IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI

SC 107/2024

BETWEEN	**DANIEL CLINTON FITZGERALD**
	Appellant
AND	**THE QUEEN**
	Respondent

SUBMISSIONS FOR THE APPELLANT

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MAY IT PLEASE THE COURT:

Introduction

1. Mr Fitzgerald's claim is simple:

   (a) He was subjected to a seven year term of imprisonment that the Crown admits was a breach of s 9 BORA.[1] He served more than four and a half years of that sentence. Most of that period of imprisonment[2] was itself a breach of s 9 BORA and, in turn, a breach of s 22 BORA.[3] This Court has said: "[B]reaches of some rights … will **inevitably demand** a response which must include an award of damages whether in tort or under [BORA]. The **obvious example** is any breach of s 9."[4] That authority should apply here.

   (b) In international law, a person subjected to an arbitrary detention is entitled to compensation under art 9(5) of the International Covenant on Civil and Political Rights ("**ICCPR**"), regardless of which state actor might have caused that breach, and there is no need to identify the actor or actors involved – there is no reason for the BORA to be interpreted inconsistently with art 9(5).

   (c) *Attorney-General v Chapman* ("***Chapman***")[5] should not be relied upon to exclude state liability just because the sentence was imposed by a judge. *Chapman* was wrongly

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[1] Statement of Defence, para 3.1.
[2] Ellis J held in *Fitzgerald v Attorney-General of New Zealand* [2022] NZHC 2465 ("**HC judgment**") (at [71]) that the detention became grossly disproportionate 15 months after Mr Fitzgerald was first remanded in custody, from December 2016; accordingly, Mr Fitzgerald was arbitrarily detained for some 1334 days (or roughly 44 months). The appellant has accepted that finding.
[3] The respondent has not filed a notice to support the Court of Appeal judgment on other grounds (r 20A of the Supreme Court Rules refers) and hence Ellis J's finding of a breach of s 22 is not challenged before this Court.
[4] *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 ("***Taunoa***") at [261] (emphasis added).
[5] [2011] NZSC 110, [2012] 1 NZLR 462.

decided and should be departed from for reasons advanced by the appellant in this Court in *Putua v Attorney-General*. *Chapman* is inconsistent with the terms of art 2(3) and art 9(5) ICCPR and with the views of the Human Rights Committee as expressed in *Thompson v New Zealand*[6] and *Barrio v Spain*.[7] Article 9(5) was not considered by any judge in *Chapman*. Nor did *Chapman* involve s 9 or s 22 BORA inspired claims. It should not be extended to exclude state liability for breach of those provisions.

(d) The public policy concerns relied upon by the majority in *Chapman* do not arise here and so *Chapman* should not be applied:

(i) Judicial independence: this case does not involve personal liability for the sentencing judge, nor any attack upon – or undermining of – the judge's independence. State liability here will not prevent or discourage any judge from acting in accordance with what they consider to be the correct view of the law.

(ii) Liability here does not undermine finality of litigation. The judge's decision has been shown to be wrong in the ordinary way. These proceedings go with, not against, the grain of finality: there is no collateral attack on any judgment.

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[6] *Thompson v New Zealand*, View adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3162/2018, CCPR/C/132/D/3162/2018, Views adopted on 2 July 2021, reported at *Thompson v New Zealand* (2021) 12 HRNZ 873 (UNHRC).

[7] *Barrio v Spain*, Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication no 3102/2018, CCPR/C/136/D/3102/2018, Views adopted 25 October 2022.

