IN THE SUPREME COURT OF NEW ZEALAND SC 120/2009

BETWEEN THE ATTORNEY-GENERAL OF NEW ZEALAND

Appellant

AND MERVYN CHAPMAN

Respondent

Hearing:	6 December 2010
Court:	Elias CJ McGrath J William Young J Gault J Anderson J
Appearances:	D B Collins QC, C J Curran and B L Orr for the Appellants R E Harrison QC, A J McKenzie, K H Cook and P N Allan for the Respondent

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CIVIL APPEAL

SOLICITOR-GENERAL:

As Your Honours please, Mr Curran and Mr Orr appear with me this morning.

ELIAS CJ:

Thank you Mr Collins, Mr Curran, Mr Orr.

MR HARRISON QC:

As Your Honours please, I appear with my learned friends Mr McKenzie, Mr Allan and Mr Cook for the respondent.

ELIAS CJ:

Thank you Mr Harrison, Mr McKenzie, Mr Allan, Mr Cook. Yes Mr Solicitor?

SOLICITOR-GENERAL:

Thank you very much Your Honours. I wonder if Your Honours would be kind enough to take the case on appeal and turn to tab 6. This is the third amended statement of claim.

ELIAS CJ:

This is post the hearing?

SOLICITOR-GENERAL:

It is indeed Your Honour and if one turns to paragraph 2 one sees encapsulated the legal issues raised by this appeal. The Attorney-General is sued for and on behalf of the judicial and/or the executive branches of the government of New Zealand including individual Judges. Now the appellant takes absolutely no exception to him being sued for and on behalf of the executive branches of the government of New Zealand. And as the leave question identifies, the true issue is whether or not the Attorney-General is an appropriate defendant when the alleged breaches of the New Zealand Bill of Rights Act have been committed by members of the judiciary. From this very innocuous paragraph in the third amended statement of claim cascade a huge volume of very significant constitutional and legal issues.

In a few moments I will summarise the appellant's case, the order in which the submissions will be made and who will be making the submission. But by way of introduction can I remind the Court that what the Privy Council held in *R v Taito* [2003] UKPC 15, [2003] 3 NZLR 577 and what the Court of Appeal reaffirmed in *R v Smith* [2003] 3 NZLR 617 (CA) was that a system devised by Judges of the Court of Appeal for dealing with criminal appeals where legal aid had been declined, breached the Court of Appeal (Criminal) Rules, in particular rules 10 and 13, sections 389, 390 and 392 of the Crimes Act and section 59 of the Judicature Act. What the Privy Council held in *Taito* and what the Court of Appeal reaffirmed in *Smith* was that the legislature and the executive had put in place a structure for the disposition of appeals but that structure was not adhered to by the Judges of the Court of Appeal and the Privy Council held that in not adhering to that structure persons in Mr Taito's case, and in the respondent's case, were denied appeal rights.

I emphasise that the leave issue focuses upon breaches of the New Zealand Bill of Rights Act by members of the judiciary. Claims involving alleged breaches of the New Zealand Bill of Rights Act by the executive can be argued by the respondent at

trial but in my respectful submission the true gravamen of this case will be dealt with if the Court provides the answer to the question which it has posed in the way in which the appellant seeks.

Can I now very briefly summarise the submissions and the order of the submissions which the appellant will make, and I have made available to the registrar a one page synopsis which identifies the key issues as the appellant sees them and –

ELIAS CJ:

I'm sorry, so the result is that the claim has to proceed in respect of any claims against the executive even if you are correct in the points you're bringing to the Court?

SOLICITOR-GENERAL:

Correct Your Honour. The appellant's submissions are divided into three parts. I will be addressing the Court on the first two –

ELIAS CJ:

I'm sorry, does that concession also apply to breaches by the legislative branch of government or are you not going to enter into that?

SOLICITOR-GENERAL:

I'm not entering into it because the appellant is not sued in respect of alleged breaches of the New Zealand Bill of Rights Act by the legislature although submissions made by the respondent do, at times, hint at that. I've taken Your Honours to the allegation as it currently stands. The Attorney-General is sued in respect of alleged breaches by the executive and judiciary.

ELIAS CJ:

But the argument, while there are elements of the argument which are specific to the functions discharged by the judicial branch, your principal argument would, it seems to me, probably hold good for any claim in respect of breaches by the legislative branch also?

SOLICITOR-GENERAL:

Indeed Your Honour. If there were a claim specifically alleging breaches by the legislative branch of government then the same submissions would apply.

ELIAS CJ:

Yes I mean that might have other problems in any event but you say that the Attorney-General is only the correct defendant in respect of breaches by the executive branch.

SOLICITOR-GENERAL:

Indeed Your Honour. Yes. So the appellant's submissions are divided into three parts and I will be addressing the Court in relation to the first two parts and Mr Curran in relation to the third part. I just would like to very briefly summarise the appellant's case before getting into the details of the issues that are raised by the appeal. Part 1 deals with who is the appropriate defendant and it is the appellant's case that neither the State nor the government of New Zealand have legal personality under New Zealand domestic law. Secondly, *Baigent's Case* provides a remedy against the executive branch of government of New Zealand for the actions of the executive branch and for no other branches. Thirdly, consistent with the separation of powers and judicial independence, the Attorney-General is not the appropriate defendant for claims where the breaches are said to have been committed by members of the judicial branch of government. And fourthly, the individual Judge, or Judges, who possess legal personality are the appropriate defendants where actions allege judicial breaches of the New Zealand Bill of Rights Act.

The second part of the submissions focuses upon judicial immunity. It will not surprise anyone to know that the appellant will be arguing that if Judges are sued for New Zealand Bill of Rights breaches, they are entitled to the traditional absolute immunity that Judges enjoy. And there are two overriding reasons for judicial immunity namely constitutional propriety, maintaining the separation of powers and maintaining judicial independence and what I've labeled case specific reasons, finality of litigation and avoiding collateral attacks on judgments of Court competent jurisdiction. An din my respectful submission all of these reasons for judicial immunity apply to claims based upon alleged breaches of the New Zealand Bill of Rights act by the judiciary.

If the Crown or executive is directly liable for breaches of the New Zealand Bill of Rights Act then the Crown and the executive, or executive, must be entitled to the same immunity as the immunity that is given to the Judges and it will be the

appellant's submission that failure to recognise the immunity of the Crown or an executive would represent a collateral assault on judicial immunity itself.

ELIAS CJ:

Do you say that the Crown is the executive only?

SOLICITOR-GENERAL:

Yes for these purposes I do Your Honour and that is an argument –

ELIAS CJ:

Why do you say that "for these purposes"? For what purposes is that not an adequate description?

SOLICITOR-GENERAL:

That is an issue which I intend to spend quite a bit of time developing –

ELIAS CJ:

I see, yes, thank you.

SOLICITOR-GENERAL:

– in just a few moments Your Honour.

ELIAS CJ:

That's fine.

SOLICITOR-GENERAL:

But it is certainly a very live issue and one that I've very conscious of.

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

The third part of the appellant's submissions will be delivered by Mr Curran and the focus of his submissions is that damages are not the correct remedy for judicial fair trial breaches in criminal cases. His submission will be that criminal justice remedies, particularly the appellant correction remedies, provide an effective and appropriate remedy for judicial breaches of the New Zealand Bill of Rights, fair trial rights in

criminal cases. He will also be submitting that damages are an inappropriate remedy for breaches of such rights. He will be submitting that neither comparative nor domestic case law provides coherent support for a damages remedy for judicial breaches of fair trial rights and similarly he will be arguing no support can be inferred from parliamentary inaction or action following the Law Commission's report on *Baigent* liability. An essence of Mr Curran's submissions will be to urge this Court to adopt the dicta of His Honour Justice Young in *Brown v Attorney-General* [2005] 2 NZLR 405 (CA).

So that is the outline of the case for the appellant and I now wish to deal with each of the points and if I can alert Your Honour the Chief Justice that I will be dealing with the issues Crown/executive and who is the appropriate defendant in about 10 minutes time. The first and I think, with respect, the starting point is that the State or government of New Zealand is not a legal entity for domestic law purposes. Neither the State nor the government of New Zealand have legal personality under New Zealand domestic law. Both are actually political constructs which consist of branches that do have legal status. Your Honours, the origin of the concept of domestic liability for public law damages is *Maharaj v Attorney-General of Trinidad and Tobago (No 2)* [1979] AC 385 (PC) and what has often been overlooked is the context in which *Maharaj* was decided. In *Maharaj* the Privy Council were dealing with a constitutional structure that is not the same as that which exists in England and Wales or New Zealand. *Maharaj* was decided in the context of express constitutional provisions which recognised two things.

First the concept of the State of Trinidad and Tobago as a domestic legal entity and secondly, that the Attorney-General was the appropriate defendant in any proceedings against the State of the Republic of Trinidad and Tobago. I have made available the constitution of Trinidad and Tobago and I do not invite Your Honours to look at it, just at the moment because I think I can address these issues relatively quickly but it is in bundle 1 of the authorities under tab 3 at page 13.

ELIAS CJ:

Just pause a moment. I was trying to remind myself of the way in which this very broad argument was dealt with in the Court of Appeal and although the Court of Appeal records that you argue that the Attorney was not the proper defendant, I did not recall them dealing with matters quite in the way you are putting them to us now

and I have a query as to whether the high and absolutist constitution position you are putting to us, was actually argued in the Court of Appeal.

SOLICITOR-GENERAL:

Indeed it was Your Honour but you are correct in saying that the Court of Appeal dealt with it very briefly and indeed in one sentence, it said that the Attorney-General was the obvious or the natural, I have forgotten the language, obvious defendant in a case such as this. But I can assure Your Honours there have been quite a lot of submission made on that very point.

McGRATH J:

Mr Solicitor, before you head into the comparative jurisprudence of the particular *Maharaj*, could you just elaborate a bit more on your observation that the State is not a legal entity, it is the branches of government that have legal status? I would just like to know what the argument is, before I start looking at the overseas jurisprudence.

SOLICITOR-GENERAL:

Certainly. The argument is Your Honour that in New Zealand as in England and Wales an enduring feature of our constitutional history has been the absolute refusal to recognise the State "as a legal entity for domestic law purposes". The remarkable feature of the English constitution and the constitution which we have inherited is that the State is not a legal entity. What are legal entities are the branches that comprise the State and that is the consequence of the remarkable compromise which was struck in 1688, which contrasts with the lack of compromise that occurred in continental jurisdictions where the role of the sovereign was brought to a very abrupt end, particularly in France and concepts, legal entities, known as the State assumed the powers that had previously been evolved from the monarch to the three branches of government in English constitutional systems.

Now I am going to elaborate on that and take you to authorities which support of all of that.

McGRATH J:

The question was really, which are the bodies that have legal status?

SOLICITOR-GENERAL:

Certainly.

McGRATH J:

Being branches of government, I understand.

SOLICITOR-GENERAL:

Yes indeed. The executive and the legal entities or the legal persona of the executive are quite a number but the main ones being the Attorney-General, Ministers of the Crown, Chief Executives of government departments and there are other legal persona who are the executive. In relation to the legislature. The legal persona, the Speaker of the House of Representatives, or the Clerk of the House of Representatives and in relation to the judiciary, the legal persona are the individual judges.

McGRATH J:

So when you talk about branches of government having legal status, you are not saying that the executive, the legislature and the judiciary have legal status but those who comprise them have legal status.

SOLICITOR-GENERAL:

Precisely, yes. Now I was just dealing very, very briefly with *Mahara*j. There the Privy Council was dealing with the constitutional arrangement which was quite different from that which applies in New Zealand and England and Wales. In *Maharaj,* as with most Republics, the constitutional arrangements involve the recognition of a State as a legal entity for domestic law purposes and we see later in the submissions, how that applies, for example in the Republic of Ireland. But as I have been emphasising, it is a significant feature of British constitutional history, that there has been a refusal to recognise the State as a legal entity for domestic law purposes and this point can be emphasised by taking you to the following authorities.

The first is a judgement of His Honour, Lord Justice Sedley in *Chagos Islanders v Attorney-General & Ors* [2004] EWCA Civ 997 which can be found in volume 3 of the bundle of authorities under tab 48 at paragraph 20.

ELIAS CJ:

Which decision is this. Is this – this isn't the decision that went on appeal is it?

SOLICITOR-GENERAL:

I believe it is the appeal decision Your Honour.

ELIAS CJ:

Well it went to the House of Lords or the Supreme Court, I cannot remember which. The *Chagos Island* case, I'm sorry, carry on, I will have a look.

SOLICITOR-GENERAL:

I am sure Your Honour is right but I am also searching and it is not in relation to this point.

ELIAS CJ:

No and it may not be this decision that was appealed, it seems a very short decision.

SOLICITOR-GENERAL:

Not this decision at all I am told, that went on appeal.

ELIAS CJ:

Yes, that is what I would have thought.

SOLICITOR-GENERAL:

Now in paragraph 20 and I am sorry that this is such a small and succinct statement of such a significant point. His Lordship makes the observation that English common law has no knowledge of the State. Public law recognises the Crown as the repository of a range of prerogative and statutory powers and then proceeds to explain that the State, as such, has no legal entity. Now another –

ELIAS CJ:

Well I do not understand this course of action to be brought against "the State".

SOLICITOR-GENERAL:

Well it is bought against the Attorney-General in relation to breaches by "the State" in the submissions.

ELIAS CJ:

Breaches by one of the branches of government responsible under the New Zealand Bill of Rights Act?

SOLICITOR-GENERAL:

I understand that, and if that was all that was being said, I would have no quibble but my friend says, it is a State liability and that is why the Attorney -General.

ELIAS CJ:

No vicarious liability.

SOLICITOR-GENERAL:

Precisely, direct liability. This proceeding started off as one by alleging vicarious liability. Since Mr Harrison's involvement, that's stopped, appropriately so, but what is being said is that the Attorney-General is liable because this is a failure by the State to comply.

ELIAS CJ:

Well isn't that just shorthand for one of the branches of government?

SOLICITOR-GENERAL:

If that were so, I would be quite content.

ELIAS CJ:

What, you would be content for the Attorney to be the defendant?

SOLICITOR-GENERAL:

No I would be content if that were the argument Your Honour. What I am saying is that the Attorney can only be liable for breaches by one specific branch of government, but where my friend wishes to take the Court is to say, well, this is much bigger than that. Really what we're complaining about a State or "government" breaches and therefore the Attorney-General is the natural or obvious defendant when the State or the government is at fault.

Now, if you just focussed as the statement of claim does upon the Attorney-General allegedly being liable for breaches of the Bill of Rights by Executive and/or the judiciary, and didn't expand it to say the Attorney-General was really liable because

this is a State failure or a government failure, then I'd be quite content and it's because he wishes to expand it in order to try and pin the tail on the Attorney-General, then I'm explaining the constitutional reasons why in England and Wales and New Zealand, we don't actually recognise the State or the government as a legal entity but we do recognise individual branches of government that have legal personality, and where they commit breaches then they are the appropriate entities to be named as the defendant.

MCGRATH J:

When we speak about liability in the context of the executive under the Bill of Rights to remove any debate about it, don't we normally speak of Crown liability rather than Attorney-General liability, is the Attorney-General only there as the person who is sued on behalf of the Crown?

SOLICITOR-GENERAL:

Yes and I will be submitting in a few moments, Your Honour, that the Attorney-General, that the Crown is synonymous with the executive for these purposes.

ELIAS CJ:

You will go on to explain –

SOLICITOR-GENERAL:

Exactly.

ELIAS CJ:

– what other purposes there are because –

SOLICITOR-GENERAL:

Yes, yes, because there are loose –

ELIAS CJ:

– you can't pick and choose.

SOLICITOR-GENERAL:

Yes I know but, well, maybe I can address it this way, Your Honour.

ELIAS CJ:

Well, it's just that my understanding of the constitution is that it revolves around the Queen in Parliament and the Queen in her Courts.

SOLICITOR-GENERAL:

Yes, but that are quite separate from the executive and the Attorney-General is not answerable for what the Queen's Judges might do in their branch or with what the legislature might do in their branch.

MCGRATH J:

But the Crown maybe and that's as I understand it Mr Harrison's central argument, he's saying that the Crown is liable, conscious as it handles the purse strings, I think is the way he puts it but I don't understand it to be saying that the Attorney-General is liable in any sense, it's the Crown that's liable.

SOLICITOR-GENERAL:

Yes, liable for breaches by and that's the important point. Liable for breaches by the executive or the judiciary and that is why I started off by going to the specific pleadings in the third amended statement of claim.

MCGRATH J:

So your argument is, as I understand it, really it's not that the Attorney-General is not liable, is that the Crown is not liable for acts of the judiciary?

SOLICITOR-GENERAL:

Correct, yes. Now, in his textbook Professor Joseph Constitutional and Administrative Law and can I invite Your Honours to go to volume 5 of the bundles of authority, tab 96 at page 585.

ELIAS CJ:

Sorry, volume 5 was it?

SOLICITOR-GENERAL:

That is correct, Your Honour. Under tab 96, Your Honour, page 585 at paragraph 6.4.1. Actually, I might have a misprint here.

ELIAS CJ:

If the Crown is not liable for the acts of the judiciary and if the Crown is not liable because I think the same argument would be made for the acts of the legislature, then your argument is the Crown is not liable?

SOLICITOR-GENERAL:

Correct, it's only liable for breaches of the Bill of Rights Act by the executive.

MCGRATH J:

Well, it's only liable for anything by the executive, I think you're saying, aren't you?

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

I have not appreciated that such a bold argument was being advanced from reading the decision in the Court of Appeal.

YOUNG J:

Well, look at the legislature. I suppose there are two sorts of challenges that might be made, one to legislation which would raise difficult issues, the other to perhaps an action by the House of Representatives, such as, for instance, committal someone for contempt if that's not now banned by the Legislature Act. If someone is committed for contempt, who would be the defendant if that were challenged in the Court? You'd say the speaker, would you?

SOLICITOR-GENERAL:

Yes, or the Clerk of the House, Your Honour and whilst this might cause some issues in some quarters, it is based upon a sound constitutional history.

ELIAS CJ:

Yes, it's just that you may be able to advance this argument more narrowly by simply concentrating on the representative function of the attorney without taking such high ground which will, it seems to me, almost invite us to invent the common, or to express the common law constitution and I just really wonder what we're getting into here, particularly without the benefit of any determinations that would assist us in the lower courts.

SOLICITOR-GENERAL:

Yes, well, I am certain that Your Honours can deal with this issue in the narrow way that Your Honour has indicated, but my friend is the one who has opened this up by this very, very broad concept of State or government liability and I am responding by saying there is no such thing as a State or a government for domestic law purposes in New Zealand, and absent and address to Your Honours on that point, I would, with respect, be remiss in not dealing with the point so Professor Joseph at paragraph 6.4.1 explains in some detail the pertinent personification of the Crown –

ANDERSON J:

16.4.1.

MR COLLINS QC:

16.4.1, thank you Your Honour and what His Honour does in this section under 16.4.1 is explain in considerable detail what I've been submitting to Your Honours, namely that we haven't had in this country a legal entity known as the State and it is for this reason that in domestic proceedings, one cannot commence a statement of claim by alleging that the cause of action is against, as first defendant, the government of New Zealand or the State of New Zealand. If Your Honours had seen such a statement of claim whilst sitting in the High Court, you would have immediately been dealing with an application to strike out or adjourn or an invitation to the plaintiff to go away and find the right defendant.

Now, I've emphasised that I've been dealing with the position at domestic law. I accept without hesitation that for international law purposes, there is a State of New Zealand and that for international law purposes the State is an invisible legal entity and is internationally accountable for wrongful acts of organs of the State. I have no difficulty with that at all and that's precisely what the European Court of Justice decided in *Köbler v Republik Österreich* Case C-224/01, [2004] QB 848 (ECJ) which was referred to in the Court of Appeal and in its judgment, but that's dealing with liability from an international law perspective not a domestic law perspective.

ELIAS CJ:

This was the sort of issue that was discussed, although in a different context, really about the liability of or using the executive to represent the Crown in *M v Home Office* [1994] 1 AC 377 (HL), wasn't it?

SOLICITOR-GENERAL:

Yes it was, yes.

ELIAS CJ:

Does, are you going to take us to that authority because there might be something in there, because that was thought to be quite a –

SOLICITOR-GENERAL:

Far reaching –

ELIAS CJ:

– significant decision and the argument there was that the Crown couldn't be sued in its courts –

SOLICITOR-GENERAL:

Correct.

ELIAS CJ:

– and the Court, as I understand it, held that – yes it could, it could be sued through its minister.

SOLICITOR-GENERAL:

Where there was a statutory provision –

ELIAS CJ:

Where there was a –

SOLICITOR-GENERAL:

– which permitted that to happen.

ELIAS CJ:

I see. Was there?

SOLICITOR-GENERAL:

Yes, I'll just get the relevant privy.

ELIAS CJ:

I thought it was a more sort of general principle?

SOLICITOR-GENERAL:

I'll come back to that point if that's convenient to Your Honour.

ELIAS CJ:

Yes but what – presumably that reasoning, just as that reasoning was applied to the liability of the executive, you will need to meet why it shouldn't also apply to liability –

SOLICITOR-GENERAL:

Of the judiciary.

ELIAS CJ:

Of the – for the judiciary.

SOLICITOR-GENERAL:

Yes indeed.

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

Now I want to deal very briefly with the true ratio of *Baigent* and *Auckland Unemployed Workers' Rights Centre Inc v Attorney*-General [1994] 3 NZLR 720 (CA) because what my friend says is that *Baigent* and *Auckland Unemployed Workers' Union* provides authority for the proposition that the Court of Appeal decided that the executive could be held liable for judicial breaches of the New Zealand Bill of Rights Act and in particular my friend says that *Auckland Unemployed Workers' Union* probably understood the stance for that proposition. He submitted that in the Court of Appeal and the Court of Appeal accepted that proposition and he therefore naturally enough continues to make that submission. However, with respect to my friend and to the Court of Appeal, a careful reading of the judgment leads to the conclusion that regardless of what counsel in *Auckland Unemployed Workers' Union* thought he was seeking, the Judges who decided that case clearly did not understand that their judgments were authorising a New Zealand Bill of Rights damages claim against the Attorney-General for

New Zealand Bill of Rights breaches by a member of the judiciary and I'll need to take Your Honours to the judgment which can be found in volume 1 under tab 24.

ELIAS CJ:

Are you going to come back to Professor Joseph's book when you expand on –

SOLICITOR-GENERAL:

Yes I can Your Honour. Yes I can.

ELIAS CJ:

You're going to develop this argument more fully?

SOLICITOR-GENERAL:

Yes indeed.

ELIAS CJ:

Thank you.

SOLICITOR-GENERAL:

Now at page 723, at line 10, the learned President – sorry it's actually line 11, the learned President explains that the Attorney-General was sued in respect of the New Zealand Police.

YOUNG J:

What page?

SOLICITOR-GENERAL:

This is *Auckland Unemployed Workers' Union* –

YOUNG J:

Sorry what volume?

SOLICITOR-GENERAL:

Volume 1.

YOUNG J:

Thank you.

SOLICITOR-GENERAL:

Tab 24.

ELIAS CJ:

What are the police?

SOLICITOR-GENERAL:

Agents of the executive.

ELIAS CJ:

Are they?

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

Is that established because they do have –

SOLICITOR-GENERAL:

Independence.

ELIAS CJ:

Independence.

SOLICITOR-GENERAL:

Constabulary independence but it has never been in doubt that the police are an agent of the executive. They fall within the executive branch of government.

YOUNG J:

That's in New Zealand, what about in the UK where they're sort of agents of local government except in London?

SOLICITOR-GENERAL:

Can I reflect on that Your Honour?

YOUNG J:

Because they normally sue the chief constable of the Warwickshire Police or something?

SOLICITOR-GENERAL:

Yes indeed. Again I would have thought, but I'll reflect further on this Your Honour, that in the United Kingdom they would fall naturally within the executive branch of government.

ELIAS CJ:

But it is the case that they, we have held in the, you know, constable for South Yorkshire, or all of those cases.

SOLICITOR-GENERAL:

Yes they exercise independent constabulary judgment but they are nevertheless, like many independent office holders, part of the executive. So what the judgment says is that the first defendant, the Attorney-General was sued in respect of the New Zealand Police and then at page 724, lines 13 through to 22, His Honour says that, "The amended statement of claim is an elaborate document. For present purposes it is enough to say the plaintiffs allege that in obtaining and executing the search warrant the police acted unreasonably and maliciously." And then at page 725 His Honour Justice Hardie Boys in the first paragraph, explains that, "The Crown is said to have both a corporate liability for the police operation as a whole and a vicarious liability for the actions of individual officers."

ELIAS CJ:

Sorry where's that?

SOLICITOR-GENERAL:

"The Crown".

ELIAS CJ:

725?

SOLICITOR-GENERAL:

That's at 725, line 45 Your Honour – 46 I'm sorry.

ELIAS CJ:

I see.

SOLICITOR-GENERAL:

Last sentence of that paragraph. And then at line 54, "The claims are brought in tort and under the New Zealand Bill of Rights Act. In the case of the first appellants the police actions are said to have amounted to… a breach of the right to be secure against unreasonable search." And then at page 726, lines 13 to 17, "I am satisfied, for the reasons I have given in my judgment in the *Baigent* case, that insofar as the police action constituted an infringement of rights affirmed by the New Zealand Bill of Rights Act, the appellants have a cause of action against the Crown."

Now in my respectful submission what the Judges in that case appeared to be focusing upon –

ELIAS CJ:

It arises by virtue of that Act, that's the Bill of Rights Act –

SOLICITOR-GENERAL:

Correct.

ELIAS CJ:

– and is maintainable under the Crown Proceedings Act which is presumably you're going to take us too?

SOLICITOR-GENERAL:

Yes indeed. But what the Judges appeared to be deciding was that in obtaining and executing a search warrant a claim could be brought against the Attorney-General for the actions of the police in obtaining and executing the search warrant. In my respectful submission *Auckland Unemployed Workers' Union* goes not further than *Baigent* and I believe I am entitled to make the submission that if the Court in *Auckland Unemployed Workers' Union* had been taking the radical step of reinstating an action against the Attorney-General for judicial breaches of the New Zealand4 Bill of Rights Act, then it would have plainly said so and the Court didn't take that step because the Court believed it was concerned with New Zealand Bill of Rights breaches by the police.

YOUNG J:

But the claim against the judicial would be over the search warrant would it?

SOLICITOR-GENERAL:

Over the issue of the search warrant Your Honour.

YOUNG J:

But this was at a time, well I cant remember the timing, but wasn't this at a time when District Court Judges didn't have immunity anyway?

SOLICITOR-GENERAL:

Ah –

YOUNG J:

Or had qualified immunity?

SOLICITOR-GENERAL:

They had qualified immunity up until *Harvey v Derrick* [1995] 1 NZLR 314 (CA), legislative changes which flowed from *Harvey v Derrick*.

ELIAS CJ:

Why did the Crown stand behind –

SOLICITOR-GENERAL:

Sorry Your Honour?

ELIAS CJ:

Why did the Crown stand behind them?

SOLICITOR-GENERAL:

Behind the executive?

ELIAS CJ:

No behind –

SOLICITOR-GENERAL:

The police?

ELIAS CJ:

– the Judges individually sued, the ones who didn't have immunity. What was the thinking behind that?

SOLICITOR-GENERAL:

At that point the issue had not really been developed at all Your Honour.

McGRATH J:

But they had an indemnity didn't they?

SOLICITOR-GENERAL:

The District Court Judges did have a statutory indemnity at that time.

ELIAS CJ:

A statutory one?

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

Oh.

McGRATH J:

So that's why the Crown –

ELIAS CJ:

I see, yes, thank you.

SOLICITOR-GENERAL:

At that time. They no longer have the statutory indemnity because –

ELIAS CJ:

They don't need it. They're immune.

SOLICITOR-GENERAL:

They have absolute immunity.

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

Now can I start to develop the argument that the Crown means the executive for domestic law purposes and it is a part of the appellant's case that the Crown is synonymous with the executive for section 3(a) of the New Zealand Bill of Rights Act purposes. There the actors under the New Zealand Bill of Rights Act are identified as being the executive, the legislature and the judicial branches of the government of New Zealand. Consistent with constitutional separation of powers the executive, if it is – the Crown, if it is the executive, cannot be sued for judicial branches of the New Zealand Bill of Rights Act.

