



Oxford Pro Bono Publico
www.law.ox.ac.uk/opbp

The Liability of States in Damages for Rights-Violating Conduct by the Judiciary in the Performance of Judicial Function

Comparative Research for the Judge-President of Namibia

As part of the Southern African Judicial Assistance Project in collaboration with the Democratic Governance and Rights Unit, University of Cape Town

March 2014

CONTRIBUTORS

Faculty:

Professor Paul Craig
Professor of English Law
University of Oxford

Research co-ordinator(s):

Shreya Atrey
Chairperson, OPBP
DPhil in Law Candidate, University of Oxford

Max Harris
Events and Liaison Officer, OPBP
Master of Public Policy Candidate, University of Oxford

Researchers:

Chris Oxtoby
Researcher, Democratic Governance and Rights Unit, University of Cape Town

Justice Alfred Mavedzenge
LLM in Constitutional and Administrative Law Candidate, University of Cape Town

Zachary Vermeer
DPhil in Law Candidate, University of Oxford

Rebecca Elvin
DPhil in Law Candidate, University of Oxford

Hasan Dindjer
Bachelor of Civil Law Candidate, University of Oxford

Katie Allan
Bachelor of Civil Law Candidate, University of Oxford

Ruth Rosenstock
Magister Juris Candidate, University of Oxford

Daniel J Black
Bachelor of Civil Law Candidate, University of Oxford

In addition, the research co-ordinators would like to thank:

- **Professor Timothy Endicott**, Dean of Faculty of Law at the University of Oxford, for his support of this project;
- The Members of the OPBP Executive Committee, **Professor Sandra Fredman**, **Dr Liora Lazarus**, **Dr Miles Jackson**, **Dr Jacob Rowbottom**, and the members of the OPBP Student Committee, **Tamas Szigeti**, **Kate Mitchell**, **Eleanor Mitchell**, **Vrinda Bhandari**, **Lauren Dancer** and **Daniel Cashman** for their support and assistance with the project.

Indemnity

Oxford Pro Bono Publico (OPBP) is a programme run by the Law Faculty of the University of Oxford, an exempt charity (and a public authority for the purpose of the Freedom of Information Act). The programme does not itself provide legal advice, represent clients or litigate in courts or tribunals. The University accepts no responsibility or liability for the work which its members carry out in this context. The onus is on those in receipt of the programme's assistance or submissions to establish the accuracy and relevance of whatever they receive from the programme; and they will indemnify the University against all losses, costs, claims, demands and liabilities which may arise out of or in consequence of the work done by the University and its members.

Intellectual property

This report has been prepared exclusively for the use of the Judge-President of the Namibian High Court in accordance with the terms of the Oxford Pro Bono Publico Programme. It may not be published or used for any other purpose without the permission of OPBP, which retains all copyright and moral rights in this report.

TABLE OF CONTENTS

EXECUTIVE SUMMARY	1
INTRODUCTION	2
COMPARATIVE LAW	3
I AFRICA	3
a) The Seychelles.....	4
b) Botswana.....	6
c) South Africa	9
d) Zambia.....	14
II PRIVY COUNCIL	15
a) The Decision in <i>Maharaj</i>	15
b) Post- <i>Maharaj</i> Jurisprudence.....	16
III NEW ZEALAND	19
a) <i>Chapman</i> : Background.....	19
b) Decision of the Supreme Court	20
(i) The Majority View	20
(ii) The Minority Opinion.....	23
IV UNITED KINGDOM	25
a) Position under the Human Rights Act 1988.....	25
b) Position at Common Law	26
V EUROPEAN COURT OF HUMAN RIGHTS.....	27
VI THE EUROPEAN UNION	31
a) Liability of the European Union.....	32
b) Liability of Member States	32
VII UNITED STATES OF AMERICA.....	33
a) Rights Established by the United States Constitution.....	34
b) Rights Established by State Constitutions	36
VIII CANADA.....	37
ANALYSIS AND CONCLUSION	40

EXECUTIVE SUMMARY

This report considers the question of whether a State can be liable in damages for the violation of rights by the judiciary. The purpose of the research has been to provide comparative law analysis of the most relevant jurisdictions which have considered this issue. These jurisdictions include Africa (in particular Botswana, the Seychelles, South Africa, and Zambia), Privy Council, New Zealand, the United Kingdom, the European Court of Human Rights, the European Union, the United States of America and Canada. The key findings from these jurisdictions can be summarised as:

Jurisdiction	Finding
Africa	<p><i>Seychelles</i> – no direct case on point; the jurisprudence (predicated upon an express constitutional provision) leans towards precluding damages from being awarded. The privilege of judicial immunity for all acts done in good faith seems to block the liability of the State.</p> <p><i>Botswana</i> – no direct case on point; results from two distinct cases indicate two diverging trends, but on balance, it leans towards damages being precluded.</p> <p><i>South Africa</i> – a High Court case has suggested that legislation which makes provision for damages could be passed in accordance with the constitution.</p> <p><i>Zambia</i> – no direct case on point; only case relates to liability of judges for damages, rather than State liability.</p>
Privy Council	The leading case of <i>Maharaj</i> specifically allows for State liability in damages for breaches of rights by the judiciary; however its scope of application has been limited by subsequent cases.
New Zealand	The leading case of <i>Chapman</i> has ruled (in a 3–2 split decision) that damages against the State for judicial breach of rights should not be available, primarily for policy reasons.
United Kingdom	Clear statutory possibility for a claim in damages against the Crown for the breach of human rights by the judges under the Human Rights Act 1998; however, no general common law remedy exists unless the breach is of a very specific nature.
European Court of Human Rights	The leading case of <i>McFarlane</i> accepts and allows the possibility of a claim against the State for breaches of rights by judges, at least those caused by judicial delay.
European Union	Liability of Member States in damages for actions of its national judges is accepted in the European Union jurisprudence when the breach is manifest and of a sufficiently serious nature.
United States of America	No general public law action in damages against either the United States or the individual States for the violation by Federal or State officials of rights guaranteed by the United States Constitution.
Canada	Such liability has been accepted in principle, but the threshold is high (more than mere negligence) and the conditions for invocation of this liability have been rare.

INTRODUCTION

1. The Judge-President of Namibia invited OPBP to provide comparative law research on the issue of whether, and under what circumstances, the State is liable in damages for breaches of human rights by national judges. This project is the first in the Southern African Judicial Assistance Project which aims to provide judges in Southern Africa with international and comparative law research assistance in partnership with the Democratic Governance and Rights Unit (DGRU), University of Cape Town.
2. This report provides critical perspectives from various jurisdictions with developed jurisprudence on this issue. The focus is on national or federal level case law, and constitutional and statutory instruments. It examines African case law (in particular, decisions from Botswana, the Seychelles, South Africa, and Zambia), Privy Council jurisprudence, the leading New Zealand case on the point, European Union case law, United Kingdom and European Court of Human Rights jurisprudence, and cases from the United States of America and Canada.
3. There are two points worth noting about the approach pursued in this report. The Judge-President requested that: *firstly*, that we make no comment on the merits of arguments presented in the case before him that prompted this research; and *secondly*, that we adopt a neutral perspective on the correct position under Namibian law. Accordingly, we have aimed at presenting the case law without any further observations about the quality of the reasoning in specific cases. Consequently, we have also bypassed a prior discussion on the method of applying comparative law research in the Namibian context. Similarly, the research does not directly pursue the related inquiry of personal liability of judges and judicial immunity, but engages with it only to the extent that it bears upon the issue of State liability in damages.
4. Although the research cannot claim to be exhaustive—whether in its selection of relevant jurisdictions or the case law within them—the purpose has been to provide an overview of the most significant arguments pursued in these jurisdictions in deciding the issue of State liability in damages for breach of human rights by the judiciary. In this way, we have resisted subjective judgement about the correct approach and seek only to indicate the spectrum of possible responses in determining the issue.

COMPARATIVE LAW

5. This part aims to provide a broad overview of the relevant jurisdictions which have grappled with the issue of State liability in damages for violations of human rights by the judiciary. These include: Africa (in particular, Botswana, the Seychelles, South Africa, and Zambia), the Privy Council, New Zealand, the European Union, the United Kingdom, the European Court of Human Rights, the United States of America and Canada.

I AFRICA

6. In each of the African jurisdictions investigated below—the Seychelles, Botswana, South Africa and Zambia—the main question: whether a State can be liable in damages for rights violating conduct by the judiciary, has been answered in the negative. The jurisdiction which came closest to accepting that constitutional damages were available in principle for rights violating acts of the judiciary was South Africa, in a High Court case which observed that legislation to this effect would be in accordance with the constitution.
7. With respect to policy arguments which may prevent the payment of constitutional damages for rights-violating acts of the judiciary, the leading authority in Seychelles (as explained further below) does not offer strong reasons for not awarding damages and, on the contrary, the reasoning would seem to suggest that if judicial immunity is lost these may be available. By contrast, the policy in Botswana is heavily against the imposition of damages on account of maintaining the integrity of the judicial system and public confidence in the judiciary. However, these arguments would perhaps be mitigated in a constitutional framework which did not provide for absolute immunity of judges. In South Africa the payment of constitutional or public law damages was considered to be a possibility under a different statutory framework. Furthermore, in cases of vicarious liability a number of policy reasons have been advanced for attaching liability to the State for the actions of non-judicial officers. However, whether these arguments would also allow vicarious liability to be extended to judicial officers cannot be stated with certainty, not least because of the continuing emphasis on judicial independence. Finally, the only Zambian case on this issue relates to judicial immunity for payment of damages rather than State liability in damages for breaches of rights by the judiciary.

a) The Seychelles

8. The position in the Seychelles appears to be that damages cannot be awarded or be paid by the State for rights-violating acts of the judiciary on account of the interpretation of specific terms under the constitution. The most significant decision indicating this is from the Constitutional Court in *Subaris Co Ltd and Others v Perera and Another*.¹ The *Subaris* case concerns the scope of judicial immunity from suit under the constitution of the Seychelles. The case was determined specifically under the terms of the constitution, but also contains instructive discussion on the policy underlying the immunity. In the final analysis, the court found that the existence of immunity is tied to exercising the judicial functions in *good faith*. However, the court's quick dismissal of the possibility of claiming for damages calls for a more inquiry into this case.
9. In *Subaris*, the actions of the respondent (a judge) were challenged as being partial towards one side in particular judicial proceedings and hence in violation of the right to a fair trial, as guaranteed by article 19(7) of the constitution. The respondent countered that he was immune from any legal action on account of article 199(3) of the constitution, which provided that: 'subject to this constitution, Justice of Appeal, Judges and Master of the Supreme Court shall not be liable to any proceedings or suit for anything done or omitted to be in done by them in performance of their functions.' The court held that article 199(3) conferred judicial immunity which was not qualified by the fundamental rights provisions of the constitution and that the only legitimate limits on that immunity were those which the constitution itself provided for under article 134.² Thus, the right to a fair trial under article 19(7) could not qualify the broad judicial immunity guaranteed under article 199(3). The

¹ [2011] SCCC 4 (Constitutional Court of the Seychelles).

² Article 134 of the constitution of the Seychelles provides that: '(1) A Justice of Appeal or Judge may be removed from office only-(a)for inability to perform the functions of the office, whether arising from infirmity of body or mind or from any other cause, or for misbehaviour; and (b)in accordance with clauses (2) and (3); (2) Where the Constitutional Appointments Authority considers that the question of removing a Justice of Appeal or Judge from office under clause (1) ought to be investigated- (a) the Authority shall appoint a tribunal consisting of a President and at least two other members, all selected from among persons who hold or have held office as a Judge of a court having unlimited original jurisdiction or a court having jurisdiction in appeals from such a court or from among persons who are eminent jurists of proven integrity; and (b)the tribunal shall inquire into the matter, report on the facts thereof to the Authority and recommend to the President whether or not the Justice of Appeal or Judge ought to be removed from office; (3) Where, under clause (2), the tribunal recommends that a Justice of Appeal or Judge ought to be removed from office, the President shall remove the Justice of Appeal or judge from office; (4) Where under this article the question of removing a Justice of Appeal or Judge has been referred to a tribunal, the President may suspend the Justice of Appeal or Judge from performing the functions of a Justice of Appeal or Judge, but the suspension- (a)may, on the advice of the Constitutional Appointments Authority, be revoked at any time by the President; (b)shall cease to have effect if the tribunal recommends to the President that the Justice of Appeal or Judge ought not to be removed from office.'

important consideration for present purposes is what the qualifications on the immunity were found to be.

