IN THE SUPREME COURT OF NEW ZEALAND SC 67/2006

BETWEEN **CHRISTOPHER HAPIMANA BEN MARK TAUNOA AND OTHERS**

Appellant

AND **HER MAJESTY'S ATTORNEY-GENERAL AND OTHERS**

Respondent

Hearing 1 and 2 November 2006

Coram Elias CJ
Blanchard J
Tipping J
McGrath J
Henry J

Counsel T Ellis, D La Hood and AC Wills for Appellants
C Gwyn, D J Boldt and B Keith for Respondent

CIVIL APPEAL

10.00am

Gwyn May it please the Court I appear with Mr Boldt and Mr Keith for the cross appellants and Mr Boldt will develop the Crown submissions in support of the cross-appeal.

Elias CJ Thank you Ms Gwyn, Mr Boldt, Mr Keith.

Ellis May it please the Court Ellis, La Hood and Wills for Taunoa and others.

Elias CJ Thank you Mr Ellis, Mr La Hood and Miss Wills. Right Mr Boldt.

Boldt Thank you Your Honour. Your Honours this cross-appeal is far broader in its scope either than the facts of this individual case or indeed of the wider prison context. It arises from three particular concerns that the Crown has about the approach of His Honour Justice Young at first instance, none of which were disturbed by the Court of Appeal. The first and most fundamental of these relates to when public law compensation should be awarded in response to a breach of the New Zealand Bill of Rights Act and in para.18 of the trial Judge's remedies judgment which is behind tab 10 in the first volume of the case on appeal at page 157 Your Honours

Elias CJ I'm sorry can you give me the reference again?

Boldt Yes, it's page 157 of the case which is volume 1 and it's behind tab 10 and in that paragraph, para.18 His Honour essentially set out the basis on which he regarded an award of public law compensation as appropriate in this case. His Honour said without detailing the failures which gave rise to my conclusions the finding that these applicants while on BMR were not treated with humanity or with the inherent dignity due every person inevitably means effects were suffered by individual applicants, thus in a case such as this where the breach has ultimately affected the daily lives of some of the applicants in significant ways a declaration alone is not in my view adequate relief. I'm satisfied therefore as a general proposition that an award of compensation for the Bill of Rights breaches here is appropriate and as I've noted Your Honours in para.80 of the written submissions, what the Judge has done effectively in that passage is to move directly from a finding that there has been a breach that has affected the daily lives of the respondents to a finding that compensation is warranted and it is our respectful submission that His Honour was wrong to move so directly from that conclusion to a finding that compensation was warranted. Now the second area where in our submission the Judge misdirected himself was by using the common law and the level of damages available in tort as his guide when fixing the level at which he would award compensation, because as Your Honours will have seen, His Honour found his starting point for each of the applicants to whom compensation was awarded by taking the $10,000 per month figure that the High Court in the *Manga* decision had decided was an appropriate rate for false imprisonment and dividing by four. So His Honour used effectively the tort of false imprisonment and indexed his awards in this case to those of the plaintiff in the *Manga* case who had of course been completely unlawfully imprisoned who ought to have been at liberty and it is our respectful submission that His Honour was wrong to use basically a private law paradigm as the basis on which he fixed his awards for these respondents in public law compensation and I'll be developing a submission that an entirely different scale bearing in mind the entirely different purpose that an award of public law compensation serves would have been appropriate in this case. And the third concern Your Honours

Tipping J Sorry, you say the entirely different scale or an entirely different approach?

Boldt Well it's an entirely different approach Your Honour having regard to the entirely different purpose that an award of public law compensation serves from an award of damages and private law.

Elias CJ Is it accurate to speak of the tort of false imprisonment as a private law matter? I mean I know it's tortious but is this a distinction that's real?

Boldt Well it is Ma'am because of course the tort of false imprisonment applies not only to the Crown. It's not only the Crown that can be a defendant in the tort of false imprisonment. If somebody locks me in a room out of malice or annoyance they don't have to be a Crown actor before I have a right of action against that person in false imprisonment and the tort cases which prior to the Bill of Rights Act were used against the Police for example if they were to wrongly arrest someone were really no more than an unremarkable application of the law of false imprisonment, the straightforward tort to a state actor. Now of course there are circumstances in which state actors have some protection that is not available to a private citizen but it has always been regarded as the private liberty interest of the person imprisoned that is looked after by the tort of false imprisonment. Now of course there is a significant overlap between the tort of false imprisonment and s.22 of the Bill of Rights Act which says nobody can be arbitrarily detained, but it is our submission that the right to be free from arbitrary detention which of course is only something that can be breached by a Crown actor, is a public law wrong if it happens to the individual. It is something for which there may well be a private remedy because the tort of false imprisonment remains available but if you choose as a plaintiff to bring the claim under s.22 of the Bill of Rights Act then as the *Baigent* case said you are submitting yourself to a public law regime and you take all of the incidental pieces of a public law regime that accompany that.

Elias CJ I've never understood New Zealand law to be as categorical about a distinction between public law and private law and I wonder to what extent it's been much more thorough-going in other jurisdictions but I don't really understand New Zealand law to have been as categorical.

Boldt Well Ma'am I think certainly the English common law maintains this distinction quite rigidly and

Elias CJ And has got into quite a lot of trouble through it.

Boldt Well I won't comment on that Your Honour but it's certainly true that in fields of administrative law the New Zealand Courts have run ahead of a lot of the other Commonwealth jurisdictions in terms of perhaps importing public law obligations onto private entities, beyond that though the conception of tort as a private right is not something that certainly in my experience and in my reading I've seen as necessarily being submerged within a public law context except in cases where there is for example a breach of the Bill of Rights Act.

Tipping J Is your point partly that the common law damages approach is primarily compensatory whereas the public law approach according to what I read in your submission should be primarily vindicatory?

Boldt Absolutely Sir and declaratory.

Tipping J Yes.

Boldt What it recognises is that there is a public declaration that accompanies this. This is not anymore just about the plaintiff, it is in fact a case that the plaintiff brings not only on behalf of him or herself but to an extent on behalf of others and on behalf of the wider community and this case is in fact as good an example of that as you'll ever find because these plaintiffs of course weren't the only people who were on the BMR and they were seeking to identify a systemic wrong in a way which would ordinarily have been the focus say of a case in judicial review, but they were seeking to challenge a policy which had been adopted by the Department of Corrections in which they said was unlawful and of course as we now know they were correct. But anyway Your Honours those are the first two points. We argue that the Judge moved far too directly from a finding of breach to a finding that compensation was payable and secondly that His Honour was wrong to use effectively private law or tort, or the private law or private tort scale as the appropriate basis for fixing compensation. Now our third concern is a much narrow and more fact specific one and that is that in any event, even applying a common law scale to the facts of this case, the awards were simply excessive and the best articulation in my respectful submission of why they were excessive can be found in the judgment of the Court of Appeal which used a number of comparitors and each of those when looked at against the awards of compensation in this case indicated that the awards were too high and it is our respectful submission that having done that exercise the Court of Appeal, with the greatest of respect, was wrong not to intervene and to reduce the awards significantly, but it is our respectful submission that that exercise of course is only one that this Court need engage in if it disagrees with the Crown on the first and second of these other issues that I've raised. So in a sense the issue for this Court in this case is what is the proper role of public law compensation in New Zealand, and in particular should it be regarded as

indistinguishable from private law damages in tort or do these two kinds of compensation effectively cover different fields? Are they basically the same in practical terms or do they recognise different interests and serve different purposes? It is of course important to note that His Honour Justice Young in applying the approach that he did in the High Court was doing little more than applying in a relatively unremarkable way a number of dicta that had developed in the Court of Appeal in the thirteen or so years since the *Baigent* decision, but it is our respectful submission that those decisions of the Court of Appeal have failed to recognise that what the Court was identifying in the *Baigent* was something entirely new and something that it itself characterised as distinct from an action in private law in tort.

Tipping J In para.20 of his relief Justice Ronald Young says 'if claimants of a sum of money for a Bill of Rights breach is compensation to the victim then in this case etc', I read his 'if' as meaning 'as', in other words because, in other words that was a statement by the Judge as I read him that his view was that the payment of a sum of money was compensation to the victim. Is that correct in your submission?

Boldt Yes Sir I did too.

Tipping J It's not a question it's saying as it's compensation therefore. So he's expressly directed himself on the basis that it's compensation and no more, no less.

Boldt Yes, His Honour is effectively saying 'if this is to be an award of compensation, I have to now look at the harm done that I am now going to compensate' and I think that becomes even more explicit as you look at the analysis that follows where he takes this base rate of $2,500 per month and then

Tipping J I'm just looking for a succinct statement as to how he was directing himself and that seems to be about as succinct as one gets read that way.

Boldt Yes.

Tipping J Yes.

Boldt Yes, His Honour was looking to compensate. There isn't any question about that and what His Honour wasn't doing was looking to see how within the wider scheme of identifying and declaring a public wrong money might fit. And what's interesting is that in fact earlier on in His Honour's judgment he had recognised that shall we say the public purpose in this case could be very effectively addressed by a declaration at para.15 of His Honour's judgment. He talks about the declarations that were made

in favour of these plaintiffs, and this is at page 153 and really the passage that I want to focus on starts three lines from the bottom. His Honour said 'these declarations are not simply hollow words as a pre-requisite for monetary compensation. The declarations matter at a number of levels. They enable an individual plaintiff to say what happened to me should not have happened. It is an official declaration that they should not have been treated in the way that they were. It means Corrections must stop treating these prisoners unlawfully. This is to the prisoners' advantage. Counsel for the respondents' advise me that that has already happened, informs Corrections and ensures that the errors made will not be repeated in future with other inmates and in a broader context it ensures there is oversight of important public institutions such as prisons. It reminds us that those members of society who are in prison are entitled to minimum standards of treatment'. And what His Honour has done in para.15 is he's recognised in a way that echoes the sentiments of numerous human rights decisions in other jurisdictions about the importance of declaratory relief in a public law context and that these official words publicly stated from the Court actually have a very salutary effect in responsible jurisdictions like New Zealand in terms of ensuring ongoing compliance and are not simply as perhaps has been indicated in the number of other decisions in New Zealand, they're not simply hollow words, they're not simply toothless or meaningless unless they're accompanied by something more tangible.

Henry J Mr Boldt at some point will you be giving us the principles which the Crown says apply in determining whether or not there should be compensation for a breach?

Boldt Yes, in fact if it would help Sir I can articulate those now.

Henry J It would help I think so we know where we're heading.

Boldt Well it's our submission that the public purpose that accompanies a declaration are essentially those that are set out in the paragraph that I've just referred Your Honours to. If a declaration is all that is going to be required to publicly mark the breach then in general nothing additional is going to be required. A declaration isn't simply a hollow or a toothless or an empty vessel, but there are going to be cases where something more than a declaration is required and where the Court needs to mark it's particular disapproval of particular conduct because it is severe. It represents a particularly poor example of state practice and one of the reasons that the Crown has not sought to appeal against the award in favour of Mr Toft's in this case is because we recognise that he is a prisoner with particular vulnerability and somebody on whose behalf prison management ought to have been particularly careful in terms of the treatment that they provided. With somebody for whom where there is a

breach that something more than a simple declaration is going to be required.

Henry J Is that something more than saying if it's bad there's no compensation, but if it's very bad you do get compensation?

Boldt Well there is certainly more to it than that Sir but the severity of the breach is something that has always been acknowledged in other jurisdictions as being a highly relevant factor in terms of whether there ought to be a compensatory remedy as well as a declaration. But there are a number of other factors that have to be taken into account. One of the most important as the state outlined of the state actor when the breach occurs, so if you have a breach that is committed deliberately or in bad faith then once again the case for compensation is going to be significantly greater.

McGrath J What about the damage to the claimant, is that not a primary factor?

Boldt That also is going to be a factor Your Honour and whether because of particular vulnerability or just because the damage has impacted with particular severity on somebody then that also is going to be a highly relevant factor.

McGrath J Should we understand from what you've just said that because of the harm caused to Mr Tofts the Crown's not challenging that particular award? It accepts that that was in his case and in special circumstances a primary factor?

Boldt Certainly he was particularly vulnerable. Now the evidence was slightly ambiguous as to whether he actually suffered significant additional harm as a result of his placement on the BMR but he was significantly more likely to have suffered such harm and in those circumstances we accept that whether he did not really doesn't matter. But certainly if he had suffered more then that also would have weighed in favour of the decision and it also would have been taken into account no doubt in fixing the level of award required to mark this disapproval.

Henry J Mr Boldt I'm going on to a little bit of tangent here but if there is personal injury resulting from the conduct, does that have to be excluded because of the ACC provisions from any assessment?

Boldt Well the Court of Appeal considered that question expressly in the *Wilding* decision and the conclusion of the Court there was that compensation for personal injury is not available whether the injury is caused in the course of the breach of the Bill of Rights Act or in any other way. But we aren't really talking about compensation here Sir at all. What we are talking about is, because it's our submission that compensation, the money that an

individual receives as a result of a wrong done to him or her is primarily the province of private law. That is something that someone will generally sue for in tort and receive. This regime is separate from and in a sense cumulative to the entitlement that somebody has to compensation at private law.

Henry J But if somebody has in fact suffered damage or personal injury that doesn't get taken into account in the assessment?

Boldt Well in *Wilding* the Court said that there may be aspects of the injury that go to indicate the severity of the breach that will need to be marked, so in other words you aren't compensating for the injury. What you're looking at is the action of the person who caused the injury and you're taking into account that, but of course if the injury was committed accidentally by a person acting entirely in good faith then that's going to give rise to an entirely different set of circumstances from that involving a case where injury is deliberately inflicted.

Elias CJ But what about if it's systematically inflicted?

Boldt Can you be a little more specific Your Honour?

Elias CJ Well I'm just wondering is your argument that good faith means deliberately flouting the law? By that I mean absence of good faith means deliberately flouting the law. Is that

Boldt Well certainly deliberately flouting the law is going to be an example of absence of good faith, yes, and if somebody acted with completely reckless disregard to their legal obligations then that would clearly be a relevant factor too.

Elias CJ But what if the system deliberately adopts a course that's found to be unlawful, is that not a factor that would come into the assessment of whether damages is appropriate?

Boldt Well in our respectful submission Ma'am the question would be 'why did the system adopt a course that was unlawful'? And if it was simply a result of a good faith error, justice occurs routinely in a administrative law context that isn't something that gives rise to a right to compensation. In the absence of a number of other factors our administrative law has always said you can get the law wrong and people can suffer quite significant monetary loss for example as a result of this but an entitlement to compensation will generally require something more. You're going to need for example to be able to bring yourself within the tort of misfeasance in public office before money is going to flow as result, because like a public law action under the Bill of Rights Act,

administrative law is forward-looking. It's primary object is to identify and fix the problem rather than to compensate those who have suffered the breach in the first place.

Tipping J Do we have to weight into this difficult mix the Court of Appeal's observation in *Baigent* that it's compensation not punishment?

Boldt There are some unusual, well I shouldn't say unusual, there are some perhaps inconsistent comments within the *Baigent* decision that I'm going to take Your Honours to because the fact that it is not punishment is something we all acknowledge but the question is what is required is a forward-looking means of addressing this harm that has already occurred.

Tipping J I don't think you should assume in the light of the submissions overall that everyone acknowledges without question that no element of punishment comes into it parche *Baigent.*

Boldt Well

Tipping J I'm not settling a view here Mr Boldt – far from it, but I think it would be a dangerous assumption for you to make at this level of inquiry where we're not bound by anything.

Boldt Yes, well I'm very happy to explore punishment as a potential

Tipping J I'm not wanting to encourage you to do so necessarily but I just felt lack of response to your observation might disarm you.

Boldt For the moment at least Your Honour I'm content to explore the matter in the context of simply a forward-looking and constructive response to a breach that has occurred rather than a retrospective and compensatory response, which is generally the model that prevails in private law.

Elias CJ And yet you take the view that Mr Tofts, that the award of damages there was appropriate. I'm struggling really for the point of principle here. If you accept that the damages awarded to him were appropriate, aren't you then really taking issues with the Judge simply in terms of his assessment as to whether damages was appropriate in the case of the others turning on how he viewed the impact upon them which you accept to be a relevant consideration in relation to Tofts and the other factors to be taken into account in vindication.

Boldt His Honour certainly expressed the award in favour of Mr Tofts once again as compensation for the harm that had been done to him or for whatever damage shall we say he suffered as a result of his time in the BMR. Now I don't want to be taken by these submissions as saying that

that rationale for the award in Mr Tofts' favour is accepted as correct by the Crown. On the other hand

Elias CJ Well you said he was particularly vulnerable.

Boldt Yes Ma'am but my point is that the same award could have been made in favour of Mr Tofts by applying the principles that the Crown is articulating in this case, namely that by reason of his particular vulnerability of which Corrections was aware, he ought to have been treated differently. This was something that they knew about

Tipping J It goes to the character of the breach rather than the consequences of the breach is close to what you're saying isn't it?

Boldt Indeed Sir, that's exactly what I'm submitting. In other words it's not so much the consequences that Mr Tofts suffered but it was what lay behind the fact that his rights under s.9 were breached, and before I lose sight of it, we've strayed a distance from Your Honour Justice Henry's original question about the principles that should guide an order for public law compensation. I've spoken about the state of mind of the actor and I've spoken about the vulnerability of the victim and the potential consequences of the victim and I've spoken about the severity of the breach and then there is another factor which is also relevant and that is there may be circumstances in a particular case that indicate that previous declarations made by the Court, previous expressions of the Court's displeasure with particular conduct have fallen on deaf ears if there has been a failure to remedy in reliance on what might be regarded as the usual persuasive effect of a declaration, then something more may well be required as an additional incentive to secure compliance in the future. If for example, and I know in the 90's there was a lot of talk about domestic violence arrest policies which had been held by the Courts to be unlawful with the Police, circumscribed the discretion that they have to arrest and charge by saying 'wherever there is a complaint of domestic violence if there is evidence of an offence, we will arrest' and the Courts held in a number of different cases that that was unlawful. Now if a policy such as that were to continue in the face of an expressed declaration of a legality then one might expect on top of any award that might be made in favour of the plaintiff at private law and compensation that the Court might want to make an additional award to mark its disapproval at the ongoing breach of the Bill of Rights and the ineffectiveness of the normal declaratory relief.

Tipping J Marking disapproval and punishment are close bedfellows.

Boldt They are Sir and certainly it would fit within a number of theories of punishment in terms of concepts of general and individual deterrents. It is our submission though that what this is is a forward-looking shall we say

incentive to secure compliance. Now if that can be re-characterised in a more punitive vein well that's perhaps open to people who look at it, but it's our submission that what you are doing is looking forward

Tipping J Enocourager.

Boldt Exactly Your Honour.

McGrath J So what Mr Boldt you're saying is that a declaration generally will vindicate the rule of law but in some special circumstances it won't. In particular if it's an ongoing breach and that compensation is available as a supplementary remedy in that special situation?

Boldt Yes Sir, exactly.

McGrath J I know this is not the complete argument but that's what you're saying on this point?

Boldt On this point, that is exactly it Sir.

Elias CJ And that it isn't compensation, it's exemplary damages?

Boldt Well once again I wouldn't want to fall into the language of exemplary damages

Elias CJ Well that's the effect though isn't it?

Boldt The threshold for exemplary damages has been fixed very high and I wouldn't want to be seen to be advocating a circumscribing of the Court's discretion in terms of when an award of this kind might be appropriate. Certainly there will need to be something out of the ordinary but it doesn't necessarily need to be the kind of shocking, outrageous case that our Courts have held as necessary before an order for exemplary damages is required. This remains a broadly discretionary regime. This is really argument about the principles that underpin the exercise of that discretion and it's our submission that there is very solid authority for the proposition that a declaration will generally be sufficient but that there may be situations in which a declaration is not sufficient and I've given a number of examples of situations in which a declaration is not sufficient, but really that ought to be the guiding principle in my respectful submission.

Tipping J Can you be as absolute as that? You're saying this across the board but surely a declaration would not usually be sufficient for torture.

Boldt Oh Your Honour the severity of the breach, the right that is breached, and the importance of that right are always highly material and it's

inconceivable that a breach of the right to be free from torture would not attract an award. And Your Honour that is something which is acknowledged in our written submissions.

Tipping J Well I know what you would probably but simply with respect to say a declaration will usually be sufficient is a bit elusive isn't it?

Boldt In the context Sir of a jurisdiction where we don't talk to people, of course. Now where you have really grey breaches, and it's to be hoped that that never comes to New Zealand, then of course a declaration is not going to come close to

Tipping J Are you really saying that for s.23(5) breaches a declaration will usually be sufficient? I'm trying to get you to be more specific than the earlier observation. Is that what you're really saying if we're going to start talking about levels of we don't normally do these things in New Zealand?

Boldt Well I hope Sir we don't ever do these things in New Zealand.

Tipping J Well is that really the force of your submission here that s.23(5) breaches will not normally require more than the declaration?

Boldt I wouldn't tie it to an individual provision Sir. Even breaches of s.9 in New Zealand are very rare. Now Mr Tofts was an example, and a most unfortunate one, which the Crown, as we acknowledged at the last hearing, deeply regrets but even those breaches in New Zealand are pretty rare and ordinarily breaches of rights in New Zealand are not able to be elevated in our submission to the kind of level where something more than corrective action on the part of the Court is required.

McGrath J Doesn't a payment of compensation have some sort of place in recognising the dignity of the individual that this should not have happened?

Boldt Well Sir yes that's one potential rationale that's been canvassed as a reason for imposing awards of compensation but it is our respectful submission that that by itself isn't ever going to be sufficient because the kinds of interests that are served by a declaration actually do all of that and more. Money is as I think we've covered at some length in the written submission is your ultimate private law remedy. It is something that doesn't have any residence beyond the individual who receives it, and that's fine if you are suing for compensation in a private law realm but where you submit yourself to public law you are taking on something more than your own experience and what you're looking to achieve is something forward-looking that is going to put matters right.

McGrath J I do recognise the force of what you say that a declaration will usually go a considerable way towards vindicating the rule of law. I recognise that. But it does seem to me there's another dimension in relation to the individual and if we put aside the harm and the restoration restorative aspect, it seems to me it probably lies in the dignity of the person and that a payment of compensation is an indication that the state respects the dignity of the person which is not something that really flows on from a declaration that his rights have been breached.

Boldt Well Sir I would challenge the last part of that proposition. With respect, a declaration in that sense is priceless. Mere money can buy all sorts of things but a declaration and official acknowledgement from the Court publicly stated that this thing shouldn't have happened to you and it must stop happening to others is clear and resounding – a personal vindication as one could ever ask for, and to say oh and in addition we'll throw a few thousand dollars your way in my respectful submission adds very little.

Henry J I take it Mr Boldt that your resistance to the proposition would be in part at least that it would always result in an award of compensation once there had been a breach because otherwise there would be no loss of dignity?

Boldt I would certainly agree with that Sir and in fact a more basic proposition that we've advanced in the written submissions is that seems to have been the approach that the New Zealand Courts have applied since *Baigent*. We really pretty much do automatically proceed to the point where we say something is required for you to make sure that you go away from this process with something in your pocket and it's really that proposition that we challenge at a fundamental level and to say that is not generally the role of a private law action.

Elias CJ Isn't it a question of degree though, if the affront to dignity, which of course underlies the covenant, is severe, isn't that something a Court is entitled to take into account in deciding what is the appropriate remedy

Boldt Absolutely Your Honour and we certainly don't take any issue with the proposition that where there is a severe breach of any of the rights in the Bill of Rights Act, then of course it is open to a Court in its discretion to decide that a declaration alone isn't going to be sufficient to mark this. Our proposition though is that the starting point and the presumptive relief where you have a breach of this kind ought to be a declaration and the question must always be asked 'what is it about this case that would make a declaration inadequate in these circumstances' and then to go on to ask 'what level, if there is something there, what level of compensation would properly mark the breach that has been identified in terms of bringing it home both to the community and to the defendant that this kind of conduct must not reoccur'?

Elias CJ And that's your problem with Justice Young's decision, that he didn't apply the presumption that you say you should start with?

Boldt That's right Ma'am and he didn't look for particular features of this case that might warrant an award and as I say readily consent that such features would have been present in the case of Mr Tofts. But secondly we also say that even if he had answered the first question in the affirmative he then didn't go on to ask himself the second questions which is 'what level is required to mark this, not how can I compensate these individuals for the harm'.

Tipping J Is it perhaps helpful, not so much about compensating the individuals, but compensating for the inadequacy of a declaration?

Boldt Sir I think that's a very good way of putting it with respect, I

Tipping J I'm not saying that's my view but I'm just suggesting to you that that is really what you're trying to achieve?

Boldt Well in terms of a very concise way of articulating it Sir I wouldn't have any difficulty with that proposition

Tipping J I've been struggling with this word 'compensation' and if you twist the word in that direction then you get an easier conceptual fusion with the idea of vindication.

Boldt Indeed Sir and would, with the greatest of respect, endorse exactly that sentiment in terms of what we're seeking to achieve with the regime that we're proposing here. Perhaps Your Honours it may be unnecessary for me to do this but other jurisdictions have articulated the kind of concept that I've been trying to describe and perhaps the best and clearest example of a regime that has developed along the lines that the Crown is advocating in that we say in fact is the natural progression from the sentiments underpinning the *Baigent* decision is what's been happening in the United Kingdom since the passing of the Human Rights Act 1998 and the leading decision in the UK on this question is the *Greenfield* case and if I might take Your Honours to that, *Greenfield* can be found in volume 2 of the cross-appellants' bundle of authorities. It's behind tab 20 in volume 2. If I could direct Your Honours to page 684 of the report behind tab 20 and in fact the proposition that Your Honour Justice Tipping has just outlined in terms of where compensation fits into the mix is entirely consistent with what the House of Lords has said in para.19, which is at the top of page 684 'the House of Lord rejects the proposition that compensation should be assessed in the same way as compensation is assessed in tort', and the Lords set out three reason why this should be the case. First the 1998 Act

is not a tort statute; its objects are different and broader. Even in a case where a finding of violation is not judged to afford the remedy just satisfaction, such a finding will be an important part of his remedy and an important vindication of the rights he has asserted. Damages need not ordinarily be awarded to encourage high standards of compliance binding the states since they're already bound in international law to perform their duties under the European Convention in good faith, although it may be different if there is felt to be a need to encourage compliance by individual officials or classes of official'. And that sentiment that sets out the role of compensation at least as it's seen in the UK is very close to the proposition that we are seeking to advance in this Court.

Elias CJ Well it's quite interesting though that it goes on to talk about providing remedies at home. So that's reasoning that's very specific to the circumstances of the Human Rights in the UK.

Boldt Well with respect Ma'am I don't agree with that and in fact if I could take Your Honours to the *Baigent* decision I think that we will see that exactly the same sentiment underpinned a number of the comments that the Court made in that case. I mean it created the public law compensation remedy in the first place. If I could take you to the *Baigent* decision at volume 1 of the cross-appellants' authorities and it's behind tab 5. The best discussion of the position in international law and in other jurisdictions can be found in the judgment of His Honour Justice Hardie Boys and if I could perhaps take Your Honours to the top of page 700 of the decision, His Honour's comments there between lines 1 and 5 'as the Court pointed out the European Court of Human Rights has frequently awarded damages. Citizens of New Zealand ought not to have to resort to international tribunals to obtain adequate remedy for infringement of covenant rights. This country is affirmed by statute. I consider that the Courts are obligated to provide those remedies by domestic law and exactly the same

Tipping J Moreover the remedy is seen as one in public law not in tort.