ELIAS CJ:

Well are you just making that statement as a bald statement –

SOLICITOR-GENERAL:

No I'm just going to go into the reasons why.

ELIAS CJ:

Ah.

SOLICITOR-GENERAL:

This is the introduction Your Honour –

ELIAS CJ:

I see, sorry.

SOLICITOR-GENERAL:

– I'm going to explain a little further why I'm making that statement.

ELIAS CJ:

It is not just – well the question I have. It is not just an assertion based on separation of powers doctrine because if so, you need to explain to us why separation of powers doctrine applies to the New Zealand constitution.

SOLICITOR-GENERAL:

Yes I am certainly going to do that a little later Your Honour but for the purposes of section 3(a) of the New Zealand Bill of Rights Act, three Act laws are identified as comprising the government of New Zealand. Now there are three sources of reference which support the submission that for domestic law purposes, the Crown needs the executive in New Zealand domestic law. First are a number of statutes which I will take Your Honours to, secondly case law and third, academic authorities.

Now in the written submissions, I have identified a number of statutes which refer to the Crown, in a way that clearly suggests that the Crown refers to the executive, although there are some which also refer to the Crown as being the sovereign or both the sovereign and the executive. The important point for present purposes is that I am unaware of any statute which refers to the Crown as meaning the judiciary or the legislature for domestic law purposes. If we look at the statutes where the Crown is referred to and start with the obvious statute, namely the Crown Proceedings Act, officials and servants of the Crown are defined in a way which excludes the Governor-General and Judges.

Under the Public Finance Act, the Crown or the sovereign is defined to include all ministers of the Crown and all departments. A similar definition can be found in the Public Audit Act. In the Electoral Act, however, the Crown means Her Majesty, in respect of the government of New Zealand. I re-emphasise that –

ELIAS CJ:

What is the government of New Zealand in that? This is the Electoral Act?

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

Well it must be more than the executive.

SOLICITOR-GENERAL:

It includes the sovereign.

MCGRATH J:

Does it use that terminology, the government of New Zealand or in right of New Zealand?

SOLICITOR-GENERAL:

Volume 1, tab 13 Your Honour, section 2. No it is Her Majesty in respect of the government of New Zealand

ELIAS CJ:

Sorry, volume 1 – I don't have a section 2. Oh, it is the definition.

SOLICITOR-GENERAL:

Yes the definition section. I am sorry Your Honour, it is section 3 I am sorry.

ELIAS CJ:

Sorry, where are we meant to be?

SOLICITOR-GENERAL:

Tab 13.

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

Electoral Act, page 3. It is only the page that has actually got definitions in it Your Honour, Crown means. Does Your Honour not have that page?

ELIAS CJ:

No.

SOLICITOR-GENERAL:

My apologies Your Honour.

ELIAS CJ:

I find that very odd.

SOLICITOR-GENERAL:

Second page.

ELIAS CJ:

Oh I am sorry, thank you, yes I do have it. It is government defined?

SOLICITOR-GENERAL:

No.

ELIAS CJ:

We don't have G though but you can tell me it is not defined?

SOLICITOR-GENERAL:

Correct. Now the important point for present purposes, Your Honours, is that as far as I am aware, no domestic statute defines the Crown as encompassing all three branches of government. As I have just submitted in taking Your Honours to domestic statutes refine the Crown to mean either the sovereign, the executive or both. Not the judiciary.

Now the second source of authority, are leading judicial pronouncements are these, in many instances and these, in many instances, will be well known to Your Honours.

ELIAS CJ:

I am just wondering what we can draw from that because the statutes will be concerned with particular subject matter. They are not constitutive of the New Zealand State, so an omission in statute law is, apart from the Constitution Act which I guess you are going to take us to.

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

Is perhaps not surprising?

SOLICITOR-GENERAL:

Well if the Crown was to mean anything other than the executive, in the eyes or minds of the legislature, anything other than the executive and/or the sovereign, then one would expect that to be very clear from any definitions of the Crown that the legislature was passing.

ELIAS CJ:

Does the Judicature Act contain any definitions?

SOLICITOR-GENERAL:

We have looked Your Honour, no.

ELIAS CJ:

Because it does not exclude a role for the executive.

SOLICITOR-GENERAL:

Doesn't exclude a role for the executive?

ELIAS CJ:

No, in the judicial branch of government, regulation making powers and things like that.

SOLICITOR-GENERAL:

Oh I see, yes, yes indeed.

ELIAS CJ:

Sorry.

SOLICITOR-GENERAL:

Perfectly correct if you do ask that question Your Honour. The leading judgments which focus upon what is meant by the Crown include –

ELIAS CJ:

Sorry are you moving on to case law?

SOLICITOR-GENERAL:

Yes I am.

ELIAS CJ:

From the statutes?

SOLICITOR-GENERAL:

Yes indeed.

ELIAS CJ:

What does the Constitution Act say?

SOLICITOR-GENERAL:

If we go to volume 1, tab 2. We find that under the Constitution Act, there is the four divisions. Part 1 dealing with the sovereign and the head of State. The executive, who are required – under which ministers are required to be members of parliament and then there are privy relating to parliamentary under-secretaries and other office holders as members of the executive, then the legislature and the requirements for being a member of the legislature and then under part 4, the judiciary.

McGRATH J:

Yes but for my part Mr Solicitor I can accept that the Crown normally means executive, not always, because we speak of the Crown in Parliament and concepts are like that. But I am not sure how that helps you with your basic proposition, that the Crown, as the executive, cannot be sued for judicial breaches.

SOLICITOR-GENERAL:

Because if, in my respectful submission Your Honour, if I am correct in saying that the Crown means the executive, then the Crown or executive, cannot be sued for breaches of or omissions of a branch of government over which it has no jurisdiction and no control.

McGRATH J:

Mr Harrison's point will be that the Crown, in the executive concept, has at its disposal, the resources of the nation and it is the only person who pays cheques.

SOLICITOR-GENERAL:

Well one has to pause and reflect on that. Ultimately, yes, the executive does have the purse strings in its hands but it is the legislature that places the money in the

purse in the first place and the executive cannot expend money that has not been approved by Parliament by way of an appropriation.

McGRATH J:

There are rules but I do not think that has got anything to do with it.

SOLICITOR-GENERAL:

No it is very, very important Your Honour that again, it is fundamental to the separation of powers. It is Parliament that approves the appropriation, it is for the executive to conduct the expenditure.

McGRATH J:

The Crown and the executive could have a liability. There may be some problems as a lack of in appropriation in actually paying it out but that is not going to negotiate any liability the Crown has.

SOLICITOR-GENERAL:

I am happy to accept that point Your Honour.

YOUNG J:

Is your position simply that treating the Crown as a defendant for, in a case where judicial breaches of the Bill of Rights are alleged, is simply an illegitimate go-round of judicial immunity?

SOLICITOR-GENERAL:

Absolutely.

YOUNG J:

And is that the guts of it?

SOLICITOR-GENERAL:

Yes. The reason why we're having this argument, sorry, we're embroiled in this particular issue at the moment, is because my friend alleged judicial breaches and knows full well that if he were to sue the Judges –

YOUNG J:

He can't sue the Judges so he's got to find some other suitable defendant –

SOLICITOR-GENERAL:

– he's got to find another defendant who he thinks he can pin the tail on for judicial breaches and to summarise it very, very briefly, my respective submission which I want to elaborate on and quite a lot more, that involves a fundamental blurring of the separation of powers and does a great deal to undermine the independence and the standing of the judiciary.

Now, the Crown means the executive case law and if I can just very briefly bring Your Honours attention to these leading cases and then one academic authority of international standing. *Town Investments Limited v Department of the Environment* [1978] AC 359 (HL), I'll just read out where Your Honours can find it rather than invite Your Honours to go to this, these provisions. It's in volume 3, tab 59 Lord Diplock at page 381. Instead of speaking of the Crown we should speak of the government, a term appropriate to embrace both collectively and individually all the ministers of the Crown. In the same judgment Lord Simon, the Departments of State including the ministers at their head are themselves members of the corporate aggregate of the Crown.

McGRATH J:

Page?

SOLICITOR-GENERAL:

Four hundred. In *M v Home Office* which is volume 3, tab 55 at page 395, Lord Templeman at 395 –

ELIAS CJ:

Sorry, tab?

SOLICITOR-GENERAL:

Fifty five at page 395, Lord Templeman, the expression the Crown has two meanings namely the Monarch and the executive. Now, leading academic right is also recognised that the Crown usually refers to the sovereign –

ELIAS CJ:

Sorry, this expresses the, a view which is contrary to what you're putting to us which is that the Crown is only ever the executive?

SOLICITOR-GENERAL:

Or the sovereign.

ELIAS CJ:

Well, it's the sovereign – but the sovereign is the, this – the Judges do their work in the Queen's courts and Parliament, it's a Queen in Parliament that passes the laws so the reference to the Monarch may well be apt to cover the legislative and judicial branches of government.

SOLICITOR-GENERAL:

With respect, as I read the judgment, what Lord Templeman was saying was that the expression "the Crown has two meanings," it's either the Monarch or the executive and in my respective submission it could be both. That's the way I read what Lord Templeman was saying, Your Honour. I don't think he was going any further than that and, in any event, it's not the sovereign that meets liability. The sovereign can't be sued. It is only the executive that could meet that liability.

Now, the last authority I wanted to go onto on this point is P W Hogg and P J Monahan, *Liability of the Crown*, which is in volume 5 under tab 94 at page 11 where the learned authors and what Sir Kenneth Keith described as a majestic work. Addressed the issue of what is meant by the Crown and starts off with an often used quote from *Town and Country*, *Town Investments*, I'm sorry, and then proceeds with, "Although we now have a constitutional monarchy in which the role of the Queen and her representatives in commonwealth countries has become almost entirely formal, the Crown has persisted as the name for the executive branch but not the legislative branch of government. The executive power is actually exercised by the prime minister and other ministers who direct the work of the civil servants in the various government departments. This structure is actually commonly described as the government or the administration or the executive but lawyers usually use the term

the Crown. Thus lawyers speak of the Crown expropriating a house or the Crown being sued for breach of contract or the Crown being bound by statute."

Your Honour, in my respective submissions, Lord Diplock, Lord Templeman, Lord Simon, Professors Hogg and Monahan, as well as a host of other Judges whom I haven't taken you to and academics who have written in similar vain, are entirely correct when they say that the Crown means either the sovereign or the executive or a combination of the two, and if this analysis is correct, in terms of s 3A of the New Zealand Bill of Rights Act, the Crown can only be treated as being synonymous with the executive.

YOUNG J:

What, leaving perhaps aside *Maharaj*, what authority is there for the view that the Crown doesn't compass the judiciary?

SOLICITOR-GENERAL:

I'm sorry, Your Honour, I just – could I invite Your Honour to move –

YOUNG J:

Sorry, leaving aside *Maharaj* perhaps, what authority is there in terms of domestic law for the proposition that the Crown does represent the judiciary or that the judiciary, the judiciary's actions can be sheeted home to the Crown?

SOLICITOR-GENERAL:

My friend interprets *Baigent's* and *Auckland Unemployed Workers' Union* as supporting that proposition.

YOUNG J:

Is that because of the search warrants?

SOLICITOR-GENERAL:

Yes, but as I've gone to some things to emphasise, with respect, it might have been what he was trying to argue in *Auckland Unemployed Workers' Union* but it doesn't appear to be what the Judges were thinking they were deciding.

McGRATH J:

In *Maharaj* against the context of a particular constitution of a particular constitution did the Privy Council say the State is responsible for the actions of the Judges?

SOLICITOR-GENERAL:

Yes and *Maharaj*, as Your Honour will appreciate from *Brown* has been interpreted in subsequent Privy Council judgments and, in particular, *Independent Publishing* to mean that the liability was vested against the Attorney-General because of the State being a domestic legal entities failure to, use the language of another Judge, erect a scaffolding upon, within which the judiciary could probably act.

McGRATH J:

Maharaj was really a case, wasn't it, where the Judge, the government – I don't want to use State –

SOLICITOR-GENERAL:

Well, in that case, it was a State, Sir. We shouldn't shy from that because it was.

McGRATH J:

It was case though using a, trying to look more broadly outside that constitutional arrangement, not so much where the government was held responsible for the actions of the Judges because the way that it was expressed by Lord Diplock was that the State was directly liable for the actions and it was, as you say, if you like, an international law concept that was imported into the constitutional arrangements in Trinidad and Tobago but is that as far as it went. There was no indication, was it, that they were treating the Crown or the executive as directly taking over the responsibility for what the judiciary had done.

SOLICITOR-GENERAL:

Correct Your Honour.

McGRATH J:

It was the State, as you rightly say, in that context, that was directly liable.

SOLICITOR-GENERAL:

Correct and yes, it is an international law concept but it is also quite particular to the constitution of Trinidad and Tobago and the legislative structure relating to Crown liability, whereby as I emphasised right at the beginning, you have a domestic entity

called the State of Trinidad and Tobago, for whom you sue the Attorney-General when you allege State breaches. And, as I said earlier, we will see a similar concept applies in the Republic of Ireland although there, they have said, you can't actually hold the State or the Attorney-General liable for breaches of fundamental rights by members of the judiciary.

McGRATH J:

That is still a first instance decision is it, *Kemmy*?

SOLICITOR-GENERAL:

It is indeed, *Kemmy v Ireland* [2009] IEHC 178. That is the second, I understand, the second highest Court in Ireland. Now I wanted to deal very, very briefly with the responsibilities of the Attorney-General and I can just encapsulate this.

ELIAS CJ:

Sorry were you planning to take us to any other – you said that you were dealing with case law or statute case law and academic writing. Were you going to take us to any other?

SOLICITOR-GENERAL:

No those are the key ones. I can take you to others if you wish but those are the key points and they all say much the same thing, that is the important point Your Honour. Now I wanted to very briefly explain, or sorry summarise the role of the Attorney-General. Clearly a member of the executive and he is the inter-face between the executive and the judiciary and is responsible for the executive's relationship with the judiciary and importantly as a former Solicitor-General, has written the Attorney-General's relationship with the judiciary, as one which is conducted at constitutional arms length and involves a relationship between the Attorney-General and a separate branch of government and that well-known article is in volume 5, tab 100 and I have quoted from page 204.

Now the next issue is whether, in addition to being the appropriate defendant for proceedings involving New Zealand Bill of Rights' breaches by the executive/Crown, should the Attorney-General be the appropriate defendant for New Zealand Bill of Rights' breaches by the judiciary and in my respectful submission, the answer is no. There is absolutely nothing in the constitutional history of the office or in the roles

currently discharged by those who hold the office of Attorney-General, to suggest the giant leap which the Court of Appeal was willing to take when it held that the Attorney-General was the obvious defendant for judicial breaches of the New Zealand Bill of Rights.

YOUNG J:

When District Court judges were, from time to time, sued for invalid judicial action, was the claim always against them individually as opposed to against the Attorney-General. Now Upton is possibly a different situation but apart from that?

SOLICITOR-GENERAL:

The answer is yes Your Honour. I am not aware of any claim against a District Court judge in the pre *Harvey and Derrick* time. I believe the Attorney-General was named as the defendant on behalf of, in relation to acts of the District Court judge. Can I just pause and just remind Your Honours though that if a District Court judge committed or allegedly committed a reviewable error, it used to be that the defendant was the named Judge. It was the Judge. Now an amendment was made to the Judicature Act around about 1991-92 somewhere, I have just forgotten the exact time but in the early 1990s so that the appropriate defendant in judicial review proceedings, where it was alleged that a District Court judge had committed a reviewable error, became the Court or the Registrar of the Court or tribunal concerned.

ANDERSON J:

It was just named as the Court, the District Court at Manukau, for example.

SOLICITOR-GENERAL:

Or Tribunal, yes.

ANDERSON J:

That was the name of the magistrate for example, like Mr Rossen, who was sued for mandamus at one stage.

SOLICITOR-GENERAL:

Yes, and in a case called Crispin, Justice McGechan explains rather bluntly, why that change was brought about, because of sensibilities of District Court.

ANDERSON J:

I remember it at the time, bit miffed about it.

ELIAS CJ:

On that point, you say that before the immunity was legislated, there was a statutory immunity but when did the statutory immunity come in and what was the position before it came in because it wasn't that long ago was it?

SOLICITOR-GENERAL:

It was mid-way through the 1990s Your Honour and it followed Harvey and Derrick where liability was established in relation to a District Court judge. At that point there was no absolute immunity. There was a statutory indemnity and it was for that reason that the Attorney-General was acting for the judge in that particular case. Now the Judicial Matters Bill enacted the immunity as in tab –

ELIAS CJ:

Oh no I am sorry. I may have said immunity, I meant the indemnity. The indemnity was a statutory one before the immunity was imposed

SOLICITOR-GENERAL:

Correct.

ELIAS CJ:

But what date did it come in and what was the position before then?

SOLICITOR-GENERAL:

Okay, tab 8 of the respondent's bundle I think.

ELIAS CJ:

I don't seem to have a respondent's bundle. I have got a supplementary casebook.

SOLICITOR-GENERAL:

Actually this is just the Bill.

YOUNG J:

It's that one there.

ELIAS CJ:

The supplementary.

SOLICITOR-GENERAL:

This is just the Bill, what about the Act. So the Act is actually on the previous page under tab 7.

McGRATH J:

We are looking at a volume without tabs, is that right?

SOLICITOR-GENERAL:

Mine is tabulated, is no one else's? Page 103. I guess someone very kindly tabulated mine. So to answer Your Honour's question. I am just trying to find the exact –

ELIAS CJ:

No I am interested in the indemnity because the indemnity, as you have said, was a statutory one before this. I want to know when the statutory indemnity was provided for and what was the position before it was?

SOLICITOR-GENERAL:

And I am just trying to find the year that this amendment occurred.

YOUNG J:

2004 I think.

McGRATH J:

It was part of the Law Commission's report.

SOLICITOR-GENERAL:

Yes 2004.

ELIAS CJ:

But you are talking about the immunity?

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

I am talking about the indemnity that preceded it.

SOLICITOR-GENERAL:

So up until 2004 there was a statutory indemnity.

ELIAS CJ:

Yes, where was that provision found?

SOLICITOR-GENERAL:

It was in the District Court's Act of 1947 and whether we have the provision for Your Honours I don't know.

ELIAS CJ:

Perhaps after the adjournment you might just tell me. When that indemnity was first enacted and if you know it, what was the position beforehand, because it may be helpful to know?

SOLICITOR-GENERAL:

I understand Your Honour's question.

McGRATH J:

Just for my part Mr Solicitor. I can see that (a) (b) (c) it helps to look at the position of the District Court judges, because as *Harvey and Derrick* shows, they were sued individually because the liability was individual and backed up by an indemnity and as you say the Crown Law Office would represent them accordingly. But the key thing, it seems to me, is in relation to the Attorney-General. I, for my part, will accept that you can't sue the Attorney-General unless there is a liability of executive government in this area. If there is it seems to be canvassing the Attorney-General because the Attorney-General is standing up for the executive government.

SOLICITOR-GENERAL:

Yes.

McGRATH J:

If the executive government is not liable it seems to me you can't.

SOLICITOR-GENERAL:

Well that's my case in a nutshell.

McGRATH J:

But I'm not sure, as I said earlier, how much your argument such as Crown means executive and the position in relation to indemnities and immunities of District Court Judges. I don't see that that takes you particularly far.

SOLICITOR-GENERAL:

I agree. It doesn't – it's certainly not the answer and can I just encapsulate what I think Your Honour is saying. The reasons why it is that the Attorney-General could not or should not be named as the defendant for actions involving judicial breaches of the New Zealand Bill of Rights Act, alleged judicial breaches of the New Zealand Bill of Rights Act, and it relates solely to issues of power and control. The Attorney-General, as a member of the executive, clearly has no power or control over members of the judiciary and liability, in common law context, only ever is sheeted to those who have responsibility, power or control in relation to the wrongdoer either directly or even vicariously and there is a great – sorry Your Honour.

McGRATH J:

Just I suppose as you make these points it seems to me constitutionally things seem relatively straightforward. The executive government has the constitutional responsibility for funding all of the costs of the judiciary.

SOLICITOR-GENERAL:

Correct.

McGRATH J:

If there are incidental costs through judicial acts giving rise to liability, constitutionally you would expect the executive government to meet it. Now why shouldn't the law follow the constitutional position?

SOLICITOR-GENERAL:

Because we're dealing with liability here Your Honour and liability can only be attached to those who commit the breaches or have power and control over those who commit the breaches. That is one of the most fundamental tenets of our common law system. It would, in fact, be quite an extraordinary step to name as a defendant, and to hold as liable a defendant, an entity who has absolutely no power

or control over the alleged wrongdoers actions. Over the alleged wrongdoer full stop. One can't imagine any other situation where it could be said that legal entity A shall be held liable for the acts and omissions of legal entity B, notwithstanding the fact that legal entity A has absolutely no power, control or responsibility in a legal sense for the legal entity B. There is simply no situation in the common law where such a liability could be considered appropriate. I challenge my friend or anyone else to come up with a situation where such a fundamental issue of liability would be addressed in the way which my friend would argue it should be.

In terms of the Attorney-General having no power or control over the judiciary there is a particularly pertinent judgment of His Honour Justice Kirby when he was a member of the Supreme Court of New South Wales, a case called *Rajski v Powell* (1987) 11 NSWLR 522 (NSWCA) which can be found in volume 3 at tab 65 where His Honour justice Kirby said at page 530, line F, "Power to direct and control is absent in the relationship between the Attorney-General and judicial officers. Indeed it is fundamental to our arrangements to the administration of the justice that no power should exist. Accordingly the theoretical basis for rendering a law minister responsible for the acts of a judicial officer simply does not arise from the relationship between them."

Now I pause to acknowledge in that case there was, as this case started off, an attempt to try and hold the Attorney-General vicariously liable for the acts and omissions of a judicial officer but nevertheless the learned Judge accurately identifies the nature of the relationship between Attorney-General and judicial officers.

Now I want to spend some time on judicial independence because judicial independence is really at the heart of the appellant's submissions. Creating the Attorney-General, a member of the executive liable for the actions of the judiciary, risks undermining judicial independence. Judicial independence is of paramount importance to the appellant's case and underpins all facets of the appellant's submissions and it is a topic which I will refer back to later in my submissions. Suffice for present purposes to make the following points. Judicial independence is assessed from the perspective of the fair minded and informed reasonable observer. Now the respondent criticises the appellant for not adopting this perspective at paragraph 108 of his submissions and then follows with the following two assertions. Judges won't be worried about damages liability. They're made of sterner stuff.

And Judges recognise they may, at times, have to place rights above their own interests, at paragraph 114.

In making these submissions the respondent falls into the trap which he unfairly accuses the appellant of falling into by focusing on the internal perceptions of the interests of Judges. Judicial independence is not secured by the Judges own interests being outweighed nor is it relevant that they may or may not be made of sterner stuff. It is secured by testing the public's objective perception of their independence from every other person.

The respondent has, with respect, mischaracterised or misunderstood the appellant's arguments and these arguments are not simply the appellant's arguments. They are arguments which have been universally acknowledged and accepted and applied in every cognate jurisdiction. Thus in the 2005 High Court of Australia case of *Fingleton v R* [2005] HCA 34, [2005] 227 CLR 166, to be found in volume 3 at tab 64, pages 38 and 39, the then Chief Justice of Australia affirmed, reaffirmed the statements of the Lord Denning in S*irros v Moore* [1975] QB 118 (CA) which my friend –

ELIAS CJ:

Sorry what page?

SOLICITOR-GENERAL:

Page 38 and 39 Your Honour.

ELIAS CJ:

I don't think there's –

SOLICITOR-GENERAL:

Sorry, this is volume 3 Your Honour, tab 64.

ELIAS CJ:

Yes.

McGRATH J:

Paragraphs 38 and 39.

ELIAS CJ:

Paragraphs.

SOLICITOR-GENERAL:

Sorry Your Honour. 38 and 39 where then Chief Justice Gleeson reaffirmed the statements of Lord Denning in *Sirros v Moore* which my friend describes as being outdated and thinks is unappealing and the noted the public interest in maintaining the independence of the judiciary requires security not only against the possibility of interference and influence of governments but also against retaliation by persons or interests disappointed or displeased by judicial decisions. Similar observations were made more recently by Justices Gummow, Hayne and Crennan in a case which isn't before you but which I'll give you the reference to. It's *Forge v Australian Securities Investment Commission* (2006) 228 CLR at 45. I want to spend a little bit of time looking at some leading Canadian cases. In *Valente v The Queen* (1985) 24 DLR (4^{th}) 161, which is volume 4, page 75.

GAULT J:

Which page?

SOLICITOR-GENERAL:

Volume 4 Your Honour.

GAULT J:

Which page?

SOLICITOR-GENERAL:

Tab 75.

GAULT J:

Tab 75.

SOLICITOR-GENERAL:

At page 687. Here Justice Le Dain spent quite a lot of time focusing on the ingredients of judicial independence in a very comprehensive and commendable analysis. At 687 in the second paragraph commencing "I thus" His Honour defined judicial independence as "The capacity of Courts to perform their constitutional functions free from actual or apparent inference by and to the extent that it is constitutionally possible, free from actual or apparent dependence upon any persons

or institutions including, in particular, the executive arm of government over which they do not exercise direct control." His Honour then observed that it is generally agreed that judicial independence involves both individual and institutional relationships. The individual independence of a Judge is reflected in such matters as security of tenure and institutional independence of the Court or tribunal over he or she presides and is reflected in its institutional or administrative relationships to the executive and legislative branches of government.

His Honour added, at page 689, that the general test for judicial independence asks whether the tribunal may be reasonably perceived as independent, both independence and impartiality are fundamental; not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice. Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation. Similar observations were made by former chief justice Dickson in a case called *Beauregard v Canada* [1986], 2 S.C.R. 56. Now I don't think that judgment is actually –

YOUNG J:

Is this about the parking arrangements, the Superior Court Judge in Quebec?

SOLICITOR-GENERAL:

Yes it is Your Honour.

YOUNG J:

I think they took the view that the parking arrangements they had couldn't be altered to their disadvantage by the provincial governments without gross interference with their independence – I think they did pretty well in Quebec but not so well –

SOLICITOR-GENERAL:

The Chief Justice made the following points which may be of assistance to Your Honours with grappling with the issues.

ELIAS CJ:

But this is in a very different context Mr Solicitor, isn't it. The submission that you are making is that in public perception, the executive standing behind the judiciary in terms of liability, would undermine perceptions of independence, is that it?

SOLICITOR-GENERAL:

That's it. And I am unaware of any authority which would hold otherwise and, indeed, all of the authorities go to considerable length to emphasise independence of the judiciary and it's arm length relationship with the executive and with the legislature and when it comes to breaches of rights, again elements of the independence and immunity, I am sorry. In aspects of independence as well as immunity of judges, in a constitutional sense, trump those of the individual rights of individuals.

ELIAS CJ:

So the former indemnity provision was constitutionally very suspect.

SOLICITOR-GENERAL:

Yes indeed, yes.

McGRATH J:

Your predecessor was not able to persuade the Court of Appeal of that.

SOLICITOR-GENERAL:

No, but in reality it was suspect because the judiciary were beholden to the executive.

ELIAS CJ:

Well I am not sure whether that is really very useful because if there is an obligation, where does the beholdeness enter into it? An obligation to indemnify?

SOLICITOR-GENERAL:

Well can I express that a little differently because if contrary to everything that the appellant – to this Court – you were to hold, I am sorry. If you were to go down a line which says "The individual Judges are to be the appropriate defendant, there is no immunity, is there an indemnity". At that point there is no statutory indemnity, it would be for the executive in the form of the Minister of Finance to exercise a judgment in the public interest under the Public Finance to decide whether or not to provide an immunity.

ELIAS CJ:

I notice that – I think it was in the case that you took us to, in Australia, the New South Wales case. There was reference to a common law indemnity.

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

I think it was that case, it was one of the cases you have just taken us to. Presumably, one imposed by judicial decision.