(e) Even if *Chapman* were found to remain good law (denied), state liability for the breach of ss 9 and 22 BORA can be sheeted home to the Crown so long as some non-judicial action can be said to have made a material contribution to the breaches. That is consistent with normal human rights law principles[8] and with causation principles operative in other parts of the legal system.[9] Here, there has been a material contribution by the Crown prosecutor who selected the charge of indecent assault with no regard to s 9 BORA and with no regard to her role of acting as an administrative safety valve as contemplated at the time the legislation was passed. State liability arising out of the prosecutor's material contribution to the BORA breaches cannot be evaded just because the sentence was imposed by a judge, particularly when "the received understanding" at the time (to use the respondent's language)[10] was that the three-strikes regime required a judge to impose the maximum sentence upon conviction.

(f) The eventual setting aside of Mr Fitzgerald's (wrongly imposed) original sentence by this Court and his release post-resentence brought to an end his **ongoing** arbitrary detention (as per the requirements of art 9(4) and 14(5) ICCPR). But it did **not** provide him with redress for the **prior** period of arbitrary detention that he suffered (which is a separate requirement set out in art 9(5) ICCPR).

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[8] See *Attorney-General v Putua* [2024] NZCA 67 at [88]–[92]. See also *McAlister v Air NZ Ltd* [2009] NZSC 78, [2010] 1 NZLR 153 at [49] per Tipping J ("a material ingredient") and cases noted at 17.13.3 of A Butler & P Butler, *The New Zealand Bill of Rights Act: A commentary* 2nd ed 2015. See also *Henry v British Columbia (Attorney General)* 2015 SCC 24, [2015] 2 SCR 214 ("***Henry (SCC)***") at [98] ("[t]he 'but for' causation test may, however, be modified in situations involving multiple alleged wrongdoers. … In this scenario, the causation requirement will be satisfied if the claimant can prove that the prosecutorial misconduct materially contributed to the harm suffered").

[9] *W v ACC* [2018] NZHC 937, [2018] 3 NZLR 859 at [6](1) (ACC claim for mental injury caused by physical injury).

[10] Respondent's submissions opposing leave, 29 November 2014, at [34].

> Damages are what is required to provide appropriate redress for the egregious breach of his human rights arising out of the period of arbitrary detention that Mr Fitzgerald actually endured.

Essential facts

2. This Court is well familiar with the factual background of this case. The facts need no extensive recapitulation.

3. Mr Fitzgerald has been admitted to mental health facilities on at least 13 occasions. He has experienced severe psychosis, has schizophrenia, and has a history of substance abuse. He lacks family support and has had difficulty sustaining accommodation. He struggles to control impulses, especially sexual impulses. He has many criminal convictions.[11]

4. On 3 December 2016 Mr Fitzgerald kissed one woman without her consent and pushed another, on Cuba Street, Wellington. Both were strangers. The incident caused undoubted distress to both. He was charged with indecent assault, common assault, and breach of an extended supervision order. Indecent assault was a qualifying 'three strikes' offence under what was s 86A(12) of the Sentencing Act 2002. Mr Fitzgerald had been twice convicted of indecent assault before, meaning the 2016 charge could give rise to his 'third strike' offence. After a contested trial, he was found guilty on all charges. The High Court sentenced Mr Fitzgerald to seven years' imprisonment, considering it was required to do so by the legislation. The Court of Appeal agreed (by majority). In the Crown's language, these two decisions represented the received understanding of the three strikes scheme at the time.[12] The Supreme Court (by a 4-1 majority) found, however, that s 86D(2)

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[11] *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551 ("***Fitzgerald* (SC)**") at [156] (per Arnold and O'Regan JJ) and [263] (per William Young J); HC judgment at [20].
[12] Respondent's submissions on leave to appeal, 29 November 2014, at [34].

of the Sentencing Act could be interpreted in light of the New Zealand Bill of Rights Act 1990 ("**the Bill of Rights**") as subject to a limitation that the requirement to sentence an offender to the maximum sentence does not apply where to do so would breach s 9 of the Bill of Rights and New Zealand's international obligations. The courts below had misinterpreted the legislation and, accordingly, Mr Fitzgerald had wrongly been sentenced to seven years' imprisonment.

