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THIS ISSUE INCLUDES CONTRIBUTIONS BY:

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Fiona Wright

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VICTORIA UNIVERSITY OF WELLINGTON

*Te Whare Wānanga o te Ūpoko o te Ika a Māui*



FACULTY OF LAW  
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# DAMAGES UNDER THE UNITED KINGDOM'S HUMAN RIGHTS ACT 1998 AND THE NEW ZEALAND BILL OF RIGHTS ACT 1990

*Juliet Philpott\**

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*This article considers and compares the approach that has been adopted by the judiciaries in New Zealand and the United Kingdom jurisdictions regarding the availability of damages as a remedy for breach of the rights contained respectively in the New Zealand Bill of Rights Act 1990 and the United Kingdom's Human Rights Act 1998.*

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## **I INTRODUCTION**

This article considers and compares the way in which the courts in New Zealand and the United Kingdom have grappled with the difficult task of awarding damages for violations of fundamental rights protected by the Human Rights Act 1998 (UK) (HRA) and by the New Zealand Bill of Rights Act 1990 (NZBORA). It initially considers the courts' perception of the nature of the damages remedy before looking at how remedies have been awarded in practice. In particular, the article questions whether the courts' understanding of the nature of the remedy — especially in terms of how it differs from a common law remedy — is manifested in their approach to damages awards to date. It also questions whether the conservative approach to damages that has been adopted in both jurisdictions can provide adequate protection for fundamental rights.

Part II of the article sets out the framework within which compensation awards are made in the United Kingdom and New Zealand, with a focus on the relevant provisions of the HRA and the NZBORA and on the seminal decision of the New Zealand Court of Appeal in *Simpson v Attorney-General (Baigent's Case)*.<sup>1</sup> Part III addresses the nature and purpose of a remedy for a rights violation with particular attention paid to the differences between public and private law remedies

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

and Part IV discusses the conservative approach to damages awards that has been adopted in both jurisdictions.

## ***II THE LEGISLATIVE FRAMEWORK FOR COMPENSATION AWARDS***

The United Kingdom's legislative framework for domestic remedies for breaches of the rights articulated in the Convention for the Protection of Human Rights and Fundamental Freedoms (the "Convention") is contained in section 8 of the HRA, which comprehensively sets out the basis on which remedies are to be awarded.<sup>2</sup> A large measure of discretion is left to the courts to award such remedies as they consider "just and appropriate".<sup>3</sup> To some extent, this discretion is limited as a court may not award damages unless it has taken account of all the circumstances of the particular case, including any other relief or remedy granted in relation to the act in question and the consequences of any decision in respect of that act, and the court is satisfied that the award is necessary to afford "just satisfaction" to the "victim"<sup>4</sup> of the rights breach.<sup>5</sup> Furthermore, when determining whether to award damages and the amount to be awarded, the courts are directed to take into account principles applied by the European Court of Human Rights (the Strasbourg Court) when making awards under Article 41 of the Convention.<sup>6</sup>

Article 13 of the Convention provides that the victim of a rights breach is entitled to an effective remedy. This article is not explicitly incorporated into domestic law by section 1 of the HRA as the provisions in section 8 were considered sufficient to ensure that victims of rights violations could obtain an effective remedy before the domestic courts. As explained by the Lord Chancellor, Lord Irvine:<sup>7</sup>

...I cannot conceive of any state of affairs in which an English court, having held an act to be unlawful because of its infringement of a Convention right, would under [section] 8(1), be disabled from giving an effective remedy.

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2 Section 9 of the Human Rights Act 1998 (UK) addresses remedies for judicial acts.

3 Human Rights Act 1998 (UK), s 8(1).

4 Human Rights Act 1998 (UK), s 7(1).

5 Human Rights Act 1998 (UK), s 8(3).

6 Human Rights Act 1998 (UK), s 8(4).

7 (18 November 1997) 583 HLD col 479.

Crucially, claimants would not need to take proceedings to Strasbourg to obtain a remedy for a breach of the Convention.<sup>8</sup>

Whereas section 8 of the HRA constitutes a comprehensive remedies provision, the NZBORA is silent on the question of remedies. Early drafts of a Bill of Rights contained a remedies clause<sup>9</sup> which ultimately was omitted from the NZBORA, allegedly because the Government recognised that the clause was linked, in the public's view, with the broadly unwelcome proposal that the Bill be enacted as supreme law.<sup>10</sup> During the second reading of the Bill, the Rt Hon Geoffrey Palmer, then Prime Minister, stated that "... the Bill creates no new legal remedies for courts to grant. The judges will continue to have [available to them] the same legal remedies as they have now ...".<sup>11</sup> Arguably, therefore, it was intended that a breach of the NZBORA would not give rise to a new remedy, and instead that "traditional" remedies such as exclusion of evidence, habeas corpus, or stay of proceedings should be utilised.<sup>12</sup>

The United Kingdom Law Commission has argued that the absence of a remedies clause in the NZBORA means that it cannot directly be compared with the HRA.<sup>13</sup> However, despite the absence of express statutory authority to award remedies, a remedies jurisdiction exists in New Zealand. In *Baigent's Case*, the Court of Appeal held that the absence of a remedies clause was "probably not of much consequence"<sup>14</sup> and "[did] not show an intention that there should be no remedy, but rather that Parliament was content to leave it to the Courts to provide the remedy".<sup>15</sup> The deletion of the proposed clause should not be regarded as determinative: "...it would not be a sound technique in interpreting the [NZBORA] to give dominant influence to a package of previous draft proposals that were never enacted".<sup>16</sup>

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8 Home Office *Rights Brought Home: The Human Rights Bill* (CM 3782, United Kingdom, 1997) [*Rights Brought Home*]. See also *R (Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14, para 19 Lord Bingham [*Greenfield*].

9 Minister of Justice, "A Bill of Rights for New Zealand" [1985] AJHR A6.

10 *Baigent's Case*, above n 1, 677 Cooke P.

11 Rt Hon Geoffrey Palmer (14 August 1990) 510 NZPD 3450.

12 This was the interpretation preferred by Gault J in his dissenting judgment in *Baigent's Case*, above n 1, 711-713.

13 United Kingdom Law Commission *Damages Under the Human Rights Act 1998* (LC266, London, 2000) para 4.20.

14 *Baigent's Case*, above n 1, 676 Cooke P.

15 *Ibid*, 718 McKay J; see also *ibid*, 691 Casey J.

16 *Ibid*, 677 Cooke P.

The majority believed that Parliament would not have intended the NZBORA to be "little more than sounding brass or tinkling cymbal",<sup>17</sup> particularly as the NZBORA was enacted to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights (ICCPR).<sup>18</sup> Under article 2(3) of the ICCPR, States Parties undertake to provide persons whose rights and freedoms are violated with an effective remedy and to develop domestic remedies for rights breaches. These obligations would not be met if victims of violations could ask the United Nations Human Rights Committee for a remedy but could not obtain one from domestic courts.<sup>19</sup> Casey J did not regard "the absence of a remedies provision in the [NZBORA] as an impediment to the Court's ability to 'develop the possibilities of judicial remedy' as envisaged in art [2]3(b)".<sup>20</sup>

Accordingly, the Court of Appeal held that effective remedies must be available for a breach of the rights contained in the NZBORA. The NZBORA is binding on the courts<sup>21</sup> "and we would fail in our duty if we did not give an effective remedy to a person whose legislatively affirmed rights have been infringed".<sup>22</sup> In many instances:<sup>23</sup>

[t]here would ... be problems in adapting traditional common law remedies such as negligence, trespass etc, to encompass all the rights and freedoms in the [NZBORA] in order to give appropriate redress for their infringement. Clearly legislation of this kind, with its emphasis on human rights in relation to state activity, is something new in our legal pantheon.

Therefore, in certain cases, an award of monetary compensation will constitute an (and on occasion, the only) effective remedy,<sup>24</sup> although the remedy to be awarded will be determined by the court on

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17 Ibid, 693 Hardie Boys J; see also ibid, 691 Casey J. Earlier judgments had emphasized that a generous interpretation of the NZBORA was required to give individuals the full effect of their fundamental rights and freedoms: *Ministry of Transport v Noort*; *Police v Curran* [1992] 3 NZLR 260, 268 (CA) Cooke P and 277 Richardson J, both referring to Lord Wilberforce's judgment in the Privy Council in *Minister of Home Affairs v Fisher* [1980] AC 319 (PC).

18 New Zealand Bill of Rights Act 1990, Long Title. See *Baigent's Case*, above n 1, 699 Hardie Boys J; see also *R v Grayson and Taylor* [1997] 1 NZLR 399, 409 (CA) Judgment of the Court.

19 *Baigent's Case*, above n 1, 691 Casey J and 700 Hardie Boys J.

20 Ibid, 691 Casey J.

21 New Zealand Bill of Rights Act 1990, s 3.

22 *Baigent's Case*, above n 1, 676 Cooke P; see also ibid, 702 Hardie Boys J.

23 Ibid, 691 Casey J.

24 Ibid, 676 Cooke P, 692 Casey J, 703 Hardie Boys J and 718 McKay J.



the facts of each case.<sup>25</sup> It is now widely accepted in New Zealand that "*Baigent* damages"<sup>26</sup> are available for a breach of the NZBORA where a court determines that compensation is necessary to provide the victim of the breach with an effective remedy.<sup>27</sup>

In both the United Kingdom and New Zealand remedies for rights violations are not awarded as of right; it is for the courts to determine whether a remedy is appropriate. As jurisprudence in this area slowly develops, a key issue that has confronted the courts is the nature of the remedy.

### III THE NATURE AND PURPOSE OF THE REMEDY

In some jurisdictions, rights violations of the kind contemplated by section 8 of the HRA and by *Baigent's Case* are treated as a constitutional tort,<sup>28</sup> whereas in others, particularly where rights are contained in a constitutional document, remedies for rights violations are considered to be a public law remedy.<sup>29</sup> Whether a remedy for a rights violation is classified as a public law or a private law remedy is an important question, not only conceptually, but practically — the "characterisation of the 'wrong' involved may have important consequences for the way in which damages under the [HRA and the NZBORA] are understood and developed by the courts"<sup>30</sup> and may help to clarify precisely what the objective of the remedy is. That is, if the wrong is characterised as a type of constitutional tort, private law remedial principles, in which the goal is to return the claimant to the position he or she was in prior to the breach, will be relevant. If it is categorised as a public law cause of action, the objectives of the remedy may be broader; they may include affirming the importance of the violated right, deterring future breaches, and improving the standard of public administration.