10. The scope of this broad immunity was delimited when the court indicated that the privilege was granted on an *implied condition* which could be breached in case of ‘misbehaviour’³ by a judge under article 134.⁴ Thus, judicial immunity was limited to ‘exercise in good faith’ and the protection of ‘honest mistakes’⁵ and not ‘the protection of malicious or corrupt or erring agents.’⁶ The court found that:

... the immunity is conferred on a judge on an implied condition that he should perform his judicial functions without self-interest, fear or fervour to anyone and in accordance with the law and the Constitution. As he adjudicates upon the liberty and property of others, he ought to perform his duties with the highest degree of integrity, impartiality, ability and, above all, with accountability not only to the public but also his conscience.⁷

11. Although the court did not delve into the precise consequences which would follow in case of loss of immunity, it appears to have ruled out the availability of damages being awarded on the basis that it could erode the integrity of the system and harm public confidence in it.⁸
12. However, three caveats to this seemingly broad conclusion should be noted. *Firstly*, with regard to ruling out an award of damages on the grounds of the integrity of the system and maintenance of public confidence, the court appears to be speaking about the judge being sued personally, and not the State on account of an individual judge’s actions. *Secondly*, the court appears to be referring to situations where the immunity had not been lost—drawing from Lord Coke, this court also seems to follow the view that immunity will not be lost easily and without strong justification.⁹ *Thirdly*, in any event, the relevant conclusion is predicated upon the nature of the Seychelles constitution which provides only for certain consequences in law in case of the loss of immunity under article 134 and did not specifically include a provision for the award of damages.

³ *Subaris* (n 1) 233-235 (‘... all improper or wicked or immoral and unlawful acts and conducts that could possibly be committed by a judge in the performance of his functions as judge or otherwise’).

⁴ *ibid* 232. The court explained immunity: ‘... not a licence for judges to do anything in the name of law and infringe the rights of others ... It simply serves as a shield, not as a sword in the hands of the judges to wield and injure the rights of his fellow citizens.’

⁵ *ibid* 233.

⁶ *ibid* 232-233.

⁷ *ibid* 233.

⁸ *ibid*.

⁹ *ibid*.

13. Thus, following *Subaris*, a claim in damages is unlikely to succeed when challenging the rights violating conduct of the judiciary. The policy arguments pursued by the court on the circumstances of the loss of judicial immunity do not themselves seem to bar a claim of constitutional or public law damages. However, the absence of a specific constitutional provision and arguments of public confidence and the integrity of the system are influential in ruling against the possibility of damages.
14. The pending *sub judice* appeal in the matter of *Serret v Attorney General*¹⁰ is also relevant as it considers the issue of ‘whether a person can make a claim for damages in respect of a judicial tort or the infraction of a constitutional right by the judicial arm of government other than by appeal to a higher court’. The plaintiff alleges wrongful imprisonment and seeks damages in an action against the Attorney General.¹¹ The government, it appears from the record in the Supreme Court, intends to defend the matter *inter alia* on the ground that judicial officers have immunity from suit and therefore no action can lie against a judge and consequently no action lies against the government, as this is debarred by the constitution.¹² On the other hand, the plaintiff also relies upon article 19(3) of the constitution which provides that a person shall be ‘compensated by the State according to law’ if subsequent to a conviction and a punishment, a serious miscarriage of justice is shown.
15. Egonda-Ntende CJ, in finding that the claim should be referred to and heard by the Supreme Court, stated that judicial immunity was not implicated in the proceedings.¹³ However, given the submissions made by the government in the Supreme Court, this case will be a useful case to follow - insofar as matters of judicial immunity and State liability for damages may be raised in it.

b) Botswana

16. The trend in Botswana seems to indicate mixed possibilities of claiming damages from the State for the rights-violating conduct of the judiciary; however, on balance the result seems to be the same as the Seychelles. Since no case has been directly decided upon this issue, consideration of two contrasting cases is revealing.

¹⁰ [2013] SCSC, Civil Suit No. 158 of 2012 (Supreme Court of the Seychelles).

¹¹ *ibid* 3.

¹² *ibid* 5.

¹³ *ibid* 11.

17. The case of *Oatile v Attorney General*¹⁴ decided by Dingake J, made available the award of constitutional damages in Botswana.¹⁵ This remedy had been sought on account of the failure of the Attorney-General to try the defendant within a reasonable time. While the case was not concerned with State liability for rights-violating acts of the judiciary, it did turn on rights violations within the broader legal system.
18. The availability of the remedy turned upon two principles incorporated in the constitution of Botswana.¹⁶ Section 18(1) provides for an application to the High Court for ‘redress’ in the event that a constitutional provision was being denied, or likely to be denied, to a person. This section had to be read with section 18(2) which provides that the High Court: ‘may make such orders, issue writs and give such discretion as it may consider appropriate for the purpose of enforcing or securing the enforcement of any provisions of section 3 to 16 (inclusive) of this Constitution.’ Thus, the question was whether the word ‘redress’ contemplated the award of constitutional damages. The court answered in the affirmative to find that damages should be awarded if due and appropriate.¹⁷
19. Several steps in the court’s reasoning are noteworthy. *Firstly*, it was noted that constitutional provisions in Botswana were to be given a generous and liberal reading.¹⁸ This led to the conclusion that when a court finds that the common law provides inadequate remedies it must develop the common law or fashion novel remedies because it is ‘critical for the purpose of protecting all individuals who may be aggrieved, especially disadvantaged people.’¹⁹ *Secondly*, the court found significant support for its conclusion from the seminal Privy Council case of *Mabaraj*,²⁰ on account of the fact that the relevant constitutional principles of Trinidad and Tobago and Botswana are similar in their requirement of ‘redress’.²¹ *Thirdly*, after a review of South African, United States, and other Privy Council authorities, Dingake J concluded that: ‘The net effect of a majority, if not all, of the decisions referred to above is that it now appears *almost universally accepted that damages are available as a*

¹⁴ [2010] 4 LRC (High Court of Botswana).

¹⁵ *ibid* 665 [8].

¹⁶ *ibid* 669-670 [42-50].

¹⁷ *ibid* 670 [55].

¹⁸ *ibid* 670 [49].

¹⁹ *ibid* 671 [57-60].

²⁰ *Mabaraj v A-G of Trinidad and Tobago (No 2)* [1978] All ER 670 [for a detailed discussion see II below].

²¹ *ibid* 671 [66-67], 676 [91-95], 681 [131].

remedy for infringement of constitutional rights and freedoms entrenched in the Constitution.²² Further, it is important to reiterate that the question of the potential application of the principles elucidated above to State liability for the acts of judges is not explored in *Oatile*.

20. Despite the ‘universally accepted’ position taken by Dingake J in *Oatile*, previous decisions from the High Court of Botswana have found that judges of superior courts in Botswana had an absolute immunity against claims for damages arising from their judicial conduct based upon established common law, even if the judge acted in bad faith.²³ In *Tebbutt and Others v Water Engineering (PTY) Ltd and Another*,²⁴ Moore JA placed reliance on Lord Bridge’s statement in *McC v Mullan*²⁵ where his Lordship stated:

the principle underlying this rule is clear. If one judge in a thousand acts dishonestly within his jurisdiction to the detriment of a party before him, it is less harmful to the health of society to leave that party without a remedy than that nine hundred and ninety nine honest judges should be harassed by vexatious litigation alleging malice in the exercise of their proper jurisdiction.²⁶

21. It can therefore be observed that policy reasons have been advanced in the strongest terms in support of judicial immunity and independence. This would indicate a relevant distinction in the provision of constitutional damages for rights violating acts of the judiciary *vis-à-vis* rights-violating conduct of other organs of the State. Thus, these policy arguments conflict with any claim for constitutional or public law damages being awarded for rights violating acts of the judiciary. The policy arguments advanced essentially say that it is better not to investigate and stand in judgement on judicial conduct even at the risk of a misconduct being left without proper remedy.
22. The conclusions to be drawn from the authorities in Botswana are therefore mixed: *firstly*, judges enjoy an absolute immunity from suit for acts done within the judicial role, even in bad faith. This seems to rule out damages being recovered from the State for rights violating acts of the judiciary; the absolute nature of the immunity conferred on judges suggests that their actions will not be questioned in the relevant sense (though this question does not seem to have been finally determined); *secondly*, although the judges have constitutional immunity

²² *ibid* 672-677 [70-101] (emphasis supplied). However, Dingake also acknowledged that these authorities could not be directly transplanted in Botswana’s context ‘given that such restrictions cannot be implied from the provisions of s 18(1) and (2) of the Constitution of Botswana’. *ibid* 675 [84].

²³ *Tebbutt and Others v Water Engineering (PTY) Ltd and Another* 2005 (1) BLR 125 (CA), 7.

²⁴ *ibid*.

²⁵ [1985] AC 528 (HL).

²⁶ *Tebbutt* (n 23) 7.

from suit, the policy arguments in *Oatile*, in a general sense, could be deployed to suggest that but for the constitutional preservation of immunity a case could perhaps be made to allow the State to be sued for rights-violating acts of the judiciary. However, the import of the principle of judicial immunity in the case where it was directly considered (*Tebbutt*) and the strength of its articulation of the underlying policy considerations indicates that, notwithstanding the fact that *Oatile* is a more recent authority, the policy arguments emerging from Botswana are weighted heavily against a finding that constitutional damages could be awarded against the State for rights-violating acts of the judiciary.

c) South Africa

23. South African jurisprudence on this issue has emerged along the lines of consideration of the vicarious liability of the State for the acts of its judiciary. The development began when the High Court of South Africa in *Claassen v The Minister of Justice and Constitutional Development*²⁷ found that the common law doctrine of immunity must conform to the principles established under the constitution. However, it held that the doctrine in South Africa was already in accordance with the constitution.²⁸ This, in combination with the fact that section 12 of the constitution did not of itself afford a right of compensation to the victim if a constitutional right was infringed,²⁹ led to the result that damages were not payable in this case. Based upon this view of immunity, the court found that the question of vicarious liability did not arise.³⁰ However, the court observed that legislation could still provide for public law damages in principle.³¹ This admission gives rise to the consideration of the doctrine of vicarious liability.
24. According to Olowofoyeku: '[T]his view [the possibility of vicarious liability] is uniformly rejected in the common law world. Judicial officers are not regarded in common law as servants of the state'.³² The South African authority cited for the traditional view by Olowofoyeku is the 1906 decision of Mason J in *Cooper v. The Government*³³ where the petitioner sought damages from the Government for illegal imprisonment. The question now is whether or not the advent of the constitutional era, which has seen the expansion of

²⁷ 2010 (2) SACR 451 (WCC).

²⁸ *ibid* 28, 31, 32.

²⁹ *ibid* 32.

³⁰ *ibid* 37.

³¹ *ibid* 35-36.

³² A A Olowofoyeku, *Suing Judges: A Study of Judicial Immunity* (OUP 1993) 158.

³³ (1906) TS 436.

vicarious liability against officials other than judicial officers, may have changed the traditional position *vis-à-vis* judges as well. The important aspect of *Cooper* for present purposes is the observation of Mason J that under an Ordinance of 1903³⁴ ('To Impose Liabilities upon the Crown in regard to the acts of its Servants') it would be hard to uphold such a claim because a magistrate in a judicial capacity could hardly be brought within the definition of a servant of the Crown for the purposes of that Ordinance.