SOLICITOR-GENERAL:

Probably.

ELIAS CJ:

You would say that that was unsound too, as undermining judicial independence.

SOLICITOR-GENERAL:

Yes well currently in New Zealand, at least in domestic law, the only person who can provide an indemnity on behalf of the Crown, is the Minister of Finance and that is found in section 65ZD of the Public Finance Act which permits the Minister of Finance on behalf of the Crown to give an indemnity to a person if the government or the ministers believe it is necessary or expedient in the public interest, to do so.

ELIAS CJ:

But are you saying that that would preclude a common law imposition of indemnity?

SOLICITOR-GENERAL:

I am not going to go that far Your Honour but all I am saying is, that the law as we understand it at the moment, provide for a form of indemnity and it is a statutory form of indemnity which only the executive can give.

YOUNG J:

I have actually got the wrong case with *Beauregard*. That was a pension case, a differential pension arraigned.

ELIAS CJ:

Valente?

YOUNG J:

No *Beauregard.*

SOLICITOR-GENERAL:

And it was in *Beauregard* that Chief Justice Dickson said that the rationale for the two pronged modern understanding of judicial independence is recognition that the Courts are not charged solely with the judication of individual cases, that is, of course one law. It is also the context for a second different and equally important role, namely as protector of the constitution and the fundamental values embodied in it, rule of law. Fundamental justice, equality, preservation of the democratic process, are the most important. In other words, judicial independence is essential for fair and justice resolution in individual cases. It is also the life blood of constitutionalism in democratic societies. Is this a convenient place to pause?

ELIAS CJ:

Yes we'll take the morning adjournment now thank you.

COURT ADJOURNS: 11.28 AM

COURT RESUMES: 11.51 AM

ELIAS CJ:

Yes Mr Solicitor.

SOLICITOR-GENERAL:

Thank you very much Your Honours. Your Honour the Chief Justice, part of the answer to the question you asked me about the timing of the legislative indemnity can be found in the judgment of *Harvey v Derrick*.

ELIAS CJ:

Yes that's been drawn to my attention by Justice Young, 79?

SOLICITOR-GENERAL:

1979 and the report, I think that must have been the Beatty Commission report, which recommended the change from a process which I have to confess I can't recall or am familiar with where it seems that a certificate from a High Court Judge needed to be obtained and that's the bit which –

ELIAS CJ:

Yes I'm just –

SOLICITOR-GENERAL:

– I want further research to be done on.

ELIAS CJ:

Yes I'd be grateful because it is part of the way we have coped with this issue in the past and I'd like it cleared up. Thank you.

SOLICITOR-GENERAL:

Yes, yes –

ELIAS CJ:

A certificate sounds like a statutory procedure, doesn't it? It's very strange. Yes, thank you.

SOLICITOR-GENERAL:

Yes so I will have somebody explore that a little further.

ELIAS CJ:

Thank you.

SOLICITOR-GENERAL:

Before I continue with the submissions I wish to make about judicial independence can I emphasise that it would be most unfortunate if issues relating to indemnity were to sidetrack the Court. Your Honour the Chief Justice talked about the executive standing behind the judicial branch of government and His Honour Justice McGrath made observations of a similar nature. Whether there is an indemnity or not should not determine the outcome as to who is the right defendant. Issues of indemnity should not cloud judgments about liability. In this case this isn't about the executive standing or not standing behind the judiciary, it's a case in which my friend wishes to place the executive in front of the judiciary and say that a member of the executive, the Attorney-General, is the appropriate defendant when judicial breaches of the Bill of Rights Act occurs.

Judicial independence, as I was saying before the morning adjournment, involve concepts where Courts, particularly Canada, have consistently intercised the crucial importance of ensuring that the public perception of judicial independence is never undermined. For example, in the Supreme Court of Canada in a case called *Mackin v New Brunswick (Minister of Finance)* 2002 SCC 13, [2002] 1 SCR 405, which can be found in volume 4 at tab 69 – sorry paragraph 38, it was noted that the judicial system is unable to claim any legitimacy or command the respect and acceptance that are essential to it in order for such confidence. To be established and maintained it is important that the independence of the Court be openly communicated to the public.

All of the appellant's case is focused upon ensuring that the public perception of judicial independence is not threatened. By enabling litigants to sue the Attorney-General for BORA breaches allegedly committed by members of the judiciary risks undermining public perception of a compromise of judicial independence in three distinct ways.

First, by the public perceiving that a collateral factor, a claim for damages, maybe introduced into the Judge's mind when performing his or her judicial functions. The public could rightly perceive that Judges could be influenced or concerned about potential New Zealand Bill of Rights Act liability and the inevitable corollary or extensive litigation, fears of potential cross-examination by disaffected or possibly even vexatious litigants attempting to collaterally attack or impugn the decisions that they complain of.

Secondly, by the public perceiving that a damages remedy paid for by the executive will introduce a structural incentive for the executive to monitor, scrutinize or control the judicial branch thereby resulting in what was described in *Kemmy* as a chilling effect upon the judicial process.

Thirdly, by creating a perception that the public or taxpayer is required to pay for damages arising from BORA breaches by the judiciary thereby introducing a public pressure for the executive to control or manage the judiciary particularly following any unpopular cases of New Zealand Bill of Rights Act damages.

Now the Court of Appeal dismissed these arguments in a single paragraph, paragraph 96, by reasoning that judicial independence would not be undermined

because “rewards will generally be moderate” and “other judicial decisions are more likely to be a cost on the public purse” such as retrials. With respect the Court of Appeal appears to consider that the sole focus of the public’s attention will be on the ultimate cost in monetary terms of a remedy. That maybe so, however, potential cost is, with respect, irrelevant and an unprincipled consideration in the context of judicial independence. The only relevant consideration is whether the public could reasonably perceive that the availability of a damages remedy through judicial New Zealand Bill of Rights Act breaches, would undermine the absolute institutional and individual independence of the judiciary. In that respect it is the award of damages itself, not its amount, that will have the foremost effect on public perceptions of independence and, with respect, there is a world of difference between the public’s perception of a retrial, which raises absolutely no independence concerns whatsoever, and a monetary award of damages for judicial Bill of Rights breaches to be met by the executive and paid for by public funds.

The separation of authority and function which underpins judicial independence includes the judiciary not being answerable for the judicial decisions except by way of appellate processes and in limited circumstances by way of judicial review. The judiciary cannot be made to explain their decisions to the executive or any agent of the executive and this point was made very clear by Her Honour Justice McLachlin, as she then was, in a case called *MacKeigan v Hickman* [1989] 2 SCR 796, which is in volume 4, tab 68, at pages 830 and 831. The issue before the Supreme Court was whether public inquiries under the Public Inquiries Act could be used to compel Superior Court Judges, who sat on a criminal appeal, to testify before a Royal Commission.

Her Honour noted at page 380 that the Judges’ right to refuse to answer to the executive or legislative branches as to how or why a Judge arrived at a particular judicial conclusion was essential to the independence of the Judge. Her Honour said, “The analysis in *Beauregard* supports the conclusion that judicial immunity is essential to the concept of judicial independence as stated by Dickson CJ in *Beauregard* the judiciary, if it is to play the proper constitutional role, must be completely separate in authority and function from other arms of government. To entertain the demand that a Judge testify before a civil body in emanation of the legislature or executive on how or why he or she made his or her decision would be to strike out the most sacrosanct core of judicial independence.”

McGRATH J:

Sorry, what page is that at?

SOLICITOR-GENERAL:

Page 830 and 831 Your Honour. Now to just then summarise this particular part of the submissions. The non-ability of the executive for judicial New Zealand Bill of Rights breaches, not matter how it is categorised, will in my respectful submission, give rise to a public perception of a modified relationship between the executive and the judiciary which will, or will be seen, to place external pressures or give the perception of creating pressures, on individual judges in the performance of their functions and that constitutes a significant undermining of judicial independence.

So who then should the appropriate defendant be, where the New Zealand Bill of Rights Act breaches are allegedly committed by members of the judiciary. The answer in my respectful submission is that only the judge or judges should be required to be named as the appropriate defendant, where it is alleged that they have committed New Zealand Bill of Rights Act breaches and the reasons for this can be succinctly stated.

Where the Judges are responsible for alleged breaches, it is only appropriate that they and not another branch of government, answer that allegation and secondly, the judiciary, i.e. the individual Judges do not lack legal personality and this much is clear from proceedings where very misconceived but in one case, successful proceedings have been bought against Judges in New Zealand, we refer to *Nakhla v McCarthy* [1978] 1 NZLR 291 (CA)*, Fray v Blackburn (1863) 3 B & S 576 (QB)* and *Upton v Green (No 2)* (1996) 3 HRNZ 179 (HC)

ELIAS CJ:

Those cases, of course, were where the Judge lacked jurisdiction, weren't they? I am just wondering if there is a difference. The Judge was sued in his or her personal capacity because they weren't actually exercising judicial power, I just wonder whether it might be different if they are exercising the judicial power of the government?

SOLICITOR-GENERAL:

Yes Your Honour, I am just trying to recall *Nakhla*, where the allegation was that there was a missing page.

YOUNG J:

Mr Nakhla didn't have any luck in that case.

SOLICITOR-GENERAL:

Absolutely not, no.

McGRATH J:

But if we focus on the District Court Judges' cases, those were really actions in tort as the Chief Justice said.

SOLICITOR-GENERAL:

Yes, those were yes.

McGRATH J:

Acting outside power, in particular, cropping up often in ex parte actions, I think, where the Judge didn't have power to decide something ex parte.

SOLICITOR-GENERAL:

Although if one pauses there, Your Honour. I wonder if *Upton v Green* actually falls into that category at all.

McGRATH J:

Well that might have been a Bill of Rights case wasn't it. It was, was it? Someone on your side seems to think so.

SOLICITOR-GENERAL:

Oh, really?

McGRATH J:

I think *Harvey and Derrick* was the tort case.

SOLICITOR-GENERAL:

Yes *Harvey and Derrick* definitely was a tort case.

YOUNG J:

But I am sure *Upton and Green*, it must have been Bill of Rights wasn't it because the complaint was he didn't get a fair hearing on sentence.

SOLICITOR-GENERAL:

That's correct, yes.

ELIAS CJ:

No but, yes. All right.

McGRATH J:

I think that the *Harvey and Derrick*, I think is a case against you though, isn't it, on this general line that this chilling effect line, or the effect, the apparent bias element that may come up if Judges are seen to have their actions give rise to liability.

SOLICITOR-GENERAL:

I don't know if it counts against me Your Honour. I accept that there are some dicta in *Harvey and Derrick*, the one sentence that goes against me but apart from that, I think the general principle.

McGRATH J:

But *Harvey and Derrick* does indicate that at least in the area of tort, the New Zealand Courts were prepared to hold liable a Judge who stepped outside his jurisdiction.

SOLICITOR-GENERAL:

And then the legislative response was one of complete immunity.

YOUNG J:

Well you say that if there is liability here, it should be on the Judges and you say there can't be liability on the Judges because there is judicial immunity.

SOLICITOR-GENERAL:

The appropriate defendant is the Judges, if it is alleged that it is the Judges and the Judges alone who have committed the breach.

ELIAS CJ:

But my point is, that the authorities you are taking us to, to say that this is the position in New Zealand law, may have been looking at Judges acting beyond the judicial power conferred on them.

SOLICITOR-GENERAL:

Yes, which is exactly –

ELIAS CJ:

And it may be different or at least, the argument that it may at least be more arguable, that different considerations apply, within the judicial power.

SOLICITOR-GENERAL:

– yes Your Honour, right at the epicentre of the allegations in this case, is a claim that the Judges were acting without judicial power, that they were acting contrary to the appeal provisions of the Crimes Act, contrary to the Criminal Appeals Rules, Court of Appeal Criminal Appeals Rules and section 59 of the Judicature Act and Lord Steyn very carefully analysed how those provisions were not adhered to.

ELIAS CJ:

Yes I suppose it is concerned with a statutory Court, rather than with a Court with inherent jurisdiction in the Court of Appeal, so that might be right.

ANDERSON J:

Those are merely aspects of the underlying complaint which is that an appeal right guaranteed by section 25(h) was not accorded.

SOLICITOR-GENERAL:

Correct, accorded because of judicial systems of dealing with appeals contrary to the legislative and executives framework in the Crimes Act and the Criminal Appeal Rules.

ANDERSON J:

But the right at least to be breached and in respect of which a remedy is sought is the right guaranteed by section 25(h).

SOLICITOR-GENERAL:

Yes indeed Sir. Now it has been, I am sure for Your Honour, quite a distracting submission so far, in parts, and I wish to focus on judicial immunity now, which is the second part of the submissions as outlined in the one page synopsis which I have made available to Your Honour. Your Honours, judicial independence underpins every facet of the appellant's case. Sorry, judicial immunity underpins every facet of the appellant's case. It is a central factor in this appeal. This isn't a case of the appellant giving with one hand and taking with the other, as my friend would say. This is a case of the appellant inviting this Court to look squarely at what is actually being claimed and what the approach of the respondent is, in this particular case, where he seeks to avoid the effects of judicial immunity by seeking to name, as a defendant, an entity, who, in my respectful submission, cannot and should not, be appropriately named as a defendant, where the alleged breaches are those of the judiciary.

The purpose of judicial immunity can be very succinctly summarised and elaborated upon, if necessary, through Your Honours. The purpose of immunity has been set up as one of two great constitutional wrong norms involving the judiciary, namely the separation of powers and judicial independence. The leading cases on judicial independence all emphasise that judicial immunity is linked very closely to judicial independence, that to not have immunity would attack judicial independence and the authorities, which I can take you to and elaborate on that point if it is necessary, include *Nakhla* where Sir Owen Woodhouse said that judicial immunity is in no sense a private right, which might be regarded as having been conferred upon him, in which he might be said to enjoy, is merely the repository of a public right which is designed to ensure that the administration of justice will be untrammelled by the collateral attacks of disappointed or disaffected litigants. That single concept is gladly accepted, we believe, by citizens and lawyers alike, and its strength extends to prevent civil proceedings against the judge in respect of the exercise of jurisdiction, even though he may act with gross carelessness or be moved by reasons of actual malice or even hatred.

Now this is the, this theme from *Nakhla*, can be found repeated in a number of internationally recognised cases. It can be found in the judgment of Chief Justice Gleeson in *Fingleton,* in volume 3, tab 64, paragraph 38 where His Honour said, "This immunity from civil liability is conferred by the common law, not as a pre-requisite of judicial office for the private advantage of judges, but for the protection of judicial independence in the public interest. It is the right of citizens that there be

available for the resolution of civil disputes between citizens and citizen, or between citizen and government, and from the administration of criminal justice, an independent judiciary whose members can be assured with confidence to exercise authority without fear or favour."

Similar observations were made by former Chief Justice Warren in *Pierson v Ray* 386 US 547 (1967), which can be found in volume 4, at tab 89. His Honour the Chief Justice said, "Few doctrines were more substantially established at common law than the immunity of Judges from liability for damages for acts committed within the judicial discretion as this Court recognised when it first adopted the doctrine in *Bradley v Fisher* in 1872. This immunity applies even when the Judge is accused of acting maliciously and corruptly and it is not for the protection or benefit of a malicious or corrupt Judge, but for the benefit for the public whose interest that it is that the Judges should be at liberty to exercise their functions with independence and without fear of consequences."

So separating the role of the judiciary and maintaining their independence are, as I said right from the outset, wrong norms which underpin judicial immunity. Also of relevance are factors which are more case specific, namely finality of litigation and avoiding collateral attacks. In *Hunter v Chief Constable of West Midlands* [1982] AC 529 (HL), Lord Diplock, and this case is in volume 3, tab 52, Lord Diplock stressed the undesirability of initiating proceedings which have the affect of being a collateral attack on decisions made by another Court of competent jurisdiction. The principle underlying the rule is clear. If one Judge acts either dishonestly or within jurisdiction to the detriment of a party before him, it is less helpful, Lord Diplock said, to the health of society to leave that party without a remedy than the 999 honest Judges – then 999 honest Judges should be harassed by litigation alleging malice in the exercise of their proper jurisdiction.

In the present context judicial immunity guards against collateral attacks of this nature because allegations of judicial breaches of fair trial rights can be pursued in an appeal against conviction but not in parallel proceedings. Your Honours I appreciate that in *Lai v Chamberlains* [2006] NZSC 70, [2007] 2 NZLR 7 this Court held that finality of litigation did not justify retaining the immunity for barristers against negligence claims arising from the conduct of litigation. However, Your Honours, the policy factors which determine the outcome of *Lai v Chamberlains* do not transpose comfortably to the respondent's proposal that judicial immunity should not be –

should not limit claims for judicial breaches of the New Zealand Bill of Rights Act. It is worth noting the obvious. As I have outlined earlier, judicial immunity serves several important values. It is simply not the finality of litigation that it serves to affirm. It's dangerous to focus, as the respondent does, on each of these values in isolation. Reference to *Lai v Chamberlains* will not assist the Court in this regard. The two immunities, barristerial and judicial, are simply not the same.

There are only two scenarios which a New Zealand Bill of Rights claim based upon judicial breaches, could possibly be brought. Firstly, where there is an existing conviction following an appeal that has not been pursued or where the appeal has been unsuccessful. In such a claim a New Zealand Bill of Rights damages claim alleging judicial breaches of fair trial rights constitutes a blatant collateral attack on a decision of a Court of competent jurisdiction and such a proceeding should not be permitted.

The second possible scenario is where a conviction has been overturned on an appeal and in such a case, as will be submitted in more detail by Mr Curran, the plaintiff in that particular case will have already received an effective New Zealand Bill of Rights Act remedy.

Lai's case by case approach to class is a barristerial negligence whereby claims proceed until examined on an individual basis for abuse undermines the purpose of judicial immunity which is to insulate the Judge at the time he or she is exercising his judicial function from the fear that they may be liable for future proceedings. For this reason the factors which have always, and always will, continue to weigh in favour of a judicial immunity should not be undermined by allowing litigants to sue the judicial branch in damages for Bill of Rights breaches.

In the appellant's submission judicial immunity serves the valuable objectives of ensuring finality to litigation and avoiding collateral attacks upon the judgments of Courts of competent jurisdiction. The respondent complains that this approach should not prevail over fundamental constitutional rights of individuals and the answer to this complaint can be found in Canadian jurisprudence. In *Taylor v Canada (Attorney General)* (2000) 184 DLR (4^{th}) 706 (FCA), to be found in volume 4 under tab 74 at page 57, the Federal Court of Appeal in a case involving a claim alleging judicial errors, the Court held at paragraph 57 through to 59 the following, "I conclude that judicial immunity is not inconsistent with the Charter since judicial

immunity itself is a fundamental, constitutional principle." And in *MacKeigan v Hickman*, McLachlin J, as she then was, held that the analysis in *Beauregard* supports the conclusion that judicial immunity is central to the concept of judicial independence.

The Chief Justice held, and this is the next paragraph, held in the reference re Provincial Court Judges –

ELIAS CJ:

What paragraph?

SOLICITOR-GENERAL:

58. I'm reading paragraphs 57, 58 and 59. That judicial independence is an unwritten constitutional principle recognized by the preamble to the Constitution Act 1967. He also said that judicial independence is valued because it serves important societal goals, one of which is the maintenance of public confidence in the impartiality of the judiciary which is essential to the effectiveness of the Court system. Accordingly, judicial immunity itself is a constitutional principle contrary to the submissions that have been argued by the appellants. So that case is a very clear authority for the proposition that judicial immunity is even more important than an individual's Bill of Rights right and should not be permitted to trump the well established constitutional principle of judicial immunity.

Now the second element of the immunity question asks the question, if everything that has been submitted beforehand is rejected, does judicial immunity apply if the Attorney-General is the correct defendant in this case. If the Judges aren't the correct defendants, but the Attorney-General is, what happens to judicial immunity? Guidance to the correct answer to this question can be obtained from two Irish cases, both from the Republic of Ireland, where the State is, it is important to note, a legal entity under the constitution of the Republic. In one case, which you don't have before you, *W v Ireland* (1997) 2 Irish Report at 161, the President of that Court, Costello P, articulated why the benefits of the wrongdoers immunity should insulate the defendant, in that case the State of the Republic of Ireland. His Honour said at 161, "It was argued that a victim like the plaintiff in the present case who suffers injury due to the negligent act of the Attorney-General should be at liberty to sue the State even though an action against the Attorney-General was not maintainable.

This would be," he said, "clearly a novel form of immunity. It would mean that the wrongdoer, in this case the Attorney-General could be immune but the State, assuming the State's liability, would not be immune." And then he proceeds to explain further why he believed that such an approach was contradictory.

The second case, and one which some reliance is placed upon, is the case of *Kemmy v Ireland* which Your Honour Justice McGrath referred to earlier. *Kemmy v Ireland* can be found in volume 3 at tab 54. Some of Your Honours may not have had the opportunity to read this particular case –

ELIAS CJ:

I haven't.

SOLICITOR-GENERAL:

Kemmy was convicted of rape and sentenced to three years' imprisonment. The Court of Appeal set aside his conviction and did not order a retrial. At that time, Kemmy had served his term. He sought damages from the State for infringements by the State through its judicial organ of his constitutional right to a fair trial, so in many respects, strikingly similar to the current proceeding. His Honour Justice McMahon gave detailed reasons as to why appeal not compensation was the appropriate corrective mechanism for a breach of fair trial process.

ELIAS CJ:

Of course, the complaint here was that there wasn't an appeal. I fully understand the argument, I understood really that Mr Curran was going to develop this but I fully understand the argument relating to trial and correction of any error through the appeal process but this case is very unusual because that opportunity wasn't effectively available.

SOLICITOR-GENERAL:

And with respect, the issue that I am focussing upon now, whether or not the immunity which the judges would have, disappears if the claim is bought against the Attorney-General and that point is one which Justice McMahon focussed upon and it is that part of his judgment that I now wish to focus upon, before inviting Mr Curran to address the Court on the third part of the appellant's submissions.

His Honour at page 21, explained in some detail why he believed that the immunity did not disappear if the claim was bought against the State for judicial breaches and the factors and can I invite Your Honours to just focus on the balance of the judgment from the paragraph commencing "apart from that line of reasoning" to the end of the judgment on page 22 but can I summarise what it was, well it is, that His Honour said. He was influenced by the following. He believed that judicial independence would, itself be compromised if the immunity did not transfer in effect to the State. He also believed that finality of litigation would be undermined if the immunity disappeared altogether. He was also influenced by the proposition that there would be collateral and unfortunate influences on judges, if the immunity disappeared and finally, he focussed upon the existence of appropriate alternative remedies which Mr Curran will be addressing you on.

And in a paragraph which I think succinctly summarises the dilemma which the respondent has in this particular case, His Honour said, on page 22, in the paragraph commencing "Finally" – "it is somewhat contradictory since these proceedings are taken against the State on the basis that the judge is part of the State apparatus, for the plaintiff to suggest that the established immunity, which the judge enjoys, ought not to benefit the State, also in circumstances. He is arguing that the judge should be identified with the State on the one hand, when liability is considered and should, on the other hand, be distinguished from the State, when immunity is at issue.

And that is indeed the dilemma that the respondent has. He wishes the Attorney-General to be the appropriate defendant for judicial breaches and to say, that for judicial breaches, the Attorney-General is answerable, yet when it comes to questions of immunity, he says that the Attorney-General should not have the benefit of the same immunity, which would automatically attach to the judiciary if the proceeding he bought against the entity, that should be named as the defendant, namely the individual charges.

So in summary, to summarise the first two parts of the appellant's submissions. Your Honours, what we have, as I have been at some length to emphasise, is that in this case the executive and the legislature, through the relevant provisions of the Crimes Act and the Criminal Appeal Rules, created what Justice McMahon described as the scaffolding for judicial activity. The Privy Council in *Taito* notwithstanding the scaffolding created by the executive and the legislature, the judiciary created and administered a system for dealing with certain classes of criminal appeal which did

not comply with either the legislation or the regulations. The respondent focuses for present purposes, on alleged judicial breaches of the New Zealand Bill of Rights Act and ignores the fact that the legislature and executive created the scaffolding for the judiciary, but he nevertheless seeks to hold a member of the executive, liable as the defendant for judicial breaches of the New Zealand Bill of Rights Act. He focuses upon the Attorney-General because he knows full well that had he named the right legal entities as defendants, then the immunity that they rightly possess, would stop his claim in its tracks, thus the respondent looks for another defendant, solely to avoid the consequences of judicial immunity.

That tactic succeeded in the Court of Appeal and in my respectful submission, it should not succeed in this Court. Now Your Honours, I will invite Mr Curran to address the Court on the third part of the appellant's case.

ELIAS CJ:

Yes thank you Mr Solicitor.

MR CURRAN:

May it please the Court. At the heart of the Crown submission on this issue, the issue of the correct remedy for judicial breaches of fair trial rights, is a mild proposition. That proposition is that the same criminal justice system remedies, which have always effectively dealt with fair trial problem remain effective to do so. The Crown submission on this point falls into three parts today.

The first part looks at the criminal justice system, particularly it's paradine remedy of appellant correction and explains why this provides effective and appropriate Bill of Rights Act remedies, as those terms are understood, and Bill of Rights Act jurisprudence for judicial fair trial breaches.

The second part of the Crown argument looks at the competitor, the damages remedy, and explains how this again, in Bill of Rights Act terms, is an inappropriate remedy for judicial fair trial breaches.

And the third part of the argument I wish to advance today, looks at the arguments marshalled by the Court of Appeal and by the respondent, in favour of a damages remedy and concludes ultimately that those cannot be persuasive. Now this structure roughly tracks the written submissions that Your Honours will have read, I

certainly do not intend to repeat those submissions but I will make some points of emphasis, with the Court's indulgence and also focus on some points which are genuinely in contest between the parties.

So turning first to an examination of the criminal justice system remedies and those traditional remedies. In this Court in *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 confirmed what the attributes of a proper Bill of Rights Act remedy are. A remedy must be effective, it must be appropriate and it must be proportionate. It also explained helpfully, what an effective Bill of Rights Act remedy is, what an effective remedy needs to do. It needs to vindicate rights in the sense of upholding the value and importance of the rights being remediated. It also has to denounce breaches, so it has to mark the deviation from the right standard are being examined in the case and it must also deter public actors from future non-compliance with those breaches and it is the Crown's submission that the criminal justice system, with its traditional framework of remedies, does all of these jobs of an effective remedy, exceedingly well.

The one point I wish to emphasise in my oral address today concerns the issue of vindication. In my submission when one looks to the response of Appellate Courts to breaches of the rights in issue today we see the importance and value of the rights being stressed, the rights being vindicated, and I should say at this juncture that the rights, you will have picked this up from the written submissions of Your Honours, but this address focused on those fair trial rights implicated by this particular claim. Those are section 25(a), the fair hearing right. Section 25(h), the right to an effective appeal and perhaps buttressing, underlying those rights, the right to natural justice and its criminal dimension in section 27.

Where the Courts find a breach of these rights, the remedy is quite apparent. The Court will assist on a new trial where a breach of section 25(a) is found. Where there's a breach of 25(h), the appeal right, the Courts will insist on a rehearing of the appeal. In terms of breaches of section 25(a), unfair trials, there's imply no room for limiting doctrines like section 5 of the Bill of Rights Act, this Court in *Condon* confirmed that it's an illimitable right, section 25(a), and there's no room either for the limiting doctrine, as it were, in section 385 of the Crimes Act, the proviso. Again that was confirmed by this Court in *Condon* and in situations where breaches of section 25(h) are found, cases like *Taito*, *Smith* and *Petryszick v R* [2010] NZSC 105, confirm that there's no need to show an arguable miscarriage of justice in order to

have the remedy of a rehearing of an appeal granted. In fact the Solicitor-General made the argument to the contrary in *Taito* but it was rejected by the Privy Council.

