

FUNDING FAIR PLAY IN ACTION
MONETARY REMEDIES IN JUDICIAL REVIEW

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INTRODUCTION

The law, at present, does not recognise any general right to damages for loss that results from unlawful administrative action.

This dissertation will examine the reasoning behind the current lacuna in the law in Chapter I. Chapter II will consider a current proposal for reform that the Law Commission for England and Wales is considering. Chapter III will examine damages under the New Zealand Bill of Rights Act and whether it could be used as a stepping stone for damages in judicial review. Chapter IV will look abroad to consider the position for redress in France and whether anything may be gained from this system. Chapter V will tie these Chapters together and present a framework for change.

CHAPTER I: THE PROBLEM

A. THE TRADITION AGAINST DAMAGES

'To some, this may be a small matter, but to Mr Harry Hook it is very important'¹. At 6.20 in the evening of the 16th of October, 1974, Mr Harry Hook, a street trader, had an 'urgent call of nature'. Unfortunately, all the toilets in the street market were closed and locked for the night. He went into a side street and there proceeded to relieve himself. Two council employees rebuked him, to which he replied 'I can do it here if I like'. The employees called a security guard who reprimanded Hook. He replied with an 'emphatic version of '[y]ou be off''.

The incident was reported. The market manager considered it to be a serious matter. After being dissatisfied with the apology Hook gave when asked about the matter, the manager banned Hook for life from trading in the market. Mr Hook was granted two further hearings. At the second, Hook waited in the corridor while his representative dealt with the committee. The representative was not given particulars of the charge against Hook, and was not given evidence of the charge prior to the hearing. The manager was present at the deliberation of the committee. The committee decided to adhere to the original decision.

Mr Hook commenced legal proceedings against the committee for breach of natural justice. The conclusion of the sorry affair was that the decision to ban Mr Hook for life was quashed.

¹ *R v Metropolitan Borough Council, ex parte Hook* [1976] 1 W.L.R 1052, per Lord Denning.

A satisfactory result for Mr Hook? The decision to ban Mr Hook occurred on the 30th of October 1974. The case was not heard in the Court of Appeal until the 20th February 1976. For that simple and spontaneous act of public urination, Mr Hook lost the ability to trade in the market for a year and a half, which was his livelihood.

At present, as it was in 1976, there is no general discretionary power vested in the courts to award monetary compensation for unlawful administrative action². There remains a 'chapter of public law still...largely unwritten'³. Monetary redress for maladministration cannot be obtained through judicial review proceedings. The claim must constitute a pre-existing tort. Yet in most situations, it is rare that a decision impugned on any of the grounds of review will also constitute a tort. This is a less than satisfactory result for a plaintiff who has invested time and money and stress into litigation that does not yield the result they may have anticipated -

'clients who have suffered loss as a result of invalid administrative action feel and express, often in colourful language, a very strong sense of injustice over the difficulty and frequently the inability to obtain some appropriate redress for the loss they have sustained. Their bitterness is often compounded by the realisation that their taxes are supporting the defendant who, if a public official, suffers no financial loss and little personal inconvenience or frustration in connection with the administrative actions that are called into question.'⁴

² I am using the term 'unlawful' to relate to the three traditional grounds of judicial review for which a decision may be impugned: illegality, irrationality and procedural impropriety

³ *Somerville v Scottish Ministers* [2007] UKHL 44 per Lord Scott at [77].

⁴ G P Barton "Damages in Administrative Law" in *Judicial Review of Administrative Action in the 1980's: Problems and Perspectives* Michael Taggart (ed) (Oxford Uni Press, 1986, pp123-152) p147.

Administrative law must find a way to ensure the actual outcome does not negate the triumph and render the case a 'pyrrhic victory'⁵.

B. WHY THIS PROBLEM EXISTS

Why does this position exist in administrative law? Part of the reason stems from the place of judicial review in our constitutional framework. The institution of judicial review encompasses 'the rule of law, the separation of powers, and the independence of the judiciary'⁶.

A fundamental tenet of the rule of law is the equality principle. The equality principle, as articulated by Dicey, is the idea that every person is subject to the same law, and no one is above the law. This is a fundamental tenet to the rule of law. Every person is subject to the same rules of legal liability, including those who act in exercise of executive power –

'[E]very official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen. The Reports abound with cases in which officials have been brought before the courts...for acts done in their official character but in excess of their lawful authority'⁷

This involves two necessary limbs. The first is that the government should not have the benefit of immunities that are not also enjoyed by its subjects, and

⁵ term adopted from Jeremy McBride *Damages as a Remedy for Unlawful Administrative Action* Cambridge Law Journal (1979, November, 38(2), p323-345) p323. This term is a reference to King Pyrrhus of Epirus who defeated the Romans in 279BC but suffered heavy casualties.

⁶ Phillip Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Brookers, Wellington, 2007), p815.

⁷ A V Dicey *An Introduction to the Study of the Law of the Constitution* (10th ed, Macmillan Press, Hong Kong, 1959), p193.

secondly the government should not be subject to liabilities that citizens are not also subject to⁸.

Dicey's equality principle resulted in tort law being the predominant method of controlling executive power⁹. If Crown action is illegal it may constitute a tort in private law. It is in this area that the Crown can be exposed to damages claims in the same manner a citizen would if they committed a tort action.

But it is clear the Diceyan theory did not present us with the whole picture. It 'assumed...that exercise of broad discretionary power was absent'¹⁰. It ignored the fact that public authorities, unlike private citizens, are vested with enormous coercive powers, and these powers might be abused in ways that do not involve any actionable wrong in private law¹¹.

During the time of the Second World War, legal history saw the development of a completely separate regime of liability that is not applicable to private citizens – judicial review¹². It has been expressly recognised that judicial review was an invention to ensure the rule of law over actions of the executive¹³. Traditionally, as part of the Diceyan hangover, it was thought to be vital to keep the regime of public law liability distinct from private law¹⁴. For this reason, administrative law remedies and private law damages exist in

⁸ Peter Cane, "Damages in Public Law", *Otago Law Review* (1999, vol. 9, pp489-517), p490.

⁹ Lord Woolf, Jowell, J., Le Sueur, A., and De Smith, S., *De Smith's Judicial Review* (6th ed, Sweet & Maxwell, London, 2007), para 19.027.

¹⁰ Paul Craig, *Administrative Law* (5th ed, Sweet & Maxwell, 2003), p4.

¹¹ Joseph, above n6, p819.

¹² *Ibid.*, p816.

¹³ *Mercury Energy Ltd v Electricity Corp of NZ Ltd* [1994] 2 NZLR 385 (PC), p388.

¹⁴ Geoff McLay, "The Revolution in Public Authority Law" in Andrew Butler and Geoff McLay (eds), *New Zealand Law Society Seminar: Liability of Public Authorities* (New Zealand Law Society, Wellington, 2004, pp13-16), p16.

'parallel universes'¹⁵. If an action does not constitute a tort, then there can be no recovery of damages through public law, even if that action is illegal.

The equality principle in its present form therefore restricts government liability law, rather than expanding it as the principle in its unqualified form suggests. The continued non-availability of damages in public law is anomalous to Dicey's equality principle and '[t]here is seldom much reflection on whether one can accept the equality principle...and, on the other hand, coherently deny compensation to those who are hurt by actions deemed illegal by administrative law'¹⁶.

Consequently, as mentioned above, when those harmed by administrative action seek monetary redress they must attempt to frame their claim to fit it into tortious action.

C. PROCEEDING BY TORT – A TORTUROUS PROCESS?

The torts that may apply to public authorities are breach of statutory duty, negligence and misfeasance in public office. These offer the possibility of recovering damages for unlawful administrative action on some occasions.

To succeed in a claim for breach of statutory duty, the existence of an enforceable duty giving rise to a claim in damages must be established. This is a matter of statutory construction. This can be established via the test

¹⁵ McLay, above n14.

¹⁶ Geoff McLay, "Public Liability Revisited" in Chris Curran, Dean Knight and Geoff McLay (eds), *New Zealand Law Society Seminar: Liability of Public Authorities* (New Zealand Law Society, Wellington, June 2009, pp1-11), p2.

emphasised in *X(Minors) v Bedfordshire County Council*¹⁷ where a private law cause of action was said to arise –

‘if it can be shown, as a matter of construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public, and that Parliament intended to confer on members of that class a private right of action for breach of that duty’¹⁸

It has also been recognised that in some situations a public authority may be liable in negligence. The scope of public law negligence is very limited. The requirement that a duty of care exists works as a control factor. It allows the courts to deny a duty of care in situations where to find such a duty would hamper the public authority from performance of their duties.

Misfeasance in public office is the only specific ‘public law tort’. Misfeasance in public office requires that the defendant is a public officer, who acted with malice towards the plaintiff, or with knowledge that the conduct was unlawful and likely to injure the plaintiff. There must also, in most cases, be proof that the plaintiff suffered damage.

Attempting to fit unlawful administrative action into a pre-existing tort action is often like trying to fit a round peg into a square hole. *Dunlop v Woollahra*¹⁹ illustrates this point. In this case the appellant had purchased property with the intention of obtaining planning consent to erect eight storey buildings of residential flats. The plan was to on sell the site to a development company at a price greatly enhanced by the planning consent. The local authority was opposed to this development and on the advice of its solicitors it passed two

¹⁷ [1995] 2 AC 633

¹⁸ per Lord Browne-Wilkinson, p731.

¹⁹ [1982] AC 158

invalid resolutions that limited the number of storeys that could be built and imposed a building line restriction.

The plaintiff was successful in obtaining declarations that the resolutions were null and void. In between the resolutions being made and the subsequent declarations by the court, there had been a slump in the property market. The appellant could not sell the property at the price he originally envisaged and incurred significant expenses.

The plaintiff brought an action claiming damages for the loss, contending, amongst other things, negligence for failing to afford the plaintiff a hearing before deciding to implement the resolutions. The claim was denied on the grounds that the failure to grant a hearing cannot *alone* amount to a claim for breach of a duty of care. That is to say, there is no duty of care in negligence to afford a hearing. There is a *public law duty* to grant someone a hearing. However, breach of that public law duty cannot sound in damages.

But neither the peg nor the hole is to blame. The mandate that damages are only available through private law actions against the State may be nothing more than 'an unthinking identification of damages with certain causes of actions and not others, and the fact that in common law systems, public law has been quite a recent development'²⁰.

D: WHY NATURAL JUSTICE?

This dissertation will focus in part on whether damages are available in particular for a breach of natural justice. The reason why there ought to be a

²⁰ Cane, above n8, p489.

focus on natural justice is because of an important development in our law – namely the New Zealand Bill of Rights Act 1990 and *Baigent* damages. The *Baigent* remedy provides us with the only testing ground in which ‘public law’ damages have been developed. The issue with this testing ground is the Bill of Rights is primarily concerned with *human rights*. Procedural impropriety is the only head of review that has a correlating right in the Bill of Rights through section 27(1).

Procedural impropriety, or natural justice as it will be termed in this dissertation, encompasses two key concepts – *audi alteram parte*, that an individual must be given adequate notice of the case against them and an adequate hearing, and *nemo iudex in causa sua* which requires that the adjudicator be unbiased. This may present a somewhat misleading picture, as each of these principles have sub rules that result in the principle of natural justice having a very wide scope.

All of the rules will not be canvassed here. It will suffice to say the application and content of the rules of natural justice depend on the facts of the case, chiefly the nature of the power that is exercised and the resulting effect on individual interests.