25. With respect to this observation, any such law would now be subject to the overriding provisions of the constitution. This is important because if judicial immunity were ever found by a higher court either to be inapplicable (following the reasoning in *Claassen*, allowing questions of vicarious liability to be raised) or if legislation of the type envisaged (providing for damages in certain circumstances) were adopted, it is clear that any rules limiting the circumstances where vicarious liability could arise would have to conform to the constitution. Therefore, given the prevailing constitutional background today, the traditional view under common law, debarring vicarious liability of the State for judicial conduct, cannot necessarily subsist in South Africa.
26. Thus, the conclusions flowing from the South African jurisprudence, may be stated as follows: *firstly*, it was found in *Claassen* that article 12 of the constitution did not, of itself, allow a right of compensation for infringement of constitutional rights, however, it was suggested that this was constitutionally possible through legislation; *secondly*, the possibility of vicarious liability was not pursued in *Claassen* because of the finding that the system of judicial immunity was constitutional; *thirdly*, the payment of constitutional/public law damages was considered as a possibility under a different statutory framework. Furthermore, in cases of vicarious liability a number of policy reasons have been advanced in attaching liability to the State for the actions of non-judicial officers. In light of the constitutional framework, these may carry some force *vis-à-vis* the judiciary, but this question cannot be answered with certainty especially given the importance placed upon concerns of judicial independence.
27. It may also be useful to consider South African decisions that have dealt with the question of liability for costs of litigation, whether of the government or the judges personally. In *Regional*

³⁴ Transvaal Ordinance 51 of 1903.

Magistrate Du Preez v Walker,³⁵ the then-Appellate Division held that, where a ruling by a judicial officer is appealed to a higher court, there is a general rule that costs cannot be granted against a judicial officer. However, an order of costs may be made against the judicial officer in exceptional circumstances.

28. In *Walker*, the respondent had been charged with culpable homicide due to a car accident in which his two children had been killed. Evidence suggested that he had suffered a form of seizure immediately before the accident. The appellant magistrate, trying the case at first instance, found the respondent to be ‘mentally disordered or defective’ when the accident took place, and ordered him to be detained pending a determination of his mental status.³⁶ Respondent then sought to set aside the order, and asked for costs against the appellant *de bonis propriis*. It was argued that appellant had acted *mala fide* in performing his judicial duties, having wilfully ignored the procedure prescribed for dealing with the raising of an accused’s mental condition during a criminal trial. The High Court set aside the order, and while it did not find the appellant to have acted *mala fide*, it found that his conduct had been ‘perverse’ or ‘at least grossly illegal’, and ordered him to pay the costs of the review proceedings ‘in his official capacity’.³⁷ On appeal, Van Winsen AJA held that:

It is a well-recognized rule that the courts do not grant costs against a judicial officer in relation to the performance by him of such functions solely on the ground that he has acted incorrectly. To do otherwise could unduly hamper him in the proper exercise of his judicial functions.³⁸

29. However, the court acknowledged that where a judicial officer makes herself a party to the merits of proceedings instituted to correct her action, and such opposition fails, the court has discretion to grant costs against her. In addition, the court recognised one more circumstance in which damages could be awarded:

It is also a recognised exception to this general rule that if it is established that the judicial officer’s decision has been actuated by malice, the Court setting aside or correcting such a decision may grant costs against him even although he has not made himself party to the merits of the proceedings.³⁹

30. Van Winsen AJA held that, if *mala fides* were not established, costs could not be awarded against the judicial officer *de bonis propriis*.⁴⁰ On the facts of the case, it was held that though

³⁵ 1976 (4) SA 849 (A).

³⁶ *Regional Magistrate Du Preez v Walker* 1976 (4) SA 849 (A), 852.

³⁷ *ibid.*

³⁸ *ibid* 852-853.

³⁹ *ibid* 853.

⁴⁰ *ibid.*

the appellant's conduct had been wrong in law, it was not *mala fide* and thus no order was made as to costs.⁴¹ It is significant to note Van Winsen AJA's remarks on the question of the State's liability for costs:

There is no justification for saddling the State with liability for costs where the action of a judicial officer in his capacity as such has been corrected or set aside on review. Costs are not awarded against the State when on appeal a magistrate's judgment is set aside because he is in error as to the law or in his findings of fact. It would be surprising if, in the event of the same result being achieved on review, the State were to be held responsible for the successful applicant's costs. *Moreover it is inappropriate that the Court's displeasure with the conduct of the appellant should result in an order mulcting in costs the State which was neither a party to the suit nor responsible for the judicial officer's actions. There is no room in such a case for the application of the doctrine respondeat superior.*⁴²

31. It is apparent that the threshold set in the *Walker* case is a high one.⁴³ However, there have been instances of South African courts holding judicial officers liable for costs: for example, where a magistrate is *functus officio* and fulfills administrative functions, costs can be ordered against the magistrate personally merely for acting incorrectly, without reaching the threshold of *mala fides*.⁴⁴

32. In *Ntuli v Zulu and Others*,⁴⁵ the applicant sought an order of costs against a judicial officer (in a divorce court with equivalent status to a magistrates' court) in her official capacity, alternatively *de bonis propriis*. The costs in question related to a High Court decision setting aside orders made by the judicial officer in relation to a dispute over the custody of minor children. When making this decision, the High Court issued a *rule nisi* calling on the judicial officer to show why she should not pay the costs of the proceedings, since:

It is the gross irregularities in the proceedings before the second respondent that have given rise to the present application. Had the second respondent been mindful of her obligation to apply the maxim *audi alteram partem*, this entire application would not have been necessary. Indeed, the proceedings before the second respondent on 14 August 2003 defy belief.⁴⁶

33. The judicial officer had effectively granted a final order, despite the relief being sought before her being in the form of a *rule nisi*, and dismissed an application for reconsideration

⁴¹ ibid 855-856.

⁴² ibid 856 (emphasis supplied).

⁴³ See *S v Herbst* 1980 (3) SA 1026 (E), where the court found that a magistrate should have recused himself for conduct that included impermissible questioning of the accused, and allegedly smiling and winking at the prosecutor, but that this did not suffice to warrant an order for costs against the state.

⁴⁴ *Priem v Hilton Stuart Trust and Another* 1994 (4) SA 255 (E).

⁴⁵ 2005 (3) SA 49 (N).

⁴⁶ *Ntuli v Zulu and Others* 2005 (3) SA 49 (N), 50.

without hearing counsel's argument.⁴⁷ On the return date in the High Court, Jappie J distinguished the case from *Walker* on the basis that the judicial officer in *Ntuli* had 'refused to perform her judicial function'. Jappie J further held that:

Costs may be awarded against a judicial officer, acting in a judicial capacity, where his or her conduct can be described as *mala fide*, he or she has taken sides or conducted himself or herself maliciously or where there has been gross illegality in the case.⁴⁸

34. However, Jappie J held that the judicial officer's conduct could only be described as grossly irregular, but found that he could not find that the judicial officer had acted *mala fide* or with manifest bias, and therefore that an order of costs *de bonis propriis* would not be appropriate: '[I]t would be unjust for the applicant to be mulcted with costs in circumstances where she was simply exercising her rights as a litigant and having been prevented from doing so by the unreasonable conduct of the second respondent.'⁴⁹
35. Despite Jappie J's attempt to distinguish the decisions, the judgment in *Ntuli* does not sit easily with the *Walker* decision. It is not immediately apparent how the judicial officer's refusal to perform her judicial functions is distinguishable from the error of law in *Walker*. However, the decision does not seem to have been appealed, and it is possible that *Ntuli* nevertheless illustrates the direction in which South African law will go on this issue, though it relates to costs rather than public law damages. Furthermore, unlike *Walker*, *Ntuli* was decided after the introduction of the 1996 Constitution and since then the South African courts have extended the scope of vicarious liability for damages of the State for the actions of officials other than judicial officers.⁵⁰
36. It is also interesting to note that there are cases where the courts, in exasperation at the conduct of government officials, have preferred to find such officials liable for costs *de bonis propriis* 'under certain circumstances where the actions of such an official were unlawful, and caused litigation and the costs in respect thereof.'⁵¹ The courts seem to regard this as a necessary deterrent for such misconduct, and express wariness about making taxpayers foot

⁴⁷ *ibid* 50-51.

⁴⁸ *ibid* 53.

⁴⁹ *ibid*.

⁵⁰ *Carmichele v Minister of Safety and Security and Another* 2001 (4) SA 938 (CC) (liability for the failure of prosecutors and investigating officers to oppose bail of a dangerous individual who subsequently attacked a victim against whom threats had previously been made); *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) (liability for rape committed by police officers while on-duty); *F v Minister of Safety and Security and Others* 2012 (1) SA 536 (CC) (liability for rape committed by a police officer while off-duty).

⁵¹ *Coetzee v National Commissioner of Police and Others* 2011 (2) SA, 227 (GNP) [65].

the bill for egregious misconduct by government officials.⁵² These judicial principles may be relevant in considering the development of South African law on the present issue.

d) Zambia

37. There is very little further case law from the Southern African region on this issue, and an even smaller proportion of the case law deals directly with the question of liability in damages for unlawful judicial conduct. The single case to deal with the issue of liability in damages for unlawful judicial conduct from Zambia is *Godfrey Miyanda v Matthew Chaila (Judge of the High Court)*.⁵³ The petitioner sued the respondent, a judge of the High Court of Zambia, for causing unnecessary delays in hearing and deciding his application, arguing that the judge had ‘refused to adjudicate or to determine the action and to deliver judgment in a reasonable time or at all.’⁵⁴ The petitioner sought an order declaring that the judge’s refusal to adjudicate or determine the action was wrongful and unconstitutional; that the judge’s failure to perform his functions was a denial of justice; and that the delay in determining the action was unreasonable and in breach of the judge’s statutory duty. Thus the petitioner’s prayer was for an order directing the judge to determine the action, ‘and deliver judgment and damages’.⁵⁵
38. The court noted that, according to the record, judgment had been delivered just over a year after the hearing of the case and the filing of written submissions. However, the case raised a preliminary issue as to ‘whether a judge of the High Court can be sued in respect of anything done or omitted while discharging or purporting to be discharging any responsibilities which he has in connection with execution of judicial processes.’⁵⁶ The court held that judges can never be liable for damages in respect of wrongful conduct when performing their duties as judges. After noting the ‘very serious doubt whether a High Court can make orders of mandamus and damages against itself’,⁵⁷ the court endorsed Lord Denning’s remark that:

if the judge has accepted bribes or [has committed] the least degree of corruption or has perverted the course of justice, he can be punished in the criminal courts. That apart, however, a judge is not liable to an action for damages and the reason is not because the judge has any privilege to make mistakes or to do wrong but that he should be able to do his duty with complete independence and free from fear.⁵⁸

52 ibid.

53 (1985) ZR 193 (HC).

54 *Godfrey Miyanda v Matthew Chaila (Judge of the High Court)* (1985) ZR 193 (HC), 194.

55 ibid 194-195.

56 ibid 195.

57 ibid 197.

58 ibid 199.

39. Indicating that there are other ways of ‘punishing the judge’ (namely criminal liability, and impeachment could also be a possibility in the most egregious cases), and that these did not include suing judges for damages, the court held that: ‘It will ... be setting a very dangerous precedent and a serious threat to the independence of the judiciary if suing [a] judge is established as [a] remedy to a delayed judgment.’⁵⁹
40. This case establishes the primary ground for reinforcing judicial independence through denying a claim in damages against judges. Drawing on Lord Denning’s remark, there is the closely related consideration of the negative impact on judges of deciding cases with the fear of personal liability. However, it should be noted that this was a case primarily on judicial immunity, rather than State liability.