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25 Ibid, 692, Casey J and 718 McKay J.

26 *P F Sugrue Ltd v Attorney-General* [2004] 1 NZLR 207, 223 (CA) Blanchard J.

27 See for example *Brown v Attorney-General* [2005] 2 NZLR 405, para 25 (CA) Chambers J [*Brown* (CA)]: "[t]hat the Courts have jurisdiction to give a compensation remedy was established by this court in [*Baigent's Case*]." Following *Baigent's Case*, the New Zealand Government accepted the advice of the New Zealand Law Commission that legislation should not be introduced to remove the remedy created in *Baigent's Case* on the basis that NZBORA breaches warranted an effective remedy, the development of common law remedies to protect NZBORA rights was likely to be "slow and sporadic" and because "international law supports linking remedies to rights" (New Zealand Law Commission "Crown Liability and Judicial Immunity: A Response to *Baigent's Case* and *Harvey v Derrick*" (NZLC R 37, Wellington, 1997) para 74).

28 See, for example, *Bivens v Six Unknown Agents of the Federal Bureau of Narcotics* (1971) 403 US 388.

29 Richard Clayton and Hugh Tomlinson *The Law of Human Rights* (vol 1, Oxford University Press, New York, 2000) paras 21.13 and 21.17 [*The Law of Human Rights*]. See, for example, *Maharaj v Attorney-General of Trinidad and Tobago (No 2)* [1979] AC 385 (PC).

30 *The Law of Human Rights*, above n 29, para 21.12.

In *Baigent's Case*, the New Zealand Court of Appeal characterised the new remedy as "a public law remedy and not a form of vicarious liability for tort".<sup>31</sup> In *R (Greenfield) v Secretary of State for the Home Department*, Lord Bingham stated unequivocally that "[the HRA is] not a tort statute. Its objects are different and broader".<sup>32</sup> It seems, therefore, that the courts in both jurisdictions consider the remedy to be a public law remedy or, at least, to have wider objectives than a private law remedy. As Clayton and Tomlinson note, this conclusion is consistent with the fact that remedies under the HRA (and the NZBORA) are awarded at the discretion of the courts whereas tortious damages are awarded as of right. Moreover, most other jurisdictions regard damages for rights violations as a public law remedy.<sup>33</sup>

However, having classified the remedy as a public law remedy, the courts in both jurisdictions have adopted an approach to remedies for rights violations that is heavily influenced by private law remedial principles. This section of the article addresses first, the tendency of the United Kingdom judiciary to focus on the particular victim and the particular breach when awarding damages with no apparent regard for wider considerations such as the impact of the violation on the right itself. In New Zealand, the focus of awards is, in theory, broader — the objective of the remedy is not only to compensate for the particular breach but also to affirm the right in question and to deter future breaches. However, as the article goes on to discuss, the courts have not satisfactorily reconciled parallel claims for damages in tort and under the NZBORA (or, for that matter, the HRA), with the result that damages in tort may be regarded as sufficient to remedy a NZBORA violation. Questions arise, therefore, in both jurisdictions as to whether the remedy is, in fact, very much different from a remedy in tort.

#### A *The Objective of Damages Awards*

In the New Zealand High Court in *Manga v Attorney-General* Hammond J engaged in a significant discussion of the differences between public and private law remedies. He observed that:<sup>34</sup>

Cases based upon violations of the Bill of Rights are about the vindication of statutory policies which are not "just" private: they have overarching, public dimensions. The context of such a proceeding necessarily changes, in at least three ways. First, the case is not a winner-takes-all kind of case. Damages are an economic concept. Bill of Rights cases routinely involve a rearrangement of the social

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31 *Baigent's Case*, above n 1, 677 Cooke P; see also *ibid*, 700 Hardie Boys J.

32 *Greenfield*, above n 8, para 19 Lord Bingham.

33 *The Law of Human Rights*, above n 29, paras 21.21-21.23. See also *Fose v Minister for Safety and Security* (1997) 3 SA 786, para 55 (CC) Ackermann J.

34 *Manga v Attorney-General* [2000] 2 NZLR 65, 81-82 (HC) Hammond J.

relations between the parties, and sometimes with third parties. The object is to promote mutual justice, and to protect the weak from the strong. Secondly, the future consequences of such a case are every bit as important as the past, and the particular transgression. Thirdly, there is a distinct interface with public administration, and indeed, the governance of a given jurisdiction ...

The United Kingdom judiciary does not appear to have engaged in any significant way with the distinctions between private and public law remedial objectives articulated by Hammond J. In their view, the purpose of HRA damages is to compensate the claimant for the particular breach, not to affirm the importance of the infringed right,<sup>35</sup> whether for the individual victim of the violation or for the broader community. When damages are given, they are awarded using the principle of *restitutio in integrum*,<sup>36</sup> a common law damages principle, in which the objective is to return the claimant to the position he or she was in prior to the breach.<sup>37</sup> The future consequences of the breach or of the remedy are irrelevant; an early judgment suggested that awards should be not so low as to undermine respect for the Convention,<sup>38</sup> but subsequently the courts have indicated that awards need not be made to encourage future compliance with Convention rights.<sup>39</sup>

Thus, like damages for breach of contract or tort, the focus of damages awards under the HRA is solely on compensating the victim of the particular breach. It is difficult, therefore, to ascertain what Lord Bingham meant when he alleged that the HRA has broader objectives than a tort statute. Public policy objectives, such as encouraging public authorities to conduct their functions in a manner consistent with Convention rights, have been held to be irrelevant<sup>40</sup> and any objectives other than compensating the claimant are not evident in the manner in which damages have been awarded for breach. In fact, to the extent that the public interest is relevant, it appears to lie in ensuring that awards are not so high as to hinder a public authority from carrying out its functions: "[t]he cost of

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35 *R (KB) v Mental Health Review Tribunal* [2004] QB 936, 959-960 Stanley Burnton J.

36 *Restitutio in integrum* has been referred to as the "guiding principle" of HRA damages awards: *R (Bernard) v London Borough of Enfield* [2002] EWHC 2282, para 42 Sullivan J. It is also used in Strasbourg for damages awards under the Convention: see *Anufrijeva v Southwark London Borough Council* [2004] QB 1124, 1155 Lord Woolf CJ; New Zealand Law Commission, above n 27, paras 3.19 and 4.34.

37 *Albacruz (Cargo Owners) v Albazero (Owners), The Albazero* [1977] AC 774, 841 (HL) Lord Diplock; *Gardiner v Metcalf* [1994] 2 NZLR 8, 12 (CA) Cooke P.

38 *R (Bernard) v London Borough of Enfield*, above n 36, para 58 Sullivan J.

39 *Greenfield*, above n 8, para 19 Lord Bingham; *R (KB) v Mental Health Review Tribunal*, above n 35, 959 Stanley Burnton J.

40 *Greenfield*, above n 8, para 19 Lord Bingham, although Lord Bingham acknowledges that encouraging compliance may be relevant in limited circumstances. See also *R (KB) v Mental Health Review Tribunal*, above n 35, 959 Stanley Burnton J.

supporting those in need falls on society as a whole. Resources are limited and payments of substantial damages will deplete the resources available for other needs of the public...".<sup>41</sup>

According to the Court of Appeal, in exercising its discretion to award damages under section 8, a court should consider what is "just" for the individual victim as well as for the wider public "who have an interest in the continued funding of a public service".<sup>42</sup> This consideration appears to prevail over the public's interest in encouraging public bodies to respect their obligations under the Convention. While it is important that public authorities continue to function efficiently, it seems equally important to encourage them to operate in a manner that is consistent with their Convention obligations.<sup>43</sup>

In comparison to the claimant-focused approach of the United Kingdom judiciary, the New Zealand Court of Appeal has held that "[t]he objective [of compensation] is to affirm the right...".<sup>44</sup> In calculating the quantum of an award, relevant considerations include "the need to emphasise the importance of the affirmed rights and to deter breaches...".<sup>45</sup> Thus, remedies for a breach of the NZBORA are, in part, forward-looking; the future consequences of a breach may be as important as the impact of the violation on the claimant. Moreover, the focus is not just on the claimant, but on the community's interest in continued respect for the right.<sup>46</sup> Reinstating respect for the right and ensuring that public bodies conduct their affairs in accordance with the NZBORA are important objectives, as is ensuring the claimant is duly compensated for his or her loss.

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41 *Anufrijeva v Southwark London Borough Council*, above n 36, 1160. Lord Woolf CJ has argued extra-judicially that any principles for calculating compensation must take into account the fact that damages are paid out of public funds: "[t]he days when public bodies could be regarded as having purses of bottomless depth are now past". Lord Woolf of Barnes "The Human Rights Act 1998 and Remedies" in Mads Andenas and Duncan Fairgrieve (eds) *Judicial Review in International Perspective* (vol II, Kluwer Law International, The Hague, 2000) 429, 433. The preference for modest awards is discussed further below in Part IV(B).

42 *Anufrijeva v Southwark London Borough Council*, above n 36, 1155 Lord Woolf CJ referring to David Scorey and Tim Eicke *Human Rights Damages: Principles and Practice* (Sweet & Maxwell Ltd, London, 2002) para A4-036.

43 In addition, Clayton has observed that "balancing the interests of the victim with [those of] the public is not part of Strasbourg case law". Richard Clayton "Key Human Rights Act Cases in the Last 12 Months" (2004) 6 EHRLR 614, 630.

44 *Baigent's Case*, above n 1, 703 Hardie Boys J; see also *Udompun v Attorney-General* [2005] 3 NZLR 204, para 177 (CA) Glazebrook J for the Court.

45 *Baigent's Case*, above n 1, 678 Cooke P.

46 Dissenting in *Dunlea v Attorney-General* [2000] 3 NZLR 136, 158 (CA) Thomas J argued that the "community's interest in ensuring that [NZBORA] rights are heedfully respected by the state" should be a factor leading to the need for vindication of the specific breach.

