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ARTICLE

Baigent Damages for Breaches of Natural Justice

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This article explores whether damages ought to be available for breaches of natural justice and whether the New Zealand Bill of Rights Act 1990 (NZBORA) should provide a pathway to achieve this. Currently, administrative law damages are not available in New Zealand. Consequently, a person applying for judicial review on the grounds that a decision has been made in breach of the principles of natural justice will not be compensated for any loss suffered. However, *Simpson v Attorney-General* (*Baigent*) establishes that damages are available for breaches of the NZBORA. This creates the potential for damages to be awarded for breaches of the right to natural justice, as this right is affirmed by s 27(1) of the NZBORA. This article argues that damages should be awarded for breaches of s 27(1) in appropriate circumstances.

I Introduction

Andrew Butler and Petra Butler argue that the facts of *Jain v Trent Strategic Health Authority* (*Jain*) illustrate a situation where damages for breach of s 27(1) of the New Zealand Bill of Rights Act 1990 (NZBORA), the right to natural justice, ought to be recoverable.[1] Natural justice requires a person to receive a fair and unbiased hearing before a decision is made if that decision will negatively affect their rights, interests, or privileges. The three main requirements of natural justice are: adequate notice, a fair hearing and a lack of bias in the decision-making process. *Jain* (a United Kingdom House of Lords decision) concerned the Nottingham Health Authority (the Authority), which had obtained an order to close down an advanced age nursing home owned and operated by

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1 *Jain v Trent Strategic Health Authority* [2009] UKHL 4, [2009] 1 AC 853; and Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [27.10.14].

Mr and Mrs Jain.[2] The Authority's proceedings were heard without notice to the Jains.[3] The Jains' appeal against the Authority's statutory successors, Trent Strategic Health Authority, succeeded. The Registered Homes Tribunal (the Tribunal) heard the appeal and was scathing in its criticism of the Authority.[4] However, this was too late to stop the Jains' nursing home business from being "ruined", and the Jains from suffering "serious economic harm".[5] As the Tribunal did not have the power to award damages, the Jains brought a claim in negligence against the Authority.[6] As the House of Lords held that the Authority did not owe a duty of care, the claim failed.[7] However, the House of Lords provided some hope. Their Lordships considered that the Jains would have been entitled to compensation if they had been able to proceed under human rights legislation that was not yet in force at the time.[8]

If *Jain* had been decided in New Zealand through judicial review proceedings, the Jains would not have received damages for their loss. This is because damages are not available to compensate loss caused by a public authority's unlawful administrative action unless the authority has also committed a private law tort.[9] The term "unlawful" for the purposes of this article relates to the three traditional grounds of judicial review: illegality, irrationality and procedural impropriety. This article focusses on procedural impropriety, or a breach of natural justice.

A plaintiff usually also cannot bring a private law claim in tort for breach of natural justice. The Court of Appeal has held that any such failures do not amount to a breach of a duty of care resulting in an award of damages.[10] However, the right to natural justice is affirmed by s 27(1) of the NZBORA.[11] In *Simpson v Attorney-General* (*Baigent*), notwithstanding the rule against administrative law damages, the Court of Appeal held that courts have a discretion to award damages for breaches of the NZBORA.[12] Hence, *Baigent* created the potential for an award of damages for a breach of natural justice. Despite this development, damages for a breach of s 27(1) are rarely awarded.[13]

This article argues that damages should be awarded for breaches of s 27(1) in appropriate circumstances. Part II will consider the rule against administrative law

2 *Jain*, above n 1, at [1].
3 At [2].
4 At [7]–[8].
5 At [9].
6 At [8] and [10].
7 At [20].
8 Human Rights Act 1998 (UK); and *Jain*, above n 1, at [11]–[18]. *Jain* has been described as a startling case for this reason: see Geoff McLay "Book Comment: What are we to do with the Public Law of Torts?" (2009) 7 NZJPIL 373 at 374.
9 In this article, I will refer to the tribunal or other public authority against which a s 27(1) claim is made as a public authority. See Philip A Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, Wellington, 2021) at 1262.
10 *Takaro Properties Ltd (in rec) v Rowling* [1978] 2 NZLR 314 (CA) at 317, 328 and 338.
11 As the right to natural justice is *affirmed*, it takes its common law meaning which involves two key concepts. These are *audi alteram partem* (the parties be given adequate notice and the opportunity to be heard) and *nemo judex in causa sua* (which requires that the decision-maker be disinterested and unbiased): see Grant Huscroft "The Right to Justice" in Paul Rishworth and others (eds) *The New Zealand Bill of Rights* (Oxford University Press, Auckland, 2003) 753 at 754.
12 *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA) [*Baigent*] at 692 per Casey J, 703 per Hardie Boys J and 718 per McKay J.
13 *Combined Beneficiaries Union Inc v Auckland City COGS Committee* [2008] NZCA 423, [2009] 2 NZLR 56 at [56].

damages and shows that this rule has impacted the attitude of the courts to *Baigent* damages. Part III will consider the extent to which *Baigent* damages are available for breaches of s 27(1). Part IV will consider the difficulties in proving a causative link between a breach of s 27(1) and any loss suffered by the plaintiff. Part V concludes that damages should be made available for a breach of s 27(1) in limited circumstances. Such circumstances will likely exist where there has been a serious breach that has serious consequences, damages are the only effective remedy, and the damages awarded would be proportionate—considering the interests of both the victim and the public served by the public authority.

II Administrative Law Damages

Given that there is no damages remedy in administrative law, when a person applies for judicial review on the grounds that a decision has been made in breach of the principles of natural justice, the court can quash the decision or order a rehearing.[14] However, the applicant will not receive damages for any loss suffered.[15] The purpose of this Part is to discuss why the rule against administrative law damages has proved to be problematic in administrative law and for the development of NZBORA damages, particularly damages for breach of s 27(1). Current administrative law remedies do not "undo" any loss suffered. Further, it is difficult for plaintiffs to establish a tortious claim for loss caused by unlawful administrative actions. This Part will also discuss the implications of awarding damages for breach of s 27(1) for the rule against administrative law damages.

A *The inadequacy of current administrative law remedies*

The *Jain* case is a good illustration of the inadequacy of administrative law remedies.[16] In *Jain*, despite the unlawfulness of the decision to close the nursing home, the administrative law remedy granted was to quash the order granted to the defendants. This did not undo any of the loss suffered. Hence, the plaintiffs were left to bear the costs of the closure of their business.