II PRIVY COUNCIL

41. The Privy Council’s jurisprudence on this issue began with *Maharaj*,⁶⁰ which has since been considered specifically (relating to judicial breaches) on three occasions and also more generally (relating to breaches of other State actors). The current state of the law in the Privy Council on the issue of damages for judicial breaches is best explained through a consideration of *Maharaj* and each of the subsequent cases in turn.

a) The Decision in *Maharaj*

42. *Maharaj* was an appeal to the Privy Council from the Court of Appeal of Trinidad and Tobago. The appellant, a barrister who had been committed to prison for contempt of court by Maharaj J, claimed that the failure of the judge to inform him of the nature of the contempt contravened a constitutional right and therefore he was entitled to redress for deprivation of his liberty. The Privy Council had previously quashed the original committal order and so it fell to the Privy Council to determine whether there had indeed been a breach of a constitutional right and also ‘whether the appellant was entitled by way of redress to monetary compensation for the period that he had spent in prison’.⁶¹
43. The Privy Council allowed the appeal, and held that: *firstly*, where a constitutional right has

⁵⁹ ibid 200.

⁶⁰ *Maharaj* (n 20).

⁶¹ ibid [3].

been contravened, an order for payment of compensation is ‘clearly a form of redress to which a person is entitled to claim’; and *secondly*, such a claim would only arise: (i) in the ‘rare event’ of a ‘failure to observe one of the fundamental rules of natural justice’; and (ii) where the judicial breach ‘has resulted in, or is likely to result, in a person deprived of life, liberty, security of the person or enjoyment of property...[which] *cannot be put right on appeal to an appellant court*’.⁶²

44. Before considering how this decision has been applied in subsequent Privy Council decisions it is worth noting that: *firstly*, consideration of the meaning of ‘redress’ was in the context of section 6(1) of the constitution conferring a right to ‘apply to the High Court for redress’; and *secondly*, the only right of appeal available to the appellant was to the Privy Council.

b) Post-*Maharaj* Jurisprudence

45. Privy Council decisions since *Maharaj* have not overturned or cast doubt on the decision, but have increasingly limited it to specific circumstances. Arguably, the jurisprudence since *Maharaj* has diluted any ‘principle’ relating to judicial breach and damages which may have been gleaned from it. At least three decisions — *Hinds v Attorney General of Barbados*,⁶³ *Forbes v Attorney General of Trinidad and Tobago*⁶⁴ and *Independent Publishing Co Ltd v Attorney-General of Trinidad and Tobago* —⁶⁵ have specifically considered the issue of damages for breach of rights by the judiciary.
46. *Hinds* was an appeal from Barbados, where the Privy Council was asked to consider similar questions to those in *Maharaj*—whether there had been a breach of a constitutional right (due to the Judge’s denial of legal representation) and whether the appellant was entitled to redress (under section 24 of the constitution, worded quite similarly to the Trinidad and Tobago constitution considered in *Maharaj*). The Privy Council dismissed the appeal on the grounds that ‘the appellant’s complaint was one to be pursued by way of appeal against conviction’ and that proceeding based on a right to seek ‘redress’ were ‘fresh proceedings’ which could not be allowed.⁶⁶ In making this finding, the Privy Council emphasised a distinguishing factor from *Maharaj*, that there was no right to appeal (except to the Privy

⁶² *ibid* [9] (emphasis supplied).

⁶³ [2002] UKPC 56.

⁶⁴ [2002] UKPC 21.

⁶⁵ [2004] UKPC 26.

⁶⁶ *Hinds* (n 63) [24].

Council).⁶⁷

47. Despite distinguishing *Maharaj*, the *Hinds* decision could be seen as largely adhering to the *Maharaj* ‘principle’ (as far as possible, considering the statutory context outlined above) relating to damages for judicial breach. This is evidenced by: *firstly*, the Privy Council’s use of the phrase ‘governing principle’ when referring to Lord Diplock’s explanation of the distinction between errors of law and fact and fundamental breaches of natural justice;⁶⁸ and *secondly*, the statement that: ‘it would be undesirable to stifle or inhibit the grant of constitutional relief in cases where a claim to such relief is established and such relief is unavailable or not readily available through the ordinary avenue of appeal’.⁶⁹
48. A similar approach was taken in *Forbes* in relation to the question of awarding damages. The Privy Council in allowing the appeal, found that there had been no breach of constitutional rights; however, it still referred to a general rule ‘that it is only in rare cases where there has been a fundamental subversion of the rule of law that constitutional redress is likely to be appropriate’.⁷⁰ Further, the Privy Council noted that there was little need to ‘add their own observations’ to the existing line of authority.⁷¹ The Privy Council in *Forbes* also referred to the statement in *Hinds* that: ‘it would be undesirable to stifle or inhibit the grant of constitutional relief in cases where a claim to such relief is established and such relief is unavailable or not readily available through the ordinary avenue of appeal’.⁷²
49. However, in *Independent Publishing*, the Privy Council arguably diverged from the approach in *Hinds* and *Forbes* (which note *Maharaj*’s practical limitations, yet apply it as precedent). The Privy Council noted:

Lord Diplock’s judgment [in *Maharaj*] has been widely understood to allow for constitutional redress, including the payment of compensation, to anyone whose conviction (a) resulted from a procedural error amounting to a failure to observe one of the fundamental rules of natural justice, and (b) resulted in his losing his liberty before an appeal could be heard. *That, however, is not their Lordships’ view of the effect of the decision.* Of critical importance to its true understanding is that Mr *Maharaj* had no right of appeal to the Court of Appeal against his committal and equally, therefore, no right to apply for bail pending such an appeal.⁷³

⁶⁷ ibid [23]-[24].

⁶⁸ ibid [23].

⁶⁹ ibid [24].

⁷⁰ *Forbes* (n 64) [18].

⁷¹ ibid.

⁷² ibid [17].

⁷³ *Independent Publishing* (n 65) [87] (emphasis supplied).

50. Whilst *Hinds* also distinguished *Maharaj* on the basis that the appellant in that case had a further right of appeal, the language was more deferential to *Maharaj* than the dicta in *Independent Publishing* above. In rejecting the ‘widely understood’ meaning of *Maharaj* and noting that its ‘true understanding’ depended on the unavailability of appeal, the Privy Council was arguably diluting any principle which may have existed from the decision *Maharaj*, with the result that it now rests on its own facts. This argument is strengthened by the Privy Council’s further dicta that ‘now that rights of appeal exist, ... their Lordships see little reason to maintain the original distinctions made in *Maharaj (No 2)* ... between fundamental breaches of natural justice, mere procedural irregularities and errors of law...’⁷⁴ This indicates that the factual peculiarities of *Maharaj* not only limit its application, but undermine the principles it supported.
51. However, it cannot be said with certainty whether this is the actual effect of *Independent Publishing*. The effect of *Independent Publishing* on *Maharaj* has not been specifically considered by the Privy Council with the view to determining *Maharaj*’s remaining weight as an authority. Further, *Maharaj* continues to be cited by the Privy Council without reference to any supposed doubt shed on it by the decision in *Independent Publishing*. For example, it is still cited as authority relating to the issue of constitutional breach.⁷⁵ In *Naidike and Others v Attorney General of Trinidad and Tobago*,⁷⁶ the Privy Council notes that *Independent Publishing* summarised the ‘well established principle’ of considering the legal system as a whole and considering whether there is an avenue of redress, but makes no attempt to reconcile *Independent Publishing*’s watering down of *Maharaj*.
52. Finally, it is useful to note that, on the subject of the definition of ‘the State’, the Privy Council in *Maharaj* had found that the judicial action which committed the appellant to prison, was an act of ‘the judicial power of the State’, and clarified that this was not a matter of vicarious liability.⁷⁷ This reasoning has been followed in all the cases since *Maharaj* without further consideration and thus, no case has reopened the issue of whether a judicial act is an act by the State.

⁷⁴ *ibid* [93].

⁷⁵ See for example *Sharma and Others v Attorney General of Trinidad and Tobago* [2009] UPKC 36, [17]; *The State v Boyce* [2006] UKPC 1 (cited with approval in *Ian Seepersad and Roodal Panchoo v The Attorney General of Trinidad and Tobago* [2012] UKPC 4, and distinguished in *Suratt and Others v The Attorney General of Trinidad and Tobago* [2008] UKPC 38 on the issue of damages for constitutional breaches by State organs).

⁷⁶ [2004] UKPC 49, [53].

⁷⁷ *Maharaj* (n 20) [9].

III NEW ZEALAND

53. In New Zealand, the Supreme Court has had the opportunity to directly adjudicate upon the issue of State liability⁷⁸ in damages for rights-violating conduct of the judiciary in the leading case of *Attorney-General v Chapman*.⁷⁹ By a bare majority, the apex court held that actions brought against the government under the New Zealand Bill of Rights Act 1990 (NZBORA) will not lie for judicial breaches of rights. Since this case was decided recently by New Zealand's highest court, it provides a good overview of New Zealand jurisprudence on this issue.

a) *Chapman*: Background

54. The claimant, Mr Chapman, was convicted of four counts of sexual assault and indecencies and sentenced to imprisonment. In 2001, the Court of Appeal declined Mr Chapman's application for legal aid and dismissed his appeal against conviction on an ex parte basis. The Privy Council in *R v Taito*⁸⁰ later found the ex parte process in operation for criminal appeals at this time to be in breach of NZBORA. This process was found, in effect, to deprive appellants of their appeal rights and deny them fundamental rights of fairness and natural justice.

55. Appeal re-hearings were scheduled for affected appellants, including Mr Chapman. On rehearing, Mr Chapman's appeal succeeded.⁸¹ His conviction was quashed and a retrial was ordered. The retrial did not proceed⁸² and Mr Chapman was discharged under section 347 of the Crimes Act 1961.⁸³ Mr Chapman then filed proceedings in the High Court seeking public law compensation from the Attorney-General on the basis of a breach by judicial officers of his rights under sections 25 and 27 of NZBORA.⁸⁴

⁷⁸ The terms government, state, nation and crown are used interchangeably for these purposes, however Chief Justice Elias engages in a discussion around the nuanced meaning of these words in the New Zealand context: *Attorney-General v Mervyn Chapman* [2011] NZSC 110, [14].

⁷⁹ *ibid.*

⁸⁰ *R v Taito* [2003] UKPC 15, [2003] 3 NZLR 557.

⁸¹ A video of the complainant's evidence had been replayed to the jury during the original trial and no balancing material had been provided. The case of *R v S* CA215/00, 28 August 2000, decided shortly before Mr Chapman's original appeal was dismissed, established grounds for a retrial in similar circumstances.

⁸² In the interim, the Police lost the complainant's statement and the complainant elected not to give evidence again. In light of this lack of evidence, Mr Chapman was discharged.

⁸³ This is deemed to be an acquittal according to s 347(4).

⁸⁴ Section 25(h) of the New Zealand Bill of Rights Act 1990 provides: 'Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:

56. Preliminary questions of law were removed to the Court of Appeal for determination before trial.⁸⁵ The Court of Appeal considered New Zealand case law, notably *Simpson v Attorney-General* (*Baigent's case*),⁸⁶ along with policy considerations relating to judicial immunity, and rejected the Attorney-General's argument that the liability of the Crown was limited to rights breaches by the executive branch of government. The Court of Appeal held that, in principle, public law compensation was available for judicial breaches of NZBORA where correction within the criminal process was unable to remedy the breach. Moreover, the Court of Appeal determined that the Attorney-General could not cloak himself in the immunity available to individual judges. He was found to be the appropriate defendant in the proceedings with respect to public law liability. The Attorney-General appealed this decision with leave to the Supreme Court.

b) Decision of the Supreme Court

(i) The Majority View

57. McGrath and William Young JJ, joined by Gault J in a separate concurring opinion, formed a bare majority of the Supreme Court. The Attorney-General's appeal was allowed and the majority decided that public law compensation was not available for judicial breaches of rights.
58. The majority discussed the relevant case law, including the Privy Council decision of *Maharaj*⁸⁷ where compensation was awarded for constitutional breaches arising out of judicial action. However, they considered the distinction between breaches of fundamental rules of natural justice and correctable errors to be a problematic.⁸⁸ Moreover, the majority

... (h) the right, if convicted of the offence, to appeal according to law to a higher court against the conviction or against the sentence or against both.'