So in my submission this remedial response by the Courts to these rights breaches shows clearly a public message about the importance of these rights. No matter how guilty an appellant appears to the Appellate Court, that appellant is still entitled to a fair trial and is still entitled to an effective appeal in a genuine sense these rights function as trumps. In my submission there can be no clearer expression of the importance in value of the rights being addressed and I do note to Your Honours that in the *R (Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14, [2005]1 WLR 673 decision from the House of Lords, that's the governing decision on fair trial remedies in the United Kingdom, Lord Bingham at paragraph 9 of that decision, I won't take Your Honours to it, but he acknowledged that where article 6, the equivalent right in the European Convention, is breached the outcome will often be that the decision is quashed and a retrial ordered and this will vindicate the victim's convention right, said Lord Bingham. So in my submission the ethicacy of the remedies available on criminal appeal is a strong one but I do note that the respondent makes two challenges to the effectiveness of appellate remedies and he uses his own case pattern, fact pattern, to illustrate this.

So if I do – I do want to spend some time on those objections with the Court's indulgence. The first objection he makes, if I do justice to my learned friend, is that well where was the public vindication and acknowledgement of my rights. My appeal, my second appeal in 2003 was ultimately decided on technical grounds, modern Bill of Rights Act grounds, concerning the balance, the need to balance – a replaying of –

YOUNG J:

Isn't it a Bill of Rights, isn't that perhaps a Bill of Rights Act ground? That he didn't get a fair trial?

MR CURRAN:

Well Sir it wasn't framed –

YOUNG J:

It wasn't –

MR CURRAN:

It wasn't framed as that. It was framed as an orthodox appeal ground as it were. Interesting –

YOUNG J:

But it was, the guts of it was that he didn't have a fair trial because the Judge had read out an incomplete portion of the evidence, hadn't he, the cross-examination as well as the evidence in chief. I think that's right isn't it?

MR CURRAN:

That is certainly the gravamen of the complaint he made.

YOUNG J:

So the complaint is that's not – it must be that that's not fair, it's unbalanced, and is that, is there a disconnection between that and the fair trial right in the New Zealand Bill of Rights Act? That it's unfair for the purposes of criminal appeal system but insufficiently unfair to engage a right under the New Zealand Bill of Rights Act?

MR CURRAN:

Exactly so Sir. We're getting into the hair splitting that Lord Hailsham wasn't too keen on in the *Maharaj* decision but that is the point. In *R v Condon* [2006] NZSC 62, [2007] 1 NZLR 300 this Court was clear about the gravity of procedural impropriety that would need to be reached before you could say that this is an unfair trial. It's got to be so irremediable, so grossly prejudicial that it falls short of a fair trial standard. And it might be below an unfair trial and nevertheless still a miscarriage of justice or an error of law such as could support a conviction appeal under section 385 of the Crimes Act.

So my learned friend says that his appeal dealt with this orthodox ground of appeal, where was his acknowledgement and vindication of rights. His second complaint is about compensation. He says, how can the Crown talk about an effective remedy on appeal when I lost liberty from the period of my first appeal being heard in 2000, October 2000 I believe it was decided, through to when I was released on bail in 2003 I lost liberty and without compensation for the liberty I've received no effective remedy. So I want to deal with these two objections before moving on. First of all the point of public vindication. In my submission the respondent has effectively confused the outcome of the appeal process, his second appeal, with its remedial

value because in fact the only reason he got a rehearing of this appeal was because of the acknowledgement the system made of the importance of his rights. The fact that the first appeal conducted pursuant to the ex parte appeal system could not stand. That was the vindication and action and in response to my learned friend's objection around what about the public acknowledgement, what about the public vindication. Well in my submission that was addressed in the twin decisions of *Taito* and *Smith*. In my submission no one reading those judgments could have been left in any doubt about the important and value of the rights of persons subject to that ex parte appeal system.

ELIAS CJ:

Mr Curran, the problem you've got in this case very unusual case is that he was denied his right of appeal and the lag between the system, belatedly, recognising that and moving to provide a remedy is what isn't otherwise addressed.

MR CURRAN:

Well Ma'am the issue of the delay in the system in coming back with a remedial response in my submission that's not one to explore through the rights vehicles that the respondent has relied upon. If he suggests that the system provided its remedy with undue delay that has a particular remedial response too in the Bill of Rights Act, section 25(b) –

ELIAS CJ:

You are suggesting that the second appeal process was sufficient vindication. I'm simply pointing out that it doesn't address the problem with the – that he was denied his appeal when it should have been heard.

MR CURRAN:

Well the fact Ma'am, the systems remedial response is exactly as you would hope. It did provide the rights benefit he was denied at the first instance, here actually at first appeal, because it provided him with the very effective appeal he should have had at first instance. Now Your Honour suggests that this was too late down the track. In my submission, in fact, the system rallied quite effectively in response to what it perceived to be a systemic response in notable part thanks to Your Honours judgment in *R v Smith* so ultimately a problem arose, the ex parte appeal system, it was identified on further appeal to the Privy Council in the *R v Taito* and then in the *R v Smith* the Court of Appeal provided a practical remedial response to those persons

subject to the system, one which thanks to the strength of the rights, actually circumvented the legislative requirement in the Crimes, Criminal Appeals Amendment Act, which was to establish that you had suffered an arguable miscarriage of justice and Your Honour's decision in the *R v Smith* said, there is no need for that. So my submission, there was a remedial response that gave Mr Chapman and his 1500 similarly situated litigants, exactly the right to benefit that they wished to have, or should have had, at first appeal.

Now Your Honours point about time, it came later in the piece. The decision of *Kemmy* in Ireland is nice on this point. It talks about the fact that an appellate remedy is necessarily after the fact, it will be later in time than the original breach but that just follows from the fact an appeal comes temporarily later. If the complaint is –

ELIAS CJ:

What -

MR CURRAN:

Can I just finish this point Ma'am. If the complaint is that it came unduly late, that there was a delay in the appellate phase of the system, the proper complaint is s 25(b) of the Bill of Rights Act.

ELIAS CJ:

Well I was simply going to point to the fact that in, I think it was in that *D'Orta Ekenaike* case in the High Court of Australia. The Judges said that "Citizens have to accept that the wheels of justice grind a little slowly" and so on "and there are some costs you have to bear as a citizen". That is not really what happened here. The appellant could have expected that any remedy he got for a fair trial breach, would be a little later and there is a very powerful argument that the law should not seek to provide a remedy for any delay in that but here you had a denial of the right of appeal and the matter was corrected later. So there is an additional cost that people in this position have been put to.

MR CURRAN:

Then perhaps if I can get on, Your Honour, to the issue of compensation for loss of liberty which is the essence of that point. Perhaps we can explore that issue further.

YOUNG J:

Well can I just pause there. Taito himself went through the same processes as the respondent and he did appeal.

MR CURRAN:

Indeed Sir.

YOUNG J:

And the respondent could have appealed. There was enough of an appeal judgment of the Court of Appeal to found a right of appeal.

MR CURRAN:

It could have been the *R v Chapman* instead of the *R v Taito*, yes Sir.

YOUNG J:

Would it have made – what was the timing, when did *Taito* come out, at the beginning of 2002?

MR CURRAN:

Yes Sir, within a year I suppose of Mr Chapman's situation. So some of the delay was arguably reflective of the fact that the respondent obtained his remedial response as a result of Mr Taito obtaining his remedial response.

ELIAS CJ:

Well part of the background, of course, was the decision of the Court of Appeal that legal aid was not available for further appeal.

MR CURRAN:

Yes Ma'am.

McGRATH J:

I think the distinction, as I see it, that has come from your discussion with the Chief Justice, Mr Curran, is that Mr Chapman – the effect of the Court of Appeal's decision is really that Mr Chapman was convicted as a result of an unfair system, corrected eventually by *Taito*. He wasn't convicted because of the administrative delays that the system inevitably has and if an unfair system of the essence of the finding, you get back to some of the issues that arise in the *Maharaj* case and the subsequent revisiting of that and the *Independent Publishing* case but it may be that Mr Chapman

has a very special position that can be distinguished from the criminal justice system generally, because of that aspect of the finding.

MR CURRAN:

The issue of the unfair legal system is addressed later in my submissions, Your Honour, when I approached the question of the line of Privy Council cases, because one of the difficulties with the line of Privy Council cases is that they now address a different right to the one we have in New Zealand. In *Independent Publishing Co v Attorney-General of Trinidad and Tobago* [2004] UKPC 26, [2005] 1 AC 190, the Privy Council said that the right there not to be deprived of liberty without due process of law, is a right to a fair legal system so it mandates the Court, in that superior law constitution, to look at the entire legal framework, including legislation, and say did you receive a fair legal system, did you interact with a fair legal system. In fact, as is perhaps not surprising in the domestic Bill of Rights Act framework, Sir, which isn't of superior law status, we don't focus on adjudicating on the fairness of the legal system, with all the adjudications on the fairness of legislation that that might entail and the breach of the principles of comity et cetera. Instead our rights in 25(a) and 25(h) focus on specific phases of the justice system process and say, at first instance, you are entitled to a fair trial. On appeal, you are entitled to an effective appeal. But they do not mandate, in my submission, going on to adjudicate on the fairness of the legal system as a whole. Still not further to issue damages in respect of a legislative failure to erect the scaffolding, to use my learned senior's words, that is considered fair. So in my submission that is really the distinction that we will get onto when we look at the Privy Council cases but it is an important one for present purposes.

If I can turn to this compensation objection. There are a number of responses that the Crown would make to that. One is particular to the respondent's circumstances and the others are of a more general nature. So first of all looking at the particular circumstances. In my submission, it is extremely doubtful that the respondent can actually make a claim that his loss of liberty was caused by the breaches that he points to. His argument in his written submissions is, had I had an effective appeal in 2000, it would have been successful, I would have been released at that stage and the three years I subsequently spent in prison can be attributed to the breaches of rights that I experienced.

ELIAS CJ:

But that is a matter for trial surely if the case goes ahead. How can we –

YOUNG J:

Because, as you say, it might highlight the nature of the uncertainties that are going to be present in this case because Mr Finlayson/Chapman's grounds of appeal advanced the first time round, were not the ones on which he succeeded, the cases upon which he succeeded were not decided at the time of his first appeal and perhaps the complainant would have gone ahead with a retrial if the case had been determined in his favour in October 2000.

ELIAS CJ:

But that is not the nature of the enquiry - what might have happened

MR CURRAN:

Well Ma'am, that is the nature of the loss that he claims, that he says is compensable and the European Court and other Human Rights Courts around the world, say that if you want to get compensation or damages for a particular loss, you have to show it has been caused by the breach of rights in issue, but in case Your Honour is concerned, quite rightly, that I am delving into the minutiae that would get extracted in a trial process. My general point was exactly the one identified by Justice Young. I wanted to highlight some endemic uncertainties in this field that come when you try and rely on these forms of loss and suggest that they should be compensated. Even if we make all the assumptions, some of which Justice Young was articulating, that Mr Chapman should have got legal aid, that his legal representative would have been alert to the *R v S* being promulgated in late August 2000, would have changed the grounds of appeal so that he could have succeeded, on appeal in 2000, you still have the difficulty of whether Mr Chapman would have spent in fact lots more time, or more time, in prison as a result because, of course, the two impediments to a retrial in 2004 were the fact that the complainant didn't want to give evidence again, so far down the track, and the fact that the vide evidence of the complainant's evidence had been lost. And if we'd had a retrial in 2000 there's absolutely no guarantee that either of those two conditions would not have obtained and in fact Mr Chapman could have found himself facing more time imprisonment than he ultimately served.

And I don't make this point for its particular circumstances but only to show that these are endemic problems in the area as – well being pointed out in *Greenfield*, one feature of article 6 jurisprudence is that you can't – if you point to a breach of article 6

you can't be sure that the outcome of the trial would have been any different if the violation had not occurred. And in *Greenfield* the House of Lords go on to point out that the European Court of Human Rights is very concerned not to speculate on what the outcome would have been and accordingly not to grant compensation in this area. He says that in the "great majority of cases" the finding of violation is considered just satisfaction for these forms of breach. So that was the sole significance of delving into the facts of this particular case, at least as pleaded, but I also wanted –

McGRATH J:

Mr Curran, could you just explain, you said that he might have served more time?

MR CURRAN:

Correct Sir.

McGRATH J:

Could you just elaborate on that?

MR CURRAN:

Certainly. That is because he was in the actual event released about six months earlier than he would have been by operation of statute by fact that he was granted bail pending his second appeal in 2003. So he actually served three and a half years' imprisonment for his conviction, subsequently overturned and no retrial. He would have served at least a minimum of four years if he had been fairly convicted with the appellate process operating properly.

YOUNG J:

Could you just pause there? The cases on which the appeal turn were actually decided in 2002?

MR CURRAN:

No Sir. There is a slight error in the Court of Appeal's –

YOUNG J:

Oh is there, right.

MR CURRAN:

Yes Sir. There's a reference to *R v S* –

McGRATH J:

2000, yes.

MR CURRAN:

Which was actually decided in 2000. The Court of Appeal erroneously attributed it to 2002 and if – that's obvious by the paragraph, which I forget, in the Court of Appeal judgment, but they refer to *Trantor* also making the same point but it was decided earlier than *R v Smith*, or something. The timeliness is quite clearly out. The important point is, it was decided in late August 2000, that was before Mr Chapman's first appeal was ultimately decided but after, as Your Honour pointed out, he'd actually lodged his appeal which was on a different ground. So we have to assume, on the respondent's story, that he would have got legal counsel and his legal counsel would have been alert to the latest Court of Appeal jurisprudence and amended his grounds of appeal accordingly.

I did want to get onto a couple of general points as well on this issue of compensation because in my submission it relies on quite a doubtful premise that an effective Bill of Rights Act remedy must compensate in order to be effective –

ELIAS CJ:

Well that isn't what *Taunoa* decided and the reference to the modesty of these sort of awards makes that clear.

MR CURRAN:

Yes Ma'am, that was going to be my point, that there's no obvious mandate stemming from *Taunoa* to say that compensation is a necessary part of an effective Bill of Rights Act remedy. I accept Your Honour the Chief Justice's opinion and Justice Tipping were to the contrary but one doesn't derive a mandate for compensation from the other judgments in that particular appeal. I know my learned friend would like to bring this claim in Canada, and that's why he cites *Vancouver (City) v Ward* (2010) SCC 27 where compensation was considered, one of the remedial functions under the Charter, but the reality is if my learned friend wants to recalibrate the purposes of effective remedies that this Court came to in *Taunoa*, in my submission he'd need to do a lot more comparative law work than he does do in his submissions. He'd need to deal with the jurisprudence in the United Kingdom.

Cases like *Greenfield* and *Anufrijeva* where compensation was stated to be of secondary, if any, importance. He'd have to deal with the cases in the Crown bundle, *Somogyi v Italy* (2008) 46 EHRR 5, *Sejdovic*, *Öcalan v Turkey*. Cases of the European Court of Human Rights which say most recently in principle the most appropriate remedy for breaches of these kind of rights is a retrial or reopening the criminal proceedings.

He doesn't attempt to do that sort of comparative law work which in my submission would be required to change the *Taunoa* framework. But even if we accept that there is this compensation mandate, and it's required in the case of an effective remedy, and we ignore counter-examples like the exclusion of evidence, where effective Bill of Rights Act remedies have nothing to do with compensation, we still have this issue, and Your Honour the Chief Justice alluded to it earlier in interchange, about is the loss of liberty something that in principle we're comfortable with compensating for. And one of the difficulties pointed out by this Court in *Lai v Chamberlains* is that you're dealing with lawful imprisonment and where you have lawful imprisonment it's very difficult to characterise that as a form of damage which is compensable, or should be compensable.

ELIAS CJ:

I'm not sure that some of these premises in a case that was properly run wouldn't shake out a bit more and it bothers me to be asked to determine this on a rule 418 application. At least in *Taunoa* it was following trial and there was, of course, in that case other vindication that the regime had been brought to an end through the actions of the people involved. But whether one would say that you never have to move to address a feature such as this, in these very unusual circumstances, might be something much better determined in the context of facts.

MR CURRAN:

Well I suppose the Crown can only deal with the case as it has been run, I think, very ably by my learned friend and these are, of course, issues of general applications –

ELIAS CJ:

Your application though, isn't it? I mean you wanted this point of law determined.

MR CURRAN:

And the respondent consented to that application.

ELIAS CJ:

Yes I see that.

MR CURRAN:

And as has been pointed out by at least one member of this Court previously sometimes it's helpful to determine issues of proper remedy in the abstract dealing with issues of general consideration, that was Justice Young's point in the *Brown v Attorney-General* decision. So the general point I simply wish to make here is that it's difficult to characterise what is lawful imprisonment as a form of compensable loss. Does – the position doesn't change even if the – even if the imprisonment follows a breach of rights. That was made clear by Your Honours' decision in *R v Smith* at paragraph 46 where Your Honours said, in respect of the ineffective appeals under the ex parte appellant system, nevertheless those appeals were effective to decide the legal consequences that they set out so the breach of rights didn't affect the validity of the consequences that came about. The same approach was taken, with respect, in *Brown v Attorney-General* in the judgment of Justice Chambers. There, there was an allegation that wrongful imprisonment ensued from the alleged breach of fair trial rights in that case and Justice Chambers for four members of the Court said at paragraph 31 that this simply wasn't a tenable claim. That in fact the Department of Corrections would have been acting unlawfully if it had not imprisoned Mr Brown after his conviction. So in my submission there's a huge difficulty in compensating for what is a lawful consequence.

That was how I –

ELIAS CJ:

I'm sorry, I thought you were pausing. I was going to ask you whether it was a convenient time to take the adjournment but finish what you were going to say.

MR CURRAN:

I was simply going to say that those were the general points of application I wish to make in response to this idea of compensation. It is very much a convenient time to take the break.

ELIAS CJ:

Thank you. We'll resume at 2.15.

COURT ADJOURNS: 1.00 PM
COURT RESUMES: 2.14 PM

ELIAS CJ:
Yes Mr Curran.

MR CURRAN:
Thank you Your Honour. Before the break we covered the topics of vindication and how appellate remedies vindicate the fair trial rights and issue in this proceeding and we also covered the objection around compensation.

As a final topic in this area of the effectiveness of appellate remedies or criminal justice system remedies, I wanted to deal with a lingering concern Your Honours might have, certainly a concern that the Court of Appeal had, around the exceptional case. What about the exceptional case, not necessarily one we can predict now but a hypothetical future case where we are worried about the ethicise of criminal justice system remedies and in my submission this is an important topic because in actual fact, at various points in the arguments, there is not a great of conceptual space between where the Court of Appeal was on this issue and where the respondent was on this issue and where the Crown is on this issue. My learned friend in his written submissions at paragraph 106, talks about appellate remedies generally, providing effective remedies for these sorts of fair trial breaches and likewise the Court of Appeal was prepared to confine its possible availability of damages to rare cases, perhaps even rarer in the case of criminal breaches of fair trial rights.

So there is this natural concern, I think, to put aside for the rainy day the possibility of damages in a rare or exceptional case. Now one problem with this concern is knowing exactly what an exceptional case looks like because with the greatest of respect to my learned friend, he does not really outline the parameters of the exceptional case. The one distinguishing feature he points to, with his own case, is the loss of liberty but in addition to the problems we were discussing in inter-change, prior to the break, in a sense this particular feature proves too much because, of course, a great number of appellants who have alleged breaches of section 25 or section 25(h) at issue, will, in fact, be in custody so if that is the distinguishing feature of the exceptional case, it is really the norm rather than the exception.

ELIAS CJ:

Is it worthwhile to try to imagine the exceptional case? Isn't it the case that the Court must be confident it can exclude all possible cases and –

YOUNG J:

We don't allow witnesses to be sued for perjury, not because witnesses do not ever commit perjury because a lot of witnesses who do not commit perjury, would be sued. So we are saying, okay there are going to be exceptional cases, someone has been lied in Court and lied to a conviction and lied into jail and it is absolutely terrible but you can't see the witness.

MR CURRAN:

Indeed Sir and Your Honour is articulating perhaps in different words, the systemic disproportionality argument that the Crown makes, citing Your Honour's judgment in *Brown v Attorney-General* on this very point, the idea that the problem with articulating a narrow hypothetical jurisdiction is that people argue those cases, with all the attendant distortions that that brings.

YOUNG J:

Every plaintiff's case is exceptional to the plaintiff.

MR CURRAN:

Quite right Sir. But I think there are some general points to be made in addition to that sort of systemic disproportionality, because it is important also to realise what this objection about exceptional cases effectively amounts to. It amounts to a submission that there were a category, an exceptional category of cases of fair trial breach that the criminal justice system could not effectively remedy, prior to the *Baigent* damages remedy being created and that is rejected by the Crown. We now couch fair trial problems in the language of rights but the criminal justice system has always responded effectively to them and in my submission, for exceptional cases, the criminal justice system has exceptional remedies and they are listed at paragraph 31 of the Crown's written submissions. Two sourced in the prerogative, the power of the prerogative of mercy and the prerogative of ex-gratia compensation and also outside of ordinary appeal systems, the ability of an appellate Court to recall or revisit appeals, as we have seen utilised in this particular fact situation and in my

submission those exceptional mechanisms do provide a safety valve in the system for that rainy day, that exceptional case. It is important also, in case Your Honours are concerned about the non-judicial aspect, or character of at least two of those three remedies, to remember that the ICCPR is not worried about which branch provides the effective remedy. In fact in Article 23(b) of the ICCPR the ICCPR contemplates effective judicial administrative and legislative remedies. It is up to the State party bound by the ICCPR to devolve between its constitutional branches, the ability to provide an effective remedy. So that would be the Crown's submission on that point.

Before leaving the criminal justice system and turning my attention to the damages remedy, I just wanted to focus on that other dimension of an effective, or rather a proper Bill of Rights Act remedy and that is the appropriateness of the remedy. Now we're told, I think the original insight was by Justice Richardson in the *Martin v Tauranga District Court* [1995] 2 NZLR 419 (CA) case which was a case about undue delay, that appropriate remedies are remedies which are designed to meet the values which underlie the rights being remediated and that's subsequently been bedded down in the Bill of Rights Act jurisprudence in cases like *Attorney-General v Udompun* [2005] 3 NZLR 204 (CA) at paragraph 174 and Your Honour Justice McGrath's decision in *Taunoa* at paragraph 367, picking up on this concept of appropriateness. Well, in my submission, there is simply not a more appropriate remedy than the one available on appeal for breaches of these rights. If a breach of fair trial is established in section 25(a), you get the very rights benefit you should have had back, in the form of a re-trial, no proviso, no section 5 Bill of Rights Act argument to be had says *R v Condon*. If there's a breach of section 25(h) the effective appeal, you get that appeal reheard. Again, no scope to argue that you were guilty anyway, so you should have got a rehearing of the appeal.

So in my submission, that is an exact mapping of right to remedy as this dimension contemplates. But it is particularly appropriate in the criminal justice context in my submission, that we have the remedies that we do because in a real sense, recourse to appellant remedies establishes what might be called a virtuous circle. If an appeal is lodged and it is successful at pointing out the breach, it reinforces the integrity of the criminal justice system by publicly demonstrating that system's capacity for self correction. In turn, that builds public confidence in the system and public trust in the appellate remedies being exercised. So the Crown submission is that any distraction from that virtuous circle is to be regretted.

Your Honours that, those were my only points about the criminal justice system and its appropriate and effective remedies for fair trial of breaches. I now want to turn to the damages remedy and look at some of the difficulties with that particular candidate for a proper Bill of Rights Act remedy in this area. In my submission, the most telling objection to the remedy of damages in this area relies on that same concept of appropriateness. Because if Your Honours accept what my learned senior was saying about the threat to judicial independence that comes with liability in this area, you can simply translate that into an undermining of the very right that damages are trying remediate in this sphere, because of course section 25(a) guarantees a right to and here I quote, "A fair and public hearing by an independent and impartial Court." So the extent that my learned senior is on solid ground with the threat to judicial independence, in my submission liability in this area, damages liability, would in fact constitute, not a reflection of the values underlying the right, but a reversal or an undermining of the values underlying the right. That's the very antithesis, in my submission, of an appropriate Bill of Rights Act remedy and in fact this is a genuine crossover point in the Crown's submissions.

The arguments that my learned senior advanced about, in support of the reliance of the Crown or the State or Judges on judicial immunity, if these claims can run, the same arguments can be used to support the inappropriateness of a damages remedy in this context. So if, as my learned senior points out, there is threat to the finality of litigation involved in these sorts of claims, that too is a reason not just to extent immunity, but to deem the damages remedy in an appropriate one. The same with the prospect of judicial witnesses. If that gives this Court room for pause about the nature of this vehicle of rights remediation, then in my submission it's another reason to avoid calling damages an appropriate remedy for breaches of these rights. So this is a point of crossover between the parts of the Crown's argument today.

But there is also a negative story about the damages remedy, in terms of the anomalies that it introduces or has the potential to introduce into the criminal justice system and I want to talk about just two of those today. The first is the introduction of arbitrary distinctions between ultimately acquitted defendants and this was the concern that Lord Hailsham had in the *Maharaj* and ultimately his concerns were vindicated and endorsed by the Privy Council in *R v Taito* in the *Independent Publishing* case and when you get to the end of that *Independent Publishing* case, and the Privy Council has deduced that the Trinidad and Tobago legal system is now

a fair one, there's a right of appeal and a right to bail, you can almost feel the culpable relief on the part of the Privy Council when it says and now we abolish the distinction that caused so many problems in *Maharaj* between sort of fundamental breaches of natural justice and really fundamental breaches of natural justice and Your Honour the Chief Justice raised a similar concern in interchange with me earlier, stemming from Lord Hobhouse's judgment in the *Arthur J S Hall v Simons* [2002] 1 AC 615 (HL) case that was picked up by this Court in *Lai v Chamberlains* that he too was worried about arbitrary picking between categories of losers in the criminal justice system. Errors are endemic to the criminal justice system and whilst they are extremely unfortunate and to be regretted, Lord Hobhouse pointed out that selecting a category of those ultimately acquitted defendants for compensation amounted to what he called a capricious distribution of damages and was not to be countenance. There in the context of barristerial liability admittedly, but the same point holds true here as Lord Hailsham was quick to point out. So in my submission, that is an unfortunate and inappropriate consequence, should damages be recognised in this area.

The final anomaly I wish to talk about the final point I wish to make about the damages remedy, concerns New Zealand's reservation to Article 14.6 of the ICCPR. That is the provision in the ICCPR that requires States parties to provide compensation for miscarriages of justice where newly discovered facts conclusively show that the conviction should be reversed or a pardon entered and New Zealand has of course, as the Court of Appeal acknowledged in this case, reserved its position on Article 14.6 to the extent that the ex gratia compensation scheme does not discharge that obligation.

My learned friend, rather bravely I suggest, suggests that in fact this proves his point that if New Zealand was so careful to exclude the compensation obligation under Article 14.6, if it really was worried about compensation under Article 14 proper, it should have entered a reservation to that Article too. Now, in my submission, that's a difficult submission to make and not in the least because you can't actually reserve your position in respect of Article 14 in toto as the general comment to that Article makes clear but in my submission, the error is more fundamental, it misses the point. New Zealand has explicitly and very cautiously reserved its position to the one specific compensation obligation that obtains under this right. So that's a very cautious stance in respect of compensation.

ELIAS CJ:

Do we have a copy of that reservation?

MR CURRAN:

It's recorded Ma'am in the Court of Appeal judgment –

ELIAS CJ:

I know but we don't have the whole document, do we?

MR CURRAN:

Not as a separate legal instrument Ma'am, in the bundle. Just to finish the reference for those on the Court who maybe interested, at paragraph 63 of the Court of Appeal judgment is the text of the reservation. In my submission, that cautious stance would be made a mockery of if New Zealand somehow, by reserving its position to the very – the one express compensation obligation in this area, somehow was thought to entail an exposure to a much wider and more general and unexpressed compensation liability under the rest of that Article. So that is the point, that is the anomaly that the Crown is attempting to adduce under this heading.

Your Honours, that's all I wish to say about the damages remedy. The rest of the arguments are made in the written submissions and I intend to leave those for Your Honours consideration.

The next and final part of my submissions concerns some of the arguments that have been raised by the Court of Appeal and by my learned friend on behalf of the damages remedy. I really wanted to look at just two, the Privy Council case law and set that in a wider comparative setting and I then wish to look at the legislative inaction, what we make of Parliamentary action or inaction following the Law Commission's report into *Baigent* liability.