The point is natural justice has many dimensions and applies to a broad range of situations. It applies not only in criminal contexts where liberty is at stake, but also in commercial situations such as licensing where the interest at stake is merely economic.

The reason why it is important to emphasize that different interests might be at stake depending on the circumstances is that they may result in different loss. When someone is denied renewal of a license in breach of natural justice the

loss is economic. Where someone has been denied the chance to mitigate their sentence, the loss becomes harder to quantify. And lastly, the question might arise as to whether courts would ever compensate for violation of the right to natural justice independent of any harm caused.

E: HISTORICAL PROBLEMS SPECIFIC TO NATURAL JUSTICE

Breaches of natural justice were traditionally perceived as particularly inappropriate candidates for monetary redress because of the now outdated distinction between acts that are 'void' and acts that are 'voidable'.

In *Dunlop v Woollahra*²¹ the Court concluded no damages would be payable for another reason. The effect of the failure to provide an adequate hearing rendered the exercise of the power *void ab initio*. This means the decision was incapable of affecting legal rights, as it was invalid from the outset, and therefore the plaintiff was free to ignore the resolutions. Thus, the damage suffered by the plaintiff could not be said to have flowed from the decision but rather was caused by the plaintiff himself.

It is now generally accepted a decision made contrary to natural justice has the consequences stated in *Calvin v Carr* –

'a decision made contrary to natural justice is void, but that, until it is so declared by a competent body or court, it may have some effect, or existence, in law. This condition might be better expressed by saying that the decision is invalid or vitiated.'²²

²¹ [1982] A.C 158

²² [1980] A.C 574, at p589-90

The position stated in *Dunlop v Woollahra* that the cause of the injury cannot be regarded as flowing from the original decision because that decision ought to be ignored, is incorrect.

F: SEARCHING FOR THE ANSWER

For decades this problem has been commented on without reaching any kind of satisfactory conclusion. In 1980, the Public and Administrative Law Reform Committee concluded that the common law cannot be expected to evolve to produce 'a satisfactory principle of public liability...based as it is on concepts of private liability'²³. The Committee recommended a framework for unlawful administrative action based on the principle of equality before public burdens:

'[E]xceptional losses should not be borne by the individual on whom they have been inflicted by the government or governmental agency in pursuit of the public good. If the assumption is that the community benefits from the activity, then the conclusion must be that the community should bear the cost of it. Unlawful governmental action is to be perceived within this framework.'²⁴

Yet twenty nine years on, are we any closer to a damages remedy in judicial review? The question is still 'whether a system of remedies in administrative law can be complete without the provision of rights to compensation and restitution to people harmed by ultra vires acts or omissions of public bodies.'²⁵

²³ Public and Administrative Law Reform Committee, *Damages in Administrative Law* (Government Printer, Wellington, 1980), p2.

²⁴ Ibid.

²⁵ Lord Woolf, Jowell, J., Le Sueur, A., and De Smith, S. above n8.

The debate is being re-opened by the recent consultation paper published by the Law Commission for England and Wales. This consultation paper sets out a proposal for reform of public law liability and tentatively suggests the creation of a new damages remedy for judicial review proceedings. This will be discussed further in Chapter II.

Furthermore, developments of the *Baigent* remedy have at least provided a measure of redress for Bill of Rights breaches.

The scope of this development, considered in Chapter III, is most likely to be felt in cases involving human rights issues, rather than to provide any redress for the Harry Hook's of the world whose loss is merely economic.

Because of the limited nature of both of the aforementioned options, it is necessary to consider the more comprehensive coverage provided by French administrative law. Whether this system is transplantable to New Zealand will be questioned.

CHAPTER II: THE ENGLISH LAW COMMISSION'S PROPOSALS FOR REFORM

A: THE SCOPE OF THE CONSULTATION PAPER

The Law Commission for England and Wales completed a consultation paper on the 17th of June 2008²⁶ intending to deal with the question of when and how citizens should be able to obtain redress from the State for substandard administrative action. Kenneth Parker QC, the Commissioner responsible for the paper, said that the 'key concern...is to balance fairness to an aggrieved person with the need to promote effective administration.'²⁷

The Law Commission has concluded, provisionally, the inability to obtain monetary remedies in judicial review for loss is an unsatisfactory position in English law. The reform has had a hearty welcome, with Fordham asserting that 'public lawyers should unite behind it, Government should accept it, and should enact it'²⁸.

As will be discussed, however, it is not the *substance* of what the Law Commission is suggesting that calls for celebration but rather the mere fact they are suggesting it in the first place.

B: THE POSITION FOR ADMINISTRATIVE REDRESS IN ENGLAND

²⁶ Law Commission for England and Wales, *Administrative Redress: Public Bodies and the Citizen*, Consultation Paper no. 187, (Norwich: Stationary Office, London, 2008)

²⁷ Kenneth Parker QC, Law Commission press release, 3 July 2008, http://www.lawcom.gov.uk/docs/cp187_press_release.pdf, accessed 11/10/2009

²⁸ Michael Fordham "Monetary Awards in Judicial Review" *Public Law*, (January 2009, pp1-4), p1.

As will be recalled from Chapter I, monetary remedies in judicial review proceedings are generally unavailable. In England, if compensation is claimed, it must be claimed in conjunction with an existing judicial review remedy. The claimant must also show that damages would ordinarily have been awarded in private law for the conduct complained of²⁹.

The position in England has added dimensions not present in New Zealand law. Domestic incorporation of the European Convention on Human Rights through the Human Rights Act 1998 provided a possible means of obtaining monetary remedies for unlawful administrative action.

The Human Rights Act 1998 (UK)

Section 8 of the Human Rights Act provides a potential direct route to obtaining monetary remedies. Under section 8(1), the court has the power to grant an award of damages for unlawful administrative action. 'Unlawful' action arises if the public authority acts in a manner that is incompatible with a Convention right³⁰. Monetary remedies are not granted as of right. They will only be awarded if they are necessary to award 'just satisfaction', taking into account any other remedy that is given³¹. This term of 'just satisfaction' is the approach adopted by the European Court of Human Rights³².

In determining whether to make an award of damages and the quantum of any award under the Human Rights Act, the court must take into account the principles applied by the European Court of Human Rights in relation to compensation under Article 41³³.

²⁹ Supreme Court Act 1981 section 31(4), Civil Procedure Rules rule 54.3

³⁰ Section 6(1) Human Rights Act 1998

³¹ Section 8(3) Human Rights Act 1998 (UK)

³² Article 41, European Convention on Human Rights

³³ Section 8(4), Human Rights Act 1998 (UK)

European Union Law

Another possible avenue to obtain monetary remedies is under European Union Law. A claimant can recover compensation from a member state where that state has breach a rule of European Union law³⁴. The European Court of Justice has established three conditions that must be satisfied. In brief, the rule of European Union law breached must have been intended to confer rights on the individual, the breach must be 'sufficiently serious' and there must be a direct causal link between the breach and the damage³⁵.

There is therefore the uncomfortable position that a claimant could obtain monetary remedies for a breach of European Union law, or under section 8(1) of the Human Rights Act, but not where the proceedings are brought by way of judicial review, and do not allege tortious conduct.

The Law Commission suggests there is a need for monetary remedies to be available in public law, outside of the limited public law tort options and the aforementioned possibility for damages for a breach of European Union law, or under section 8(1) of the Human Rights Act.

This is justified by reference to the fact that there seems to be a great injustice in the ability of a plaintiff to successfully challenge a decision in judicial review proceedings, and the inability to then recover loss.

³⁴ Joined cases C-6/90 and C-9/90 *Francoovich and Bonifaci v Italy* [1991] ECR 1-5357

³⁵ Joined cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v Federal Republic of Germany* and *R v Secretary of State for Transport ex parte Factortame Ltd* [1996] ECR 1-1029

This is regarded as especially problematic in cases where a license has been denied or revoked wrongfully and the plaintiff has lost income in the interim between the unlawful decision and the courts adjudication on the case³⁶.

C: SUGGESTED OPTIONS FOR REFORM

The Law Commission recommends reform of the remedies available against public bodies in accordance with 'modified corrective justice' principles. This is the principle that someone who causes harm to another has a duty to remedy that harm³⁷. The role of the court is to restore that equilibrium. This principle must be *modified* to take into account the fact that public authorities have wider duties to the public and awards of compensation could impede the discharge of those duties.

If a plaintiff has made a successful challenge in judicial review proceedings, then a finding of public law unlawfulness would create the potential for damages to be awarded, in accordance with the principles below³⁸.

If a claimant satisfies the suggested elements of conferral of a benefit, 'serious fault' and causation, compensatory remedies should be available as a discretionary remedy. This is subject to some preliminary matters that already exist in judicial review proceedings. Justiciability will remain as it is conceived in administrative law³⁹. Only 'truly public' activity will fall under scrutiny⁴⁰. Whether activity is truly public, and so amendable to review, is

³⁶ Law Commission for England and Wales, above n26, para 4.28

³⁷ Tom Cornford "Administrative Redress: The Law Commission's Consultation Paper", *Public Law* (January 2009, pp70-88), p71.

³⁸ Law Commission for England and Wales, above n26, para 4.98

³⁹ Law Commission for England and Wales, above n26, para 4.108

⁴⁰ *Ibid.*, para 4.110

dependant on consideration of the body itself, taking into account the purpose and functions of the body, and the particular actions of that body⁴¹.

Conferral of a benefit test

The 'conferral of a benefit' test is modelled on the 'conferral of rights' approach of the European Court of Justice⁴². The slight change in terminology reflects the fact that public law remedies are not restricted to a narrow class of rights. It is sufficient the legal regime intended to promote or protect the interests of a class of persons to which the claimant belongs to and the harm suffered by the individual was of a similar nature to the benefit that the regime conferred⁴³.

If a claimant can establish there was a conferral of a benefit, then they must go on to show the 'right' was infringed in a manner that meets the 'serious fault' threshold.

Serious fault test

The Law Commission recommends adopting the concept of fault based liability from negligence law with some modifications⁴⁴. What is required here is an aggravated level of fault⁴⁵. This reflects the balancing exercise that must be struck in public law liability between the interests of the plaintiff and the demands placed on public bodies⁴⁶.

⁴¹ Ibid., para 4.113

⁴² Ibid., para 4.136

⁴³ Ibid., para 4.133

⁴⁴ Ibid., para 4.144

⁴⁵ Ibid., para 4.146

⁴⁶ Law Commission for England and Wales, above n26, para 4.144

The Law Commission lists several factors that could lead to a finding of 'fault'⁴⁷:

- likelihood of harm involved in the conduct
- seriousness of harm
- knowledge of the public body at the time the harm was caused that their actions could cause harm
- cost and practicability of avoiding the harm
- social utility of the activity
- extent and duration of departures from established good practise
- extent to which senior administrators had made possible or facilitated the failures

It is only when these factors are engaged in an *aggravated* manner that the conduct will move beyond mere administrative failure and into compensatable harm and meet the threshold of 'serious fault'⁴⁸. The conduct must fall far below that expected of public bodies⁴⁹.

The Law Commission refers to the developing jurisprudence of the Court of Justice in dealing with breaches of EU law as another measure of guidance. Within the 'sufficiently serious' test, two factors have been established as an indication of when a breach will be serious. The breach must be manifest and the consequences that follow must be grave⁵⁰. The Court of Justice also provides factors that can assist in characterising the breach⁵¹;

⁴⁷ Law Commission for England and Wales, above n26, para 4.146.

