁴ Above, n 49, 1021.

in his dissenting judgment in *Baigent*⁹⁵ much of the Bill of Rights Act simply restates existing legal protections. For example, section 23(1)(c) does no more than restate the existing law relating to habeas corpus. Similarly, the section arguably represents no more than a basic codification of the common law principles of natural justice.

The new remedy may lead to a dramatic increase in the liability of public bodies, particularly where there are presently no recognised defences to proven breaches of the Bill of Rights Act. It seems that once a litigant establishes a breach the issue becomes one of the extent of damages rather than of whether there are any applicable defences. The result may be that where an established cause of action, for example, in tort overlaps with a Bill of Rights claim plaintiffs will understandably focus on the latter.

It is significant that the rights set out in the Bill are not subject to any provisos or qualifications other than such "reasonable limits prescribed by law". The strict liability for breach was confirmed by Eichelbaum CJ in *Whithair's* case.

A further criticism of the new remedy is that it overrides the existing and long standing bar in section 6(5) of the Crown Proceedings Act 1950. This is on the basis that the liability established by a breach of the Act is a direct liability of the state, rather than one which arises vicariously.

It is also unsatisfactory for the availability and measure of the new remedy to rest solely with the courts. This is quite inconsistent with the apparent intention of Parliament when enacting the Bill. It was very much the issue of judicial unaccountability that was at the heart of public objections to an entrenched Bill.

In a careful discussion of the implications of *Baigent* for the role of the judiciary, Todd makes the following observations.⁹⁶

⁹⁵ [1994] 3 NZLR 667, 710.

⁹⁶ Above, n 49, 1024.

The availability of the public law remedy and the assessment of any compensation are entirely within the discretion of the Court. The Crown is exposed to a range of new and quite uncertain heads of civil liability, these lacing the carefully articulated limits of common law torts together with any relevant statutory defences.

Nor can it be argued credibly that there were no alternative remedies, or causes of action, available to address the conduct as pleaded. Todd questions the necessity of the new remedy and notes that it could hardly be said that the common law in 1994 was so deficient that the only suitable approach was to abandon the ordinary rules and leave the matter to the discretion of the Court. The *Baigent* remedy, however benign and desirable, represents a substantial assumption of power by the judiciary.⁹⁷

To an ever increasing extent the judiciary may become the final arbiter on matters of broad social policy. Such a development is troubling both because it amounts to a transference of power from elected to unelected representatives, and because it draws the Judges more and more into contentious political, rather than legal, disputation.

Such was the concern about *Baigent's* case that in September 1995 the Minister of Justice asked the Law Commission to report on issues of Crown liability under the Bill of Rights.⁹⁸ The Law Commission⁹⁹ reviewed thoroughly the implications of the new remedy and whether a legislative response was warranted.

The Commission found that there was an undoubted need for an effective New Zealand Bill of Rights, given the extent of Executive power and the extent of the Crown's various privileges and immunities, pursuant to statute, the prerogative and common law.¹⁰⁰ The Commission also emphasised the normative, educative and incentive roles of the Bill of

⁹⁷ Above, n 49, 1024.

⁹⁸ The writer was at that time private secretary to the Minister. Any views expressed in this paper are mine alone.

⁹⁹ Two of the four members of the Commission at that time were Judges.

Rights. The Commission observed that the availability of pecuniary remedies for breaches of the Bill served as a significant disincentive to those who might otherwise act inconsistently with the rights in question. Further, and significantly in the context of the availability of damages in administrative law, the Commission stated that since some of the rights set out in the Bill did not ordinarily attract a monetary remedy under the general law, the new action would “fill that gap”.¹⁰¹

The Commission went on to discount submissions that the new remedy was inconsistent with the Parliamentary intention. The Commission asserted that it did not necessarily follow that merely because Parliament had rejected the concept of superior law, as originally mooted in the White Paper that its failure to enact an express remedies clause meant that *Baigent's* case was decided contrary to its will. The final backstop, of course, was that Parliament could limit or reject the new remedy.¹⁰²

More questionably, the Commission found that a monetary remedy under the Bill of Rights would only be particularly significant where criminal proceedings are not brought against the defendant, or fail. That was apparently because, the Commission supposed, in almost all proceedings where *Baigent* compensation is sought the normal tort remedies would also be available.