The extent to which the importance of affirming the right in question and deterring further breaches is actually taken into account by the New Zealand courts when calculating the quantum of damages to be awarded is difficult to assess as, in general, the courts do not provide much in the way of reasoning or explanation for the sums that are awarded for NZBORA violations. In *Baigent's Case*, Cooke P suggested that awards should be global and not broken down into distinct elements.<sup>47</sup> This approach has been adopted by the judiciary, who presumably prefer not to provide detailed explanations of the components of their awards. It does mean, however, that it is difficult to glean much from the quantum awarded; it is not clear in any given case what amount, if any, the court has added to the compensatory amount for the purposes of deterrence or affirmation. In *Udompun v Attorney-General*, for example, the Court of Appeal engaged in a reasonably lengthy discussion in support of its decision to award damages to the plaintiff for the violation of her right to respect for her dignity,<sup>48</sup> in the course of which it noted that "the purpose of [NZBORA] compensation is to vindicate the right ...",<sup>49</sup> but did not explain how it determined that NZ\$4,000 was an appropriate amount to award or what portion of that sum was targeted towards vindication of the right. Nor is it clear whether the Court intended a portion of the award to act as deterrence against future violations of the right.

Despite this practical difficulty, it seems evident that the New Zealand judiciary has a more rights-focused view of the purpose of remedies for rights violations than the United Kingdom courts. They are prepared to consider the impact of the violation on the value of the right rather than simply the loss that the breach has brought about for the particular claimant. Perhaps this approach is a consequence of the fact that the availability of NZBORA damages was authorised by the courts in the first place. Their inclination to treat damages awards as having a wider objective than simple compensation may be a hangover from the progressive approach of the Court of Appeal to remedies in *Baigent's Case*.

### **B Relevance of Private Law Remedial Principles**

However, having labelled the remedy for breach of the NZBORA a public law remedy and indicated that the objectives of damages for NZBORA violations are broader than the purely compensatory focus of remedies in tort, common law remedial principles have had, and may continue to have, a substantial impact on damages awards in New Zealand. This has occurred because "...in the great range of cases where a claim of a breach of the [NZBORA] is made there will also be a claim in tort".<sup>50</sup> Where parallel claims are made, a key question facing the courts is

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47 *Baigent's Case*, above n 1, 678 Cooke P.

48 The Crown had conceded that damages were appropriate if a breach was found.

49 *Udompun v Attorney-General*, above n 44, 243 Glazebrook J for the Court.

50 *Dunlea v Attorney-General*, above n 46, 149 Keith J.

how to award damages to remedy both the tort and the NZBORA breach without allowing the claimant to recover twice for his or her loss. This is an important issue, as an approach that associates NZBORA damages too closely with common law damages risks undermining the differences identified between public and private law remedial objectives and challenging the very basis for the NZBORA remedy created in *Baigent's Case*.

The Court of Appeal has recently refused to address the question and has preferred an incremental approach in which the issues will be addressed when they are likely to have practical consequences.<sup>51</sup> However, the Court has previously commented on the relationship between NZBORA and common law damages; in *Dunlea v Attorney-General*, the majority of the Court stated, obiter, that "there are strong reasons" for adopting the same approach to fixing compensation for a breach of the NZBORA as is used for compensating a tort arising out of the same facts.<sup>52</sup> The majority felt that, more often than not, a claim for breach of the NZBORA will be made together with a claim in tort, that essentially the same facts will be relevant to both claims, and that the rights in question have long been protected by tortious remedies.<sup>53</sup> Thus, there is no need for a different approach.

This reasoning is problematic for several reasons. While in most instances a claim for breach of the NZBORA may be made together with a claim in tort, this will not always be the case. Successful claims for damages under the NZBORA have been made without a parallel claim in tort<sup>54</sup> and, as the majority itself notes, even where a tort is alleged it may not be made out or may be defeated by statutory immunities.<sup>55</sup> Furthermore, this approach assumes that any public law elements of the remedy for the state's wrongful actions will arise only when no common law remedy exists: "are we to pretend that the public law factors in respect of a breach of the [NZBORA] only arise where by fortuitous happenstance there is no equivalent private law remedy?"<sup>56</sup>

Conversely, the approach misguidedly assumes that when common law remedies are available, they can properly address the NZBORA violation. This may not be the case. It cannot simply be enough that a common law remedy is available; as Thomas J argued in the minority in *Dunlea*, a

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51 *Brown* (CA), above n 27, 423 Chambers J.

52 *Dunlea v Attorney-General*, above n 46, 149-151 Keith J.

53 *Ibid*.

54 See, for example, *Upton v Green (No 2)* (1996) 3 HRNZ 179 (HC) [*Upton* (HC)]; *Binstead v Northern Region Domestic Violence (Programmes) Approval Panel* [2000] NZAR 865 (HC) [*Binstead*]; *Udompun v Attorney-General*, above n 44.

55 *Dunlea v Attorney-General*, above n 46, 149 Keith J.

56 *Ibid*, 154, Thomas J dissenting.

cause of action under the NZBORA does not duplicate a common law action and the focus is on the "inadequacy as well as the availability of the [common law] cause of action".<sup>57</sup> It was precisely the fact that common law remedies may not adequately protect NZBORA rights that led the Court in *Baigent's Case* to conclude that a specific remedy for breach of the NZBORA was necessary. Likewise, Thomas J has argued that private law remedies are generally inadequate to remedy NZBORA breaches because of the importance of vindicating the right, a consideration that is not relevant to common law damages.<sup>58</sup>

In a tortious claim the plaintiff claims damages for the breach of a duty owed to the plaintiff. It is in the nature of a private right to remedy a private wrong. In a claim under the [NZBORA] the plaintiff seeks compensation for the breach of a right of a different character. It is a public right in the sense that it is a right against the state possessed by all citizens, but the breach occurs to the plaintiff and it is the intrinsic value of that right to the plaintiff which then falls to be compensated. The plaintiff is compensated, not just as the victim as in the private law proceeding, but as a citizen possessing a thing of value in itself.

...

Compensation for a breach of the [NZBORA] therefore embraces the extra dimension of vindicating the plaintiff's right, a right which has been vested with an intrinsic value, and it is that intrinsic value to the plaintiff for which he or she must be compensated over and above the damages which the common law torts have traditionally attracted.

In 2005, the Privy Council echoed these comments in *Attorney-General v Ramanooop*:<sup>59</sup>

An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach and deter further breaches...

To date, the notion of NZBORA damages involving an "extra dimension" has not gained much traction with the majority of New Zealand's Court of Appeal. Perhaps, however, the reluctance of the Court finally to settle the relationship between damages awards in tort and under the NZBORA is, in part, due to the strength of the views expressed by Thomas J in *Dunlea* (and by Hammond J in

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<sup>57</sup> Ibid.

<sup>58</sup> Ibid, 154, 157 Thomas J dissenting.

<sup>59</sup> *Attorney-General of Trinidad and Tobago v Ramanooop* [2005] UKPC 15, para 19 Lord Nicholls of Birkenhead [*Ramanooop*].

*Manga* and subsequently in *Udompun* and in *Attorney-General v Taunoa*).<sup>60</sup> The Court of Appeal presently favours a conservative approach to damages awards for NZBORA breaches.<sup>61</sup> However, given its conclusion in *Baigent's Case* and the more recent comments of the Privy Council in *Ramanoop* that an important objective of NZBORA compensation is to affirm the right in question, the Court may find it difficult to ignore Thomas J's argument or to conclude that remedying NZBORA violations by reference to common law damages can adequately address this objective. Indeed in *Taunoa*, the majority of the Court of Appeal acknowledged that NZBORA compensation involved the "added dimension" of vindication of the right that had been violated and deterrence of further breaches. However, this was not a case in which a claim in tort sat alongside the alleged NZBORA violation so it is not clear how, or even if, the Court would have quantified this added dimension.

Nevertheless, such an approach essentially was adopted by Hammond J in the High Court in *Manga*, prior to the judgment in *Dunlea*. Manga was a prisoner whose sentence was mistakenly extended by 252 days. The Crown admitted that he was wrongfully imprisoned for the extended period. Hammond J found the detention also to amount to an arbitrary detention contrary to the NZBORA. He then considered how to remedy both causes of action. As illustrated above, Hammond J emphasised the differences between private and public law remedial objectives and argued that private law remedies could not adequately address NZBORA breaches.<sup>62</sup> Nevertheless, the Judge ultimately decided that "[w]hether a Court should move to monetary relief surely depends on whether there is anything which is not (appropriately) covered by an existing or collateral cause of action".<sup>63</sup> Thus, where there are parallel claims, the courts should first remedy the common law breach, before considering whether that remedy is sufficient to address the NZBORA violation and, if it is not, determining what should be awarded in addition to the common law damages. Ultimately, the compensation awarded for Manga's wrongful imprisonment was held to be sufficient to remedy the breach of his right not to be arbitrarily detained.<sup>64</sup>

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60 *Attorney-General v Taunoa* [2006] 2 NZLR 457 (CA).

61 This is discussed further below in Part IV.

62 *Manga v Attorney-General*, above n 34, 81-82 Hammond J.

63 Ibid, 82 Hammond J. See also *ibid*, 79 Hammond J. This is consistent with the view of Casey J in *Baigent's Case*, above n 1, 692: "In some [instances, what is an adequate remedy] may be that already obtainable under existing legislation or at common law; in others, *where such remedies are unavailable or inadequate*, the Court may award compensation for infringement ..." (emphasis added). Thus, if common law remedies are available and adequate, they may be sufficient to remedy the breach meaning that there is no need for an award of NZBORA damages.

64 *Manga v Attorney-General*, above n 34, 84 Hammond J. See also *Slater v Attorney-General (No. 2)* [2007] NZAR 47 (HC) where a similar conclusion was reached.