So turning first to the Privy Council cases and this will pick up one of the concerns that Your Honour Justice McGrath raised with me earlier in interchange about systemic breaches, of how they might sound in the New Zealand context. Both the Court of Appeal and the respondent rely on the constitutional jurisprudence of the Privy Council from the Caribbean in favour of a damages remedy for breaches of these rights.

The Court of Appeal concluded effectively that *Independent Publishing*, the last word on the topic if you like from the Privy Council, they concluded that this word effectively just reset the bar for damages. So if *Maharaj* stood for the proposition that provided you point to a fundamental deprivation of natural justice and you point to a loss of liberty, you get a damages remedy, I*ndependent Publishing* recalibrated the threshold and said no, no that's not sufficient, what you do need to show is a breach of – you need to show an unfair legal system.

Now, in my submission, that fundamentally misunderstands the nature of *Independent Publishing* and the Privy Council jurisprudence because it's even more fundamental than a remedial threshold. In fact, what *Independent Publishing* did was redefine the right in section 4(a) of the Trinidad and Tobago constitution, the right not to be deprived of liberty without due process. They redefined it to become a systemic right, a right to a fair legal system.

It might be worth just turning our attention to Independent Publishing which is in volume 3, tab 62. If Your Honours pick up the judgment at paragraph 88 which is, I think, the second last page, page 223 of the reported version. It might actually be helpful to pick up the judgment at paragraph 87, it makes the point that has just been made, "Lord Diplock's judgment," this is in *Maharaj*, "has been widely understood to allow for constitutional redress, including the payment of compensation to anyone whose conviction (a), resulted from a procedural error to amounting a failure to observe one of the fundamental rules of natural justice and (b), resulted in his losing his liberty before an appeal could be heard."

Now, I pause to interpolate. This would be a perfectly reasonable interpretation of *Maharaj*. That however, is not Their Lordships' view of the effect of the decision. So a reinterpretation or a reinvention of *Maharaj* goes on in *Independent Publishing*. Then picking up the judgment again at paragraph 88, "In deciding whether someone's section 4(a) right has been violated, it is the legal system as a whole which must be looked at, not merely one part of it. The fundamental human right, as Lord Diplock said, is to a legal system that is fair." The final sentence of that paragraph, "Mr Ali," he is the editor who has been held in contempt, "complains about his failure to secure his release on bail within four days of his committal but Mr Ali can't point to an unfair legal system. Their Lordships would hold the legal system as a whole to be a fair one."

The same point is made at paragraph 92, on the other page, "Be that as it may, given that Mr Ali had a right of appeal, Their Lordships regard him as having enjoyed the benefit of due process. As in *Hinds*, so too here, any shortcomings in the first hearing could be made good on the appeal and by the grant of bail meanwhile –

ELIAS CJ:

Well, that's significant, isn't it, "and by the grant of bail meanwhile"? It all followed in the correct sequence in this case.

MR CURRAN:

Indeed Ma'am and of course, New Zealand does have a bail right, pending the determination of an appeal, as Mr Chapman took advantage of in this case. The broader point that I was trying to make was that the right in question here has been redefined to interrogate the fairness of the legal system as a whole. That's significant in my submission because our rights framework does not do that. Our rights framework guarantees individual phases of the criminal justice system will be fair. Section 25(a) says you're entitled to a fair trial. Section 25(h) says you're entitled effective appeal. What it does not do is mandate the Courts to look at the overall fairness of the legal system and in fact in *Condon*, I won't take Your Honours to the reference but at paragraph 40 of *Condon*, there's a rejection by this Court of a systemic type argument when they're talking about the *Hinds v Attorney-General of Barbados* [2001] UKPC 56, [2002] 1 AC 854 decisions which did take a systemic approach to fair trial rights.

So, in my submission, the New Zealand – this effectively renders the Privy Council jurisprudence on this topic just unhelpful because of the different rights framework involved. In my submission, even if we thought we could interrogate the fairness of the entire legal system, it is difficult to see in what way that could plausibly be done under a non-superior constitutional setup, like the Bill of Rights Act.

As I think I outlined earlier, it would be difficult to see how an adjudication on legislative failures and I do note that my learned friend in his submissions, lapses into accusing the legislature of moving tardily and not responding when the bells were ringing after *Nicholls v Registrar of the Court of Appeal* [1998] 2 NZLR 385 and so on, the alarm bells. In my submission, an adjudication on legislative failures like that, would breach the comity principle that Parliament and Courts are alert to respect their respective constitutional functions.

I should also point out that if damages are the goal, as they are for my learned friend, there is a real porosity of precedent for holding legislative failures, or legislative actions to sound in damages. Can't do it in the United States and the reference there is *Pierson v Ray* at page 554, citing *Tenney v Brandhove* and it appears you can't do it in Canada either. There's a reference in the *Mackin v Newbrunswick* at paragraph 78 to an administrative law textbook which gives that same proposition, that legislators have an absolute immunity in respect of their legislative output. As you might expect, because you want to foster that constitutionally valuable activity, so you don't want to hold the legislature in liability for damages for purporting to act in the public good, as they do when they pass legislation. So my submission, if the Privy Council, which are dealing with superior law constitutions, even if those were good precedent for the New Zealand, for the different New Zealand setup, we would run into very difficult considerations around the role of the legislature.

I was going to also deal with domestic case law. I will briefly make a point about the rest of the comparative legal framework and try and finish crisply for Your Honours. It is important to note that the Court of Appeal and the respondent only deal with the Privy Council. The only party to have done the kind of comparative heavy lifting in this case is the Crown, with respect, and at paragraphs 51 through 76 of its written submissions, the Crown does deal with these different jurisdictions and although it is fair to say that local factors between these jurisdictions make it hard to generalise, one general lesson that we can take from those comparative stories, is that there's no real compelling case for a damages remedy, for breaches of this kind. In the United Kingdom there's a legislative solution under the Human Rights Act. You can't obtain damages for judicial breaches of rights, except to the extent that the UK's international obligations require them to provide a compensation remedy and that's not for fair trial breaches, that's for breach of the right to liberty and that provision is section 93 of the Human Rights Act.

In Canada, as we see from the governing decision of *Vancouver (City) v Ward*, there's a real sympathy for the efficacy of traditional remedies and also for immunity concerns around constitutionally valuable activity and the Crown suggests that is fertile ground for the Crown's argument in Canada.

In the United States, it's simply a remedial impossibility to obtain damages of this kind. You can't sue Federal Judges, you can't sue State Judges, they're entitled to

judicial immunity and if you reformulate your claim against State or federal agencies or governments, you're equally scuppered, because the sovereign immunity of those entities prevails.

And finally, the European Court of Human Rights. There you do see occasional damages remedies being granted in this area, but that's somewhat confounded by the fact that, as has been noted by this Court in *R v Condon* and the Court of Appeal in *Brown v Attorney-General* somewhat confounded by the fact that damages is the remedial currency that the European Court has to deal with and even in that sphere, as Lord Bingham pointed out in *Greenfield*, in the great majority of cases a violation, a finding of violation is considered to provide just satisfaction and further, and the most recent cases, which are included in Your Honours bundles, *Somogyi v Italy, Sejdovic v Italy and Öcalan v Turkey,* the European Court is getting increasingly committed to articulating, in principle, the idea that the most appropriate remedy is a retrial or reopening of criminal proceedings where you have this kind of fair trial breach. So the overall story is very much, if New Zealand were to recognise this kind of remedy, it would be bolder than so of its cognate jurisdiction partners.

To finish Your Honours, I just wanted to talk briefly about the idea of the legislative response to the *Baigent* report, somehow implicitly endorsing the validity of a damages remedy. Now the Crown at paragraphs 87 and 88 of its submissions, canvasses two equally plausible interpretations of this legislative inaction. I should just perhaps articulate the proposal in case Your Honours aren't familiar with it. The Law Commission looked into *Baigent* liability and actually proposed that judicial liability in damages should be legislated against and that proposal never came to fruition so my learned friend says, ah, well that shows that the Parliament clearly wanted there to be a damages remedy.

The Crown has pointed to, in its written submissions, two other entirely plausible interpretations of legislative inaction, which is always dangerous to try and interpret. One, a lack of urgency or priority. It's hard to see the Law Commission's proposal as having much urgency when even the Law Commission itself thought that *Baigent* only established a liability for executive breaches. So hardly clambering for the Parliament's attention. And secondly, Your Honours, it could equally have just been left for judicial development. After all, that was exactly what the Law Commission recommended for quantum principles and for principles of contribution between the Crown and public bodies. But the one point that my learned friend raises to say – but

I can show that this was explicit Parliamentary approval, is the history of the Judicial Matters Bill.

Now this has come up already in interchange between the Crown and the Court today. The Judicial Matters Bill was the Bill that responded to one of the other proposals of the Law Commission, which was to extend the immunity of inferior Court Judges and my learned friend points to the some of the legislative history of that particular Bill to suggest that Parliament very much knew what it was doing and if I can just have the case, the extra case, this was a point relied upon by the Court of Appeal and by my learned friend to suggest that Parliament actually, when it was extending the judicial immunity of inferior Court Judges was also at the same time preserving *Baigent* liability for judicial breaches of rights.

If we turn to, I don't think tabs will be helpful, but page 108 of the respondent's supplementary casebook, that's the only white casebook Your Honours should have before you. This is the explanatory note to the Judicial Matters Bill, page 108, and the statement is, "Judicial immunity does not preclude other remedies for persons agreed by some action by a Judge. For example," and the third bullet down, "Compensation from the Crown in cases of miscarriage of justice." Now the Court of Appeal said, oh, well, that might be a reference to preserving *Baigent* damages liability and my learned friend also makes that point but with respect that phrase "compensation from the Crown in cases of miscarriage of justice", clearly refers to the ex gratia compensation scheme and the same phrase is used in the other references that my learned friend makes from this legislative history at page 113, fro the first reading speech, and page 116 from the select committee report. And quite clearly looking at that phrase "compensation fro the Crown in cases of miscarriage of justice" if that had been intended to refer to *Baigent* liability, the phrase wouldn't have been compensation from the Crown, it would have been compensation from the Courts, surely. And furthermore Your Honours – so "from the Crown" clearly anticipates Crown control or discretion over the compensation in question i.e. the ex gratia scheme.

ELIAS CJ:

Well I don't know if the *Baigent* damages were from the Crown and that's the debate we've had with – well the submissions we've had from the Solicitor-General.

MR CURRAN:

Well Ma'am if –

ELIAS CJ:

I'm sorry I don't want to take your time on it. I'm just simply pointing out that the references you've taken us to are, it seems, mutual because they don't specifically indicate whether it is the voluntary compensation system that is being referred to or not and it is against the background of the *Baigent* decision.

MR CURRAN:

Well with respect Ma'am I just can't accept that it is neutral. Even if Your Honour was concerned about the first, the ambiguity that Your Honour perceives in the first half of that sentence, what about the second half of the sentence, "in cases of miscarriage of justice". Not in cases of breach of fair trial rights or breaches of the Bill of Rights Act, as you might expect if they're talking about *Baigent* liability but in cases of miscarriage of justice. That's exactly the same language that New Zealand uses in its reservation to preserve the ex gratia compensation scheme.

YOUNG J:

Have you got a copy of the Crown – of the Cabinet policy?

MR CURRAN:

Yes Your Honour, that is in volume 6 of the –

YOUNG J:

Volume 6.

MR CURRAN:

The Cabinet minute concerned is at 107.

ELIAS CJ:

Sorry, what are we referring to this for? It's not legislative.

YOUNG J:

I'm just wondering whether this is a reference to something that has got a name. But it probably doesn't capture the name.

MR CURRAN:

It doesn't talk about miscarriages of justice Sir.

YOUNG J:

They say wrongful conviction.

MR CURRAN:

So in that respect I accept that it could be more precise but the text of our reservation to Article 14.6 of the ICCPR refers to the existing system for ex gratia payments to persons who suffer as a result of a miscarriage of justice. So that's the language that I perceive it in this particular phrase that comports with the ex gratia scheme. It certainly doesn't refer to fair trial breaches or breaches of rights or breaches of the Bill of Rights Act as one might expect if the *Baigent* damages liability reedy is preserved. I understand Ma'am it's not a major point but I did want to take Your Honours to it.

That concludes my submissions unless Your Honours have any further questions?

ELIAS CJ:

No thank you Mr Curran. Yes Mr Harrison?

MR HARRISON QC:

If I could just begin Your Honours by stepping back and reminding you about the difference in analytical framework or approach that the written submissions reveal with the Crown's three questions, or one overall question and three sub-questions, and the quite different analysis that I've proposed in the introductory section of our submissions and then carried through into the body. And although we're going to lose sight of that because I'm not going to trawl you through all of that I am unrepentant in submitting that our framework is better as an approach starting as it does with identifying the true juridical nature of the *Baigent* remedy and then asking whether it extends to what I'll call for short judicial BORA breach as I'm going to have to say that expression a lot.

The Crown with its three sub-questions formulated them in a particular order in the written submissions and has completely reversed that order looking instead today at Attorney-General not the appropriate defendant followed by judicial immunity followed by the question whether you should have a remedy of damages for judicial

BORA breach. I note that because it just emphasises the problem with analytical framework by even – to an even greater extent, putting the cart before the horse because how can you possibly deal with an argument for example that the Attorney-General is not the appropriate defendant before deciding whether there's going to be a remedy for judicial BORA breach and equally if it's a matter of substantive law you conclude that there is such a remedy and no reason to hive off judicial BORA breach from any other kind of BORA breach by any other party, once you've reached that point and said, yes, there is a right of action or a cause of action or a substantive remedy, how can you go on and say, well there isn't a defendant. It seems a very strange way of approaching the issues, with respect.

So having said that, and just by way of staring off, my submission is that the provision of a case specific effective remedy for breach of BORA is now fundamental of our rights jurisprudence as *Taunoa* affirms. Case specific meaning look at the particular individual case, ask whether a remedy is required and if so identify the remedy or remedies. It's not a unitary thing where you say well I'm giving one remedy therefore I have to choose which remedy I'm giving. Of course more than one remedy can be given a typical combination being a declaration of breach and damages.

Now that's the proposition. It's fundamental to give a case specific effective remedy but when you come to judicial BORA breach the Crown doesn't, and it cannot, directly challenge that proposition. Instead the Crown mounts a collateral attack by arguing that within the criminal justice system error correction, that is to say by appellate correction generally, alone will be, or should be deemed to be, the sole effective remedy. That's their proposition. Specifically aimed at the criminal justice system but if that is sound then I submit that the logic of the Crown argument should flow on in at least three directions, none of which, I submit, are acceptable. The three directions, first, the logic of the Crown argument cannot stop at damages for judicial BORA breach. If the logic is that error correction within the criminal justice system is the sole effective remedy that is needed, it's not a BORA remedy, it's a remedy of the system. So the logic is no BORA remedies are needed at all. Not simply that damages is not needed. Why stop at damages. Secondly, if appellate error correction is –

ELIAS CJ:

I'm sorry, you'll have to explain that a little bit better for me.

MR HARRISON QC:

Right, well what I'm saying is the Crown is saying that within, in the context of the criminal justice system, all you need is the appellate system which is not a *Baigent's* remedy, it's the system. So, they are saying all we need is the appellate system, the logic of that is that you don't need any *Baigent* remedies –

ELIAS CJ:

But that's –

MR HARRISON QC:

– not that you don't need damages –

ELIAS CJ:

– typically the result where declaratory relief is sufficient remedy. You declare the law, don't you?

MR HARRISON QC:

Well, to say that an appeal is allowed is not to give a *Baigent* remedy, it's simply to do what the criminal justice system contemplates.

ELIAS CJ:

Isn't the remedy to – the remedy for denial of appeal, the remedy is, the first remedy at any rate, is to provide an appeal?

MR HARRISON QC:

The first remedy? Yes, yes, I accept that but if we're not looking for the moment at denial appeal, what the Crown is saying is that all we need is appellate correction. That is the be all and end all. It's the only thing we need to deal remedially with Bill or Rights breaches. That seems to be their proposition and they say that's why we don't need damages but it also, the logic of that goes further to say well, we don't need any other *Baigent* style remedy either.

GAULT J:

Mr Harrison, are you arguing that even where the law does provide a full and adequate remedy, there should also be a *Baigent* remedy?

MR HARRISON QC:

No, no, I'm arguing that simply because the law provides a remedy that is of first recourse and adequate in the generality of cases, it doesn't follow that there never can be a *Baigent* remedy. That's the Crown proposition. The Crown proposition is, appeals work and are adequate for general purposes, therefore there should be no damages. I'm submitting that that simply doesn't follow.

To move on, the logic also – this is my third point. The logic of the Crown argument about error correction in the criminal justice system cannot be confined to the criminal justice system because error correction – the availability of error correction is at least as great in the civil or non-criminal context where you've not only got rights of appeal but greater rights of rehearing and so on. So, my point is and it's just a preliminary point, that the Crown really shies away from acknowledging the ultimate logic of its argument and where that leads but I submit that the Court must face up to it.

Logic aside, the premise, I've just referred to this, the premise of the Crown position is that appellate correction within the criminal justice system will always provide a complete and exhaustive remedy and that's a flawed premise. It's not, I would submit, some fundamental truth, no matter how many times it is said and it's correctness and practice is directly contradicted by the facts of the present case and it's also contradicted by the approach of *Lai v Chamberlains*, the majority in the case and much of the exchanges about issues like undermining finality and so on, point out the difference between the majority and Justice Tipping on the never say never approach that attracted Justice Thomas' attention memorably but I don't rely on that kind of statement as such.

There are cases, with respect to Justice Young, there are cases where you say we must exclude a certain type of proceeding entirely but there are also and these are in the majority, cases where you do not exclude a remedy outright in those categorical terms and where one is concerned with breach of basic human rights and our Bill of Rights in this country, the never say never approach is the one that ought, I submit, to be adopted because it's not merely a question of domestically drawing up the drawbridge or bringing down the shutters because there is always this international obligation, dimension to the problem which I deal with in the submissions.

Now, I noted my learned friend Mr Curran and it's a theme of the Crown's submissions, arguing that in effect it's the respondent who is trying to make the new law here and so the onus is somehow on us and we need to argue accordingly but this is not just point scoring because there are consequences which flow.

I want to begin by submitting that it's not the respondent who seeks to overturn settled law here but the Crown and I submit that in a nutshell because when the majority in *Baigent* embraced *Maharaj* and also and I'll come to it, gave the actual ruling in *Auckland Unemployed Workers' Rights*, they actually did, as a matter of precedent, usher in a damages remedy for judicial BORA breach and if respect for precedent, judicial precedent, binding judicial precedent and not just the obiter dicta of a single Judge here and there is a matter for this Court to be concerned with, then the true position is that *Maharaj* has governed the judicial BORA breach position ever since *Baigent* acknowledged its force.

Now, this is important, not just from a precedent point of view but because it rebuts two other Crown arguments. First of all, it gives the lie to the Crown floodgates argument which says if you allow damages claim for BORA breach you are opening Pandora's box and people will be sued up and down the country. Now, for reasons that are in my submissions and I will expand on this a little later, it isn't the case, the understanding of the law following *Baigent*, the understanding of the Law Commission, the cases that went forward at first instance, all proceeded on the basis that you could have a damages remedy for judicial BORA breach.

You can count the cases, they are less than the fingers of one hand, the sky has not fallen in and the point is not only about floodgates and the number of cases, it also impacts on the Crown's arguments here about public perceptions of lack of judicial independence. The idea that oh, if you allow this, the public will suddenly perceive that Judges lack independence. If the cause of action has been around ever since *Baigent* and indeed operated in some instances, wouldn't you expect the public perception of lack of independence to have materialised by now –

ELIAS CJ:

Well, it hasn't arisen in the context of judicial – subject to the argument that you'll address to us I'm sure, on the warrant issue. It hasn't been focused on judicial breach of the Bill of Rights Act is the argument.

MR HARRISON QC:

Yes, well my submission is it has. There –

YOUNG J:

Well there was the *Upton* case, what else is there?

MR HARRISON QC:

There's the *Upton* case. There's Your Honour's own decision in *Small v Attorney-General*, High Court, Christchurch Registry, CP No. 157/99, Young J, 5 May 2000.

YOUNG J:

That wasn't a case involving Judges and at least in a real sense it was – at most it was a challenge to a search warrant which no doubt had been – and I can't, was it a Judge or a registrar who'd signed the search warrant –

MR HARRISON QC:

Well –

ELIAS CJ:

Judicial power.

MR HARRISON QC:

– with respect it makes no difference whether it was a Judge or a registrar, it's still a judicial act and covered by judicial immunity if the individual sued personally. It was – the point is this, that in *Small* the point was conceded.

ELIAS CJ:

I'm sorry, is that right? That judicial immunity covers the acts of registrars exercising judicial authority? I just hadn't appreciated that.

MR HARRISON QC:

I think yes.

ELIAS CJ:

Yes, thank you.

YOUNG J:

Well the statutory judicial immunity that was put in in 2004 but was that actually for registrars as well? I mean there may be common law immunities but does the District Courts Act provision cover it?

MR HARRISON QC:

The –

ELIAS CJ:

Perhaps judicial officer or whatever –

MR HARRISON QC:

Yes –

ELIAS CJ:

– includes –

MR HARRISON QC:

– judicial officer, an immunity. In any event the point is perhaps the – if I can just get –

YOUNG J:

Section 119 says every District Court Judge has at all times the same immunity as a Judge of the High Court.

MR HARRISON QC:

Yes. Yes that was the equal footing immunity that was introduced by amendment in 2004. The – perhaps there's certainly a provision in the Crown Proceedings Act which deals with a form of statutory immunity in section 6(5) is it? Yes. The cases are *Innes v Wong (No 2)* (1996) 4 HRNZ 247 which is at tab 31, volume 1 of the Crown casebook. Now I'm not arguing about whether there's a right or wrong, I'm just arguing that such cases occurred.

ELIAS CJ:

Yes.

YOUNG J:

But I think, I mean there are obviously, well say a search warrant was set aside, would it then be possible to sue the people who executed it or is that covered by the search warrant – by the Crown Proceedings Act or the Police Act?

MR HARRISON QC:

Well this is the point at – sorry not *Innes*. It very – at personal liability level the individuals who execute under an invalid search warrant are protected from immunity. The point of *Baigent* is that the direct liability of the Crown or State is separate from and not protected by the individual immunities. And the same holds true, we say, for judicial officers. Now the – sorry it's *Upton v Green* I wanted to refer to in volume 2, it's at tab 46, where Justice Tompkins awarded damages for the actions of a District Court Judge who was there being sued personally along with the Attorney-General and *Baigent's* case was applied based on the Judge's breach of the plaintiff's right to a fair hearing.

YOUNG J:

So where does he – where does the Judge dismiss the claim against the Judge? I think it must be on page 193.

ELIAS CJ:

No.

YOUNG J:

He's talking about State liability.

ELIAS CJ:

Dismissed the claim –

YOUNG J:

What he – I don't know if he actually formally dismissed it but he only entered judgment –

MR HARRISON QC:

Only awards against the second defendant, the Crown. But my only point at the moment is that following on from *Baigent* the understanding was that you could sue a Judge for judicial BORA breach. *Upton v Green* was one such. In *Rawlinson v Rice* [1997] 2 NZLR 651, which is in that same volume at tab 43, the plaintiff was suing a District Court Judge for misfeasance in public office which gave rise to some significant legal difficulties and the Court of Appeal urged him to reinstate his, instead his claim for breach of the Bill of Rights, for judicial breach, and pursue that. Ms Ailsa Duffy as the – as she then was, urging that that was appropriate at page 663 of the report, it actually starts on 662 at line 50. The other matter relates to a cause of action which Mr Rawlinson had initially pleaded against the Crown, claiming damages for breach of section 27 BORA. He abandoned it because he wanted a jury trial. At line 4 on the next page, Ms Duffy informed us that the Crown accepted liability for damages for breach of section 27 and was prepared to negotiate an appropriate sum. So he was urged to, for example by Justice Tipping at the bottom of page 667, to concentrate on his Bill of Rights cause of action.

So there – and I'll come to the Law Commission report because with respect the Crown is wrong in saying that they didn't, that report did not think that there was a judicial BORA breach liability to the contrary they did. So until this case, just looking at the New Zealand decisions, the position has been one of general understanding that you could sue for judicial BORA breach. But if you treat *Maharaj* as binding authority on a New Zealand Court, that too is part of New Zealand law and *Maharaj* in some ways does say it all and I want to just go back to *Maharaj* for reasons that will become apparent. That's volume 3, tab 63.

YOUNG J:

What happened to *Rawlinson v Rice* in the end, do you know?

MR HARRISON QC:

No, I assumed he settled. There was a fairly strong signal that he should. He settled out of Court my learned friend Mr Collins says. So I know we've touched on *Maharaj* a number of times but I'd like to do this in my own way, tab 63, the constitutional right in question is set out at page 393 of the Privy Council's advice, Lord Diplock's judgment, and it's under that heading, "Chapter 1, clause 1," and where it ends, "And the right not to be deprived thereof, being that there is such as liberty, except by due process of law," and I actually agree with Mr Curran that the critical thing about the later case of *Independent Publishing* is that it redefined the right. But that's neither

here nor there, that's their right and there is now different content to that Trinidad and Tobago right, because it's been redefined, but the principle at issue, or one of them, was where a Judge breaches the right, whatever it may be, what are your, what are your remedies in terms of damages.

Now, at page 339, sorry 399, I'm sorry Your Honour, the critical portion of Lord Diplock's judgment appears and we, it was argued that you couldn't have compensation as it was called, against Trinidad and Tobago, pursued in the person of the Attorney-General, for a variety of reasons and if we go to 399 between (b) and (c) it starts up, "It has been urged upon their Lordships on behalf of the Attorney-General that so decide to provide compensation, would be to subvert the long established rule of public policy that a Judge cannot be made personally liable in Court proceedings being done by him, before he exercised his judicial functions, and that weighed heavily with the Court below. Their Lordships however think these fears are exaggerated." And then there's a series of propositions, one beginning, "In the first place and these are principles which I submit are still valid and in New Zealand context today. No human right, fundamental freedom is contravened by a judgment order that is wrong and liable to be set aside on appeal from where an error of fact of substantive law, even if imprisonment results. The remedy is to appeal to a higher Court. The fundamental right is not to a legal system that is infallible, but to one that is fair," and so on, the rest of that, down to where it starts just above (f) in the second place. "In the second place, no change is involved in the rule that a Judge cannot be made personally liable for what he has done when acting or purporting to act in a judicial capacity. The claim for redress under section 6(1) for what has been done by a Judge, is a claim against the State for what has been done in the exercise of the judicial power of the State. This is not precarious liability, it is a liability of the State itself. Not a liability in tort at all, a liability in the public law of the State, not of the Judge himself, merely created."

Now that passage I have just read out is what was affirmed by the majority judges in *Baigent*. Key passage, but it's, please note, for reasons I'll come to, it's the proposition that starts in the second place and then he goes on into third place, "Even a failure by a Judge to observe one of the fundamental rules of natural justice, does not bring the case within section 6," and that's a proposition about the interpretation of the particular provisions at issue.

Now, there was then the case of *Hinds* which is at, in the same volume at tab 63.

YOUNG J:

Is that what we've just looked at 63?

MR HARRISON QC:

Tab, sorry, tab 61 and this is a later Privy Council decision at para 22. The challenge there was, well, counsel for Barbados was complaining that the applicant who had a conviction which hadn't been overturned on appeal, who lodged a constitutional challenge instead, was making what amounted to a collateral attack on his criminal conviction on constitution grounds, he should have appealed, and then at 23, counsel relies on an impressive line of authority and *Maharaj* is regarded as part of this impressive line and Lord Diplock's, in the first place proposition, is set out and indeed you notice that if we go to over the page to between (b) and (c), (b), in the first place proposition is cited, then there is a line of dots omitting, "In the second place proposition," and the third place proposition is all cited. So that's, that's *Hines*. There's no suggestion in *Hines* that *Maharaj* in any respect is wrongly decided –

YOUNG J:

Just, what, what was, what did the Judge mean, this is going back to **(inaudible – someone coughed 15:26:36)**, "Even a failure by a Judge to observe one of the fundamental rules of natural justice does not bring the case within section 6, unless it has resulted, is resulting or is likely to result in a person being deprived of life, liberty, security of the person." Why did that not apply to someone who goes to jail as a result of an error that breaches a right to a fair trial, or something of that sort?