Therefore, individuals who suffer loss as a result of unlawful administrative actions often feel a sense of injustice over their inability to be appropriately compensated for their loss.[17] These feelings are often heightened because the individuals pay taxes that support the defendant who, as a public authority, is not required to pay damages for the loss that it causes.[18] It is questionable then why an individual who has suffered pecuniary loss ought to be satisfied by having the decision at issue reversed. This does not undo the pecuniary loss.[19] Hence, from a plaintiff's perspective, current administrative law remedies, absent a damages remedy, are unsatisfactory in cases where there is little justification for the defendant's actions which caused the plaintiff to suffer loss.

14 Paul Craig *Administrative Law* (8th ed, Thomson Reuters, London, 2016) at ch 26.
15 Joseph, above n 9, at 1262.
16 *Jain*, above n 1, at [8].
17 George Barton "Damages in Administrative Law" in Michael Taggart (ed) *Judicial Review of Administrative Action in the 1980s: Problems and Prospects* (Oxford University Press, Auckland, 1986) 123 at 147.
18 At 147.
19 Peter Cane *Administrative Law* (5th ed, Oxford University Press, Oxford, 2011) at 310.

B *The availability of a tort claim is severely limited*

While damages are awarded in tort law to compensate for loss caused by unlawful administrative action, their availability is "severely limited".[20] The elements of the tort can often be difficult to establish. For instance, plaintiffs often cannot claim in intentional torts, such as trespass to land[21] and false imprisonment,[22] because the circumstances do not demonstrate any direct physical interference.

Moreover, torts such as negligence, breach of statutory duty and misfeasance in a public office all require proof of something additional to the loss suffered as a result of the unlawful administrative action. I will now consider each of these torts in turn and explain why they are difficult to establish in cases of unlawful administrative action.

First, to succeed with a claim in negligence, the plaintiff must establish that a duty of care exists. However, the court can deny a duty on public policy grounds,[23] such as where a duty would restrict the public authority in the performance of its duties. Additionally, there is a reluctance by courts to find a duty when the loss is purely economic.[24] Hence, the reality is that public authorities rarely owe a duty of care.

Secondly, to succeed with a claim of breach of statutory duty, the plaintiff must establish that the statutory duty was imposed for the protection of a "limited class of the public", and was intended to confer on those persons a private right of action for breach of that duty.[25] In addition to these high hurdles to establish the tort, there is also "considerable reluctance on the part of the courts to impose upon local authorities any liability for breach of statutory duty other than that expressly imposed in the statute".[26] Hence, public authorities will rarely be held to have committed the tort of breach of statutory duty.

Finally, to succeed with a claim in misfeasance, the plaintiff must establish that the defendant is a public officer who has acted maliciously toward the plaintiff, or knew that the conduct was unlawful and likely to injure the plaintiff—in some cases, the plaintiff must also prove that they have suffered damage.[27] Thus, particularly due to the requirement for malice, unlawful administrative action will rarely amount to misfeasance in a public office.

Therefore, in most cases, plaintiffs will be unable to prove that the unlawful administrative action amounts to a tort. The result is that they have no private law remedy to recover any loss they suffer.

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20 Graham Taylor *Judicial Review: a New Zealand perspective* (4th ed, LexisNexis, Wellington, 2018) at [5.63].

21 See Stephen Todd *The Law of Torts in New Zealand* (8th ed, Thomson Reuters, Wellington, 2019) at 502–505.

22 At 112.

23 *Anns v Merton London Borough Council* [1978] AC 728 (HL) at 751–752.

24 Todd, above n 21, at 270.

25 *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 (HL) at 731.

26 *T (a minor) v Surrey County Council* [1994] 4 All ER 577 (QB) at 597.

27 *Three Rivers District Council v Governor and Co of the Bank of England (No 3)* [2003] 2 AC 1 (HL) at 191–193.

C *Should administrative law damages be available?*

The unavailability of administrative law damages has been widely criticised by judges and legal commentators.[28] The primary argument in favour of administrative law damages was summarised by Peter Hogg:[29]

> The unfortunate individual who happens to be directly injured by an invalid governmental decision should not have to bear the cost. The entire tax-paying community should share the cost of its government's occasional errors.

In line with that argument, the United Kingdom Justice Committee has proposed that a general right to damages for unlawful administrative action should be enacted through legislation.[30] However, many have also opposed the introduction of administrative law damages. The purpose of this Part is to rebut some of the main opposing arguments.

(1) The arguments against awarding administrative law damages

The current justifications for the non-availability of administrative law damages largely relate to the distinction between public law and private law. In the House of Lords decision of *X (Minors) v Bedfordshire County Council*, an award of administrative law damages was rejected for the following reason:[31]

> It is important to distinguish such actions to recover damages, based on a private law cause of action, from actions in public law to enforce the due performance of statutory duties, now brought by way of judicial review. The breach of a public law right by itself gives rise to no claim for damages. A claim for damages must be based on a private law cause of action.

However, neither argument gives any substantive reason why damages should not be a remedy for a public law wrong. Nevertheless, arguments can be made that damages, being a private law remedy, may be out of place in a public law context. Damages based on a private law cause of action are corrective, available as of right (non-discretionary), tend to be between two parties, and are often retrospective.[32] In contrast, remedies in public law proceedings are distributive, discretionary and often prospective.[33]

However, the argument that damages may be out of place in a public law context seems to overlook that they would be a discretionary remedy. According to Michael Fordham, a critical reason why there is reluctance to introduce administrative law

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28 Paul Craig "Remedies Available in Judicial Review Proceedings" in David Feldman (ed) *English Public Law* (2nd ed, Oxford University Press, Oxford, 2009) 793 at 820; Peter Cane "Damages in Public Law" (1999) 9 Otago LR 489; Law Commission for England and Wales *Administrative Redress: Public Bodies And The Citizen — A Consultation Paper* (Consultation Paper No 187, June 2008); Tom Cornford *Towards a Public Law of Tort* (Routledge, Oxford, 2016); and Taylor, above n 20, at [5.60].

29 See Sue Arrowsmith *Civil Liability and Public Authorities* (Earlsgate Press, Winteringham, 1992) at 236.

30 Justice–All Souls Review Committee *Administrative Justice: Some Necessary Reforms* (Oxford, Clarendon, 1988) at 360–364.