Boldt Indeed Sir and that's a theme that runs through, if not all, then most of the judgments in *Baigent*. Very similar sentiments were expressed by His Honour Justice Casey, and if I could take Your Honours to page 691 of the *Baigent* decision at around about line 40, sorry 44, 'the Bill of Rights Act reflects covenant rights and it would be a strange thing if Parliament which passed it one year later, that's the Bill of Rights Act, which passed the Bill of Rights Act a year after it acceded to the first optional protocol to the covenant and it must be taken as contemplating that New Zealand citizens could go the United Nations Committee in New York for appropriate redress but could not obtain it from our own Courts'. So there was a very clear sentiment in New Zealand when this remedy was devised that we were bringing ourselves within the international mainstream and that we

were providing in New Zealand the kind of public remedy that New Zealand citizens would otherwise have to go to international forums to obtain, so it's a very similar sentiment to that underpinning what the House of Lords said in *Greenfield*. And there is just one other aspect of the English position that it's appropriate to emphasise at this point and I'm sorry to be taking you back and forth between volumes but behind tab 19 in volume 2 there's the decision of the English Court of Appeal in Anufrijeva against Suffolk Borough Council and at page 1155 of that report the Court of Appeal under heading *The Strasbourg Principles*

Tipping J 11?

Boldt 1155 Sir.

Tipping J Thank you.

Elias CJ This went to the House of Lords didn't it?

Boldt No.

Elias CJ Not this one?

Boldt No, and I understand that leave was refused. Oh I'm advised by my friend Mr Keith that it didn't go on this point anyway.

Elias CJ Oh great, it did go on one point though because

Blanchard J No, leave to appeal refused. Well that's only one of the cases.

Boldt But in the passage to which I'd like to refer Your Honours is in para.58; the Court of Appeal there is talking about the principles that govern awards in *Strasbourg*. But it also cites with apparent approval a passage from a commentator named Karen Reid who says 'the emphasis', this is in terms of compensation 'is not on providing a mechanism for enriching successful applicants but rather on the role of compensation in making public and binding findings of applicable human rights standards'.

Tipping J But the next quote's not very encouraging – Lester and Pannick.

Boldt Of course and one of the criticisms that has been levelled in England is that by placing too much reliance on *Strasbourg* for fixing awards or guidance as far as compensation is concerned, there actually isn't an awful lot in the jurisprudence of the European Court that articulates principle. Now one area where in fact there is a pretty clear and recognised tariff is in the area of prison conditions where those have led to a breach of Article 3 of the Convention and there seems to be a pretty standard award now of

around about 3,000 Euro, so in terms of saying that the principles are difficult to find and articulate at least in that area, there is now a fairly clear consensus that has emerged from the European case law and that has been applied also in the United Kingdom, but yes it's perhaps a slightly more apposite criticism in areas other than Article 3 where perhaps there isn't quite such a clear articulation of principle. But in any event the Anufrijeva case was discussed at some length in *Greenfield* commented that tort awards might be useful as a guide for fixing

Tipping J I don't know how much we're going to be required to go into this but the very next paragraph 59 where who is the author, whoever the person is who's written this said 'despite these warnings of the difficulty of finding principles, the Court of Human Rights appears to have applied a direct tort principle'. It's all extraordinarily elusive.

Boldt It is and one of the things that is clear certainly from the European jurisdiction is the pecuniary loss, where that can be identified

Tipping J Oh are they talking about restitution only in the sense of the actual pecuniary loss?

Boldt Well in terms of non-pecuniary loss the way the European Court operates is to make awards on what it calls an 'equitable basis ' and the kinds of awards that I've been talking about where this 3,000 Euro award is standard have all been cases of non-pecuniary loss where someone has say suffered distress as a result of being imprisoned and conditions that don't meet the required standards

Blanchard J What does an equitable basis mean in this context? Is it just judicial language for thinking of a number?

Boldt I don't want to sound unduly cynical Sir but it sounds as though it means everyone gets the same and everybody gets around about 3,000 Euro. That seems to be a pretty recognised tariff in what they haven't done as between the various cases is identify gradations of particular severity.

Tipping J Of course the European jurisprudence owes as much to sort of civil law ideas as it does to common law ideas so we're really getting a kind of difficult blend of two distinctly different approaches, even if it were for ordinary compensation.

Boldt Yes I accept that entirely Sir and again that has been one of the criticisms that has been levelled. Your Honours we handed up today a bundle of supplementary materials and these include a couple of cases where we'd put in the wrong reports in the last bundle and it has also included among it some relatively recent critical work

Elias CJ Sorry, have you finished taking us to the relevant passages in this case?

Boldt Actually Ma'am I haven't quite and I'm sorry

Elias CJ Para.66 seems to be where he comes to the critical issue.

Boldt Perhaps I ought to also say in having made perhaps a flippant remark about everybody getting the same in the European context, having a standard award of that kind which is a reasonably significant sum of money is clearly taken by the European Court to be an effective way of marking perhaps additional disapproval over and above what can be met by the making of a simple declaration, so it means that there is an award that is neither extravagant nor nominal which simply marks the award.

Blanchard J Could it be that that approach has developed because the European Court is considering cases from a considerable number of jurisdictions in which the social and financial conditions vary very considerably and that it does not want to have to try to pitch awards calibrated for each country, therefore it chooses the so-called equitable approach which as you say is above nominal but not very substantial, and if that's so is that an appropriate approach for a domestic Court in New Zealand where we do understand our social and financial situation?

Boldt Well certainly Sir there is room to debate the level of the award but it is the making of the award that is the salutary exercise in terms of marking the wrong, and once you have taken that additional step that the amount of money in a sense becomes rather a lot less important. What I was going to refer Your Honours to is a critical article which is in this new

Elias CJ Sorry, before you do that, I'm just reading on in this case which I haven't read before. At para.74 the Court is endorsing using the level of damages in torts as some sort of comparative

Blanchard J Isn't that the passage that got disapproved in the House of Lords case?

Boldt Yes that's right Sir. It was that conclusion in Anufrijeva that the House of Lords in *Greenfield*

Elias CJ And Lord Steyne dissented didn't he?

Boldt I'm not sure that he did, no Ma'am. No there wasn't a dissenting judgment in *Greenfield*. Perhaps there is just one additional paragraph in *Greenfield* that I could take Your Honours to before we can put it away for the moment and that is para.9 of the *Greenfield* decision. And that really echoes that sentiment in the quotation from the commentator Ms Reid in

the Anufrijeva case and that is 'the routine treatment of a finding of violation as in itself just satisfaction for the violation found. It reflects the point already made that the focus of the Convention is on the protection of human rights and not the award of compensation'. And that's important for two reasons. Firstly it does emphasise that the award of money is designed for situations over and above the ordinary and the second which I suppose is another way of making the same point is to emphasise the first words there which is 'the routine treatment' and so this really does emphasise that we have a pretty clear presumption in favour of a declaration that would ordinarily be sufficient.

Tipping J And Lord Bingham at 10 following seems to have distanced himself from this rest of duty idea both as a matter of the Latin tongue and more substantively

Boldt Yes Sir.

Tipping J So it just struck me as being a very awkward way of expressing it in this particular context and obviously it hasn't got any traction in England.

Boldt No Sir, nor really in Europe despite the fact that it is referred to as one of the guiding principles, certainly at least in the case of non-pecuniary loss. The kinds of sentiments that Your Honours have raised, and this is really a quantum point rather than the basic point regarding the role of compensation, but Your Honours have commented that different jurisdictions clearly had different levels of awards domestically and certainly this is something that others have commented on and in the new bundle, the cream coloured bundle there is an article by Richard Clayton QC and indeed he was counsel for the applicant in *Greenfield* itself, so it's perhaps not surprising he's not entirely enthusiastic about the case or its outcome but he suggests in a rather critical way that by relying on Europe for guidance in terms of awards, the Court has perhaps subjected itself to an international jurisdiction that is subject to factors not readily applicable at home and in paras.31 through to 33 he has some observations about the difference for example between a British case and a Greek case showing that in domestic law there is a significant difference between the kinds of levels that might be expected and that a much more indigenous approach ought to have been applied, but certainly the House of Lords in that respect wasn't convinced. Mr Clayton of course was also the counsel who appeared on behalf of the applicant in Anufrijeva. Now what we have done in the written submissions Your Honours is looked at the decisions as they have emerged from the Court of Appeal over the years and one of the features that is apparent is that a great deal was read into things that were said in passing or obiter or indeed were not said in the *Baigent* case and it's important in my respectful submission when examining what was said in *Baigent* to remember what the focus in that case was. That was of

course an appeal against a High Court decision striking out *Mrs Baigent*'s claim and the issue for the Court was simply whether a public law, or should I say whether any civil regime existed that would allow a claim in damages for a breach of the Bill of Rights Act and the focus of the argument in that case was very much on whether there was any right of action. The Crown said there was not and the nature of the discussion centred around things such as the absence of a remedies provisions in the New Zealand Statute – the fact that there had been one in the white paper which was removed. But there was not any real focus in that case on what a public law compensation regime would look like. That really wasn't the issue in the case. There were certainly some passing comments by members of the Court but it must be borne in mind very much that there was a far narrower focus in terms of the issue that the Court had to resolve. But that said subsequent decisions seized on aspects of the *Baigent* decision – for example there was a comment by His Honour Justice McKay that the same amount in terms of compensation should be recoverable whether one sued in private law or under the Bill of Rights Act and there was also a comment from President Cooke to the effect that something less than $70,000 might have been an appropriate award for the brief but serious intrusion that was alleged in the *Baigent* case and of course the imprecision associated with saying something less than $70,000 meant that it became very difficult to know whether by that one might except $500 or $60,000. But in any event the issue became if not completely settled then virtually settled by the time of the Court of Appeal's decision in *Dunlea* and in *Dunlea* the Court of Appeal held that although it reserved its position and said we don't finally decide this, the majority said there are very strong reasons for considering claims for compensation under the Bill of Rights Act and damages and tort on the same footing and that the same kinds of scale ought to be applied, in other words you would get the same amount of compensation assessed in accordance with the same principles, whichever approach was taken. And there was perhaps further alignment of the two concepts and decisions such as *Wilding* where the Court confirmed that just as in an action for a public law claim that falls within the statute bar under the Accident Compensation Legislation should not give rise to any kind of compensation for personal injury. So we have a very clear signal and when I say that His Honour Justice Young was wrong to derive these awards with reference to tort principle, His Honour was doing nothing more than following a pretty authority from the Court of Appeal on this point. However it is that principle this alignment that has occurred over the years and secondly the disregard that has been shown to the efficacy of the remedy of a declaration that has in our respectful submission led us down a path in New Zealand where we are no longer really aligned with comparable jurisdictions and where our approach to awarding compensation is out of step with the kind of public law approach that the Court in *Baigent* had in mind with reference to the international

instruments and its desire to bring New Zealand within the mainstream rather than outside the mainstream in terms of its treatment.

Elias CJ Are you going to take us to authorities from any other jurisdiction on this point?

Boldt Well there are a number of other jurisdictions that I canvassed in our written submissions Ma'am and part of the problem is that even in a country like Canada which has had a civil remedy under the Charter for a long time, the authorities that have emerged are firstly few and far between and secondly it's very very difficult to discern any principle from those, in fact as Your Honours may have seen from the Canadian decisions that we have included, there's an awful lot of discussion about the appropriate principles; very little guidance; very little consensus that has emerged, and that has always been something that's been regarded as somewhat surprising given the availability of this remedy, but the Canadian decisions are there. Some make awards that one could regard as nominal, and I don't say that to mean small awards, but awards that are simply a certain to mark the breach; others come up with a rudimentary calculation as to what might serve a compensatory interest; others treat the common law and Charter claims as the same but add an additional declaration to mark the breach of the Charter. But there really isn't a lot of guidance in my respectful submission that can be drawn from the various Canadian jurisdictions

Tipping J There's no decision of the Supreme Court for example which you could say is the closest they've got to sort of defining the concepts, the principles? I don't recall there be anything very specific in what you've put in the written.

Boldt No, my friend Mr Keith I think is saying they've never actually awarded compensation, or never upheld an award of compensation in the Supreme Court. Very few of those cases have actually reached it.

Blanchard J Have they every tipped one over other than on a liability ground?

Boldt Not that I'm aware. They certainly did that in the *Autumn* case but that was on grounds unrelated to the making of the award. So perhaps surprisingly the Canadian Courts don't afford very much guidance in this area, and that was something that was commented on by the Law Commission when it conducted its review into the *Baigent* decision. We've also included in the submissions a couple of cases from South Africa where there Constitutional Court has actually expressed some scepticism as to whether compensation is ever appropriate for non-pecuniary loss and that's in the *Fose* decision.

McGrath J Sorry, which decision?

Boldt The *Fose* and I'll take Your Honour to the passage. It's in volume 2 Your Honour behind tab 28. It's in the decision of Justice Ackermann. at para.68 which is page 826 of the report and a comment there is 'I had considerable doubts whether they were even in a case of infringement of a right which has not caused damage to the plaintiff and award of constitutional damages in order to vindicate the right would be appropriate to for the purposes of s.74. That section provides that a declaration of rights is included in the concept of appropriate relief and the Court may well conclude that a declaratory order combined with a suitable order as to costs would be a sufficiently appropriate remedy to vindicate a plaintiff's right even in the absence of an award of damages. It's unnecessary however to decide this issue in the present case'.

Blanchard J That's not the approach the Privy Council's taken on constitutional cases from the Caribbean.

Boldt Well we've got the decisions of *Ramanoop* and *Merson* and I see we're just hitting 11.30 but I'd be very happy to address those decisions straight after the break if that would be convenient?

Elias CJ Yes that's convenient, thank you very much.

11.30am Court adjourned
11.52am Court resumed

Elias CJ Thank you. Mr Boldt.

Boldt Thank you Your Honour. Before the break Your Honour Justice Blanchard inquired about the position in the Caribbean, at least as articulated in a couple of decisions from last year by the Privy Council and the case of *Ramanoop* which is the first one certainly has a number of dicta that are not consistent with the kinds of submissions that are being advanced by the Crown in this case. But it is important to bear in mind that what was at issue in *Ramanoop* was what was regarded by everybody as a particularly egregious breach of the rights of the plaintiff in that case and the issue that the Privy Council was particularly concerned with was whether as a Court adjudicating upon a constitutional breach something more than mere compensation was available and the Privy Council concluded that 'yes a declaration will sometimes do it' but it used the words 'more often than not you're going to need something more than just words' and certainly in the context of a particularly significant breach one could understand that. In fact the result if this had occurred in New

Zealand perhaps leaving to one side for a moment the ACC bar, would probably have been the same. The compensation would have been achieved on the model that we advocate by an award of damages and the severity of the breach would then in all likelihood have been marked by an additional award for the breaches of the Constitution. These decisions are both decided in the context of Supreme Law Constitutions which expressly provide for redress to be granted by a Court upon application. But perhaps the better or more applicable discussion by the Privy Council last year was in the second of those two decisions. The *Merson* decision which cited at length from *Ramanoop* but made a number of additional observations, and that's in volume 3 Your Honours of the bundle I've handed up and it's behind tab 38. This was a case where the plaintiff was subjected to assault and battery, false imprisonment, malicious prosecution and breaches of the plaintiff's constitutional rights and the award was divided up in a slightly unusual fashion as Your Honour can see. At para.2 the Judge at first instance awarded some special damages then $90,000 damages for assault, battery and false imprisonment; $90,000 for malicious prosecution and $100,000 for the contravention of the plaintiff's constitutional rights.

Blanchard J How much is that in our money do you know?

Boldt I think Mr Keith knows the answer. The answer is it's $16,000

Keith US.

Boldt $16,000 US dollars.

Blanchard J That's $100,000.

Boldt $100,000 Bahamas dollars is $16,000 US dollars, and the complaint

Tipping J About $25,00 New Zealand.

Boldt That would be about $25,000 NZ, maybe a little less given the strong dollar but around about that Your Honour. My friend Mr Ellis says we were at 67 cents this morning so yes about $24,000

Tippng J Your client's interested in that.

Ellis I just heard it on the news.

Boldt I don't think any of these plaintiffs have got offshore bank accounts Your Honour but in any event the issue as the case wound its way up the hierarchy in this was whether this award was sustainable on the basis that it must have involved on the state's submission an element of duplication

Blanchard J Do we actually know what happened to this woman? The judgment isn't easy reading factually.

Boldt No there's a lot of description in para.7 of the callous and high-handed nature of the

Blanchard J But it's very vague in terms of what actually happened and over what period.

Boldt Well that's right Your Honour, although in fact it's probably not material for the purposes of the discussion that we're having because the issue really was this question of double counting, whether that had occurred and if it had occurred whether that was permissible and the Privy Council in para.15 said that the way that Her Honour had approached the case made it a little difficult to see whether or not there was any overlap and they drew the conclusion that in fact what had happened is that the Judge had reached a global sum and had roughly divided that evenly among the three different heads of liability that had been found without articulating any clear basis on which that division was appropriate. But in any event the passage to which I'd like to draw Your Honours attention comes in para.18 of the judgment and it's not completely or even significantly in my respectful submission different from the kind of model that the Crown contends for in this case. Beginning at the third line of that paragraph, 'if the case is one for an award of damages by way of constitutional redress and Their Lordships would replete that constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course' and that is in my respectful submission a significant caveat, the nature of the damages awarded may be compensatory but should always be vindicatory and accordingly the damages may in an appropriate case exceed a purely compensatory amount. The purpose of a vindicatory award is not a punitive purpose, it is not to teach the executive not to misbehave; the purpose is to vindicate the right of the complainant whether a citizen or a visitor to carry on his or her life in the Bahamas free from unjustified executive interference, mistreatment or oppression. The sum appropriate to be awarded to achieve this purpose will depend upon the nature of the particular infringement and the circumstances relating to that infringement. It will be a sum at the discretion of the Trial Judge and in some cases a suitable declaration may suffice to vindicate the right in other cases an award of damages, including substantial damages and it may be seen as necessary.

Blanchard J What does the Court mean by 'exceeding a purely compensatory amount'? What's a purely compensatory amount?

Boldt The purely compensatory amount is what would be achieved in tort.

Tipping J Well no not necessarily.

Blanchard J That doesn't seem to help you.

Boldt Yes, well leaving aside questions of exemplary damages of course but that is the amount that applying normal tortious principles to the wrong committed would bring you back into the position in which you were

Tipping J I think that Their Lordships without expressly saying so were engaging concepts of aggravated damages which is still compensatory but they're necessary if you like to mark the way in which the tort has been committed. I personally am not a fan of the label 'aggravated damages' but I suspect that underlies some of it.

Boldt It may very well Your Honour and it is difficult given the different awards that were made here for the different heads of damage to really see what underpinned the awards at first instance but the general sentiment in that paragraph with the exception that ordinarily one would expect purely compensatory damages to be the field of private law and to be achieved as could very easily have happened in the *Merson* case itself by awards under those common law headings such as an award for assault, malicious prosecution, false imprisonment, with the additional question and the important question under the Constitution being 'is something more required to fully vindicate this right' taking account of those public law aspects of the case that we've been discussing.

Tipping J Is it fair to suggest that what Lord Scott was saying here for the Board really in the slightly awkward sentence may be compensatory but should always be vindicatory, is that the primary aim is vindication but in order to achieve vindication it may be necessary to have an element of compensation?

Boldt Possibly Sir. My reading in fact of it was that what sometimes happens in the Caribbean and *Ramanoop* was a good example of it, is that people do not, even though they have suffered a tortious wrong that would give rise to a private law action, they sometimes elect to sue purely on constitutional grounds and that appears to be what occurred in *Ramanoop* so although one would have undoubtedly been available a course of action, say battery and in false imprisonment in *Ramanoop*, there was simply a constitutional claim and that was dealt with both as a means of providing compensation to the victim of the wrongdoing and also, and this was the reason for the discussion in the Privy Council, an additional award to mark the community's disapproval of the wrongdoing. So when I see the regimes under discussion in these two cases as being distinct from the one that we advocate is that perhaps because of the express constitutional

provisions providing for redress to be granted directly under the constitution, people do bring claims for compensation as the amends of getting **what** under our system it's our respectful submission is the proper province of private law.

Tipping J But if you haven't got a private law claim the breach of the Bill of Rights does not subsume a private law claim, you're not suggesting as I understand you that there can't be some compensatory element in the public law award or are you?

Boldt I think we are Sir, yes.

Tipping J You are?

Boldt Yes, yes, it will generally as I have emphasised be the role of tort to compensate a person where there has been only a private harm done to that person. There may also be accumulative claim in tort, oh sorry, accumulative claim under the Bill of Rights Act, but if for some reason the claim in tort is not available it's certainly our submission that the Bill of Rights Act can't be used to effectively re-animate a tort that Parliament or the common law in its wisdom has decided to extinguish and in that respect our position is not very different from that articulated by the Court of Appeal in *Wilding*. In *Wilding* for example the Court said we don't want to allow carefully struck balances between a regime which is designed to benefit everybody and introduce a no-fault compensation system in New Zealand to be circumvented by the introduction of a Bill of Rights exception and it is our

Tipping J The context there was the construction of a statutory bar wasn't it?

Boldt Yes.

Tipping J I see that as being a bit different from the wider proposition that you're now advancing that it's no part of these damages to compensate.

Boldt I guess it depends on the reason why the question is asked. What I'm concerned to avoid is any suggestion that where for whatever reason the law has decided to exclude a compensatory remedy from a plaintiff at private law that that bar whether it be a creature of statute or a creature of the common law ought to be overturned simply because a human right under the Bill of Rights Act enters the mix.

Tipping J You understand that point?

Boldt Yes. Now if compensating for the breach would effectively do that, would effectively undermine whatever public policy it is that has given rise to the

absence of a private law remedy, then it is our respectful submission that that's inappropriate.

Elias CJ I'm not finding the concepts very easy - compensation, tort. If the acknowledged aim is vindication of the right or remedy for the breach of the right your argument seems very close to me to saying that the vindication is only of the legislative purpose. If it's an indication of the right that's being denied, how is it that an element of compensation can be excluded?

Boldt I guess Ma'am it comes back to what the purpose of the award is in the first place and it is our submission that it is the public purpose of awards under the Bill of Rights Act that give rise to the need to make them in the first place. It is something about the Act that has been committed, whether because it is particularly egregious or is in bad faith, or impacted with particular severity, or was done in violation of earlier warnings from the Court or whatever. And so in those circumstances this need for compensation is arrived at quite independently of any harm to the plaintiff and accordingly it isn't such a relevant consideration having decided, if it is decided, that the purpose of an award is to mark the breach, to then go into the particular circumstances of the plaintiff and to come up with an award that compensates the plaintiff with reference to the normal tortious principles of general damages or whatever.

Elias CJ But it doesn't have to. I mean the two things don't have to be the same. If the aim is to achieve a remedy or vindication of the right which has been denied to the plaintiff, in some circumstances there may be no adequate remedy without compensating the plaintiff for what he has lost, which is he's had the right denied to him.

Boldt I understand Your Honour's point. It's our submission though that this regime was created for a different purpose. It isn't solely focused on the person who has suffered the breach

Elias CJ Well why is it a guarantee to every person has the right, why is it expressed like that?

Boldt Because this is a mark of what the state must do relevant to all of its citizens and what it must not do relevant to any of its citizens.

Elias CJ Well then why use the language of right? What not simply say the state must not deprive any person of liberty

Boldt Well it was the Court of Appeal in *Baigent* that settled upon this description of a right as a public right, something different from rights as they are conceived in private law rights. The rights that protect all of us

from being falsely imprisoned or from being assaulted or from anything else. The Court of Appeal considered that it was this additional over-arching public purpose that distinguished a claim under the Bill of Rights from those claims that everybody can bring in private law and it was the whole basis of the reinstatement of that cause of action. One of the models that had been discussed during argument in *Baigent* was the concept of breach of statutory duty which is a private law tort and you have a statutory right to something and it's breached then there can be a private law claim and one of the bases on which it had been argued by the Crown that the immunity provisions defeated the claim under the Bill of Rights Acts is that breach of statutory duty is a tort. The immunity provisions excluded liability in tort and therefore even if a claim under the Bill of Rights existed it had to have been defeated by those provisions. And the Court of Appeal's answer to that was 'yes but this is not a tort, this is a public claim. This is no longer about simply two individuals squaring off even if one of those individuals happens to be the state, this is something that has a different and more broadly focused purpose' and there is a lot of discussion and there are a couple of decisions and a good article that I will take Your Honours to that discusses the clear conceptual distinction between a private claim and a public claim. But from the point of view of a plaintiff who brings a claim in public law it is no longer just about you, it's about a wrong that has been done that impacts more broadly on the community as a whole and there are comments in a number of cases and indeed Your Honour the Chief Justice in the *Marsharey* decision talked about the need not to over-personalise these rights to the individual. It is a more broadly focused concept than that.

Elias CJ Well I don't know it seems a mile away from the idea that the Bill of Rights Act was meant to permeate the whole of New Zealand law and these categories I'm not convinced about at the moment but you carry on.

Blanchard J I think what we're looking at here is really a hybrid, it's not pure public law and it's certainly not pure private law, but it's got some elements of each.

Boldt Well that's potentially one interpretation. What I'm

Elias CJ It doesn't provide for damages as a remedy and therefore that's not your first point of recourse to vindicate, but *Baigent's* case says that.

Boldt Yes well the concern that would arise on that model, particularly if we return to concepts of compensation for a wrong that is suffered to an individual I guess a separate question arises as to how that might be calculated and how that calculation might differ from a calculation in tort, because at the moment the only two models that we have seen are the one that has prevailed here to date which is that a Bill of Rights claim basically

a tort claim in disguise. There is very very little practical difference and awards are made upon a finding of violation and they are assessed in exactly the same way, and it's that model that we say is wrong. The alternative model, the model has at least found favour in a number of overseas jurisdictions is that these two concepts are entirely distinct. The private law actions the one that covers your compensation generally. The public law aspect to the case, the constitutional aspect to the case is what determines the public response to the constitutional wrong that is done to you and that can be achieved by any number of forward-looking declaratory methods of which one may be compensation, but not always, not generally. Now it may be that there is room for a hybrid. It certainly isn't a concept that I'm aware of from other jurisdictions but what I would urge Your Honours to avoid the prospect of is a mechanism by which tort can simply be cloned, can simply be replicated in the form of a Bill of Rights claim, which is then used to defeat the limitations that the law has for other reasons placed on the availability of compensation. One of the impacts, and I say this now having dealt with dozens of claims brought under the Bill of Rights Act that have settled, is that the great attraction of a Bill of Rights Act claim over and above a claim in tort is because at least on the interpretation as it's been implied thus far is that this is simply a tort claim to which none of the normal immunities that ordinarily protect governmental actors apply. The reason that the *Baigent* case had been struck out at first instance was because there are a number of provisions in the Crimes Act, in the Police Act, and most particularly in the Crown Proceedings Act, which say actors who are relying on a duly executed warrant issued out of a Court can't then be sued in tort for things that they do in reliance on that warrant. Well the way that this regime has effectively worked itself out over the last few years is that litigants can now simply say 'well you searched the wrong house – you had a search warrant but that doesn't matter any more, please pay money' and on the basis of the analysis that our Courts have come down with over the years, that is a perfectly viable claim and those claims tend to be paid out in exactly the same way as they would have been if the Police had gone in there without a warrant, and it's that complete overlap between tort and the Bill of Rights Act remedy that we say is wrong and that's where we say we've managed to get off track.