This rather weak conclusion is surprising. It is incongruous to argue that common law remedies are "not wide enough"<sup>65</sup> to address a violation of the NZBORA, only to decide that, in fact, the private law remedy awarded is sufficient to address the broader elements of the NZBORA breach. If public and private law remedies have inherently different objectives, it surely follows that common law remedies will rarely be sufficient to remedy NZBORA violations. Allowing private law damages to remedy a NZBORA violation blurs the distinctions drawn between the two and allows the public law remedial objectives to be absorbed within the private law compensatory focus.<sup>66</sup> Given the outcome of the case, Hammond J's focus on the differences between public and private law remedies ultimately adds "little of consequence to the proper compensatory approach".<sup>67</sup> It is not apparent whether Hammond J felt his approach to NZBORA damages adequately addressed the distinctions he had identified or if he settled on that approach because he could not find a more suitable way to reconcile the two remedies. Arguably, it would have been more appropriate to conclude, as Thomas J subsequently did in *Dunlea*, that the tortious compensation was inherently inadequate to remedy the NZBORA breach and that additional compensation was necessary.

Where claims in tort and under the NZBORA both succeed, it seems unavoidable that one award must be made first. Hammond J seemingly did not consider that one approach would be to award damages under the NZBORA first, with residual damages in tort awarded subsequently if necessary. This was proposed in *Baigent's Case* where Cooke P suggested that a "legitimate... approach, having the advantage of simplicity" was to "make a global award under the [NZBORA] and nominal or concurrent awards on any other successful causes of action".<sup>68</sup> This approach would negate any risk of double recovery and would ensure that "the public law element is not submerged in the task of compensating the plaintiff for his or her physical damage and mental distress".<sup>69</sup> Essentially, it would ensure that sufficient weight could be afforded to the "intrinsic value" of the right. It is somewhat surprising that Cooke P's alternative approach has not been seriously considered by subsequent courts, particularly in *Manga*, where the "public law element" of NZBORA remedies was important.<sup>70</sup> The Court of Appeal had the opportunity to consider it in

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65 Ibid, 81 Hammond J.

66 See *Dunlea v Attorney-General*, above n 46, 157 Thomas J.

67 Andrew Butler "Compensation for Violations of the New Zealand Bill of Rights Act 1990: Where Are We At?" (2002) 6 Human Rights Law and Practice 134, 137 ["Compensation for Violations"].

68 *Baigent's Case*, above n 1, 678 Cooke P.

69 *Dunlea v Attorney-General*, above n 46, 157 Thomas J.

70 In *Attorney-General v Hewitt* [2000] 2 NZLR 110 (HC), a full bench of the High Court decided that Cooke P's suggestion did not compel courts to consider NZBORA damages ahead of common law damages, but that it was intended to be one legitimate approach where there were concurrent claims. The approach was not adopted in that case, nor has it been employed since.

*Dunlea* but elected not to do so, although Thomas J suggested that, where there are parallel claims, "it may be appropriate" for the NZBORA violation to be addressed first.<sup>71</sup>

In accordance with the relatively small amount of jurisprudence under the HRA to date, the problem of reconciling parallel damages awards has not arisen to the same extent in the United Kingdom as it has in New Zealand nor have the United Kingdom courts had the same opportunity — or shown the same inclination — to grapple with the differences between private and public law remedies. In *Marcic v Thames Water Utilities Ltd*, the Technology and Construction Court awarded the plaintiff damages for interference (the failure to carry out works to halt flooding around his home) with his right to respect for private life and home under article 8(1) of the Convention.<sup>72</sup> The Judge was bound by precedent to dismiss a claim in private nuisance. The Court of Appeal subsequently found for Marcic in nuisance and held that "it was reasonable to assume" that the damages that the plaintiff became entitled to at common law would provide him with just satisfaction and therefore would "displace... any right that he would otherwise have had to damages under the [HRA]" and render the HRA damages claim "academic".<sup>73</sup>

While, in effect, the result in this judgment is no different from *Manga* — in both, the rights violation was deemed to be remedied by common law damages — the approach adopted by the United Kingdom Court of Appeal differs from that of Hammond J in a crucial respect: Hammond J was prepared at least to ask whether damages over and above the common law remedy were necessary to address the NZBORA violation. Presumably, had Hammond J felt it necessary, he would have awarded additional damages on top of the amount awarded in tort, whereas it does not appear that the Court of Appeal considered whether additional damages were warranted. The Court of Appeal's "displacement" approach simply ignores any differences between private and public law remedies and assumes that common law remedies will be sufficient to remedy the public law breach; it focuses on the availability of a common law remedy without considering the adequacy of that remedy.

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71 *Dunlea v Attorney-General*, above n 46, 157 Thomas J. Contrast Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) 822.

72 *Marcic v Thames Water Utilities Ltd (Damages)* [2002] QB 1003 (TCC).

73 *Marcic v Thames Water Utilities Ltd* [2002] QB 929, para 104 (CA) Lord Phillips MR. The Court held that this Convention right had been breached. A similar approach was adopted by the South African Constitutional Court in *Fose v Minister for Safety and Security*, where, although the plaintiff's claim for damages for assault had not yet been resolved, it was held that the "substantial damages" that the plaintiff would "no doubt" be awarded if successful in that action would vindicate the breach of his constitutional rights (*Fose v Minister for Safety and Security*, above n 33, para 67 Ackermann J).

On appeal, the House of Lords dismissed both causes of action and did not consider whether the "displacement" approach was appropriate;<sup>74</sup> therefore, it is not clear whether that approach will apply in future cases involving parallel damages claims.<sup>75</sup> Given the assertion in *Greenfield* that the HRA has different, broader objectives than a tort statute, the displacement approach may not be adopted. While Lord Bingham's intention was to dissuade courts from using levels of tort damages to guide the quantum awarded under the HRA, his statement may also mean that, in future cases involving parallel claims, tort damages will not be regarded as appropriate to remedy a breach of a Convention right. At the very least, if the objectives of HRA remedies are broader than those of tortious remedies, it does not seem "reasonable to assume", as the Court of Appeal did, that tort damages will automatically provide a claimant with just satisfaction. However, as we have seen in *Manga*, a simple assertion that HRA remedies have broader objectives than common law remedies may not prevent tort damages being used to remedy rights violations, particularly as the United Kingdom judiciary has a more claimant-focused understanding — akin to the purpose of tort remedies — of the purpose of HRA remedies than the New Zealand courts.

Consistent with the claimant-focused approach to HRA damages, the United Kingdom judiciary has shown no inclination to contemplate Thomas J's concept of an "extra dimension" associated with awards for rights violations. In fact, rather than recognizing any element of HRA violations which might encourage more generous compensation, the judiciary has grappled with the question of whether damages under the HRA should be low in comparison to tort awards.

Early judgments under the HRA rejected Lord Woolf's extra-judicial contention that HRA damages should be lower than tort awards.<sup>76</sup> Stanley Burnton J argued in *R (KB) v Mental Health Review Tribunal* that there is no reason why this should be the case as — in the view of the United Kingdom judiciary — the purpose of both types of awards is to compensate the victim.<sup>77</sup>

Subsequently, the House of Lords rejected an approach to HRA damages which looked to domestic awards for guidance. As noted above, in the course of his discussion of quantum of

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74 *Marcic v Thames Water Utilities Ltd* [2004] 2 AC 42 (HL).

75 It was adopted by the High Court in *Dennis v Ministry of Defence* [2003] EWHC 793, para 61 Buckley J.

76 Lord Woolf, above n 41, 434.

77 *R (KB) v Mental Health Review Tribunal*, above n 35, 960 Stanley Burnton J. See also *R (Bernard) v London Borough of Enfield*, above n 36, para 59 Sullivan J; *Anufrijeva v Southwark London Borough Council*, above n 36, 1159-1160 Lord Woolf CJ. In New Zealand, it has been suggested that damages should be low in comparison to tort (*Binstead*, above n 54, 876-877 Williams J; *Upton* (HC), above n 54, 196 Tompkins J). However this proposition has not attracted much attention, possibly due to the fact that it is broadly accepted that damages under the NZBORA have wider objectives than simple compensation.

damages, Lord Bingham argued that the HRA had broader objectives than a tort statute. He then contended that:<sup>78</sup>

Even ... where a finding of violation is not judged to afford the applicant just satisfaction, such a finding will be an important part of his remedy and an important vindication of the right he has asserted.

Arguably, this statement in the context of the broader judgment implies that awards under the HRA might be lower than comparable tortious awards, taking into account the value to the victim of the finding of a violation. It is interesting to compare this approach with that of Thomas J in *Dunlea*. Both believe that the objectives of remedies for rights violations are broader than those of remedies in tort. However, Lord Bingham seems to suggest that the broader objective can be addressed by a finding of violation, which is itself inherently valuable to the plaintiff. Even where the finding will not provide just satisfaction, he implies that the quantum of damages can be adjusted, presumably downwards, to take account of the value of that finding. In comparison, Thomas J unequivocally rejects the contention that a declaration of breach would adequately remedy the NZBORA breach<sup>79</sup> and argues that "...it is [the] intrinsic value to the plaintiff for which he or she must be compensated over and above the damages which the common law torts have traditionally attracted."<sup>80</sup>

Thus, compensation should be adjusted upwards to reflect the intrinsic value of the breach. It does seem counter-intuitive to argue that the HRA has broader objectives than a tort statute and then to suggest that a lower award is sufficient to meet those objectives. Lord Bingham does not think that HRA damages need to encourage compliance with the Convention but perhaps his approach goes too far in the other direction; as Hartshorne argues, if damages are low compared with tortious awards, this risks "creat[ing] the impression that human rights ... [are] somehow less worthy of observance by public bodies compared with their other obligations".<sup>81</sup> Moreover, if the goal of HRA damages is *restitutio in integrum*, it would seem strange if damages were lower than in tort, where the same principle is applied.<sup>82</sup>

The following section considers the way in which damages for rights violations have been awarded in practice, specifically focusing on the broadly conservative approach to damages adopted in both jurisdictions.

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78 *Greenfield*, above n 8, para 19 Lord Bingham. See also the obiter comments of Ackermann J in *Fose v Minister for Safety and Security*, above n 33, para 68.

79 *Dunlea v Attorney-General*, above n 46, 153 Thomas J.

80 *Ibid*, 157 Thomas J. See also *ibid*, 158 Thomas J.