31 *X (Minors)*, above n 25, at 730 per Lord Browne-Wilkinson.

32 Janet McLean "Damages and Human Rights: A Changing Relationship Between Citizen and State?" (2009) 17 JRE 289 at 290.

33 *Manga v Attorney-General* [2000] 2 NZLR 65 (HC) at [125]–[126].

damages is because they are often referred to as being available as of right.[34] Fordham has said that: "[s]tated in that way, it is no surprise. A 'general right to indemnity' would be a disaster … The bill to the taxpayer would be huge".[35] Therefore, the concern that public law damages may open up the floodgates to indeterminate liability claims appears to be misplaced.

According to Sue Arrowsmith, another argument against introducing administrative law damages is that "most claims would be for economic loss".[36] In her opinion:[37]

> The courts have restricted recovery for economic loss caused by negligence to narrow and well defined categories … it would create an anomaly to allow recovery for economic loss as a general principle where this is caused by invalid administrative action.

However, in my view, no anomaly would be created because administrative law damages would be discretionary. Thus, a court would be expected to make decisions on damages having regard to public law considerations, and economic loss would be only one of those considerations when assessing whether to award damages in a particular case. As Arrowsmith points out: "[t]he need to limit recovery for economic loss does not provide a conclusive argument against a principle of liability".[38]

According to Carol Harlow, another difficulty with awarding damages in administrative law is that courts have less experience than public authorities in making administrative decisions, and such proceedings may be overly burdensome on the legal system.[39] But this argument underestimates the courts' ability to adapt to novel areas of law. Moreover, judges are often called upon to make broad judgements without substituting their decisions for those of public authorities.[40] If the courts can make what are often judgement calls on damages in private law proceedings,[41] then why can they not also do so in public law proceedings? Hence, I agree with the United Kingdom Justice Committee to the extent it recommends that the courts are an appropriate institution to deal with such claims.[42]

Another traditional justification for denying administrative law damages is that an invalid decision is void of legal effect, cannot adversely affect a person,[43] and the only effect is delay.[44] But there are good reasons to question this argument.[45] For instance, where a public authority refuses to give permission for a business start-up, and that decision is made in breach of the principles of natural justice, the business suffers a loss as it cannot earn any revenue during the period of delay.

Defensive practice concerns are also presented as arguments against administrative law damages. First, it has been argued that because judges will be aware of the

34 Michael Fordham "Reparation for Maladministration: Public Law's Final Frontier" (2003) 8 JR 104 at 104.
35 At 104.
36 Arrowsmith, above n 29, at 237.
37 At 237.
38 At 238.
39 Carol Harlow *Compensation and Government Torts* (Sweet & Maxwell, London, 1982) as cited in Arrowsmith, above n 29, at 238.
40 Craig, above n 14, at [21-007].
41 Todd, above n 21, at 1116.
42 Justice–All Souls Review Committee, above n 30.
43 Taylor, above n 20, at [5.60].
44 *Takaro Properties Ltd v Rowling* [1987] 2 NZLR 700 (PC) at 709–710.
45 Taylor, above n 20, at [5.60].

consequences of holding a decision invalid, they will be "distinctly more hesitant to quash decisions in borderline cases".[46] However, it is also possible that judges will not make decisions with a defensive frame of mind. This is because the plaintiffs will only be compensated for loss they suffer, and nothing more.[47] Secondly, George Barton has argued that public authorities might rely excessively on legal advice before coming to a decision, which may lead to slower—and therefore less effective—administration.[48] However, Peter Cane points out that this argument is non-specific, is supported by little empirical evidence and is not only relevant to public law contexts.[49] Moreover, a countervailing argument might be that the possibility of damages awards might improve the quality of administrative actions and decisions.[50] Therefore, the defensive practice argument does little to justify denying the availability of administrative law damages.

As Cane argues, there appears to be no sound argument of legal principle to justify the unavailability of administrative law damages. The only logical reason to deny damages would be due to concerns about the impact on the public purse.[51] While a general right to damages may create an excessive burden on the public purse, the same is not necessarily true for discretionary damages. Public purse considerations may well be a relevant factor in a court's decision about whether to award damages. Therefore, the reasons for making an award must be solid. I consider that the facts of *Jain* are an example of a situation in which it would be appropriate to spend public resources on an award of damages.

(2) Conclusion on whether administrative law damages ought to be available

Most of the arguments opposing administrative law damages are rebuttable, or do not provide a sufficient reason for denying administrative law damages in principle. I agree with Cane's argument that if the law starts from the position that loss should not be left uncompensated, rather than the position that damages are only available for common law causes of action, then there is force in the argument that damages should be available as a remedy for unlawful administrative action.[52] The House of Lords even considered that the gap in administrative law remedies is a gap that does not exist in more developed systems.[53]

D *Should damages only be awarded for breaches of natural justice?*

Another issue to consider is whether there are reasons why damages should not be available as a remedy for breach of natural justice under s 27(1) of the NZBORA, given that they are not currently available as a remedy for the other two categories of administrative law wrongs (illegality and irrationality). In *Combined Beneficiaries Union Inc v Auckland City COGS Committee*, Glazebrook J considered that it would be inappropriate "to isolate only breaches of natural justice" for an award of NZBORA damages, and to exclude an

46 Public and Administrative Law Reform Committee *Damages in Administrative Law* (May 1980) at 35.
47 Barton, above n 17, at 149.
48 At 149.
49 Cane, above n 28, at 500–501.
50 Barton, above n 17, at 149.
51 Cane, above n 28, at 491.
52 At 492.
53 *Hoffman-La Roche v Secretary of State for Trade and Industry* [1975] AC 295 (HL) at 358–359 per Lord Wilberforce.

award of damages for the other grounds of judicial review.[54] In Glazebrook J's view, "[t]he scope of remedies for public law wrongs is a complicated issue and should be tackled in a holistic rather than piecemeal fashion".[55] There appear to be three possible responses to this alleged inconsistency problem: reading in all three grounds of review to s 27, only awarding damages for breach of natural justice, and administrative law damages being made available generally.