However, the Commission did not consider the possibility that, at least so far as public defendants are concerned, plaintiffs may prefer to rely on alleged breaches of the Bill of Rights rather than the common law causes of action. It is difficult to see why a plaintiff would elect to pursue a cause of action in tort, with the attendant elements to be proved and the available defences, where a strict liability cause of action under the Bill of Rights is available. It is certainly possible that one effect of the new remedy is that the tort of misfeasance in a public office will fall into desuetude, or that the elements of the Bill of

¹⁰⁰ Note that another option would be to remove most, if not all, of the Crown's privileges and immunities. See S Price “Crown immunity on trial” (1990) 20 VUWLR 213 at 219 and Hogg *Liability of the Crown* (Law Book Company, Sydney, 1989).

¹⁰¹ Above, n 88, 16-17.

¹⁰² Above, n 88, 18-19.

Rights cause of action for public law compensation might over time incorporate some tort-like characteristics.¹⁰³

Those criticisms aside, there was clearly a good case for the retention of the new judicially-developed remedy. The Commission's findings were based squarely on considerations including the principle of equality before the law, and the fundamental nature of the various rights and freedoms set out in the 1990 Act. Further, it seems unarguable that a "Clayton's Bill of Rights" would not suffice in terms of New Zealand's obligations pursuant to the International Covenant on Civil and Political Rights. The Law Commission concluded that no legislation should be introduced to remove the *Baigent* remedy.¹⁰⁴

The nature and availability of remedies under the Bill of Rights Act was dealt with in some detail by the full court of the Court of Appeal in *R v Grayson and Taylor*¹⁰⁵ in which the Police had monitored suspicious activity at the appellants' kiwifruit orchard. The Police had entered the property without a warrant to corroborate information which suggested that cannabis plants were being cultivated amongst the kiwifruit vines. Two constables went onto the property, causing no damage, and staying for about five minutes. As a result of that visit the Police obtained a search warrant and later located a large number of mature cannabis plants. The District Court had ruled that the initial Police inspection of the property, while unlawful, was not unreasonable in all the circumstances. That approach was confirmed in the Court of Appeal.

In a helpful obiter discussion, the Court observed that the Bill of Rights was not a technical document and must be applied in New Zealand society in a realistic way. The

¹⁰³ There is at present little sign of such a development, especially in light of *Whithair's* case in which the learned Chief Justice declined to imply any provisos or qualifications to the Bill of Rights remedy, except such reasonable limits prescribed by law. Given the comparative novelty of the new remedy, though, the recognition of some qualifications to the availability of the remedy cannot be ruled out.

¹⁰⁴ Above, n 88, 2.

¹⁰⁵ [1997] 1 NZLR 399.

Court emphasised the flexibility and range of the possible remedies available under the Bill.¹⁰⁶

A robust and rights-centred approach to individual rights is not necessarily inconsistent with flexibility of remedies where rights are breached. A remedy is no less an effective remedy because it is one appropriate to the circumstances of the breach rather than a remedy inflexibly applied in respect of all breaches.

The formulation of appropriate remedies should be approached broadly. To settle upon a single remedy to be applied in all cases rather than keeping open the full range of possible remedies risks inflexibility and the rejection of possibly more appropriate remedies in particular cases. Similarly the response to any particular breach arguably should be at the appropriate level. It should be no less an effective remedy because it is fashioned to bear some relationship to the nature and seriousness of the breach.

Those observations are arguably distinguishable from the “rights-centred” approach emphasised in *Baigent*. Indeed, they may represent a somewhat more pragmatic method of achieving a balance between the competing interests of the state and the individual. The Court of Appeal's approach in *R v Grayson and Taylor* seems to take a broader approach whereby the Court balances the rights and interests of the individual with the underlying public interest. The Court expressly recognised the tension between those two competing interests and referred to the limitations on the rights contained in the Act, most notably in section 5.