81 John Hartshorne "The Human Rights Act 1998 and Damages for Non-Pecuniary Loss" (2004) 6 EHRLR 660, 670.

82 See Duncan Fairgrieve "The Human Rights Act 1998, Damages and Tort Law" (2001) PL 695, 710.

#### IV A CONSERVATIVE APPROACH TO DAMAGES

As in other jurisdictions, the courts in both the United Kingdom and New Zealand have adopted a conservative approach to damages awards for breaches of fundamental rights. The approach to remedies for rights violations that has been adopted very quickly by the United Kingdom judiciary and over time by the courts in New Zealand treats damages as a remedy of "last resort".<sup>83</sup> That is, in circumstances where public law compensation would be an effective remedy, if another remedy would effectively address the violation, this will be preferred.<sup>84</sup> Moreover, the courts have stipulated that, even when damages are awarded, they are to be modest.

Hammond J, who has condemned this conservative approach to damages awards, believes it to be the result of concern "that there will be problems raised by ephemeral losses, highly subjective damage to feelings, and unmeritorious lawsuits for damages to pure feelings".<sup>85</sup> Certainly, the threat of a "compensation culture" seems to loom large over the judiciaries, both of which have displayed an increasing reluctance to award damages unless no other option is available. This approach is consistent with the requirement in section 8(3) of the HRA that the courts consider "any other relief or remedy granted... in relation to the act in question" before awarding damages. It is also consistent with the justification provided by the Court of Appeal in *Baigent's Case* for the creation of a compensation remedy, namely the fact that a traditional remedy would not adequately vindicate Mrs Baigent's violated rights. However, a conservative approach to damages generates a real risk that undeniably deserving claimants whose loss cannot effectively be remedied in any other way will nevertheless be denied damages — or will be awarded only a nominal amount — as a result of the courts' concern to ensure that damages are reasonable and opportunistic claims are discouraged.

##### A Availability of Damages

Although the courts in both jurisdictions have indicated that, where there is an alternative effective way to remedy a claimant's loss, that remedy will be preferred ahead of damages, they differ in their view of what type of remedy will be effective so as to negate any need for compensation. The view in the United Kingdom seems to be that a simple declaration of breach will often suffice and damages will be unnecessary, whereas the New Zealand Court of Appeal has indicated that a declaration of breach will not always be enough and that, if no other remedy is available, damages will be awarded.

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83 *Anufrijeva v Southwark London Borough Council*, above n 36, 1155 Lord Woolf CJ. See also Scorey, above n 42, para A4-040.

84 In *Udompun v Attorney-General*, above n 44, 241 Glazebrook J for the Court, the New Zealand Court of Appeal stated unequivocally that "[w]here there already is an effective remedy, [NZBORA] compensation is not needed...". See also *ibid*, 243 Glazebrook J for the Court.

85 *Ibid*, 247 Glazebrook J for the Court.

The United Kingdom Court of Appeal has stated that, in cases involving violations of the HRA, the goal usually is to "bring the infringement to an end" with "any question of compensation [being] of secondary, if any, importance".<sup>86</sup> While bringing the infringement to an end can be a vital element of a court's response to a violation, doing so, without more, may not be sufficient to address the loss suffered. Moreover, in many cases, by the time damages are sought for a rights violation, the infringement has already ceased. Where this has occurred, the New Zealand Court of Appeal has held that the only way to remedy the breach is to award compensation to the victim. In a recent case, a Thai national had been detained pending a flight out of New Zealand.<sup>87</sup> During her detention she had not been given access to any sanitary products. The Court found a breach of her right to respect for her dignity.<sup>88</sup> In awarding damages, the Court remarked that:<sup>89</sup>

The breach, by its nature, has already occurred. Mrs Udompun is no longer detained and she cannot ... be put back into the position she was in before the breach. In such circumstances, a declaration of breach, for example, would give but hollow satisfaction.

In comparison, in *Greenfield*, where the infringement of the plaintiff's right was also brought to an end prior to the hearing, the House of Lords held that a simple declaration would be an adequate remedy.<sup>90</sup> *Greenfield*, a prisoner who had been incarcerated for an additional 21 days after failing a mandatory drug test, contended that his right to a fair hearing under article 6 of the Convention had been violated as the decisions to uphold the charge and impose the extended sentence had not been reached by an impartial tribunal and he had been denied legal representation. The House of Lords considered only the claim for damages as the Secretary of State conceded a breach of article 6. It acknowledged that the deputy controller who heard the charge was neither independent nor impartial, but concluded that he was familiar with the relevant standard of proof and had conducted the adjudication "with ... regard for the appellant's interests".<sup>91</sup> Moreover, adjudication by a prison authority was the norm and the appellant had no expectation of any other procedure. Thus, there was no "special feature" of the plaintiff's claim warranting an award of damages for any frustration and

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<sup>86</sup> *Anufrijeva v Southwark London Borough Council*, above n 36, 1153 Lord Woolf CJ. See also *Greenfield*, above n 8, para 9 Lord Bingham.

<sup>87</sup> *Udompun v Attorney-General*, above n 44.

<sup>88</sup> New Zealand Bill of Rights Act 1990, s 23(5).

<sup>89</sup> *Udompun v Attorney-General*, above n 44, 242 Glazebrook J for the Court. Similarly, in *Baigent's Case* monetary compensation was regarded as the only effective remedy for the violation of Mrs Baigent's rights — a "mere declaration would be toothless". *Baigent's Case*, above n 1, 676 Cooke P.

<sup>90</sup> *Greenfield*, above n 8, para 31 Lord Bingham

<sup>91</sup> *Ibid*, para 28 Lord Bingham.

anxiety or for the lost opportunity to achieve a different result; a declaration of violation would suffice.<sup>92</sup>

Given that the violation of his right to a fair hearing resulted in 21 additional days in prison, it is remarkable that the House of Lords refused to award damages to the claimant. Although care must be taken to ensure remedies for rights violations do not become a means by which claimants are unnecessarily enriched, it is important that deserving claimants are not denied compensation as the result of an overly conservative approach to damages. If a plaintiff like Greenfield cannot successfully claim more than a declaration of violation, it is difficult to conceive of a situation in which a damages claim will succeed.<sup>93</sup> Moreover, as the New Zealand Court of Appeal argued in *Udompun*, albeit in relation to a different right, given that the breach had been terminated, it seems unlikely that a simple declaration would be sufficient to return Greenfield to his position prior to the violation. It is therefore not clear that Greenfield received just satisfaction for the loss suffered as a result of the violation of his right.

An important consideration for the House of Lords was that the Strasbourg Court routinely decides that, in article 6 cases, a finding of violation will amount to just satisfaction.<sup>94</sup> The House of Lords insisted that section 8(4) of the HRA required domestic courts to "look to Strasbourg and not to domestic precedents" for guidance as to damages and that they "should not aim to be significantly more or less generous than the [Strasbourg C]ourt might be expected to be...".<sup>95</sup> This approach is problematic for several reasons. First, section 8(4) does not require the courts to *apply* any principles of the Strasbourg Court and does not suggest that those principles are to be considered at the exclusion of other, domestic, guidance.<sup>96</sup> Moreover, it is widely accepted that the Court lacks clear principles for establishing when — and how much — compensation should be awarded for a breach of the Convention.<sup>97</sup>

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92 Ibid, para 29 Lord Bingham.

93 Kris Gledhill "Damages Under the Human Rights Act" (2005) 24 CJQ 298, 302.

94 *Greenfield*, above n 8, para 9 Lord Bingham.

95 Ibid, para 19 Lord Bingham. Early judgments under the HRA had looked to domestic awards in tort and by Ombudsmen for guidance as to the appropriate level of damages to be awarded; see *R (Bernard) v London Borough of Enfield*, above n 36, para 60 Sullivan J, and *R (KB) v Mental Health Review Tribunal*, above n 35, 961 Stanley Burnton J. This approach is also discussed with approval in *Anufrijeva v Southwark London Borough Council*, above n 36, 1160 Lord Woolf CJ.

96 New Zealand Law Commission, above n 27, para 4.2. See also Richard Clayton "Damage Limitation: The Courts and the Human Rights Act Damages" (2005) PL 429, 431 ["Damage Limitation"].

97 In *R (KB) v Mental Health Review Tribunal*, above n 35, 950-951 Stanley Burnton J commented that the Strasbourg Court "...tends to award global sums on an 'equitable' basis, and its judgments do not analyse the basis of calculation ... or give a breakdown between different items of damages. They may not even

Secondly, in the context of section 8(4), it is important to note that the Strasbourg Court does not have available to it the range of remedies available to a domestic court; while it can, and often does, award a simple declaration, it cannot quash a decision of a national government nor can it compel a government to take particular measures.<sup>98</sup> Arguably, this should dissuade national courts from adhering too closely to Strasbourg jurisprudence as the Court's assessment of what is "necessary to afford just satisfaction" in a particular context may differ from a domestic court's objective assessment in a similar scenario.

Thirdly, one interpretation of Lord Bingham's statements is that he intended domestic courts to award damages of a similar scale to those awarded in Strasbourg. While an underlying goal of the HRA was to ensure that claimants could receive the same remedy from the domestic courts as they could in Strasbourg, it is by no means clear that the purpose of section 8(4) was to require the domestic courts to apply the same scale of damages as is applied in Strasbourg;<sup>99</sup> "[i]f Parliament had intended the English courts to apply [Strasbourg] standards, the legislation could easily have been drafted to achieve this objective".<sup>100</sup> It is also questionable whether the quantum of damages awarded in Strasbourg would adequately compensate a claimant in the United Kingdom.<sup>101</sup>

It is, therefore, debatable whether it is appropriate to adopt the conservative approach (at least in article 6 cases) of the Strasbourg Court to damages awards, to the exclusion of assistance from domestic damages awards by entities such as the Local Government Ombudsmen, which may provide useful guidance in comparable circumstances as they "are seeking to give just satisfaction for the adverse consequences of administrative failings of the kind which occurred in the present

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distinguish between damages and the costs and the expenses of the proceedings...". See also New Zealand Law Commission, above n 27, para 3.4; *Anufrijeva v Southwark London Borough Council*, above n 36, 1155 Lord Woolf CJ; Scorey, above n 42, para A2-052.

98 New Zealand Law Commission, above n 27, para 3.31.

99 Section 8(4) was designed to ensure that "people will be able to receive compensation from a domestic court equivalent to what they would have received in Strasbourg" (*Rights Brought Home*, above n 8). However, this can be read as implying that a victim should be able to receive a remedy of the same value as he or she would have received in Strasbourg, where that value is relative to the domestic social context, rather than implying that the victim should receive an equivalent dollar amount. An alternative interpretation is that "equivalent" compensation refers to the availability of a damages remedy, rather than to the quantum of any such remedy ("Damage Limitation", above n 96, 438).