5. This case concerns whether the state is liable for the breach of Mr Fitzgerald's rights, in particular under ss 9 and 22 of the Bill of Rights. Because of *Chapman*, the focus at trial and before the Court of Appeal was on the Crown prosecutor's actions. The pleadings, however, were careful not to assign 'blame' to any particular s 3 Bill of Rights actor. The evidence showed that the Crown prosecutor was, on multiple occasions, able to review and amend the indecent assault charge.[13]

6. On 1 February 2017, as was required by the Memorandum of Understanding between the Solicitor-General and the Police Commissioner ("**the MOU**"), the Police sought peer review from the Crown prosecutor of their decision to charge Mr Fitzgerald with a third strike offence. Legal privilege has been maintained over the advice but the Police proceeded with the charge. A lawyer for Mr Fitzgerald emailed the Crown prosecutor on 7 April 2017 seeking an amendment to the charge (from indecent assault to common assault). On 10 April 2017, the Crown prosecutor refused to amend the charge, even though she accepted that "this is a relatively low level indecent assault".[14] That same day, counsel for Mr Fitzgerald proposed the charge to be amended to doing an indecent act (not a qualifying offence under the three strikes regime). There does not appear to have been a response to this

[13] Affidavit of Kate Feltham at [10]-[23].
[14] Affidavit of Kate Feltham, exhibit PKF-2.

proposal.[15] On 10 April 2017 the Crown prosecutor indicated that because the charge related to a third strike offence, the matter would need to be adjourned to the High Court. According to an affidavit filed, the Crown prosecutor had "no recollection of considering the likely sentencing consequences in … assessment of the public interest test".[16] This was despite the facts that:

(a) The received understanding of the three strikes regime was that successful conviction would result in the mandatory imposition of the maximum sentence of seven years.[17]

(b) Plainly, the imposition of the maximum sentence on Mr Fitzgerald would violate the illimitable right guaranteed by s 9 BORA.

(c) The prosecutor was under no duty to prosecute on a charge of indecent assault.

(d) There was an available non-strike offence that would allow Mr Fitzgerald's conduct to be adequately punished within the totality of offending sentencing principle[18] (bearing in mind that the assault on the friend was the more serious offending); that offence was doing an indecent act.

(e) The prosecutor was intended to act as an administrative safety valve so that the three strikes regime would not be applied in cases like Mr Fitzgerald's.

7. In September 2017 Mr Fitzgerald sought a sentencing indication. Dobson J indicated that "the Court would have to impose a sentence of seven years' imprisonment [if he were found guilty].

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[15] As noted in *Fitzgerald* (HC judgment), at [24]–[25].
[16] Affidavit of Philippa Kate Feltham at [22].
[17] Refer Crown's submissions on leave, 29 November 2014, at [34].
[18] Section 85, Sentencing Act 2002.

The Court would not have any choice in that matter".[19] His Honour also classified the assault "as being towards the bottom end"[20] and noted that "You are clearly in need of relatively high level of treatment for your mental health condition".[21] Unsurprisingly, Mr Fitzgerald pleaded not guilty. In March 2018 the late Simon France J found Mr Fitzgerald guilty on all three charges, though his actions were at the "lower end of conduct amounting to an indecent assault".[22] He sentenced Mr Fitzgerald to seven years' imprisonment in May 2018 even though "the nature of the assault is at the bottom end of the range" and despite his mental health issues, because "there is no discretion at all",[23] but found that a non-parole order would be manifestly unjust, so ordered that the normal parole period apply. The case was unsuccessfully appealed to the Court of Appeal before it succeeded in this Court.