Section 27(1) of the New Zealand Bill of Rights Act 1990 provides: 'Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.'

⁸⁵ *Chapman* (n 78).

⁸⁶ *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA), also known as *Baigent's case*, held the Crown was liable for public law damages arising out of Bill of Rights breaches by the government, specifically, actions of the police.

⁸⁷ *Maharaj* (n 20).

⁸⁸ *ibid* [153].

considered that later Privy Council decisions had modified the effect of this case.⁸⁹ They also considered *Baigent's* case and found that the availability of public law damages for breaches of NZBORA established in that decision, and in subsequent authorities such as *Auckland Unemployed Workers' Rights Centre Inc v Attorney-General*,⁹⁰ applied only to breaches on the part of the Executive. The majority supported a narrow view of *Baigent's* case, which involved wrongdoing on the part of the police, and declined to extend liability to include judicial breaches of rights. The majority drew on policy considerations, including questions relating to judicial independence, to support its position.⁹¹ In particular, they expressed concerns regarding the impact a public law remedy for judicial breaches of rights might have on policy considerations such as achieving finality in litigation; promoting judicial independence; and the availability of other remedies, such as the appellate process, for breaches of rights. This position was captured as:

Both the specific and general reasons given are relevant to whether a remedy of public law damages is available under the Bill of Rights Act for breaches of rights by judges acting in that capacity. In that context the desirability of achieving finality, promoting judicial independence and the availability of existing remedies for breach, including through the appellate process, are of principal importance and we confine our discussion to them.⁹²

59. With respect to the need for finality, the majority identified the risk of re-litigation and collateral challenges that might accompany liability as having the potential to undermine public confidence in the effective functioning of the rule of law. This provided a basis for 'institutional immunity' for judicial breaches of rights:

The law discourages relitigation by aggrieved parties of issues determined by the courts, other than by appeal. The policy of the law in that respect is in part concerned to protect the public who were involved, including other parties and witnesses, from the stress and expense of unwelcome continuing involvement in court process concerning the same issues. If civil actions against the government could be maintained on the ground that the judge breached the plaintiff's rights, collateral challenges would plainly be brought with the same consequences identified by Fisher J. Those affected, who were directly involved in the earlier litigation, would justifiably feel they were not being properly protected from harassment by the justice system. Along with the wider public observing such collateral proceedings, they might well lose confidence in the effective functioning of the rule of law in our society. This is perhaps the strongest reason for the law to provide personal immunity for judges and, if it is to be effective in achieving finality, an institutional immunity is also necessary, protecting the government or anyone else from the

⁸⁹ See also a detailed discussion in section II above (noting that this section II above reflects this Report's own analysis of the Privy Council jurisprudence, separate from any consideration by the majority in *Chapman*).

⁹⁰ *Auckland Unemployed Workers' Rights Centre Inc v Attorney-General* [1994] 3 NZLR 720 (CA).

⁹¹ *Chapman* (n 78) [127], [145].

⁹² *ibid* [180].

bringing of collateral action for breach of rights in the course of the judicial process involved, so that public confidence in the fair and effective administration of justice can be retained.⁹³

60. The majority also identified the need to protect judicial independence and to ensure that judges are not influenced in any way – or perceived to be influenced – by the spectre of government liability arising from claims of judicial wrongdoing. The undesirability of requiring judges to act as witnesses was discussed.⁹⁴ Thus, the majority found that:

If the executive government became liable in damages for judicial breaches of rights, it is likely that members of the public engaged in or observing litigation would become concerned that the prospect of future litigation to this end might distract the judge from acting in an entirely independent way. They would see the right of action as exposing a judge to pressure, by indirect means, to act in a way that minimises the risk of claims based on government liability. There is a risk that public confidence in the effective administration of the law will be eroded.

If such claims are permitted, judges will be pressed by the defendant government to be witnesses in proceedings brought as a result of their actions. The Law Commission rightly recognised that it was undesirable for judges to have to give evidence concerning their conduct. We agree with the Solicitor-General that such a prospect would also in itself give rise to a perception that judges may come under pressure in their decision-making if they believe they may be questioned concerning it at a later stage. It could well also impact on the willingness of qualified lawyers to accept appointment. In this area public perceptions of the independence of the judiciary are important...⁹⁵

61. The majority also considered the Law Commission report, *Crown Liability and Judicial Immunity: A Response to Baigent's case and Harvey v Derrick*.⁹⁶ In this report, the Law Commission recommended that legislation should be enacted to ensure the judiciary could not be found liable for public law damages arising from rights breaches. No action was taken on this point, although the government had implemented an additional recommendation of the Law Commission and legislated to grant District Court judges the same immunities as High Court judges. In response to the legislature's silence in enacting this recommended exception from liability, the majority considered that 'the failure to implement this recommendation indicates no more than that Parliament has left it to the courts to decide whether the remedy is available for those breaches.'⁹⁷ The majority considered that the appellate structure of the

⁹³ *ibid* [182].

⁹⁴ The Chief Justice responds to this point in her dissent, noting that judges cannot be compelled as witnesses under s 74(d) of the Evidence Act. *ibid* [63]. This matter is discussed further in Stephanie Woods, 'Judicial Immunity: State immunity' [2012] NZLJ 6.

⁹⁵ *Chapman* (n 78) [185], [186].

⁹⁶ Law Commission, *Crown Liability and Judicial Immunity: A Response to Baigent's case and Harvey v Derrick* (NZLC R37, 1997).

⁹⁷ *Chapman* (n 78) [174].

courts and the availability of rehearing and review provided adequate safeguards against infringement of rights by the judiciary.⁹⁸

(ii) *The Minority Opinion*

62. By contrast, the minority view espoused by Elias CJ in a dissenting opinion with which Anderson J agreed, argued that the liability established for breaches of rights in *Baigent's* case should lie against all the three branches of government, including the judiciary. The minority stressed the importance of providing an effective remedy for breaches of rights under both NZBORA⁹⁹ and the obligations recognised in article 2(3) of the International Covenant on Civil and Political Rights, to which New Zealand is a party.¹⁰⁰
63. The minority did not consider that *Baigent's* case could be read as justifying an exception for judicial breaches.¹⁰¹ The Chief Justice stated that she considered that ‘the reasoning adopted by the majority in *Baigent* applies equally to acts of the judiciary.’¹⁰² She discussed overseas authority¹⁰³ together with earlier New Zealand cases¹⁰⁴ where the availability of such a remedy ‘seems to have been assumed’,¹⁰⁵ in order to support an argument for public law damages for judicial breaches of rights. In further support of this view, the Chief Justice also referred to the decision of *Maharaj*, which she did not consider to be limited in the extensive manner suggested by the majority. The Chief Justice also considered arguments relating to the need to ensure finality in litigation to be ‘overblown’, stating:

The emphasis placed on the need to avoid collateral challenge of judicial determinations, as already indicated, seems to me to be overblown. Objections that proceedings for vindication of rights are “collateral” or contrary to a public interest in the finality of court decisions suggest more rigidity in the legal system than is accurate. Collateral challenge by way of judicial review lies against decisions of inferior courts. Removal of the common law immunity of barristers in New Zealand now permits the questioning of outcomes in determined proceedings unless the suit

⁹⁸ *ibid* [193]-[195].

⁹⁹ *ibid* [27]-[29].

¹⁰⁰ *ibid* [26].

¹⁰¹ *ibid* [33]-[37].

¹⁰² *ibid* [34].

¹⁰³ The Chief Justice cites the Canadian decision of *R v Germain* (1984) 53 AR 264 (ABQB), which applied *Maharaj* and determined that compensation did lie as a remedy for judicial breach of rights guaranteed by the Charter. However, the accused in that case did not seek compensation. *ibid* [37].

¹⁰⁴ *Auckland Unemployed Workers' Rights Centre Inc v Attorney-General* [1994] 3 NZLR 720 (CA); *Rawlinson v Rice* [1997] 2 NZLR 651 (CA); *Upton v Green (No 2)* (1996) 3 HRNZ 179 (HC); *Attorney-General v Upton* (1998) 5 HRNZ 54 (CA); *Martin v Tauranga District Court* [1995] 2 NZLR 419 (CA); *Harvey v Derrick* [1995] 1 NZLR 314 (CA); *Lai v Chamberlains* [2006] NZSC 70, [2007] 2 NZLR 7; and *R v Williams* [2009] NZSC 41, [2009] 2 NZLR 750. *ibid* [35]-[36].

¹⁰⁵ *ibid* [36].

is abusive. Disciplinary proceedings against judges and administration of the ex gratia compensation payments systemised in New Zealand by procedures established by Cabinet also entail questioning of judicial determinations. But since these are avenues of redress explicitly exempted from the United Nations principles on judicial immunity, it suggests that the policy behind judicial immunity is seen, internationally at least, to be satisfied by the narrower objective of protecting judges from personal liability.¹⁰⁶

64. In terms of policy questions relating to judicial independence, Anderson J expressed the minority view in unflinching terms:

I turn now to the issue as to whether recognising Crown liability for judicial acts of the nature and effect complained of by Mr Chapman might, or might seem to, derogate from judicial independence. If there were any such risk I would not countenance Crown liability. The immunity of judges from being sued is one of the most important ways in which judicial independence is protected. A judicial system that is institutionally independent and a judiciary whose members are individually independent are fundamental to the rule of law and the welfare of a nation and its people.

It is the solemn and ineluctable duty of the judicial and the executive branches of government, often exemplified, to protect judicial independence. The proposition that judicial independence might be or might seem to be compromised, if in certain extraordinary circumstances the Crown might be held liable for judicial acts, rests on assumptions of potential or seeming timidity on the part of judges and constitutional delinquency on the part of the executive. The timidity is apprehended, not because judges could be personally liable, which they cannot be, but because it might be thought that a judge could possibly be influenced in making a decision by a wish not to upset the government or out of anxiety for his or her reputation. Having for more than 40 years seen judges in action and having been a judge for more than 24 years, I have no such apprehension. The best way of maintaining confidence in the judiciary is for it to emphasise the rights affirmed by the Bill of Rights Act. As to possible delinquency on the part of the executive, I take the view that the more the rule of law and the rights affirmed by the Bill of Rights Act are proclaimed, protected and vindicated, the lesser the risk of unconstitutional conduct by any branch of government.¹⁰⁷

65. With regard to the recommendation contained in the report of the Law Commission,¹⁰⁸ discussed above, the minority inferred that the absence of legislative action indicated the possibility of implicit government approval of a remedy for judicial breaches of rights, stating that ‘Parliament, although invited to do so by the Law Commission, has not changed what was seen to be the existing legal exposure of the State.’¹⁰⁹

¹⁰⁶ ibid [70].

¹⁰⁷ ibid [223]-[224].

¹⁰⁸ Law Commission, *Crown Liability and Judicial Immunity* (n 96).

¹⁰⁹ *Chapman* (n 78) [77].

66. Thus, ultimately policy considerations played a central role in the reasoning of both the majority and minority opinions and in the final determination of the court. The appeal of the Attorney-General was allowed and the Supreme Court found that, in effect, judicial immunity extended to the judicial institution in relation to Bill of Rights claims and related liability for public law damages. The matter was remitted to the High Court for determination at trial.