100 Ibid, 438.

101 "[T]he overriding object of an award of damages is to compensate the claimant for his injury. Compensation that might be adequate in one country, with a low cost of living, might well be inadequate in the UK; conversely, it is possible that compensation that would be no more than adequate in another country might be excessive in the UK social and economic conditions...". *R (KB) v Mental Health Review Tribunal*, above n 35, 959 Stanley Burnton J. See also Scorey, above n 42, para A4-053.



case".<sup>102</sup> Lord Bingham argued that the HRA "was not [enacted] to give victims better remedies at home than they could recover in Strasbourg".<sup>103</sup> However it is highly questionable whether claimants will approach the courts for an HRA remedy if they can obtain a higher amount from an Ombudsman on the same facts. In fact, the United Kingdom Court of Appeal has gone so far as to encourage claimants to look to alternative means of dispute resolution, including the Ombudsmen, before seeking remedies from the courts under the HRA. Their rationale was that, even where damages are awarded under section 8, the amount awarded is likely to be less than the cost incurred in bringing the proceedings.<sup>104</sup> Leaving aside the procedural difficulties with this approach identified by Clayton,<sup>105</sup> it is difficult to reconcile the Court's proposal with Parliament's intention, embodied in section 8, that damages be available for rights violations and that the courts be responsible for awarding those damages. Whereas in New Zealand Parliament has not prescribed that remedies are available for breach of the NZBORA and that the courts are responsible for awarding those remedies, the United Kingdom Parliament has so provided. Surely, therefore, it is not for the courts to encourage alternative means of addressing rights violations.

The New Zealand courts are similarly reluctant to award damages for violations of the right to a fair trial. However, even in fair trial cases, the New Zealand judiciary may not be prepared to regard a simple declaration of breach as an adequate remedy. In *Brown v Attorney-General*, the High Court was asked to determine whether the plaintiff's right to a fair trial had been violated by a decision to decline his application for legal aid. The plaintiff had been charged with aggravated burglary and attempted murder. He sought legal aid to pay for independent testing of a key piece of prosecution evidence. As in *Greenfield*, by the time of the hearing, the rights infringement had been brought to an end as the tests had been undertaken, an appeal had been heard and the conviction had been quashed.<sup>106</sup> Glazebrook J remarked that NZBORA damages were generally only awarded in "exceptional" cases and that fair trial cases must be particularly exceptional to merit an award.<sup>107</sup> The Judge declined to confirm whether there had been a breach of the plaintiff's right but remarked obiter that Brown's claim would not have been sufficiently exceptional to merit damages on the basis that his successful appeal and the quashing of his conviction had remedied the violation.<sup>108</sup>

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102 *R (Bernard) v London Borough of Enfield*, above n 36, para 54 Sullivan J.

103 *Greenfield*, above n 8, para 19 Lord Bingham.

104 *Anufrijeva v Southwark London Borough Council*, above n 36, 1161-62 Lord Woolf CJ.

105 "Damage Limitation" above n 96, 435-436.

106 *Brown v Attorney-General* [2003] 3 NZLR 335, 359 (HC) [*Brown* (HC)] Glazebrook J.

107 *Ibid*, 357-358 Glazebrook J.

108 *Ibid*, 357-358 and 359 Glazebrook J. The Court of Appeal found that there had not been a breach of the NZBORA, and therefore declined to express an opinion on "when (if ever) compensation or financial relief

Thus, the "exceptionality" of a case and whether or not it merits a damages award were linked to the availability of alternative ways to remedy the breach. The implication is that, if — as in *Greenfield*<sup>109</sup> — no appeal process was available, the breach may have been sufficiently exceptional and damages may have been justified.<sup>110</sup> Therefore, while the New Zealand judiciary is reluctant to award damages in fair trial cases, they may have decided that *Greenfield*, who was not able to appeal the decision to postpone his release, merited a damages award.

That the New Zealand judiciary might have reached this conclusion has been thrown into question, however, following the enactment of the Prisoners' and Victims' Claims Act 2005 (the "2005 Act") by the New Zealand Parliament in response to the decision in *Taunua*. In that case, several former prisoners were awarded compensation for a breach of their rights to respect for their dignity that was committed while they were in prison. Subsequently, Parliament enacted the 2005 Act, which creates a mechanism by which the victim of a prisoner's crime may be entitled to the compensation paid to the prisoner for breach of the prisoner's rights under the NZBORA during the prisoner's incarceration.<sup>111</sup> In addition, section 13 of the 2005 Act (which, together with section 14, expired on 30 June 2007) provides that the courts can only award compensation to a prisoner for a breach of (among other things) the prisoner's rights under the NZBORA by the Crown if the prisoner has exhausted all available complaints mechanisms without redress and if no other remedy or remedies can provide effective redress. Moreover, when determining if compensation is an appropriate remedy for breach of the prisoner's right, the 2005 Act requires a court to take into account various factors including the steps taken (if any) by either the prisoner or the defendant to mitigate any loss or damage that arose, whether the breach was committed in bad faith, the consequences of the breach for the prisoner and the prisoner's conduct.<sup>112</sup>

The 2005 Act seemingly was an attempt by the Government to ensure that violent criminals were not seen to be "profiting" from their offending while incarcerated. Unsurprisingly, however, its enactment generated considerable controversy with some supporting its emphasis on victims' interests and others arguing that it showed scant regard for the need to protect prisoners'

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would be an appropriate remedy for breach of 'fair trial' rights" (*Brown* (CA), above n 27, para 100 Chambers J).

109 A prison manager reviewed the deputy controller's decision but it appears that *Greenfield* played no part in the review and that the review was only of the procedure followed by the deputy controller.

110 In *Upton*, an earlier case involving an alleged breach of the right to a fair hearing, the fact that the plaintiff had been sentenced to three months imprisonment and that his appeal was not heard before his release, encouraged the High Court to award damages for the violation of his right (*Upton* (HC), above n 54, 196 Tompkins J).

111 Prisoners' and Victims' Claims Act 2005, subpart 2 of part 2.

112 Prisoners' and Victims' Claims Act 2005, s 14.

fundamental rights. Without commenting on the relative merits of the 2005 Act, it is possible that its enactment will have a lasting chilling effect on the award of damages to prisoners. This is the immediate purpose of sections 13 and 14 but, even after their expiry, the courts may be disinclined to award NZBORA compensation (or may prefer to make smaller awards) to prisoners on the basis that the person who will ultimately receive the compensation is not the person whose NZBORA rights have been infringed.<sup>113</sup>

### **B Modest Awards**

Not only are damages awarded as a remedy of last resort but, when awarded, they are modest. The courts in New Zealand have held, based on international case law, that "extravagant awards are to be avoided".<sup>114</sup> In the United Kingdom, the need for moderation has been linked to Strasbourg awards which are "noteworthy for their modesty"<sup>115</sup> as "the focus of the Convention is on the protection of human rights and not the award of compensation".<sup>116</sup>

It is difficult to reconcile a direction for modest awards with the objectives, adopted in New Zealand at least, of affirming the value of the right in question and deterring future breaches. We encounter in *Udompun*, for example, the stipulation that NZBORA damages are to be modest alongside an acknowledgement that the right violated was "important", the violation "serious" and that damages are the only appropriate remedy.<sup>117</sup> There is a real danger that, if public authorities receive only a small penalty for seriously infringing the NZBORA, they will not be encouraged to give fundamental rights the necessary respect.

Even if, as is the case in the United Kingdom, the purpose of remedies is simply compensatory, modest awards may not allow the plaintiff to be put back into the position he or she would have been in were it not for the violation. Where loss can be quantified, the principle of *restitutio in integrum* would seem to require that the full amount of the loss be paid in damages. Where loss is non-pecuniary, a presumption in favour of modest awards may encourage the courts to adopt a lower starting point than they otherwise might, with the result that claimants will inevitably receive less than the value of their loss.

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113 Subpart 2 of part 2 of the Prisoners' and Victims' Claims Act 2005 has no expiry date. The effect of section 13 can be seen in *Edgecombe v Attorney-General* [2005] DCR 780 (DC) where Judge Erber declined to award compensation because the victim of the NZBORA breach, a former prisoner, had not sought redress elsewhere before pursuing his NZBORA claim.

114 *Baigent's Case*, above n 1, 678 Cooke P.

115 *Greenfield*, above n 8, para 17 Lord Bingham.

116 *Ibid*, para 9 Lord Bingham.

117 *Udompun v Attorney-General*, above n 44, 242, 245 Glazebrook J for the Court.

As noted above, one rationale advanced in the United Kingdom in favour of modest awards is that the public interest lies in ensuring that public bodies are able to carry out their functions unimpeded by hefty damages bills.<sup>118</sup> It is debatable whether it is appropriate for the courts to consider the impact of awards on the finances of public authorities. Parliament has directed the courts to provide just satisfaction to a victim of a rights breach. It is also responsible for providing resources to public authorities and therefore "must be taken to have provided the resources to meet such awards".<sup>119</sup> Moreover, the financial implications of a damages award for the errant public authority arguably should be irrelevant; a claimant's right has been breached and that remains the case whether the authority can afford to pay damages or not. Even if the need for a financially viable public service is a relevant consideration, it should not be allowed to "systematically trump [the interests] of the individual".<sup>120</sup>

In New Zealand, the preference for modest awards has not been expressly linked to the need to ensure that public bodies are able to carry out their functions. In fact, very little justification has been given for the low level of awards.<sup>121</sup> What amounts to a "modest" award has altered over time however; although he was not asked to decide on an amount, in *Baigent's Case* Cooke P regarded "somewhat less than" NZ\$70,000 to be an appropriate amount for breach of the plaintiff's right to be free from unreasonable search and seizure.<sup>122</sup> Recently, the plaintiff in *Udompun* was awarded NZ\$4,000 for breach of her right to respect for her dignity. While the circumstances of the two cases differed — not least because they involved breaches of different rights — the discrepancy between the amounts considered appropriate to remedy the breach in each case is indicative of an increasingly conservative approach to quantum. A further comparison can be made between the NZ\$70,000 mooted in *Baigent's Case* and the NZ\$18,000 that was awarded six years later to one of the plaintiffs in *Dunlea*, also for an unreasonable search and seizure.