The first response would be to read in all three grounds of review to s 27. On its face, s 27(1) sets out a right only to natural justice. It does not extend to the other two grounds of judicial review. While s 27(2) sets out a right to apply for judicial review (which is not limited to any particular ground of review), this section has been treated simply as having "secured" judicial review.[56] Previous attempts to strain the interpretation of s 27(2) in order to extend the boundaries of judicial review have failed.[57] It has also been said that s 27(2) does not "oust or trump established judicial review principles".[58] Hence, s 27(1) currently needs to be treated as applying only to breaches of natural justice.

The second response (only awarding damages for breach of natural justice) is persuasive. In section 27(1), Parliament has provided a right to natural justice. However, if the NZBORA has not provided rights in relation to the other two heads of review, then it seems more anomalous to deny damages in relation to s 27(1) than it would be to not to award damages under those heads of review. Another justification for this solution is that if damages are awarded under s 27(1) for breach of natural justice, this avoids what is arguably an inconsistency within the NZBORA—namely, accepting *Baigent* damages as a discretionary remedy for most breaches of the NZBORA, but not accepting them as a remedy for breaches of natural justice. Thus, there is an inconsistency in awarding damages for breaches of natural justice, but not other administrative law wrongs. But equally, there would be an inconsistency if damages were not allowed for breaches of natural justice when they are available as a discretionary remedy in relation to other breaches of the NZBORA.

A third response would be for courts to award damages for breaches of s 27(1), and allow this to act as a catalyst for a development that might result in administrative law damages being available for all three heads of judicial review. Rodney Harrison QC, a leading litigator in NZBORA cases, once appeared hopeful that this solution would be favoured.[59] While this may currently be a remote prospect, the position might change if courts were to accept that the law against administrative law damages is outdated.[60] Should that happen, Harrison's hope might become the "holistic" solution to which Glazebrook J was referring.[61]

54 *Combined Beneficiaries Union Inc*, above n 13, at [61].
55 At [61].
56 *McKean v Attorney-General* [2007] 3 NZLR 819 (HC) at [40].
57 *Young v New Zealand Police* [2007] NZCA 339; *Siola'a v Wellington District Court* [2008] NZCA 483, [2009] NZAR 23; and *Young v Christchurch City Council* HC Christchurch CIV-2008-409-003095, 9 April 2009.
58 Taylor, above n 20, at [16.16].
59 Rodney Harrison "The Remedial Jurisdiction for Breach of the Bill of Rights" in Grant Huscroft and Paul Rishworth (eds) *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (Brookers, Wellington, 1995) 401 at 438–439.
60 See Taylor, above n 20, at [5.60].
61 *Combined Beneficiaries Union Inc,* above n 13, at [61].

III NZBORA Damages

Despite there having been no movement on the rule against administrative law damages, the Court of Appeal in *Baigent* established that damages are available as a remedy for breaches of the NZBORA, notwithstanding the omission of an explicit remedies provision in the NZBORA.[62] The Court ruled that NZBORA damages (or the *Baigent* remedy, as it is commonly referred to) is a public law remedy, rather than a private law remedy.[63] Moreover, the Court found that an action for damages under the NZBORA was an action directly against the Crown, rather than an action for which the state is vicariously liable.[64] The Court also found that *Baigent* damages are a discretionary remedy, rather than being available as of right.[65] Therefore, *Baigent* damages are but one remedial option. Importantly, *Baigent* also established that a remedy for breach of the NZBORA must be adequate, appropriate and effective.[66]

Following the *Baigent* decision, "a revolution appeared to be in the offing. But … [t]hat revolution never happened."[67] It would appear that the rule against administrative law damages discussed in Part II has cast a long shadow over the development of NZBORA damages in general, and damages for breach of s 27(1) in particular. That shadow is well illustrated by the following comments made by Glazebrook J in *Combined Beneficiaries Union*:[68]

> Damages for public law wrongs are not normally available at common law and it is not the function of Bill of Rights damages to fill any perceived gap in remedies for such wrongs.

Awards of NZBORA damages have been infrequent and minor.[69] This has been especially the case for breaches of s 27(1). In *Combined Beneficiaries Union*, Glazebrook J commented that damages for breaches of s 27(1) of the NZBORA are rarely awarded.[70] However, both judges in *Combined Beneficiaries Union* expressly left open the issue of whether NZBORA damages would be available for a breach of s 27(1) in a future case.

A *Should Baigent damages be available for breach of s 27(1)?*

The starting point is the Supreme Court decision in *Taunoa v Attorney-General*.[71] Decided after *Baigent*, *Taunoa* contains a comprehensive discussion of the approach taken to NZBORA remedies.[72]

62 *Baigent's case*, above n 12, at 676–677, 692, 702–703 and 718.
63 At 677, 692, 702–703 and 718.
64 At 677, 692, 702–703 and 718.
65 At 676, 692, 702–703 and 718.
66 At 677, 692, 702 and 718.
67 Geoff McLay "Damages for Breach of the New Zealand Bill of Rights – Why Aren't They Sufficient Remedy?" [2008] NZ L Rev 333 at 334.
68 *Combined Beneficiaries Union Inc*, above n 13, at [61].
69 McLay, above n 67, at 334–335.
70 *Combined Beneficiaries Union Inc*, above n 13, at [56].
71 *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429.
72 Butler and Butler, above n 1, at [26.7.8].

(1) General approach to NZBORA remedies

Taunoa reaffirmed the *Baigent* requirement of an "effective remedy".[73] *Baigent* established that NZBORA damages will only be awarded where there is no other effective remedy.[74] In *Taunoa*, Blanchard J built upon this idea. His Honour stated that a court must:[75]

> … begin by considering the non-monetary relief which should be given, and having done so it should ask whether that is enough to redress the breach … taking into account any non-Bill of Rights Act damages which are concurrently being awarded to the plaintiff. It is only if the Court concludes that just satisfaction is not thereby being achieved that it should consider an award of Bill of Rights Act damages. When it does address them, it should not proceed on the basis of any equivalence with the quantum of awards in tort.

Therefore, under this general approach to NZBORA remedies, it is difficult to succeed in a claim for damages under s 27(1). This is because, often, there will be an existing tort that provides effective compensation. Where this is not the case, a breach of natural justice can often be rectified by a remedy other than damages, such as a right of appeal.

In addition to requiring that any remedy be effective, the Supreme Court considered that it "must also be appropriate and proportionate" to the particular breach.[76] Appropriate means that the remedy must not only be effective, but also suited to the particular case.[77] Proportionate means that the remedy must balance private and public interests, and "strike the right note".[78] Therefore, in selecting a remedy for a breach of the NZBORA, the focus is on it being effective, appropriate and proportionate.