8. This Court expressly noted that Parliament had underscored the need for the 'three strikes' regime to be administered in a way so that prosecutorial discretion could be exercised as a safeguard to avoid injustice.[24] Justices Arnold and O'Regan noted that the assessment of the charge in light of the Solicitor-General's prosecution guidelines "would take into account not just the sufficiency of the evidence, but also the public interest in prosecution, which would include Bill of Rights considerations".[25] Justice Glazebrook said: "To meet the concerns about possible overreach, an administrative process was put into place …"[26] In a footnote, her Honour added: "That administrative process seems

[19] *R v Fitzgerald* [2017] NZHC 2206 at [8]. See also [15].
[20] At [9].
[21] At [14].
[22] *R v Fitzgerald* [2018] NZHC 465 at [22].
[23] *R v Fitzgerald* [2018] NZHC 1015 at [21], [22] and [13].
[24] See discussion in HC judgment, at [41]–[50], citing the judgments of Winkelmann CJ, Arnold J (joined by O'Regan J), and Glazebrook J.
[25] *Fitzgerald v R* (SC), at fn 282.
[26] Ibid, at [248].

to have failed in this case." (It would appear that the Crown prosecutor here did not understand her role within that process.)

9. When the case came before the High Court again for re-sentencing, Simon France J said on 1 November 2021: "As matters stand, [Mr Fitzgerald] has served way too long for his offence."[27] His Honour found that a sentence of time served was appropriate, and noted that it was "a positive moment to be advised at sentencing that temporary accommodation will be available tonight and in the short term …"[28] His Honour also said: "in my view the state owes Mr Fitzgerald a duty to provide assistance as a matter of priority given the history of the matter."[29]

10. It is undisputed that Mr Fitzgerald suffered a breach of his rights under s 9 of the Bill of Rights as a result of the disproportionately severe punishment that he experienced. Ellis J (unsurprisingly) concluded that his detention was also a breach of s 22 BORA, and the respondent has not sought to raise this issue by way of a notice to support on other grounds. Nor has the respondent sought to challenge (1) Ellis J's determination that, assuming it was possible to award BORA damages here, they should be awarded; or (2) the quantum of the award made by Ellis J in the High Court.

11. Therefore, the question for this Court is whether the Court of Appeal was correct to allow the respondent's appeal on the ground that the breach of Mr Fitzgerald's rights in this case could not give rise to state liability, for the reasons given by that Court.[30] As part of answering that question, the status of this Court's decision in *Chapman* arises for consideration.

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[27] [2021] NZHC 2940 at [14].
[28] Ibid, at [12].
[29] Ibid.
[30] See decision of the Court on leave in *Fitzgerald v Attorney-General* [2024] NZSC 180: "The approved question is whether the Court of Appeal was correct to allow the appeal".

The reasoning in the courts below

12. In the High Court, Ellis J – after reviewing the facts and relevant context – noted that her approach was based on the law as it was understood to be in 2017.[31] Justice Ellis accepted that Mr Fitzgerald's detention was "lawful in the orthodox sense",[32] but noted that this did not answer the broader question of whether it was arbitrary under s 22: i.e. contrary to standards of appropriate state conduct.[33] Overseas authority has found that detention can be rendered arbitrary where it entails or results from breach of another right.[34] In this case, the detention became grossly disproportionate 15 months after Mr Fitzgerald was first remanded in custody, from December 2016; accordingly, Mr Fitzgerald was arbitrarily detained for some 1334 days (or roughly 44 months).[35]

13. Justice Ellis found (uncontroversially) that Crown prosecutors are state actors under s 3 of the Bill of Rights, and rejected the view that this was an area for judicial restraint: because compliance with the Bill of Rights "is a matter of duty", and/or because unlawful exercise of prosecutorial discretion is necessarily justiciable.[36] Justice Ellis observed that Parliament in this case expected a 'safety valve' role to be played by prosecutors,[37] and this role was captured explicitly by the MOU and implicitly by the Prosecution Guidelines (given "statutory heft" by s 188 of the Criminal Procedure Act 2011).[38] Prosecutors plainly had to consider the Bill of Rights, including s 9; the question was what more the Bill of Rights required them to do. Justice Ellis considered that where a stage-three prosecution would foreseeably and likely result in a