⁴⁸ *Ibid.*, para 4.147.

⁴⁹ *Ibid.*, para 4.147.

⁵⁰ *Ibid.*, para 4.151.

⁵¹ *Ibid.*, para 4.151.

- the clarity and precision of the rule breached
- measure of discretion left by that rule to national authorities
- whether the infringement was intentional or involuntary
- whether any error of law was excusable or inexcusable
- whether or not the position taken by a community institution may have contributed towards the omission
- adoption or retention of national measures or practises contrary to community law

Causation

In determining causation, the Law Commission recommends applying general tort principles⁵². The claimant must establish the defendant's conduct resulted in the damage alleged, and the damage is not too remote a consequence of the defendant's actions⁵³.

This will be a major limitation in judicial review proceedings, especially in cases of alleged procedural impropriety. In judicial review proceedings if there is a finding of procedural impropriety the decision will often be remitted to the decision maker for reconsideration. If the decision maker, on the second consideration comes to the same conclusion the plaintiff will effectively have not suffered any loss.

The Law Commission recommends in cases where the decision maker subsequently decides in favour of the plaintiff, damages ought to be available for loss sustained in that period⁵⁴.

⁵² Law Commission for England and Wales, above n26, para 4.168.

⁵³ *Ibid.*, para 4.168.

⁵⁴ *Ibid.*, para 4.172.

D: WHAT KIND OF DAMAGE WILL BE RECOVERABLE?

Provided the plaintiff can establish these three elements in judicial review proceedings, subsequent to a finding of unlawfulness, damages should follow. The purpose of damages is to restore the plaintiff to the position they would be in if the breach had *not* occurred. This is a concept drawn directly from rules that govern recovery in negligence cases⁵⁵.

Although the Law Commission acknowledges that cases of pure economic loss have caused problems in tort law, it is reluctant to place a strict limitation on this type of recovery⁵⁶. The justification for this stance is cases involving unlawful refusal of a license causing financial loss are the 'paradigm' case in judicial review proceedings⁵⁷. Any bar on recovery for pure economic loss would be too restrictive, and would, it is argued, reduce the effectiveness of the suggested reform⁵⁸.

E: THE REFORM - CAUSE TO CELEBRATE?

When considering the proposed reform, two issues stand out. The first is the lack of any link to concepts of unlawfulness in public law. The second is the importation of concepts from European Union law.

Unlawfulness in a public law sense?

The Law Commission has suggested that claims about unlawfulness will clearly fall to be dealt with under judicial review proceedings, and claims relating to carelessness will be dealt with under private law proceedings for

⁵⁵ Law Commission for England and Wales, above n26, para 4.179.

⁵⁶ *Ibid.*, para 4.179.

⁵⁷ *Ibid.*, para 4.179.

⁵⁸ *Ibid.*, para 4.178.

negligence⁵⁹. This, they say, is because there is ‘a real difference in nature...between public law illegality on the one hand, and negligence, on the other’⁶⁰. It is not at all clear how this distinction operates within the new reforms. The standard has been characterised as ‘neither public law illegality or negligence’⁶¹.

The Law Commission has acknowledged the current position for public law tort based liability – breach of statutory duty, misfeasance in public office and negligence – presents claimants with an almost impossible task and adequate redress is rarely achieved. In determining what actions will attract an award of damages, the Law Commission is clearly suggesting nevertheless that we look to tort principles.

This is clear when we look to the suggested requirement that a plaintiff must prove the legal regime intended to confer a benefit upon the plaintiff, or a class to which the plaintiff belongs. This is identical to the requirement in breach of statutory duty.

The further requirement in the ‘conferral of a benefit’ test is the damage to the plaintiff must be of a similar nature to the benefit intended to be conferred. This is akin to the requirement in breach of statutory duty that the damage caused must be of a kind the statute is designed to prevent. If a plaintiff suffers a different kind of injury, the loss will not be recoverable.

⁵⁹ Law Commission for England and Wales, above n26, para 4.198

⁶⁰ *Ibid.*, para 4.199

⁶¹ Cornford, above n38, p87

This concept will operate as a major limitation for liability, as not all public powers are granted by statute⁶². Furthermore, often harm is caused not by failing to confer a benefit but by the unlawful exercise of public power⁶³. It is suggested instead that courts ought to look to rules of public law. These rules of public law would consist of legislation *and* judicially made rules of administrative law⁶⁴.

Tort references also permeate the further requirement of 'serious fault'. This threatens to open up the tremulous relationship between public law and negligence, by insisting on a fault based regime of liability⁶⁵. Rather than creating a system that links the grounds of review with the remedy, there is a 'nebulous and ill assorted menu of factors'⁶⁶ that should be taken in to account.

Domestication of European Union Law

The importation of 'serious fault' from European Union law may also not be particularly applicable in the domestic context. *Francovich* liability is to ensure uniform compliance with EU law. National authorities, under *Francovich*, cannot claim that the imposition of damages would impede discharge of their duties as the aim of such liability is to ensure compliance with EU law⁶⁷. The harshness of the rule is mitigated by liability only attaching to aggravated breaches of EU law⁶⁸.

⁶² Cornford, above n38, p84.

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*, p78.

⁶⁶ *Ibid.*, p84.

⁶⁷ *Ibid.*, p82.

⁶⁸ *Ibid.*, p82.

There is no need to have this limiting factor on domestic public law liability, because public authorities should, in any liability regime, be able to plead that the imposition of liability would harm the public interest⁶⁹.

F: CONCLUSION

The advantages of the Law Commission's suggestions are in actuality limited to the fact this debate is once more being opened up. The substantive suggestions are far removed from concepts of public law. The Law Commission's recommendations are, in truth, for a new type of public law tort.

It will be interesting to see whether the proposed reform takes a different shape when the Law Commission releases its final report on the subject.

⁶⁹ Cornford, above n38, p82.

CHAPTER III: BAIGENT LIABILITY

A: DEVELOPMENT OF A NEW POWER TO AWARD DAMAGES

*Simpson v Attorney General*⁷⁰ established in New Zealand the availability of damages as a remedy for a breach of the New Zealand Bill of Rights Act 1990 (Bill of Rights). A warrant was issued for the search of Mrs Baigents home. The information relied on was incorrect. The person suspected of selling drugs was not living at that address, nor had any connection with Mrs Baigent. When the police were told they had the wrong house, they replied “[w]e often get it wrong, but while we are here we will have a look around anyway.”⁷¹

Proceedings were brought against the Attorney General alleging negligence in obtaining the warrant, trespass, misfeasance in public office and making an unreasonable search in breach of section 21 of the Bill of Rights.

The majority of the Court of Appeal held damages are available for a breach of the Bill of Rights. This is not a form of vicarious liability. It is direct liability against the Crown as guarantor of the rights and freedoms contained in the Bill of Rights. It is not tort liability, but public law liability. Section 6(5) of the Crown Proceedings Act 1950 did not apply as it only protects against actions in tort.

In deciding the appropriate response to a breach of the Bill of Rights, courts are to bear in mind the remedy must be appropriate and effective⁷². Damages

⁷⁰ [1994] 3 NZLR 667 (CA) (Hereafter referred to as *Baigent*)

⁷¹ *Ibid.*, p670.

⁷² *Ibid.*, p761.

should be considered as one remedial choice. Damages therefore are not available of right but are discretionary.

B: THE STANDARD OF LIABILITY

The Court in *Baigent*⁷³ did not consider whether all breaches of the Bill of Rights potentially attract damages, or whether there must be failure to meet a certain standard. Put another way, would mere administrative failings suffice, or would there need to be something approaching gross misconduct?

It is clear from the facts of *Baigent*⁷⁴ the conduct on behalf of the officers was particularly repugnant and showed flagrant disregard for the plaintiff's right.

Subsequent case law rejected suggestions there ought to be a requirement of conscious violation or reckless indifference for the plaintiff's rights before damages can be considered⁷⁵.

Although there are no formal requirements above and beyond establishing a breach of the Bill of Rights not all breaches will attract the potential for a damages award. It is contingent upon the nature of the right and the nature of the breach. Blanchard J in *Taunoa v Attorney-General*⁷⁶ held 'it may be entirely unnecessary or inappropriate to award damages if the breach is relatively quite minor or the right is of a kind which is appropriate vindicated by non-monetary means'⁷⁷.

⁷³ *Simpson v Attorney-General*, above n71.

⁷⁴ *Ibid.*

⁷⁵ *Whithair v Attorney-General* [1996] 2 NZLR 45. It was also considered in that case that pleading good faith would not provide a defence.

⁷⁶ [2008] 1 NZLR 429 (SC).

⁷⁷ *Ibid.*, para [256].

This is a natural consequence of the notion in *Baigent*⁷⁸ that although a judge has discretion in remedial choice, the focus in selecting that remedy is on providing the plaintiff with a proportionate, appropriate and effective remedy.

An effective remedy is one that meets the aim of *vindicating* the right. Other aims include deterrence, denunciation, and compensation. Blanchard J in *Taunoa* adopted the following definition of vindication from *Fose v Minister of Safety and Security*⁷⁹

One of the ordinary meanings which to vindicate bears, the aptest now it seems to me, is “to defend against encroachment or interference”. Society has an interest in the defence that is required here. Violations of constitutionally protected rights harm not only their particular victims but it as a whole too.

The court in *Taunoa*⁸⁰ concluded vindication is achieved when the court defends and upholds the importance and value of that right. Tipping J found that vindication must be the primary focus of a remedy⁸¹. Some breaches will necessitate an award of damages where a declaration or other remedy fails to vindicate the right.

C: DAMAGES FOR SECTION 27(1)

As we have seen, damages are not available in judicial review proceedings. *Baigent* liability marked a considerable change in New Zealand’s legal landscape, offering the availability of public law damages against the Crown

⁷⁸ *Simpson v Attorney-General*, above n71.

⁷⁹ 1997 (3) SA 786.

⁸⁰ *Taunoa v Attorney-General*, above n77.

⁸¹ *Ibid.*, [317]

for breaches of the Bill of Rights. The question remains as to whether that availability extends to *all* breaches of the Bill of Rights.

Writing in 1994, Rodney Harrison expressed the hope that if damages were available for a breach of section 27(1), this would provide an impetus for change in administrative law, and open up the possibility for monetary remedies in judicial review⁸². If damages are available for a breach of section 27(1), then an inconsistency could be created. Damages would be available for a procedurally flawed decision, but not for an unreasonable decision in judicial review. If the effects of procedural impropriety can be compensated for, then so too should the effects of other grounds of review.

As will be discussed below, there is a pervasive reluctance to award damages for a breach of section 27(1). This reluctance is echoed in the English courts dealing with cases under the Human Rights Act 1998 (UK). Although the advent of the ability to award damages under the Human Rights Act has been heralded as ‘a radical departure in English public law, since maladministration by public bodies does not entitle the injured party to compensation’⁸³, the restrictive approach taken by the courts suggests that, at least in relation to natural justice, the status quo remains at large.

New Zealand

In New Zealand, it is very difficult to be successful in a *Baigent* type claim for a breach of section 27(1). There are two main reasons for this that stem from

⁸² Rodney Harrison, “The Remedial Jurisdiction for Breach of the Bill of Rights” in Grant Huscroft and Paul Rishworth (eds) *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (Brooker’s, Wellington, 1995, pp401-430), p430.