IV UNITED KINGDOM

67. In the UK, there is a statutory admission for a claim in damages against the Crown for the breach of human rights by judges under the Human Rights Act 1998 (HRA). However, aside from this, there is no general common law remedy which exists in this regard unless the breach is of a very particular and recognised nature. The position in the UK can thus be delineated into two separate threads—*firstly*, under the HRA; and *secondly*, under the common law.

a) Position under the Human Rights Act 1988

68. The HRA incorporates the rights contained in the European Convention on Human Rights (Convention) into UK law. Under section 6 of the HRA, it is unlawful for a public authority to breach a claimant's rights under the Convention. Courts and tribunals are considered public authorities for the purposes of the HRA.¹¹⁰ A court is capable of breaching a party's Convention rights in the course of judicial proceedings and it follows that in such a case it would be acting unlawfully under UK law.
69. Breaches of Convention rights as a general matter give rise to a cause of action under which the public body is potentially liable in damages.¹¹¹ Section 9(3) relates to liability in damages

¹¹⁰ HRA, s 6(3)(a). The right to a fair trial is contained in article 6 of the Convention.

¹¹¹ HRA, ss 7-8. The nature of the cause of action is controversial. Craig notes that: 'Commentators differed as to the nature of the cause of action in s.8, with some analogising it to breach of statutory duty, while others preferred to see it as a free standing tort. It is clear from the case law that there are marked differences between s.8 and traditional torts and hence it may be better to regard s.8 as sui generis.' Paul Craig, *Administrative Law*, (7th edn, Sweet & Maxwell 2012). In the case of *Regina (Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14; [2005] 1 WLR 673, Lord Bingham said (at [19]) that 'the 1998 Act is not a tort statute.' In *R (on the application of Sturnham) v Parole Board* [2013] UKSC 23; [2013] 2 A.C. 254, Lord Reed, giving the leading judgment in the Supreme Court, approved Lord Bingham's dictum and said that 'section 8(3) and (4) of the Act have been construed as introducing into our domestic law an entirely novel remedy, the grant of which is discretionary, and which is described as damages but is not tortious in nature, inspired by article 41 of the Convention.'

in respect of judicial acts done in good faith. It provides: ‘In proceedings under this Act in respect of a judicial act done in good faith, damages may not be awarded otherwise than to compensate a person to the extent required by article 5(5) of the Convention.’ Article 5(5) of the Convention provides that: ‘Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.’

70. The common law does not recognise a concept of ‘the State’.¹¹² A comparable concept is of ‘the Crown’, which is represented by Government ministers. Hence section 9(4) provides that damages claims under section 9(3) are to be brought against the Crown and that in such a case ‘no award may be made unless the appropriate person, if not a party to the proceedings, is joined’ – the ‘appropriate person’ being the Minister responsible for the court concerned or someone nominated by him.¹¹³ Further, it would appear that, at least in respect of certain types of court, the court itself cannot be sued because it is not recognised as a distinct legal entity. In *Hinds v Liverpool County Court*¹¹⁴ the High Court declared that: ‘there is no such entity in law as the Liverpool County Court. Judges, circuit, county and district dealing with all types of civil work, including family law matters, sit in the building known as the Liverpool County Court but it is not an entity in itself.’
71. Where damages are available they must only be awarded where necessary to afford ‘just satisfaction’ to the victim.¹¹⁵ Damages under the HRA in general are awarded infrequently and those awards that are made are lower than in comparable tort cases.¹¹⁶ Courts must take into account the principles used by the European Court of Human Rights (ECtHR) in determining damages.¹¹⁷

b) Position at Common Law

72. Acts by public bodies that are illegal in the public law sense (viz. those which are *ultra vires*, breach common law rights, are contrary to natural justice, etc) do not *ipso facto* generate a cause of action so as to allow a claim for damages. They may of course generate a right of

¹¹² Woolf et al, *De Smith's Judicial Review* (7th edn, Sweet and Maxwell 2013) 112; Olowofoyeku (n 32) 159.

¹¹³ HRA, s 9(5).

¹¹⁴ *Anthony Dominique Hinds v Liverpool County Court and Others* [2008] EWHC 665 (QB), [10].

¹¹⁵ HRA, s 8(3).

¹¹⁶ Wadham et al, *Blackstone's Guide to the Human Rights Act 1998* (6th edn, OUP 2011) 83.

¹¹⁷ HRA, s 8(4).

appeal or judicial review. To claim damages, however, it is necessary to show that the conduct in question falls within a specific tortious cause of action, such as negligence, breach of statutory duty or misfeasance in public office. Such causes of action prescribe a ‘fault’ element in addition to the illegality itself. It is *prima facie* possible for judges to commit such a tort in the performance of their judicial role. Misfeasance in public office is perhaps the most plausible action a claimant might seek to bring. The requirements of this tort are, in brief outline: an unlawful act or omission done in the exercise of power by a public officer, in bad faith and with knowledge, that causes the claimant loss.¹¹⁸ However, even this area is covered with a widespread acceptance of immunity, both in favour of the Crown (represented through one of its Ministers) and the judiciary. It appears that judicial immunity is foregone only when a judge *knowingly* acts *outside* jurisdiction¹¹⁹, and not when acting within jurisdiction (even if maliciously)¹²⁰ or acting in the honest belief that the act was within the jurisdiction.¹²¹

73. Thus, the result is that even if one could in principle make out a claim in the tort of (say) misfeasance in public office for the actions of a judge, it would be virtually impossible to find someone to sue—the Crown immunity would bar a claim against the Crown, and judicial immunity would bar a claim against the judge. Thus, any potential tort claim will be narrowly defined and that even if its elements are satisfied it would be extremely difficult to find a defendant who did not enjoy immunity from a claim in damages.

V EUROPEAN COURT OF HUMAN RIGHTS

74. The ECtHR approach visible through the leading case of *McFarlane v Ireland*¹²² allows for the possibility of claiming damages from the State for the rights violating conduct of its judges. In *McFarlane*, the ECtHR dealt with allegations of serious judicial delay in Ireland. It is necessary to first consider the leading Irish case of *Kemmy*,¹²³ which established the relevant background for *McFarlane*.
75. In *Kemmy*, the claimant was convicted and imprisoned for rape and sexual assault. After he had already served his sentence his conviction was quashed and no retrial was ordered. In

¹¹⁸ Woolf et al, *De Smith's Judicial Review* (n 112), 1014. See generally *Three Rivers* [2001] UKHL 16; [2003] 2 AC 1.

¹¹⁹ *Sirros v Moore* [1975] QB 118, 136, 149; *Re McC (A Minor)* [1985] AC 528, 540GH.

¹²⁰ *Sirros* (n 119) 132-133; *McC* (n 119) 540-541.

¹²¹ *Sirros* (n 119) 134-135; *McC* (n 119) 541, 550.

¹²² *McFarlane v Ireland* [2010] ECHR 1272.

¹²³ *Kemmy v Ireland and Another* [2009] IEHC 178.

quashing the conviction the court had held that the way the trial judge had repeated aspects of the evidence to the jury was unfair since it omitted mention of the accused's testimony in a way that was unbalanced and could have confused the jury. The claimant brought a claim in damages against the State, arguing that the trial judge's conduct was not merely an error of law but amounted to a breach of the right to a fair trial.¹²⁴ In addition and in the alternative he claimed damages from the State for negligence and/or breach of duty of servants or agents of the State. He further claimed, if necessary, a declaration that any personal immunity enjoyed by judges was unconstitutional.

76. In deciding the issue, the Irish High Court relied upon this understanding of a 'State':

The State is a legal person separate and distinct from its citizens...it may sue and be sued as a juristic person and it has the capacity to hold property...[it] is an abstract concept but it exercises its powers and discharges its duties and obligations through its three constitutional organs, namely its legislative, executive and judicial organs.¹²⁵

77. The Court held that the State could not be vicariously liable for the acts of judges since 'it is wholly inappropriate to attempt to describe the relationship between the State and a member of the judiciary in the master/servant terminology developed for the purposes of imposing vicarious liability for tortious acts or omissions.'¹²⁶ This was because of concerns for the independence of the judiciary, particularly that:

under the Constitution, the judge does not receive his power or authority from the State but from the people, is independent in the exercise of his functions and is free from interference from the state, particularly from the other organs of government ... It would be difficult to consider the judge to be part of the State "enterprise", since his only function is to administer justice as mandated by the people.¹²⁷

78. Furthermore, the State could not be liable directly for the acts of judges. McMahon J offered several justifications for this. *Firstly*, he held that 'many of the reasons which support personal judicial immunity—the promotion of judicial independence, the desirability of finality in litigation, the existence of an appeal and other remedies as well as the public interest—can also support the argument for State immunity.'¹²⁸ *Secondly*, he found that: 'To make the State liable in such a situation would indirectly inhibit the judge in the exercise of his judicial

¹²⁴ Article 40.3.1 provides that 'The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.' Article 38 states: 'No person shall be tried on any criminal charge save in due course of law.'

¹²⁵ *ibid* [8]-[10].

¹²⁶ *ibid* [59].

¹²⁷ *ibid* [58]. Article 35.2 of the Irish Constitution states: 'All judges shall be independent in the exercise of their judicial functions and subject only to this Constitution and the law.'

¹²⁸ *ibid* [74].

functions and this, in turn, would undermine his independence as guaranteed by the Constitution. It would introduce an unrelated and collateral consideration into the judge's thinking which could prevent him from determining the issue in a free unfettered manner. It might, for example, encourage the other organs of government to monitor the conduct of the judges in this regard, thereby resulting in "a chilling effect".¹²⁹ *Thirdly*, he regarded it as constitutionally inappropriate to hold the State liable for the acts of judges, who are independent from it and are not even 'doing the State's business'.¹³⁰ *Fourthly*, the plaintiff's argument was illogical since '[h]e is arguing that the judge should be identified with the State on one hand, when liability is considered, and should, on the other, be distinguished from the State when immunity is at issue.'¹³¹

79. The High Court found that the claim against the State would have failed in any case since there was no breach of the plaintiff's rights, especially the right to a fair trial under the Irish Constitution. In relation to judicial immunity the court stated: "The truth is that the State cannot "in" or "by its laws" do much more than it has done, because of the constitutional independence guaranteed to the judiciary and because of the theory of separation of powers."¹³² It added that: "This is a clear example of a situation where the wrongly convicted person may have no remedy and yet the State, for higher public policy considerations, and perhaps with some reluctance, is content to live with this outcome."¹³³ Thus, considerations of judicial immunity were held to militate against State liability for judicial acts in general.
80. The ECtHR considered the issues of judicial and State liability and immunity for unlawful judicial acts, in the light of *Kemmy*, in the case of *McFarlane*. The applicant argued before the Grand Chamber of the ECtHR that Ireland had breached his right to a fair trial under article 6 of the ECHR and his right to an effective remedy under Article 13 in the prosecution of criminal charges against him.

¹²⁹ *ibid* [75].

¹³⁰ *ibid* [76] ("[T]he State is not directly involved with his activities, does not write his mission and cannot intervene with the judge's exercise of his functions. While in one sense, it may be appropriate to describe the judiciary as an organ of government in the broad constitutional representation of the State, in another sense, when exercising its jurisdiction, the judiciary is truly decoupled from the State.")

¹³¹ *ibid* [78].

¹³² *ibid* [64].

¹³³ *ibid* [68].

81. The majority (12 out of 17) found for the applicant's right to an effective remedy.¹³⁴ It held that even if a cause of action were open to the applicant in Irish law in respect of delay in prosecution and judicial proceedings, such a cause of action would not be sufficient for the purposes of Article 13. This is because it would not cover delays caused by the actions of individual judges, such as the late handing down of judgments.¹³⁵ Any cause of action against the State was deficient for Article 13 purposes, as it was established in the court's jurisprudence that the court will 'hold a state responsible under the "reasonable time aspect of Art 6(1) for delay by judges in delivering their judgments."'”¹³⁶ It can therefore be seen that the ECtHR will *require* a claim to be available against the State in respect of judicial acts which constitute a breach of the State's obligations under the Convention.
82. Furthermore, the majority found that there was an important distinction between a claim against the State and one against individual judges. While a State could provide personal judicial immunity compatible with the Convention, it could not also bar claims against the State in respect of rights-breaching judicial act: 'contrary to the High Court in the *Kemmy* case ... there is a relevant distinction to be drawn between the personal immunity from suit of judges ... and the liability of the State to compensate an individual for blameworthy delay in criminal proceedings attributable in whole or in part to judges.'¹³⁷
83. The minority (5 out of 17) accepted the majority's assumption that the Convention required a claim against the State to be available for judicial conduct (eg for delays), but considered that the majority had misinterpreted Irish law and that, therefore, Ireland was not in breach since it did provide such a remedy.¹³⁸ The joint dissenting opinion of Judges Gyulumyan, Ziemele, Bianku and Power considered that the *Kemmy* decision did not preclude the applicant from bringing a claim in damages in respect of judicial delay, and that therefore

¹³⁴ The same argument arose in relation to a question regarding the Court's jurisdiction, viz. whether the applicant had exhausted his domestic remedies. Whether the remedies had been exhausted depended on which remedies there were.