Another important concept underpinning the jurisprudence of NZBORA remedies is that of "vindication".[79] In *Taunoa*, Blanchard J accepted a dictionary definition for vindication: "to defend against encroachment or interference".[80] McGrath J described vindication as the "upholding [of the right] in the face of the state's infringement".[81]

In *Taunoa*, Blanchard J gave the leading judgement on the general approach to NZBORA remedies.[82] Tipping, McGrath and Henry JJ expressly concurred.[83] Blanchard J considered that:[84]

> The primary task is to find overall a remedy or set of remedies which is sufficient to deter any repetition by agents of the state and to vindicate the breach of the right in question.

In his Honour's view, compensation was a secondary objective of NZBORA remedies, and punishment was not a consideration.[85]

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73 *Taunoa*, above n 71, at [106], [232], [300] and [364]–[365].
74 *Baigent's case*, above n 12, at 676, 692, 703 and 718.
75 *Taunoa*, above n 71, at [258].
76 At [300]. See also at [367].
77 Butler and Butler, above n 1, at [26.7.4].
78 At [26.7.5].
79 At [26.7.7].
80 *Taunoa*, above n 71, at [253].
81 At [366].
82 At [121]–[274].
83 At [299], [373] and [385].
84 At [253].
85 At [255].

(2) Should compensation be a secondary objective of NZBORA remedies?

While Blanchard J gave the leading judgment in *Taunoa*, Tipping J, in the same case, considered that compensation and vindication "have an equal claim for attention in providing an effective remedy for a Bill of Rights breach".[86] His Honour's reason for a "dual purpose" remedy was that a breach of human rights has two victims: first, the immediate victim, and secondly, society as a whole.[87] That said, Tipping J did concur with Blanchard J's approach to remedies, albeit "in general terms".[88]

Like Tipping J, Elias CJ, in her dissenting judgment in *Taunoa*, appeared to place more weight on the compensatory function of NZBORA remedies, as she considered that compensation and vindication were interrelated. In her Honour's opinion, "[w]ithout adequate compensation, the breach of right is not vindicated."[89] She also considered that "vindication adopted must recognise the importance of the right and the gravity of the breach".[90] Elias CJ did not expressly concur with Blanchard J's approach to NZBORA remedies. Therefore, while Blanchard J considered that compensation was a secondary function of NZBORA remedies, Elias CJ and Tipping J appeared to consider that compensation is something more than secondary. Henry J generally agreed with both Blanchard and Tipping JJ.[91] This would seem to indicate that he did not see any substantial divergence between the two approaches.

It is noteworthy that, on the facts of *Taunoa*, the plaintiffs suffered no pecuniary loss. As such, the compensatory function of the remedy was focussed on intangibles such as offended feelings and harsh conditions. In the view of Butler and Butler, this factual context is important "when considering the degree of divergence between the Tipping J and Blanchard J approaches to the compensatory focus of BORA damages".[92]

The different approaches to remedies taken by Blanchard and Tipping JJ in *Taunoa* are reconcilable. According to Blanchard J, the primary objective of NZBORA remedies is deterrence and vindication, not compensation. However, Blanchard J still regarded compensation as a secondary consideration. Blanchard J's approach does not trivialise a claim for compensation where there is a genuine loss, although it does seem that the courts now tend to treat instances of intangible harm as only involving moderate loss.

Turning now to Tipping J's approach to remedies in *Taunoa*, his Honour considered that an effective remedy had the dual purpose of vindication and compensation.[93] Admittedly, Tipping J began his explanation with the plaintiff's position, but simply said that the interests of the plaintiff "require the court to consider what, if any, compensation is due".[94] Tipping J then explained that "the court must also consider what is necessary by way of vindication in order to protect society's interests in the observance of fundamental rights and freedoms".[95]

The key to analysing the approaches of Blanchard and Tipping JJ to NZBORA remedies is to appreciate that they are public law remedies. This leads to Blanchard J's conclusion

86 At [317].
87 At [317].
88 At [299].
89 At [109].
90 At [112].
91 At [385].
92 Butler and Butler, above n 1, at [27.6.7].
93 *Taunoa*, above n 71, at [317].
94 At [317].
95 At [317].

that the primary objective is deterrence and vindication. This objective calls for an assessment of what is an appropriate remedy. Only if damages are determined to be the appropriate remedy does it become an objective. But if it does become an objective, then, as Tipping J seems to indicate, compensation for any loss suffered must be considered when deciding a proportionate response.

That said, some commentators take the view that the majority approach in *Taunoa* represents a significant shift away from providing victims of human rights breaches with "effective" compensation, and towards an approach that views society's perceived needs as a priority.[96] Jason Varuhas has described this shift in approach as moving towards a "'public interest' conception" of the *Baigent* remedy.[97] Accordingly, Varuhas argues that this approach has effectively turned "human rights law on its head".[98] Harrison argues that the majority approach in *Taunoa* encourages "a double standard" as between contractual damages and NZBORA damages.[99] He argues that "[n]o one would argue that an apology mitigates or reduces an award of damages in a commercial setting. So why should it when human rights are at stake?"[100]

In light of the above two criticisms of *Taunoa*, compensation ought not to be a secondary objective of NZBORA damages. But, even if *Taunoa* is correct in finding that compensation is a secondary objective, *Taunoa* does not eliminate the possibility of compensatory damages being awarded in appropriate circumstances. A judge may still exercise his or her discretion to award compensatory *Baigent* damages where it is appropriate and proportionate.

(3) How does this general approach to NZBORA remedies apply to natural justice?

Blanchard J considered that in order to determine whether NZBORA damages ought to be awarded in a particular case, a Court should begin by looking at "the nature of the right and the nature of the breach".[101] His Honour considered that:[102]

> It may be entirely unnecessary or inappropriate to award damages if the breach is relatively quite minor or the right is of a kind which is appropriately vindicated by non-monetary means.