⁸³ Clayton “Damage Limitation: the Courts and the Human Rights Act Damages”, *Public Law* (2005, pp429-439), p429.

the requirement that a remedy for a breach of the Bill of Rights must be effective, appropriate and proportionate.

The first is where the breach of section 27(1) also involves a tort, like false imprisonment for example, damages will be awarded through the private law proceedings first. If the private law proceedings provide an effective remedy, then there is no need for further compensation under the Bill of Rights.

The second reason is even where there is no pre-existing tort, a breach of natural justice may be remedied effectively through other means, such as the appeal process. In these circumstances, the courts look to the existence of something 'more' that would justify an award of *Baigent* damages.

Concurrent claims

The long title of the New Zealand Bill of Rights provides that purpose of the Act is to 'affirm, protect, and promote human rights and fundamental freedoms in New Zealand'. The Bill of Rights is a declaratory document of pre-existing common law rights. As Richardson J stated in *R v Jefferies*⁸⁴:

'The statute is evolutionary not revolutionary in its approach. It draws together but does not create new human rights.'

In many cases, a breach of the Bill of Rights will also involve a claim in tort. Case law subsequent to *Baigent* has held the traditional remedy for a breach of rights is to be found in the common law.

The possibility of concurrent claims was considered in *Baigent*. It was not truly at issue in *Baigent* because a claim in tort was barred by s6(5) Crown

⁸⁴ [1994] 1 NZLR 290, p306

Proceedings Act. Gault J concluded Bill of Rights damages are auxiliary⁸⁵. It would be inappropriate and unnecessary to grant Bill of Rights compensation if the same breach was actionable at common law or under a statute. McKay J recognised that in some situations involving deprivation of liberty there may also be a right to damages for false imprisonment or trespass. This would not, in his opinion, bar an action under the Bill of Rights⁸⁶. Damages could be recoverable by either route.

Cooke P, presenting the most radical view of concurrent liability, said that the correct approach in this situation would be to make a global award under the Bill of Rights⁸⁷. Nominal awards could then be made under other causes of action to avoid double recovery⁸⁸.

Subsequent case law has appeared to embrace Gault J's views in *Baigent*, to the effect that Bill of Rights damages are unlikely to be awarded if there is a pre-existing tort action available.

*Manga v Attorney General*⁸⁹ illustrates this point. The plaintiff in this case commenced proceedings against the Crown for a breach of section 22 of the Bill of Rights⁹⁰ and tortious liability for wrongful imprisonment. Due to a misinterpretation of the law by Corrections, the plaintiff was detained for 252 days longer than he ought to have been. It was accepted the legislation was confusing and poorly drafted, and had since been rectified. The plaintiff was awarded damages in tort to the sum of \$60,000.

⁸⁵ *Simpson v Attorney-General*, above n71, p711.

⁸⁶ *Ibid.*, p767.

⁸⁷ *Ibid.*, p682

⁸⁸ *Ibid.*

⁸⁹ [2000] 2 NZLR 65.

⁹⁰ s22 Liberty of the person - everyone has the right not to be arbitrarily arrested or detained.

In reaching this award, Hammond J considered the injury to feelings and the injury to liberty itself independent of pecuniary loss. In determining the value to be placed on Manga's liberty, the task was to compensate and restore Manga to the position he would have been in had the breach not occurred⁹¹.

Hammond J asked whether there was any basis to award further public law damages. Hammond J concluded the only possible answer would be to make an award on the basis of the affront to liberty *itself*, independent of the harm actually done to Manga⁹². This was seen as compensation for poorly drafted legislation, because the cause of the breach was that the legislation was an 'impenetrable maze'⁹³. Quite clearly, this involves constitutional problems. Parliament is free to enact bad legislation.

Hammond J then issued a declaration for the breach of section 22. The declaration alone was sufficient to provide an effective remedy for the *public* law wrong⁹⁴.

There has been some doubts on whether this is the correct interpretation of *Baigent* liability. Juliet Philpott criticises the approach taken in *Manga* for blurring the distinction between public and private law, and '[allowing] the public law remedial objectives to be absorbed within the private law compensatory focuses⁹⁵.

⁹¹ *Manga v Attorney General*, above n93, para [56].

⁹² *Ibid.*, para [135].

⁹³ *Ibid.*, para [136].

⁹⁴ The Government subsequently adopted Cabinet guidelines whereby those who are wrongfully convicted and imprisoned may receive compensation of up to \$100,000 for each year spent in prison.

⁹⁵ Juliet Philpott "Damages Under the United Kingdom's Human Rights Act 1998 and The New Zealand Bill of Rights Act 1990" *New Zealand Journal of Public and International Law* (2007, Vol 5, pp211-242) p233.

Thomas J, delivering a dissenting judgment in *Dunlea v Attorney General*⁹⁶, rejected altogether the submission that public law damages should not be available where there is a concurrent private law action. Thomas J held public law damages are available where there is no existing tort cause of action *and* where there is an existing tort cause of action but the remedy is inadequate. The key question, according to Thomas J, is not whether an existing remedy is available but whether that private law remedy provides an effective remedy⁹⁷.

In Thomas J's reasoning, private law damages do not provide an effective remedy because public and private law remedies have fundamentally different purposes that are not coextensive⁹⁸. A private law right is a private right. The claim under the Bill of Rights has an 'added dimension', namely the intrinsic value that Parliament has vested in that right⁹⁹.

Thomas J's discussion on remedies for a breach of 'constitutional rights' has been endorsed by the House of Lords in *Attorney- General of Trinidad and Tobago v Ramanoop*¹⁰⁰ as of considerable assistance in assessing constitutional remedies.

The argument that Bill of Rights damages involve an 'extra dimension' that could allow concurrent claims has not gained much traction in the courts. A plaintiff is unlikely to recover damages for a breach of the Bill of Rights if there is a pre-existing tort action.

⁹⁶ [2000] 3 NZLR 136.

⁹⁷ *Ibid.*, para [57].

⁹⁸ *Ibid.*, para [64] – [67].

⁹⁹ *Ibid.*, para [66].

¹⁰⁰ [2005] UKPC 15.

Breaches of natural justice that do not involve a concurrent claim

*Upton v Green*¹⁰¹ represented the high point for damages for a breach of section 27(1). This was one of the earliest cases involving a claim for damages for a breach of section 27(1) to be decided following *Baigent*.

In *Upton*, the plaintiff was sentenced without having an opportunity to make submissions. Tompkins J held that because the term of imprisonment had already been served the only method of rectifying the breach would be an award of damages. Tompkins J did not consider issuing a declaration.

The premise for awarding damages for the breach of section 27(1) was there was a reasonable chance the defendant may have been persuaded to impose a lesser sentence if the plaintiff had been heard. This is despite the fact Tompkins J could not conclude the outcome would have been different if the plaintiff had been heard. Rather, actual prejudice need not be shown – the risk of it is enough¹⁰². The plaintiff was awarded \$15,000 not on the basis of any ‘mathematical process’¹⁰³, but rather on a broad assessment of the loss of a chance.

Upton v Green was appealed by the Crown to the Court of Appeal¹⁰⁴. One of the grounds of appeal was that the damages were inappropriate or excessive given Mr Upton’s prior conduct. The Court of Appeal could not find any basis for overturning or reducing the award made by Tompkins J. In coming to this conclusion, the Court of Appeal noted the serious consequences of the breach of natural justice¹⁰⁵.

¹⁰¹ (1996) 3 HRNZ 179

¹⁰² *Ibid.*, p202

¹⁰³ *Ibid.*

¹⁰⁴ *Attorney General v Upton* (1998) 5 HRNZ 54 (CA)

¹⁰⁵ *Attorney General v Upton*, above n104, p64.

Despite this seeming endorsement from the Court of Appeal, subsequent case law has heavily criticised the approach taken in *Upton*, and the availability of damages for a breach of section 27(1) itself. The Crown repeatedly resists claims for damages in such cases, even though in *Rawlinson v Rice*¹⁰⁶ it accepted monetary liability to the plaintiff for a breach of s27(1). *Brown v Attorney-General*¹⁰⁷, *Udompun v Attorney-General*¹⁰⁸ and *McKean v Attorney General*¹⁰⁹ discussed below are examples of the conservative approach currently taken in regards to damages for section 27(1).

Delivering a separate judgment in *Brown*, William Young J expressed strong views about the inappropriateness of damages as a remedy for a breach of section 27(1). William Young J considered that the rules of natural justice could be best protected via the appeal process, rather than by awards of damages¹¹⁰.

William Young J expressed concerns that if there is an entitlement to compensation for breaches of natural justice, the courts will be less willing to find that there has been unfairness¹¹¹.

Lastly, William Young J concluded that the legislature in 1990 did not intend breaches of section 27(1) to attract monetary remedies¹¹². Such a development

¹⁰⁶ The plaintiff in that case had been subjected to a non molestation order made in the Family Court that the court had no jurisdiction to make, and was made in breach of natural justice. The plaintiff proceeded unsuccessfully with a claim for misfeasance in public office, despite the offer by Crown law for a monetary settlement for the breach of section 27(1) NZBORA.

¹⁰⁷ [2005] 2 NZLR 405.

¹⁰⁸ [2005] 3 NZLR 204.

¹⁰⁹ [2007] 3 NZLR 819.

¹¹⁰ *Brown v Attorney-General*, above n108, para [142].

¹¹¹ *Ibid.*

¹¹² *Ibid.*

would ultimately place a financial burden on the tax payer that parliament did not intend¹¹³.

William Young J rejected any suggestion of awarding damages even in cases that move beyond a mere breach of natural justice, concluding that:

‘The not entirely happy experience of the Courts in this country with claims for exemplary damages suggests that the costs to litigants and the community of such a discretionary head of jurisdiction would be grossly disproportionate to the value of the few, if any, awards likely to be made and to any other public benefits likely to be derived from such litigation.’¹¹⁴

Some comment is necessary on William Young J’s comments. Upon the birth of the *Baigent* remedy, many commentators criticised the court for creating a remedy that Parliament did not intend¹¹⁵. It is now many years on from *Baigent*, and the remedy is firmly established. Parliament had ample chance to curtail the remedy, but has chosen to leave it to judicial discretion. It is difficult to follow the logic of an argument that suggests Parliament did not intend monetary remedies for a breach of section 27(1) when it appears to have accepted the *Baigent* remedy wholesale.

While the majority did not express any views on the appropriateness of compensation as a remedy for a breach of section 27(1), they acknowledged the strength of William Young J’s conclusions¹¹⁶. A conclusion on this matter was unnecessary as the court found there was no breach of section 27(1).

¹¹³ *Brown v Attorney-General*, above n108, para [141]

¹¹⁴ *Ibid*.

¹¹⁵ see for example J A Smellie “The Allure of Rights Talk: *Baigent*’s Case in the Court of Appeal” *Otago Law Review*, (1994, Vol 8, pp188-205)

¹¹⁶ *Brown v Attorney-General*, above n108, para [101].

Udompun concerned a case where a Thai immigrant had been detained first at Auckland airport, and then at the police station after being refused entry into New Zealand. The trial judge had awarded the plaintiff \$25,000 in recognition of the breach of section 27(1)¹¹⁷. This amount was said to be justified because the breach of natural justice was the ‘catalyst’ for the suffering and loss of dignity she experienced later on¹¹⁸. On appeal, the Court held there had been no breach of section 27(1). Nevertheless, the Court made some general comments about the availability of damages for a section 27(1) breach.