Blanchard J Well Mr Boldt maybe the Crown should have been fighting some of those cases in order to see where the Courts would go. *Baigent* was a case which came as I understand the facts of it, within the egregious breach category where they knew they were in the wrong place and carried on anyway. Why haven't you, if you haven't taken a case of the kind you're mentioning, which was a simple mistake where they're in the wrong house and presumably there would be cases around where they realise they're in the wrong house and they say 'sorry' and back out.

Boldt Yes

Blanchard J It strikes me as an unlikely scenario for award of damages.

Boldt The problem is I think Sir that this is a relatively unremarkable application of first of all the Court of Appeal saying in *Baigent* a claim for unreasonable search is not a tort so the immunity provisions do not protect you and there's also High Court authority that says that going to the wrong house even with a valid warrant is an unreasonable search and we've also got implicit authority up until *Dunlea* and pretty much express authority from *Dunlea* on that you calculate damages in accordance with the same principles as you do in tort, so at least prior to the advent of this Court

Blanchard J What would you get in tort for that kind of situation, assuming there was no immunity for the Police? It's a trespass on the property which you'd only give relatively nominal damages if you backed out as soon as you realised you were in the wrong place.

Boldt Yes although of course sometimes they don't realise they're in the wrong place until after the search has been completed or

Blanchard J Well that would no doubt be factored in to a tort law damage. It seems to me that the Crown may be running scared a bit on this.

Boldt Well all I can say Sir is that, and I speak of someone who hasn't worked at Crown Law for four or five years now but certainly when I was there we were just doing our best to be responsible and to apply the law as fairly as it had been articulated and certainly there is authority that a good faith search of a property or even a brief one entitled occupants to $1,500 a piece. That was the outcome in *Dunlea*, and I argued in *Dunlea* that that was much too high given that the Police were in the property for all of about three minutes and that it wasn't an especially intrusive search to the extent that having Police Officers in your property can never be regarded as non-intrusive.

Blanchard J It was the armed offenders squad wasn't it?

Boldt It was the armed offenders squad but it was after everything had calmed down and they had this routine of checking properties to make absolutely sure there wasn't anyone else present who might pose a danger and so they went through the property.

Blanchard J With their guns?

Boldt I can't recall Your Honour whether they did or not but in any event the occupants weren't present, they were down the street having been

evacuated so it wasn't as though the presence of armed men in the property would have terrified them particularly. I think the biggest aggravating feature in that case was there was a boot print on the wall because someone had gone up into the loft to make sure there was no-one hiding in the roof space and anyway that gave rise to an order of $1,500 both in trespass and an unreasonable search. So certainly at least as these cases have interpreted and it's not a remarkable interpretation of these various cases, the law does appear when you have a breach of the Bill of Rights Act you will generally get money and the money will be calculated in accordance of Court principle and we needn't stray at all from this case to see an example of that. That in fact of course is exactly what His Honour Justice Young did when he fixed these awards. So if there is to be any kind of a hybrid, coming back to Your Honour's proposition, it would need to be a hybrid that in our respectful submission recognises that these are not the same thing that a claim under the Bill of Rights Act however it is described serves a different purpose and answers different interests to a simple claim in private law and that even the Bill of Rights itself says that other pieces of legislation such as immunity provisions can't be rendered ineffective simply by virtue of perceived inconsistency with the Bill of Rights Act. Now what I can take Your Honours to now – there's been discussion about the difference between public and private law and I can probably touch on this relatively briefly now. In the new bundle of authorities that I handed to Your Honours, there is an article from 1976 in the Harvard Law Review by an author named Abrams Chayes.

Blanchard J He wasn't just an author he was Professor Chayes of Harvard Law School.

Elias CJ And Stanford at one stage too.

Blanchard J And Stanford. He was a very famous man.

Boldt I didn't intend the slightest disrespect Your Honour.

Tipping J There seems to be some sensitivity.

Boldt And in full recognition of his eminence the reason the article is in is because it is even today acknowledged as the leading articulation of the distinction between a public law claim and normal action in private law. This article was referred to by His Honour Justice Hammond in the *Manga* decision which you will have seen from the written submissions is the clearest attempt in any New Zealand Court to date to set out how a tort claim and a claim of public law are different, but His Honour there bases his analysis principally on this article, and as we can see at page 1282, Professor Chayes sets out the three defining characteristics of a private law claim. The lawsuit is bipolar and it's just two individuals or two unitary interests diametrically opposed to be decided on the winner-take-all basis.

Secondly it's retrospective, it's backward-looking. It's something that has happened – we're not interested about the future, right and remedy are inter-dependent. The scope of the relief is derived more or less logically from the substantive violation under the general theory that the plaintiff will get compensation measured by the harm caused by the defendant's breach of duty, whether that be by compensation for a contractual right or a tort, and over the page it's a self-contained episode and the fifth is that the process is party-initiated and party-controlled. And at page 1284 the Professor notes that the object of this article is to describe somewhat more fully the public law model and its departures from the traditional conception, and second to suggest some of its consequences for the place of law and Courts in the American political and legal system, and Professor Chayes then goes on to set out the ways in which a public law claim is different and the key characteristics of a public law action as set out at page 1302 of the article. Now Your Honour the Chief Justice of the last hearing on this talked about the context of structural relief in the United States and much of this article is written against that backdrop which of course isn't applicable in New Zealand but there are a number of these elements nonetheless that are of assistance in New Zealand and there are two in particular that I will draw attention to. The first is No. 4 which is that 'relief is not conceived as compensation for past wrong in a form logically derived from the substantive liability and confined in its impact to the immediate parties; instead it's forward looking, fashioned, ad hoc on flexible and broadly remedial lines, often having important consequences for many persons including absentees', and this case is a very good example of exactly that. Indeed it's also a very good example of the point in No. 8 which is 'the substance of the lawsuit isn't a dispute between private individuals about private rights, but a grievance about the operation of public policy'.

Blanchard J Does Professor Chayes deal anywhere with any kind of public law claim where damages are a possibility?

Boldt His analysis Your Honour is all about the more broadly focused structural relief and I must say that when I read it through and I perhaps rather negligently didn't re-read it prior to today's hearing, but there was nothing as far as compensation

Elias CJ This is really about structural injunctions isn't it, because it's talking about Court continued supervision and so on?

Boldt Well Your Honour that's correct, although what I was going to come to is though the parallels that can nonetheless be drawn between the kind of broader focused remedy and what actually happened in this case because as we have seen the declarations that the Court made in this case had very profound effects, not only with respect to the behaviour management

regime at Auckland Prison which was immediately discontinued, it not only resonated in the ways that Justice Young described in his decision, but it also led to pretty much an immediate change in the law to make sure that this could never happen again, and there was that amendment to which attention has been drawn in the written submissions to the new Corrections Act which was brought in, and the Parliamentary debates refer directly to the Taunoa decision as the basis on which the whole process by which people were detained administratively within prisons in New Zealand has now changed. Now it used to be prior to the amendment but it was left entirely to the Department of Corrections to decide whether people ought to be segregated administratively. There was an escalation certainly. Superintendents could do it for 14 days and after than it needed to be referred to Head Office, which had to continue to approve every three months the segregation. But under the new Act now the most the Department can do is place somebody in administration for three months and after that a visiting Justice, of course as an independent judicial officer, has to approve any ongoing administrative segregation and it is for prison management, it's for the Department to justify why a person ought to be out of mainstream in those circumstances. So this case is a very clear example of what Justice Hammond was talking about in *Mango*. In New Zealand declarations are seldom in vain. This is a very responsible jurisdiction and these comments are taken seriously and they led to an immediate and positive change. Not only has the Government recognised that what happened to these plaintiffs ought not to have happened. It has made sure it can never happen again to anybody else.

Blanchard J Did that occur before the damages judgment?

Boldt Yes, it occurred as a consequence of the initial declarations that were made at the conclusion of the judgment on liability, and it was introduced by way of a supplementary order paper at the Committee stages of the Bill and it was an amendment as Your Honours will have seen from the extracts from Hansard, something that the Green Party initiated and it was adopted by the Government and it became part of the Bill with express reference to this case. So we don't have here any kind of a high-handed continuation of violations of this sort and the systemic potential for this to occur in the future has been removed. Now it's in this context that it's also important to analyse the .. sorry Ma'am.

Elias CJ The Chayes article which I have read before is actually quite irrelevant to the matter before us because it is about structural injunctions and Court regulation for the future. You keep saying that declaratory relief is, or public law relief is forward looking. But that's only true in part. It depends because you can get a declaration of breach which is wholly historic, or you can have a declaration that the Crown should desist from

behaviour so then that's future looking, but you can have both. Both are embraced in the concept of vindication of right.

Boldt I accept all of that and perhaps when I talk about it being forward looking that's a little loose. Certainly in this case there was a very strong forward looking element to the declarations that were given and I guess what distinguishes the public and private law concepts is that in a private law case you're only looking back, you're not seeking to re-arrange the relationship between the parties for the future which is a very large part of what a public law claim sets out to do.

Elias CJ Well you may be, you may be determining what the terms of a Deed of Trust mean or what the terms of a contract mean. It may well have forward implications for the relationship between the parties. I mean it just seems to me again that all these categorisations are not terrifically helpful.

Boldt Certainly where compensation is sought for a past wrong though, the episode is a self-contained one that has happened and has gone and that isn't the kind of broader inquiry that is appropriate in a public law case, and this case is as good an example as one can ever see of that concept because although this wasn't a case brought by, it was originally nine plaintiffs, but five that were relevant to the Bill of Rights Act, the case did serve as quite a wide-ranging inquiry into the BMR as a whole and into the policy of the Department of Corrections relative not only to these plaintiffs but also to all prisoners who had deemed to be a very significant security and behavioural problem within the prison system. And one thing I must take strong issue with with the comments made by my learned friend in the last hearing where he suggested that somehow there hadn't been a proper inquiry in the course of this trial as to what occurred. It's very difficult to think of a more broadly focused way to articulate all of the things that occurred over the entire history of the BMR than occurred here. There was complete discovery in every document associated with the BMR from head office, from establishment right through and the entire first volume of the agreed bundle and indeed the case on appeal in the Court of Appeal consisted of what were called foundation documents. These were all of the documents that tracked through the evolution of this programme and a great deal of the inquiry that was directed to Corrections Officers and also to the General Manager of Public Prisons, who gave evidence about this programme, related to the broad and general way in which it was implemented. So these plaintiffs were examples of people who had been on the programme. No certainly they all had their own individual stories to tell and they all made a number of very serious allegations personal to them but those specific allegations were dismissed. What remained was the systemic problem that have been identified.

Elias CJ Which impacted on them. Well the Judge found that those systemic problems impacted on the individuals.

Boldt Well he found that they impacted upon them in the sense that they weren't wholly unaware of the breach. What he didn't find with the conspicuous exception of Mr Tofts was that there had for example been any psychological/psychiatric condition caused by the placement of the plaintiffs on the regime. There had in the case of all of the plaintiffs with the exception of Mr Robinson been an assertion that placement on the regime had for example caused post-traumatic disorder and that was simply rejected. Now again my friend says oh but there weren't proper examinations. Well in fact again there were expert examinations both by a psychiatrist and psychologist of all of these plaintiffs by their own expert and examinations by the Crown's expert Dr Chaplow as well. So the Court was actually in possession of medical evidence as a result of these examinations but also the full personal files of all of these plaintiffs, which included particularly in the case of Messrs Kidman and Taunoa, extensive medical records, numbers of consultations with psychologists and psychiatrists and in fact one of the reasons that the claims were dismissed was because there were significant inconsistencies between for example what Mr Kidman said in the course of two routine psychiatric examinations during his time on BMR and what he said to his expert psychiatrist a month later for the purposes of this proceeding and he was on the one hand fine

Elias CJ Hang on Mr Boldt this is a fairly lengthy digression from your argument and you may feel some sense of grievance and you may want to respond but we're interested and we're anxious to hear where your argument is going. So what you're saying is that there is something in the nature of a class dimension to this litigation, but don't you have to go further and say that the compensation went beyond what was necessary to vindicate the violation of each of the plaintiffs' rights?

Boldt I guess Ma'am in a very very long-winded way that was the point that I was hoping to reach and really simply wanted to make the point, perhaps pre-emptively, that the absence of findings of actual mental illness for example or serious psychological suffering on the part of any of these plaintiffs wasn't the problem of the nature, it wasn't caused by the nature of the inquiry and it was simply the result of the Judge assessing the very considerable evidence before him and concluding that it wasn't present and that's why this case with respect to all of the plaintiffs bar Mr Tofts, is squarely in the category of a breach that has been suffered but where it's not possible to point to any significant that has been done to any of the individuals as a result.

Elias CJ Well what was the significant harm done to *Mr Baigent*?

Boldt *Mrs Baigent.*

Elias CJ *Mrs Baigent*, sorry.

Tipping J *Mr Baigent* probably suffered some too.

Boldt Well the Court in that case was simply saying that the cause of action could continue. The harm for which public law compensation may have been available if all of the allegations and the statement of claim had been true, would have arisen certainly on our submission from the fact that this really fell into the egregious breach category. There was an allegation at least that the Police upon entering the premises had said we often get it wrong but while we're here we'll have a look around anyway. In other words they were entirely on that allegation reckless as to whether they were in the right house or not. They just thought they'd go through it.

Elias CJ I'm just trying to understand. Are you saying that damages are only available where the actor has acted egregiously or where the person suffering the breach of rights suffers physical or mental damage?

Boldt Those are both examples of situations in which we accept that compensation may be appropriate. The harm to

Elias CJ Well are there any other examples?

Boldt Well there was at least the example of something more than a declaration being required to secure future compliance because a declaration has been ignored in the past.

Tipping J Is your point any more Mr Boldt than the absence of permanent harm, ignoring questions of temporary is a significant in the whole equation as to whether money is required as well as a declaration?

Boldt Yes Sir that's exactly it.

Elias CJ Well of course it has to be a significant factor but I thought you were rather saying that that it's a bar if you haven't suffered some.

Boldt Our submission is, I would never seek to say that there are rigid categories into which a plaintiff must fall before he or she is going to be entitled to compensation, but what we do have is in overseas jurisdictions, and we say with respect that the law is or ought to be here, a strong presumption in favour of a declaration as being sufficient in itself to vindicate the public aspect of the case and something out of the ordinary will be required before money on top of that declaration is going to be required and

bringing it back to this case it's our point that the declarations have had both to the extent that you're looking at the interests of the plaintiffs, the cross-respondents as individuals, the Judge has articulated how this impacts upon them, and that's given them a strong sense of personal vindication, but even more there has been a very quick and emphatic public policy response in reliance upon this declaration and that indicates I think better than anything that something more isn't required, nothing more is required in this case to bring home the nature of the wrong that has been committed.

Blanchard J Despite the length of time it went on for in the case of all of the appellants?

Boldt Well Sir it must be said very brief with respect to three of them. Mr Gunbie was on there for six weeks before he was, and he in fact was removed from the programme as a consequence of an interim order applications.

Blanchard J He's not an appellant. I was excluding him.

McGrath J Cross-respondent.

Boldt Yes he was the beneficiary of an award Sir and we do say that it was wrong to give him an award and Mr Kidman and Mr Tofts were on there for three months.

Blanchard J Well that's a fairly lengthy period of time.

Boldt Yes

Blanchard J Mr Robinson was a year and Taunoa was two years eight months.

Boldt Well that's true Your Honour and again I don't want to delve too far into the particular facts of this case but there were certainly other factors that explained the length of time that Mr Taunoa spent on the programme.

Tipping J Why don't you want to do that Mr Boldt?

Boldt I'm very happy to do it Sir

Tipping J I thought if you were attacking it both on the basis of principle and on the basis of quantum, we have to look pretty closely at the facts of these cases.

Boldt Well I'm very happy to do that although it may be a little out of sequence. The point I

Tipping J No I don't want you to do it out of sequence. You just seemed to be saying you didn't think you really needed or wanted to do it at all.

Boldt Well I suppose if the issue is whether there's something more in this case might be provided simply by the length of time that the respondents spent on the programme then that might be an appropriate opportunity just to say that with respect to Mr Taunoa, a lot of the time that he spent on the programme was as a result of very deliberate misconduct on his part and a complete refusal to engage with the programme or to cooperate with the authority of Corrections Officers. He was described in one of the briefs, and certainly not contradicted, as the worst behaved inmate ever to do BMR. Another person said he caused more problems than every other prisoner in D Block put together and perhaps the best articulation of Mr Taunoa comes from an extract I've reproduced in the written submissions so Your Honours need not go the place on appeal, and it can be found at page 29 of our written submissions on this. In footnote 113 Senior Corrections Officer Lesley Torr gave evidence that wasn't challenged in cross-examination about Mr Taunoa and she said Mr Taunoa was one of the few inmates who took a very long time to respond. 'He was in many ways the most inmate ever to do the programme. I found him highly intelligent and he could be charming if he wanted to be but he was also wilful, manipulative and very dishonest. He was strong and fit and was often abusive and threatening towards staff. He had no respect for the authority of Corrections Officers and showed a particularly bad attitude. He hated BMR and spent much of his time complaining about every aspect of it'.

Blanchard J I don't suppose he said it was illegal?

Boldt Oh he did.

Blanchard J Yes.

Boldt He pursued, he along

Blanchard J And he was right.

Boldt He was. He and Mr Robinson brought the principal complaint to the Ombudsman that led to a number of changes to the programme in 2001. As Your Honours will recall the minimum length of time shall I say on the programme decreased from nine months to six months and Head office took over ongoing scrutiny of the placement of inmates on BMR. The Ombudsman didn't rule on whether the regime complied with s.71A of the Penal Institutions Act, but it is unfortunate in that context that despite being legally advised throughout, and there's no dispute that both Messrs Taunoa and Robinson were legally advised throughout as well as making

countless complaints about every aspect of the case that they didn't bring an application for interim orders, they didn't seek judicial review in bringing an interim orders application because the Court of Appeal in the *Bennett* case very firmly said the way to challenge administrative segregation when it's wrongly imposed is to bring a judicial review. That can be arranged as quickly and as informally as an application for habeas corpus in a properly urgent case, and if that had been done at an early stage it's certain the outcome would have been achieved a great deal earlier. But at least as far as Mr Taunoa was concerned in terms of the time that he spent, the operative paragraph is really para.27. He, as Miss Torr noted, the reason that he spent so long on BMR was that the first 18 months or so he simply refused to pull his head in and accept the routine of the Block. No-one else in the history of the programme behaved so consistently badly over such an extended period. I think it had turned into a battle of wills for him. Finally in the second half of 2001 his attitude showed a notable change and he progressed through the phases very quickly. But what Mr Taunoa had resolved to do during his time on BMR was to break the regime. He said 'I simply will not co-operate with this regime that is being imposed upon me. I will not behave well. In fact I will do the opposite' and the file, and indeed Your Honours have seen reference to it is replete with examples of serious disciplinary matters and other just general bad uncooperative and threatening behaviour. So that was the reason that he spent so long on there and Justice Young spoke in his judgment about the fact there was a large part of self-inflicted prolongation of the time that was spent by Mr Taunoa on the programme, so it certainly ought not in my respectful submission to be held against the Department, or at least held entirely against the Department for those reasons.

Elias CJ I'm sorry I'm perhaps a little behind thinking about your submission that there must be some permanent damage or something out of the ordinary before damages are appropriate. If the finding that there's been breach of s.23(5) is upheld, if it's accepted that there's been a breach so that you've got a finding that each of these plaintiffs, being people who have been deprived of liberty, have not been treated with humanity and respect of their inherent dignity, isn't it unreal as long as that infringement is not trifling to say that this is not something out of the ordinary?

Boldt In the sense that a breach of the Bill of Rights Act is never ordinary

Elias CJ Well you keep talking about breach of the Bill of Rights Act but we're talking about this specific provision, we're talking about a finding not challenged that each of these plaintiffs has been not treated with humanity and the respect they're entitled to.

Blanchard J Over an extended period.

Boldt Well it's obviously a matter for Your Honours where this case falls on the scale of egregious breaches. We would draw a clear distinction between prison conditions that have been found to breach s.23(5) and would in an international context no doubt breach Article 10 of the ICCPR. It may approach a breach of Article 3 of the European Convention but that's obviously a moot point. In none of those regimes is there an automatic progression from a finding of a breach to the need for there to be a consequential award. The circumstances of the breach still need to be taken into account. Now if it's the Court's ultimate assessment that the breaches were of sufficient severity that something more than a declaration is required here then that's obviously a matter for Your Honours. However it is our submission that they don't reach that level. These were conditions that certainly fell below what the Department was obliged to provide for the inmates, but this was a regime that was designed to comply with the standard minimum rights that every inmate has under the regulations. It was designed to ensure that none of the rights that they had in accordance with those regulations were breached. It was designed entirely in good faith and for the very best of purposes and at least as far as the plaintiffs, with the exception of Mr Tofts were concerned, there wasn't any significant harm done, and Ma'am I don't say there needs to be permanent harm done, but there needs to be something more than distress and annoyance associated with a particular breach and in my submission before that level of severity is attained and again that is something that the English cases have stressed quite consistent with the European jurisprudence.

Elias CJ Well is the context of s.23(5) equivalent?

Boldt In the context of Article 3 of the European Convention which in fact as we discussed during the last hearing is perhaps somewhere half-way between our s.23(5) and our s.9. Even so there have been cases in the European jurisdiction where it's been held that a declaration is just satisfaction. And we can perhaps discuss those more fully after the break, but there is certainly not at least internationally any automatic assumption that a breach of one of these rights, and indeed Article 10 of the Convention is in the same category, that a breach of one of these rights automatically translates into a right to money. It won't just by itself be enough.

Henry J It's that principle you are wanting to avoid?

Boldt Oh yes Sir, absolutely.

Henry J That a breach of s.23(5) will give rise to an award of damages simply to recognise the individual's position.

Boldt That's exactly right Sir, thank you.

Elias CJ We'll take the lunch adjournment now thank you.

1.02pm Court adjourned

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2.18pm Court resumed

Boldt Now Your Honours just before the break I told Your Honours that there were examples under Article 3 of the European Convention where a breach of Article 3 had been found but no award of compensation had been made. In fact I was wrong about that. The cases that I have seen under Article 3, which as I had also said is a rather higher standard than that prescribed by s.23(5) have resulted in an award of compensation of around about 2 to 3,000 Euros and I have gone back over the cases over lunchtime and in all of the cases that we've located there are certainly examples of cases in the prison context where there has been a finding that the very serious breaches, or serious harm that is required before the high threshold of Article 3 is attained had not been met but that instead there has for example been a breach of Article 8 of the European Convention which talks about for your right to private and family life and home and correspondence and the Courts in that situation have said that no further remedy other than a declaration is appropriate. But I can't direct Your Honours to a case where an Article 3 breach has resulted in only a declaration. A good example of an Article 8 in the prison context is the decision of *Martin* in the Northern Ireland prison service. This is a domestic decision in the United Kingdom and it's behind tab 31 in Volume 2. And what that case concerns are seriously unhygienic conditions within a particular prison in Northern Ireland and there are various descriptions of the toileting regime in this case which it was obviously very different from anything that anyone in our case had to endure. In effect though there was a small chamber pot in a cell which had to be slopped out in a sluice and no facilities for washing hands, that the whole facility was dirty and smelly and quite obviously unhygienic and the Court in that case drew a contrast with the decision in *Napier and Scottish Ministers* which is the much more serious slopping out case from Scotland where a prisoner sustained very bad eczema and was quite significantly affected by having to be involved in such an unhygienic regime and also at the same time having to share a cell with somebody,

and in that case a breach of Article 3 was found. In this case, the *Martin* case, the Court held that the overall conditions in *Magilligan* differed from the prison conditions in *Napier*. I'm reading here from page 12 – 'ill treatment must attain a minimum level of severity if it is to fall within Article 3. Although proof of intent is not essential the Court must have regard to whether the object was to humiliate and to debase the person concerned and whether as far as the consequences were concerned it adversely his personality in a manner incompatible with the Convention'. So there was a high standard of severity required for a breach of Article 3 and then at para.41, this is pages 21 and 22 the Court concluded that the conditions, the unhygienic conditions in this prison caused the plaintiff a sense of frustration but there is not evidence that he suffered any ill-health as a result of the lack of hygiene involved in the procedures adopted by the period of his incarceration the toileting facilities had considerably improved because of the installation of the unlock system, I'm satisfied that the Prison Service in its approach to toileting arrangements did not set out to deliberately humiliate or demean prisoners. The failure of the system was a failure to understand and appreciate the obligation to carry out a focused inquiry, explicit reference to Article 8, and in the end the Court concluded that declaratory relief in those circumstances would be sufficient. So Article 3 in the European Convention as I say falls midway shall we say between s.23(5) and s.9. It is certainly correct to say that the Human Rights Committee which is dealing with more directly analogous provisions in the form of Article 10 and Article 7 has on a number of occasions declined to make any recommendation for compensation where there has been a breach of Article 10 and a number of those cases are included in the bundle. It's also appropriate to note, although it's not perhaps a significant point, that the Convention Against Torture itself, to which a good deal of reference was made at the last hearing, contains in Article 14 an enforceable right to fair and adequate compensation for a victim of torture. The Convention goes on to say that a large number of the rights in the Convention also apply to other acts of cruel, inhumane or degrading treatment or punishment which do not amount to torture as defined in Article 1, but what is significant about that is that Article 16 does not extend the right to compensation to other acts of cruel, inhumane or degrading treatment or punishment, and the whole Convention Against Torture is in the new volume, the cream coloured volume behind tab 2, but I'm looking here at Article 14 and Article 16, where there is as I say an express right compensation in the case of torture but not in the case of these lesser forms of cruelty. So it is fair to say I think Your Honours that the consensus internationally is that breach of a provision such

as s.23(5) will always require declaratory relief quite clearly and sometimes it may also attain a level of such severity that something more is required or there may be other factors such as particular vulnerability of the individual, bad faith or say repeat infringements, but what we're talking about here is a distinction between an express right to compensation and a concept of a broader remedy of which monetary compensation will form a part where that is necessary to attain these broader purposes but not otherwise, so if you can achieve the appropriate conclusion without monetary compensation then that's the preferred outcome and that as I say is not only consistent with European jurisprudence it's also entirely consistent with the way the English and the Human Rights Committee have approached questions of this kind. Now there are just a couple of other things that I wish to direct Your Honours' attention to and the first is that the English and Scottish Law Commissions in their paper regarding the question of compensation under the Human Rights Act set out a series of factors that tended to govern European Court decisions in terms of whether compensation should be awarded and those are set out in para.50 of the written submissions. All of these comprise shall we say examples of circumstances where something more than declaratory relief may be required but it also indicates that there are countervailing factors that are also to go into the mix in determining an overall effective remedy and this may for example include reference to the conduct of the plaintiff which is something which at common law for example in a false imprisonment case isn't going to assist but given the broad remedial discretion and the fact that this is a public law proceeding rather than simply an action in private law regarding an enforceable right, then it is appropriate to take that kind of thing into account. But it also makes it quite clear that the state of mind of the state actor and the seriousness of the breach are going to be your principal determining characteristics other than in very severe cases the impact upon the plaintiff. It's also noteworthy that the English Courts have discussed the role of distress falling short of significant harm and the English Courts have commented that distress, frustration of the kind referred to in the *Martin* decision are a part of everyday life and the common law has generally set its face against there being an enforceable right to compensation where something short of a very serious trauma is suffered by you and the reference to that, the case that articulates that most clearly is at tab 39 of the bundles, that's Volume 3, it's a decision of Justice Stanley Burnton, but it was also referred to with approval by the Court of Appeal in *Anufrijeva* and in particular I would refer Your Honours to page 966 of the report. It fact it begins really at para.71 on page 965, this was a case concerning delays in hearings

before the Mental Health Review Tribunals and His Honour in this case said 'I don't think every disappointment or feelings of distress constitute compensatible damages for present purposes. There are a number of European cases referred to. Under English law disappointment, distress and feelings of frustrations are not normally freestanding heads of damages. The law applies an overtly restrictive approach even to the extent of excluding any claims for nervous shock or distress caused by a lack of care. Distress and disappointment are part of everyday life and do not necessarily lead to claims for damages. Convention rights are important basic rights and it is doubtless arguable that damages for their breach may be awarded for injuries that would not be recognised as deserving of compensation in other areas. It is nonetheless significant that Chief Justice Lord Woolf's opinion was that damages for their breach should be lower than damages for tort rather than higher and of course that was a comment that was subsequently superseded by the comments of the House of Lords in *Greenfield*. There is a risk of creating anomalies between damages recoverable for breach of convention rights and those for other civil wrongs the Courts should be reluctant to do so'. And there has as I say been expressed approval in the Court of Appeal's decision in *Anufrijeva.* I think there is the express comment 'we want to commend Justice Stanley Burnton for the quality of the judgment in this decision' so this does form I think an accepted part of the English approach at least. And that also is relevant in this case where we don't have despite allegations of psychiatric or psychological harm, what we have instead are feelings of frustration and anger on the part of these plaintiffs, these cross-respondents, by virtue of their being placed in an austere regime for the periods that they were there and there can certainly be no doubt that some of them found it intensely frustrating and it is from the point of view of the prisoner a far less stimulating environment than a normal prison environment, but those feelings of distress, anger and frustration are not things that the law has generally said are capable of attracting compensation in and of themselves. Now there was a good deal of discussion before the break about whether there is any really meaningful distinction to be drawn between public and private law claims, and I did say in answer to that that perhaps I didn't articulate it as clearly as I could have that this has always been regarded, or at least was regarded by the Court in *Baigent* as an absolutely essential difference. The learned President, Lord Cooke, in his judgment in *Baigent* spoke about human rights violations and remedies for that being a field of their own. That this was something quite separate and distinct from the kinds of loss have ordinarily attracted compensation in New Zealand

Blanchard J Are you going to give us a reference to this?