Blanchard J also considered that breaches of natural justice are unlikely to warrant an award of damages, as they are "better addressed by a traditional public law means", such as an order to rehear the proceedings.[103] Tipping J also accepted this.[104]

Other cases concerning breaches of s 27(1) have also taken the approach that breaches of natural justice are likely better vindicated by non-monetary means.[105]

96 Rodney Harrison "Using Human Rights Law in Litigation: Remedies for Breach of the New Zealand Bill of Rights Act 1990" (25 June 2014) <www.rodneyharrisonqc.com> at 11.
97 Jason Varuhas "The Development of the Damages Remedy under the New Zealand Bill of Rights Act 1990: From Torts to Administrative Law" [2016] NZ L Rev 213 at 213.
98 At 240.
99 Harrison, above n 96, at 13.
100 At 13.
101 *Taunoa*, above n 71, at [261].
102 At [256].
103 At [261].
104 At [298].
105 *Combined Beneficiaries Union Inc*, above n 13, at [56]; and *Attorney-General v Udompun* [2005] 3 NZLR 204 (CA) at [169].

In *Attorney-General v Udompun*, Glazebrook J commented that "there is force in the proposition that compensation should not be available for breaches of natural justice as a matter of course".[106] These comments, however, have been interpreted to mean that an award of damages for breaches of s 27(1) will likely be rare (in situations where there is no other effective remedy), rather than never being available.[107] In *Combined Beneficiaries Union*, Glazebrook J considered that an award of damages for breach of s 27(1) would be:[108]

> … confined to circumstances where there is no other effective remedy, where human dignity or personal integrity or (possibly) the integrity of property are also engaged and where the breach is of such constitutional significance and seriousness that it would shock the public conscience and justify damages being paid out of the public purse.

After discussing these circumstances proposed by Glazebrook J, Butler and Butler go on to say that, in their view, "it would not be appropriate to shut the door on damages claims for breach of s 27(1) in appropriate cases".[109] Further, they note that the examples of cases given in *Combined Beneficiaries Union* where it would be appropriate to award damages for a breach of s 27(1) are "good ones".[110]

Therefore, in *most* circumstances, breaches of the right to natural justice will likely be better addressed by non-monetary, traditional public law means. This article argues that there are nevertheless *limited* circumstances in which a breach of the right to natural justice can only be remedied by an award of damages. But what are these limited circumstances?

On its face, Glazebrook J's words require the matter to involve human dignity, personal integrity or (possibly) the integrity of property, before damages can be awarded. However, these words are obiter and draw heavily on reasons given by Blanchard J in *Taunoa* for an award of damages.[111] However, the facts of *Taunoa* called for a focus on intangibles such as hurt feelings and harsh conditions. Glazebrook J's requirement that the breach must be of such constitutional significance and seriousness that it would shock the public conscience and justify damages is likely to resonate with the Supreme Court. It ties in with a statement by Williams J in *Binstead v Northern Region Domestic Violence Approval Panel (NR)* that monetary compensation is only appropriate in "egregious cases".[112] In cases involving pecuniary loss as opposed to intangible harm, the Supreme Court would want to be satisfied that the breach is egregious.

As Butler and Butler point out, "whether a remedy ought to be granted is a matter of discretion" and "a wide range of matters can be legitimately considered in deciding on what remedy is effective, appropriate and proportionate in the individual circumstances".[113] Eleven factors likely to be most relevant to the assessment of whether NZBORA damages ought to be awarded for a breach of s 27(1) are as follows.

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106 *Udompun*, above n 105, at [168].
107 *Percival v Attorney-General* [2006] NZAR 215 (HC) at [51]–[52].
108 *Combined Beneficiaries Union Inc*, above n 13, at [70].
109 Butler and Butler, above n 1, at [27.10.14].
110 At [27.10.14].
111 *Combined Beneficiaries Union Inc*, above n 13, at [62] and [70].
112 *Binstead v Northern Region Domestic Violence (Programmes) Approval Panel* [2002] NZAR 865 (HC) at [35].
113 Butler and Butler, above n 1, at [26.7.15].

The first is "the nature of the actor who committed the (alleged) breach"[114]—in other words, that NZBORA damages ought not to be available for judicial breaches of s 27(1).[115] The second is "the nature of the right that has been breached".[116] As outlined above, *Combined Beneficiaries Union* provides examples of cases where it would be appropriate to award damages for a breach of s 27(1) but which, for the reasons outlined above, should not be read as an exhaustive list. The third is "the circumstances and seriousness of the breach";[117] the motives or intentions of the wrongdoer and/or the gravity of the breach may potentially be relevant. The fourth is "the seriousness of the consequences of the breach";[118] for example, an affront to human dignity would likely be a serious consequence. The fifth is "the nature of the damage or loss caused by the breach",[119] taking into account that a range of compensable losses can be recoverable—including, for example, economic loss, humiliation and damage to feelings.[120] The sixth is "the defendant's response to the breach".[121] The seventh is "whether a non-monetary remedy … is adequate vindication in the circumstances";[122] for example, remitting the decision back to the decision-maker. The eighth is "any relief awarded on a related cause of action";[123] for example, damages not being available for breaches of s 27(1) in addition to tortious damages. The ninth is "any public interest factors", including "deference", "impact on the public purse" and the "class of person affected by the breach".[124] The tenth is "any applicable statutory rules providing immunity from liability, restricting the amount of BORA damages, or providing relief for all or part of the damages occasioned by the breach".[125] Finally, the eleventh is "failure to mitigate damage, the plaintiff's (mis)conduct, and other disentitling factors".[126]

It is possible that a New Zealand court might also look for guidance from European case law on art 41 of the European Convention on Human Rights (the Convention), which empowers the European Court of Human Rights (ECHR) to award just satisfaction for a violation of the Convention. However, this may not be of much help, as the ECHR has not developed particularly clear principles on this issue.[127]

Two points should be emphasised. First, the seriousness of the breach discussed in factor three above is an extremely important factor for a court to consider when deciding whether an award of damages is justified.[128] It has been suggested that seriousness is judged by reference to "the relative importance of the right in issue", the "gravity of the particular breach" and potentially "the motives or intentions of the wrongdoer".[129] The right to natural justice should only be downplayed where a breach of that right is not

114 At [27.8.2].
115 See *Chapman v Attorney-General* [2011] NZSC 110, [2012] 1 NZLR 462.
116 Butler and Butler, above n 1, at [27.8.2].
117 At [27.8.2].
118 At [27.8.2].
119 At [27.8.2].
120 At [27.24.1].
121 At [27.8.2].
122 At [27.8.2].
123 At [27.8.2].
124 At [27.8.2].
125 At [27.8.2].
126 At [27.8.2].
127 Craig, above n 14, at [30-029]. See also McLay, above n 8, at 380, where he describes this jurisprudence as "shambolic". See also Cornford, above n 28, at 235.
128 See *Combined Beneficiaries Union Inc*, above n 13, at [73]–[79].
129 Butler and Butler, above n 1, at [27.11.1].

a serious breach that has serious consequences. However, it seems clear that the breach will need to be egregious. Put another way, it is likely to "depend upon the degree of culpability involved: there should be no damages for maladministration unless it is very very bad".[130] Secondly, a court should consider, in deciding whether to award damages, the nature of the loss, as discussed in factor five above. However, I see no justification for any suggestions or inferences that economic loss is less important than other items of loss.[131] Loss is loss.