The Court agreed with the Crowns submissions that section 27(1) should not be seen as creating any change in the current position in administrative law that damages are generally unavailable¹¹⁹. An inconsistency would be created if they were available – damages would be available for a procedurally flawed decision but not a procedurally correct but irrational decision. The court essentially agreed with the position of William Young J in *Brown*. In normal circumstances it will be sufficient the decision is set aside with an order it should be reconsidered¹²⁰.

A justification for this cautious approach was said to be found in the original rationale for *Baigent* damages. One of the factors that influenced the court in *Baigent* to develop a monetary remedy was to meet New Zealand’s international obligations under the International Convention on Civil and Political Rights (ICCPR)¹²¹. There is no general protection given to natural justice in the ICCPR other than in the criminal context in Article 14(1)¹²².

¹¹⁷ *Udompun v Attorney-General* (2003) 7 HRNZ 238.

¹¹⁸ *Ibid.*, para [180].

¹¹⁹ *Udompun v Attorney-General*, above n109, para [168].

¹²⁰ *Ibid.*, para [169].

¹²¹ *Simpson v Attorney-General*, above n71, Cooke P at p676, Casey J at p691, Hardie-Boys at p699, McKay J at p718.

¹²² *Udompun*, above n109, para [170].

McKean considered the impact of *Brown* and *Udompun* on the decision in *Upton*. *McKean* involved random drug testing in prison. The plaintiff's sample was found to be inconsistent with urine, and he was charged with tampering with the urine sample. The charge was heard by a Visiting Justice who found the charge proven. The plaintiff was sentenced on the 5th September to five days cell confinement and twenty eight days loss of privileges. On the 19th of September the plaintiff filed for judicial review. The court made an interim order deferring completion of the sentence pending the outcome of the review case.

In the judicial review proceedings the defendant conceded there was a breach of natural justice through the refusal of legal representation and the failure to provide the plaintiff with a copy of the report that the prosecution case was based on. The plaintiff claimed loss in the form of the five days of cell confinement, loss of privileges up until the interim order, restrictions resulting from being identified as a drug user, and emotional harm.

In determining whether compensation would be an appropriate response here, Fogarty J considered *Upton* was not regarded as settling the law in this area¹²³. Although the comments in *Brown* and *Udompun* were essentially obiter, Fogarty J saw this as strong indications from the Court of Appeal that damages should not generally be available for a breach of natural justice.

Fogarty J concluded the strongest reason against an award of damages in this case was the need to protect the independence of the judiciary¹²⁴. Imposing fiscal liability on the Crown for the actions of a Visiting Justice could result in

¹²³ *McKean*, above n110, para [21].

¹²⁴ *McKean*, above n110, para [34].

public pressure on the executive to exert greater control. This would run contrary to the imperative principle that the judiciary ought to be independent from executive control.

In reaching this finding, Fogarty J saw two possible interpretations of *Baigent*. The first is the Crown is the guarantor for all bodies under section 3 and their actions¹²⁵. The second narrower interpretation of *Baigent* would be the case stands on its own facts¹²⁶. *Baigent* is therefore authority for the proposition that direct liability may be imposed on the Crown for actions of the police that are in violation of the Bill of Rights¹²⁷. Fogarty J preferred the narrower reading as it accorded neatly with his concern to uphold judicial independence¹²⁸.

The above cases show it is highly unlikely a claimant will be successful in a claim for damages for a breach of natural justice where the breach can be adequately remedied through the appeal process. But what happens if the claimant has lost something that cannot be regained via appeal?

The Court of Appeal in *Binstead v Northern Region Domestic Violence Approval Panel*¹²⁹ accepted the possibility that the plaintiff could recover a small portion of lost wages that resulted from the breach of natural justice. Mr Binstead was the owner and facilitator of a group for men aimed at stopping violence and providing anger management courses. Regulations provided that such groups were subject to approval. The Panel responsible under the regulations

¹²⁵ *McKean*, above n110, para [23].

¹²⁶ *Ibid.*, para [26].

¹²⁷ *Ibid.*, para [26].

¹²⁸ *Ibid.*, para [35].

¹²⁹ [2002] NZFLR 832.

decided not to renew the plaintiffs approved status in breach of natural justice.

The court held the main aim in providing a remedy for a breach of natural justice is vindication of that right¹³⁰. Vindication can be achieved by quashing the decision¹³¹. Monetary compensation should only be available in 'egregious' cases that involve loss of liberty¹³².

The order the Panel had breached section 27(1), the reinstatement of his approved status and the ability to have his application reconsidered provided effective vindication of his rights¹³³. Subject to proof of causation and quantum, some part of his lost income could be recovered. Although this is a modest and conservative approach to damages, it does show a willingness to at least recompense for lost earnings¹³⁴.

In 2009 the Court of Appeal in *Combined Beneficiaries Union Inc v Auckland City COGS Committee*¹³⁵ had another opportunity to settle the law regarding damages for a breach of section 27(1). In a more extensive judgment, the Court of Appeal concluded, unsurprisingly, damages for a breach of section 27(1) would not generally be available. This accorded with the views expressed in the Supreme Court in *Taunoa*. Section 27(1) was isolated by Blanchard J in *Taunoa* as a right unlikely to warrant damages if breached because other means of addressing the wrong are available¹³⁶.

¹³⁰ *Binstead*, above n129, para [34].

¹³¹ *Ibid.*

¹³² *Ibid.*, para [35].

¹³³ *Ibid.*, para [39].

¹³⁴ *Ibid.*

¹³⁵ [2009] 2 NZLR 56. Hereafter referred to as COGS.

¹³⁶ *Taunoa v Attorney-General*, above n77, para [261].

The first reason advanced in *COGS* relates to the relationship between administrative law and the NZBORA. Damages are not generally available at common law through judicial review, and the *Baigent* remedy should not be used to fill any apparent gap in the law¹³⁷. If damages were available for a breach of section 27(1), a plaintiff could circumvent the unavailability of damages in judicial review proceedings by opting to pursue a claim under the Bill of Rights instead. This, of course, is premised on the person or body responsible for the breach being subject to the Bill of Rights under section 3.

Related to the above is an inconsistency argument. If a breach has caused 'irrevocable financial loss'¹³⁸ it does seem the only way it can be remedied is through an award of damages¹³⁹. There is no protection in the Bill of Rights against irrational decisions. This is a concept particular to judicial review proceedings, and the unavailability of damages in that cause of action would remain.

The potential loss from a procedurally flawed decision and an irrational decision could be the same, but no redress would be available for the latter decision¹⁴⁰. The fact that the legislature has chosen to include section 27(1) in the Bill of Rights would be the only justification for damages being available in one situation but not the other.

Proceeding from these concerns, the Court held that the key concern in such cases is to bring the infringing conduct to an end¹⁴¹. This can be achieved by

¹³⁷ *COGS*, above n136, para [57].

¹³⁸ Smellie, above n116, p200.

¹³⁹ as seen in *Binstead*, above n130.

¹⁴⁰ Smellie, above n116, p201.

¹⁴¹ *COGS*, above n136, para [62].

standard administrative law remedies¹⁴². In most cases ending the conduct and, in some situations, issuing a declaration will be sufficient remedy.

The court gave some indication as to when circumstances might justify an award of damages. By way of summary, the court held damages for a breach of section 27(1) would only be appropriate in the following type of situation –

‘where there is no other effective remedy, where human dignity or personal integrity or (possibly) the integrity of property are also involved, and where the breach is of such constitutional significance and seriousness that it would shock the public conscience and justify damages being paid out of the public purse’¹⁴³

Damages were declined in this situation because the breach was trivial, did not involve dignity or personal integrity, no property right was engaged, and the breach was committed in attempts to tidy up administrative of the COGS scheme.

Although the Court declined to overrule *Upton*, they concluded they could have had grounds to as it ‘appears to have merely been assumed...that Bill of Rights damages could be awarded’¹⁴⁴.

Summary

In selection of a remedy under the Bill of Rights, the courts focus is on providing the plaintiff with an effective remedy. Damages are no longer the primary remedy for a breach of the Bill of Rights, but are residual.

¹⁴² COGS, above n136, para [67].

¹⁴³ Ibid., para [70].

¹⁴⁴ Ibid., para [71].

Damages will generally only be awarded if the court concludes the plaintiff has not been provided with an effective remedy. It is clear the courts consider a breach of section 27(1) can be dealt with effectively by traditional means, such as a declaration or the ability to appeal.

The courts will look for something *more* than a mere breach of section 27(1) to conclude that other remedies cannot provide effective redress. Damages will not be awarded for 'relatively minor bureaucratic bundles'¹⁴⁵.

The scope of the *Baigent's* remedy will, in most cases, be restricted to 'human rights' type claims, and claims for economic loss will generally not be covered by the remedy. *Binstead* offers some indication a plaintiff could claim loss of earnings in the time between the flawed decision being taken and the judgment of the court.

This is considered to severely limit any future developments of monetary remedies in judicial review¹⁴⁶.

England

Parallels can be drawn between the reluctance by New Zealand courts to award damages for a breach of section 27(1), and the reluctance of English courts to award damages for a breach of Article 6 of the European Convention on Human Rights.

The purpose of the Human Rights Act 1998 was to incorporate the European Convention on Human Rights into domestic law. Section 8 of the Human

¹⁴⁵ COGS, above n136, para [65].

¹⁴⁶ Harrison "Civil and Criminal Remedies for Breach of the Bill of Rights" in Andrew Butler and Grant Illingworth (eds.) *Using the Bill of Rights in Civil and Criminal Litigation* (July 2008, New Zealand Law Society Intensive, Wellington, pp109-131), p131.

Rights Act 1998 provides the power to award monetary remedies for a breach of Convention rights.

Section 8 provides the following –

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

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

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

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

(b) the consequences of any decision (of that or any other court) in respect of that act, the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made

(4) In determining –

(a) whether to award damages, or

(b) the amount of an award, the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention

It is unlawful for a public authority to act incompatibly with a Convention right (section 6(1)). If a public authority does act in a manner that violates a Convention right, the court can award monetary remedies under section 8.

'Public Authority' is defined to include the Courts and any person whose functions are functions of a public nature (section 6(3) and section 6(6)).

How does this apply to natural justice?

Article 6 of the European Convention on Human Rights provides that everyone, in determination of their civil rights and obligations or any criminal charges, has a right to a fair and public hearing by an independent and impartial tribunal.

Lord Bingham, delivering the unanimous decision of the House of Lords in *R (Greenfield) v Secretary of State for the Home Department*¹⁴⁷, concluded that instances where it will be necessary to make an award of damages for a violation of Article 6 to achieve just satisfaction are likely to be rare.

This case had very similar facts to *McKean*. In this case the prisoner was charged with administering a controlled drug to himself, or failing to prevent another from administering the drug to him, contrary to rule 51(9) of the Prison Rules 1999. The charge was heard before the deputy controller, who refused the prisoner's request for legal representation. The deputy controller found the charge proved, and the prisoner was required to serve 21 additional days of imprisonment. The prisoner subsequently applied for judicial review on the grounds that his fair trial rights had been breached because the deputy controller was not an independent and impartial tribunal, and he had been denied legal representation.

Lord Bingham noted violations of Article 6 can be distinguished from violations of other rights, such as the right to be free from torture (Article 3).