As the Court of Appeal noted in *Anufrijeva v Southwark London Borough Council*, the low level of awards often means that it will cost claimants more to pursue the proceedings than they will receive in damages if their claim is successful.<sup>123</sup> If this is the case, it is seriously debatable whether

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118 *Anufrijeva v Southwark London Borough Council*, above n 36, 1154 Lord Woolf CJ. There may also be a problem with "floodgates" as "[t]here can be numerous victims of the same unlawful act" (Lord Woolf, above n 41, 433). See also Carol Harlow "Damages and Human Rights" (2004) NZLR 429, 430-431.

119 *R (KB) v Mental Health Review Tribunal*, above n 35, 959 Stanley Burnton J, in relation to article 5(5).

120 Fairgrieve, above n 82, 702.

121 In *Manga v Attorney-General*, above n 34, 82 Hammond J suggested that the judiciary should awards remedies "with restraint" to enhance public confidence, democratic decision-making and public morality.

122 *Baigent's Case*, above n 1, 678 Cooke P.

123 *Anufrijeva v Southwark London Borough Council*, above n 36, 1161 Lord Woolf CJ.

the damages awarded can be effective. The Court regarded this as a reason to discourage claimants from bringing claims under the HRA until alternative dispute resolution options had been exhausted. Of course, another way to address this inequity is to raise the level of quantum awarded. Rather than discouraging victims of rights breaches from bringing proceedings, perhaps the balance between ensuring that public authorities are financially capable of carrying out their duties, on the one hand, and providing plaintiffs with effective remedies, on the other, needs to be reconsidered.

### ***C The Right in Question***

The conservative approach to damages awards appears to be linked, in part, to the particular right at issue in each case. The courts in both jurisdictions have recognised that some rights may more appropriately attract remedies for breach than others. It is widely accepted that "[t]he choice of remedies should be directed to the values underlying the particular right",<sup>124</sup> with the implication being that, while damages may effectively remedy breaches of certain rights, they will not be effective for all. The courts' preference for damages as a remedy of last resort is manifested in their attitude towards different rights; whereas violations of procedural rights, such as the right to a fair trial, often can be remedied in the course of the trial process (for example, by discharge) and damages are therefore unnecessary. Such remedies are inappropriate for a loss of liberty, where the breach has occurred and cannot be undone. In such cases, the courts seem more willing to move towards damages as the appropriate remedy.

#### ***1 Right to a fair trial***

As has been noted already in this paper, the courts are particularly reluctant to award damages in cases involving a violation of the right to a fair trial. In *Greenfield*, the House of Lords distinguished violations of article 6 from violations of other articles because:<sup>125</sup>

[I]t does not follow from a finding that the trial process has involved a breach of an article 6 right that the outcome of the trial process was wrong or would have been otherwise had the breach not occurred.

In comparison, breach of other articles results automatically in a wrong to the victim. This led Lord Bingham to restrict himself to examining the Strasbourg approach to awarding damages under article 6, rather than taking guidance from cases addressing breaches of other rights, on the basis that "[t]here is a risk of error if Strasbourg decisions given in relation to one article of the Convention are read across as applicable to another".<sup>126</sup>

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<sup>124</sup> *Martin v Tauranga District Court* [1995] 2 NZLR 419, 428 (CA) Richardson J.

<sup>125</sup> *Greenfield*, above n 8, para 7 Lord Bingham.

<sup>126</sup> *Ibid.*

As noted above, Lord Bingham observed that in the "great majority" of article 6 cases, the Strasbourg Court has "treated the finding of a violation as, in itself, just satisfaction..."<sup>127</sup> He commented that, although damages may be available in Strasbourg for breach of a claimant's fair trial rights, this will only be in cases where a causal connection can be established between the breach of the right and the loss suffered.<sup>128</sup> Adopting a similar approach to the case before him, he concluded that damages were not warranted for frustration or anxiety as the plaintiff could not have expected an alternative method of adjudication, nor were they warranted for the loss of an opportunity to achieve a different result as there was no proof that an independent adjudicator would have reached a different conclusion.<sup>129</sup>

Damages have been awarded for violations of fair trial rights in New Zealand. In *Upton v Green (No 2)*, the plaintiff claimed damages for the failure by the first defendant, a District Court Judge, to allow him to make submissions on sentence.<sup>130</sup> Tompkins J in the High Court found a breach of his right to an independent and impartial hearing and awarded NZ\$15,000 in damages, which represented the lost opportunity to try to persuade the District Court Judge to impose a lesser sentence. Although Tompkins J admitted that he was "not able to reach any clear conclusion on whether, if the plaintiff had been fairly and fully heard, the result would have been different", he held that the court did not need to go so far and that it was "sufficient if the course adopted might work to the person's prejudice".<sup>131</sup> Unlike in *Greenfield*, the fact that the Judge could not conclusively determine whether the result would have been different had the violation not occurred was not fatal to damages being awarded for the lost opportunity.

In *Brown*, Glazebrook J considered herself to be constrained by the precedent set in *Upton*. She interpreted the test laid down by Tompkins J as requiring a person to "...show that the result may have been different, not that it would have been different" and, applying that test, concluded that the outcome for Brown may have been different had legal aid been awarded and the tests been conducted.<sup>132</sup> This is a much lower standard than that attributed to the Strasbourg Court by the

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<sup>127</sup> Ibid, para 8.

<sup>128</sup> Ibid, para 11 Lord Bingham. This is not strictly accurate. In a number of Article 6 cases, the Strasbourg Court has been prepared to award damages in the absence of a causal link: See New Zealand Law Commission, above n 27, para 3.62-3.69; Scorey, above n 42, paras A2-023 and A2-060 and following.

<sup>129</sup> *Greenfield*, above n 8, paras 28-29 Lord Bingham.

<sup>130</sup> *Upton* (HC), above n 54.

<sup>131</sup> Ibid, 195 Tompkins J, referring to the judgment of Lord Denning in *Kanda v Government of Malaya* [1962] AC 322 (PC). On appeal, the Court of Appeal upheld Tompkins J's award (*Attorney-General v Upton* (1998) 5 HRNZ 54 (CA)).

<sup>132</sup> *Brown* (HC), above n 101, 358 Glazebrook J.

House of Lords, which observed that, in some cases involving an alleged loss of opportunity, the Strasbourg Court has regarded the causal connection to be established where "the outcome of the proceedings would or very well might have been more favourable to him".<sup>133</sup>

Having applied the *Upton* test, Glazebrook J declined to decide whether there had been a breach or to award compensation. However, as has been discussed above, she stated that, if she had found a breach, the case would be insufficiently "exceptional" to warrant damages.<sup>134</sup> The requirement that a case must be "exceptional" brings the test formulated by Tompkins J much closer to the standard attributed to the Strasbourg Court by the House of Lords. It is consequently more difficult for a plaintiff to successfully claim damages for loss of opportunity occasioned by a breach of the right to a fair trial than it was following the decision in *Upton*. Arguably, however, the two-step approach adopted by the courts in New Zealand, in which a plaintiff must prove first that the result "may" (but not necessarily "would") be different and then that the case is sufficiently exceptional to warrant damages, is preferable to the test applied in *Greenfield*. Although, practically, the result may be the same whichever test is applied, the House of Lords' approach places a very heavy evidentiary burden on a plaintiff. In many cases it may be impossible for a plaintiff to prove that a result "would" or "very well might have been" different.<sup>135</sup> Taking the facts of *Greenfield* as an example, how could the plaintiff prove that access to legal representation and an independent tribunal would or might well have led to a different result? Although it seems possible, if not likely, that the result may have been different, no evidence could be provided to establish this. The best a plaintiff could legitimately do is show that the result may have been different. However the House of Lords' view was that "[a] legal representative might have persuaded [the deputy controller] or another tribunal to take a different view or he might not. It is inappropriate to speculate."<sup>136</sup> In a case such as *Greenfield*, speculation may be the only avenue open to the plaintiff.

In a separate judgment in the Court of Appeal in *Brown v Attorney-General*, William Young J argued that, in general, the courts should not award compensation to remedy unfair trial processes, even in exceptional cases, "but rather should require such complaints to be raised with either the trial judge or on appeal".<sup>137</sup> As justification for his view, William Young J argued, inter alia, that

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<sup>133</sup> *Greenfield*, above n 8, para 13 Lord Bingham referring to *Perks v United Kingdom* 30 EHRR 33. In *R (KB) v Mental Health Review Tribunal*, an earlier case not involving an article 6 breach, the claimant had to prove on the balance of probabilities that "he would have had a favourable decision at an earlier date if his Convention right had been respected" (*R (KB) v Mental Health Review Tribunal*, above n 35, 964 Stanley Burton J).

<sup>134</sup> *Brown* (HC), above n 101, 357-358 Glazebrook J.

<sup>135</sup> *Greenfield*, above n 8, para 13 Lord Bingham.

<sup>136</sup> *Ibid*, para 28 Lord Bingham.

<sup>137</sup> *Brown* (CA), above n 27, 432 William Young P.

the rules for trial fairness are likely to be ill-suited for determining entitlements to compensation, having been established for a different purpose; that Parliament did not intend the NZBORA to compensate those who had been subjected to unfair trial processes and that for courts to award compensation "would create a fiscal burden on the taxpayer which Parliament can hardly be seen to have authorised"; and that the natural remedy for breach of fair trial rights is in the jurisdiction of appellate courts rather than by way of damages.<sup>138</sup> Essentially the Judge's argument is consistent with the last resort approach to damages — his contention is that the appellate process provides an alternative way to remedy violations of fair trial rights. The Judge did not regard his proposal as chilling the application of the right to a fair trial; he regarded the use of the appellate system as a corollary to the remedy of exclusion of evidence used by courts in other circumstances.<sup>139</sup> Notably, the majority "acknowledge[d] the strength of the views" expressed by William Young J.<sup>140</sup> If his views are adopted in future, it would spell the end of damages awards in fair trial cases in New Zealand.