Such an approach is to be welcomed for recognising the relationship between the rights of the individual and the broader public interest. Without minimising the importance of a rights-centred approach to individual rights recognition of the interests of the community can only serve to enhance the position of the Bill of Rights Act in New Zealand society. Too heavy and unrealistic an emphasis on the paramountcy of individual rights risks bringing the administration of justice into disrepute and the castigation of the Bill of Rights Act itself as a “rogues’ charter”.

¹⁰⁶ [1997] 1 NZLR 399, 412.

Writing extra-judicially, Sir Ivor Richardson observed that an over-emphasis on individual rights to the exclusion of community rights can be harmful. His Honour observed that a purely rights-based approach fails to take account of the equally valid rights of the community. Further, such a preoccupation tends to downgrade the obligations and responsibilities that all members of society owe to each other.¹⁰⁷ Those observations appear to underlie the reasoning of the Court of Appeal in *R v Grayson and Taylor* and represent something of a change of emphasis from *Baigent's* case.

D IMPLICATIONS FOR STATE LIABILITY

It is useful to contrast the implications of the *Baigent* remedy for the liability of public authorities in New Zealand with the liability of authorities overseas. It should be noted at the outset that no comparable jurisdiction possesses a statutory Bill of Rights in the form of the 1990 Act. In Canada, for example, section 24(1) of the Charter of Rights and Freedoms provides that the Court may provide such remedy as it considers "appropriate and just in the circumstances" where a person has had his or her rights or freedoms infringed or denied. Even some 14 years after the enactment of that provision there appears to be no appellate authority governing the damages remedy. It remains uncertain whether liability is a direct liability of the state or a vicarious one or whether tort principles apply. The Law Commission's research found that where damages are awarded, the amounts are usually well under \$10,000.00.¹⁰⁸

Of particular interest, given the similarities between the two countries,¹⁰⁹ are recent developments in the United Kingdom. The new Human Rights Act¹¹⁰ is intended to

¹⁰⁷ Rt Hon Sir Ivor Richardson "Rights Jurisprudence - Justice For All?" in P Joseph (ed) *Essays on the Constitution* (Brookers, Wellington, 1996), 61-62.

¹⁰⁸ Above, n 107, 71.

¹⁰⁹ Particularly, their unitary and centralised systems of government, largely unwritten and unentrenched constitutions, and a shared common law heritage.

¹¹⁰ At the time of writing, the Human Rights Bill had been amended in the House of Commons and was before the House of Lords: <http://www.parliament.the-stationery-office.co.uk>, 19 September 1998. The Bill is one of a number of significant constitutional reforms to be advanced by the Labour Government, which

“give further effect” to the rights and freedoms set out in the European Convention on Human Rights, and provides that, so far as possible, legislation is to be read and given effect to in a way which is compatible with the rights set out in the Convention. Further, the Act provides that it will be unlawful for a “public authority”¹¹¹ to act in a way which is incompatible with a Convention right.

The United Kingdom Human Rights Act shares a number of similarities to the New Zealand Bill of Rights Act. It provides for a rule of interpretation, namely that other domestic legislation is to be interpreted in a way which is compatible with the Convention.¹¹² Further, it is intended to give effect to certain supra-national rights and freedoms (although it is concerned with the European Convention of Human Rights, rather than the International Covenant on Civil and Political Rights), and it applies to public authorities. Neither the Human Rights Act nor the Bill of Rights Act are entrenched, and they do not empower the courts to strike down incompatible legislation

Yet, there are a number of very important distinctions. First, it seems that whereas the purpose of the New Zealand Bill of Rights was essentially declaratory and affirmative, the purpose of the United Kingdom Human Rights Act was to give substantive effect to rights and freedoms. Secondly, the United Kingdom legislation simply adopts the European Convention rather than providing for additional rights and freedoms. Third, the Human Rights Act provides that Convention rights (and decisions and declarations concerning those rights) are effectively mandatory considerations for decision makers in determining issues concerning the Convention. Fourth, the Act provides expressly for

include changes to the House of Lords, freedom of information legislation, and the devolution of powers to legislatures in Wales and Scotland.