Boldt I can give you a reference to that Sir, yes. *Baigent* of course is tab 5 and the passage that I'm referring to is at page 677 of the report at line 26 'In a wide-ranging argument Mr Shaw was able to point to strong international authority for the view that the redress of breaches of affirmed human rights is a field of its own. Compensation awarded against the state for such breaches by state servants, agents or instrumentalities is a public law remedy and not a form of vicarious liability for tort'. And the Learned President went on to refer to the *Maharaj* decision which is another case from Trinidad and Tobago and His Honour went on to expressly endorse the survey of international jurisdictions undertaken by his Honour Justice Hardie Boys. And the Learned President went on to say that 'the analysis has procedural consequences of practical importance'. There was some discussion there about the availability of the right to a jury trial as not being available for a public law claim but it also significant that the Learned President went on to say that this really is something that was never contemplated when other enactments such as the Judicature Act and I'm sure he would also have said the Crown Proceedings Act, the Police Act, the Crimes Act, which created immunities that was quite beyond the scope of anything contemplated when those enactments came into force.

Tipping J The dictum at page 678, line 15, about the ability to compensate for distress and injured feelings doesn't seem to line easily with the proposition you were on a few minutes ago.

Boldt No it doesn't Sir, and I acknowledge that without a moment's hesitation. As I say

Tipping J You're inviting us to depart expressly from that?

Boldt I am Sir and this really was one of the areas, and I mentioned some of the other comments that were, some of the other obiter comments that were made on this page a little earlier such as the reference to the $70,000, and there was also a reference by His Honour Justice McKay in his judgment to the same compensation being available whether one proceeds in tort or under the Bill of Rights Act.

Henry J Were those matters argued to any extent Mr Boldt in *Baigent*?

Boldt I don't believe so, no Sir and it's obviously been a while but of course the focus in that case was whether this remedy existed at all and the scope of the argument really was just entirely directed to that and the issue in large part was what was Parliament's intention in enacting the Bill of Rights Act. Why did it delete the proposed remedies clause from the white paper

and soforth. Furthermore as I say, part of the argument that the Crown was making is that if there is an actionable remedy under the Bill of Rights Act it's a tort, it's a breach of statutory duty to which these amenities all apply. So it was the plaintiffs' argument developed particularly with reference to *Maharaj* that said no, this isn't that at all, this is a field of its own. This is public law compensation that sits entirely outside the conventional framework. And certainly those kinds of comments, the reference to the $70,000 and the suggestions as to what heads of loss might be recovered really are what has been responsible I think for this development of parallel tort and Bill of Rights Act remedies and also the President's judgement says that a declaration by itself is toothless and it's that that has been picked up on a number of succeeding decisions where New Zealand Courts have said yes by itself a declaration is a hollow and meaningless remedy and it's that proposition that we emphatically reject and invite this Court to reject. Certainly that is not what other jurisdictions have said or thought. In fact in a public law jurisdiction a declaration is central. It's perhaps worth noting that the Court did regard *Baigent* as quite a severe case. The whole Court was very concerned about that comment about 'while we're here we'll have a look around anyway' and of course that put a complexion on its consideration of the case. Now in terms of fixing the levels of compensation it's our respectful submission that the kinds of approaches that have been taken overseas are appropriate here as well and that this is another method of recognising the distinction between the two kinds of proceeding. One is to mark out something that needs public emphasis, whereas the other is a compensation for a wrong. It is as I said a quintessentially private law remedy and it ought not to be granted unless it enhances the public law, the overall public law remedy. Now I've largely dealt with the way that this submission that we advance would have impacted upon this case if it had been applied. The Court was in my respectful submission entitled to take account of the fact that not only can declarations, particularly in a systemic case of this kind, be regarded as a salutary remedying of themselves both in the wider context by encouraging changes of behaviour, but also for the plaintiffs themselves by allowing them officially to say this ought not to have happened to me, a wrong was done to me. But also here because there were very strong public policy changes that were brought about as a result of this decision. So in fact while we say that a declaration is a remedy of some moment in and of itself in any case and will as the English Courts have said already go quite some way towards providing adequate indication or just satisfaction, here the declaration had an even greater effect than might ordinarily have been expected and this is something that in our submission would if this analysis had been applied have led the Judge away from deciding that something further was required in this case for everybody with the exception of Mr Tofts. This was a case where there were a number of serious personal and private allegations that had been made but those had been rejected. There's certainly no suggestion that if any of the

very serious allegations made by Mr Taunoa and others had been accepted then the outcome would have been different, but in light of the rejection of those and the finding that the Corrections Officers acted in good faith and were really trying simply to address a problem that had become intolerable, then this is not one of those cases where something more than a declaration is required.

Tipping J How are you going to know that until you see what response there is to the declaration?

Boldt Well generally see we won't although in this case the change was made during the period between the two judgments

Tipping J That was fortuitous, yes.

Boldt It was but in any event we can assume I think in New Zealand in the absence of evidence to the contrary that declarations are taken very seriously and do make a difference. There were comments very strongly to this effect by Justice Hammond in the *Manga* decision and I think until evidence does emerge that perhaps the executive is not properly respectful of judicial declarations of this sort then that presumption ought to continue to apply. So it's our submission that all of the indicators in this case would point away from an award, taking account for example of that list of criteria that the English and Scottish Law Commissions set out, this isn't a case that falls into any of those categories.

Elias CJ Where do we find those?

Boldt Well Ma'am they're summarised in para.50 and within para.50 I've given the reference to the report and that's tab 50 in volume 3.

Elias CJ That's fine.

Boldt It should perhaps also be emphasised Your Honours that the language of this proceeding throughout this steeped and public law terminology there were writs of certiorari being sought with respect to each of the placements on BMR. This was in every respect what would prior to the Bill of Rights Act have been an administrative law case, where an illegality was identified and remedied and this is not the kind of case where you're just addressing a tort up as a Bill of Right claim. This was always a case with a broad public law focus and that was the way that it was pleaded and articulated in the High Court. So it's our submission that there ought not to have been any awards but turning to the second issue which is if there were to be an award in each of these cases, how significant should it be. Now the Europeans and by extension the British Courts have as I say settled upon what they call an equitable approach

which is a standard approach without significant and detailed regard in each case to the individual circumstances and as I suggested before, a large part of the reason for that is that this is just a standard response to mark a violation and it fits well within that context as an award that is neither small nor particularly large but which makes a public statement, and that European approach has been applied by extension domestically in the UK and Your Honours have got now properly the *Napier* decision. There was a subsequent decision inadvertently included in the original bundle but the actual first instance *Napier* decision is in the bundle and it's under tab 4 and

Tipping J Could I just ask for some help before we move on? This equitable approach so-called, does it have a pre-set amount if you like for each category of breach or how does it work in actual operation?

Boldt Well Your Honour we've included a table of awards from prison contexts behind tab No. 41 in Volume 3 and this draws a contrast between prison conditions cases where

Tipping J Sorry, behind tab 43?

Boldt 41.

Tipping J 41, sorry.

Boldt We've set out a number of cases that deal with prison conditions and as Your Honours will see they're all very much of a muchness in awards of 2,000, 3,000, 4,000 Euros. Awards of 2,000 and 3,000 Euros are very common. But you'll also see that at the bottom of the second page there certain different scales are applied where you get into the realm of deliberateness treatment and far higher awards are made in that kind of context and where breaches of rights under the Convention are severe and deliberate and I'm not just talking about the normal level of severity required to attain the level of breach, but where you actually have the quite deliberate infliction of harm on detainees you are going to look for a lot more. That I think would be a distinction between Article 3 cases that are at the 23(5) end of the spectrum and Article 3 cases that are at the s.9 end of the spectrum and we certainly wouldn't dispute that that kind of a distinction would be appropriate in New Zealand as well, where you have the deliberate infliction of cruelty, well, it's going to be very hard to say that there shouldn't be an award and indeed that the award shouldn't be of a severity to mark that. The position with respect to other rights in the Convention is perhaps less easily able to be discerned than the standard approach to a prison condition's case under Article 3, but even there the European Courts' approach is becoming clearer that with each year there are more decisions of a principled nature coming out and certainly the

criticism that has been levelled by for example Mr Clayton in his articles is perhaps a few years out of date because I do understand that in recent years this obscurity as far as principle is concerned is diminishing rapidly. But it certainly isn't a case of every right getting the same award. It might be appropriate to have a look at the individual applicants in this case. I've been speaking of them as though they are all the same, and that exactly the same considerations would apply with respect to each of them. The award in favour of Mr Gunbie for example was an award based on an extremely short stay

Elias CJ Sorry, before you get on to that I was just thinking about this notion of deliberation. This was a purposeful regime. It's been found to be in breach of s.23. Are you saying to be deliberate in the sense that you're using it the authorities would have to have had insight that it was inhumane?

Boldt Certainly if the purpose of the regime had been to demean and humiliate then that would definitely qualify regardless of what people thought about the legality of it. Equally if they thought it was illegal and thought you know well we often get it wrong but we'll impose this anyway, then that also would take you outside your usual range and you would be hard pressed in that case to say that they were acting in good faith. But here they really did have a belief that they were acting lawfully. It's turned out to be an incorrect understanding of the law but as the judicial review context teaches us people make good faith mistakes in terms of what they're allowed to do under statutory authority all the time and that's what administrative law is designed to correct. You wouldn't ordinarily get a right to compensation unless there were the additional elements that for example we'd found a tort of misfeasance and you certainly couldn't have established misfeasance in this case. Now I was going to come to the question of the individuals in this case. Now Mr Gunbie is perhaps the clearest example, if ever you could have one of a person for whom there were no particular aggravating factors at all and yet who still received an award simply by virtue of his being on the regime. Mr Gunbie, as Your Honours may recall wasn't even able to give evidence at trial. He was locked up for contempt after about quarter of an hour of his evidence in the High Court and that was the last we saw of him, and the agreement that was reached with respect to him and his participation in the claim is that there could not be any reference to evidence specific to Mr Gunbie but that he was entitled to the benefit of general findings that would inevitably impact upon him by virtue of having been on the regime. So there was no evidence at all from him for example about any even mild feelings of distress or frustration or anything of that sort and he

Blanchard J How long was he on the regime?

Boldt Six weeks, and he came off so quickly because at the very beginning of this proceeding back in 2002 there were interim orders applications filed on behalf of Messrs Gunbie, Tofts and Kidman. Mr Gunbie had actually been taken off the regime in order to come to Court in Wellington and Corrections having already taken him off the regime to let him attend Court they wouldn't put him back on it when he returned to Auckland. So that was the end of him as far as the BMR was concerned. And as far as Messrs Tofts and Kidman were concerned before the interim orders application could be determined, there was a problem with the renewal of their placement on BMR. It wasn't sent to Head Office within the requisite three months and so their placement on BMR lapsed and they were immediately removed from the programme. So those three, all of them had much shorter stints on the BMR than a normal BMR inmate would, but as far as Mr Gunbie is concerned we know nothing about him other than that he was on the regime and he came off it reasonably fast and it's our respectful submission that there is nothing even capable of demonstrating facts or impact capable of warranting an award of compensation. As far as Messrs Tofts and Kidman were concerned, well Mr Tofts of course isn't before this Court but Mr Kidman, he got an award of $8,000 and this was based really on His Honour Justice Young's $2,500 per month equation. Mr Kidman didn't suffer any particular hardship by virtue of his placement on the regime. He made a number of allegations that were rejected but he also was someone for whom there was for example attentive psychiatric care. He was examined by a Psychiatrist twice while he was on the regime and really his award was based on little more than his participation for a truncated period in BMR itself and once again

Tipping J Was he on for about three months was he?

Boldt He was on for three months, yes. He and Mr Tofts were both on for three months. Then we turn to Mr Robinson and His Honour increased the award for Mr Robinson over and above what Mr Robinson would have received at the simple rate of $2,500 a month. He gave him an extra $10,000 and the reason for that was His Honour's finding that but for the placement on BMR there would have been, but for the fact that BMR had as part of its design minimum timeframes, there would have been nothing to justify the ongoing segregation of Mr Robinson beyond perhaps the first few months of his placement. He certainly went into the regime in response to undeniably appalling behaviour in Wanganui Prison and the Judge was in no way critical of the decision to classify Mr Robinson as a person for whom a behaviour management regime was required, assuming such a thing could exist lawfully. He certainly was an unmanageable inmate but his behaviour in BMR was never a particular problem. He didn't get into serious trouble at all and he had basically an unremarkable 12 months

Tipping J I'm sorry I've lost why he got an extra $10,000. I just haven't grasped it.

Boldt What His Honour said was that if it hadn't been for these arbitrary timeframes that formed part of the BMR design, which is you know you spend a few months on this phase and then if you're good you carry, the Judge said look if it hadn't been for that there would have been no reason to continue to segregate you, there would have been no reason

Tipping J You mean because he'd ceased to be someone necessarily involved on the programme but he had to remain on because that was the structure of the programme. Is that the essence of it?

Boldt That's right and he wouldn't have been segregated, he would have been back in the mainstream if it was only his behaviour that had been the issue and you can find the reference to that Your Honour at page 159 of the case on appeal which is para.26 of His Honour's judgment. His Honour said 'if he had been assessed as an administratively segregated prisoner his segregation could not have lasted anything like that period of time. I consider Mr Robinson should have been returned to the mainstream prison well before the 12 months had expired'. So that was the aggravated feature that was identified

Tipping J I'm sorry, again I'm being a bit obtuse I think Mr Boldt. Please bear with me. Do you mean that no one can get off the BMR irrespective of their behaviour in under 12 months?

Boldt Not in under 12 months Sir but up until September 2001 the minimum period for placement on BMR was nine months and that was changed after September 2001 to a minimum period of six months. Now that was subject particularly after the Ombudsman's changes in October 2001 to ongoing review of the placement by Head Office, and there certainly was evidence that some prisoners were taken off BMR as a result of the routine Head Office review of whether they

Tipping J You've answered my point, thank you, unless you need for other purposes to go on, I understand the point.

Boldt So there was a way out after September 2001 is my point Sir.

Tipping J Yes.

Boldt So anyway Mr Robinson, he was slightly unusual in that respect. And then we came to Mr Taunoa and he got $55,000 with reference to his second period on BMR and it wasn't until the Court of Appeal's decision that there was any attempt made to compensate him for his first period on

BMR, but he was on there for 26 months but the Judge held, and this is an important finding at para.34

Blanchard J Is that right, 26 months? I thought that got corrected.

Boldt Actually I'm just trying to think Sir, I think

Blanchard J I think it was two years eight months.

Boldt No Sir, it was two stints. The second one in fact was basically two years on the nose if I remember correctly. He was there from March 2000 to March 2002 on his second stint. The eight months reference comes from the fact that Mr Taunoa actually did BMR twice. He was taken to Auckland Prison in late 1988 following disruptive behaviour in Manawatu Prison and he had a pretty unremarkable first stint in BMR, in fact he came off it relatively quickly.

Blanchard J So how long was that?

Boldt He was there from November 1998 to July 1999.

Blanchard J So that's eight months?

Boldt That is eight months Sir. So that's

Blanchard J And the other period was two years?

Boldt The other period was two years exactly. March 2000 to March 2002.

Blanchard J So, two years eight months!

Boldt Yes but over two periods.

Blanchard J So what?

Boldt I suppose that's a fair point Sir.

Tipping J It's not quite as bad as being there for

Blanchard J It's almost a thousand days.

Tipping J Yes, almost a thousand.

Boldt I was going to go on to make the point that His Honour made at first instance which is that he says 'I take into account', and this is page 163 of the judgment, 'I take into account a modest part of the cause of this was

his protest at the regime's unlawfulness but a large part was his responsibility. I'm satisfied that Mr Taunoa would have been in some form of isolation throughout the time and for a part subject to punishment regimes that may well have had similar legitimate conditions to BMR. On the other hand Mr Taunoa suffered most severely from for example the unlawful strip searches that were an aggravating feature of the regime'. So there is a clear contrast to be drawn between Mr Taunoa on the one hand who really was a disruptive prisoner and who continued to be highly disruptive throughout his time on BMR, throughout his period on BMR and somebody for example like Mr Robinson who's prolonged extension in the programme was simply a part of the design of the programme. Mr Taunoa would have come off it a great deal more quickly had he simply got on with his sentence like everybody else.

Tipping J He got $55,000 for the second period from the Judge, the Judge not giving him anything for the first period is that right?

Boldt That is right.

Tipping J And then $10,000 got added in the Court of Appeal?

Boldt That's right.

Tipping J And was that to recognise the first period or was it just simply a mathematical

Boldt It was, it was just to recognise the fact that the Judge had forgotten about the first period.

Tipping J So it was to reflect the first period?

Boldt Yes, yes it was and that was something that was expressly asked for in the Court of Appeal, everyone in fact having forgotten about the first period. Mr Taunoa actually didn't even complain particularly about his first time on BMR. He said it was very different the second time around.

Tipping J That's why I asked the question because the simple addition of a linear figure did not seem to be immediately defensible.

Boldt It was done as a very pragmatic solution to the fact that both the Judge and I hope no-one minds me saying so, Mr Taunoa's team had basically forgotten to ask for a sum for the first period and it was just a very quick and pragmatic way rather than sending it back. I think I asked in the Court of Appeal for a reference back to the Judge for that to be considered separately but the Court of Appeal sensibly said no don't, let's just solve it now with a quick and easy addition. And the reason in part that it wasn't

more I think using His Honour's formula is that Mr Taunoa himself hadn't ever asserted particularly that the first time in BMR was all that bad. He said that it was very clear to him when he got back on BMR in 2000 that it was a very different and he said more oppressive regime but

Tipping J No doubt we'll hear more about this from Mr Ellis but when you say that everybody forgot, was it actually in issue, just not averted to in submissions or was it more actually an issue and then it was decided to tag a bit more on for something that hadn't been formerly an issue?

Boldt Well it was formerly an issue Sir in the sense that it was part of the claim always, but in his judgment on quantum His Honour Justice Young made reference only to the second period, because that's really what all of the evidence had been about. Mr Taunoa was a very unremarkable presence in BMR in his first period. For some reason he took far greater umbrage at the regime the second time around and decided that he simply wasn't going to co-operate with it and there was a very prolonged as I've said battle of wills between Mr Taunoa and the administration.

Blanchard J I notice that the Judge says at para.34 on page 163 that he accepts that Mr Taunoa did suffer from some aggravation of his existing mental health problems.

Boldt The evidence with respect to Mr Taunoa's mental state Your Honour was that he suffered from a personality disorder. He didn't suffer from a psychiatric condition in any sense or an neurological condition of the kind that for example Mr Tofts suffered from, but for example there was discussion between the psychiatrists as to whether Mr Taunoa might be described as meeting the clinical test for psycopathy test or not, but it was the kind of regime that for a person with a very shall we say strong and stubborn personality of this kind, it would have confronted his sense that he could make the rules in a way that other kinds of prison regime would not. That I think is what's being referred to there. I think rather than ferret around Sir in the material to show you Dr Chaplow's evaluation of Mr Taunoa which is in the case on appeal, I might do that in reply if I may just to save time now, but I'd like to be able to explain that there is a distinction between a psychiatric condition caused by the BMR and a personality disorder that is going to be shall we say aggravated by a tough regime and there are a number of other references in other parts of the judgment to this not amounting in Mr Taunoa's case to anything especially significant in a psychiatric or psychological sense. But that is the background in any event against which all of these inmates received awards of compensation and it is of course a matter for Your Honours as to whether applying the tests that I've articulated, some, any or all of them might qualify for an additional award over and above a declaration. But in any event it's our submission that the award ought to be fixed with

reference to the need to mark the violation rather than to expressly compensate for example the time spent. It is in our respectful submission wrong in principle for the Court to have adopted this rather mathematical and mechanical analysis and it's our submission that that sort of an approach while it clearly has a place when you're trying to devise a scale for people who have been the victims of false imprisonment isn't really appropriate in a public law action where the question is do we need to mark this with something more, and if the answer is 'yes' then a sum that is able to bring attention to the fact that this is deserving of an award is what should be arrived at.

Tipping J Are you really saying that it would only be on a fall-back position wouldn't it that we'd be involved in adjusting a figure that had been based on a correct principle. Your case essentially is that that figures are not based on a correct principle therefore it is at large and we must apply the figure to the correct principle. It's only at the very last hurdle if you like if you fall at all others that you say this is too much even on the principles that were articulated?

Boldt Exactly Sir and there certainly isn't a comparison. With any of the jurisdictions that we have looked at where a

Tipping J But you don't shy off saying that if we come to it this is outside a reasonable discretionary appraisal if you like or whatever the classic tests are for grossly excessive or excessive to the point of intervention.

Boldt I do Sir.

Tipping J It's one of those if we need to get there?

Boldt And I'll come to that very

Tipping J And is that because of the English figures or is it more intuitive or what is it?

Boldt It's not because of the English figures, because they belong to a different regime altogether. If you are applying the approach that the English apply then we don't need to look at months multiplied by a base amount or anything of that sort, we're actually engaged in an entirely different inquiry which is as has been said not in enriching the plaintiffs but in marking the violation in a tangible way and that need not be with a substantial amount.

Tipping J No but if the Judges below applied the correct compensatory principles, then why is this outside the proper range available? Why is it so high as to

be subject to appellate correction? That's what I want you to just help me with just a little bit.

Boldt Well I probably can't do better Your Honour than the Court of Appeal did on this. The Court of Appeal went through a number of different comparisons when it considered this question of compensation.

Tipping J But it didn't think it was too high.

Boldt Well it probably did think it was too high but not so high as to warrant intervention I think was the

Tipping J Well that's the point, why should we differ from the Court of Appeal on that?

Boldt Well I've got two answers. The first is that the Court of Appeal's outline of the considerations that made the awards too high were so compelling and the difference between the comparitors that they identified and the facts of this case were so significant that the awards were well beyond what an appropriate comparison would indicate the correct awards were.

Tipping J You're saying they got it absolutely right except they didn't actually recognise the consequences of what they'd said?

Boldt Yes, well I wouldn't say they didn't recognise the consequences of what they said but they made a very very compelling case for a reduction in the awards and then stopped short of actually reducing them.

Henry J Could you just draw my attention to the passages where they effectively said that?

Boldt Of course Sir. The consideration of quantum begins at page 221 of the case on appeal but the passages that I'm referring to are really at pages 226, 227 and 228 and for example the Court drew comparisons between general damages awarded in tort in New Zealand which are very modest by comparison with the awards here, the awards that are commonly made to compensate for distress in an employment context. At para.170 the Court drew comparisons with the kinds of awards that a person might receive for very severe and permanent physical injury and noted for example that the amputation of a leg below the knee would provide an entitlement of $13,959.99.

Tipping J A very exact figure for a misfortune

Boldt An 80 percent impairment gives you a figure that has 6 cents on the end. Also the Court at para.172, and I should note of course that you get a small

what's it called, an independent living allowance, a small independent allowance that you carry with you but this is your award of compensation to reflect the loss. The Court also compared the awards in this case with the average in New Zealand and noted that for an average weekly gross income a New Zealander can expect to earn just under $30,500

Henry J It doesn't appear to be in the approach that the trial Judge took with him.

Boldt No, no, and that was going to be the second point that I made. It's our submission that you simply cannot compare as His Honour has tried to do a regime where someone was subjected to more onerous conditions than would ordinarily prevail and a person who was entitled to be completely free. The *Manga* decision was what gave rise to the $10,000 base figure for the monthly entitlement of someone who was entitled to be at large in the community and was instead in prison, and His Honour said well applying as best I can an analogy to that sort of situation I think $2,500 a month for these inmates is about right. Now these breaches, although, and we don't shrink for a moment from saying that they ought never to have happened and that they did breach the rights of the cross respondents under s.23(5), there was nonetheless no comparison between a person subject to a more onerous than normal regime and a person who is entitled to be entirely free and that's emphasised even more firmly by the fact for example Mr Taunoa even on the Judge's analysis, Mr Taunoa would have been subject to a very restrictive regime whether or not he was on BMR. His behaviour throughout that 24-month period of his second time was such that he would undoubtedly have been in administrative segregation and probably in a punitive regime for large parts of that.

Henry J Yes but just coming back to the Court of Appeal's approach for a moment, my impression from it is that they haven't really gone away from the trial Judge's approach but simply looked at these other possible comparative awards and said well even looking at that we're not persuaded the other was too much, but inherently, I took the view anyway from reading the judgment that they weren't resiling from the trial Judge's approach of a per monthly assessment.

Boldt What they did I think Sir without particularly commenting on the per month assessment because don't forget that only gave the starting point and there were aggravating and litigating factors taken into account for each inmate, was instead of perhaps attacking or examining even the basis on which the Judge calculated the award, they just looked at the ultimate awards that the Judge had made in favour of each of the inmates and despite noting a number of comparitors that would indicate that those awards really were very much on the high side they nonetheless decided that they would not intervene. But they didn't really get into the question

of whether it was right in principle or wrong in principle for the Judge to have engaged in this kind of a calculation.

Henry J Well they certainly didn't say it was wrong.

Boldt Well no Sir they didn't and to that extent

Henry J Otherwise they would have interfered with it.