¹⁴⁷ [2005] UKHL 14

In a case of a violation of Article 6, it will often be difficult to conclude whether or not the outcome would have been different if the violation had not occurred. Because of this a finding of the violation will in itself provide just satisfaction. The focus in Human Rights Act cases is the protection of human rights. The courts main concern is to end the conduct and to restore the plaintiff to the position he would have occupied if his Convention rights had not been violated.

The claim for damages was rejected. The court held the declaration was 'just satisfaction'. Although the deputy controller was not impartial or independent, and the prisoner had been denied legal representation, all other aspects of the proceedings were conducted in an exemplary manner. The court concluded the prisoner could have not expected any other kind of adjudication as it was the norm. Damages for anxiety and frustration arising from believing he would not get a fair hearing were therefore rejected. No special features existed that might warrant an award of damages.

Greenfield illustrates the English courts take a similarly restrictive approach to damages for a breach of natural justice. That the violation had ended by the time the case came to court obscures the fact the prisoner had spent 21 additional days in prison. It is unclear how a declaration served to put the plaintiff in the position he would have been in had the violation not occurred.

The position taken in *Greenfield* is comparable of New Zealand cases such as *COGS*, where the court looks for something 'more' to justify an award of damages.

Greenfield takes an even more restrictive approach to New Zealand. In *COGS*, the Court alluded to the loss of liberty as being a factor that would warrant

monetary remedies for a breach of natural justice. In *Greenfield*, the prisoner was subjected to an extra 21 days in prison that he may not have otherwise served, and thus loss of liberty was experienced.

D: CONCLUSION

It is clear what is currently taking place with *Baigent* damages does not provide much hope that a general discretionary damages remedy in judicial review will evolve.

There is some indication there is a need for discussion on the issue. Baragwanath J, delivering a separate judgment in *COGS*, hinted at the need for 'careful consideration' of the issue¹⁴⁸. Baragwanath J did not think the facts of *COGS* warranted piecemeal discussion of the issue. The question of whether damages might be awarded for a breach of section 27(1) should be left to a case that turns upon it, rather than in a case like *COGS* where the point was moot¹⁴⁹.

Baragwanath pointed to the reference to the French system of administrative liability in the New Zealand Law Commissions' report¹⁵⁰ on *Baigent* liability and concludes 'there appears to have been no argument that there might be adopted in New Zealand some variant of the principle of French law'¹⁵¹ and there may be a case for such development¹⁵². Such a development might see a

¹⁴⁸ *COGS*, above n136, para [104]

¹⁴⁹ *Ibid.*, para [113].

¹⁵⁰ New Zealand Law Commission Report no. 37 *Crown Liability and Judicial Immunity: A Response to Baigent's Case and Harvey v Derrick*, May 1997, Wellington.

¹⁵¹ *COGS*, above n136, para [102].

¹⁵² *Ibid.*

'mature system of public law'¹⁵³ focused on the fact that it is public sector conduct intended to benefit the community that causes the harm or loss¹⁵⁴.

¹⁵³ *COGS*, above n136, para [103].

¹⁵⁴ *Ibid.*

CHAPTER IV: FRENCH ADMINISTRATIVE LAW

French administrative law is fundamentally different from English administrative law. The passage by Dicey quoted below adequately summaries both the system of French administrative law and traditional English attitudes towards it:

[T]here can be with us nothing really corresponding to the 'administrative law' (*droit administratif*) or the 'administrative tribunals (*tribunaux administratifs*) of France. The notion which lies at the bottom of the 'administrative law' known to foreign countries is, that affairs or disputes in which the government or its servants are concerned are beyond the sphere of the civil courts and must be dealt with by special and more or less official bodies. This idea is utterly unknown to the law of England, and indeed is fundamentally inconsistent with our traditions and customs.¹⁵⁵

Dicey considered the French system of separate administrative courts ran contrary to the rule of law and English assumptions about how administrative power can best be controlled. The traditional Diceyan model has transfixed our administrative law for decades and successfully 'promoted the superiority of British legal institutions over European legal traditions'¹⁵⁶.

The dissatisfaction with the current position for redress has led many commentators to look abroad. Lord Wilberforce noted that '[i]n more developed legal systems this particular difficulty does not arise'¹⁵⁷.

¹⁵⁵ Dicey, above n7, p203

¹⁵⁶ Joseph, above n6, p817

¹⁵⁷ *Hoffmann-La Roche (F) & Co AG v Secretary of State for Trade and Industry* [1975] AC 295, at p359

As mentioned above, France has a completely separate system of liability that is applicable to administrative acts. The administrative courts have exclusive jurisdiction over liability for administrative acts.

At the top of the hierarchy in the administrative jurisdiction is the Conseil d'Etat. The Conseil d'Etat reviews decisions of the lower administrative courts, and answers questions of law that are referred from the lower courts¹⁵⁸.

The French system has adopted a special court to decide conflicts of jurisdiction between the civil and the administrative courts¹⁵⁹. The judges of the court consist of equal members of the highest courts of both jurisdictions¹⁶⁰.

A: THE DEVELOPMENT OF MODERN STATE LIABILITY

The concept of modern state liability in France derives from the early case of *Blanco*¹⁶¹. Blanco was injured by a wagon that was crossing between different parts of a state owned tobacco factory. The definition of state liability in *Blanco* was held by the court to be 'neither general nor absolute'. Special rules would apply to strike a balance between the 'needs of the service' and the 'necessity of reconciling rights of the state with private rights'.

The case of *Blanco* is more familiar to our concepts of tort liability, rather than public law liability in the sense of this dissertation. However, the French

¹⁵⁸ John Bell, *French Legal Cultures*, (Butterworths, London, 2001), p31.

¹⁵⁹ Bernard Schwartz *French Administrative Law and the Common Law World*, (New York University Press, 1954), p63.

¹⁶⁰ *Ibid.*

¹⁶¹ TC 8 February 1873, *Blanco*, D.1873.3.17 translated in Duncan Fairgrieve *State Liability in Tort* (Oxford University Press, 2004) at p288.

administrative courts have extended the original case of *Blanco* much further than just tortious action.

Today jurisdiction is dependant on two basic elements. The administrative courts will have jurisdiction if the activity is the activity of a public authority, and is satisfying a public need.

Whether or not the action is the activity of a public authority is likewise a broad concept. Private bodies that engage in public activities may also fall within the jurisdiction of the administrative courts.

There are two principles that have evolved to be the foundation of administrative liability in France¹⁶². The first is one of legality. The administration must act according to law. This is similar to our concept of the rule of law in the English legal system whereby the state is subject to, and not above, the law. The principle of legality provides a standard of conduct that the administration cannot depart from¹⁶³. Violation of the principle of legality can become a ground for review¹⁶⁴.

The second is that of *responsabilité*. The administration ought to be liable to compensate a citizen who is subjected to loss as a result of administrative action¹⁶⁵. This provides a justification for imposing liability even where the action of the administration is lawful.

¹⁶² Neville Brown and John Bell, *French Administrative Law* (5th ed, Oxford University Press, 1998), p181.

¹⁶³ *Ibid.*, p239.

¹⁶⁴ *Ibid.*

¹⁶⁵ *Ibid.*, p182.

The burden of the above liability is placed on the administration to balance two privileges enjoyed by the administration. The administration enjoys the privilege of the *décision exécutoire*, which is the coercive power of the state to create rights and obligations of citizens without their consent¹⁶⁶. The administration also enjoys the right to have issues with citizens determined by recourse to its own system of courts (*privilège de juridiction*)¹⁶⁷.

Broadly speaking, the administration can be liable for administrative fault and, in some circumstances, where no fault or illegality exists.

B: THE PRINCIPLE OF LEGALITY

What rules of law is the administration bound to observe? Although the principle of legality is broadly comparable to our doctrine of ultra vires, the French system goes beyond mere observance of the relevant statute¹⁶⁸.

Firstly, the administration must act in accordance with relevant enacted law¹⁶⁹. The judge is tasked with determining what rules apply to the action that is being challenged. At the top of the hierarchy of legal norms in France, the administration must act in accordance with the rules of the Constitution and ratified international treaties¹⁷⁰. Second in the hierarchy is statute law and regulations¹⁷¹.

¹⁶⁶ Brown and Bell, above n162, p182

¹⁶⁷ Ibid.

¹⁶⁸ Ibid., p157

¹⁶⁹ Ibid., p214

¹⁷⁰ Ibid.

¹⁷¹ Ibid., p215

The administration must also respect individual rights that are created by its own prior decisions¹⁷². It is also obliged to respect decisions of the administrative courts. Where the administrative court annuls a decision, the decision of the court is then binding on the administration and its future actions¹⁷³. The administrative court provides an important function in regulating the conduct of the administration and setting standards that the administration can adhere to in the future.

The concept of legality has also been extended to include unwritten *principes généraux du droit*, which are comparable to English principles of natural justice¹⁷⁴. These are described as 'a creation of the courts inspired by ideas of justice...in order to ensure the protection of the individual rights of the citizen'¹⁷⁵.

C: LIABILITY FOR ADMINISTRATIVE FAULT

The administration can be liable for acts of *faute de service*. This occurs where the fault is linked with provision of a public service¹⁷⁶.

An error that renders a decision unlawful will constitute fault¹⁷⁷. Non observance of the above principles will constitute liability. It is not necessary to establish misfeasance or negligence¹⁷⁸ beyond this, and the concept of 'fault' in French law is therefore distinguishable from our own concept of fault. This

¹⁷² Brown and Bell, above n162, p215

¹⁷³ Ibid.

¹⁷⁴ Ibid., p216.

¹⁷⁵ Ibid., p217 quoting Bouffandeau (former president of the Section du Contentieux).

¹⁷⁶ Ibid., p186.

¹⁷⁷ Duncan Fairgrieve, *State Liability in Tort* (Oxford University Press, 2004), p126.

¹⁷⁸ Brown and Bell, above n162, p190.

is not to say that every illegal action of the administration will result in liability. It is necessary to establish some loss to the complainant¹⁷⁹.

In some situations simple fault will not suffice¹⁸⁰. *Faute lourde* (gross fault) is held to be appropriate where the public service is especially difficult¹⁸¹. Gross fault will be necessary before the administration can be held liable. The concept of gross fault enables the French courts to take into account policy concerns that have stultified the development of a monetary remedy in judicial review in English law¹⁸².

The main policy concern that is operative in this area is that some functions that public authorities are charged with are notoriously difficult. In French administrative law, the difficult and sensitive nature of a task charged to the public authority will not militate against liability entirely.

D: LIABILITY WITHOUT FAULT

In some situations the administration may be liable even where fault, in the sense discussed above, cannot be established. This is underpinned by two principles. The first is the principle of *égalité devant les charges publiques* – the burden of loss caused by activities undertaken in the public good should be shared by society as a whole, and no one individual ought to bear that loss¹⁸³. The harm or burden must be beyond that which an ordinary citizen would be

¹⁷⁹ Brown and Bell, above n162, p191. The court in some situations has awarded damages where there has been no loss on the basis of bare violation of a legal right. This will be discussed further below.

¹⁸⁰ Ibid.

¹⁸¹ Marie-Aimée Latournerie “The Law of France” in John Bell and Anthony Bradley (eds) *Governmental liability: A Comparative Study* (The United Kingdom National Committee of Comparative Law, 1991), p207.