MR HARRISON QC:

This is the interpretation of the relevant constitutional guarantee, which is later reinterpreted in the *Independent Publishing* case.

YOUNG J:

Right, is section 6 set up somewhere?

MR HARRISON QC:

Sorry, is Your Honour referring to –

YOUNG J:

Section 6 of the Trinidad and Tobago constitution.

MR HARRISON QC:

Yes, but are you referring to *Maharaj* –

YOUNG J:

Yes.

MR HARRISON QC:

The reported *Maharaj*?

YOUNG J:

Yes, here it is, page 93.

ELLIAS CJ:

I'm sorry Mr Harrison, I'm just really wondering what sort of progress we're making and whether I should make enquiry of the Bench and of counsel whether if we took an adjournment now, we should sit on, we won't be able to sit until five, but till about 10 to five. Does that suit counsel? I'm just a little worried because we have another case tomorrow afternoon I understand.

SOLICITOR-GENERAL:

That would certainly suit me Your Honours and I think you know when we accepted this fixture, I informed the Court that I was on a plane out of New Zealand at 3 o'clock tomorrow –

ELLIAS CJ:

Yes.

SOLICITOR GENERAL:

– and so I would have to stop about 1 o'clock tomorrow.

ELLIAS CJ:

Yes, all right, well, we'll take a 15 minute adjournment now, unless you want to finish what you were saying, I'm sorry Mr Harrison, I was thinking of this and didn't notice where you were up to in that answer.

MR HARRISON QC:

I'll come back to Justice Young's query after the break.

COURT ADJOURNS: 3.29 PM

COURT RESUMES: 3.50 PM

ELIAS CJ:

Yes, Mr Harrison.

MR HARRISON QC:

Thank you Your Honour. I'm just going to come to Justice Young's point in a moment but just to recap what I'm trying to demonstrate here. It's two overall points by looking at *Maharaj* and the later Privy Council cases. First of all, relative to the Crown's arguments that you're being asked to accept, the first issue is what did *Maharaj* decide and my submission is in essence two related points. One, that the liability for breach of a constitutional guarantee is a direct liability of the State. The second point is that in relation to that liability there is no availability of judicial immunity as against the State. So, the Crown argued for a proposition that because if a Judge is sued would be entitled to judicial immunity. That is naturally to be extended to the New Zealand State or the Attorney-General, whoever is defendant. That argument is directly rejected by *Maharaj.*

The second line of inquiry about *Maharaj* is have the principles I've just identified been subsequently doubted and I've finished with the first of those. I was part way through the second and about to go to *Independent Publishing* but we need to, for me to address a query from Justice Young, we need to go back to *Maharaj* at 63, tab 63 in that volume, at about (f) on page 399, the words, the claim for redress under section 6(1), is a claim against the State and I think Your Honour was asking me about section 6. If we go to page 393 of *Maharaj*, I referred to clause 1 at (c). That is the right, then the remedy is at (f) and that is 6. "For the removal of doubts, it is hereby declared that if any person alleges a breach of the constitution, then without prejudice to any other action which is lawfully available, that person may apply to the High Court for redress."

Now that doesn't say that the claim expressly is a claim against the State. However, the issue of who should be sued and no one has mentioned this thus far but I point out that at 394(h) at the bottom to over the page, this issue was also addressed. It

was argued for the Attorney-General that even if the High Court had jurisdiction he's not the proper respondent and Their Lordships shared the Court of Appeal right to reject this argument, the redress claim by the appellant section 6 was redressed from the Crown, now the State, for a contravention of the constitutional right by the judicial arm of the State. There's a reference to their Crown Proceedings Act, "By the provision in question it is provided that the proceedings against the Crown," it still said Crown, now the State, "should be initiated against the Attorney-General, not to find the proceedings in tort." So, that's what I wanted to say on that point.

Now, going to *Independent Publishing* which is at tab 62 and you were taken to this but I just want to go back a little bit further. If we go to paragraph 85, Their Lordships are discussing *Maharaj* and at 85, a few lines in, "The majority of the board was given to Lord Diplock who expounded the governing principle as follows at page 399 to 400." Now, if we go down in that indented paragraph, just above line V, you'll see a row of dots, the line begins, "This can be anything but a very rare event... even a failure by a Judge." Then over the page –

YOUNG J:

This is the point I didn't understand and I still don't understand it. Section 1 of the constitution says you can't be deprived of liberty, section –

MR HARRISON QC:

If Your Honour pleases, I really must finish this point if I may. For the train of this to be interrupted means I have to start again. Can I come back to you?

YOUNG J:

That's a terrible threat but I'll have to listen to you.

MR HARRISON QC:

Well –

YOUNG J:

I still don't understand this point though which is – I mean, it means I'm not following the argument, I'm sorry.

MR HARRISON QC:

Right, well can I come back to it?

YOUNG J:
Certainly.

MR HARRISON QC:
Now, the point is, in *Independent Publishing* this passage is cited at para 85 but there's an omission from the middle of the paragraph just above (d). Then over the page, at 87, there is comment on that passage and a reinterpretation of it, reinterpreting the constitutional guarantee, the particular guarantee in question. Now, keep your finger at para 85 and go to tab at 63, *Maharaj* itself, at page 399. What we can see, if we look at 399(d), Lord Diplock's in the first place and the second place and the third place.

Now, what is omitted from the disapproved of reasoning in *Independent Publishing* is Lord Diplock's, in the second placed passage. So, if you're looking at 399, just above (f), the sentence and line ends, "but a very rare event," that's where the dots start. Then at (g) in that same page, where it starts, "In the third place," the text resumes after the dots at, "even a failure by a Judge".

So it's a laborious exercise. The point is, Lord Diplock's in the second place proposition is not what the later board took exception to in *Independent Publishing* but it is Lord Diplock's in the second place proposition that was adopted by the Court of Appeal in *Baigent*. That is the two legs I identified originally, direct liability of the State and no extension of judicial immunity to that State liability.

I recognise that Your Honour Justice Young, in your judgment in *Brown* expressed a different view but my submission is if you look through these Privy Council cases, it's quite clear that the *Maharaj* proposition is still good law and has not been disapproved of.

If I can be of further assistance to Your Honour Justice Young, I'm happy to –

YOUNG J:
Look at 393 of *Maharaj*.

MR HARRISON QC:
Yes.

YOUNG J:

The structure of the constitution seems to be that no one can be deprived of the right to liberty which is the right that was engaged in this case and then subsection, or section 2, requires Courts and anyone else to not deprive a person of a right to a fair hearing in accordance with the principles of fundamental justice. Now, *Maharaj's* complaint presumably is a combination of 1 and 2, that is, that he was deprived of liberty without a fair hearing?

MR HARRISON QC:

Presumably, yes, seems to be.

YOUNG J:

That's why I – what I find difficult with Lord Diplock is why he saw his head of liability as one reserved for rare cases because it virtually – well, not in all but in a significant number of cases, those whose appeals are allowed have succeeded on what would normally be a subset of the right to a fair hearing, subset of the right to natural justice.

MR HARRISON QC:

Well, I, I – it's not necessary for me, in my submission, to defend the Lord Diplock *Maharaj* interpretation of that particular constitutional guarantee against the reinterpretation of it in *Independent Publishing.* It's a specific guarantee capable of being judicially infringed. We have other guarantees differently worded and my learned friend argues that they are not guarantees against systemic problems. I don't agree with that, but if you take, if you take the *Harvey v Derrick* example, where the right breached, had we had the Bill of Rights then, would have been section 22, arbitrary detention, the *Maharaj* principle, be in the second place principle, is the one we rely on and the fact that the particular guarantee in *Maharaj* may have this much content or that much content, is beside the point. It's just a differently worded guarantee. We've got, Mr Chapman has got to demonstrate that a guarantee that the Bill of Rights extends to him was breached, not the Trinidad and Tobago one, but one in our own Bill of Rights, so that I submit is really the best I can make of it.

It's, so if I may move on. I'm back into my submissions, but rest assured very quickly, page 2 of the main written submissions, I just want to point out, I'm sure this is obvious, that there's, as referred to at the top of page 2 of our written submissions,

there's a chronology a few pages from the end, which sets out the interplay between the various steps taken overall. The *Nicholls v Registrar of the Court of Appeal* case, which and this goes to the systemic complaint, expressed some major doubts about the system in May 1998 and despite that, by the time the respondent's appeal was dismissed in October 2000, the system was still operating. The decision that dismissed his appeal, incidentally is tucked away in my volume of supplementary cases at page 47.

Then *R v Smith* came along, this para 6 of my submissions and the passage is cited at the bottom of para 6 from *R v Smith*, contained a very useful summary of the BORA breaches. My learned friend Mr Collins tried to characterise *R v Taito* as involving beaches of various statutes, but it's very clear that the extent of the breaches also breached BORA rights and that is clear from that summary.

So, the point is then this case is not only unusual in that the breaches happened at appellate level, it's also unusual because of the systemic nature of the breaches and so, and this is at para 10 and 11 of the submissions. The paradigm for the Crown argument is a one off breach by a judicial officer, where the officer goes off the rails and the argument is, well, if, it could just as easily be a legal error not involving breach of the Bill of Rights as one involving breach. There's an anomaly, why should we compensate for the one, not the other. There are two answers to that. First of all that the reason we compensate for breach of rights is that rights are given an enhanced status over non-rights, non-human rights. So there's no anomaly in saying, those rights which are in the Bill of Rights backed by international law and our obligations at international law, get treated differently from non-rights, or those rights which aren't in the Bill of Rights. The second answer is that what happened here was systemic and a failure of the appeal system on a number of levels and how does one pinpoint who to sue if you're suing individual officers, as I mention at the bottom of page 3, the Judges concerned were Justices Thomas Blanchard and Tipping in dismissing the first appeal, but there are a whole lot of other facets, including original design of the system, who introduced it, and the other participants. So, it is quite wrong to take the paradigm of a single judicial outcome and argue from that that this is akin to having to sue a single, or complain about a single Judge.

Now, we, so as I note in the submissions and as is clear from what we heard today, the Crown does not dispute, although it really does not acknowledge, the public law nature of the *Baigent* remedy that we're concerned with. Not acknowledging the

public law nature of the remedy, enables private law principles, such as judicial immunity, to be put forward as appropriate limitations on the right of act –

ELLIAS CJ:

Is that submission that's accurate, because the immunity would also apply to public law causes of action would they not?

MR HARRISON QC:

The judicial, the individual judicial immunity?

ELLIAS CJ:

Yes.

MR HARRISON QC:

Well, that begs the question whether it would Your Honour. We won't have to go there –

ELLIAS CJ:

No.

MR HARRISON QC:

– if the argument, if the argument is, well, whether it applies to an individual Judge sued for BORA breach or not, it doesn't apply to the State if the State is sueable, that's the short answer that I would propound, but I'm not going to concede that either, if the Crown were right and there was no available defendant to sue, other than individual Judges for BORA breach, I would argue that the unique public law nature of the remedy means that judicial immunity does not apply, it's an extension of the immunity to the public law remedy and just as we haven't had judicial immunity and judicial review, we shouldn't have it in that area. But we don't have to go that far. All I'm saying is that I'm not prepared to concede the point, because if we come absolutely down to the, if the last persons standing are Judges who have breached the Bill of Rights, and we get into the effective remedy principle at international law, he might be driven to withhold the immunity.

YOUNG J:

Where a local authority is said to have breached the Bill of Rights, who's, what's, who's the proper defendant there?

MR HARRISON QC:

Well, our position of course is that, as the Court of Appeal said, we don't need to go there, but the, my answer would be that the, it makes sense to sue the section 3(b) actor, be it a school board, a local body or whatever, but with a residual fallback liability of the Crown as overall guarantor to ensure that the remedy is delivered and that's because of the international law responsibility of New Zealand as a State to deliver these rights and remedies.

Now, I was talking about the private law context, sorry the public law nature of the remedy and the danger of using private law principles willy nilly, the example is that, another example is the proposition that the Attorney-General should not be sued because at common law liabilities are only sheeted home to those with power and control over the actor who has breached the Bill of Rights. That was strongly stressed by my learned friend. He submitted that you couldn't possibly have a liability of the State or the Attorney-General for judicial breach because the State, it's an anathema to suggest that the State has power or control over the individual Judges or the judiciary and indeed he went so far to say – submit that there is no other scenario that could arise and he challenged me to come up with something.

Now my first answer to that is, this notion of power and control is actually a private law, common law concept addressing vicarious liability issues and of course if it's a direct liability, not vicarious, then we aren't there anyway. But I thought I would refer to the situation of the Police and Mr Thatcher if you would for Their Honours I've got copies of that and for my learned friends because the police are, the police are in fact covered and the State is liable for what they do in the individual case but they are statutorily independent, they always have been, but the Policing Act mentioned this in various ways. Section 8, principles, 8(e) principles but, "Policing services are provided independently and impartially." Section 16(1) addresses what the Commissioner of Police is responsible to the Minister of Police for but subsection (2), "The Commissioner is not responsible to, and must act independently of, any Minister of the Crown," et cetera, regarding (a) and (b) in particular. And then the police oath is at section 22(1) and its an oath to perform duties in particular the expression "without favour or affection, malice or ill-will". Not that far from the judicial oath which is "without fear or favour, affection or ill-will". Presumably malice is not something to be attributed to Her Majesty's Judges. But there's an answer. The police are operationally independent but nonetheless the fact that in an individual case there's

no power or control over them doesn't meant that the executive can't be held liable for their misdeeds.

Now I, at page 13 and following I deal with the question posed, what is the legal basis of the BORA remedy. Is there any reason for treating judicial BORA breaches different and I submit we haven't heard from the Crown any reason for treating – at the fundamental, the theoretical or juridical level, there's no reason to treat an asserted damages remedy for judicial BORA breach as a different legal animal. So if it's the same legal animal then we, we certainly have our foot in the door, shall we say.

Now I then go on to look at *Vancouver (City) v Ward*. In relation to the right at issue I'll just touch on some materials that Your Honours might like to bear in mind. Page 15, the article – I set out the Article 14, sub rule 5, ICCPR right, which is the comparable right at international law. "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law". And there's a Human Rights Committee general comment that I refer to. That is at bundle of authorities volume 6, tab 111, and there is a discussion of that right, particularly at paras, and these are among the references there, 45, 48 and 49. The content of the right is there referred to and there's quite a useful discussion at – and that's at tab 111 and so the writers, the right that at international law that we say was breached for this respondent is discussed, a discussion of according to law – at 48 it said, the right in question imposes on the State party a duty to review substantively both on the basis of sufficiency of evidence and of law to conviction and sentence. And at 49 the right to have a conviction reviewed can only be exercised effectively if a convicted person is entitled to any reasoned written judgment of a trial Court and other documents such as trial transcripts necessary to enjoy the effect of exercise of the right, and there's discussion at 45 as well. So that's part of that.

Now 51, I refer to two sets of materials. The Human Rights Committee communication in *EB v New Zealand* is in my supplementary materials which I call RSC, RSC page 49. The particular references are – that I would emphasise, are at paragraphs 9.3 and 9.4, and what the Committee said was that the systemic delays in the New Zealand Family Court breached the right in question there. So that the Human Rights Committee held New Zealand in breach for judicial acts and omissions in terms of the handling of EB's child custody case in the Family Court. The key authority is *Köbler* in the European Court of Justice. The judgment in the Queen's

Bench reports is at volume 4, tab 77 of the Crown bundle of authorities. The advocate general's judgment comes first and then the substantive judgment is from page 895 on and I'd like to go to those passages for a moment so that's volume 4, tab 77. So this is the Court itself, not the advocate general, and the passages I want to refer to, which are referred to by paragraph numbers, start at page 901 of the report. So just a sentence from paragraph 30, page 901, "First, as the Court has repeatedly held, the principle of liability on the part of a Member State for damage caused to individuals as a result of breaches of community law for which the State is responsible is inherent in the system of the Treaty." Paragraph 31, no I can leave that. Paragraph 32, "In international law a State which incurs liability for breach of an international commitment is viewed as a single entity, irrespective of whether the breach which gave rise to the damage is attributable to the legislature, the judiciary or the executive. That principle must apply a fortiori in the community legal order…" and I needn't read the rest.

Paragraph 33, "In the light of the essential role played by the judiciary in the protection of the rights derived by individuals from community rules, the full effectiveness of those rules would be called in question and the protection of those rights would be weakened if individuals were precluded from being able, under certain conditions, to obtain reparation when their rights are affected by an infringement of community law attributable to a decision of a Court of a Member State adjudicating at last instance."

I interpolate, it seems to have been common ground that for breach of rights by a Court below the top Court, the remedy could be given. The argument here, in which a number of EU states joined, was that you couldn't have that remedy when it was the top Court of the State in question, so what they went on to say is yes, even with the top Court, you can still breach the right and the citizen of that State can sue for damages if his right is breached.

So, at 39 it was said, "Recognition of the principle of State liability of a decision of a Court adjudicating at last instance does not in itself have the consequence of calling in question that decision as res adjudicata proceedings seeking to render the State liability do not have the same purpose, do not necessarily involve the same parties." Then 40, "Res adjudicate does not preclude 41, nor can the arguments based on independence and authority of the judiciary be upheld. As to independence of the judiciary, the principle of liability in question, in terms not the personal liability of the

Judge, but that of the State, the possibility that uncertain conditions the State may be rendered liable for judicial decisions contrary to community law does not appear to entail any particular risk that the independence of a Court adjudicating at last instance will be called into question." And then there's an argument about diminishing the authority of a last instance Court by implication and they reject that proposition as well. And then at 48 to 50 there's more discussion with the points.

So the Crown seek to dismiss our reliance on *Kobler* by saying, well, that's an international law and international law is different, but of course, leads around in a circle because if we go back to *Baigent*, the substantive liability for BORA breach, the *Baigent* remedy was established because failure to do so would put us in breach of our international obligations to provide an effective remedy. That wasn't the only reason, but it was emphasised.

Now what the Crown is, in effect saying is, even if the substantive law liability for judicial BORA breach exists somewhere out there, you can deny it procedurally by saying that no one can be sued, you can't sue the Attorney-General and we don't have a State and also of course, the argument around judicial independence and so on. It, with respect, it's not going to wash if this case were ever to get to the Human Rights Committee and that's not a threat, it's just something the Court responsibly ought to bear in mind, just as the *Baigent* Judges did and it's a kind of a settled response since *Baigent.* This is our response to our international law obligations.

So in page 16 on, I look at what I call, I ask Your Honours to consider whether there's a functional role for BORA damages. I set out extracts at page 16 from *Vancouver (City) v Ward* and I invite Your Honours to take the time to read the entire passage. I've omitted parts and at paragraph 55, the Crown is correct in its suspicion that we are inviting a little bit of a rethink about the *Taunoa* approach, but as I note at the top of page 18, the Crown accepts that *Taunoa* had no clear majority for giving BORA remedies a primary compensatory purpose, but equally the converse is true. So it was suggested we ought to have done a whole lot more work in this area and been much more comparative, but at the end of the day, the Crown argument itself asks the Court to determine whether BORA damages is an appropriate remedy, to which a perfectly response is, is it functionally necessary? Which takes us into the *Ward* issue and I then point out, this is my paragraph 55, that *Taunoa* can be distinguished because the appellants, other than one who's ward was not in issue, the appellants hadn't suffered personal loss or damage over and above the breach of their rights.

They hadn't suffered a loss of liberty, because they were serving their sentences. We say that the respondent either lost his liberty, or at least suffered the loss of a chance of gaining his liberty sooner. He also, he pleads suffered distress, so that there is this different dimension to *Taunoa* and a rethink is perfectly appropriate.

So at page 18 on I look at some scenarios. They were all set out. I'd like to just refer briefly to the House of Lords case of *Jain v Trent Strategic Health Authority* [2009] 1 AC853. That is in supplementary bundle, what I call RSC, at page 92 and I set out the facts in paragraph 61. This is a bit like the obiter discussion in *Harvey v Derrick* because this was a pre Human Rights Act English case and the plaintiffs were lost out on common law principles. There was no, they were owed no duty of care in negligence, but unlike the argument for the Crown, which says if the Crown law won't go there, the rights remedy equally should not. The House of Lords was quite forthright in asserting that there would have been a remedy if the Human Rights Act had been in force.

So the key passages are listed in footnote 33 on page 20. A number of those are really just people agreeing with the leading judgment of Lord Scott of Foscote who obviously thought that there was a major injustice that had been down by an ex parte magistrate's order, closing a rest home that envisaged no prospect of prompt review. So that after, in the course of a long failure to get the matter back before a Court on its merits, the business was completely ruined and at para 11, *Jain v Trent Strategic Health Authority* at paragraph 11, Lord Scott's judgment –

ELLIAS CJ:

Oh sorry, you said page, but before, it's –

MR HARRISON QC:

Sorry, it was page 96 of the pagination, para 11 of the judgment.

ELLIAS CJ:

Thank you.

MR HARRISON QC:

So Lord Scott notes in para 11 that the case wasn't under the Human Rights Act. Then he goes on to look whether imposing the damages liability would be an appropriate limitation on the rights and he concludes, I won't take Your Honours

through it, but it's paragraphs 11 to 18, he concludes, I won't take Your Honours through it but it's paragraphs 11 to 18, he concludes fairly emphatically that they would have had a remedy for the judicial order which breach their rights and ruined their business.

McGRATH J:
Was it the health authority or the magistrate whose complaint was principally directed at?

MR HARRISON QC:
It was the local authority applied ex parte and the magistrate granted the ex parte order. So it was both but specifically the ex parte order and the failure to provide a system to –

McGRATH J:
You rely on the Magistrates Act?

MR HARRISON QC:
Yes.

McGRATH J:
Yes.

MR HARRISON QC:
The Magistrates Act but it's systemic and acknowledged to be systemic because not only is it the original order but it's the failure to provide for the ability to review the order promptly. I mean, it's – there's reference to, one of the Judges says, when I was in practise and looking at Anton Piller orders, the critical thing justifying the use of extreme ex parte measures was that there was built in immediate review, that's what the Judge says in this decision and that is a critical aspect.

You can have ex parte orders, providing there's full merits based review before people's businesses or lives are ruin but, the main point is, it's a scenario which on the Crown argument here, even though it's in the civil context, on the Crown argument there would be no remedy for judicial BORA breach.

Now at page 21 we come to the question of what *Baigent* and *Auckland Unemployed* actually decided and I have set all that out. A key passage is Justice Cooke which I've set out with emphasis in para 65 of my submissions but also there is Justice Hardie Boys, this is volume 1, the *Auckland Unemployed* is at volume 1, tab 24. So we have, as quoted in para 65, we have Justice Cooke saying, "There is the difference from *Baigent* to the present case. The search warrant is alleged to have been invalid. I think that unlawfulness in the obtaining or issue of the warrant would be an important factor, possibly decisive." So if he's talking about issue of the warrant then plainly, in my submission, he's looking at judicial BORA breach or its equivalent, at the hands of a registrar.

Justice Hardie Boys, and this is my para 66, at page 7 to 8, under the heading, "Invalidity of the search warrant," records, "The statement of claim makes a general attack on the validity of the search warrant," alleging this and that and that claim was struck out. To paraphrase His Honour, he then reinstates both the tortuous claim, so far as it's based on malice and the Bill of Rights claim for breach of section 21.

So it's quite clear, in my submission, that the Court in *Auckland Unemployed* was consciously dealing with a claim that challenged the judicial act of issuing a search warrant. Either in *Auckland Unemployed* or *Baigent*, or both, there's a discussion about the fact that issuing a search warrant is a judicial act. There are various points at which that is discussed. So we do say that *Auckland Unemployed* and *Baigent* established our point but we also say that *Maharaj* did because it became part of law as soon as it was received when the overall Baigent remedy was created.

Now, on the topic of what I describe as extension of judicial immunity, from defence personal to the individual Judge, to a defence available to the State or Attorney-General, *Harvey v Derrick* has a very revealing analysis by Justice Richardson which I identify at para 71, page 22 of the submissions. I'd like to take Your Honours to that because it's quite prescient, with respect. At tab 30 and starting at page 324. I realise these cases will be bringing back memories for Your Honour Justice McGrath, having featured in a number of them.

ELIAS CJ:

Sorry, what volume is this?

MR HARRISON QC:

Volume 1, at 30. Now, *Harvey v Derrick* has an overlay of jurisdiction as well because of the State of the provisions that dealt with the liability of a District Court Judge or Justice at the time. Incidentally, they are at the top of page 323, you can see section 193. That was the provision limiting personal liability at that point.

At page 324, line 32, His Honour begins in that context, the jurisdiction context. His Honour points out a conceptual difficulty, then goes on at line 35, "Indeed, settling the bounds of judicial immunity involves two competing policies, the justification for the immunity and the need to compensate those agreed by the wrongful conduct, weighing in contemporary terms accepted reasons for juris immunity and the goals of tort law and public law. A range of public interest considerations that have been advanced by Courts and commentators to justify juris immunity, the primary grounds are," and those are set out –

McGRATH J:
Can I just ask you to pause there? Is Justice Richardson there pointing to a balancing test?

MR HARRISON QC:
Yes, I would submit that he is and it becomes clearer as His Honour goes on, from line 40, "To refer to the range of public interest considerations." He lists the primary grounds, in favour of judicial immunity. Then towards the bottom, "Those public policy reasons have to be weighed against the public interest in providing remedies for those aggrieved by the exercise of judicial power. Traditional tort policy would require every Judge to exercise reasonable care to ensure he does what only he or she is compelled to do."

Then there's a reference to the expansion of potential tort liability of professional groups, public law remedies. "The conduct," line 6, "The conduct of Judges," this is in the quote, "is amenable to Bill of Rights guarantees." So that's the analysis there.

As per my exchange with the Chief Justice earlier, the difficult issue would be whether to extend judicial immunity to a Judge individually sued for BORA breach. In fact, in *Rawlinson v Rice* the Court of Appeal seemed to think there was no problem doing that because Rice was personally sued but you don't have to go there if you have the State represented by itself or the Attorney-General as the appropriate defendant.

McGRATH J:

You're almost suggesting a section 5 analysis.

MR HARRISON QC:

Well –

McGRATH J:

To me, now that's what you've said, I know, but is – does the judicial immunity or the bounds of judicial immunity limited so that it can't go beyond what a free and democratic society can tolerate under section 5 of the Bill of Rights Act?

MR HARRISON QC:

Well that's certainly another way of formulating it Your Honour. If you accept my analysis that remedy of right breach and procedure are inextricably linked and we can't artificially give with one hand and take away with the other, then overall when you are contemplating allowing an immunity to operate, and intrude, if that's not too loaded a word, into the Bill of Rights area, then a section 5 analysis might well be appropriate.

ELIAS CJ:

But that would be an interpretation of the statutory immunity, is it?

MR HARRISON QC:

Well it's not as – in the case of Superior Court Judges –

ELIAS CJ:

Oh yes.

MR HARRISON QC:

– it's are common law rather – but it's analogous. I mean it comes down to the use of proportionality as well as a tool to reach an appropriate human rights outcome. But on this topic I do cite – on the topic of common law immunities, and of course now I'm not going to be able to find it, I cite a couple of decisions on hesitation before – they're in footnote 56 on page 36 of my submissions. A Court of Appeal decision in

New Zealand Defence Force v Berryman [20080] NZCA 392 and *Darker v Chief Constable of the West Midlands Police* [2001] 1 AC 435. They're both in my supplementary bundle. In essence the – as I say at the top of page 36, the modern approach is that there needs to be caution about extending immunities. So that ties into the balancing approach and Justice Richardson's obvious caution when dealing with issues in *Harvey v Derrick*. Now –

McGRATH J:

Your submissions refer to a passage from the President as well?

MR HARRISON QC:

Yes.

McGRATH J:

But you don't make so much of that I take it?

MR HARRISON QC:

No.

McGRATH J:

It's hard to see a lot in that.