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[31] HC judgment, at [52].
[32] At [55].
[33] At [56].
[34] At [57].
[35] At [71].
[36] At [76]. Justice Ellis cited authority in support of this proposition, from New Zealand and overseas, at [77]–[90].
[37] At [92].
[38] At [94].

grossly disproportionate sentence that contravened notions of justice and risked undermining the integrity of the judicial process, and was so severe as to shock the national conscience, there was a duty on the prosecutor to prefer a different charge.[39] The Crown prosecutor had not done so (and had not considered s 9).[40]

14. Justice Ellis rejected the Attorney-General's submission that prosecutorial liability should be denied either because of an argument about the declaratory theory of law (that the judge always had the power to decline to impose a grossly disproportionate sentence, meaning the prosecutor was not in breach)[41] or because the judge's sentence superseded the prosecutorial error. Addressing *Thompson v Attorney-General*,[42] Justice Ellis expressed difficulty with the concept of causation in relation to s 22, and observed that the duty of prosecutor was simply "to make a decision that did not give rise to a foreseeable risk that Mr Fitzgerald would be detained pursuant to a grossly disproportionate sentence".[43] There followed a discussion of principles governing the award of damages under the Bill of Rights, an issue not in focus on this appeal.[44] Justice Ellis found that there was a presumption of compensation due to the right to compensation under art 9(5) ICCPR to which the Bill of Rights gives effect, and drew on an approach informed by the Prisoners' and Victims' Claims Act 2005 to find that an award of damages was necessary to provide effective redress;[45] $450,000 damages plus interest was appropriate.

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[39] At [97].
[40] At [98].
[41] Justice Ellis found that the prosecutor's decision was the primary safeguard and discretion at sentencing was a long-stop: see [107].
[42] [2016] NZCA 215, [2016] 3 NZLR 206.
[43] At [121].
[44] The Crown has not sought to support the Court of Appeal's judgment on other grounds.
[45] At [149].

15. The Court of Appeal approached the questions quite differently. The lead judgment (given by Cooper P, joined by Brown J) began by acknowledging that "[a]t the time of the decision to prosecute", because indecent assault was a stage-three offence under the three strikes regime, "there was … a risk that Mr Fitzgerald would become subject to a disproportionately severe punishment on sentencing"; that risk eventuated.[46] The judgment considered that the Attorney-General was "probably right" that there was no statutory duty under s 188 of the Criminal Procedure Act to comply with the Prosecution Guidelines, but did "not think the point is of any significance".[47]

16. After recounting the Guidelines at some length, as well as the MOU and relevant evidence, Cooper P and Brown J noted that "it is axiomatic that a sentence" is not the result of prosecutorial action but "the exercise of judicial power".[48] (With respect, because of the received understanding of the three strikes regime, that axiom did *not* apply; the prosecutor's choice of third-strike charge would determine the sentence to be imposed; the very point of Mr Fitzgerald's claim is that the three strikes regime fundamentally inverted the normal constitutional division of roles between court and prosecutor; this was recognised during the legislative debates; here only the prosecutor was meant to act as an administrative safety valve.) According to the lead judgment, the breach of Mr Fitzgerald's rights was the consequence of the sentence imposed by the judge.[49] The lead judgment then examined, again at some length, authorities favouring judicial restraint in review of prosecutorial discretion.[50] It was accepted that Mr Fitzgerald's case was not an application for review of the

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[46] *Attorney-General of New Zealand v Fitzgerald* [2024] NZCA 419 (**"*Fitzgerald* CA judgment"**) at [2].
[47] Ibid, at [43].
[48] Ibid, at [85].
[49] Ibid.
[50] From [92] of the judgment.