¹³⁵ *McFarlane* (n 122) [121] ('The 17-month period required to approve the High Court judgment and found blameworthy under Article 6(1), would not therefore appear to be addressed by this proposed constitutional remedy').

¹³⁶ *ibid* [121]. The Court cited its previous decisions: *Eckle v Germany*, 15 July 1982, § 84, Series A no. 51; *O'Reilly v Ireland*, no. 21624/93, Commission's report of 22 February 1995, §§ 65-66; *Somjee v The United Kingdom*, no. 42116/98, § 72, 15 October 2002; *Obasa v The United Kingdom*, no. 50034/99, § 34, 16 January 2003; *O'Reilly and Others v Ireland*, no. 54725/00, § 33, 29 July 2004; and *McMullen v Ireland*, no. 42297/98, § 39, 29 July 2004.

¹³⁷ *McFarlane* (n 122) [121]. The Court referred back to its decision in *Ernst and Others v Belgium* (Application No 33400/96) [2003] ECHR 359 (15 July 2003) in which it upheld judicial immunity from suit as proportionate and not a breach of Articles 6 or 13.

¹³⁸ The separate dissenting opinion of Lopez Guerra did not address this point.

there was a remedy available to him (which he had, consequently, failed to exhaust). More particularly, they made the following points. *Firstly*, they found that the distinction between judges' personal immunity and the liability of the State for judicial conduct was 'not, in fact, lost on the High Court judge.'¹³⁹ *Secondly*, they distinguished the High Court's decision in *Kemmy* in that it did not deal with cases of delay in the legal system:

[*Kemmy*] concerned the question of State immunity for alleged unfairness of trial caused by a judicial error. It was not about State liability for delays in the legal system. In general, such delays tend to occur, when where a State fails to erect the proper "scaffolding" to support the efficient administration of justice. Such scaffolding may be vulnerable if a State fails, for example, to provide a sufficient number of judges or to have in place an efficient case management system. In *Kemmy* the High Court Judge specifically distinguished between liability for judicial error (as in the case before him) and liability for what one might call the system's failure.¹⁴⁰

84. *Thirdly*, they suggested that the majority had omitted to quote passages in *Kemmy* that made its true finding clear: 'In the paragraphs omitted, the trial judge had expressly stated that 'the State *may be liable* for failing to erect the appropriate scaffolding' thus leaving open the question for determination in an appropriate case.'¹⁴¹ *Lastly*, agreeing with the majority, the dissenting opinion of Judges Gyulumyan, Ziemele, Bianku and Power affirmed that personal judicial immunity was 'a fundamental aspect of judicial independence.'¹⁴² However, they found that this would not stand as an obstacle in Irish law to a claim against the State for excessive delays in the judicial system.¹⁴³
85. The disagreements about the correct interpretation of Irish law aside, it is clear from both the majority and minority judgments that the ECHR requires States to provide a claim in damages for the rights-breaching conduct of the judiciary.

VI THE EUROPEAN UNION

86. The position as regards the European Union (EU) can be discerned from two separate scenarios—*firstly*, when the EU could itself be liable for an act of its judges; and *secondly*, when EU Member States could be liable for violations of EU law by their national judges. In the second scenario, which is immediately relevant for our purposes, EU jurisprudence

¹³⁹ *McFarlane* (n 122), dissenting opinion, [16].

¹⁴⁰ *ibid.*

¹⁴¹ *ibid* (emphasis in original).

¹⁴² *ibid*, dissenting opinion, [17].

¹⁴³ *ibid.*

indicates acceptance of claims in damages against the State for rights-violating conduct of national judges.

a) Liability of the European Union

87. There is no relevant case law in relation to the liability of the EU for rights-violating conduct of its judicial officers.¹⁴⁴ There have been cases challenging the first-instance decision for breach of fair process and the right to fair hearing within a reasonable time. However, these cases have mainly concerned the legality of the decision and the prayer for relief did not relate to a claim of damages under article 340 of the Treaty on the Functioning of the European Union (TFEU).

b) Liability of Member States

88. The leading decision of the European Court of Justice (ECJ) in *Köbler v Austria*¹⁴⁵ confirms the possibility of suing a Member State for damages where there is a human rights violation by the judiciary. This is the result of an extension of the State liability principle established in the seminal case of *Francovich*¹⁴⁶ where the ECJ held that State liability for harm caused to individuals because of an infringement of EU law was inherent in the Treaty system.
89. *Köbler* concerned a claim against a Member State to pay damages when the rights violation was committed by the Supreme Court. The ECJ confirmed that this was possible when the infringement was ‘manifest’ and when the court had taken into account all the factors like the degree of clarity and precision of the rule infringed, whether the infringement was intentional, whether the error of law was excusable or inexcusable etc. The conditions for invoking this liability included: *firstly*, an infringement of rights conferring provisions; *secondly*, a ‘sufficiently serious’ breach leading to a manifest and grave disregard of the provision; and *thirdly*, a direct causal link between the infringement and the loss sustained.
90. In reaching this decision, the ECJ rejected arguments made before it in relation to *res judicata*, legal certainty and judicial independence. *Firstly*, in following *Francovich* and *Factortame*, it found that the international law principle of State liability for the breaches of international

¹⁴⁴ Pekka Aalto, *Public Liability in European Union Law* (Hart 2011) 190.

¹⁴⁵ [2003] All ER (D) 73, confirmed in *Traghetti del Mediterraneo SpA v Italy* [2006] All ER (D) 101.

¹⁴⁶ Joined Cases C 6/90 & 9/90 *Francovich and Bonifaci v Italy* [1991] ECR I-5357; [1993] 2 CMLR 66.

law by its agent applied to Community law.¹⁴⁷ Since the State is viewed as a single entity, State liability must extend to cases where infringement of rights was attributable to the decision of a supreme court. *Secondly*, the court dismissed concerns of *res judicata* since a claim for compensation need not involve the invalidation of the decision which resulted in the violation.¹⁴⁸ *Thirdly*, the ECJ clarified that its decision did not undermine the independence of national judiciaries because it did not relate directly to individual liability of the judges.¹⁴⁹ In fact, the ECJ saw its stance as enhancing the quality and authority of the judicial systems.¹⁵⁰

91. It is important to note the opinion of the Advocate-General which stated that every Member State within the EU accepted, in principle, State liability in damages for the unlawful conduct of its judges except for (at the time of the judgement), Ireland.¹⁵¹ Further, according to the accepted principle of *wertende Rechtsvergleichung*, it was sufficient that State liability in damages for unlawful judicial acts was recognised in some but not all Member States. Given that EU law is binding upon twenty-eight States, the result in *Köbler* affirms a crosscutting trend between European nations. However, the acceptance of State liability in damages for illegal judicial acts flowing from *Köbler* should not be overstated given that this report does not carry out an actual analysis of the position in law in the EU Member States; thus it is possible, for example, that Ireland may have been the only prominent example which had directly rejected such liability through a leading judgement.
92. Thus, it is clear that the ECJ jurisprudence is consistent in allowing for damages to be claimed from a Member State for the infringement of rights by the national judiciary *in cases where the court has manifestly infringed the applicable law such that the resulting damage is sufficiently serious*.

VII UNITED STATES OF AMERICA

93. There is generally no public law action in damages against either the United States or the individual States for the violation by Federal or State officials of rights guaranteed by the United States Constitution (US Constitution). This principle applies equally whether or not the rights violation is committed by a judicial officer, or by an officer from another branch of

¹⁴⁷ *Köbler* (n 145) [32].

¹⁴⁸ *ibid* [39].

¹⁴⁹ *ibid* [42].

¹⁵⁰ *ibid* [43].

¹⁵¹ *ibid* [48], Opinion of Advocate General, [77-86].

government. Since no general right of action for damages against the Federal or State government exists, there has been no need to specifically consider whether such an action would extend to liability for rights violations committed by the judicial branch, as opposed to the executive.

94. In the United States' federal system, both the Constitution of the United States and the individual State constitutions are sources of public law rights. This section considers both *firstly*, whether the Federal or State governments are liable in damages for breaches by the judiciary of rights established by the US Constitution; and *secondly*, whether individual States may be liable for breaches by the State judiciary of rights established by their State constitutions.

a) Rights Established by the United States Constitution

95. Neither the United States as a federal entity, nor the individual States, is liable for public law damages for violations of rights established by the United States Constitution. This applies whether the official who committed the violation belongs to the judiciary, or to another branch of government.
96. 'Constitutional torts' against and local officials are based on the Enforcement Act of 1871, which (as amended) is now 42 USC §1983. This provision was enacted in the years following the American Civil War, to provide a means of redress against officials (particularly in the southern States) who were refusing to enforce the recently enacted Fourteenth Amendment. §1983 provides that:

Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.
97. §1983 provides a basis of action for damages against State, territory and officials. It has also been held to allow the recovery of damages from local government entities. It does not provide a basis for recovering damages from Federal officials who have violated the US

Constitution. But in the 1971 case of *Bivens v Six Unknown Named Agents of the Federal Bureau of Narcotics*,¹⁵² the Supreme Court found a comparable right of action against Federal officials was implicit in the US Constitution itself.

98. However, neither §1983 nor *Bivens* provides a basis for the liability of the State—either an individual State, or the federal entity, the United States—for violations of constitutional rights committed by its officials. The term ‘person’ in §1983 has been interpreted not to include the individual States as sovereign entities. The Constitution recognises the immunity of individual States from suit in the Federal courts.¹⁵³ Although the Supreme Court has held that Congress can abrogate individual State’s immunity on the basis of the Fourteenth Amendment,¹⁵⁴ it has also found that §1983 was not intended to do so.¹⁵⁵ Thus, the individual States are entitled to retain immunity for violations of Federal constitutional rights committed by its officials.
99. Similarly, the United States (that is, the federal entity) is not liable for damages for breaches of constitutional rights committed by Federal officials. In the case of *Federal Deposit Insurance Company v Meyer*,¹⁵⁶ the Supreme Court unanimously refused to extend the liability of federal officials established in *Bivens* to allow action against the United States or federal agencies. In delivering the judgment of the court, Thomas J gave two reasons for this finding. *Firstly*, extending liability for damages to the United States or Federal agencies would undermine the incentive for individual officers to avoid violating constitutional rights.¹⁵⁷ *Secondly*, an action in damages against Federal entities would potentially impose a significant fiscal burden on the taxpayer. Therefore, it was for Congress, not for the court, to establish such an action.¹⁵⁸

¹⁵² 403 US 388, 391–92 (1971).

¹⁵³ See the Eleventh Amendment to the Constitution, and also *Alvin v Maine* 527 US 706 (1999).

¹⁵⁴ *Fitzpatrick v Bitzer* 427 US 445 (1976).

¹⁵⁵ *Quern v Johnson* 440 US 332 (1979). The Supreme Court later found that constitutional tort actions against the States were barred in state courts, as well as in federal ones: *Will v Michigan Department of State Police* 491 US 58 (1989).

¹⁵⁶ 510 US 471 (1994).