Therefore, damages ought to be awarded for breaches of s 27(1) when, in cases such as *Jain*, all of the above factors relevant to the discretionary exercise of decision-making power are taken into account, and point to a proportionate award of damages being the only effective remedy.

B *How to determine the quantum of damages for breach of s 27(1)*

If a court decides to award damages for a breach of s 27(1), it must then determine the quantum of those damages. Will the quantum of damages include an amount that compensates for any loss suffered? Or will the quantum of damages be just a modest, conventional amount of vindicatory damages, to deter the conduct and/or mark the interference with the right? It is unlikely that the quantum of any damages will be nominal, since "nominal damages benefits neither the victim nor society".[132]

The majority in *Taunoa* considered that an appropriate starting point for an award of NZBORA damages is that damages should be "moderate"[133] and "restrained".[134] In *Taunoa*, Blanchard J considered that the primary function of NZBORA damages is to bring the infringing conduct to an end and ensure future compliance, whereas making amends to a victim is generally a secondary function.[135] Thus, the primary objectives of NZBORA damages are deterrence and vindication rather than compensation. Punishment is not a consideration.[136] Blanchard J noted that these objectives distinguish NZBORA damages from private law damages.[137]

Therefore, taking the majority's approach in *Taunoa*, the quantum of damages in most cases involving breaches of the NZBORA will likely be a modest, conventional amount of vindicatory damages intended to mark the wrong to the plaintiff rather than to compensate for loss suffered. However, the problem with taking this approach too far is that if a plaintiff suffers actual loss and deserves a higher award of compensatory damages than would be awarded by a conventional sum of vindicatory damages, then that loss will go uncompensated. Hence, vindicatory damages sometimes only go so far in solving the problem. This raises the question: in what circumstances can the compensatory function of NZBORA damages operate?

130 Baroness Hale "Justice for the Jains: Remedies for Bad Administration" (2011) 12(3) Otago LR 439 at 450.

131 Compare *Combined Beneficiaries Union Inc*, above n 13, at [98]–[99] per Baragwanath J; and *Taunoa*, above n 71, at [322] per Tipping J.

132 *Taunoa*, above n 71, at [264].

133 At [265].

134 At [257].

135 At [259].

136 At [255].

137 At [243].

If damages are determined to be the appropriate remedy, then compensation for any loss suffered must be considered when deciding a proportionate response. This must mean that:[138]

> … it goes without saying, so long as one of the functions [of damages] can be and should be performed by an award of BORA damages, that will be a sufficient basis for an award to be made.

In *Taunoa*, Tipping J considered that:[139]

> Everything relevant to compensating for what the plaintiff has suffered as a result of the breach is potentially available here. *Economic loss clearly qualifies*, as does compensation for non-economic or intangible damage or detriment.

Hence, where a plaintiff suffers loss as a result of a breach of s 27(1) for which vindicatory damages would be insufficient redress, the plaintiff should be awarded compensatory damages. However, this remains a matter of the Court's discretion.

Furthermore, in *Taunoa*, it appears that at least part of the damages awarded were compensatory in nature. In that case, one plaintiff's award of damages was proportionately larger than the other plaintiff's award of damages, considering the time spent on the Behaviour Management Regime (a programme that five prisoners were subject to and which was found to be in breach of s 23(5) of the NZBORA).[140] This is because he suffered disproportionately due to a pre-existing psychiatric injury. Hence, the actual effect of the Behaviour Management Regime on the plaintiff was taken into account in determining the quantum of damages. This begs the question of whether the compensatory objective of NZBORA damages does in fact play a more important role in determining the quantum of damages than is credited in case law, despite it being a secondary consideration.[141]

Looking at the matter solely in terms of vindication, there are good reasons to question why only moderate awards of NZBORA damages must be awarded. This may only remedy small injustices. Where there has been a substantial injustice, arguably the unlawful administrative action is more likely to have considerable consequences for the community.[142]

The reality seems to be that most cases of intangible harm are treated as deserving only a modest, conventional quantum of damages. Despite their characterisation, any award of damages may be part compensatory and part vindicatory. The award will be something extra to mark disapproval of conduct that shocks the public conscience. In those rare cases where there is tangible harm, albeit economic, then that harm is, on the face of it, deserving of compensation. However, as the plaintiff is claiming a public law remedy, they must accept that any damages awarded are discretionary. It must be the only effective remedy, and it may only be made, and the quantum assessed, after balancing all the factors mentioned in this article, including the requirement that the remedy be proportionate.

138 Butler and Butler, above n 1, at [27.6.3].
139 *Taunoa*, above n 71, at [322] (emphasis added).
140 At [1].
141 See McLay, above n 67, at 364 where McLay provides an excellent description of this point, although it appears to concern him.
142 Barton, above n 17, at 148.

IV Causation

An issue that arises in cases where courts are asked to award damages for breaches of natural justice is that the court can never be certain that a decision would have been different but for the breach of the right to natural justice. For example, where there has been a breach of the right to a hearing, a court cannot be certain that if there had been a hearing, the person subject to the decision would have said something that would have changed the decision-maker's mind. Thus, it can be difficult to establish that a breach has caused any loss claimed to have been suffered. The purpose of this Part is to explore whether causation (a private law concept) should be required for an award of *Baigent* damages (a public law remedy) for breach of s 27(1) and if so, how it should be established.