¹¹¹ Which is defined in section 6(3) of the Bill to include courts and tribunals and “any person certain of whose functions are of a public nature”. This is potentially a very broad definition, and can be compared with the ‘public functions’ definition in s 3(b) of the New Zealand Bill of Rights. Interestingly, the English definition expressly excludes both Houses of Parliament.

¹¹² However, the United Kingdom legislation contains no provision comparable to section 4 of the New Zealand Bill of Rights, which provides that other enactments are not affected by inconsistency with the Bill.

the right of the Crown to intervene where a court is considering whether a court is making a declaration of incompatibility.¹¹³

Most significantly, for present purposes, is that the United Kingdom legislation provides that victims of any such unlawful conduct can bring proceedings against the public authority in the appropriate court or tribunal. Unlike the New Zealand Bill of Rights, the United Kingdom Human Rights Act provides expressly for remedies in the following terms.

Judicial remedies 8(1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.

(2) But damages may be awarded only by a court which has power to award damages, or to order payment of compensation in civil proceedings.

(3) No award of damages is to be made unless, taking account of all circumstances of the case, including-

(a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and

(b) the consequences of any decision (of that or any other court) in respect of that act,

(c) the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.

(4) In determining-

(a) whether to award damages, or

(b) the amount of the award,

the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under article 41 of the Convention.

This clause can be contrasted with the absence of any remedies provision in the New Zealand Bill of Rights. Indeed, as noted above, Parliament removed a remedies clause from the Bill of Rights before enactment. Regardless of the merits and competing arguments for and against such remedies, the United Kingdom provision has the advantage of certainty. It sets out the circumstances in which remedies, particularly damages, can be awarded and provides for the matters which must be considered in making that determination. If damages and other remedies are to be available for

¹¹³ Section 5(1).

breaches of the various rights and freedoms it is preferable that those remedies, and the considerations which govern their accessibility and application, be spelled out expressly.

The experience in the United States of America has been that whether an action for a breach of the Constitution under the Civil Rights Act¹¹⁴ is governed by tort principles and are subject to the usual State and Federal immunities. In the leading case of *Bivens v Six Unknown Agents of the Federal Bureau of Narcotics*¹¹⁵ the Supreme Court awarded damages against Federal Agents for their execution of an unlawful search. The Law Commission's research indicated that the American Courts tended to take an indulgent view of existing immunities and that very few such actions succeed.

In summary, it seems that damages are not the main remedy for breach of constitutional rights. Instead, the existing law of tort has continued to be the main port of call for litigants seeking financial compensation for the unlawful acts of public authorities.¹¹⁶

New Zealand is not the only country to face issues of public liability for administrative wrongdoing. One component which is largely missing from the New Zealand situation, however is the role of binding and enforceable supra-national Treaty obligations. In Europe the various member states of the European Union are subject to the obligations arising under the Treaty of Rome and subsequent treaties, laws and directives. The European Court of Justice has held that breaches of Union law sound in damages.

The decisions of the European Court of Justice are of some assistance in determining the scope of section 3(b) of the Bill of Rights Act, and in doing so whether the remedy of public law compensation is available for breaches of, amongst others, section 27 of the 1990 Act. The European Court of Justice has taken an expansive view of "the Executive" to include not only government departments but local authorities,

¹¹⁴ 42 USCS 1983.

¹¹⁵ (1971) 403 US 388.