Boldt No, well

Tipping J I read them as saying well the Judge's view is one way but here are a number of other ways and looking at it all together we can't say it's too much. They didn't either approve or disapprove if you like, the Judge, they just perhaps saw him as just one way of looking at it and here were a number of other ways, and stirring it all around you couldn't say it was too much. I don't know whether that's helpful?

Boldt Well Your Honour the best indication that they do think that the awards were too high but not at a level where appellate intervention was required is para.178 where the Court says in the present case we believe the awards could have been lower and perhaps should have been lower given the factors to which we have already referred, but we would not describe them as being wholly erroneous and therefore not a category-demanding intervention guided by the Court.

Tipping J Well they guided themselves by something that I was unwise enough to say in *Bronlund's* case which was an attempt to sort of just para-phrase the standard test for when you're just looking at damages in the ordinary common law context on appeal, but maybe they got themselves a bit wrong-footed for that reason.

Boldt Well there are certainly two bases on which we challenge these awards. Even leaving completely to one side now the fact that we say public law compensation ought to be calculated on an entirely different basis, that you should basically forget about tort levels and that is our fundamental submission and if Your Honours accept that then as Your Honour Justice Tipping put it, the question of damages is really at large, or compensation is really at large because there has been misdirection by the trial Judge of himself on this point but what we go on to say is that I guess the first point is 25 percent of what a person who is entitled to be in the community would have received is just too high a starting point anyway, especially for an inmate like Mr Taunoa who would have expected to be in a very restrictive regime throughout his entire time on the BMR. This wasn't a case where he was nearly free or would have been in a minimum security unit or on home detention or anything of that sort, he had slightly different

conditions to those that he would otherwise have had but not massively different conditions so he's not worth 25 percent of a free person. So that's the starting point, this is just

Elias CJ I'm sorry to interrupt but s.23(5) is about prisoners. It's about those who are deprived of liberty. It's a recognition that they are particularly vulnerable and it says they're not to be treated inhumanely and the trial Judges made a finding that they were, so is it really helpful to talk about what a bad chap this was?

Boldt Well what is important is not, in the public law context, what a bad person this chap was is a relevant factor, that is one of things that Courts and other jurisdictions have said that it is legitimate to take into account, but here the reason that I make this submission assuming for the moment that we're in common law territory, is to say that if you are looking to compare the regime that Mr Taunoa was on with the regime that he would have been on but for his presence on the BMR, the difference was not substantial. The Judge himself has said that he would have been on administrative segregation for the whole time and probably subjected to a punitive regime for periods within that, so it's not as though we're even comparing Mr Taunoa with a mainstream inmate who has half his day out of his cell and can associate with other inmates on the landing or whatever. He would have been segregated, a good many of the features of the BMR save for the legalities would have also applied to Mr Taunoa during his time in any event, so

Blanchard J What would his position have been in relation to exercise if he had not been in BMR?

Boldt If he had been held in 'D' Block, if he'd been on administrative segregation in 'D' Block he may well have had longer unlocked hours, although again that would have very much depended on his particular behaviour at any given moment and whether it was okay to allow him to associate with other inmates, but he probably would have had longer out of his cell, and I don't think we can

Blanchard J What about outdoor exercise?

Boldt Well a large part of the problem with the outdoor exercise wasn't that there was a conscious decision to deprive BMR inmates of outdoor exercise. The problem with the outdoor exercise in fact was that in 'D' Block there were serious resourcing problems as Your Honours will recall from the last hearing with the access to the yards. There were times when there were major maintenance issues and there were times when there were staffing issues that meant that it was difficult to run yards in 'D' Block and to the extent that he was still in 'D' Block he would probably

have been subject to those systemic and resourcing constraints in the same way as the BMR inmates.

Tipping J But that doesn't alter the consequence.

Boldt No it doesn't and we don't make excuses. This is not a question of us saying

Tipping J It would might still have been offending behaviour even if he was only in 'D' Block, if you couldn't get your prison working properly. I put that in the most elusive way.

Boldt Yes, although it's difficult really to know here how much of the finding that there was a breach of s.23(5) arose from the conditions that the inmates endured whilst on the regime and how much of it arose from the fact that the Department had got the law wrong. Your Honours will remember that from the original judgment of Justice Young at first instance he said there are three reasons why I find that there were breaches of s.23(5) in the case of BMR inmates. The first was there was a breach of the Penal Institutions Act because the Department of Corrections read the law incorrectly. The second reason was there was a breach of the Penal Institutions Regulations which said that segregated inmates should wherever possible have the same kinds of conditions that they would have had in mainstream, so there was another mistake of law on the part of the Department, and His Honour said these two are very serious findings and he said the third reason is that there were a number of conditions that inmates in BMR endured that fell below the standards required, but what His Honour did do was to say that two of these three reasons were for a breach 23(5) were legal mistakes and he also said expressly before going on to the third one, said these legal mistakes are very important considerations.

Elias CJ Because there were no protections. Because it was done administratively and it meant that they couldn't appeal.

Boldt Well certainly Ma'am the s.71(A) breach definitely deprived them of one avenue for having their placement reviewed. It didn't deprive them of all of their avenues. As we know Mr Taunoa made dozens of complaints to the Ombudsman, he had a private audience with the Associate Minister and was represented by counsel and as I say if only he'd brought an interim orders application then his placement would have been reviewed favourably and quickly.

Henry J But how does that breach 23(5)?

Boldt Well that was our question in the Court of Appeal Your Honour. The basis on which we challenged the breach of s.23(5) in the Court of Appeal was that the Judge was wrong to characterise the mistakes of law that the Department made as being reasons in of themselves to warrant a finding that s.23(5) was breached, but we were unsuccessful with that submission. The Court of Appeal also said well you know in any event the conditions on the programme were bad but they accepted

Henry J Well I can understand the conditions being bad but how does a breach constitute itself, a breach of the regulations or a breach of the Act itself constitute a breach of s.23(5). I would have thought one has to look at the conduct which constitutes a breach and then assess that.

Boldt Well we

Elias CJ Well to be fair to the Judge he did identify it as the segregation

Henry J Segregation, strip searches and some other incidental matters.

Boldt Yes

Henry J Whether or not they breached the Regulations or the Act doesn't seem to be particularly relevant to me.

Boldt Well no Sir and that as I say was exactly the submission that we made in the Court of Appeal. His Honour actually identified as principal factors in the 23(5) breach, the breach of s.71(A) and the breach of s.155. We said exactly as Your Honour suggests that what the Court's focus ought to have been on was the conditions that each inmate endured and whether those considered quite independently of the legality of the situation fell below the requisite level and then I had an extraordinarily unsuccessful attempt to go through the various conditions on the programme to suggest that the conditions when looked at in the round wouldn't actually attain the level of severity required for a breach of s.23(5) and Your Honours will have seen from the Court of Appeal's decision that that got absolutely nowhere and of course that's why there's no challenge here to the finding.

Henry J But that was a different point though. It's the conduct that constitutes a breach rather than the breach of the Act or the Regulations constituting a breach of 23(5).

Boldt Yes, well as I say Sir that

Elias CJ Well the substance of what the Judge is identifying is segregation for lengthy periods and then he says well that would have been addressed if the regime for review had been available but it wasn't and then secondly

loss of entitlements, so it's not the breach of the Regulations in themselves, it's the length of the segregation and the loss of entitlements and then the identified matters – cell hygiene, strip searching, lack of exercise, everything else. And they are the reasons that lead him to his conclusion.

Boldt Ultimately Ma'am that's the way that it was expressed. Certainly the case that we made in the Court of Appeal without any success was that His Honour had actually identified these breaches of the Act of the Regulations as quite separate stand-alone reasons for finding a breach of 23(5) to which we said but without there being consequential treatment of the inmates personally that still attained a particular level of severity. These breaches of the law were relatively inconsequential in Bill of Rights Act terms.

Elias CJ Well I wouldn't disagree with that but I'm suggesting to you that that's not in fact really how the Judge put it and it's not how he's to be fairly understood.

Tipping J He hasn't said there is a breach of s.23(5) because there has been a breach of the Regulations or the Act.

Henry J He got pretty close to it.

Tipping J Did he.

Elias CJ Well yes but he starts with the effect.

Tipping J Yes, but anyway I don't think it could possibly float. We've simply got to look at the character of the behaviour that took place, lawful, unlawful or intermediate, and see whether what it's worth putting it frankly.

Boldt Well that's it in a nutshell Sir. If we're drawing international comparisons Your Honours have seen the *Napier* decision for example, which is a decision describing prison circumstances that were significantly much, much more severe in terms of the effect that it had on the individual prisoners and also just simply a disgusting regime that these inmates were forced to endure for lengthy periods and if there the kind of level to mark it in Human Rights terms the breach was pegged at a low-level commensurate with the kinds of awards that had come down in the European jurisdiction, and it's our submission that kind of an approach is appropriate in New Zealand. Alternatively if the appropriate comparison is with awards for false imprisonment, it ought nonetheless to be acknowledged that for an inmate, the difference for Mr Taunoa between the kind of regime he would have been on lawfully had he not been on BMR and being free in the community, it's more than a fourfold difference

that is in fact on an entirely different planet in terms of the appropriate calculation and in light of the findings that have been made regarding the lack of any particular personal impact of the regime on any of the inmates with the exception of Mr Tofts, it is our respectful submission that the awards on any meaningful comparison were too high. A good final point to make is that Mr Robinson received $40,000 for his time on BMR. Mr Manga received $60,000 for nine months in prison when he should have been free and in my respectful submission that comparison, the fact that Mr Robinson got 2/3rds of what Mr Manga got, despite the gross disparity between their circumstances is pretty clear evidence that the award here was on an entirely different scale to what it should have been on.

Tipping J Manga was, sorry Robinson was in there for 12 months and he got $40,000. Manga was wholly wrongly imprisoned for nine months, is that the figure you, and he got $60,000?

Boldt Yes.

Elias CJ But isn't the answer to that in the submission you've made to us that one of the important elements is looking at the public conduct, or the conduct of the public authorities and making the mistake in who gets locked up is one thing and of course the person affected probably should be compensated, but treating somebody inhumanely is quite another thing. I'm just not sure that these are comparable.

Boldt Well Ma'am it's certainly our submission that they aren't comparable but perhaps for different reasons than Your Honour articulates. For a start the $40,000 award was based on what Mr Manga got. It was derived with reference to the Manga scale. His Honour wasn't seeking to fix a figure that marked shall we say a denunciation of the Crown's conduct, he was looking to try to find an appropriate compensatory figure with reference to common law tort principles.

Elias CJ Yes, yes, that's a fair point, yes.

Boldt Furthermore though it is simply our submission that if we're to go down that first path then there doesn't appear to be any compelling reason why New Zealand should have awards to mark public wrongs that are substantially out of step with awards in comparable jurisdictions around the world. We were, as I've said before, seeking to come within the international mainstream by enacting a remedy called Public Law Compensation in the *Baigent* case with express reference to international jurisdictions in the way they conducted themselves, and yet there's no comparison between say what Mr Napier got for a truly appalling prison regime in Scotland, and we're not talking about an undeveloped country, in Scotland in 2001, and what these inmates have received. So damages or

compensation under the Bill of Rights Act has consistently been described in the Court of Appeal anyway as something that should be modest. As I've noted I think in the written submissions it's very hard to reconcile any kind of a statement about how modest awards should be with a principle that says you get what you get in tort, because it's impossible to apply such a principle if the tort regime provides the guide by which compensation is fixed. If the Courts are right when they say these awards should be modest, then that is consistent with what international jurisdictions do and we ought to be guided by those international jurisdictions rather than by the common law. And finally it should be re-stressed that the purpose of the BMR, the object that Corrections were seeking to achieve wasn't to humiliate or demean anybody.

Elias CJ Now when you say that, I've just been looking through the trial Judge's judgment, he does say that there was no deliberate cruelty but are you able to show me where he supports what you are putting to us, because para. 276 'pointlessly punitive strip searches is routine making privacy and so-on'. I'm not quite sure that that doesn't equate to conscious demeaning. You said if there was deliberate demeaning that would be a significant factor.

Boldt Now there is a reference Ma'am and it will just perhaps take me a moment to find it.

Elias CJ That's alright, if there is a reference I'll find it.

Boldt I tell you what Your Honour if I, if I rather than detain the Court now because I think I'm basically finished the subject to anything my learned friends might say but I'll advise Your Honours perhaps in my reply. Yes Ma'am, my learned friend makes the point that there has been a clear distinction recognised in international jurisprudence between shall we say an intentionally strict regime, which is what this was. It's certainly clear that it was meant to be an austere regime and that there was far less tolerance of behaviour that may in other regimes have been let go, so there's a clear distinction between an intentionally strict regime and a regime that is devised with the express purpose of demeaning, humiliating, harming the inmates. The case was undoubtedly within the former category. There certainly hasn't been any finding that this was done in bad faith with any intention to harm

Elias CJ It sounds like a difference between motive and intention to me.

Boldt Well Ma'am that is relevant in this context and

Elias CJ Yes I accept that.

Boldt But in any event my learned friend quite rightly asked me to direct Your Honours to the *Van der Veen* case which is a decision of the European Court. It's at tab 27 which is in the other bundle, it's in the purple volume, but that was a prison conditions decision. There was an award made on the basis of not of deliberate infliction of harm but of the deliberate creation of a tough austere regime that the European Court found fell foul of Article 3.

Elias CJ Thank you.

Boldt But unless I can assist Your Honours further those are my submissions.

Elias CJ Thank you Mr Boldt. Mr Ellis you won't get very far but would you like to get underway?

Ellis Not really.

Elias CJ We would be assisted if you could give us a map to the topics that you want to particularly address.

Ellis Yes sure, because it might be a little more organised to have the adjournment. What I was planning to do was, well I might just answer that question first and then I could have perhaps answered the quantum issue in 10 minutes, but what I have

Elias CJ That would be useful.

Ellis Proposed to do was address you on essentially four topics. One was some limited response to what Mr Boldt has just said and essentially what I'm proposing to say there or I will say there is that really we rely upon the Court of Appeal's judgment, particularly Justice Hammond. We also rely upon the Privy Council judgments at my learned friend's tabs 37 and 38. The recent Privy Council decision which seemed to conflict with *Greenfield* and the major proposition in there is that words are not a sufficient remedy, declaration is not sufficient. We'd also rely upon there belated filing of the *Clayton* article from Richard Clayton QC in their bundle they handed up today. Two articles in there where Richard Clayton QC, who was of course the counsel in *Greenfield* and also author of that big Human Rights red book, which I'm sure you've got – the Law of Human Rights comparative analysis where he's critical of the House of Lords approach. So that was really the conceptual response to my learned friend, then I want to go through some brief points of particularity which I won't spend too long on because as you will be well aware I'm trying to avoid the trap of actually engaging in the argument on the level that it's pitched at here and I don't want to go into the minutiae of it so I'm going to try and keep on a higher plane if I can. I've then got secondly four

pages, actually 10 pages, to hand you up. That's my extras of which there's four paragraphs in those 10 that I need to refer to, the other six are the index and so-on, the identification of where it is. So there's four paragraphs that I want to refer to and they're from two recent texts, in fact I might hand those out because then if you would be good enough to read them before you come it won't take me very long – from the Treatment of Prisoners European Standards which just came out from the Council of Europe from Professor Murdoch of the University of Glasgow and prior University of Barclay and Human Rights and Criminal Proceedings by Stephan Trestell, who is a Professor of Law at Zurich, the ex-President of the European Commission of Human Rights, and a Judge of the International Criminal Tribunal for Yugoslavia and there's a passage from a CPT report on Albania and one from the former Yugoslav Republic of Macedonia, so that won't take long when you've read those.

Elias CJ Thank you.

Ellis So that was my second point. The third point is the substantive part which I'm not going to, I've got two sets of submissions for you. My strike-out submission and my principal submission. Now I know you will have read them so I'm just going to go briefly through them and I'm not going to take very long on either. And then lastly, I must have some more information on it in the morning. I've got some overnight correspondence from a Human Rights colleague in Scotland who was the counsel in the *Napier* case that my learned friend has referred to and, I only got this at 9 o'clock this morning so I haven't been able to go much further with it but I'm going to take to task the Crown's submissions on *Napier*, *Martin*, the Northern Ireland case and *Callus* and there is a case called *Somerville* which relates apparently to basically I suppose something like BMR from what I can gather. A whole series of complaints regarding the procedures for segregating dangerous and violent prisoners. In the by game the conditions of segregation were complained of and as a time bar and some devolution issues from the Scottish system and Article 3 and how much damages are. Now that was heard by Lady Smith, the Lord ordinary in February of this year. High Court read and apparently that argument went to appeal and it was heard before the Scottish Court of Appeal, the Inner Session of the Court of Session for four weeks in, in, oh I'm not sure when, anyway four weeks and there hasn't been a judgment of it yet, so that's obviously going to be of some use to us all whenever we get it. He speculates that it will be going to London, because he doesn't think he's going to win but anyway so somebody spent four weeks on one of these cases in the Court of Appeal and the issues of compensation and European Human Rights and we're awaiting a judgment so it might have been of some value and then there's some comment about 10 decisions of the European Court.

Tipping J What's your point 4 Mr Ellis, I'm sorry I've missed it.

Ellis That was this.

Tipping J Oh that's it.

Ellis I'm going to rationale overnight when I've had time to analyse but I was saying there is a case that we should look out for and you should look out for

Tipping J This is this Scottish case?

Ellis The *Somerville* case in the Scottish Court of Appeal which may be, and obviously I've no idea what it says anymore than you have, but in the context of what I took to be, and I hoped not to be, that this case was a disguised attack on *Baigent*. One doesn't want to respond to that in one day when you've got Scottish jurisprudence spending some four weeks on it. It's far too important to do that, so it was one of the reasons I wasn't engaging in it, so that's my map.

Elias CJ Yes thank you.

Ellis I'll get a little bit organised overnight and

Elias CJ There was one point that you said you could deal with.

Ellis Oh yes the quantum issue.

Elias CJ Do you want to embark on that now or do you want to leave it?

Ellis I'm happy to Ma'am. It might take me between 5 and 10 minutes.

Elias CJ Yes thank you.

Ellis Right and I will provide you with this overnight in Shelton's Tax which I've referred to extensively in my strike-out application. Professor Shelton I'm pleased to say we share the same admiration for the Inter-American Court of Human Rights and its jurisprudence which as I think I said in the earlier situation is probably more advanced than most. She has an annex to her text of about seven or eight pages which are remedies awarded by the Inter-American Court from 1987 to 2004 and some of the amounts are deaths and large amounts oddly I assume that's right, like the first one says 250,000 pounds for moral damages but we seem to move on to dollars shortly after, but there is an analysis of pecuniary damages, moral damages, costs and other orders so it's quite useful seeing the entire development of that which really hasn't been articulated by the Crown and

in my submission that is the most evolved Human Rights Court in the world, so that would be useful. I'll just hand that up for your consideration. Obviously you can

Elias CJ We'd have to understand the context. We'd have to see the cases Mr Ellis.

Ellis Well yes indeed and that's really my proposition that my learned friends in their submission mentioned Shelton once or twice but we haven't an entire book on the Remedies in International Human Rights Law with no articulation of what's contained in it and if you're being asked to re-visit the conceptualisation of *Baigent* it is extremely dangerous without hearing full submission and that's why I give that to you to say you should not embark upon that because there's a whole wealth of intellectual material and analysis in there that has not been touched upon and it would be quite inappropriate to go down that road, that's my point.

Elias CJ So you're going to make that text available?

Ellis Yes I'll photocopy it but I won't be able to make the entire text available. Presumably you've got it in the library? Well I hope you have.

Elias CJ I'm not sure.

Ellis If you haven't somebody, the librarian should purchase it. The Crown has certainly referred to it and I've bought one. Anyway that was the first proposition, then in respect of Mr Gumbie where my learned friend said 'well he was only detained for six weeks', I think this is a good example of the still somewhat reprehensible position that my learned friends' take. There is nothing in the Bill of Rights in s.23(5) the Right to Humanity and Dignity with a proviso that says 'except for the first six weeks' or 'except because you're a prisoner who is a nasty bugger'. The proposition that you can be held for any amount of time at all in inhumane conditions is something that I didn't think I would ever hear from the bar before this Court.

Elias CJ Well Mr Ellis it's been put up because the length of a holding is part of the circumstance that gives rise to the conclusion of inhumane treatment, so that's why it's relevant.

Ellis Well I'm not saying it's not relevant, I'm saying it's an appalling submission to make, that one can be inhumanely kept for any length of time

Elias CJ Well I didn't understand the submission to be that.

Ellis Well you may not Ma'am but I did. It was only six weeks. Well only six weeks is a proposition that given that the Attorney is obliged to affirm, protect and promote the human right in s.3 of the Bill of Rights is something that one should not hear. If it's six hours it is too long, never mind six weeks, and it does conceptualise I think the similar proposition made in respect of Mr Taunoa. Mr Taunoa's a bad boy and in a conversation that seemed to span over half an hour there was speculation as to what would have happened to him if he hadn't have been in this regime, and he was held in an unlawful regime and that's the be-all and end of it. He is not required as Mr Boldt referred to para.93 of his submissions, in footnote 113, 'well he didn't behave himself so no wonder he was in there for so long'. Well nobody has a duty to co-operate to be held in unlawful conditions and that conceptualisation of the case is regrettable to say the least. If you were held in the early 1900's in the first British Concentration Camp in the Boer War, you don't co-operate with your Captain or in the Nazi ones, you don't co-operate, your purpose is to survive and get out. The whole conceptualisation of the rule of law is that you're supposed to be held lawfully, not unlawfully, and to suggest that because he was a bad boy he should get less compensation is an astonishing proposition and to pre-suppose that he would be held in unlawful conditions if he wasn't held in this BMR must be wrong in principle. You must pre-suppose, you will be in lawful conditions, not unlawful ones and his bad behaviour is no doubt predicated by the fact that he felt he was being mistreated. He's not held in those conditions now. Those conditions supposedly don't exist in the prison system. Instead of BMR we've got a new one called Management Unit at Rimutaka. Whether or not it's true I know not but somebody claims they've been held in their for 23 hours a day for 13 months, so we've got to change of name, so the proposition that the declaration's going to put an end to it, well that remains to be seen. Anyway, Mr Robinson, whilst he may have been detained in solitary confinement for 12 months, he was contained in solitary in various forms or other. Yes he was there for 1 year 27 days, but in solitary in various prisons around the country, he was held for another three years, 242 days. And Mr Tofts and Mr Kidman, whilst they may have only been in their BMR for three months, immediately prior to that they were held in Rimutaka for a longer period than that in administrative segregation.

Elias CJ None of this is before us is it Mr Ellis?

Ellis It's contained in the High Court judgment, certainly, the length of time. There aren't any findings that that was unlawful but contextually if you've just come from solitary and then you're put in there it's a lot different from if you've just walked off the street and been put into solitary.

Elias CJ What is the submission on this?

Ellis The submission is look at this in the context on what is happening that there are considerable periods of these clients being held in solitary beyond the BMR immediately before. So they

Tipping J Does that make it better or worse?

Ellis They're vulnerable when they start, it makes it worse, yes certainly it makes it worse.

Tipping J Because of their vulnerability?

Ellis Yes. If you'd been held in solitary confinement, as Justice Blanchard said, Mr Taunoa was held in solitary for two years and then eight months, well so what that it wasn't contiguous, well I'm saying take this in the round 2. Mr Robinson spent five years during his imprisonment in solitary confinement. This is not insignificant. Anyway at para.27 of the High Court judgment which is at page 160 on your case on appeal, volume 1, a short paragraph general comments on Mr Taunoa and Mr Robinson 'I accept as a general proposition the regime under which especially Mr Taunoa and Mr Robinson were imprisoned for considerable periods must have invariably have taken a toll on their health. A combination of isolation, poor conditions and the length of stay would have affected the strongest person'. However identifies in cause of effect is all but impossible, so it doesn't matter where they were held in isolation, it's the culmination of all these factors and of clearly influence and isn't that what the case really about Mr Taunoa in one level in essence is what it is? There was a battle of wills between Mr Taunoa and the prison authorities and at one conceptualisation that is what solitary is supposed to do – it is to break your will, and he was entitled to resist because he was being held unlawfully and what effects it must have had on his psyche, this battle for two years, must require some sort of vilification in terms of financial compensation. Assuming, I think I've said that one. One must assume he must be held lawfully in other conditions if he wasn't held in this, so in response to the question again from Justice Blanchard about how many exercises would he get, on those assumptions instead of 17 days of outside exercise he would have had 761 days of outside exercise.

Tipping J Sorry, would you just say that again? This may be important, I don't know but I just didn't catch the figures.

Ellis Instead of 17 days of outside exercise which he got in the regime, the BMR regime,

Blanchard J I thought it was 21.

Ellis Ah well whatever, I thought it was 17. He was in there for 761, so he should have had 761 days of outside exercise, once every day, whether it was 17 or 21 I'm sorry if it was

Blanchard J Is there 761

Ellis Days while he was contained in BMR.

Blanchard J Is that the two years eight months?

Ellis No that's actually two years, actually.

Blanchard J Yes.

Ellis Because I don't think there was any suggestion, I'm not sure, there was any suggestion he didn't have his yards in the first **(**inaudible). We didn't have the yard book so we don't know the answer to that one, but my point is he should have been allowed out once a day for two years, not once in 17 days, or 21 days, if it was that. And I suppose lastly but not least and pen-ultimately really what one is saying is might have been apparent from my learned friend Mr Boldt this was really brought as a systemic breach that a significant number of prisoners were being detained in these conditions. We estimate somewhere in the region of 200 and to paraphrase Lord Hope in yesterday's decision on the Pitcairn Islands when he was saying 'this is child abuse on a vast scale', well this is prison abuse on a vast scale. The entire population of 'D' Block, the most vulnerable prisoners in the prison system were subjected to this abuse and they are the most vulnerable who are due protection under s.23 of the Bill of Rights and simply because some of them are psychopaths and to use Mr Boldt's word 'unmanageable' really does say that the Department hasn't learned much. No difficult

Blanchard J I don't quite follow the argument. Are you suggesting that the level of damages that these people should have should be more because there are a lot of other people in like circumstances?

Ellis No, what I'm saying is this that my learned friend's proposition was that we should have a declaration rather than some damages and a declaration would be enough. Well that doesn't measure up to the reality of what happened. When we had the judgment of Ronald Young

Blanchard J I'm sorry I thought you were addressing quantum.

Ellis Yes I was but I'm trying to answer your question too.

Blanchard J Well my question was related to quantum.

Ellis Yes, well hopefully you'll understand my answer. What I'm saying is this that given that the argument that the Crown put forward is that there should be a quantum of zero, and that a declaration is enough, when we had the judgment of Ronald Young J in the liability finding in April of 2004, I think, there was not a murmur from the public or anybody else. No outrage, absolute nothing. He issued declarations and the quantum was left for September. It was only after the quantum judgment came out in September that there was an adverse reaction and it is plainly the case that the quantum judgment caused public reaction to which the Government responded and appealed.

Elias CJ But how's an adverse reaction relevant at all? The point is was the declaration, did it lead to the changes in the prison regime? It's not the adverse reaction, it's was it effective.

Ellis Well no it didn't lead to the changes in the prison regime. It was coincidental that there was a Corrections Bill going through the house which had been in preparation for years and it was, I can take some credit I suppose, some lobbying of the Greens that managed to get the legislative amendments that have altered this, but it

Tipping J Is it your point in the simplest of terms that you've got to have money and the more the better to make people take notice?

Ellis Yes I would adopt that, yes.

Tipping J Yes well I just think we're spending an awful lot of time on something that you could articulate pretty bluntly.