prosecutor's decision to prosecute, and it was also acknowledged that in an appropriate case it is possible to review a decision to prosecute.[51] But the lead judgment said there was no suggestion of "improper purposes" or prosecution on the basis of "considerations that could not properly be taken into account".[52] (With respect, this analysis wholly ignores what this Court said about how (1) the public interest test for prosecution "would include Bill of Rights considerations";[53] and (2) the importance of the administrative safety valve role of the prosecutor.)[54] The judgment also observed in passing that in addition to the judge's role in imposing the sentence needing to be properly acknowledged, Parliament's role in putting in place the legislative scheme should be highlighted.[55]

17. The lead judgment of the Court of Appeal considered the Prosecution Guidelines were correctly enforced. While the judgment records that their Honours could not "accept" the view that the prosecutor was obliged to proceed on "a lesser charge of indecent behaviour [sic]",[56] little explanation was given for that finding. This is somewhat surprising and difficult to reconcile with the acceptance by the President and Brown J "that Bill of Rights Act considerations should inform consideration of the public interest test in commencing a prosecution".[57] Cooper P and Brown J said it would be "very problematic" to claim that such considerations should give rise to a duty not to proceed with the charge in this case. Such a view "had no underpinning in the statute" (though no reference to BORA was made here),[58] and would not be "appropriate in terms of the architecture of the

[51] At [99]–[100].
[52] At [101].
[53] *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551 at fn 282.
[54] See discussion in HC judgment at [41]–[50], discussing relevant parts of the Supreme Court judgment.
[55] At [101].
[56] At [115] (this should be a reference to indecent act).
[57] At [119].
[58] Ibid.

constitution, the respective roles of the legislature …, the executive … and the judiciary" (though no reference was made here to s 3 of the BORA nor to the fact that the whole point of the three strikes regime was to depart from the usual constitutional architecture).[59] Cooper P and Brown J found that responsibility lay with the judge (and because *Chapman* could not be challenged in that Court that meant there could be no state liability). Ultimately the lead judgment recognised the injustice that cases like Mr Fitzgerald's case produce and suggested that some consideration should be given by the executive to a compensation scheme for those suffering disproportionate punishment under the three strikes regime.[60] (For completeness, at no stage has the Crown ever made an approach to settle this proceeding.)

18. Justice Miller agreed with the reasons of Cooper and Brown J, but wrote briefly on damages, with particular focus on causation principles for a case such as the present one.[61] Proffering some views on the matter, his Honour considered that the prosecutor's action might be considered a "cause in fact" of Mr Fitzgerald's sentence,[62] but was not a "cause in law", seemingly because the loss suffered was "too remote to be attributed to the prosecutor's original decision".[63] The Court had not heard argument on Justice Miller's causation thesis, including how it relates to human rights principles. More fundamentally, however, Miller J's causation analysis is impossible to square with the architecture of the three strikes regime, the principal feature of which was to make the prosecutor's choice of charge determinative of sentence outcome. Far from being remote, the prosecutor's choice was central.

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[59] At [120].
[60] At [138].
[61] At [153].
[62] At [154].
[63] At [155].

Preliminary issue: the Crown's argument that judicial actions not within scope of claim

19. The Crown has argued below that Mr Fitzgerald's claim hinges on the actions of the prosecutor and therefore no regard can be had to the actions of the Judge. That is not correct.

20. First, the pleading in the Amended Statement of Claim is not confined to the actions of the prosecutor. All material facts relevant to all state actors who made a material contribution to breach of Mr Fitzgerald's rights under ss 9 and 22 have been pleaded. The Crown has never identified a missing fact or a line of enquiry that it might have pursued but did not due to the appellant's pleading. Second, in the courts below counsel for Mr Fitzgerald recognised that it was not open to them to rely on the judicial acts in light of *Chapman*, as explained and applied beyond ss 25 and 27 cases in the Court of Appeal's reasoning in *Thompson v Attorney-General*.[64] However, counsel made it plain in the High Court and Court of Appeal that if this proceeding were to come before this Court, the correctness and applicability of *Chapman* would be put in issue and the contributions (if any) to the breach of ss 9 and 22 made by the Judge would be relied upon.[65] Third, leave has been granted by this Court for *Chapman* to be reconsidered.[66]

The Prosecution Guidelines and their statutory force

21. Crown prosecutors are subject to the Bill of Rights Act, as state actors under s 3. They would be subject to the Bill of Rights independent of the operation of any Prosecution Guidelines. And there is no basis to claim that prosecutors may disregard their BORA obligations by the operation of the Prosecution Guidelines.