A *Should causation be required for s 27(1) damages?*

As already explained, private law damages fulfil a different objective than public law damages. Private law damages compensate for loss suffered, whereas public law damages are primarily designed to ensure that public authorities perform their functions properly. Accordingly, Lachlan Roots has argued that "concepts traditionally associated with private law damages, such as causation, should be removed from the public law remedy of damages".[143] Nevertheless, this argument lacks a convincing explanation as to why proving causation is not necessary for succeeding in a claim for substantial public law damages. It seems that this is because causation is needed to justify a claim based on loss, whether under private law or public law. Moreover, there is a reluctance to award substantial damages simply to mark the importance of the rule that has been breached.[144]

Generally, the availability of traditional public law remedies for breaches of natural justice has not depended on establishing that the decision would have been different had proper procedure been followed. As Arrowsmith has stated: "[i]n judicial review actions a court will normally grant a remedy regardless of whether it believes a reconsideration would make a difference."[145] Arguably, this is because the case law in this area is "strewn with examples of … unanswerable charges which, in the event, were completely answered" by an order that the matter be reheard.[146] However, while this provides a sound argument for not requiring proof of causation in relation to traditional public law remedies, such as orders for rehearing, it seems to me that it cannot apply in relation to claims for compensatory damages. While a claim for damages for breach of s 27(1) may include claims for compensatory and vindicatory damages, for any substantial claim to succeed, it is likely to need to be for compensation, and therefore require the plaintiff to prove that the defendant has caused the plaintiff's loss.

B *How to establish causation*

If causation must be proved, then one way to do so would be to remit the matter for rehearing by the relevant authority. However, despite the argument outlined above (that

143 Lachlan Roots "Damages for Wrongful Administrative Action: A Future Remedy Needed Now" (1995) 2 A J Admin L 129 at 148.

144 Cane, above n 28, at 499. See also *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245; and *Lewis v Australian Capital Territory* [2020] HCA 26, (2020) 381 ALR 375.

145 Arrowsmith, above n 29, at 30.

146 *John v Rees* [1970] 1 Ch 345 (Ch) at 402 per Megarry J.

the cases are strewn with examples of unanswerable charges that are completely answered), this approach runs the risk that it will incentivise the public body to endeavour to justify the initial decision after following proper procedure.[147]

A second possibility is not to try and determine what the outcome might be had proper procedure been followed, but instead to simply assess the damage suffered by natural justice not being observed.[148] However, this is likely to be seen as too arbitrary to form a basis for any comprehensive solution.

A third approach is to deal with the issue on a case-by-case basis.[149] Some writers object to this approach "on the basis that it involves the courts adjudicating on matters which have been entrusted by the legislature to administrative authorities".[150] The issue here is whether determining causation would force the courts to go beyond reviewing the legality of a decision and decide the merits of the decision—contrary to what is regarded as acceptable in relation to judicial review.[151] This issue does not arise where the public authority is held to have had no power to act because, in that situation, a court is simply assessing the consequences of something that should not have been done.[152] But, where the public authority does have the power to act and has acted improperly, the court is effectively required to form a view on the matter.[153] This means it must undertake a partial merits review, insofar as it must assess what would have been the outcome had the matter been properly decided, in order to determine loss and causation. In doing so, the court is not substituting its own decision, but simply conducting an unavoidable hypothetical inquiry in order to make a meaningful assessment of damages and causation.[154] However, as Arrowsmith also points out, a different approach may be required in cases involving "discretion" problems "where it is difficult to assess the plaintiff's prospects of a favourable decision".[155] In these situations, it is suggested that the plaintiff should be required to prove its case on the balance of probabilities. If the plaintiff cannot do this, then, unless vindicatory damages are available, it may be that damages should usually not be awarded, since "it seems difficult to justify a wholly novel approach simply because the issue which the court must decide depends on how a public law discretion would have been exercised".[156]

C *Vindicatory damages when no causation*

In private law, damages are usually awarded to compensate the plaintiff for loss caused by the defendant.[157] However, even under private law, awards of damages are sometimes made solely "to formally recognise and vindicate the claimant's right to be free from the interference complained of".[158] It has been argued that causation does not need to be proved in relation to claims for vindicatory damages, which are not to compensate, but

147 Peter Cane *An Introduction to Administrative Law* (3rd ed, Clarendon Press, Oxford, 1996) at 75.
148 See *Upton v Green (No 2)* (1996) 3 HRNZ 179 (HC).
149 Arrowsmith, above n 29, at 31.
150 At 31.
151 Barton, above n 17, at 143.
152 At 143.
153 At 143.
154 At 143.
155 Arrowsmith, above n 29, at 32.
156 At 32.
157 Todd, above n 21, at chs 20 and 25.
158 At 1314.

to vindicate a right.[159] However, a sound basis for vindicatory damages claims is that the powers accorded by fundamental rights to prevent infringement are akin to assets, the loss of which should be compensated by monetary damages.[160] Notwithstanding the above arguments, a restrained approach to vindicatory damages has been taken not only in New Zealand,[161] but also in England and Australia.[162]

V Conclusion

As a result of *Baigent*, it is clear that an award of damages is one of the discretionary remedies available for a breach of the NZBORA, including a breach of s 27(1). However, it seems that the rule against administrative law damages has restrained the development of NZBORA damages. This is particularly so in relation to damages claims based on s 27(1). Such claims deal not only with claims against public authorities, but also claims that relate to only one of the three heads of challenge under administrative law, and which are often for economic loss. In short, s 27(1) damages can be viewed as the most direct challenge to the rule against administrative law damages, and one that poses a threat to the public purse.

While damages awarded for breaches of s 27(1) will be rare, the case law leaves open the possibility that they may nevertheless be awarded for serious breaches that have serious consequences for the plaintiff. Section 27(1) damages are a discretionary remedy and will only be awarded where there is no other effective remedy. Moreover, s 27(1) damages must be proportionate, and therefore have due regard not only to the individual's right to natural justice, but also the public interests served by the public authorities whose actions sometimes breach those rights, and the other factors mentioned in this article. *Baigent* damages are, after all, a public law remedy.

159 Jason NE Varuhas "Before the High Court — *Lewis v Australian Capital Territory*: Valuing Freedom" (2020) 42 Syd LR 123 at 136.

160 See Kit Barker "Damages Without Loss — Can Hohfeld Help?" (2014) 34 Oxf J Leg Stud 631.

161 *Taunoa*, above n 71, at [257] and [265] per Blanchard J.

162 See *R (Lumba)*, above n 144; and *Lewis*, above n 144.