Ellis Well I got side-tracked by the question.

Tipping J No you didn't.

Ellis I did. Yes my learned friend Mr La Hood said we know that because of the circumstances that happened and that's what I was trying to articulate, that the declaration would have been mere words but compensation was needed because it's actually brought to the attention of the legislatures, the public and the Courts this very issue in a very profound way because we get retrospective legislation as a result of the compensation. There's no retrospective legislation in relation to the declaration it's very much an issue, anyway that was all I wanted to say relating to quantum.

Elias CJ Thank you. Thank you counsel, we'll take the evening adjournment now and we will resume tomorrow at 10am.

4.19pm Court adjourned

SC 6/2006 Part 3 Thursday 2 November 2006

10.02 am Court resumed

Elias CJ Yes Mr Ellis?

Ellis Ma'am I've had time to reflect on yesterday's proceedings and as a result of that and because inevitably in my view the Prisoners and Victims Compensation Act is likely to face international challenge, at least in respect of retrospectiveness and discrimination. It is always necessary to exhaust every domestic remedy that one needs to exhaust otherwise you can't raise the matters elsewhere, so in that context I make two further applications to the Court which are interlinked. One is that the whole Court should recuse itself for the appearance of pre-determination and secondly that the Chief Justice, Justice Blanchard and Justice Tipping should independently and linked to that recuse themselves in any event. It won't take me too long to go through that

Elias CJ Shall we carry on with the appeal and come to this at the end, that's probably the more sensible way to deal with it?

Ellis Well I prefer to do it the other way around. I prefer to deal with it now and carry on and then you can make your decision when I finish before you hear Mr Boldt.

Elias CJ This is tedious in the extreme Mr Ellis when we're in the middle of grappling with some quite complex issues to interrupt it in this way.

Ellis Well I'm sorry Ma'am. Whether this Court has jurisdiction to hear the appeal when the Judge is confident to do so is of the utmost importance and takes precedence over all other questions before this Court and if you

Elias CJ Well Mr Ellis if you want to grandstand

Ellis No I don't want to grandstand, I've just told you I

Elias CJ You're making a serious application?

Ellis I'm making a serious application.

Elias CJ Could you please identify the grounds of the application.

Ellis Yes, I will do, I will do on the basis if I need to exhaust or remedy. Yes the grounds are on this basis in respect to the whole Court. The application was made to strike out, stay, or have a declaration of inconsistency in respect of the cross-appeal. When the matter was called yesterday that was not heard. Natural justice requires it to be heard before you hear the substantive grounds of the appeal of the cross-appellants and a well-informed independent observer would consider in my submission that that was a pre-determination and Your Honour's reaction just now that this is tedious and grandstanding indicates, appears to indicate Your Honour's formed a view to a very serious application.

Elias CJ Well you can take that up in the appropriate forum at the appropriate time. You didn't seek to have the application heard, indeed you indicated that you would come to it in opening yesterday, you would come to it today and we're certainly prepared to hear it if you want to advance any further arguments on it.

Ellis Well yes but I think it's a bit late in the day, I mean we got up, I mean when the matter was called yesterday both sides hesitated as we discussed very briefly was that going to be heard first with no idea whether it was or it wasn't, so we both rose to be heard and obviously the Court had decided that as matter of jurisdiction it was not going to hear first.

Elias CJ Well if counsel doesn't stand and ask to be heard Mr Ellis

Ellis No counsel filed an application, this is, this is

Elias CJ Alright, do you want to carry on with this present application that you're making?

Ellis Yes.

Elias CJ Alright.

Ellis So it won't take me

Elias CJ So the basis is that the Court should recuse itself for the appearance of pre-determination in not inviting you to enlarge upon the submissions you had made in support of your application, is that right?

Ellis No in not hearing the application prior to hearing the cross-appeal, the principal points on the cross-appeal from my learned friend. The application was the appeal be struck out but obviously a strike-out application comes first.

Elias CJ Well the Court hasn't determined your application Mr Ellis.

Ellis I understand that

Elias CJ Right.

Ellis But an independent observer may well consider that you've embarked upon a course, which means you have determined it.

Elias CJ Alright thank you.

Ellis And if Your Honours would be good enough to look at three cases. *In re P a Barrister*, a short extract from a judgment of *RAR v PAB* by Justice Asher and an extract from the *Queen and Smith* and I've only put a couple of paragraphs of some of them because I didn't want to take forever. So in *Smith*, which Your Honours will be aware of, that was the post-*Taito* case about whether there would be another potential 1,500 appeals or not and in that case the Chief Justice Your Honour was presiding and in para.44 of that

Elias CJ Did you give us this.

Ellis Well I hope so. Just two pages of it

Elias CJ No we've only got one.

Ellis At para.44 of that Ma'am, Your Honour makes the point that I'm saying constitutional law is not a game of hide and seek and Your Honour makes the very apt response that neither is it a game of cat and mouse where in my submission not hearing an application to strike out or stay when the basis of the application and submissions before the Court other Courts can't have a fair trial is playing hide and seek with constitutional law and it should have been heard, and Justice Asher, in his judgment, which was a successful recusal application quite recently, he says at para.46, 'lawyers may well appreciate that this Judge would have put these views to one side once a substantive case has begun and deal with it with an open mind. Judges will unavoidably develop a preliminary review in reading the papers will put that aside when they hear evidence submissions. I have no doubt that that is what the Judge would have done in this case. However what lawyers may think and Judges do is not the issue'. To summarise a reasonably informed observer would have included there was a real possibility but at the substantive hearing the Judge would retain these views

Elias CJ Well we don't have the context here. Are you going to tell us what it was?

Ellis The context was the Judge had expressed a view and wasn't shifting in quite robust terms, but the point I'm making

Elias CJ Well do we have that in the extract Mr Ellis?

Ellis No you don't, but the point I'm making is simply that

Elias CJ That the appearance matters, well I don't think anyone would disagree with that in terms of presumptive bias.

Ellis I'm not suggesting they would, but that case if it's of any use is a good thorough New Zealand example of a recent analysis of bias but as I say I didn't want to put everything before you, and what I have put before you is the case of re **P** which is a judgment from the Inns of Court. Justice Colam sitting with two Barristers as visitors to the Inns of Court, and that was a professional conduct complaint against a Barrister, and it is useful in my submission, not only because it's a relatively recent analysis on the law of bias, but in my submission it's got the best analysis of what a well-informed independent observer is cloaked with, so that's the importance of this. If I could just take you to some passages of that. At para.43, I'm sorry we've lost the page number, but it was done in a bit of hurry as you can imagine. Para.43 where Lord Steyn is discussing the test of a real possibility of unconscious bias and if you could read that paragraph to yourselves. So the context of that is the next paragraph, a subsequent paragraph in the judgment of some importance – 'the informed observer of today can perhaps be expected to be aware of the legal traditions and culture of this jurisdiction but may not be wholly uncritical of its culture, It is more likely in the words of Justice Kirby to be neither complacent not unduly sensitive or suspicious. And over the page in para.46 where the indented passage from a South Australian case – 'Judges are accustomed to defining standards of behaviour by reference to what would be done by a reasonable person. Most Judges would claim to be reasonable people, however when one is required to assess the perceptions of fair-minded lay observer, the Judge is case in a much more difficult role. Admittedly the observer is observing a professional challenge. But the Judge deciding an apprehended bias claim is not and never can be a lay observer. In order to determine the likely attitude of a fair-minded lay observer, the Judge must be clothed with the mantle of someone that Judge is not. One must avoid the natural temptation to view the judicial conduct, state of knowledge, association through the eyes of a professional Judge. An apprehension of bias by pre-judgment is based on a perception of human weakness

Elias CJ But these are all statements of general principle which the Court has no difficulty with.

Ellis Well I'm sure it doesn't, I just

Elias CJ So what is the proposition you're putting to us supported by these general principles Mr Ellis?

Ellis Well if I could just finish Ma'am, I only have one more paragraph from that judgment

Elias CJ Well can you answer the question?

Ellis Yes I can answer

Elias CJ Well it would be useful to know where you're going with these quotes so that we can read them with comprehension.

Ellis I'm saying a fair-minded and informed observer would consider that not hearing the application in the circumstances and knowing the culture and being fully aware of what happened would form the view that there was a pre-determination. It is that simple.

Elias CJ A pre-determination of what?

Ellis Of the question of whether the appeal should be heard, struck-out, stay, or a declaration issue.

Elias CJ So we should recuse ourselves from hearing your application to strike out?

Ellis No, you should recuse yourself altogether from this appeal.

Blanchard J But what would the consequence of that be? What would then happen?

Ellis Well logically if that happened a Court would need to reconvene to hear it and you would say yes I know what's coming next, 'there isn't anybody else who can hear it' so we're into the question of necessity are we not whether you are the only ones who could legitimately hear it anyway, so even if you did have, even if you were cloaked by an independent observer with the hat, whether necessity required you to hear it anyway would be a question that you could legitimately ask, but in my submission my clients are invoking their covenant rights in addition to their domestic rights and they're entitled to an independent and impartial tribunal and simply because the domestic law doesn't make it possible to reconvene another Court because of the inadequacies of the Supreme Court Act does not mean that the Government is not required to put that right. So in Texas, I don't have the citation off the top of my head, but in Texas in 1925 where all the male members of the Supreme Court were required to recuse themselves because they were, I think it was some sort of Mason's-type

event, the Governor of Texas convened an ad hoc Court of female Judges – not quite sure how he'd have got them in 1925 but nevertheless he did, so it's not an impossibility, but the inadequacies of domestic legislation are one issue, so that's what would happen Your Honour. You would need to consider as a matter of domestic necessity whether you would have to continue anyway, but I would simply say as a matter of their international complaint that the legislation is not good enough from the fact that there are inadequate alternatives, alternative members for this Court, is a breach of the international requirement to ensure proper access to justice, so it's not a foolish, well it's a

Elias CJ Mr Ellis do your clients wish not to have a domestic remedy but to have an international remedy? Is that what you're telling us?

Ellis No they've got one haven't they? They're sitting on a judgment of the Court of Appeal and they're quite happy with it in respect of this cross-appeal, aren't they, they've got their compensation

Blanchard J Well I understood that you were asking for more damages as part of your appeal

Ellis Well

Blanchard J Did I misunderstand that?

Ellis Only rhetorically Sir. There's no application before you for more damages, no. They're sitting on a remedy already so if the appeal couldn't go ahead for whatever reason then they're quite happy with their remedy which they've already got.

Tipping J So they're trying to forestall the cross-appeal on the ground that this Court can no longer be perceived to be independent and impartial, that's what it amounts to isn't it?

Ellis Yes that's right Sir, and the inadequacies of the domestic legislation in terms of access to justice.

Tipping J Well that's a downstream point.

Ellis Yes but I'm just trying to put

Tipping J But that's the nub of it?

Ellis Yes, I'm just trying to put it in context. I'm not making grandstanding, there's a proper strategic logic to this Ma'am and

Elias CJ Well I don't doubt it Mr Ellis.

Ellis Right anyway we can continue if we may.

Henry J Mr Ellis can I just be clear. Is it your submission that there is an appearance of pre-determination of the substantive appeal because the strike-out application was not pursued at the time you say it should have been?

Ellis Well I was making the application only in respect to the cross-appeal. I don't know what you mean by substantive.

Elias CJ Substantive cross-appeal yes.

Ellis Yes.

Henry J Substantive cross-appeal. Have I got that correct?

Ellis Yes.

Henry J Thank you.

Elias CJ And the basis for that is that we embarked upon hearing the Crown case on the substantive appeal without first determining the application, is that it?

Ellis Or even hearing it

Tipping J Why didn't you ask us to hear it first?

Ellis Well because

Tipping J Counsel's supposed to be robust and you're not lacking in that quality Mr Ellis.

Ellis Well I suppose because when I started the last time I'd been going less than a minute and I was jumped upon to my mind unfairly by the Chief Justice and I wasn't

Tipping J It's all her fault and it's nothing to do with your failure to

Ellis No of course it isn't, of course it isn't. You asked me and I'm trying to give you an honest answer. I thought about it and only overnight did it occur to me because of what I read in the next bit, in *Udompun* which is the next leg of this, the Chief, Justice Blanchard in your decision to refuse leave to the appellant on a s.23(5) application for larger damages in the *Udompun* case which just arrived in my Human Rights report last night

when I went back to the Chambers, but when the Crown make an application for you to decide 23(5) damages it's granted, and that, that is my next point. And when you read that together

Tipping J That's why the three, I was going to use the word 'Musketeers', probably inappropriately, should independently recuse themselves.

Ellis Yes, yes, because of the same

Elias CJ Because of *Udompun?*

Ellis Yes.

Elias CJ I see.

Ellis So your judgment in *Udompun*, if we could turn to it.

Elias CJ Well I don't have a copy.

Ellis Three pages, you don't? Right. Now that's a judgment of the three named Judges and the essential is in to my mind in para.6 of the judgment and 7. We're talking about the adequacies of s.23(5) damages and in 7 there's no point of general public or general public importance arising. Well

Tipping J Wait a minute read on quantum?

Ellis Yes, well that's what this case has been about hasn't it?

Blanchard J But that doesn't mean that we have a general view that no award under s.23(5) could possibly be outside the range. All that was being said here was that in the particular case the award, whatever the amount was, could not be said to be outside the range.

Ellis Yes but this case is about the principles lying behind it and when an appellant appeals on the s.23(5) point and is not granted leave and when the Crown appeals and is granted leave I ask the proper question what would the well-informed independent observer conclude? Now you may be quite right that you haven't formed a general opinion on it and it's a different case and soforth, but it's a proper proposition to put to you. Your jurisprudence is somewhat lacking in human rights jurisprudence - there are not many, and an independent observer might form a view of it and when you read that

Elias CJ This award turns on the points that were sought to be raised in that case but where as here there are points of principle being raised, in fact you were starting to enlarge very interestingly last night upon some of the

intellectual framework that should be brought to bear on the very question of damages awards for vindication of human rights, so that is an area of principle that we're embarked upon here, it's not a question simply of quantification of damage, it's whether damages are, or the circumstances in which damages are an appropriate response.

Ellis Yes it is obvious that one can rationalise from the individual facts of each case and come to a conclusion on that basis but I'm saying you're looking at that from the eyes of a professional Judge, not from the eyes of a well-informed independent observer, which is the text. And if I'm wrong well I'm wrong and I've made the application, I can advance it further in due course together with the international principles about the retrospective legislation and access to the Court. I'm not going to dwell on it. It's in a sense I suppose it's a little bit like, it's hard to articulate. It's like *Lesa and the Attorney-General* in the greater scheme of things. This case is brought in the contexts of some major political backlash on the case. The Court is not removed from the appearance of influence and it does raise interesting questions about whether in the strike-out application the principles

Elias CJ Sorry, what is that submission 'not removed from political influence'?

Ellis That submission is there's some unconscious, there's potential of unconscious bias.

Elias CJ Well that's quite different from a suggestion of political influence.

Ellis Well I think it is, no it's the same.

Elias CJ Well the unconscious bias is in pre-determination. That's the argument you've put to us.

Ellis Yes but I'm expanding that a little by saying there can also be unconscious bias because of the political framework involved in the whole case which is why I wanted to complete all my submission before you decided that because it links in as to what's going on in this case that the ability of this Court to engage with the retrospective legislation that the Government puts into place and its willingness to do that and what an independent observer might make of it.

Elias CJ Well there are issues there which I had thought you would come on to address us on.

Ellis Well that's why I said I wanted to do the whole lot, and not ask you to go away and retire on that because

Elias CJ So you want to make this submission and then now carry on with your general submissions, is that what you're saying?

Ellis Yes.

Elias CJ You don't want us to determine whether we should recuse ourselves?

Ellis Well if you wish to, I'm entirely in your hands, but you would have understood and I'm sure you did understand, my opening comment that I needed to exhaust my domestic remedies on this. I mean we all speak code here do we not?

Elias CJ Is that not inconsistent Mr Ellis with your view that if a jurisdictional matter is raised it must be dealt with first?

Ellis Yes it is inconsistent with my view and you will no doubt as you've raised it and put it like that, and I've always resolved to the best I can to act in a most principled manner that I can, well I must now ask you therefore to retire and consider it. Whether you do

Elias CJ Well we might need to hear from the Crown first.

Ellis Whether you do or not is another matter but I mean as you put it like that, yes, but I was hoping to continue because

Henry J Mr Ellis can I have clarification on one other point please? Would it have been permissible for us to hear the strike-out application at the outset, reserve judgment on that and then proceed to hear the cross-appeal?

Ellis Yes Sir, because it would not have had the appearance that you were favouring one party.

Henry J Right, thank you.

Ellis But I'm entirely in your hands as to where you want to go now. Part of the submissions I make in full relate somewhat abstractly to what I've just said. I'm not going to articulate them in any better fashion, but you will be able to see if they're relevant or not, but they do interlink and I don't want to disturb the flow really

Elias CJ Well alright we'll retire to consider what we do with this.

Ellis Thank you Ma'am.

10.33am Court adjourned

10.38am Court resumed

Elias CJ Yes Mr Ellis the two applications for recusal are declined for reasons which will be given later. As to how you now develop your submissions, whether you want to address, what sequence you want to address them in, whether you want to address the strike-out application first or whenever it's more convenient it's over to you.

Ellis Thank you Ma'am. Well if you recollect I was going to hand you up the annex from *Shelton* on the International Remedies from the Inter-American Court for

Elias CJ Yes we do have this in the library Mr Ellis and Justice McGrath has read it in some detail and I've flipped through it. It's an interesting text.

Ellis It is and well that's excellent then, so in the conceptualisation of my principal submissions which I'm looking for, it's the one with the single tab No. 1. I really wanted to address those submissions, or at least some of them, together with this annex and I'm pleased that somebody has read the text. It is as you say a rather interesting case and that I think was the point perhaps I was trying to make yesterday, that if one wanted to do a full-scale re-visiting of *Baigent* we would need a far more robust analysis and use that tact. Now in my submissions, what if I could just ask you to compare that annex with the Crown's tab 41 which

Elias CJ Was this in the supplementary

Ellis No that's in

Elias CJ In 41

Ellis Sort of mauvish volume 3.

Elias CJ Yes.

Ellis Right, well there tab 41 gives you, what I think my Scottish friend was trying to say was there's 10 European Court decisions with two or three thousand Euro in them and they've got just a little brief line 'breaches of Article 3' and there's so many Euros, whereas if you look at the annex it's slightly fuller and the proposition that I'm advancing principally is that we are not just confined to declarations and compensation. In the column on the far right in the annex, if we could go to the very end of it, which I assume are the later cases, if we go to the last page of it, for by way of

example we have the last one which doesn't appear to involve death. It's illegal detention, torture, theft of property, denial of justice.

Elias CJ I'm sorry I haven't found it. What page is it?

Ellis 477 Ma'am.

McGrath J So that's the *Tibby* case.

Ellis The *Tibby* case, yes that's right Sir and we're talking about legal detention, torture, theft of property and so on and we've got pecuniary damages, we've got moral damages, we've got costs and down the end which is where I was heading we've got investigate, prosecute and punish perpetrators, publish relevant parts of the judgment, written declaration accepting responsibility, adopt training programme and if you glance through the entirety of the schedule you will see that the conceptualisation of restitution is not limited to declarations and compensation, it is littered with investigate, prosecute and punish and similar type words. Make public acknowledgements, publish opinion, erect a monument, provide medical treatment. There are all sorts of remedies other than declaration and compensation and we are in our infancy in that and that is probably, I must take some responsibility I suppose for that as I think we were somewhat exhausted in the High Court when we came to the second round, both Mr France and myself, and we were I guess quite content to argue declaration and compensation instead of the wider issues which we didn't think would get a great deal of mileage

Elias CJ So they weren't argued?

Ellis Not really, not in any real sense.

Elias CJ And you were content to seek relief in the form of declaration and damages?

Ellis Essentially.

Elias CJ Yes.

Ellis Yes, but in the Court of Appeal Justice Hammond quite rightly took us to task and said look this is not the correct approach from my Canadian experiences and so on. We should be looking at all the other remedies, but it's always easier to blame somebody else and one said well why aren't you asking the Crown why they didn't ask and rather than just me, but in any event I don't think in the scheme of things either of us did justice to a full range of rights that perhaps we should have and to reinvent the wheel requires well a lot of effort but that is why it is really inappropriate to

disturb the award. If one was going to view a revisitation of *Baigent* one needs to look across the entire spectrum of remedies not just this declaration of compensation which takes me to my submissions, the principal submissions, submissions in reply to the appeal of the cross-appellants, at para.24 and I now quickly deal with the second half 24 to the end if I may and probably the rest too

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Elias CJ Are you going to enlarge upon why given that history this is a suitable case to look at the range of remedies? If you're saying that it's not a suitable case for revisiting *Baigent* isn't it also not suitable for looking at the whole scope of remedies for human rights breaches.

Ellis Yes I've obviously not made myself clear. I'm just saying given the lack of intellectual input on behalf of this issue, I mean there's an awful lot of intellectual input in this case, but as we didn't go down the full range of remedies, even when Justice Hammond remonstrated with us for it we still didn't go down there. It's not right for you to do so at this stage. We would need a lot longer, we'd need to analyse *Shelton* in depth and come with some real issues of public policy that are well prepared and well argued so I'm simply saying leave it alone.

Elias CJ So we should just be aware that there is a broader issue, which in a suitable case should be addressed, and we shouldn't be foreclosing that development?

Ellis No, no, you should be encouraging that development but not in this case Ma'am and

McGrath J Isn't the problem there though Mr Ellis that we've had the Crown both yesterday and earlier in their written submissions raise the whole question of the principles of which the Bill of Rights compensation should be awarded. There was a detailed discussion in the written submissions of which obviously you were aware and you've elected to respond. Now I would have thought that would require us to go into some at least from your side of the case, some of the issues that Dinah Shelton raises in her book and in particular in her chapters on declarations as a remedy and in her chapters on compensation as a remedy because whatever happened in the Court of Appeal and High Court there are matters there of which we've had the Crown side and they've referred to Shelton of course particular passages and I think that you really have to respond to that and I'm suggesting that you might helpfully for the Court be able to do so by looking in particular at those parts of the Shelton text.

Ellis Yes well I understand what you say as I've also read the entire book. I suppose my response to that is yes I can understand that you would review that as helpful but I'm not in a position to do it

McGrath J But you're not?

Ellis I'm not in a position to do it because

McGrath J Yes?

Ellis It's philosophically alien to the position that I'm trying to put to you in which I just tried to articulate that there is the Crown's submissions, and I don't mean this in a critical sense, a personal sense, their submissions are inadequate in attempting to view the scope of remedies that are articulated in Shelton and we would need at least two days addressed to those other issues and this is too important an issue to be done on the fly and it's an inadequate major public policy issue

Tipping J But if the Crown was inadequate surely it was for you to present what you saw as an adequate perspective.

Ellis Well no, not if the position that I'm taking is we support the proposition of the Court of Appeal and in a proper case in another day when there's adequate time then you can develop that but we're sitting on the Court of Appeal judgment which we're quite happy with. Why should my clients at their expense have to develop this? That's not right. We're happy with the judgment that we've got, well we're not happy but we're supporting it.

McGrath J The quantum has been challenged Mr Ellis and you had the Crown's written submissions in time to respond to them. This isn't a reply; this is the adversarial process with you now having to put up submissions. I mean are you really telling us that despite the Crown having spelt out much of what it said yesterday in it's written submissions earlier, you didn't recognise what was coming in this case?

Ellis Oh no, no I'm not saying that at all and I don't think you would think I would but what I'm saying, well let me try it like this. If you'd be a little patient with me, let me take you through paragraphs 24 to 30 whatever of my written submissions and then if you're not satisfied with my answer we'll return to that.

Elias CJ Can I just before you do that, because I think people might be talking past each other or we might not be catching your drift. Are you saying that the case has proceeded on the basis that declaratory relief and damages are available and appropriate responses to human rights breaches without going further into what other alternatives there might be. Now I can understand that but the aspect that the Crown raises in that which I think you do have to respond to is that damages are much less appropriate and that they are not principally to compensate those who's rights have been

infringed and I think you do need to address us on that point of principle because it's within the scope of the case as it is developed to this point. I mean is that right, am I right in expressing it in that way or do you disagree with that? The point upon which the Crown and your clients are engaged in this litigation are on the extent to which damages are appropriate and whether they are compensatory for your clients or whether they're principally to vindicate the abstract right.

Ellis Well perhaps I can respond like this Ma'am. I don't know whether you're right or wrong but I don't have any problem with what you say and I have a very simple response to it and it is this, and you'll need to go, I'm sorry, to my other set of submissions, my strike-out submissions, and that's at para.34 and there I'm relying upon the judgment of the Supreme Court of India and the extract there. So halfway down that extract one of the telling ways in which the violation of that right can reasonably be prevented in due compliance of the mandate of Article 21 is to mulct it's violators with a payment of monetary compensation - the right to compensation etc. So that together with the state using it as a shield, the proposition that I very briefly put forward and it no doubt escaped everybody's attention yesterday was I rely upon the Privy Council jurisprudence in 37 and 38

Elias CJ Yes.

Ellis That words are not enough, so the Privy Council, the Indian Supreme Court, I rely upon that in answer to a declaration is enough - that's fairyland. We're talking in real life. There needs to be some money, particularly when it's a systemic breach of this proportion and that's where I'm coming from with that. And if I may

Elias CJ Yes, yes that's fine.

Ellis Return to Justice McGrath's

Elias CJ Yes, but for myself I'm quite content if we don't have to go into describing the whole world of possibilities because this is not an appropriate for remedies but we are looking at in the context of this case the adequacy of declaration and the role of damages.

Ellis Yes because I think, I mean I did start the, I don't quite remember how, had a view that we needed some remedial psychological and psychiatric help at some stage but it just got too hard to be honest and I was unable to pursue it but it would have been, as I know now, more about it if I'd known what I'd known then I would have articulated it far far more full. But it is a learning experience really, it's all

Elias CJ Well it's very difficult.

Ellis Torture and inhumane treatment isn't everyday fare, so well looking then at my additional observations at para.24, compensation is one of substantialised arsenal. This is the original submission with the tab 1 of that. There's no point in isolating it and the cross-appellants referred to the basic principles on the right to remedy and reparation and in that at para.28 what I say is there's been no enactment of the convention nor the ICCPR. There's no apology, no investigation, no dissemination of available remedies, no education, no access to justice, and then just looking at some of those basic principles, take appropriate legislative and administrative steps, so in one form or another enact the convention and the covenant, investigate violations promptly, in (c) equal and effective access to justice, i.e., not having retrospective legislation taking away your right, in (d) we talk about reparation. In Roman 8, access to justice, (a) disseminate through public and private mechanisms remedies; (14) an adequate, effective and prompt remedy, making available all international processes; (15) adequate, effective and prompt reparation; (19) restitution; (20) compensation, which includes moral damage which that links to your schedule of the Inter-American Court propositions and the expert assistant medicine and medical services, and that's where I was coming from at the psychological and psychiatric ones. It's a lot more advanced and I appreciate it, and soforth. Public apology down at (e); judicial and administrative sanction over the page; guarantees of non-repetition; (e) legal education and lastly non-discrimination. So given that's the context of the available remedies that we have got, to expect, yes, to expect us with respect Justice McGrath, to respond to all of that I mean I'm just not capable of doing that without some significant resources. I mean it's been a struggle enough trying to get legal aid as it is. I mean that's an enormous task and if I could refer you back to my yellow submissions. Just take a note of the paragraph if you haven't got them. I'm only going to read you part of paragraph 140 quoting

Elias CJ Sorry, which are the yellow?