¹⁸² Fairgrieve, above n177, p129.

¹⁸³ Ibid., p137.

expected to bear¹⁸⁴. The French system of compensating even where the action is legal 'can allow the administration to carry out acts necessitated by the increasing interventionism of the State, while at the same time ensuring that the victims of this action are compensated¹⁸⁵'.

The second principle relates to the risk theory. In its most basic form, this theory holds that the administration and not the citizen should be liable for the effects and the risk of activities undertaken in the public interest¹⁸⁶.

There are four categories where the Conseil d'Etat has imposed liability without fault on the administration.

The first is the risks of assisting in the public service. The Conseil has taken the view that the state should indemnify those who undertake public service against the risk of doing so¹⁸⁷.

The second is risks arising from dangerous operations. If the administration creates an abnormal risk for the community, they may be liable to pay compensation if damage is caused¹⁸⁸.

The above two prospects that relate to risk and are more relevant to tort liability than general public law liability. However, the third instance is liability where a citizen suffers an abnormal burden in the public interest¹⁸⁹. It may be recalled from Chapter I that in 1980 the Public and Administrative

¹⁸⁴ Fairgrieve, above n177, p148.

¹⁸⁵ Prosper Weil, p248, "The Strengths and Weaknesses of French Administrative Law", *Cambridge Law Journal* (1965, November, Vol. 23, No. 2, pp242-259), p248.

¹⁸⁶ Brown and Bell, above n162, p194.

¹⁸⁷ *Ibid.*, p194.

¹⁸⁸ *Ibid.*, p195.

¹⁸⁹ *Ibid.*, p198.

Law Reform Committee recognised the need for a general principle that the community should bear the cost of activity pursued in the interests of society.

This rationale is apparent in French law, and is based on the principle of equality in bearing public burdens¹⁹⁰. A citizen should not have to bear a burden that fellow citizens do not also experience, and consequently he or she ought to be compensated for bearing this burden¹⁹¹.

Fourthly, the administration can also, in some limited circumstances, be liable for loss arising out of legislative action¹⁹².

E: QUESTIONS OF CAUSATION

Whether or not there is a causal link between the action or decision and the damage provides a limiting factor on liability. In order to establish causation, the court employs the 'but for' test and the damage must be a direct cause of the decision¹⁹³. Directness is determined by assessing the probability that the decision would cause the damage¹⁹⁴.

Proving causation is a pertinent problem in cases where there has been a breach of natural justice. This was seen in the aforementioned case of *Greenfield* in Chapter II, where the House of Lords refused to award damages

¹⁹⁰ Brown and Bell, above n162, p194.

¹⁹¹ Ibid.

¹⁹² Ibid., p199.

¹⁹³ Søren Schönberg, *Legitimate Expectations In Administrative Law*, (Oxford University Press, 2003), p200.

¹⁹⁴ Fairgrieve, above n177, p137.

partially on the basis any such award would involve 'speculation' the outcome would have been different¹⁹⁵.

The French courts do have an advantage over English courts when regarding questions of causation. Actions for damages in France are *contentieux de pleine juridiction*. This means the court can review matters of fact and law¹⁹⁶. It can determine whether the outcome would have been the same even if the decision maker complied with the rules of procedural fairness.

F: APPLICABILITY TO NATURAL JUSTICE – FRENCH LAW AND ARTICLE 6(1) OF THE ECHR

The administrative courts in France have found the administration liable to pay damages for a breach of Article 6(1) of the ECHR. This is an unsurprising conclusion but provides a neat contrast to the approach taken by New Zealand courts in relation to breaches of section 27(1) of the New Zealand Bill of Rights. In the case of *Magiera*¹⁹⁷ the *Conseil d'Etat* upheld an award of 30,000 francs for violation of the right to a hearing within a reasonable time contrary to Article 6(1). Ordinarily, the standard of *faute lourde* would have applied as the case concerned judicial acts. This was set aside in *Magiera* with the result that mere violation of the right will give rise to liability.

As previously discussed in Chapter II, New Zealand courts have held something 'more' is needed before compensation will be awarded for a breach of natural justice.

¹⁹⁵ Contrast this to *Upton v Green* where Tompkins J declined to speculate whether the outcome would have been different, but concluded that the mere chance that it may have been provided a basis to award damages.

¹⁹⁶ Brown and Bell, above n162, p177.

¹⁹⁷ CE 28 June 2002, *Magiera*, Req 239575 translated in Fairgrieve, above n177, p310.

Magiera instead affirmed the importance of the right to natural justice. Even where the breach may not have affected the outcome of the ultimate decision, 'litigants must nonetheless be able to ensure that this obligation is respected'¹⁹⁸.

G: THE DIFFERENCES BETWEEN THE FRENCH AND NEW ZEALAND SYSTEMS

There are obvious differences between New Zealand and France in procedural and philosophical terms that may negate how transplantable the French system may be.

The philosophical underpinnings of the French system include the theories of risk and equality before public burdens as discussed above. The implication of these theories is an emphasis on collectivist thought¹⁹⁹. The cost of compensating individuals for illegal administrative action, or loss associated with the risk principle, falls instead on the tax payer. This is seen as a legitimate consequence of a comprehensive compensation scheme.

By contrast, the English system turns the above rationale into an argument against the provision of compensation for unlawful administrative action. The public interest often outweighs the individual interest in compensation. Compensation is seen as inherently destructive to the public interest, without much consideration on whether it might be effective to change administrative behaviour.

¹⁹⁸ Fairgrieve, above n177, p314.

¹⁹⁹ *Ibid.*, p266.

One of the greatest strengths of French law is that, unlike English law, it does not see the public interest and state obligations to compensate individuals as mutually exclusive.

In terms of procedure, France functions as an inquisitorial system, rather than the adversarial system operative in New Zealand. In New Zealand, the court is restricted to the materials that the parties have placed before it. There are winners, and there are losers. Pollock and Maitland liken this system to a 'cricket-match' and note that 'judges sit in court, not in order that they may discover the truth, but in order that they may answer the question, '[h]ow's that?''²⁰⁰.

Administrative disputes and the subsequent resolution by the courts, have much wider implications than go beyond the impact on the litigating parties alone. Because the court is working with limited information, it may often decline to adjudicate on matters requiring consideration of complex issues, and will defer to the administration. This results in a form of judicial restraint²⁰¹.

In France, judges are not so restricted. The inquisitorial system is characterised as 'purposive interaction between the adjudicator and the parties'²⁰². It involves a more collaborative investigation that ensures all appropriate information is before the court. Decisions can be reached on complex issues that have wide ranging impacts for society.

²⁰⁰ F. Pollock and F. W. Maitland, *The History of English Law before the Time of Edward I* (2nd edn., Cambridge, 1898), ii, 670-1.

²⁰¹ J.W.F Allison *A Continental Distinction In The Common Law: A Historical and Comparative Perspective on English Public Law*, (Oxford University Press, 1996), p194.

²⁰² *Ibid.*, p205.

H: DAMAGES AS A RESULT OF ILLEGAL ACTION – EFFICIENCY AND INTRUSIVENESS

The link in French law between illegality and liability to pay damages provides a simple resolution to the question of when damages should be available. This is preferable to a complicated regime of liability where the plaintiff must jump through hoops to show that the breach was particularly flagrant or the like.

The availability of damage as a discretionary remedy in French law gains much strength from the way the remedy is perceived. There is the perception that the imposition of liability via the damages remedy *improves* administrative decision making²⁰³.

By contrast, damages liability in English law is seen as an impediment to administrative decision making. The nature of the remedies available in judicial review proceedings in the English legal tradition reflect a principle of ‘restrained intrusion’²⁰⁴. Administrative law judges are not, in our system, entitled to substitute their decision for that of the administration. The court cannot intrude into the functions of the executive. This is a fundamental proposition of the separation of powers.

And so, a court may quash a decision that involved procedural defects and remit it back to the decision maker for reconsideration, but the court cannot tell the decision maker what decision they ought to reach.

²⁰³ Schönberg, above n193, p193.

²⁰⁴ Cane, above n8, p494.

In *R v Ealing London Borough Council, ex parte Parkinson*²⁰⁵ Laws J expressed the concern that the ability to award damages for unlawful administrative action would 'require the court to say how the duty should have been exercised'²⁰⁶.

In terms of 'intrusiveness'²⁰⁷, monetary remedies do not encroach on the prerogative of the executive any more than other remedies already do. The imposition of damages does not require the administration to do anything, other than pay the sum owed to the citizen, or prohibit it from doing anything. It may proceed with the course of action it has chosen, provided that it compensates those affected.

Awards of damages in French administrative law do not have retrospective effect, and do not necessarily render the decision a nullity²⁰⁸. The obligation of the administration is limited to payment of the award²⁰⁹. Rights of third parties are not affected. This enables greater scope for economic efficiency. This has clear advantages over the 'blunt instrument of certiorari'²¹⁰ as it enables the administration to proceed with a chosen course of action while still compensating those affected.

As mentioned in Chapter I, administrative law in New Zealand and England has moved towards a flexible, discretionary approach to whether a decision is void or voidable²¹¹.

²⁰⁵ (1996) 8 Admin LR 281

²⁰⁶ *Ibid.*, p287.

²⁰⁷ Cane, above n8, p493. This term refers to how much freedom the body subject to the remedy has in determining how to react to the remedy, and what it must do.

²⁰⁸ Brown and Bell, above n162, p223. In some situations where the illegality is so 'gross and flagrant' the act may become a *voie de fait* and cannot be treated as an administrative act at all. In such situations the ordinary courts regain jurisdiction (p241).

²⁰⁹ Latournerie, above n181, p223.

²¹⁰ Lord Woolf, "Remedies" in *The Pursuit of Justice*, Christopher Campbell-Holt (ed) (Oxford University Press, Great Britain, 2008, pp45-69), p61.

²¹¹ *Martin v Ryan* [1990] 2 NZLR 209.

I: THE SEPARATION OF POWERS

The concept of the separation of powers has many implications for the development of monetary remedies in judicial review. It has been said '[i]n the absence of an appropriate separation of powers, the English courts will continue to lack the confidence to recognize, and the administrative expertise to operate, the general remedy for damages'²¹².

The separation of powers, in English tradition, means in brief that the judiciary and the executive are to be *independent* of each other. The rationale for this is each must act as a balance on the power of the other.

In reviewing decisions of the executive, the judiciary can only enquire into the lawfulness of what has been done, rather than the merits. This is because the executive is the proper body entrusted to make difficult policy based decisions. The judiciary is said to lack the necessary *expertise* to engage in merits based review.

Related to this lack of expertise contention is that the judiciary are restricted in terms of remedies. The judiciary cannot substitute their own decision for that of the executive.

In France, the administration and the administrative courts are not separated in such stark terms. It is not seen as a threat to judicial independence, but as a necessary precondition to the ability to review administrative decisions. It allows judges to be aware of 'the needs and constraints of administrative

²¹² Allison, above n201, p240.

life'²¹³ and avoids the creation of a 'fossilised law bearing no relationship to the realities of active administration'²¹⁴. Judges that are appointed to the Conseil d'Etat are drawn from those that have had distinguished careers in the judiciary *and* the administration²¹⁵. The Conseil d'Etat, apart from its judicial function, also acts as an advisor to the government²¹⁶.

The integration of the administrative courts and the administration provides legitimacy to the active and robust review prevalent in French law, for the courts are acutely aware of the challenges faced by the administration.