¹¹⁶ Above, n 88, 71-72.

nationalised industries, health service providers, and even constitutionally independent public authorities.¹¹⁷

In the leading case of *Francovich v Italian Republic*¹¹⁸ the Italian Government had failed to implement a European Commission directive which protected employees in the event of their employers becoming insolvent. The Italian Government was sued by factory workers who had not been afforded that protection when their employer went into liquidation. The European Court of Justice held that the protection of the rights created by Community law would be weakened if individuals could not obtain compensation where their Community law rights were breached by a member state. In doing so, the Court recognised a direct liability of the state.¹¹⁹

The European Court of Justice considered the relationship between the common law liability of public officials in tort with their liability for damages arising out of infringements of Community Law in *Brasserie du Pecheur SA v Germany*.¹²⁰ In that case the Court observed that the idea of the state liability for losses or damage caused by the lawful activity of the state was generally accepted. The Court observed that while there has been a tendency to limit the extent of that liability the general availability of damages, even for lawful state activity, remained. This was on the basis that the courts needed to balance the interests of the injured party in obtaining financial restitution for the loss or damage sustained by the state's activities, and the state's interest in being able to perform the tasks entrusted to it. The European Court observed that:¹²¹

¹¹⁷ P Craig "Once More Unto The Breach: The Community, The State And Damages Liability" (1997) 113 LQR 67, 70.

¹¹⁸ [1993] 2 CMLR 66.

¹¹⁹ P Craig "*Francovich* Remedies and the Scope of Damages Liability" (1993) 109 LQR 595, 596.

¹²⁰ *R v Secretary of State for Transport, ex-parte Factortame Limited (No 4.)* [1996] QB 404.

¹²¹ Above, n 120, 440-441.

... the emergence of the State governed by the rule of law has resulted in an increasing shift of emphasis, at least in the more advanced legal systems, from the conduct of the perpetrator of the damage to the rights of the injured party, as in the case of liability generally. From this point of view, state liability and the resulting obligation to make reparation have ended up by becoming a means of penalising unlawful and/or, or in any event, harmful conduct and thereby of achieving effective protection for individuals' rights.

The implications of those propositions are particularly significant in the context of the liability of public authorities for administrative wrongdoing. This is a comparatively recent development which may have dramatic implications for the province of administrative law.

E ADMINISTRATIVE LAW AND THE NEW ZEALAND BILL OF RIGHTS ACT

1 General

Section 27 of the Bill of Rights Act provides for right to the observance of the principles of natural justice. On one view, section 27 does no more than restate in statutory form the long-standing common law principles of natural justice. The power of judicial review is after all an inherent part of the jurisdiction of the superior courts. Certainly by 1990, the principles of natural justice were well known. In essence, they are the right to a fair hearing and the right to a decision maker who is free of bias (whether actual or apparent) or of the predetermination. While the contents of those principles had been well-established, the scope of the application of those principles and the bodies to which they applied was much less clear.¹²²

On the one hand, the enactment of section 27 arguably did no more than affirm the pre-existing position. First, the Bill of Rights Act itself purported to affirm existing rights rather than create new rights or broaden the scope of existing ones. Secondly, the actual form of s27 restates the long settled position at common law.

¹²² Hon B Robertson, *Adams on Criminal Law* (Brookers, Wellington, 1992) Ch 10.19.01.

Yet the implications of section 27 for administrative law are profound. The rights set out in section 27 have arguably been elevated from their former status as common law rules to express, and enforceable, statutory rights. Breaches of the rules of natural justice may sound in public law compensation. For example, in *Upton v Green*¹²³ Upton was awarded \$15,000.00 compensation for being sentenced to 3 months imprisonment without being given the opportunity to be heard.

In the recent case of *Rawlinson v Rice*¹²⁴ Mr Rawlinson was the subject of an ex parte non-molestation order which had been brought against him by his partner. Mr Rawlinson alleged that the Family Court Judge who had granted the order had lacked the jurisdiction to do so, and had conducted the hearing in breach of the rules of natural justice. The Crown was successful in its strike out application in the High Court, which was appealed to the Court of Appeal.