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[64] *Thompson v Attorney-General* [2016] NZCA 215, [2016] 3 NZLR 206 at [74]–[78].
[65] See for example *Fitzgerald* (HC judgment) at [3] and fn 116 and *Fitzgerald* (CA judgment) at fn 39 and [156], and the Respondent's Submissions on Leave, 29 November 2024 at fn 36.
[66] [2024] NZSC 180.

22. It is entirely consistent with the Solicitor-General's 2013 Prosecution Guidelines, in force at the time of the events at the heart of this case, for the Bill of Rights to apply to decisions made by prosecutors in laying charges.

23. The Guidelines are designed to ensure that "the principles and practices as to prosecutions in New Zealand are underpinned by core prosecution values".[67] It would be odd to contend that the observance of human rights set out in the Bill of Rights is not one of those core values. The Guidelines are intended to assist in determining "[w]hat charges should be filed",[68] confirming that prosecutors should take care when determining the decision on filing a charge. It is also plain that prosecutors are to make important decisions about continuing or discontinuing criminal proceedings if proceedings are commenced.[69] The Guidelines refer explicitly to the 1990 United Nations Guidelines on the Role of the Prosecutor, which refer to the requirement that prosecutors "respect and protect human dignity and uphold human rights",[70] as Ellis J acknowledged.[71]

24. The Prosecution Guidelines make clear that, in particular as part of the public interest test for prosecution, it is orthodox for forward-looking consideration to be given to the consequences of prosecution. The "predominant consideration" in the public interest test in favour of prosecution is "the seriousness of the offence", which is marked by "the maximum sentence" and "the anticipated penalty", indicating that a prosecutor is likely to have regard to the sentence and penalty associated with an offence with which a

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[67] Crown Law, *Solicitor-General's Prosecution Guidelines* (2013) ("**Prosecution Guidelines**"), at [1.1].
[68] Ibid, at [1.2.2].
[69] Ibid, at [1.2.3].
[70] See Guideline 12. See also Guideline 18 on giving due consideration to waiving prosecution or discontinuing prosecutions conditionally or unconditionally.
[71] HC judgment, at [8].

person is charged.[72] A public interest consideration against prosecution that is listed is that "the Court is likely to impose a very small or nominal penalty", which once again underscores that a prosecutor will customarily look ahead to the penalty likely to be imposed by a court.[73]

25. The Prosecution Guidelines envisage a review process of charges "[w]herever necessary and practicable", undertaken by a senior prosecutor.[74] The Guidelines restate, uncontroversially, that "[t]he overarching duty of a prosecutor is to act in a manner that is fundamentally fair".[75] It is hardly contentious to maintain that what is "fundamentally fair" includes the rights and freedoms affirmed in the Bill of Rights.

26. In the courts below there has been some disagreement as to whether there is a statutory duty to comply with the Guidelines.[76] While neither the existence nor strength of the Bill of Rights obligation on prosecutors turns on the statutory duty to comply with the Guidelines, the Guidelines' statutory force might be thought to fortify or reaffirm the Bill of Rights obligation.