¹⁵⁷ *ibid* 485 (‘It must be remembered that the purpose of *Bivens* is to deter *the officer*. See *Carlson v Green*, 446 US 14, 21 (1980) (‘Because the *Bivens* remedy is recoverable against individuals, it is a more effective deterrent than the FTCA remedy against the United States’). If we were to imply a damages action directly against federal agencies...there would be no reason for aggrieved parties to bring damages actions against individual officers. Under Meyer’s regime, the deterrent effects of the *Bivens* remedy would be lost.’).

¹⁵⁸ *ibid* 486 (‘If we were to recognize a direct action in damages against federal agencies, we would be creating a potentially enormous financial burden for the Federal Government. Meyer disputes this reasoning and argues that the Federal Government already expends significant resources indemnifying its employees who are sued under *Bivens*. Meyer’s argument implicitly suggests that the funds used for indemnification could be shifted to cover the direct liability of federal agencies. This may or may not be true, but decisions involving “federal fiscal policy” are not ours to make...We leave it to Congress to weigh the implications of such a significant expansion of government liability.’)

100. Thus, neither the United States, nor individual States, is liable for public law damages for breaches of rights enshrined in the US Constitution. The public law action for damages established by §1983 and by *Bivens* can only be taken against individual officials, not against the individual States or the United States as entities.¹⁵⁹ There is a legislative basis for action for damages against the United States in tort, §1346(b) of the Federal Torts Claims Act.¹⁶⁰ However, the §1346(b) cause of action, which does allow individuals to sue the United States for damages, only applies in the context of private law torts, and does not allow action for damages against the United States for the breach of constitutional rights.¹⁶¹

b) Rights Established by State Constitutions

101. Each State Constitution in the United States contains its own bill of rights, to be applied and interpreted by its own State courts as a matter of its own State law. This position requires an examination of—*firstly*, although the individual States are not liable in damages for violations of Federal constitutional rights, is a particular State liable for breaches of the rights enshrined in its own constitutions? The answer to this question may vary from State to State;¹⁶² *secondly*, if so, does that liability would cover violations of State constitutional rights committed by the judiciary.

102. As with the US Constitution, State Constitutions do not generally spell out the remedies available for breaches of the rights they contain. In some States, a general right to damages for such breaches has been established in legislation; in others, legislation allows an action for damages only when the breach is in some way especially serious. Many other States have not enacted such legislation, although in some cases State courts have themselves discovered or established such damages actions.¹⁶³

¹⁵⁹ In the context of §1983 and *Bivens* actions against individual officials, the Supreme Court has held in several cases that absolute immunity applies in relation to judicial functions, so that plaintiffs will not be able to obtain damages for constitutional torts committed by individual judges while exercising judicial functions, even those committed *mala fides*: *Pierson v Ray* 386 US 547 (1967); *Stump v Sparkman* 435 US 349 (1978); *Butz v Economou* 438 US 478 (1978). The courts asserted that absolute immunity was necessary to protect the independence of the judiciary: *Pierson*, 558–59, *Butz*, 508–09.

¹⁶⁰ 28 USC, §1346(b).

¹⁶¹ *Meyer* (n 156) 477–78.

¹⁶² For an overview, see Gary S Gilden, ‘Redressing Deprivations of Rights Secured under State Constitutions’ (2010-11) 115 Pennsylvania State Law Review 877.

¹⁶³ *ibid* 883 ff, and the cases cited therein.

103. There is a tendency for State courts to draw analogies from Federal case law in determining the remedies available for breaches of constitutional rights.¹⁶⁴ Thus, in a number of States, courts have refused to recognise the liability of the State itself for breaches of constitutional rights, instead limiting plaintiffs to actions against the individual officials who committed the breach.¹⁶⁵ In contrast, certain State courts have found that the remedies available for the breach of State constitutional rights may differ from those established at the federal level. Thus, there are some States where the State itself has been found liable in damages for breaches of State constitutional rights.¹⁶⁶
104. However, there is still the distinct question of whether such liability would apply where the rights violation has been committed by the judiciary. There do not appear to be any cases in which State liability in damages has been established in circumstances where rights were violated by the judges in the performance of their judicial function.

VIII CANADA

105. Liability of the State for breaches of rights committed by the judges is, in principle, admitted under Canadian law. However, as the development of jurisprudence in this area indicates, the threshold for invoking such liability is very high.
106. Section 24(1) of the Canadian Charter of Rights and Freedoms (Charter) provides that: ‘Anyone whose rights and freedoms, as guaranteed by the Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just under the circumstances.’ This provision gives the courts flexibility in crafting an appropriate remedy, and allows, among other things, the award of damages. However, in practice, it appears that damages are relatively rarely awarded for the breach of the Charter.¹⁶⁷

¹⁶⁴ *ibid.*

¹⁶⁵ For example, Maine: *Jenness v Nickerson* 637 A 2d 1152 (Me 1994), 1158.

¹⁶⁶ For example, North Carolina and New York: *Corum v University of North Carolina* 413 SE 2d 276 (NC 1992); *Brown v State of New York* 674 NE 2d 1129 (1996).

¹⁶⁷ David J Mullan, ‘Damages for Violation of Constitutional Rights – A False Spring?’ (1995) 6 National Journal of Constitutional Law 105, 106.

107. In the 1984 case of *R v Germain*,¹⁶⁸ the Alberta Court of Queen’s Bench recognised the possibility that the State could be liable in damages for a breach of the Charter by a judge. A judge had wrongfully and without justification placed the accused in custody for contempt of court, having failed to make clear to the accused the specific nature of the contempt with which he was being charged.¹⁶⁹ McDonald J found that this constituted a breach of various provisions of the Charter. As a remedy, the plaintiff sought a stay of the criminal proceedings against him, but McDonald J, applying section 24(1), found that this would not be ‘appropriate and just under the circumstances’. McDonald J noted that the awarding of monetary compensation was available under section 24(1) as an alternative form of remedy. McDonald J also referred to the Privy Council case of *Maharaj*, in which public law damages had been awarded against the State (applying section 6 of the Trinidad and Tobago Constitution) for a breach of human rights by a judge. McDonald J concluded that monetary compensation could be awarded for breach of the Charter.¹⁷⁰

108. McDonald J went on to observe that making an order for monetary compensation against a judge personally would go against long-standing principles of public policy.¹⁷¹ Rather, the liability which could be imposed under section 24(1) was, like that established in the Trinidad and Tobago context in *Maharaj*,¹⁷² a liability of the State itself. McDonald J cited Lord Diplock’s reasoning in *Maharaj* to describe the liability which could be imposed on the State under section 24(1) of the Charter:

The claim...is a claim against the state for what has been done in the exercise of the judicial power of the state. This is not vicarious liability; it is a liability of the state itself. It is not a liability in tort at all; it is a liability in the public law of the state, not of the judge itself, which has been newly created...¹⁷³

109. Subsequent cases have also appeared to accept the *Germain* principle that damages can be awarded against the State for violations of the Charter.¹⁷⁴ However, there appear to be relatively few cases directly applying the principle to judicial rights violations. The reasoning in *Maharaj* and *Germain* was approvingly cited by Rothman JA of the Quebec Court of Appeal in *Royer v Mignault*,¹⁷⁵ and by Rousseau-Houle JA of the same court in *Proulx v*

¹⁶⁸ *R v Germain* (1984) 53 AR 2d 264.

¹⁶⁹ *ibid* 270–71.

¹⁷⁰ *ibid* 274.

¹⁷¹ *ibid*.

¹⁷² *Maharaj* (n 20).

¹⁷³ *ibid* 679.

¹⁷⁴ *Oag v Canada* (1985), 23 CCC (3d) 20; *Pizzardi v Ontario* 76 CRR (2d) 111 (Ont SCJ); *R v F (RG)* 5 CRR (2d) 62 (Nfld TD).

¹⁷⁵ (1988) 32 CRR 1, 50 DLR (4th) 345, [66].

*Quebec*¹⁷⁶ (although in neither case was it directly determinative of the issues at hand). The Alberta Court of Queen's Bench again recognised that monetary compensation from the State could be appropriate for judicial Charter violations in *R v Rudko*,¹⁷⁷ although a stay of contempt proceedings was preferred as a remedy in that case.

110. The issue was considered in somewhat more detail by the Ontario Superior Court of Justice in *Koita v Ontario Police Services Board*.¹⁷⁸ In this case, the Ontario Superior Court of Justice considered whether the State could potentially be liable for monetary compensation under the Charter for the allegedly negligent issuing of a search warrant by a justice of the peace. The Court accepted the *Maharaj* principle that the State could be liable in damages for human rights breaches by a judicial officer, but emphasised that this would require more than negligence on the part of the judge:

In our view, a cause of action against the Crown based on *Maharaj* must involve the pleading of facts, even if unproven, which would tend to establish the advertent participation of the judge in a breach of the plaintiffs' Charter rights. This view is supported by the authorities which have considered the nature of the liability upon the state imposed by s. 24(1) of the Charter in the form of a claim for damages.

There is no suggestion whatsoever in the pleadings that the justice of the peace advertently breached the plaintiffs' Charter rights; the mere signing of the search warrant is clearly insufficient. There are no facts pleaded which would ground this cause of action within *Maharaj* or any of the other authorities brought to our attention.

111. Thus, State liability in damages for breaches of human rights by the judiciary appears to be a feature of Canadian law. However, it appears to be limited to relatively rare conditions (requiring more than mere negligence), and has not arisen frequently in practice.

¹⁷⁶ (1997) RRA 79, 145 DLR (4th) 394, [71].

¹⁷⁷ [1999] ABQB 691, [38].

¹⁷⁸ (2000) 151 OAC 360, 88 CRR (2d) 105.

ANALYSIS AND CONCLUSION

112. As is apparent from the foregoing analysis, there is a range of answers from different jurisdictions on the question of whether a State can be liable in public law damages for rights-violating conduct of the judiciary. It is perhaps analytically most helpful to suggest that there is a spectrum of approaches, with ‘no damages’ at one end of the spectrum and ‘damages’ at the other. In the middle of the spectrum can be placed jurisdictions where the answer is either unclear or undetermined.
113. Our research reveals that of the jurisdictions surveyed, at least one jurisdiction, New Zealand, has explicitly disallowed the possibility of damages against the State for judicial breaches of rights. In the *Chapman* decision, the New Zealand Supreme Court held that such damages should not be available (albeit in a 3–2 split). On the other end of the spectrum, four jurisdictions, the Privy Council, the ECtHR, the ECJ and Canada, have clearly affirmed the availability of such damages. The Privy Council has recognised that damages may be claimed against the State for judicial breaches of rights; the threshold for breach may be high, and the circumstances under which damages can be claimed may have narrowed over time, but the position of the Privy Council has not been overruled. The ECtHR in *McFarlane* ruled for State liability in damages to be provided when the illegal conduct is of the national judges. Similarly, the ECJ allows damages against the State under certain conditions of judicial behaviour (in the slightly unique context of the EU, however). Further, Canada has stated that State damages for judicial breach of rights are in principle possible (though the case law remains thin).
114. Five jurisdictions have an unclear position on the issue. Botswana and South Africa have not considered the issue directly; the Seychelles’ jurisprudence militates away from public law damages being available, but the issue has only recently come up (in the *Serret* case) and is still awaiting determination; and the UK has case law that points in multiple directions. The United States is somewhat of an outlier in that it allows no public law damages against the Federal government—there is not so much a judicial ‘carve-out’ as a ‘carve-out’ extending across the executive, judicial, and legislative branches when it comes to damages.
115. Certain distinctions must be borne in mind. The differences between cases involving personal judicial immunity (even interpreted in light of human rights imperatives) and those

involving the availability of public law damages from the State should be kept clear; and a distinction must also be drawn between costs and public law damages. It must also be recognised that some jurisdictions have constitutions that significantly shape the answer to this particular research question.

116. This survey, we hope, provides a sense of the different positions taken in comparative jurisprudence. We offer no comment on the merits of these positions. We hope that the jurisprudence presented here is of use and will contribute to the Namibian High Court's resolution of this issue.