Ellis The yellows were the submissions in support of primary appeal. I put yellow for easy code, easy recognition, well

Elias CJ I'm sorry I can't find that. Oh here it is, yes. In support of the appeal?

Ellis Yes.

Elias CJ Those are those ones, yes. And what paragraph?

Ellis Page 37, para.140.

Elias CJ Yes.

Ellis And that would be the judgment of the President, I'm not sure that that's quite accurate. He was the president until, he was then the President and he was President for five years but I don't think he was in 2006, but nobody will take me to task for that. But the passage in bold established the duty of the state to provide domestic, adequate and effective remedies. I've always maintained that such duty effectively constitutes a basic pillar not only of treaties but in the rule of law in a democratic society in it's correct application has the purpose of perfecting the administration of justice on a national level. Well it's a big task to go through the entire law of remedies in this case and because I've what I've articulated in those particular submissions I wasn't proposing to do so and I just wanted in those submissions also to refer to paragraph, and I've got a few other paragraphs and then I've finished with that bit. So if I could take you to para.12, the public's right to know is an important ingredient in all this, and we've had no real discussion of that, short of the investigative debate that we had in the original proposition, but that is an important right in International Human Rights Law and in para.10 there I make the proposition that the cross-appellants have a parsimonious approach to human rights and there's no apology and in para.15 where I refer to the Robin Islands is it, the Robbin Island guidelines, and I've set out a couple which show the difficulties that people placed in that situation such as Mr Taunoa face. Ensure that the rules of evidence properly reflect the difficulties of sustaining allegations of ill treatment in custody. That's never really been

Elias CJ Which paragraph is this?

Ellis This is para.15 Ma'am

McGrath J We're back with the reply to the

Elias CJ Oh sorry I was looking at the yellow one still.

Ellis Sorry, yes para.15 of their reply. The difficulties of, so we've got international rules here about ensuring that evidence reflects the difficulties, well we haven't articulated that with any great precision in New Zealand and that's something we need to do and there is a lot more in this case than just is there a declaration and is there compensation, and this Court should be alert for developing the law. I know you didn't like it when I criticised you about Zimbabwe but you've got to advance human rights, that's your function under s.3 of the Bill of Rights. You're to affirm, protect and promote human rights.

Henry J Mr Ellis the context of this cross-appeal which we're now discussing, is it your submissions that these factors or mainly failures on the part of the state they are, support the quantum of these awards?

Ellis Yes, yes and well not only they support the quantum but they support the philosophy that you shouldn't re-open it because you can't really get the full extent of what's happened, because if you've had no investigation you don't know the true harm that the appellants have suffered.

Henry J We're concerned with whether there should have been awards of compensation and if so the levels

Ellis Yes.

Henry J I take it that these matters go to those issues?

Ellis Yes.

Henry J I understand that thank you.

Ellis And then there's 19 to 22, and that's really I suppose why I say to Justice McGrath I'm not philosophically going down the track that you invited me to do because I think that would be wrong in principle to do because we are at a disadvantage because we are unable because of the absence of an investigation and because of the presence of retrospective legislation, we are not on a level playing field, so ask us to play by the normal rules is not appropriate so I respectfully Sir decline to go down your path and I hope you understand why. It's not a fit of peak and I'm not going to do it, there's a logic to it and that will hopefully have dealt with that set of submissions unless anybody's got any – do you want me to go any further or are you satisfied with my answer?

McGrath J I think the comment you've just made was really addressed to the particular factual circumstances which we covered at the last hearing so I don't want to respond to that. My concern is that what I've heard so far doesn't go into the conceptual questions the Chief Justice put to you, which is to what extent damages are necessary and appropriate in addition to a declaration of breach, and don't go into the academic commentary, in particular Dinah Shelton's reference, which was part of the Crown's case, and we haven't really had a discussion from you if the English case such as *Greenfield* and the earlier decision of Lord Woolf and others and I was hoping that you would be able to address those in the course of your oral submissions.

Ellis Well I repeat I suppose, I repeat that I rely upon the jurisprudence of the Privy Council and the State of Bihar. Whilst it's very tempting to accept

your bait, with respect Sir I'm not going to because it would not be a principle position who my clients take.

Elias CJ Sorry, I don't understand why that is.

Ellis Well because we're faced with the lack of investigation and we're faced with the Prisoners and Victims Claims Act. It is our proposition that we cannot get a fair hearing in this Court because of the Government's actions and given that what is the point

Elias CJ Do you mean by that you can't get a just outcome from this Court because of the legislation, is that what you're saying?

Ellis I think I mean that in the conceptualisation that I put it in my strike-out application at para.6, cross referring to the European Court cases, saying if the Government intervenes in the legislative arena that's a violation of the fair trial right under Article 6. Well that's what they've done here. So in that sense your hands are tied and that is internationally reprehensible and it places us at a significant disadvantage. They've already altered the remedy.

Elias CJ Well they may have altered the effect but we are concerned with what remedy should be given and I would have thought that even in the International forum that you'll go to to complain about the consequences, a proper determination of what entitlement to relief they should have had would have been useful.

Ellis Will you say that again Ma'am, I didn't quite catch it?

Elias CJ Well this Court has seized of the issue as to the quantum of damages. You say our hands are tied because of the legislation and that on one view they're not tied because of the legislation, that is simply a consequential issue. We are dealing with what the straight response should be.

Ellis Yes, well I suppose your conception that it is on one view, well we may differ there. On our view it does irretrievably alter what has happened because that's why I filed the application for the strike-out after thinking about the logic of if you can't have an Article 6 fair trial well how can you actually embark on the appeal in relation to it. It doesn't seem conceptually correct.

Elias CJ Sorry, what is the impediment to the fair trial, the fair hearing?

Ellis The alteration of the remedy that the High Court and Court of Appeal has granted.

Tipping J It's the diversion of the money?

Ellis Yes.

Elias CJ Yes.

Tipping J That's what it's all about isn't it?

Elias CJ But there'll be some, but there may well be some of the appellants who won't be affected by that.

Ellis Well that's absolutely true but I mean

Elias CJ So in dealing with the quantum or the fact of damages, I just don't understand why the Court's hands are tied. It may be that the effect is that as Justice Tipping says, the fruits of the Court determination will be diverted but why does that make the exercise we're embarked on unreal?

Ellis Well it makes it unreal in this sense. The enactment of the legislation is contrary to the rule of law and it

Elias CJ But that's a matter you can take up in the appropriate forum.

Ellis Well currently this is the appropriate forum Ma'am and if you're not going to engage in that, that's part of my problem. I've asked you for a declaration of inconsistency. I can understand why you might not want

Elias CJ But there's no application, a properly constituted application that's come through the Court system on that point.

Ellis Well, I mean

Blanchard J We don't have original

Ellis Sorry Your Honour, can you just hold on one second? What do you mean by come through

Elias CJ Well as Justice Blanchard was about to say

Blanchard J We don't have original jurisdiction.

Ellis Well that's an interesting question. You have Bill of Rights jurisdiction and you have *Baigent's* jurisdiction

Blanchard J Well the Supreme Court Act is very specific. I haven't given it a great deal of consideration but on a plain meaning approach to the section, the

sections of the Supreme Court Act, all we can do is to hear appeals from decisions that have been made below. We can't embark on a new exercise. We have to wait for that to be commenced in the appropriate forum, which I imagine is the High Court and for it then to come up through the system, at which point we can consider it. But the Supreme Court Act is really quite prescriptive.

Ellis It is? Where did you get that from Sir, which section?

Blanchard J I haven't got the Act in front of me but I think it is probably s.8. The Supreme Court Act tells us what we can do and in some instances can't do.

Ellis Yes but with respect Sir you must read the Supreme Court Act in conjuncture with the New Zealand Bill of Rights Act, you must read it in accordance with New Zealand's international obligation, it's not something stuck in a sheep pen, all on its own, and you ignore the surrounding ground

Elias CJ Nobody would suggest that, nobody would suggest that. In exercising our jurisdiction we under the Bill of Rights Act are bound to promote the rights recognised in the Act. That's not a problem, but the problem is that if you want to challenge the legislation you need to bring distinct proceedings. It's not a tack-on, it's a substantive claim you're making which at the moment can't be before us.

Ellis Well I see where you're coming from

Blanchard J And Mr Ellis it doesn't bite until there is actually a final award of damages and an attempt to divert those damages by the use of the new legislation.

Ellis Well that's two issues isn't it? Let's just deal with the last one if it doesn't bite. By operation of law as soon as the judgment of this Court is filed it bites, so it is a legal certainty.

Blanchard J But not until there is a judgment of this Court

Ellis Well so what, so what, whilst the, I see where you're heading, I don't think you see where I'm coming from, which is probably because I haven't articulated it. Well what I say is 'yes excuse me this is all about the rule of law'. Whilst I was on my feet in the Court of Appeal the Government is passing retrospective legislation and you say from what I see as 'well we're not going down here for technical reasons'. I say be a little bit more imaginative than that. This is a major breach of human rights. This is a major issue going to the heart of the rule of law and shouldn't be defeated by a strict interpretation of the Supreme Court Act.

Blanchard J It's not defeated by it because your clients are still at liberty to bring such proceedings as they think appropriate in relation to the operation of the new legislation.

Ellis Well international requirements require that you ought to have a remedy, an effective remedy, in a prompt fashion. The obvious place to go for something that happens in the Court of Appeal is the Supreme Court and this is where we are.

Blanchard J It didn't happen in the Court of Appeal.

Ellis Yes it did.

Blanchard J It happened in Parliament.

Ellis No it happened whilst

Blanchard J It had nothing to do with the Court of Appeal.

Ellis Yes it did. In the passages from Hansard that I've set out there is Richard Worth saying this legislation is going through now and this is happening in the Court of Appeal. It had everything to do with the Court of Appeal. They wanted to get the legislation through while the case was going on. It was an attempt to, thank you, it's in my stay submissions, yes at para.20, I've set out an extract from Dr Richard Worth, which I've highlighted. "This Government has plunged Parliament into urgency in order to cross a very clear constitutional threshold it should never cross. This is constitutionally reprehensible". And in the next passage he says "I see what is going on in the Court of Appeal". It's inextricably linked and with respect Sir you cannot pretend it isn't. It is, and it is the duty of you as Judges to tackle it. It may be a hard question, it may be a difficult question, I know that, but you should not shirk from your responsibility and with respect the impression I get is that you are because it's too hard. Well frankly that is not good enough, the Judges of the Supreme

Elias CJ Well we don't mind how hard it is Mr Ellis, we'd just like to have an application that's properly before us, or an appeal more properly, that's properly before us and if you want to you can't just tack-on another substantive claim at the end of the appellate process. If you want to challenge the application or the enactment of this legislation you'll have to file proceedings doing that in the High Court which can then progress up through the system.

Ellis Well I hear what you say Ma'am and with respect I disagree with you. And there's a consequence to this too. It is my proposition that in the conceptualisation of your right to a fair trial which includes the right to a

fair appeal in Article 14 of the Covenant I'm quite entitled to raise it in this Court and that you should hear it. If you do not then for international purposes my clients will have exhausted their domestic remedies. We do not have to go back to square one and do it, so it is raised, if you decline to hear it because you think there's a jurisdictional lack well my argument to that is you're wrong and you need to reconsider that and you need to look at this in the light of those European Court cases which say this is fair trial, this is the rule of law itself and if you can't come up with a jurisdiction on that I'm disappointed but I may have to be disappointed, but then I can go elsewhere, but to go back again and come up, I'd like to get on with something else. I've spent years on this but I completely understand

Henry J Mr Ellis you can help me a little further. As I understand it we have before us from you the application to stay or strikeout the cross-appeal. That's the only application presently under discussion.

Ellis No Sir, the application said

Henry J Or a declaration of inconsistency as well and that the basis of that I understand is this legislation?

Ellis Yes, and as I understand the Chief Justice and Justice Blanchard saying we can't do it, well I don't

Henry J Moving away from whether or not we can do that

Ellis Okay, well Your Honour I'd like to come back to it

Henry J What is the consequence of acceding to your application, simply that the appeal gets struck out and there's a declaration that it's inconsistent to pursue that in the light of the new legislation?

Ellis Yes, and the Court of Appeal judgment would stand, yes.

Tipping J What I can't understand is assuming this legislation is inconsistent, just assume that for the moment, why does that mean that the cross-appeal has to be struck out.

Ellis Well because of what I say in para.6 of my strike-out submissions, which was a distillation of what I said in my yellow ones, because changing the remedy during the course of the litigation is contrary to the rule of law

Tipping J It's not changing the remedy, it's changing the destination of the money. Now you'll say that's formalistic and all the rest of it

Ellis Yes of course I will.

Tipping J I'll say it for you, but well it's got to be just a tad analytical as opposed to rhetorical in these matters.

Ellis Oh come now, let's ask our appellant, right what's going to happen is, you may have all of your money taken away from you

Elias CJ But he may not because there will be some appellants who may well not.

Ellis Well yes that is right but whatever happens they are subject to their money being frozen for a period of time and an appallingly biased process as to how it's determined whether you've taken away. Whether anything is taken away or not, they are still victims.

Tipping J But say the Crown persuades us, and this is hypothetical, that there should be no money

Ellis Yes.

Tipping J Why does the legislation impede such a ruling if it were correct?

Ellis Good point.

Tipping J Good point.

Ellis I hadn't though of that. Let me think about it.

Tipping J You'll have to think hard I think.

Ellis Well I'm used to that. Quite right I'll have to think hard. I can't think of an answer.

Tipping J Well maybe it's morning tea time

McGrath J Just before we do go to morning tea Mr Ellis, I would just like to get clear of one point that I'd understood from what you said last night that you were going to be prepared as part of your argument today to discuss the Shelton texts - very interesting comments on declarations and compensation. Is that the case? I'm not sure what you said earlier, but are you able to help us with how passages in that text would support your clients' position in resisting the cross-appeal.

Ellis Did I say that yesterday, well if I did, I didn't think I did

McGrath J I may have misunderstood you but give a mind that's the history, what's the position now?

Ellis The position now is that Mr La Hood has passed me this, which I think, is good advice. He says *Greenfield* conflicts with Privy Council judgments.

McGrath J So *Greenfield* conflicts with which Privy Council judgments?

Ellis *Rundapon* and

McGrath J Yes, those two judgment, yes.

Ellis And *Merton*

McGrath J Yes.

Ellis And the article that I referred to yesterday in my brief 10 minutes, the Richard Clayton QC article we adopt, we adopt his reasoning.

McGrath J Now as to, can I come back just before we go to tea to Dinah Shelton's, yes.

Ellis Yes sure.

McGrath J Because you really had that text in your hands and I do remember you raising it and signalling there was a lot of good in it.

Ellis Well that was because I wanted to give you the annex to say that the, which I did give you, the annex that there's a wealth of human rights remedies and whatever. No I'm not going to go through Shelton. If you want me to go through Shelton I would need an adjournment to prepare proper written submissions. I'm not going to do it on the hoof, it's far too important. What I do say is whatever there is in the Privy Council, whatever there is in the Supreme Court of India, whatever there is in the House of Lords, you've got to apply it to the specific New Zealand statutory situation and the reality of it all is that the Human Rights Committee, the European Court, all of the international authorities we've got, there's total confusion as to what's the appropriate amount of compensation to give and I could stand here for two days and give you lots of examples which would leave you even more confused than I am.

McGrath J Thank you Mr Ellis, I understand your position, thank you.

Elias CJ Alright we'll take the morning adjournment.

10.31am Court adjourned
11.48am Court resumed

Ellis I'll just recap where I think I'm going, particularly in respect to Justice McGrath. The appellants' position is that in their view the international jurisprudence in relation to the level of compensation is confusing and unhelpful. The Canadian Supreme Court's never come to a conclusion. The House of Lords and the Privy Council seem to disagree with one another. The jurisprudence of the European Court of Human Rights, the logic of it, borders on incomprehensible. The Inter-American Court is bullish with its leading edge stuff, really it's in a state of development and New Zealand has got to stick a flag in the sand and have some proposition of its own from that material. I have got in my written submission on the strike-out application at para.16, which covers about a page and a half a long extract from Professor Shelton which I'll take you to when I get there, which deals with, but I don't want to say anymore than that because I've got a lengthy extract from what I thought was relevant. The Privy Council jurisprudence is important and is relied upon because it's more developed than most because it's been in the context of constitutional statutes in the Caribbean and we've been following that line and that's we rely upon it, the House of Lords is in its infancy in interpreting the Human Rights Act and I was going to take you to, and please don't let me forget anybody, I wanted to take you to as I said yesterday some of those Scottish cases to illustrate why this is a bit of a mess and I will do so. In fact I might do so now actually if I can find what I wanted to say. That wouldn't be inconvenient to anybody? So that we need the cross-appellants submissions, para.93, no, sorry, para.52 and there our three decisions, well they're not actually all Scottish are they. If you've got para.52, we've got two Scottish and a Northern Ireland case. It was that paragraph I wanted to dwell on to show. For *Napier* you might remember I used in the principal hearing for the proposition about the burden of proof because

Blanchard J That was the appeal?

Ellis That was the appeal, yes, now what my learned friends say here is correct, but what they don't say is that the compensation proposition was settled before they got to the Court of Session Inner House, the Court of Appeal, and the only point on appeal was that question of that, so the Scottish Executive gave up and said 2,000's alright and now there were a lot of settlements in Scotland, and this was going to cost an awful lot of money. This one in *Martin* my learned friends say similar conditions were held in the absence of personal harm not to breach Article 3, well Mr Boldt corrected himself in his oral submission on that because that is inadvertently misleading, that proposition, because it is not similar conditions and para.25 of *Martin*, if I could take you to that which is in tab 31. So in para.25? Everybody with me? Okay so this is a decision of the Queen's Bench Division of Northern Ireland and Justice Girvan

Elias CJ That's alright, there's so many bits of paper I have trouble finding things too.

Tipping J Is it your proposition that in *Martin* the conditions were less severe if you like than *Napier*?

Ellis Yes, because in the passage cited in re *Napier* it says in the middle there 'however in the present instance they were not comparable', so one can hardly say they're similar if the Court itself says they're not comparable. And in *Callison,* the third one in the trilogy, as I understand it and you will know from reading Scottish decisions, it's sometimes very hard to have a clue as to what the procedure is and what's going on and that's why I contact my friend in Scotland to try and get some clarity here. What was going on here was that there was interim relief sought and there's two sorts of interim relief. Effectively what was sought was the Scottish equivalent of specific performance which the Court says you can't have on interim relief because it's obviously determining the issue and then they wanted a declarator, which is the equivalent of our declarations, but the Court said in para.14, or it might be 16, that we're not going to do this because that would require a significant amount of public funds to be spent on an interim order and we haven't actually determined the evidence. Anyway, so it was knocked out on a procedural basis not further declined interim relief. Well so what, it's simply a procedural issue and one of no substance but it does appear and I understand my learned friends to say that they found the *Somerville* case that I was talking about, at least at first instance, of course we haven't got a judgment from the Scottish Court of Appeal yet. I haven't read it, they may have, but my understanding is that there is a significant number of settlements going on along the lines of the *Napier* proposition which presumably is reflected in the European Courts 2,000 Euros type approach as well. So my real proposition there I suppose is that it's dangerous to dwell on these authorities from jurisdictions and try and dismiss them in a paragraph, because just looking at those three, one can see there's a completely different message and if we went through the entire lot I'm quite sure that Your Honour Justice McGrath and everybody else would be better informed but equally none the wiser as to what the situation was. Anyway, so that's dealt with, the Scottish point. Now I think that leaves me with three things. I've got something to say on Article 14 and 16 of the CAP in response to Mr Boldt. I would like to go through my strike-out applications and the four documents that I handed up yesterday, which I'd like to finish with. I've found them, it's alright I've found them. So just a quick point on Article 14 and 16 of CAP Mr Boldt told you that in Article 14 of CAP there was a requirement of compensation for torture, but in Article 16 which extends some of the provisions to the inhumane treatment, it wasn't included. Well that is correct. Whether the jurisprudence if there ever got to be any, which there

isn't, would say that you don't get compensation is another matter, but in any event the situation is not as simplistic as that because New Zealand then of course entered a reservation to CAP saying they won't give compensation anyway under that Convention, but under the international covenant I think somehow the Government didn't know what it was doing because it's pointless entering a reservation to one Treaty but not the other because it's clear that the jurisprudence of the Covenant and Article 7 and 10(1) are the same as what is in the Torture Convention, of course you can have compensation and the general comments of the committee which I took you through in our appeal illustrated that compensation was a proper remedy. No I just wanted to say that, now in terms of my strike-out application which if I could now ask you to look at. You probably grasped the essence of para.1 and 2. Oh right so let us address Justice Blanchard's lack of jurisdiction point if we may and if I can get my computer to wake up. With respect Justice Blanchard I would say your interpretation of the Supreme Court Act is wrong and that you do have jurisdiction and I say that because I assumed somebody was going to ask me about the Supreme Court Act which is why I had it ready. Section 25 – General Powers On an appeal in a proceeding that is being heard in a New Zealand court, the Supreme Court – (a) can make any order or grant any relief that could have been made or granted by that court and (b) even if the proceeding has not been heard in the Court of Appeal, has all the powers of the Court of Appeal would have if hearing the appeal.

Blanchard J I haven't got it in front of me, but isn't the first part of that, and I've just focused on that for the moment, saying that this Court has power to make an order that the Court appealed from could have made but as the matter wasn't before the Court appealed from then s.25 can't give a jurisdiction.

Ellis Well I'd imagined you'd say that or words to that effect but do you not have to give the section a Bill of Rights consistent meaning and do you not have to read that in connection when it is your duty to affirm to protect and promote human rights. So you must give that section a liberal meaning and not one that is inconsistent with the Bill of Rights if that is possible and a proper interpretation of that would be that you can grant any order in the Courts below. Now if you disagree, no doubt I'm sure the judgment will reflect that, but that's the position put forward. And I suppose it has to be read in the light of the conceptualisation of the argument on the rule of law and I suppose President Cooke as he was, now there are some laws that you can't have and soforth, well if you view yourselves as simply a creature of statute, I mean I wondered with respect how you managed to make your decision in Zaoui, which I was absolutely delighted with, but I actually wondered where you found the jurisdiction to do it. Now be

Blanchard J Because bail was the issue in the Court below.

Ellis Well what I'm saying to you is put your Zaoui hat on, be liberal, inventive and protect and affirm human rights, don't be negative and read this conservatively, that's what I ask you to do. Right now we've done page 4 I think you're familiar with my proposition there and then if we turn to para.16 and the passage is from Professor Shelton. And I know it's a long passage but please bear with me because one of you at least is interested in what Professor Shelton said. When redressing human rights violations it must be recognised as well the actions against the state differ from private proceedings. First there's the added importance of ensuring the rule of law 'in a Government of laws the existence of the Government will be imperilled if fails to observe the law scrupulously. For good or ill it teaches the whole people by example. Crime is contagious. If the Government becomes a lawbreaker it breeds contempt for law. It invites every man to become a law unto himself. It invites anarchy, and I pause there to say we'll all be aware that that sentiment is profound and I doubt that anybody would disagree with me but what we have had is not just one piece of retrospective legislation lately, we've had another which goes to the heart of the rule of law, the electoral legislation and it may well take the invitation

Elias CJ Now that's really not before us Mr Ellis, we couldn't even

Ellis Well no it's not before us but it's an example of what happens when the Government becomes a lawbreaker.

Elias CJ I see.

Ellis And when maybe we will come back with that one through as you put it the proper Court process, but it's contagious. If you produce one piece of retrospective legislation it's contagious and you should put a halt to it. Anyway the denial of a remedy in human rights cases may have a particular negative effect on the judiciary. If you read those next two paragraph and I'll restart it impunity. It's very sensitive this microphone isn't it?

Elias CJ Is it you or is it Justice McGrath?

Ellis I don't know.

Elias CJ I'm not sure either.

Ellis My hearing's not that good. I can't identify

Elias CJ They are very sensitive the microphones, yes.

Ellis Right, I could read the passage about impunity. "Impunity, particularly Government impunity that leaves human rights victims without a remedy, calls into serious questions the integrity of human rights guarantees and the rule of law. A primary purpose of legally protecting rights is to effect the distribution of power between individuals and the state, specifically to protect individuals from the abuse of state power. Rights without remedies are ineffectual, rendering illusory a government's duties to respect such rights. Even the symbolic value of rights would disappear if it becomes obvious the rights can be violated with impunity." Over the page, "If society as a whole is injured by human rights violations, so also may society as a whole benefit from public remedies." and there hasn't really been that in Taunoa, the argument about whether it was private rights or public rights. Part of the requirement of a declaration is that this is the effect it has on the public and it's public element, but equally one would expect in the whole conceptualisation of human rights remedies that you get some compensation on top of that, particularly when violations are egregious and I say in these circumstances that they were. Remedies for public wrongs must be seen the public policy as an important means of promoting compliance with a public rights norms, so there's an effect on the judiciary, but for their talks about the public controversy that went on here and that takes us really right interpose by four passages as that stage. They fit in well with the impunity arguments. So that's four things I handed up to you yesterday. Albania and

Elias CJ I've got one of them.

Ellis It's a very small bundle which is probably got Albania on the front page.

Henry J Could you identify the other three for me please?

Ellis Yes there's Albania, there's a report to the Government of the Republic of Macedonia and there's two texts on Human Rights and Criminal Proceedings and The Treatment of Prisoners.

Elias CJ So this material is being directed to what submission, what proposition?