The Court of Appeal reserved its position on whether a holder of judicial office was a "public officer" for the purposes of the tort of misfeasance in a public office. The most interesting aspect of this case concerns the Court's dicta about the plaintiff's rights under section 27 of the Bill of Rights Act. Crown counsel conceded that the Crown accepted liability for damages for breach of section 27, and advised that the Crown was prepared to negotiate as to an appropriate sum. McKay J observed that there was "no doubt" that the plaintiff had suffered from the errors which had occurred. His Honour noted that the Crown had acknowledged that it would be liable if the plaintiff pursued a claim under section 27.

Duffy QC, who had appeared for the Crown in *Rawlinson's* case, notes that before the enactment of the Bill of Rights in 1990 the availability of damages in administrative law was not accepted. However, the combined effect of the Bill's guarantees of procedural fairness under sections 25 and 27, together with the Court of Appeal's decision in

¹²³ (1996) 3 HRNZ 179

¹²⁴ [1997] 2 NZLR 651

Baigent, plaintiffs now have the opportunity to pursue monetary compensation for procedural impropriety.¹²⁵

The test for determining whether a breach of section 27 sounds in compensation was dealt with by Tompkins J in *Upton's* case. His Honour said that the test for awarding compensation is whether the plaintiff can demonstrate that the events that occurred, resulting from the breach or denial of his or her right, justifies an award of compensation. In that case, the plaintiff needed to establish that there was a "reasonable possibility" that he could have persuaded the District Court Judge to impose a lesser sentence. The High Court, in essence, awarded compensation for the loss of a chance. Duffy argues that the same reasoning can be applied to any case in which a decision maker, who is subject to the Bill of Rights Act, fails to comply with the rules of natural justice.¹²⁶

The combined effect of section 27 and the availability of public law compensation is to add a powerful new weapon to the armoury of prospective plaintiffs. While the principles which determine the availability and quantum of compensation for breaches of section 27 are, at this early stage, still far from clear, the courts have developed a substantial new remedy which provides monetary compensation for breaches of natural justice.

2 *Section 3 of the Bill of Rights and the Scope of Review*

The scope of review under the inherent jurisdiction of the High Court, and pursuant to the Judicature Amendment Act 1972, is not co-extensive with the application of the Bill of Rights Act. It is, however, difficult to determine the precise extent of the overlap. Given the unavailability of damages as a remedy in administrative law, whether a person can pursue monetary compensation for administrative error or wrongdoing will turn on whether the decision maker in question is subject to the Bill of Rights Act.

¹²⁵ A Duffy QC "Baigent Compensation: Administrative Law Damages in Another Form" *Law Talk*, December 1996, 24.

¹²⁶ Above, n 125, 24.

Joseph describes the two limbs in s3 as being a status and a functions classification. Section 3 (a) extends the coverage of the Act to the conduct of the three branches of government, whereas paragraph (b) covers only those persons or bodies which discharge functions of a public nature, whether or not they properly fall within any of the branches of government.¹²⁷ Just as the scope of review has tended to lack clarity, the coverage of the Bill of Rights Act is also difficult to determine in some cases.¹²⁸

Just as judicial review is not limited to the decisions and actions of the Crown, the Bill of Rights Act applies to more than just the core departments of state. Nor is it necessary that the Crown be the only appropriate defendant in a claim under the Bill of Rights Act. In *Innes v Wong and Others*¹²⁹ a Crown Health Enterprise sought to strike out a cause of action against it. The CHE argued that it was a body independent of the Crown, and said that any remedy for breach of the Act was a public law liability of the Crown rather than being in the nature of a private law action for which the Crown might be vicariously liable. While the CHE admitted that it was subject to s3(b) of the 1990 Act, it argued that any remedy must be met by the Crown. Cartwright J held that the flexibility of the remedy might extend to granting a remedy against a Crown Health Enterprise if its actions were responsible for the breach.

The Law Commission has asserted that public bodies should accept primary responsibility for their own conduct, and that of their staff, which is in breach of the Act. The Law Commission proposes that the Crown should only be liable to the extent that it was a party to the relevant conduct of the public functionary. This was subject to the broader issue of whether the Crown should be subject to some form of residual liability

¹²⁷ P Joseph *Constitutional and Administrative Law in New Zealand* (Law Book Company, Sydney, 1993) 570.