MR HARRISON QC:

Can't see a lot in that. just – at best a straw in the wind but Justice Richardson – and I don't say that Justice Richardson is a huge help. He's just expressing a very principled, with respect, a very principled approach to what the Crown submissions treat as an absolute given which we're submitting it was not.

Now turning to page –

ELIAS CJ:

Sorry, what, the immunity?

MR HARRISON QC:

Yes. We turn to page 23 of the submissions to the Law Commission's report. I've set out a summary. If we go to the report which is in volume 6 of the Crown bundle. My para 73 gives a number of references but if you could just underline for particular

attention 154 to 159 and 186. And at tab – sorry 113 it should be. No 108 sorry, tab 108, and para 154 is at page 52. It's headed "A *Maharaj* remedy in New Zealand" and there's a discussion – it begins at 154, a little way in, in respect of the judiciary the section 3(a) principle that the Bill of Rights applies to the three branches, is said to be in conflict with the policy considerations which justify the doctrine of judicial immunity. These considerations lead us to conclude that a remedy for breach of the Bill of Rights should not be available in respect of those categories of Judges. It's a fairly bold statement. Section 3(a) says this is the case. We think it should be disapplied in respect of Judges.

ELIAS CJ:

And you would argue that maybe it's the immunity that has to be looked at –

MR HARRISON QC:

Yes.

ELIAS CJ:

– in the light of section 3?

MR HARRISON QC:

Yes, yes, and so then they emphasise all the usual suspects in 155. The availability of adequate rights of appeal disproved by the present case and the need to achieve finality in litigation. Those principles, of course, have been thoroughly reworked by *Lai v Chamberlains* using the developed abuse of process doctrine and I argue in the submissions that those principles more than adequately deal with these issues.

We also see it as undesirable for Judges to have to appear as witnesses in cases concerning their own conduct, credibility findings, credibility of Judges should not, in our view, be put in issue. I deal with it in our submissions arguing that most judicial activities are documented and most take place in open Court and those that don't are documented by decisions and reasons so that it's more of a theoretical possibility. Of course in the case of the Court that dismissed the respondent's first appeal and in respect of Sir Edmond Thomas, it might be difficult to persuade him to refrain from giving evidence. That's my little joke.

ELIAS CJ:

Yes, thank you. On that not entirely happy note perhaps we should take the adjournment.

COURT ADJOURNS: 4.47 PM

COURT RESUMES ON TUESDAY 07 DECEMBER 2010 AT 9.59 AM

ELIAS CJ:

Yes, Mr Harrison.

MR HARRISON QC:

Well, if I may make a start Your Honour. I was at page 23 of the written submissions but dealing with the Law Commission report which is in volume 6 of the Crown bundle of authorities at tab 108. Just going through passages dealing with the *Maharaj* remedy at pages 52 to 53 of the Law Commission report, specifically because it concerns the Crown submission that the failure to take up the recommendations of the Law Commission report by legislation is neither here nor there and that was associated with a submission that the report did not consider that a remedy for judicial BORA breach had been created.

I refer you to paragraph 157 which is a culmination of analysis I needn't go through. The last sentence there, "Legislation is however required to prevent an action against the Crown in respect to the conduct of Judges." The Commission having earlier in that passage noted that absolute immunity of superior Court Judges would prevent an action against the Judge personally and likewise if you increase the immunity of District Court Judges, et cetera.

Then at 158, they propose the legislation and then – and this is relevant to a line of argument for the Crown, they note that, second sentence at 158, "Compensation for miscarriage of justice would be dealt with in a manner proposed. We recognise there will be some cases where the obligation to ensure provision of an effective remedy, stipulated by Article 2.3 ICCPR, is not satisfied by either the right of appeal or our proposed legislation which was not enacted, wouldn't cover *Upton v Green (No 2)* (1996) 3 HRNZ 179 (HC) or *Harvey v Derrick* [1995] 1 NZLR 314 (CA)." But you balance Article 3.2 against considerations which I argue do not outweigh the Article 2.3 calculus.

So that was the position so far as the Commission is concerned and then what happened next was the Judicial Matters Bill and I refer to that in paragraph 77 of my submissions. The materials are in our supplementary casebook. These have been gone through but just to touch on them. You've got the Bill as introduced –

YOUNG J:

Mr Harrison, can I just ask a question. Was there a formal government response to this report?

MR HARRISON QC:

Not that I'm aware of, other than the Judicial Matters Bill itself but I am going to come back to something in the preface to the report which is tangential to that Your Honour. So at page 104 you've got the explanatory note to the Bill and this is directed to –

McGRATH J:

What tab are we in?

MR HARRISON QC:

My volume doesn't have tabs it has pagination –

McGRATH J:

Oh sorry, thank you, that's enough.

MR HARRISON QC:

– it is the supplementary casebook, page 104 Your Honour, it's the white one. I'm addressing here the suggestion from Mr Curran that maybe the proposal to legislate against the *Maharaj* style remedy was simply that the legislature was too busy and it just got – the fact that it wasn't a conscious omission, the submission is, to enact it, so no significance can be attributed to the failure to enact that recommendation.

If we look, we see at page 104, that the Bill is implementing government policy on a number of matters relating to the judiciary and they are bullet pointed. Then there's a summary of judicial complaints and removals on page 105 and the aims of that. Then 107, judicial immunity, it's noted that the Bill is implementing that aspect of the Law Commission report. So specifically, when they talk about judicial immunity and its aims and so on, they are noting that they are responding to that particular recommendation and of course over the page at 106 is the passage which occurs later as well, in the debates and in the report back, saying that judicial immunity does not preclude other remedies, compensation from the Crown and cases of miscarriage of justice.

I acknowledge that that could be – the miscarriage of justice proposition could be read either way. I place much more weight on the fact that there wasn't a legislative response. On that score, just going back to the Law Commission report at tab 108, those recommendations were no – they weren't just ordinary recommendations of the Commission because we can see from the preface to the Law Commission report just behind the letter of transmittal, it's roman nine, if Your Honours have that, the history of the matter, about three-quarters down that page headed Preface. "*Simpson v Attorney-General* was decided by the Court of Appeal in September 1995 as part of the government's consideration of issues raised by *Baigent's Case*. The Minister of Justice asked the Law Commission to give priority to its review and to include issues relating to Crown liability under the Bill of Rights Act draft report by Sir Kenneth Keith."

Then over the page, halfway down, a reference to the fact that they also included recommendations arising out of *Harvey v Derrick*. It notes that, "Legislation reversing *Harvey v Derrick* was already before Parliament by then." So this was a report that was specifically asked for by the Minister of Justice when it addressed the *Maharaj* remedy, as the report calls it. So that the failure to implement those recommendations must be regarded as significant and a decision not to disturb the potential for *Maharaj* claims.

McGRATH J:

Mr Harrison, could you just give me the page number you were reading from? I don't want you to go back to it, in the volume.

MR HARRISON QC:

It's roman nine to roman 10 of the preface in the volume. All right. Moving on. I have been addressing the question that I mentioned at the outset of whether this remedy for judicial BORA breach has in fact been part of New Zealand law all along. At page 25, I refer to *Rawlinson v Rice* and I took Your Honours through that but finally there is and this is para 82, this Court's decision in *Lai v Chamberlains*, volume 2, tab 32 of the bundle of authorities. I'll just take you to the *Lai v Chamberlains* passages. They are both in footnotes but none the worse for that.

Paragraph 66 of the judgment. No, sorry, it's in the paragraph, I beg your pardon, at line 40. "Remedies in public law against the State considered for example in *Maharaj*

illustrate that remedies for error in criminal proceedings are sometimes appropriately obtained outside the criminal justice system itself." Then there's a footnote and there's a reference in 138 to the application of *Maharaj* in *Baigent*.

Then the other reference is at 74, where again the point is referred to. In other words, we have the majority in *Lai v Chamberlains*, one could concede obiter, approving *Maharaj* as an authority still in force in New Zealand.

I want to go now to the submissions that the learned Solicitor-General advanced yesterday, coming to the twin questions of whether there's an available defendant if such a claim in principle could be advanced and, if so, who, and, secondly, judicial immunity and extending it to a defendant who isn't a member of the judiciary him or herself.

The submissions of the Crown, with the greatest of respect, are really frozen in time at the date of enactment of the Crown Proceedings Act, and it's as if nothing has moved on in common law or human rights terms so far as State responsibility is concerned, since the Crown Proceedings Act, and I'm sure I don't need to remind Your Honours that the Crown Proceedings Act was a remedial measure needed because of the proposition that the King or Queen could do no wrong, could not be sued in his or her own Courts and, in particular, could not without legislation be rendered vicariously liable for the torts of servants or agents of the Crown. And that, of course, was a proposition that went back a long way in the common law, and the Crown Proceedings Act remedy was preceded by a petition of right procedure, which was discretionary as I recall. And if you want to go back and look backwards, there's a whole lot of material to support the kind of my learned friend makes. But my submission, and I don't want to get too lateral here, is that the issue first off has to be determined in the context of the Bill of Rights and what indications from text and purpose that provided us with in terms of looking at a potential defendant or defendants, one, and, secondly, contemporary constitutional practice and expectations.

Now, I'm going to come back to the Crown Proceedings Act and some authority in a moment, but can I just say in respect of the latter point constitutional norms and expectations in a modern day New Zealand, with respect to Your Honour the Chief Justice, is right to be asking about the indemnity issue because in the Crown's submission, as I apprehend it, is that there is this strict separation of powers where

the judiciary are on their own in the interest of independence and a whole lot of things, and it strikes at the heart of independence and public perception for there to be any kind of crossover with the Crown standing behind the judiciary, and the indemnity issue demonstrates that that has long since not been the case.

The other point about contemporary practice relating to the liability of the Crown, and this may be too lateral, is this: if we look at what happens to day, it's a far cry from what the Court of Appeal said ought to happen when you sue arms of the Crown or Crown servants in the case of *Crispin v Registrar of the District Court* [1986] 2 NZLR 246 (HC) at Tauranga which, incidentally, went on appeal to the Court of Appeal. There the Court of Appeal took the classic approach that says you cannot sue a title, you've got to name the individual unless there's enabling legislation that enables you to say, "You can sue X, Y, the District Court, whatever," but my impression is that the modern day practice completely ignores that, and you get claims against the Chief Executive of the Department of Labour, all of those immigration appeals, all those name the Chief Executive, even though there's no enabling provision, CYFS –

ELIAS CJ:

But there's a statutory responsibility, I think.

MR HARRISON QC:

Yes, there is a – but in terms of naming, the point is we no longer say, "Joe Bloggs," we no longer sue Joe Bloggs, Chief Executive or –

ELIAS CJ:

But the Chief Executive is Joe Bloggs, so –

MR HARRISON QC:

Yes, but he's named by – the point is he's named by office and he's not sued personally but in his capacity as Chief Executive.

YOUNG J:

You could sue, you could name the Chief Executive personally, if so minded, couldn't you?

ELIAS CJ:

Yes.

MR HARRISON QC:

You could, and in fact I – because, conscious of *Crispin*, I often have, and what happens, if I may say, from the Bar, the Crown gently invites you to move to the title because people are uncomfortable, like District Court Judges, about being sued now. And another instance is, where the Crown position is inconsistent, in the Zaoui litigation they wanted the Attorney-General in there because they wanted the Attorney-General to stand between the plaintiff and the Inspector-General of security and intelligence. When it suits them, when it suits him or her, the Attorney-General is right in there, being named, to represent the public interest regardless of the nature of the function. Now, all I'm submitting is that is the modern constitutional practice in New Zealand, and it's a factor against which to weight the point that is now being taken.

ELIAS CJ:

But it's not comparable, the argument that's being addressed to us –

MR HARRISON QC:

No, it's –

ELIAS CJ:

– which is that the judiciary is a particular case, a special case –

MR HARRISON QC:

Yes, yes, I –

ELIAS CJ:

– and everyone else can be lumped in with the executive.

MR HARRISON QC:

Yes, yes, I understand that. Can I just – and I'm going to meet that a little more directly. That's by way of preface, and I won't take too much longer on the point.

I wonder if I could just refer to the *Chagos Island* case, which is volume 3 of the bundle, at tab 49? The passage from Lord Justice Sedley at paragraph 20 –

ELIAS CJ:

Does the House of Lords decision not have – is it of no help in this case? I haven't looked at it for the arguments here, but it's not on, as I understand it, it's not on appeal from this decision, I think that's what the Solicitor-General said, but –

MR HARRISON QC:

Yes, it's addressing a narrow point. It's addressing, as paragraph 2 of the judgment indicates, it's addressing a Crown strike-out application –

ELIAS CJ:

Yes.

MR HARRISON QC:

– to strike out the government as a defendant. So it's an argument around the capacity of the government.

Now, I just wanted to take Your Honours back to paragraph 20, which was the passage relied on. "We note that the issue was private law," – second sentence – "private law claims against the British State," and then there's the statement the sentence is in, "But the English common law has no knowledge of the State." But one needs to read on, further down, "But the State has no tortious liability at common law for wrongs done by its servants, from ministers down," and there's a reference to the point I made earlier about the Crown Proceedings Act. And then they go on, His Lordship goes on, "The Act does not work by making the State a potential tortfeasor, it works by making the Crown vicariously liable for the torts of his servants. It has only been with the enactment of the Human Rights Act that the Crown, in the form of a public authority, has acquired a primary liability for violating certain rights," and that's the point. When we move from private law to public law, the landscape and constitutional position changes and the point is, in my submission, that the notions of the State and the constitutional position has not remained static, at least in the public law sphere, and I'm going to refer to a decision –

ELIAS CJ:

Do you say that this is a reference to *Maharaj* liability, this statement?

MR HARRISON QC:

Not per se but Lord Justice Sedley is making the point that – he is talking about the private law sphere here and liability under the Human Rights Act is a different

category. So his – you could – I don't have to argue that in tort for example, there are liabilities beyond what the Crown Proceedings Act contemplates. I don't need to go that far. But my point is that when we get to public law and in particular responsibility for Human Rights breaches, we are in a different field as I think it was Justice Blanchard said in *Taunoa* it's a field all on its own and we have to approach the argument that there's no available defendant knowing where we are, what field of law we're in and its special characteristics and the – there's a helpful Privy Council decision which I will take Your Honours to if I may. But first of all I want to just go back to the basics which is what does the Bill of Rights say that helps us on this particular technical point about who the defendant is. At volume , tab 9 –

ELIAS CJ:

Sorry I'm still not sure what you're inviting us to take from this because what's said here still on one view requires there to be some corporate entity, a public authority, and the last sentence seems to suggest that. That there's no problem where the limb of the State has corporate legal personality.

MR HARRISON QC:

My only point is that the *Chagos Islanders* case is a case in private law and –

ELIAS CJ:

But he's making the distinction. He's saying that there are private law claims and there are the public law claims but I don't take that passage to be saying that even in public law claims there isn't a problem if you don't have some entity.

MR HARRISON QC:

Well what –

ELIAS CJ:

Some manifestation of the State.

MR HARRISON QC:

He's discussing primarily private law claims and what he says is, there's not a problem, it's a different kettle of fish, if you like, where you've got a Human Rights Act scenario and also it's a different kettle of fish where the limb of the State has corporate legal personality, even in the private law sphere. So he's making those

propositions, he's not sequentially, if you like, or disjunctively, as I read, and not rolling the two up together.

ELIAS CJ:

No but he's not answering the problem that we're faced with here?

MR HARRISON QC:

No he's now answering it but I wish to put my learned friend's reliance on the statement –

ELIAS CJ:

I see.

MR HARRISON QC:

– in the proper context.

ELIAS CJ:

Yes, thank you.

McGRATH J:

Mr Harrison, I take it you don't rely on the Crown Proceedings Act at all then if you –

MR HARRISON QC:

I do.

McGRATH J:

You'll come to that no doubt?

MR HARRISON QC:

I'm coming to that but if we just look at the Bill of Rights Act we've got – no actually I'll deal with this, if I may jump around, I'll deal with this when I come to the Crown Proceedings Act argument and come back to it. The case I wanted to refer to on the more – there are two limbs. Basically I suppose what I'm submitting is that in the public law area you don't need to rely on the Crown Proceedings Act and you can select either – you can either say that there's a State which is responsible and regard the Attorney-General as the appropriate representative of that State, not of the Crown in any – we needn't get into some verbal analysis of what the Crown really

means. It's a direct jump from saying it's the State, which is what section 3 say, the government of New Zealand and it jumps straight to saying well, as the Courts below it said, the Attorney-General is the obvious candidate to represent the interests of the State. Or you could, if you wanted to get into some heavy analysis, you could simply say, well if the Attorney-General is not appropriate, the State, the government of New Zealand can be sued under that title in the Bill of Rights area because we are discharging out duty at international law to provide an effective remedy, this is Article 2(3), and to develop remedies and to turn away a otherwise deserving plaintiff on the grounds that he's got no one to sue is the antithesis of developing remedies and that obligation to develop remedies must be – relate to procedure as well as substance. The two go hand in hand.

ELIAS CJ:

So you rely on the, is it the preamble to the Bill of Rights Act, the promotion –

MR HARRISON QC:

Yes. And this is –

ELIAS CJ:

– and development.

MR HARRISON QC:

This is straight *Baigent*. I mean *Baigent* did it for the substantive remedy. The Crown is arguing well the Court now can't do it for the procedure whereby you find, locate a defendant who is, who is in reality answerable and unencumbered by an immediate absolute defence of judicial immunity. So that's one leg, that's just the bold submission but the alternative is to argue that without too much violence the Crown Proceedings Act does the job and the Court of Appeal adopted the first of those saying, well obviously you can sue the Attorney-General and didn't need to deal with my argument about the Crown Proceedings Act. *Gairy v Attorney-General of Grenada* [2002] 1 AC 167, which is at our supplementary volume at page, the white volume at page 143, is a Privy Council decision that –

ELIAS CJ:

Well I suppose you could, on your argument, you could sue the Head of State?

MR HARRISON QC:

Whomever – the – if you're not suing the Attorney-General you would have to designate the State of New Zealand as an entity and the – it's – the Commonwealth of Australia has had its, its corporate status or its juridical existence recognised and if you're going to go to Joseph, and I accept that Joseph as a text is held in high regard, just before I get to *Gairy*, if I may –

ELIAS CJ:

I'm sorry the Commonwealth, the recognition of the Commonwealth of Australia that's consequential on the constitution presumably, is it, but is there any case law on that point?

MR HARRISON QC:

I was just going to – because my argument is that there's a lot – there are simpler solutions here than –

ELIAS CJ:

Yes, yes, that's true.

MR HARRISON QC:

– this but I was just going to refer to the Joseph text which is at volume 5, tab 96. You actually need to read all of the learned author's discussions but starting in particular at 16.3.3 where he discusses what he calls the corporate analogy. It refers to the Australian case law and acknowledges the common law concept of the legal personality of the Crown is implied or common law corporation. So that is to be put alongside the passage that the Solicitor referred us to at 16.4.1. And these are deep waters, but with the imperative of the Bill of Rights, which I am coming to, at least in relation to the *Baigent* remedy, there are perfectly respectable arguments to treat the Government of New Zealand itself, being the entity mentioned in section 3(a) of the Bill of Rights, as a responsible defendant if, for some reason, the Attorney-General isn't the natural candidate.

Now, sorry, back to *Gairy*, because this illustrates some of the themes I have been trying to elaborate on, at page 143 of our bundle of authorities.

McGRATH J:

But just as you go there, the only paragraph from Joseph you've referred us to in addition is 16.3.3, is that right?

MR HARRISON QC:

Yes, yes, but I'm conscious of the time. All I'm saying is there needs to be a –

McGRATH J:

I'm not wanting you to read it further, but there were further paragraphs that you wanted us to look at – I need to know.

MR HARRISON QC:

Only the one that my learned friend the Solicitor referred to.

McGRATH J:

Yes, 64.1, yes.

MR HARRISON QC:

So, *Gairy's* case, the facts are a little convoluted, but basically Gairy had been awarded damages for a constitutional breach and was unable to collect them, and he went back seeking a constitutional remedy to collect these damages that he'd been awarded, and the argument for Grenada was that he couldn't sue Grenada, he couldn't bring himself within their Crown Proceedings legislation, and therefore he missed out. And it's stated in Lord Bingham's judgment, in paragraph 1, the issue is identified, I've bracketed it, "Entrenched constitution, at issue is the power or duty of the Courts to grant an effective remedy against the State for such a violation," then they look, page 174, the constitutional position is set out, the remedial provision is at para 12, and then there's a discussion of the Crown Proceedings Act at para 13, and I've bracketed that.

Now, there's a reference at page 178 to *M v Home Office*, and the argument was, at (c), that this was, the appellant was seeking coercive relief and that *M v Home Office* precluded the grant of such relief against the Crown as Crown by name – Your Honours will remember the discussion of *M v Home Office* yesterday, the proposition established by that case was that you could have a coercive order against an individual minister of the Crown, as distinct from the Crown itself. So, Grenada was seeking to return that back on the plaintiff, saying, "Well, here you've sued Grenada and you can't have coercive relief against us," and then at line (f) there they say, "Oh, no, it's a new constitutional order".

Oh, sorry, no, 19.1 is what I wanted to refer to, "It is fallacious to suppose that the rights, powers and immunities of the Crown are immutable, they have over time been attenuated and abridged, occasionally as a result of violence legislation." The Bill of Rights of 1688, sometimes judicial decision, "It is no way inconsistent for an independent State, while continuing to bear full allegiance to the Crown, to circumscribe the historic rights, powers and immunities pertaining to the Crown in its governmental capacity." Then, 2 is a new constitutional order and, last sentence, "Historic common law doctrines restricting the liability of the Crown or its immunity to suit cannot stand in the way of effective protection of fundamental rights guaranteed by the constitution." Then there's a reference at (c) on the next page to "conservative approach" and a reference to a passage from Lord Diplock and, just above (f), "In the respectful view of the Board, that enlightened approach to the procedural implications of protecting fundamental rights must extent to the substance in law also," and then there's a reference at 4 to *Maharaj* and at the bottom of the page, referring to *Maharaj*, the Board says that *Maharaj*, the Board made it clear that the contravention in question was by the State, liability not vicarious, and just a re-statement.

And then over the page at 180 there's a discussion of *M v Home Office,* and basically they uphold the idea that in a constitutional context, "*M v Home Office* no longer applies and the remedy is direct against the State." You can add in to the that the short passage from *Maharaj* I referred to yesterday, where the Crown Proceedings Act of Trinidad and Tobago was relied on, despite the fact that it said, "Crown," it now applied to the new State.

Now, what you can say in answer to all this is, of course, that *Gairy* is a case about a superior law of constitution, not our Bill of Rights. But if you go back to *Baigent*, that argument did not wash with the majority Judges in *Baigent*, they said, "Well, once you get – if you get the fundamental principle, the status of the Bill of Rights as less than a superior law does not prevent application of these principles by analogy.

So, that's *Gairy*, and I submit that it is a helpful authority and, as I say at 97, the alternative port of call is the Crown Proceedings Act, and I won't, I can leave much of what I say there to be taken as read, but the important point in the argument is, in my submission, around section 27(3) of the Bill of Rights, which I have set out in paragraph 99. The point there is this, that you've got in section 3(a), you've got the reference to acts done by the legislative executive or judicial branches of the Government of New Zealand, but in 27(3) you've got the right to bring proceeding,

bring and defend proceedings brought by or against the Crown. So the Crown is used, in 27(3) and that parallels a provision of the Crown Proceedings Act, section 12(1). Now, what are we to make of the reference to the Crown in 27(3) compared to 3(a), the white paper which, the 1985 white paper assists on this point, and the relevant passage is at page 153 of our supplementary bundle. The comment on what became section 27(3) is at 154 of my pagination or page 111 of the document at para 10.176. After setting out that draft provision the commentary goes, "This provision," omitting words, "is designed to give constitution status to the core principle recognised in the Crown Proceedings Act, that the individual should be able to bring legal proceedings against 'the Government'," I emphasise the word, "and more generally to engage in civil litigation with it, without the Government enjoying any procedural or jurisdictional advantages, privileges. This is central to the rule of law," and then at 178, "Again, the phrase 'according to law' will enable the right to be regulated by legislation, at the moment the Crown Proceedings Act, and by common law," and at the very end of that they talk about, "Proceedings by or against the State."

So what I submit, is that when we approach the Crown Proceedings Act and the availability of the Attorney-General as a defendant, its interpretation must be influenced by section 27(3), pursuant to section 6 of the Bill of Rights and what does section 27(3) mean? It is plainly using the Crown as a shorthand for what is referred to in section 3(a) of the Bill of Rights, the collective government of New Zealand comprising the three branches. So section 3(a) is not about separation of the branches. As I say in the written submissions, it's about bringing the branches under an umbrella and making the government responsible.

So I set out the argument about using the Crown Proceedings Act and the two paragraphs that follow and in the interests of time, unless anyone wishes me to, I won't take Your Honours through that. It basically, if we go back to *Baigent*, the Judges there themselves were of the view that you could use the Crown Proceedings Act – oh sorry, perhaps I will take Your Honours to –

McGRATH J:

We're at 99 to 102, are we Mr Harrison?

MR HARRISON QC:

Yes, yes, we are. The provision of the Crown Proceedings Act that Justice Hardie Boys in particular – sorry, we don't have the full text of the Crown Proceedings Act in volume 1 of the bundle of authorities but in any event, I think it's section 3, subsection (2), of the Crown Proceedings Act that recognises a direct responsibility of the Crown for breach of statute. That was the provision of the Crown Proceedings Act that was considered to be available if required. So, those are the points –

ELIAS CJ:

Sorry, what is that provision, do you have it in front of you, can you just read it out?

MR HARRISON QC:

Oh, I see, I'm looking at the wrong Crown Proceedings Act. Tab 6, thank you. Beg your pardon Your Honours, tab 6, section 3, subsection (2)(c). So it empowers the pursuit under the Act, (c), "Any cause of action, in respect of which a claim or demand may be made against the Crown under this Act or under any other Act which is binding on the Crown and for which there is not another equally convenient or more convenient remedy against the Crown."

We've got the question begging – expression "the Crown" there. The Crown is defined in section 2 as, "Her Majesty or the Crown means Her Majesty in right of Her Government in New Zealand," but that's where, if there's any ambiguity, I call upon section 27(3) of the Bill of Rights and section 6 to come into play and also of course, at a more general level, the obligation to interpret these provisions consistent with Article 3.2 of the ICCPR, pursuant to the principles in Zaoui and cases like that.

So that's the interpretation argument and if I'm right about 3(2)(c), then section 14(2) of the Crown Proceedings Act empowers the joining of the Attorney-General, 14(2)(c), that's the way the argument works.

Now, the next issue is the question of expanding – if we get to that point and the Attorney-General is an appropriate defendant, or the government of New Zealand is, the quite separate and distinct point is whether to extend judicial immunity so that it becomes a defence and it's another virtuous circle so far as the Crown is concerned, a self-cancelling argument. I've really probably addressed that sufficiently in earlier submissions and in my written submissions.

I just want to say, about the question of judicial independence, although we were accused of not doing the heavy lifting because we didn't cite from all of the common law jurisdictions, there's actually no dispute between the parties about the principle of judicial independence. It's a good thing and it's needed.

ELIAS CJ:

Glad to hear it.

MR HARRISON QC:

Our point is, if you look at it in a New Zealand context, as I develop the argument with the judicial complaints commissioner and all of these other mechanisms, it's a different animal than it was 50 years ago, for better or for worse. There is only one case in fact that is right on point in terms of invoking judicial independence in support of ruling out a liability against the State, or the Attorney-General and that is the Irish case of *Kemmy v Ireland*. The interesting thing about *Kemmy* which my learned friend Mr Curran did not mention, is the aftermath which I refer to at paragraph 123 of my submissions, deals with *Kemmy* and then the aftermath is at 124. This is the case at our supplementary bundle, page 267.

A different case, *McFarlane v Ireland* [2010] ECHR 1272, went to the European Court of Human Rights and *Kemmy* was, as in the passage I've set out in para 124, *Kemmy* was regarded as wrong in human rights terms and the *Kemmy* absence of a remedy was relied on by the European Court of Human Rights as demonstrating that the plaintiff in *McFarlane v Ireland* didn't have a domestic remedy. The passage noted that the European Court of Human Rights thought there was a distinction between personally immunity from suit and the liability of the State to compensate, therefore blameworthy is a lie.