J: FOREIGN IMPORT – LOST IN TRANSLATION?

As mentioned above, in procedural terms the English and the French systems have very real differences. The adversarial system and the institutional framework within which the administrative courts operate in France is not a situation that could be easily transplanted into the English system.

The major differences between the English and the French systems go beyond the obvious procedural differences. Rather, the *culture* of both legal systems is fundamentally different. Rather than seeing the imposition of monetary liability as a threat to the administration, it is seen as a way of improving actions of the administration.

²¹³ President Odent, *Contentieux administrative* (Paris 1981) pp746-747, quoted in Bell, above n158, p158

²¹⁴ *Ibid.*, p66

²¹⁵ *Ibid.*, p31

²¹⁶ *Ibid.*, p68

In English administrative law there is no such attitude. Monetary remedies, outside of tort, have never existed for breaches of administrative law for decades. Even within the realm of tort, liability is heavily restricted.

It may be correct to say that 'the Conseil d'Etat draws its strengths from specifically French history, traditions and methods of administration, and that to import an institution isolated from its supporting environment would be to invite failure.'²¹⁷ A sudden ability to award damages in judicial review in the wholesale manner available in France would require 'a greater leap of imagination...to break out of long-established patterns of legal thought'²¹⁸.

²¹⁷ Justice Report *Administration under Law* (Steven & Sons Ltd, London 1971), para 16.

²¹⁸ Cane, above n8, p508.

CHAPTER V – THE BUILDING BLOCKS OF LIABILITY

Chapter II suggested the development of some form of new public law tort, a complicated ‘aggravated fault’ type of liability. Chapter III illustrated the developments of the *Baigent* type remedy. The conclusion was the current trend is a push towards *Baigent* as a residual remedy only.

What route ought New Zealand take? Baragwanath J commented that perhaps New Zealand could adopt some modified version of the French system. The rationale for such a development, according to Baragwanath J, would be based on the fact that the harm is caused by public sector conduct that is intended to benefit the community²¹⁹.

It was concluded at the end of Chapter IV that a wholesale transplant of the French system would not be operable in New Zealand. This is not to say that no lessons may be learnt from France. Reform could be made *within* the existing parameters of public law liability and judicial review, whilst picking up on some key concepts from French law.

A: COMFORTABLE CHANGE RATHER THAN RADICAL REVISION

The changes could be based, as Baragwanath J suggested, on a principle that loss caused in the interests of society should not fall where it lies. This is essentially the French principle of *égalité devant les charges publiques* – the burden of loss caused by activities undertaken in the public good should be shared by society as a whole.

²¹⁹ See the end of Chapter III.

If the remedy were to be slotted into judicial review, it is logical that unlawfulness would be the basis of liability. Unlawfulness would relate to the three grounds of review – procedural impropriety, irrationality and illegality. It would not be feasible to pull out one of these grounds and have damages available for that one alone. It may be recalled from Chapter III that this ‘inconsistency’ argument was one of the arguments against compensation for a breach of natural justice raised in *Udompun*. Damages would need to be available whether the decision was irrational or procedurally flawed. This would essentially be no fault liability.

A new damages remedy that is based on the grounds of review would provide transparency and predictability in the grants of monetary awards for unlawful administrative action. It would involve the shift of resources in an open manner. Those that assert a damages remedy would involve the shift of financial resources away from public services and into the hands of individuals ignore the fact money already changes hands within our system.

In some situations, the government makes grants of ex gratia payments. These are not made on the grounds of any legal obligation. They arise out of perceived moral and political concerns. The problem with ex gratia payments is that there are no recognisable criteria or uniformity with payments. Compounding this is the fact that few ex gratia payments come to light, unless there is high public interest in the matter²²⁰.

Using pre-existing criteria and familiar concepts from judicial review will provide much needed openness.

²²⁰ for an example of a high profile ex gratia award, see the Scampi Fisheries controversy and the related litigation (*Minister of Fisheries v Pranfield Holdings Ltd* [2008] NZCA 216)

With 'equality before public burdens' as the founding rationale for liability, it follows that loss would be a necessary prerequisite. This, from the outset, has been the thrust of this dissertation – there is something inherently wrong in a plaintiff being unable to recover loss that is caused by unlawful administrative action. 'Loss' in this sense is necessarily restricted to loss in economic, quantifiable terms.

If loss is a prerequisite it follows the remedy could not be discretionary. This may go against the principle that current remedies in judicial review are 'flexible, discretionary and made to measure'²²¹. If it were discretionary, this would discount the fact that loss has been suffered. It may also result in the remedy becoming pegged as 'residual' and courts may pander to policy concerns as has been the case in public law negligence.

Would this create a flood of claims? Carol Harlow has warned against any right to compensation, in particular in relation to human rights, bringing up concerns that it could result in a 'compensation culture and...a serious drain on governmental resources'²²². But by linking liability with loss, the class of plaintiffs is naturally limited.

It is acknowledged that an outstanding issue with the proposed new remedy as it relates to natural justice would be causation. There would need to be clearly defined principles of causation to ensure that the remedy did not suffer a 'blow out'. This cannot be resolved for all grounds of review in this dissertation. Causation relating to procedural impropriety would be the ground where this would be most problematic. As mentioned at the

²²¹ Michael Fordham, "Reparation for Maladministration: Public Law's Final Frontier?" *Judicial Review* (2003, pp104-108), p106.

²²² Carol Harlow "Damages and Human Rights" *New Zealand Law Review* (2004, p429-p450), p429.

beginning of this dissertation, cases where there has been a breach of natural justice are often remitted back to the decision maker to be made again. When the court declares the original decision to be invalid, there is no certainty at that point as to what the decision maker *would* have decided if they had observed the rules of natural justice.

The first option would be to ignore whether the final outcome would have been different, and compensate for the violation of the *right of natural justice alone*. This would be to adopt what seems to be the trend of French law in relation to violations of Art 6(1) of the ECHR²²³. As mentioned, in New Zealand where the trend is away from compensation, this is an unlikely and radical step. The possibility of compensation without loss for a breach of natural justice will be considered more fully below. It is also compensating, especially in cases involving applications for licenses, for something the plaintiff never had in the first place. This could involve an undue windfall to the plaintiff²²⁴.

The second option would be to remit the decision back to the decision maker and if the decision maker then reaches a different outcome, damages could be payable for the period between the unlawful decision and the subsequent decision. This is the solution recommended by the Law Commission for England and Wales.

Yet this raises another issue – would the decision maker employ ‘defensive administration’ tactics? Upon remaking the decision, would the decision maker *consciously* adhere to the original decision to avoid an award of

²²³ Magiera, above n197.

²²⁴ Cane “Compensation in Public Law” *Law Quarterly Review* (1980, Vol. 96, p413-497), p439.

damages²²⁵? This issue is not satisfactorily resolved by the Law Commission for England and Wales, although the Law Commission notes that no general research supports the claim public authorities might engage in defensive administration²²⁶. Indeed, it is suggested it is equally credible the threat of damages might encourage public authorities to improve their standards of decision making, rather than the reverse²²⁷.

What then, might occur if the decision cannot be remitted back to the decision maker? Can causation really be used as a limitation on liability? In this situation we will never know whether the original unlawful decision caused the loss. One answer to this might be to follow Tompkins J's approach in *Upton* and conclude that even though there is no certainty of a different outcome, the risk of prejudice will suffice. But this risks compensating for something the plaintiff never held in the first place, which is contrary to the principle that loss *caused* by the administration ought to be compensated for. Again, no guidance can be gained from the Law Commission for England and Wales. The Paper does not consider the situation where it is not possible to remit the decision back.

The answer to this issue might be to allow the courts in limited circumstances to reach a decision on the substantive merits of the case in order to conclude whether causation is established. This would follow the French model where judges have the capacity to engage in merits review.

There are also other pre-existing controls within the judicial review framework, other than causation, that would ensure the floodgates do not

²²⁵ Cane, above n224, p439.

²²⁶ Law Commission for England and Wales, above n, para 6.18.

²²⁷ Tom Cornford *Towards a Public Law of Tort* (Ashgate Publishing, England, 2008), p170.

burst. Where an alternative remedy is available to a plaintiff, it may suggest that judicial review is inappropriate. While there are no formal time limits on judicial review proceedings, the fact of delay by the plaintiff may result in a successful strike out application.

B: COMPENSATING FOR THE RIGHT ALONE

The above proposal recognises a perquisite of loss in tangible terms. Would it be appropriate to suggest an automatic right to damages where the breach does not result in quantifiable damage? This would be too great a leap at present.

Damages should remain as a discretionary remedy for a breach of human rights. Breaches of human rights can, in the courts opinion, be effectively remedied in other ways, a comment that is shared by some commentators²²⁸. The current operation of the *Baigent* remedy operates to provide compensation in cases that involve serious breaches of natural justice that result in loss of liberty, affront to dignity or egregious violations of proprietary interests.

It follows it is unlikely the mere breach of natural justice alone will suffice at present for an award of compensation. The push of the courts in regards to the *Baigent* remedy is that it is a discretionary remedy for all breaches of the Bill of Rights. If damages were to be automatic for natural justice, it would follow that they would need to be as of right for *all* breaches of the Bill of

²²⁸ Carol Harlow notes that in this area that 'damages are not the only...means of redress for human rights violations. A constitutional...tort is a sleeping tiger' Harlow, above n222, p448. See also *Manga v Attorney General* (above n90) 'a New Zealand court cannot control the purse, and the Lions strike should generally be withheld...judicial declarations are usually not in vain, even if they reach the recipient with a sound no more audible than the turning of a page' per Hammond J at [132]

Rights. Such a move would be reliant on a 'rights as trumps' position, which is outside the scope of the dissertation.

C: HARRY HOOK AND A HAPPY ENDING

How can this development be achieved? Peter Cane has commented that –

[we are] free to put those building blocks together in order to construct a public law of damages which met whatever policy objectives we chose. There is no need to be slaves to existing causes of action...because we are masters of the building blocks out of which they were constructed. We can use those blocks to build whatever new causes of action are needed for the important task of holding government accountable to its citizens in the 21st century'²²⁹

The passage from Cane above reminds us that we are the masters of change. The law ought to provide real and adequate protection to those harmed by unlawful administrative action.

This was the very reason why judicial review came into being – to ensure that the administration acts *lawfully*. It has been said it does not follow from this that an individual has a right to be indemnified against unlawful administrative action. This is paradoxical. It suggests an individual does have a right to expect the administration to act lawfully, while on the other hand asserting that when the administration acts unlawfully, the loss that eventuates will be borne by that same individual. The role of the law is to *protect* the individual from unlawful administration and at present, it is scant.

²²⁹ Cane, above n8, p509

If we come full circle and end where we began, what might have been the outcome for Harry Hook? The court had concluded the decision to ban Mr Hook for life was disproportionate, as well as contrary to natural justice, rendering it unlawful, and as such (in our brave new world) damages would be payable for the loss that resulted from the decision. After reminding himself to urinate in more appropriate places, Mr Hook may have paused to feel grateful that he was not out of pocket for a year and a half's worth of wages.

He may have thought to himself how marvellous it is to live in a society where a legal right entails a legal remedy and loss is not left to lie where it falls.

'A little additional fairness never hurts, but time will tell'²³⁰

²³⁰ *Lal v Removal Authority*, unreported, HC Wellington, AP 95/92, 10 March 1994, McGechan J p24.

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