¹²⁸ For discussion of the scope of review see, generally, Aronson and Franklin *Review of Administrative Action* (Sydney, 1987) Ch 1; G Taylor *Judicial Review* (Butterworths, Wellington, 1991) Ch 1; P Craig *Administrative Law* (3 ed, Sweet and Maxwell, London, 1994) 235; M Chen "Judicial Review, the New Zealand Bill of Rights Act and the Impact of MMP" [1994] NZLJ 296; Taggart *The Province of Administrative Law* (Hart, Oxford, 1997).

¹²⁹ [1996] 3 NZLR 238.

for breaches of the Act by such public bodies, where the redress available from them was for some reason deficient.¹³⁰

VI CONCLUSION

As noted at the outset, there is now a large and diverse range of autonomous and quasi-autonomous administrative bodies. Those bodies exercise a broad range of administrative powers. The scope for unlawful or wrongful administrative conduct to occur, and for individuals to suffer loss or disadvantage as a result, is wider than ever.

While the principles by which the courts have exercised their supervisory jurisdiction over the decisions, functions and procedures of public authorities and governmental institutions have been articulated thoroughly, little attention has been paid to the utility and accessibility of the remedies available to the courts. The remedies for addressing such wrongdoing are the ugly ducklings of administrative law. The general position throughout the common law jurisdictions is that the unlawfulness of an administrative act, without more, does not give rise to any remedy in damages.

Recent developments in the law in New Zealand have demonstrated the tension between three distinct areas - general administrative law principles, the law of torts, and the recent innovation of 'public law compensation' under the New Zealand Bill of Rights Act 1990. They each have a strong and distinctive jurisprudential basis, and serve particular purposes.

Administrative law is concerned with the lawful exercise of functions and powers by administrative bodies. The law of torts is concerned with civil obligations between individuals. The Bill of Rights provides statutory recognition to fundamental human rights.

¹³⁰ Above, n 88, 2.

Yet while the three areas are distinct, the principles and remedies which apply to them have been blurred or altered significantly by the New Zealand courts over the last decade. There had long been a degree of judicial and academic dissatisfaction with the unavailability of damages on review. In some cases, for example, a successful action for review was a hollow victory for a plaintiff where the available remedies did not sound in damages and a cause of action in tort was impractical.

... for Parliament to have grasped the nettle and provided for it expressly.

With the development of the new remedy of public law compensation, available for breaches of natural justice, the courts have blurred the distinct nature of administrative law, tort remedies and principles, and the unentrenched Bill of Rights. If monetary remedies are to be available in administrative law, rather than tort, it is better that they be provided for specifically in statute rather than through the back door of the Bill of Rights.

The new Bill of Rights remedy for breaches of natural justice will not be automatic. The Court of Appeal has observed in *R v Grayson and Taylor* that Bill of Rights remedies must be flexible and realistic, as well as effective. No doubt in the great majority of cases the pre-existing administrative law remedies will suffice and compensation will not be at issue. The floodgates will doubtlessly remain largely intact.

Further, it will take some time for the courts to articulate the principles which will govern the application of the Bill of Rights in the context of administrative law and natural justice. Yet one point is clear. Public law compensation will be available for breaches of natural justice in certain cases. Upon what principles and in which circumstances is yet to be determined.

This development is unsettling for two reasons. First, it is not obvious that the earlier law was deficient, and second, the consequences of the new remedy are difficult to discern.

It seems unarguable that the prerogative remedies served their purpose. Further, the law of torts was available where conduct occurred which was in breach of a party's civil obligations. The torts of negligence and misfeasance in a public office were – and remain – sufficiently flexible to deal with any special considerations or issues arising where the defendant was a public body. If there was a need for a dedicated monetary remedy to address administrative wrongdoing, it would have been better for Parliament to have grasped the nettle and provided for it expressly.

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