So that is something of a postscript and perhaps an object lesson when one comes to the *Kemmy* case. Now I think if I may that's just about everything. I may just check. Yes just a few things about damages in reply to Mr Curran. Relying on *Taunoa* Mr Curran submitted that what a remedy, a damages remedy, a *Baigent* damages remedy is for is to vindicate rights, denounce breaches and deter, and that's classic *Taunoa* in terms of at least some Judges. But when you listen to that in the context of this case you say, what about compensation? What's happened to restitutio in integrum, when people's rights are breached and they do suffer recognised damage, has that just gone out the window under the damages remedy

generally? And that's where I submit that the Canadian Supreme Court case in *Vancouver v Ward* is a helpful counterweight to too literal an approach to some of the *Taunoa* formulations.

Does he need a remedy? My submission is that we can't possibly decide that in the absence of evidence in this case but I will just address two points. One is Your Honour Justice Young's suggestion yesterday that Mr Chapman's second appeal sufficiently vindicated and recognised his – the BORA breaches that related to him and there was a related submission from my learned friend that the *Taito* and *Smith* decisions themselves vindicated his rights. Now dealing with the latter point first, *Taito* comes out and Mr Chapman remains in prison. He doesn't get a letter from the Queen. He's just stuck in prison. *Smith* comes out. He's stuck in prison. By what stretch of the imagination do those decisions vindicate his rights? He eventually relies on *Smith* and gets his second appeal. That appeal upholds a legal argument that relates solely to trial process and there's not a word of the fact that his rights were breached the first time around other than by way of historical narrative. How does a decision upholding his appeal on the grounds of misdirection in any way even pay lip service to the fact that he had these years of delay in getting a properly constituted appeal on the merits. My submission is that that is a very dangerous point to –

YOUNG J:

Isn't that basically what most – all that most people whose rights have been adversely affected and who've been convicted get? They get an appeal and with a bit of luck the appeal's allowed and that's it?

MR HARRISON QC:

Yes –

YOUNG J:

You may say its not enough but –

MR HARRISON QC:

In most cases, thankfully nowadays hopefully in all cases, people are convicted, they appeal, they get their appeal heard and if the appeal has merit they either get a new trial or in some cases the, they are discharged. Now that is the normal case and we're not attempting to create a remedy damages for those people.

YOUNG J:

But why would those people not have a remedy if Mr Chapman has a remedy? I know you're focusing on the Court of Appeal but what's the difference?

MR HARRISON QC:

Well the difference is that their rights under the Bill of Rights have not been breached by the appeal process.

YOUNG J:

But they've been breached by the trial process, what's the difference?

MR HARRISON QC:

Well they may or they may not have been breached by the trial process. Most successful criminal appeals, I would submit without statistics, do not involve BORA breach at trial level. They are allowed on a wide variety of grounds. Now if you even – if you take those criminal appeals which succeed by reason of BORA breach by the police or by the trial Judge, you then ask yourself what is an effective remedy for the BORA breach and you're going to, say if you're a Judge in never say never 99.9 percent of cases, the appeal is – the prompt appeal and outcome is an adequate remedy for the BORA breach.

ELIAS CJ:

It's a question of degree, isn't it? You don't need to go so far as to say there will always be a remedy in damages. You simply need to meet the case that it's being said that there can never be a remedy in damages and it must be, on your submission, it must be a contextual determination whether there has been effective vindication response correction et cetera?

MR HARRISON QC:

Yes. Yes that's correct Your Honour but back to Your Honour Justice Young, I mean I don't even have to argue that there – I could concede if I wanted to that there should never be a BORA damages remedy for trial error involving BORA breach. I could concede that. I don't because I think it's wrong but I could concede it and say but ah, this is not a case involving trial breach. It's a case of systemic BORA breach

at appellate level and that is the distinguishing point. If you want you can go down that route although I, as a purist I would argue against it.

YOUNG J:

I mean at this stage Mr Finlayson had a, perhaps theoretical right of appeal to the Privy Council, theoretical because he wouldn't have got legal aid.

MR HARRISON QC:

He had a theoretical, yes, and this perhaps takes me onto the other area I wanted to cover before sitting down. The points Mr Curran raised about proof of loss and whether he is entitled to claim for his period of imprisonment during the period of delay between the two appeals. There will be causal issues. The question whether he has contributed to his loss by not appealing to the Privy Council and whether that was a realistic option by way of, if you like, mitigation of damages, is it a – was it a reasonably open to him to appeal to the Privy Council. Those are causal issues. At the end of the day just because there are potentially slips betwixt cup and lip for him, if he's got a cause of action to get home the full measure of his loss. That's neither here nor there, with respect Your Honour, in terms of deciding the issues before this Court.

YOUNG J:

Well yes it's just contextual. He would like, presumably, to be compensated on the basis that he spent around three years in jail that he shouldn't have?

MR HARRISON QC:

Yes, that is the upper limit of his claim but a trial Judge might say you haven't, because what you've got to do is prove that what on a balance of probabilities what would have happened –

YOUNG J:

A counterfactual –

MR HARRISON QC:

Yes.

YOUNG J:

– what would have happened if the appeal had been heard in October 2000.

MR HARRISON QC:

Yes and the Judge might, a Judge could say well, what you lost is a chance, no more than a chance of, so we will take the full measure of three years in prison and discount that because all you lost was a chance. Those are trial issues and are not –

ANDERSON J:

And there is a precedent for that of course.

MR HARRISON QC:

Yes, yes.

McGRATH J:

I suppose, Mr Harrison, it's also the case that this type of situation should not arise in the future when the final appeal is to a Court based in the jurisdiction?

MR HARRISON QC:

True, yes, true and it ought to be possible, and we have a much more accessible superior Court.

McGRATH J:

I mean the issue you frame is whether it was reasonable to expect Mr Chapman to petition the Privy Council because I think that's what he would have had to do. It's no longer the question.

MR HARRISON QC:

True, true. In any event, it's a trial issue, in my submission.

ANDERSON J:

Also, you could rely on the Lord Diplock distinction between a fallible system and an unfair system, or fallibility in performance of a system and a system that is inherently unfair.

MR HARRISON QC:

Yes. I mean, I'm barely touching on the arguments that would be put forward for him at trial on these issues.

I can't resist going back to Mr Curran's virtuous circle, finally. He argued that the section 25(h) right to an appeal was the right breached and once the rehearing occurred, that was an exact mapping of the breached right to the remedy, producing a virtuous circle but the issue is the delay here, I submit. Delayed provision of the right will be a breach until it is remedied and while it is being breached it may cause damage. It's as simple as that. The old, justice delayed is justice denied, is an answer to that line of argument.

In any event, unless I can be of any further assistance, those are my submissions.

ELIAS CJ:

Thank you Mr Harrison.

SOLICITOR-GENERAL:

Thank you very much Your Honours.

ELIAS CJ:

Yes Mr Solicitor.

SOLICITOR-GENERAL:

I have eight discrete points which I wish to address the Court upon in response. The first concerns the question of indemnity and immunity for District Court Judges which results from an interchange between Her Honour the Chief Justice and myself yesterday morning. All I wanted to do Your Honour was to share with you the research that we've been able to do so far. It would appear Your Honour that District Court Judges and Justices of the Peace have always had a form of limited immunity, at least since 1882 anyway in New Zealand and the Justices Protection Act – I'm sorry, 1866, in the Justices Protection Act of 1866.

So far as indemnity is concerned, the earliest we can find reference to it is in the Summary Proceedings Act of 1957. That's as far as we've been able to go so far. Now Your Honour raised the question of a common law –

ELIAS CJ:

What form was that, was that –

SOLICITOR-GENERAL:

That was the form that required the certificate from a then Supreme Court Judge –

ELIAS CJ:

Ah, yes.

SOLICITOR-GENERAL:

– who was –

ELIAS CJ:

That it hadn't been malicious or –

SOLICITOR-GENERAL:

Exactly. It provided a limited form of immunity which consisted really of a recommendation, as I understand it, from a then Supreme Court Judge, that an indemnity should be provided by the executive in relation to the conduct of the District Court Judge, or the Magistrate in those days.

ELIAS CJ:

Right.

SOLICITOR-GENERAL:

Now Your Honour raised the question of a common law form of indemnity.

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

In the limited time available, I haven't been able to locate anything –

ELIAS CJ:

No, there probably isn't.

SOLICITOR-GENERAL:

– and indeed, I went back to *Rajski v Powell* which was the judgment of Justice Kirby that I think prompted Your Honour to raise that –

ELIAS CJ:

Oh yes, yes.

SOLICITOR-GENERAL:

– as a possibility and I've reread *Rajski* and it maybe that just in the speed with which we were dealing with matters yesterday morning, that the references to immunity might have attracted Your Honour –

ELIAS CJ:

I see, yes.

SOLICITOR-GENERAL:

– because I think if you go the judgment you'll find that –

ELIAS CJ:

It's about immunity, not –

MR HARRISON QC:

– it's all about immunity and indeed, His Honour specifically says, "No such thing as an indemnity for Judges, from any source."

ELIAS CJ:

Thank you.

SOLICITOR-GENERAL:

The second point that I wish to address concerns my friend's submissions yesterday afternoon, that *Maharaj* survives notwithstanding *Independent Publishing*, for the point that the State is directly liable for judicial breaches of rights, regardless of the contents of those rights.

Now, I wish to make it very, very clear that the appellant is not saying that New Zealand Bill of Rights damages are not direct damages. What the Crown is saying is that in relation to alleged judicial breaches of the New Zealand Bill of Rights Act, the viability is direct, if it exists, in relation to those actors that are identified in

section 3(a) of the New Zealand Bill of Rights Act, namely either the executive, the legislature, or the judiciary and that we do not import into New Zealand a concept of the State as a juristic entity.

What we have in New Zealand, as in England and Wales, are three distinct branches of government, each of which can be sued through their various actors, not the State as a whole, or the government as a whole.

ELIAS CJ:

What does that mean though? Does that mean that there are actions that could be taken against the Speaker who is thought to have the whole of the House in his belly, or whatever and the Chief Justice, similarly in respect of all the Judges?

SOLICITOR-GENERAL:

No, not the Chief Justice in relation to all of the Judges Your Honour. It would have to be individual Judges in relation to alleged wrongdoing by the individual Judges. Now, in this case –

ELIAS CJ:

So what about the legislature? I suppose, it's really getting a bit far-fetched, isn't it but –

SOLICITOR-GENERAL:

It is, it is but, nevertheless, we have had attempts to bring proceedings against the legislature in New Zealand and they've been appropriately dealt with but –

ELIAS CJ:

Those proceedings have named the Attorney-General, haven't they?

SOLICITOR-GENERAL:

There have been some Your Honour, *Boscawen v Attorney-General* [2009] NZCA 12, [2009] 2 NZLR 229 but there was one involving the Speaker which is in our footnotes somewhere I think –

ELIAS CJ:

Te Runanga o Wharekauri Rekohu v Attorney-General [1993] 2 NZLR 301 case perhaps, was it?

SOLICITOR-GENERAL:

You're right Your Honour, we're really off on quite a wild tangent when we think about that as a possibility.

ELIAS CJ:

The problem is, where your argument may end up which is the point I made at the outset of the case.

SOLICITOR-GENERAL:

Well, if Your Honour is saying because there is an indemnity for – I'm sorry, an immunity for Judges, that that creates the problem, then the issue then is for this Court to focus on whether or not the immunity continues to apply in relation to New Zealand Bill of Rights breaches. I say, that's a very legitimate issue for this Court to be seized of –

ELIAS CJ:

But we're not seized of it at the moment, are we?

SOLICITOR-GENERAL:

Yes, we would be. We would be under the way in which this question is posed Your Honour. Your Honour seems a little and I don't mean of course to pose a question of Your Honour but I am concerned that you would think that the issue is not legitimately or appropriately before you.

ELIAS CJ:

It maybe that it is but if so, it really comes with very little background in the sense of consideration by the Court of Appeal.

SOLICITOR-GENERAL:

Not because of a lack of submission to the Court of Appeal by both parties Your Honour. In fact, it was quite central to the submissions of both the Crown and my friend in the Court below. So, the second point which –

ELIAS CJ:

I'm sorry. The point I suppose I'm raising is I'm not convinced, although maybe on reflection I will be, that if we accede to the argument that you're advancing to us, that the Attorney-General can't be sued on behalf of the Judges, that we get to the question of whether there is indemnity – whether the immunity applies because the Judge is not being sued in this?

SOLICITOR-GENERAL:
I understand, I understand that aspect –

ELIAS CJ:
That's really the aspect that's bothering me. If you think –

SOLICITOR-GENERAL:
Yes. No, I can understand that concern –

ELIAS CJ:
– that it can be addressed –

SOLICITOR-GENERAL:
– but I think it's fair to say that we have all proceeded on the basis that if the first part of the Crown's argument is correct, namely the appropriate defendant is the individual Judge or Judges, then the next obvious question is whether or not the proceeding can continue if the Judges are named as defendants and that raises that question of immunity. If Your Honours wish to just simply focus on whether or not the Attorney-General is the correct defendant and just treat that as the most narrowest of interpretations of the questions before you, then so be it, but one would have to say the Court will be seized of the second part of that issue sooner or later, probably later, because it is of significant constitutional importance and an issue, with respect, that this Court ought to ultimately be asked to adjudicate upon.

So, to summarise the second of the points I was trying to make, the Crown isn't saying that there's no such thing as direct liability for BORA breaches, what the Crown is saying is that where the BORA breaches are allegedly committed by the judiciary, the appropriate defendant is not the State of New Zealand, not the Government of New Zealand, but the individual BORA actors identified in section 3(a) who have a juristic entity, and in the case of judicial breaches that is the individual Judges. In relation to the Crown, the Attorney-General would be an

appropriate defendant, but there are a host of other possible defendants, including the Commissioner of Police if it's alleged police misconduct, or a variety of other possible defendants. And it has been the Crown's case throughout that holding the Attorney-General as a member of the executive, holding him as to be the appropriate defendant for alleged judicial breaches of the New Zealand Bill of Rights Act, really does risk undermining judicial independence, and I advanced three distinct reasons for that yesterday and I will not take up the Court's time any further by re-emphasising those.

The third point I wish to deal with concerned the submission from Mr Harrison that effective rights protection trumps judicial immunity, whether for the individual Judge or for the State, and he says, "That such a damages claim for judicial breach of fair trial rights ought to survive judicial immunity," and my friend's submission on this point is judicial immunity is subservient to individual rights.

Now, the Crown's submission can be distilled to two basic points: there is no conflict between judicial immunity and an effective remedy because, in the Crown's submission, an effective remedy is provided by the criminal justice system, and you don't need to have damages in order to have an effective remedy; secondly, judicial immunity is totally consistent with the rights that are being protected, because judicial immunity is itself a constitutional norm, it is a constitution principle, and in fact it's an extremely important constitutional principle, which was why I took Your Honours yesterday to the Canadian jurisprudence which emphasised that very point. Judicial independence, as the Canadian Judges remind us, is a quintessential element of constitution propriety in a modern democracy, and *Taylor v Canada (Attorney General)* was perhaps the best and most succinct summary of the key reasons why judicial independence is to be treated as a constitutional principle and why that has to prevail over an alleged breach of rights of an individual, particularly in circumstances such as this, where what is being sought is a right to damages, as opposed to other forms of remedy for the alleged breach.

ELIAS CJ:

If in this –

McGRATH J:

I – sorry –

ELIAS CJ:

You go.

McGRATH J:

I raised with Mr Harrison yesterday whether the discussion in *Harvey v Derrick*, Richardson J, wasn't suggesting that this was not a trumping area, that it was –

SOLICITOR-GENERAL:

Was not a what?

McGRATH J:

Not an area for trumping.

SOLICITOR-GENERAL:

Yes.

McGRATH J:

You've criticised Mr Harrison for a trumping argument, but I thought I detected the word "trumping" in your argument as well, in this area.

ELIAS CJ:

Triumphant.

SOLICITOR-GENERAL:

I'm sorry Your Honour?

ELIAS CJ:

Joke.

McGRATH J:

Is it all that absolute, or is there scope for balancing in an endeavour to obtain the greatest recognition of both fundamental rights as protected values?

SOLICITOR-GENERAL:

Well, Your Honour, I would intuitively wish to try and strike a compromise or a balance, but it does appear to be that in Canada, where this issue has been carefully considered, the Judges in the cases that I took you to yesterday were very keen to

assert judicial independence over all other considerations, and I won't take you back to the cases which I spent about half an hour on yesterday, but that message is very loud and clear in the Canadian jurisprudence.

McGRATH J:

I suppose I'm querying whether that's been the New Zealand way, if you look at cases like *Gisborne Herald Co Ltd v Solicitor-General* [1995] 3 NZLR 563; (1995) 13 CRNZ 244; (1995) 2 HRNZ 142 (CA).

SOLICITOR-GENERAL:

I remember the case, I'm just trying to work through the point.

McGRATH J:

Well, there was, Justice Richardson again giving the judgment of the Court was –

SOLICITOR-GENERAL:

Yes.

McGRATH J:

– concerned as to how one could both protect fair trial rights and at the same time –

SOLICITOR-GENERAL:

Right, I see, yes, I understand what Your Honour's saying.

McGRATH J:

– freedom of expression.

SOLICITOR-GENERAL:

Yes, and of course what we're dealing with here is one discrete alleged necessary remedy, namely damages, in the context where a whole other type, a whole variety of remedies are available within the criminal justice system, and which have to quite a full extent occurred in this particular case.

ELIAS CJ:

This is, you know, one of those "off the wall" suggestions but, I was just thinking, if *Taito* hadn't gone to the Privy Council, but it was appreciated by someone who was incarcerated that there had been a denial of his rights, in that he hadn't had a proper

appeal, and he wanted to bring proceeding to get what you say is the primary remedy of giving him his appeal –

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

– how would that be set up on your argument? Could he bring – I mean, surely he would have to make application for re-hearing and the Attorney-General would be the, or the Crown would be, the Queen, I guess that's what we have, would be the respondent?

SOLICITOR-GENERAL:

The respondent, yes, yes, and, indeed, part of the claim which is, and which is the part alleging executive breach in this particular instance, alleges a failure on behalf of an officer of the executive to not be present when appeals were supposed to take place. So –

ELIAS CJ:

So –

SOLICITOR-GENERAL:

– there is no issue that the Attorney-General, the Queen, the executive, by my analysis, is a respondent in such a case.

ELIAS CJ:

So that what happens here is that there’s no ability to – because on your argument, that's the primary remedy –

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

– to get the appeal.

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

But there would be a separation of any other remedy that the Court thought was appropriate and necessary to vindicate the rights.

SOLICITOR-GENERAL:

Yes, there would be a separation.

ELIAS CJ:

With different defendants.

SOLICITOR-GENERAL:

Yes, indeed, we'd be moving from a –

ELIAS CJ:

It's not very –

SOLICITOR-GENERAL:

– criminal proceeding into a civil claim, and with different actors –

ELIAS CJ:

In which –

SOLICITOR-GENERAL:

– and different responsibilities.

ELIAS CJ:

Yes, it's just not very – it's very untidy.

SOLICITOR-GENERAL:

Well, there are so many features – and this is no excuse of course – there are so many features which are untidy. If we think about the way in which the executive, the prerogative powers are exercised in relation to criminal issues, that's also remarkably untidy, where we can have, the sovereign's represented if in New Zealand referring a case back to the judicial branch, and then ultimately for the executive in the form of

cabinet to make a decision as to whether or not there will be an ex gratia payment, it's a remarkably –

ELIAS CJ:

I don't know where that submission takes us, that we should just come up with untidy solutions –

SOLICITOR-GENERAL:

no I'm not excusing untidiness, I'm just simply saying it is a feature of the way in which our constitutional processes have evolved whereby we have moved from a unitary source of all power to three key branches of government which are independent and are distinct and exercise different functions but there are times when they have to interact and the exercise of the prerogative powers in those circumstances is one.

ELIAS CJ:

But judicial immunity couldn't be raised as a defence to the claim in which the Crown would be the necessary respondent to reopen or to provide an appeal?

SOLICITOR-GENERAL:

No, no. but where the claim is alleging a – is seeking damages for the actions of a Judge or Judges, then, as I have been – I mean Your Honours will understand the argument –

ELIAS CJ:

Is the immunity confined to damages remedies?

YOUNG J:

Well you can't – it maybe difficult, you can't issue review proceedings in relation to a decision of a High Court Judge, superior Court Judge.

ELIAS CJ:

Well that is fairly flimsy authority on one view.

SOLICITOR-GENERAL:

I just can't think of any, and it may be when I sit down I'll remember something, but I just, as I'm understanding you, cannot think of any situation where there has been a claim against a Judge for anything other than damages.

ANDERSON J:

Mandamus is brought against the Magistrate.

SOLICITOR-GENERAL:

Yes but that's –

ELIAS CJ:

Prohibition?

SOLICITOR-GENERAL:

Yes but the, that's – that's a – those are judicial review proceedings really. We're –

ELIAS CJ:

Well it could be brought in judicial review proceedings.

SOLICITOR-GENERAL:

I'm sorry Your Honour?

ELIAS CJ:

Maybe it could be brought in judicial review proceedings?

SOLICITOR-GENERAL:

Damages against the –

ELIAS CJ:

Well ultimately the Courts are going to have to grapple with the whole question of public law damages.

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

Anyway. I said it was a bit off the wall but it is, it does bother me that this case, if not taken narrowly, may invite us, as I said at the outset, to invent the constitution in part.

SOLICITOR-GENERAL:

Yes. On that note can I move onto my fourth point?

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

Because it does follow quite neatly from the question of the constitutional importance of judicial immunity and that is just to make the very succinct point, I hope succinct point, about *Lai v Chamberlains*. In my respectful submission if the Court accepts what the senior Judges of Canada have said about judicial immunity being a fundamental constitutional concept, then one instantly sees that there is quite a gulf between the concept of judicial immunity and barristerial immunity. Regardless of how important barristerial immunity was for those who advocated for its existence, it would have hard for them to say that it actually reached the elevated heights of being a constitutional principle and it is because judicial immunity is such an in ground fundamental constitutional concept that I urge this Court to treat judicial immunity, if you focus upon judicial immunity, in a way that distinguishes it from barristerial immunity.

The fourth point I wished to make concerned the true scope of *Baigent* and again without reiterating everything that I said yesterday I just wish to very succinctly summarise the point that in the Crown submission, in the appellant's submission, the *Baigent* remedy damages was not held to exist in relation to judicial breaches. I accept that my friend and I clearly differ in our interpretation of *Auckland Unemployed Workers' Union*. I listened with considerable interest to the way in which he presented that case to Your Honours and I, with respect, just remain unconvinced but of course it doesn't matter whether I'm convinced or not, it's entirely a matter for Your Honours.

But whilst discussing that issue my friend made the point, or made the submission, that concerns about the practical implications of his case shouldn't be overstated and he said that was nothing more than a theoretical possibility that Judges might end up having to give evidence. Well of the few cases that there have been one did involve

a Judge having to give evidence and that was in *Upton v Green* where the judgment of the Court refers to the conflict of evidence between the plaintiff and the District Court Judge and in that particular case ultimately it was the evidence of the plaintiff that was preferred over that of the District Court Judge. So in the very few number of cases of this kind that have come to Court my friend's theoretical possibility has actually eventuated.

The next point I wish to –

YOUNG J:

Just pause there. Is there a collection anywhere of the cases within living memory of when District Court Judges or Magistrates were sued for damages? Because there are, *Rawlinson v Rice* and *Derrick v Harvey* are two but there are others. Wasn't there one against Judge Pethig?

SOLICITOR-GENERAL:

I'm not aware of a collection in New Zealand. In *Sirros v Moore* Lord Denning traversed 400 years of history of judicial immunity but that doesn't answer Your Honour's question.

The next point, which is my sixth point, concerned the proposition about the role of the police and my friend made much of the accepted point that the police have an important constitutional independence in terms of constabulary independence and I accept that without hesitation. But the important point is this. That within the executive there are a number of officers who have to act independently of Ministers. All chief executives of government departments have to act independently of Ministers in relation to a number of important features of their responsibilities. They can't accede to ministerial pressures in relation to the employment of staff and a whole range of operational issues. As a law officer no Minister can direct me on how I'm to do my job except in relation to whether or not I have got the law wrong and in that case it's the Attorney and no one else to direct me.

The important point about police independence is that as with most other members of the executive who hold office, they have to act independently of political consideration and of ministerial direction. But the executive is responsible, ultimately, in damages for the actions of the police although, as I've said, the Police Commissioner is a juristic entity and he can be identified and named and is

frequently named as a defendant in Court proceedings. So my friend's reference to the police I don't think really undermines the fundamental point that I was making yesterday namely that the Attorney-General is an appropriate defendant where there are alleged executive breaches but the Attorney-General is not an appropriate defendant where the alleged breaches takes place in a completely different branch of government, namely the judiciary.

ELIAS CJ:

Mr Solicitor, do you want to complete or – I don't want to rush you if you –

SOLICITOR-GENERAL:

I'll be about another 10 minutes Your Honour if that's of assistance to the Court?

ELIAS CJ:

Yes, carry on, thank you.

SOLICITOR-GENERAL:

The – I have two more points which I wish to make. My friend constructs the argument relating to the applicability of the Crown Proceedings Act in the present circumstances and in *Baigent* just one Judge thought that the Crown Proceedings Act might be a vehicle that could be used and that was His Honour Justice Hardie Boys. The other Judges were not attracted, and their judgments were not attracted, to that proposition. And I agree with my friend up to a certain point. Section 3(2)(c) of the Crown Proceedings Act does allow for any cause of action in respect of which a claim maybe made against the Crown under any other Act. And as I understand his argument he then says, well a damages remedy, a *Baigent* remedy is an applied remedy under another Act, namely of course the New Zealand Bill of Rights Act and he then takes the next step of saying accordingly, the Crown may be sued for judicial breaches of the New Zealand Bill of Rights Act under the Crown Proceedings Act.

Now, there are just two points that I make in response. First, the Crown Proceedings Act makes it very, very clear that it is not concerned with the actions of judicial officers. Judicial officers are expressly excluded from the ambit of the Crown Proceedings Act. Secondly, what my friend's argument does is invite this Court to create direct liability under the Crown Proceedings Act which was plainly not the intention of Parliament in 1950 when it created the Crown Proceedings Act. Then

what Parliament's intention was, and did, was create, by curious liability for the Crown for the acts and omissions of its servants and agents who excluded the judiciary. So those are the only points I need to make in relation to that.

Finally, in relation to *McFarlane*. *McFarlane* was concerned with the State's failure to provide, the State of Ireland's failure to provide any form of remedy. The European Court of Justice was concerned with that issue, namely whether or not the Republic of Ireland provided a domestic remedy for judicial delays. What it did was said, under Article 13 of the Convention, a remedy was required and absent any form of remedy for judicial delays, one had to exist in damages.

Now that is vastly different from a fair trial rights argument, where there are a variety of other remedies which might well be available. A delay is a delay and in the European jurisprudence, that can only be addressed by way of compensation, not through any other form of remedy. Very controversially and my friend, I think, implicitly accepts the controversial nature of this, the European Court of Justice at first instance decided and it was a first instance decision on this point because it had never been argued in Ireland at all, determined that Ireland's failure to provide any form of compensation constituted a breach of Article 13. Then at one paragraph, the European Court of Justice attempted to negate judicial immunity.

I say it is a controversial decision because one only has to read the extraordinarily powerful dissenting judgments in that particular case to appreciate just how out of step with European convention jurisprudence that decision is considered to be.

Now, unless I can assist Your Honours further – I was actually less than 10 minutes, I think I managed to get the last two points made in five. I'm happy to assist Your Honours further if required.

ELIAS CJ:

No, thank you Mr Solicitor. We will reserve our decision in this matter and I thank you counsel for your assistance. It maybe, because matters of considerable moment are raised in this case, and it maybe that when we do some of the reading we may have further questions for you and I simply flag that. We will reserve our decision and we will adjourn now, thank you.

COURT ADJOURNS: 11.34 AM