Ellis Impunity and probably saves me going through the 1933 material, so it encapsulates that, save me going through that, so if I could start at the back, if I may, so that is the text entitled The Treatment of Prisoners by Professor Murdoch (just released) and on page 352 if I could refer you to one paragraph there which I will read in full to you. "The use of torture or ill treatment or the arbitrary use of detention however can in a real sense also cause harm to the body politic and to the legal system. If the circumstances and manner in which a society deprives its citizens of its liberty reflect in some manner the underlying values of that community. The level of concern to avoid arbitrary detention and to prevent the ill-

treatment of detainees provides a real measure of the practical worth of a legal system in protecting human dignity" and I pause if I may to say because I forgot the discussion yesterday fairly early on with Mr Boldt and the apt reminder to Mr Boldt, it came from Justice McGrath, on human dignity, is very poignant and this reflects that argument too. The quality of legal protection and the consequent issue of the treatment of detainees, not only is a ready litmus test for the extent in which human rights reflectively safeguarded by a legal system, but also indicates the extent to which the lessons of the past have been truly assimilated by succeeding generations, particularly within a European context, the 20th Century has been marked by profound violations of the basic rights of millions – that memory is still fresh. So it's fairly common place for human rights lawyers to talk about the lessons of history because one of the remedies is supposed to be to prevent future violations, and that's not been tackled here and likewise if we go to the next passage which is from Professor, I'm not sure what to call him, Professor or Judge Trechsel, Professor of Criminal Law and a Judge in the International Criminal Tribunal which probably doesn't meet but I don't know, anyway whatever his proper title is, if we just look at his chapter 1 and, I wish I'd read this first, I'm just looking at the quotation from Primo Levi at the very beginning of his book there which is up the top in Italian with footnote 1. The translation is 'In every part of the world, wherever you begin by denying the fundamentals of liberties of mankind, and equality among people, you move towards the concentration camp system, and it is a road on which it is difficult to halt' and that really in that short passage encapsulates what I was saying in my 1933 material which I won't need to address Your Honours. And then the two passages from, well the one from the former Yugoslavia Republic of Macedonia if you could turn if you could to the second page of that report and paragraph, it's the only one I need to refer to that begins 'the President of the Republic Judicial Council did not deny the validity of the analysis and conclusion set out in the CPT's previous report. In fact he stated he was personally convinced that Judges do not do anything to find out about torture or protect victims from ill-treatment though he indicated that the presence of a defence attorney during an initial appearance was a safeguard. And the important passage – his opinion was that a clear provision on the law on Courts was needed to authorise the Republic Judicial Council to impose disciplinary sanctions on Judges who do not investigate allegations or signs of ill-treatment. The CPT recommends serious consideration be given and I think that hopefully emphasises the European culture of investigation and the juridical duty that goes with it in far more powerful words than I can ever do and I wanted to leave Albania to the very last so I will, so I will go back to my submissions. I think we've done Dr Worth and then returning to para.23 we're back to Professor Shelton again on access to justice and substantive redress and her reference to *Blackstones* commentaries in the United States Supreme Court declare the very essence of civil liberty certainly consists in the right

of every individual to claim the protection of law whenever he receives an injury which is obviously impossible if you've got retrospectivity. Para.24, although the axioms of justice and civil liberty were trampled on and Professor Shelton again at para.25 compensatory or remedial justice, down the bottom somewhat badly spelt, I won't read the Aristotle quote but it is interesting, 'thus the essential fascias of compensatory justice are (1) the parties are treated as equal, (2) there is damage inflicted on one party by the other and (3) the remedy seeks to restore the victim to the condition he or she was in before the unjust activity occurred.' Over the page, the moral adequacy of a substitute remedy, usually money will vary considerably but may allow a victim to further his or her legitimate projects or goals. In sum, rectification and compensation in the framework of basic rights served to restore the individual to the extent possible their capacity to achieve ends that they personally value. As such compensation may have important rehabilitative effects and that is important in the whole conceptualisation of human rights compensation, the rehabilitative effect and I do regret not asking for psychological and psychiatric help, but anyway I didn't. And then over the page at para.34 I'll just re-emphasise her citation of the Ste of Bihar case which I've already referred to you. I probably don't need to address you on Magna Carta. You've got the flavour of it, but the only thing I probably need to say is in para.40 a passage from Lord Cooke in *Daley* at para.31 'to assay any of the fundamentals perhaps universal rights is beyond anything that the right to access to a Court and the point that I'm emphasising is that common law goes so deep because you'll recollect that the case was a European Convention proposition, but I'm not sure that it was actually at the time, well whatever, the common law applied to and I think maybe Lord Cooke relied on New Zealand when he said that. I don't know, but anyway it's a very powerful and poignant proposition. Almost ultimately Article 14 is relied upon, it's not just criminal charges, everybody else in Civil cases is entitled to equality and soforth and that's set out in the general comments at para.44 in Article 26 and I don't think I need to go into. And then once again at para.52 we're back to Professor Shelton in a little forward-thinking analysis in her book this time on the International Law Commission's Article on state responsibility. So it's clearly a matter that the international community is trying to address but it's not yet at that stage before I think the articles are in draft. I don't need to address you on totalitarianism as I think we've said Primo Livi, so I would like to complete my submissions with the Albanian comments if I may. In the context of really this is what it was all about and the remedy and the quantum of the remedy is important in the context of everything else that is going on, and here we have Albania, not exactly the most advanced human rights country in the world and we're given that the CPT recommend that the problem of ill-treatment by the Police, a clear message be delivered by the relevant political authority, the Minister of Interior condemning Police ill-treatment, and what we have here is we have the

Minister of Justice invoking a proposition that prisoners are scumbags which is the very antithesis of what happens in Albania, and if we can't advance beyond the level of Albania then we cannot hold our heads up as a civilised society and it is a disgrace that we don't have the apology and the condemnation of this action and those are my submissions Your Honour unless there are any questions. Thank you.

Elias CJ Thank you Mr Ellis. Mr Boldt.

Boldt Thank you Ma'am. It might be appropriate Your Honours for me to begin where my learned friend left off with the commentary of an extract by the European Committee for the Prevention of Torture, Inhumane or Degrading Treatment or Punishment. The comment made in this extract is something that the New Zealand Government would wholeheartedly endorse. This case is all about acknowledging that prisoners in New Zealand prisons were not afforded treatment that accorded with their entitlements under the Bill of Rights Act. We had a very lengthy trial at which that point was established in the public forum and we had a public judgment that set out in great detail the regime under which the inmates were held and which publicly held the Government to account for them. A range of declarations were made in favour of each and they all were taken very seriously and had an immediate and wide-ranging impact as has already been outlined and so there isn't any conflict between what the New Zealand Government sees as the purpose of the Bill of Rights Act or of these proceedings, and the kinds of sentiments that are being expressed. The only issue in this cross-appeal is whether in addition to that very clear public annunciation of the breaches that have been established, something more is required in the form of money for the individuals and for the various reasons that have been canvassed yesterday, it's our submission that this is not an appropriate case for an additional award because the very clear public purpose underpinning this litigation has already been well and truly established, first by the public nature of the proceeding itself, the judgment publicly declaring what has occurred and the formal declarations followed by the immediate remedial effect that that had. Dealing then with other matters that have been raised, first of all there is the application to strike the cross-appeal out and I don't propose to make any response to that application other than to direct Your Honours to the memorandum that was filed on behalf of the Crown when that application was first lodged in this Court, but unless there is anything that Your Honours would like to address on the strike-out question other than that contained in that memorandum, then I don't propose to say anything further. There were a couple of matters where I promised Your Honours some references and if I might deal with that now if that's convenient, the first concerns the mental state of Mr Taunoa, because there had been a comment that BMR may have exacerbated or exaggerated his existing difficulties. If I could take Your Honours to volume 1 of the case on appeal, the reference is page

124. His Honour Justice Young noted in para.230, which is just over on the previous page that psychiatric examinations by Dr Chaplow and the plaintiff's expert, Dr Barry Walsh, had not indicated the presence of any psychiatric symptoms, but the important passages are in paras. 235 through 237, the conclusion that Dr Chaplow reached is in para.236 – 'In summary I think there is very little in Mr Taunoa's history or in his notes to suggest that the BMR caused psychological or psychiatric injury but possibly exacerbated and aggravated what disability he previously had'. The Judge goes on to put that into a slightly broader context of the wider report in para.237. He makes a point there that Mr Taunoa is a person who would have no hesitation in manufacturing whatever psychiatric or psychological symptoms he believed were being looked for to support his case and went on to say 'accordingly Dr Chaplow's conservative approach is the appropriate one with regard to Mr Taunoa. Dr Chaplow's conclusions were that Mr Taunoa probably had anti-social personality and possibly social inter-personal mal-adaption. Dr Chaplow concluded that BMR possibly exaggerated and aggravated these difficulties. He was not convinced or am I that Mr Taunoa suffered from post-traumatic disorder and I accept Dr Chaplow's conclusions'. So we have a finding not even that there was an exaggeration but that there may have been an exaggeration and we're not talking about a psychiatric condition, we're talking about an inter-personal, an anti-social personality, and as I said yesterday part of the problem for someone with that kind of a disability is that they're being forced to obey rules strictly and without tolerance of breaches is like a red rag to a bull.

McGrath J Mr Boldt in his damages judgment the Judge did accept didn't he that harm inevitably occurred to both Mr Taunoa and Mr Robinson. I'm looking at page 160, para.27, 'if only the modest exacerbation of existing disabilities'.

Boldt That's an interesting comment given that even earlier in this very judgment His Honour reproduces exactly the passage to which I've just referred the Court, which is not the inevitable exaggeration of existing difficulties, but the possible aggravation of a personality disorder, and indeed as far as Mr Robinson was concerned, the finding that the Judge made was that BMR could not be, that absolutely nothing could be attributed to BMR in terms of Mr Robinson's mental state. BMR wasn't responsible for his psychological condition nor was there any evidence that it worsened.

McGrath J While he didn't accept Mr Taunoa's perceptions of himself, and did accept Dr Chaplow's, in the end he reached the conclusion that harm had occurred in this case.

Boldt Certainly that finding somewhat more loosely worded that His Honour's earlier findings is there, I accept that, but if you look Sir at para.26 of the Remedies Judgment, which is page 159 going on to 160 His Honour quotes from his para.244 of the principal judgment 'All report writers record psychological damage to Mr Robinson at an early age with resulting antisocial personality. No connection between BMR and the onset or aggravation of any of Mr Robinson's psychological disabilities have been establish on the evidence', so with respect there was, it would seem at least in the primary fact-finding exercise, a firm rejection of any suggestion in the case of Mr Robinson that there had even been an aggravation attributable to BMR, and of course the same comment applied to Mr Kidman. So that's the points regarding mental state unless there are

Elias CJ Well as you acknowledge, it's not just a question of lasting harm is it because you indicate that the impact may well have been more severe upon prisoners with these psychological problems?

Boldt Yes it was going to, it engaged the very things to which they were likely to react, that's certainly the case, or at least in Mr Taunoa's case that's definitely acknowledged, or should I say it had the potential to do that. That really is what His Honour has concluded with respect to Mr Taunoa. This may have caused an aggravation of, if you like, a narcissistic condition in which there was a reluctance to engage with the formalities of a regimented regime in a prison context and it was that factor that was of real concern, it was the being told what to do and having no say in the way that you run your daily existence in the prison which really was a red rag to a bull to a prisoner of the disposition of some of these. But in terms of what he said with respect to Mr Taunoa, it was a tentative and conservative finding that the Judge made and certainly the very serious allegations were firmly rejected. Now the other point my friend reminds me about is that there was no evidence of any physical harm to any of the inmates. Now the second set of references that I promised to provide yesterday relate to the Department of Corrections' purpose in the Judge's findings regarding that and there are two passages to which I would like to refer Your Honours. One is at page 127 of the blue volume of the case, para.264. These discussions of the Department's purpose came in the context of the discussion of the claim that there had been torture which of course requires the deliberate infliction of serious harm

Elias CJ Now you say that simply based on the authorities cited in the submissions?

Boldt The definition of torture Ma'am, yes, and indeed the definition in the Crimes of Torture Act in New Zealand.

Elias CJ Yes.

Boldt But para.264 His Honour talks about, he says 'the definition of torture is concerned with the motive of the perpetrator of the torture. The motive of Corrections in this case was not punishment. I consider it was as claimed to control the most difficult inmates in prison and to try to improve their behaviour. While its effect may have been punishment, I repeat, the focus in this part of the definition is on the motive of the perpetrator. Here the motive was not punishment'. And then the following page His Honour is still on the topic of torture but is still here talking about the intention of the Department in implementing the regime. Para.269 and sub.para.2 His Honour notes 'nor was the limited suffering that did occur deliberately inflicted. Corrections did not set out to inflict mental suffering on any inmate. They set out to control the behaviour of very difficult prisoners. Their efforts were neither well planned nor well researched. However, they were not the deliberate infliction of mental suffering'. Now the third, perhaps preliminary matter, yesterday when we were discussing the *Merson* judgment, the decision from the Bahamas, Your Honour Justice Blanchard asked whether we knew in any detail what the facts of the case were. My learned friend Mr Keith quite remarkably overnight has managed to find a newspaper article which is about the best I'm afraid we're able to do. We did look for the first instance judgment and the Court of Appeal judgment but neither of those was available, but there is a judgment from a local newspaper, The Nassau Guardian, which sets out in some detail what the facts of the case were and I'm

Blanchard J Well does Mr Ellis agree that we can receive this?

Ellis I don't know, I haven't been provided with a copy so I can't answer that question Sir.

Boldt Perhaps we can come back to that. A relatively straightforward account of the proceeding has wound its way through the Courts but then the latter part of the article is a detailed description of the facts as they had been found by the lower Courts in that case and it makes for very interesting reading. It shows that the circumstances that gave rise to the breach in that case were extraordinarily serious but I'm in Your Honour's hands as to whether I could summarise it for Your Honours, read it to Your Honours, or simply provide a copy.

Tipping J We could get the judgment.

Elias CJ Given time we can probably turn up the judgment I would have thought Mr Boldt and put that in. I think that would be a more satisfactory way of receiving it.

Boldt Well it may take some time to find Ma'am but I'm perfectly happy

Blanchard J Which jurisdiction is it in?

Boldt The case arose in the Bahamas Sir. Yes my friend reminds me that the first instance judgment

Tipping J You could go and get the judgment.

Blanchard J I'm not going to the Bahamas.

Boldt Well the other point that my friend reminds me is that as is regrettably so common I think in Caribbean jurisdictions it was a while ago, it was 1994 that the original judgment was issued and the Privy Council judgment of course came out last year so it did take a while to work it's way through. The only other point I would make on this, because my friend has raised the inconsistency between these decisions of the Privy Council and House of Lords approach in *Greenfield*, is to reiterate our submission that there isn't a necessary inconsistency between these two approaches, bearing in mind that the Caribbean jurisdictions are dealing with their own constitutions which provide expressly that a person can go to the Courts domestically and can apply for redress for constitutional violations. Redress is defined as including of course compensation. So the Courts there have a statutory mandate where there is a constitutional violation to allow claims for compensation if that is how plaintiffs elect to seek their compensation rather than by using conventional torts. And even then as the passages from the *Merson* decision to which I referred Your Honours yesterday demonstrate, first of all there is a, and I'm looking here at the *Merson* decision which is in volume 3 of the authorities, tab 38 'constitutional relief should not be brought unless the circumstances of the complaint include some feature which make it appropriate to take that course, so even in spite of the express inclusion in those constitutions of remedies provision, and the right to seek compensation the Courts have nonetheless imposed a threshold, and secondly the comment that the Privy Council has said that more will always be required than a mere declaration, certainly there was a comment in *Rundapon* that a declaration by itself is likely to be cold comfort to a plaintiff, but the discussion in *Merson* is not as emphatic as that at all, *Merson* being the later of these decisions and what the Privy Council noted, what the Board noted in *Merson* is, but there may be, there may certainly be cases where a declaration will be sufficient, and the Board went on to note that the purpose of the award is to vindicate. It has this broader public purpose than a simple measure of compensation as would be found in tort. So those aspects at least of these decisions are entirely consistent with the line that we are seeking to take. But there is a big difference between a constitutional provision of this kind and the domestic enforcement of an international human rights regime through a provision like the New Zealand Bill of Rights Act or indeed the Human Rights Act in England

and it's the Human Rights Act with its affirmation of European Convention principles and the importation of those into domestic law that has a far closer resonance with where we are in New Zealand, given of course that the long title of the Bill of Rights Act notes that it is to affirm New Zealand's commitment to the International Covenant and Your Honours will recall those comments from *Baigent* where members of the Court made it clear that what we were seeking to do in creating a remedy in New Zealand was to give access to the kinds of remedies that would otherwise have to be sought internationally, but it's my submission in light of those comments and in light of the comment of the learned President that this is a field of its own and Their Honours Justices Casey and Hardie Boys that it's clear that this is a regime that is entirely distinct in character from anything that exists in our law and that it does have an international purpose and that by far the closer analogy in terms of the application of this is with the way that international bodies have treated claims under say the Covenant or the European Convention and that of course is what the English have done and in my respectful submission that also is appropriate here. Now there were a couple of specific criticisms that were made by my learned friend before we adjourned last night. The first is the submission that the Crown was saying it is okay in New Zealand for Mr Gunbie to be treated in an inhumane fashion for six weeks, and it's okay for these other inmates to be mistreated for three months, well I hope it need not be said that of course we don't say that it's okay for somebody's rights under s.23(5) to be breached for six weeks or even six days, nor indeed do we say that the duration in Mr Gunbie's case means that he ought not to have been found to have suffered a breach. We accept that also. The only issue that this cross-appeal is concerned with is what is the consequence of that and in light of the international material and in light of the way that particularly the English jurisdiction is developed, would it be appropriate in those circumstances for there to be an additional remedy on top of the declaration, is there any necessity for that and in our respectful submission there is not. Secondly this has been described as an attack on the *Baigent* case. Well again with respect our submissions here are not an attack on *Baigent,* we are seeking an application of what the Court established in *Baigent*. Where we do suggest that there has been shall we say a deviation from the appropriate path, is in the way that various dicta in *Baigent* have been applied in cases since then and the thing that we object to and take strongest issue with is the complete overlap that has now developed in New Zealand between remedies in tort and remedies under the New Zealand Bill of Rights Act. What *Baigent* said was these are different things and it is that that in our respectful submission, it's appropriate to recognise and apply in this case. The comparative International case law as well has developed significantly beyond the state in which it was in 1994 and that of course was also something that we asked this Court to consider. Mr learned friend has said that money is required here because there hasn't been a public annunciation of the wrong

that has been done to these inmates. There hasn't been an appropriate acknowledgement by the Government that what it has done is wrong and that there hasn't been an investigation. Well first of all as I've said a number of times already, there's been a very clear public annunciation, a public judgment, a public trial and clear declarations that anyone can read.

Tipping J Has there been any form of apology?

Boldt There's certainly been an acknowledgement at the time of sentencing that the Crown without hesitation accepts that unlawful conduct on the part of prisoners

Elias CJ Sentencing

Boldt Sorry, at the time of sentencing, at the time of the remedies judgment Ma'am

Elias CJ Interesting.

Boldt You can see what I'm thinking, yes. That we acknowledge without hesitation that bad behaviour, unmanageable behaviour on the part of prisoners can never justify unlawful behaviour on the part of Corrections' staff and the Government sincerely regrets those areas where illegality has been established. That formed part of the submission that was made to Justice Young at the Remedies Hearing and that was reaffirmed by my learned friend Miss Gwyn in this Court in August and the reference for that is page 71 of the transcript of the August hearing. In as far as the lack of an investigation is concerned, well again I've made the point. Everything that was necessary in order to investigate what had happened here was before the Court, including masses of documentation, witnesses at every level from the Department of Corrections, including the General Manager of Public Prisons, who was in the witness box for a long time being grilled about the policy basis for the BMR and Corrections Officers at every level from the Unit Manager, the Principal Corrections Officer, the Senior Corrections Officers, ordinary Corrections Officers. My learned friend murmurs but not the Chief Executive and of course the answer to that is that the General Manager of Public Prisons was the person who had held all relevant delegations from the Chief Executive throughout the establishment of BMR and also held the relevant delegation regarding for example ongoing approvals for placements, so he was the person who had made the effective decision in all cases.

Elias CJ But he didn't make an acknowledgement, the acknowledgement just to pick up Justice Tipping's question, came through counsel?

Boldt Yes.

Elias CJ Yes.

Boldt That's correct Ma'am. There was certainly reference, my learned friend quoted Mr McCarthy as having commented in Geneva that New Zealand, before one of the International Human Rights Forum, so I'm not sure which one, that the New Zealand Government took very seriously any findings of illegality and we expressly reaffirmed those findings and that acknowledgement in the High Court as well. Now the final matter that I would like to address if I may is the suggestion that this in fact isn't an appropriate case for Your Honours to grapple with the issues that have been raised, and in particular the broader questions that the Crown has offered for consideration regarding the appropriate role of public law compensation in New Zealand. It is our respectful submission that this is an ideal case for the re-examination of those issues. Indeed it is difficult to conceive of a case that will raise all of the issues that remain outstanding in New Zealand in this area

Elias CJ That might be so if it had been put on that footing from the start, but do you confirm that the issues in the High Court were directed at declaration and damages weren't more ambitious than that?

Boldt Well that was what was sought Ma'am and it remains our submission of course that in New Zealand the declaration is something that can have wide-ranging structural effect. His Honour Justice Hammond talked about that in the *Manga* decision, he said that New Zealand were not in the business of ordering Governments to do things. Courts aren't in the business of doing that, what Courts do is make declarations in the full expectation that in a responsible democracy the executive will take proper note and for example if we had had a lengthy debate in the High Court about whether the Court could order the discontinuation of BMR or even more radically order the passage of legislation that would mean that this could never happen again, well yes we would have been in an extraordinary ambitious territory, but the point is that in a jurisdiction such as ours a declaration is at least on the state of the laws that exists, all you can expect. But the potent effect of a declaration is readily apparent with reference to what happened in this case when the declarations were made. All of those things did happen and they happened as a result of the Court pointing out where things had gone wrong.

Tipping J Well I readily accept that this case engages declarations, compensation and the interface between them etc, but I think all that's being suggested to you is that we haven't got any platform to go out into any other conceptual possibilities if you like as to how remedies in this field might or might not be structured and we have no basis for doing so and no need to do so because it's not an issue. You wouldn't dissent from that would you?

Boldt Not at all, not at all, and if that's all that's being suggested Sir I don't have any difficulty with

Tipping J Well that's all that's being, well it is from my point of view you've raised with clarity the declaration compensation arena, but we're not required to go into whether some other remedy might be devised in another situation.

Boldt I had perhaps understood that to be the kind of submission that was in fact being advanced but Your Honour that really is my point but also that in New Zealand there is generally no need to look wider in any event, because a declaration can do almost anything that might otherwise be achieved. This case puts its finger on a number of very important issues. It's not complicated by concurrent awards at common law for example and it is a purely public law case that has at its route a systemic problem but also acts of the state that were conducted entirely in good faith as non-pecuniary loss no serious harm done. All of those factors in my respectful submission mean that this case highlights the philosophical debate that occurred in other jurisdictions, all of which in our respectful submission have been resolved in a way that says this is a different and distinct kind of remedy and that it should be applied in a different and distinct kind of way from private remedies in tort.

Elias CJ You don't of course go so far as to argue that compensation will not be appropriate in some circumstances?

Boldt Correct Ma'am, absolutely, and of course part of the issue is in what circumstances is compensation appropriate?

Elias CJ But, I'm sorry, I'm just musing a little on your submission that in new Zealand we have a tradition of respect for declarations made by the Court, if the Court formed the view that compensation was necessary to provide vindication for the right. I'm not suggesting that it's something that we would need to embark upon in this case for the reasons that have already been discussed, but there is a cloud over that in the context of this case.

Boldt Well there is a challenge to it of the appropriateness of the awards in this case and it would be, and of course it's entirely a matter for Your Honours, but in our respectful submission though it would be unfortunate if this opportunity were missed for a more general examination of this area, because these issues impact very widely across a number of fields and certainly not confined to the Corrections field and there are a very large number of cases where these clarification of the issues that have been debated would be of considerable assistance.

Tipping J Do you dissent from the proposition that we should go as far as we properly need to decide the matters that have been put before us, but we're not here to give gratuitous general advice?

Boldt No Sir and it really very much depends on what that might consist of and it would be unfortunate for example, and again I say this with the greatest of respect and I don't pretend to tell Your Honours how far to go or how far not to go, but if the judgment was simply to say well on any analysis these awards would be justified so we don't propose to go further for example, then as I say, that would be an opportunity missed because there is a great deal of scope for a real clarification in an area where as I say the overlap between tort and public law compensation that has developed in our submission a regrettable one and it is something that would benefit from more general consideration.

Elias CJ My point was more directed at your submission that in New Zealand there is respect for declarations made by the Court and I wonder really whether that is something that we can take into account, that whether we simply have to do what we think is right and I'm not sure how we can use that submission.

Boldt The way that this was treated by Justice Hammond in *Manga* is one that I respectfully endorse. His Honour said one of the reasons that we don't have in New Zealand a tradition of say structural relief or Courts seeking to expand their powers in the way that has occurred in some overseas jurisdictions is because proper expressions on the part of the judiciary of what the Government should do to bring itself into line have generally not fallen on deaf ears. Now

Elias CJ Well what about an expression of opinion that in the particular case there should be effective compensation?

Boldt Well Ma'am I think that raises a different issue. You need not make a declaration to that effect because compensation is a separate and well-established remedy and if it's necessary the Court need only order it. What we have spoken of though is perhaps one reason for an additional award of compensation would be to emphasise that declarations, if earlier declarations had been made and were not taken seriously that there needed to perhaps be an increase in the incentive for compliance if the programme like the BMR had continued in the face of a judgment such as that delivered by Justice Young for example and other inmates had brought claims saying look even in spite of what the High Court had said here, this programme is continued. Well it would be that kind of a situation that we would readily acknowledge, would engage the need for a sterner response on the part of the Court to mark its disapproval of this ongoing illegality. But in terms of whether it is necessary to include compensation as part of

the overall package, well you've heard our submissions on that. Generally a declaration will sufficiently mark the public law imperatives in the particular case and that something more in the particular case would be required before an additional award of compensation would be necessary. Whether that be severe harm, particular vulnerability, a particularly egregious breach, bad faith, disregarding of earlier declarations or whatever. In overseas jurisdictions the Courts have been faced with a need to intervene and a good example of that is, Your Honour talked about *Brown* in America, and the fact that after a long time of where that decision wasn't in fact applied, the Courts needed to become more aggressive to ensure that it was. Well we don't have that kind of a tradition in New Zealand. It hasn't been necessary and hopefully that will continue to be the position. But unless I can assist Your Honours further with

Henry J I have one question Mr Boldt. Would you accept that as a matter of principle it may be appropriate to make an award of compensation to redress an affront to the public by the state's actions as well as an affront to the individuals' humanity?

Boldt Could you be a little more precise Sir about what you mean by an affront to the public?

Henry J Yes, if the conduct was very serious so as to make the ordinary public member think this is terrible, our state cannot act like that, would it be appropriate to make some award to recognise that factor.

Boldt Yes, I don't have any concern about that proposition.

Elias CJ It's rather as I understand it and correct me if I'm wrong that you say that is the only circumstance in which compensation should be ordered and that the effect on the individual should not be compensated in those circumstances.

Boldt No Ma'am I certainly wouldn't want to be seen narrowing it to that extent at all and as I think we've said, if there was, the reason for example that we haven't appealed in the case of Mr Tofts is because he was a person of particular vulnerability upon whom the impact would be disproportionately severe, but His Honour's Justice Henry's point would indeed be one of the principal bases on which we would acknowledge compensation should be granted.

Elias CJ Yes.

Boldt Now just one quick thing, my learned friend Mr Keith reminds me we have obtained copies of the *Somerville* decision, the Scottish decision that

my learned friend Mr Ellis referred to. It is our submission that when you read it you'll see it's of little or in fact of no relevance whatsoever to the issue that we are dealing with here, but because it has been referred to by my friend, if the Court is happy, I'll distribute copies of it.

Elias CJ Yes thank you.

Boldt And actually there is one other thing. We had some discussion yesterday about the equitable basis of awards. Para.66 of the *Anufrijeva* decision, which is in the bundle at tab 19, discusses what an equitable basis consists of in the European Courts jurisdiction. The Court noted "in determining whether damages should be awarded in the absence of any clear guidance from *Strasbourg*, principles clearly laid down by the Human Rights Act may give the greatest assistance. The critical message is that the remedy has to be just and appropriate and necessary to afford just satisfaction. The approach is an equitable one. The equitable basis has been cited by the European Court both as a reason for awarding damages and as a basis upon which to calculate them. There have been cases where the seriousness or the manner of the violation has meant that as a matter of fairness the European Court has awarded compensation consisting of moral damages". The Law Commission stated in its report that the European Court took account of a range of factors including the character and conduct of the parties to an extent which is hitherto unknown in England law.

Tipping J It's equitable but not in the chancery states?

Boldt Exactly Your Honour, exactly. But with that unless I can assist further, those are my submissions.

Elias CJ Thank you Mr Boldt. Well thank you counsel. We'll reserve our decision, not only on the application we heard this morning and the strike-out application, but also on the substantive appeal. Thank you for your help.

1.11pm Court Adjourned