## 2 *Loss of liberty*

In New Zealand, the courts have been quicker to award damages in cases involving loss of liberty. In fact, one Judge has gone so far as to state that "[t]he cases ... make it clear that monetary compensation [under the NZBORA] is appropriate only in egregious cases such as *Upton* where loss of liberty was involved...".<sup>141</sup>

Damages have not been awarded only in cases involving loss of liberty — in *Udompun*, the plaintiff was awarded damages for the breach of her right to respect for her dignity. She had been incarcerated for a period but this did not in itself lead to the damages award. In *Binstead v Northern Region Domestic Violence (Programmes) Approval Panel*, a case not involving any detention, damages were regarded as an appropriate remedy for breach of the plaintiff's right to natural justice.<sup>142</sup> However, loss of liberty is one area where the courts have not shied away from damages awards. In fact, the Court of Appeal has observed that "[i]n the case of breaches which involve deprivation of liberty ... monetary compensation is *likely* to be the appropriate remedy".<sup>143</sup>

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<sup>138</sup> Ibid.

<sup>139</sup> Ibid.

<sup>140</sup> Ibid, 423 Glazebrook J.

<sup>141</sup> *Binstead*, above n 54, 876-877 Williams J.

<sup>142</sup> As discussed below (see Part IV(C)(3)), the Court of Appeal has since expressed misgivings as to whether violations of the right to natural justice should properly be remedied by damages: *Udompun v Attorney-General*, above n 44, 241 Glazebrook J for the Court.

<sup>143</sup> *Baigent's Case*, above n 1, 718 McKay J (emphasis added).



*Dunlea* involved a police search of a residence, during which officers handcuffed, pat-searched, aimed rifles at, and detained six people, none of whom were the individual the police were seeking. The individuals concerned brought various claims including for breach of section 21 of the NZBORA, which prohibits unreasonable search and seizure. Panckhurst J in the High Court awarded damages of up to NZ\$18,000 to some of the plaintiffs for breach of section 21, including exemplary damages, and parallel awards for wrongful imprisonment and trespass.<sup>144</sup> The Court of Appeal essentially upheld the High Court judgment, with minor adjustments to the quantum awarded.<sup>145</sup> The Court was not persuaded to increase the amount awarded; it referred to a case decided before the enactment of the NZBORA where a wrongly arrested plaintiff was awarded NZ\$20,000, but, as the Court noted, this sum reflected the fact that she had been deprived of her liberty for two and a half hours (as opposed to a matter of minutes in the present case), had been humiliated, and had been confined in a police cell with two drunken males, one of whom was violent and abusive.<sup>146</sup> The implication is that the Court regarded the injustices suffered by the *Dunlea* plaintiffs to be less significant, although the plaintiffs' suffering was not inconsiderable — they were dragged from a private residence, handcuffed and pointed at with armed rifles. Thomas J in the minority considered the majority's awards to be inadequate as the plaintiffs were entirely innocent and had been involved in a terrifying experience.<sup>147</sup>

In *Manga*, the facts of which are described above, the plaintiff was awarded NZ\$60,000 for wrongful imprisonment.<sup>148</sup> In the Judge's view, the only feature of the NZBORA claim which arguably was not remedied by the common law damages was the "affront to liberty itself ... quite independent of the harm to Mr Manga".<sup>149</sup> This affront was manifested in either the poor state of the legislation leading to Manga's extended imprisonment or the failure of the Department of Corrections to have the law clarified. Both had been addressed and, therefore, an award of damages over and above the tort compensation was not warranted.<sup>150</sup>

The courts' willingness to award damages in loss of liberty cases undoubtedly reflects the flipside of the last resort approach to damages; where a plaintiff has been restrained, it is difficult to

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144 *Dunlea v Attorney-General*, above n 46, 142, Keith J.

145 *Dunlea v Attorney-General*, above n 46, 142 Keith J.

146 *Duffy v Attorney-General* (3 February 1986) HC WN A1352/82 referred to in *Dunlea v Attorney-General*, above n 46, 149 Keith J.

147 *Ibid*, 161 Thomas J dissenting.

148 *Manga v Attorney-General*, above n 34.

149 *Ibid*, 83 Hammond J.

150 *Ibid*, 83-84 Hammond J.

think of a remedy other than damages that will adequately remedy the loss suffered. Bearing this in mind, it is interesting to compare the NZ\$60,000 awarded to Manga and the NZ\$18,000 awarded to a plaintiff in *Dunlea* with the reluctance of the House of Lords to award damages to Greenfield. Although *Greenfield* did not involve a breach of the right to liberty, the acknowledged breach of the applicant's fair trial rights resulted in an additional period of imprisonment. Admittedly, Greenfield was detained for a considerably shorter period than Manga, but his liberty was restricted for a significantly longer period than the plaintiffs in *Dunlea*. While the failure to award damages in this case undoubtedly reflects the generally conservative approach of the courts to damages awards, arguably this discrepancy calls into question the approach adopted by the House of Lords whereby guidance in article 6 cases can only be obtained from article 6 decisions in Strasbourg and not from cases involving violations of other rights. It is highly probable that some article 6 cases will be brought by an applicant whose liberty has been restrained and it seems sensible to allow a court to examine cases brought under article 5 — and other articles — if the facts are sufficiently similar.<sup>151</sup> This is particularly so, when the importance of properly compensating a claimant whose liberty has been restrained is highlighted in article 5(5) of the Convention, which provides that "[e]veryone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation".<sup>152</sup>

### 3 Right to natural justice

In New Zealand, there has been some debate as to whether damages are an appropriate remedy for a breach of the right to natural justice.<sup>153</sup> In *Binstead*, damages were claimed for an admitted breach of the plaintiff's right to natural justice occasioned by a rejected application for approval of a domestic violence programme. Williams J remarked that previous jurisprudence indicated that a breach of a right relating "to the exercise of an adjudicative function" may be effectively vindicated by quashing the decision and allowing the assessment to be made again.<sup>154</sup> This would essentially put the plaintiff in the position he would have occupied if consideration of his application had not

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151 This raises the question why Greenfield himself didn't combine his article 6 claim with a claim for breach of article 5: "A number of awards have been made [in Strasbourg] for a breach of liberty rights" (*The Law of Human Rights*, above n 29, para 21.48).

152 In *R (KB) v Mental Health Review Tribunal*, above n 35, 952, 957, Stanley Burnton J rejected the argument that this article meant that damages were compulsory whenever there was a breach of article 5(4). The wording of section 8(3) of the HRA was such that, in some instances of loss of liberty, damages would be unnecessary.

153 NZBORA, s 27. See for instance, Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (Lexis Nexis NZ Limited, Wellington, 2005) 994 and following; "Compensation for Violations", above n 67, 145-146.

154 *Binstead*, above n 54, 876 Williams J.

been affected by breach of his right.<sup>155</sup> As noted above, the Judge regarded the authorities as indicating that damages were only appropriate in "egregious" cases, with the implication being that a case in which the violation could be remedied by a quashing order was not sufficiently egregious.<sup>156</sup> Ultimately, however, Williams J awarded the plaintiff "modest" damages for his lost income.<sup>157</sup>

In *Udompun*, having decided there was no breach of section 27, the Court of Appeal did not need to consider the availability of damages for breach of natural justice. However the majority agreed obiter that there was "force in the proposition that compensation should not be available for breaches of natural justice as a matter of course" as an aggrieved plaintiff would generally receive an effective remedy if the decision was set aside.<sup>158</sup> While the violation of the plaintiff's right to respect for her dignity could only be remedied by compensation as the breach had already occurred and could not be retracted, a plaintiff whose natural justice rights had been violated could be returned to the position he or she was in before the violation.

Thus, as with violations of the right to a fair trial, there is growing reluctance to award damages in natural justice cases. This is an obvious area in which the plaintiff can be put back into the position he or she would have been in prior to the breach; this is seen as a natural remedy for the violation, with the result that damages are not warranted.

## V CONCLUSION

Although damages jurisprudence for rights violations is still in its infancy, particularly in the United Kingdom, some differences in approach have emerged between the two jurisdictions. At least in theory, the New Zealand judiciary has adopted a more rights-focused approach to damages than the United Kingdom courts; they acknowledge the differences between public and private law remedies and, unlike the United Kingdom courts, have held that NZBORA remedies have broader objectives than simple compensation. However, this acknowledgement is increasingly undermined by the courts' willingness to allow common law remedies to compensate NZBORA violations. Any approach to damages that too closely aligns damages for rights violations with tortious awards — or, in the case of the United Kingdom, suggests that HRA damages may be lower than a comparable tortious award — risks undermining the differences, observed by the New Zealand courts at least, between the objectives of the two types of awards.

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<sup>155</sup> Ibid.

<sup>156</sup> Ibid,

<sup>157</sup> Ibid, 878 Williams J. Damages were also awarded in *Upton (HC)*, above n 54, in part to remedy the violation of the plaintiff's right to natural justice.

<sup>158</sup> *Udompun v Attorney-General*, above n 44, 241 Glazebrook J for the Court.

The courts in both jurisdictions, and elsewhere, have adopted an increasingly moderate approach to damages with perhaps the United Kingdom judiciary displaying a marginally more conservative attitude as compared with the approach in New Zealand. This is perhaps surprising in light of the United Kingdom Parliament's willingness to give the courts the power to award damages for breaches of HRA rights; whereas the New Zealand Parliament considered that traditional remedies were sufficient to address violations of fundamental rights, only to be overridden by the courts. Arguably the United Kingdom judiciary has retreated from the decision of their Parliament to authorise the courts to award damages in order to ensure that claimants receive effective redress. While there is perhaps merit in ensuring that damages awards for rights violations remain the exception rather than the rule, an overly conservative approach may leave deserving plaintiffs without an effective remedy for their loss.

The extent to which the two jurisdictions can and will learn from each other's jurisprudence remains to be seen, although the House of Lords' clear direction that guidance for damages awards must be obtained from the Strasbourg Court may not just preclude the courts from looking at domestic precedents but may also prevent any examination of more distant jurisprudence. The New Zealand courts, on the other hand, have demonstrated greater willingness to look to overseas jurisprudence for assistance. However, any assistance gleaned from United Kingdom decisions, or indeed from decisions taken elsewhere, seems likely only to perpetuate the conservative approach that is increasingly pervading the field.