27. In this regard, it seems difficult to read ss 185–188 of the Criminal Procedure Act 2011 other than as reflecting a statutory duty for a Crown Prosecutor to conduct a prosecution in accordance with the Prosecution Guidelines. Section 188 states that a Crown prosecutor conducting a Crown prosecution under s 187 "must conduct that prosecution in accordance with any directions given by the Solicitor-General (either generally or in the particular case)". The Prosecution Guidelines appear to be the paradigm example

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[72] Prosecution Guidelines at [5.8.1].
[73] Ibid, at [5.9.1].
[74] Ibid, at [9.1].
[75] Ibid, at [19.1].
[76] See HC judgment, at [11]; compare the slightly laconic observation in the lead judgment in the Court of Appeal at [43] that the Attorney-General was "probably right" about the opposite proposition that there is no statutory duty to comply with the Prosecution Guidelines.

of guidelines given "generally" to which s 188 refers. Section 185 also refers to the power of the Solicitor-General to "maintain guidelines for the conduct of public prosecutions"; while "guidelines" are used in s 185, and "directions" in s 187, [3.1] of the Prosecution Guidelines connects the Guidelines and s 185 when it notes that "discharge of this duty [under s 185] includes the issuing and maintenance of these Guidelines".[77]

The approach to *Chapman* and its salience in this case

28. This is a claim for state liability for breach of Mr Fitzgerald's rights. Before this Court, Mr Fitzgerald does not seek to erect a new claim of judicial breach, or to "reorient the damages claim as one against the judiciary", as the Attorney-General has suggested in her leave submissions.[78] Instead, the submission is that it is necessary for the Court to address *Chapman*, and to reinstate the pre-*Chapman* position that there is no carve-out for state liability depending on the identity of an actor involved in events resulting in breach of rights. This is because *Chapman* compels an overly pinched analysis that demands exclusive focus on non-judicial actors; reinstatement of the pre-*Chapman* position can allow for a more comprehensive and complete analysis of principles of breach and causation in this case, consistent with s 3 of BORA and international law.

29. A minute of Winkelmann CJ indicates that the Court hearing *Putua* will address and decide the correct approach for the Court when deciding whether to depart from one of its previous decisions, as well as the nature and status of the principles established by *Chapman*.[79] Counsel do not, then, restate in full the approach we submit the Court should adopt when considering departing from its own previous decision. That has been done in *Putua*. Here, it

[77] Ibid, at [3.1].
[78] Respondent's Submissions on Leave, 29 November 2004, at [30].
[79] Released to counsel in both the *Putua* and *Fitzgerald* appeals on 24 January 2025.

suffices to submit, without suggesting that these factors are exhaustive or should become a straitjacket, that considerations can be organised under five heads: (1) changes in the relevant legal and factual context since the decision; (2) the provenance of the decision being considered, including how it relates to the broader law; (3) the cogency and stability of the reasoning in the decision; (4) consequences of reconsideration; and (5) the effects of overruling. Arguments under each of these heads point to the need for *Chapman* to be reconsidered and overruled.[80]

30. A decision of this Court to overturn *Chapman* would not only remove an unwarranted carve-out for state liability for judicial acts; it would also, significantly, reinstate a unitary approach to state liability that is an essential element of the Bill of Rights. The maintenance of *Chapman* would require this Court (and other courts) to make judgments, often with the benefit of quite compressed evidence, to attribute responsibility between actors, when that approach has been denounced by the Human Rights Committee.[81] Such an approach is inconsistent with domestic law as determined in *Baigent*,[82] where broad liability against the state for damages for breach of the Bill of Rights was recognised. An approach which focuses on "breach" itself rather than "responsibility for breach" is especially apt in instances of systemic failure to which multiple actors may have contributed and in which disaggregation of actors can be challenging and undesirable in principle if a rights-centred approach is to be taken.[83]

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[80] We have filed separately our submissions in *Putua* as part of submissions in this case, to avoid repetition and for the benefit of the Court. The most relevant passages of these submissions for this part of the analysis are contained at [50]–[101].

[81] *Thompson v New Zealand* above.

[82] *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA) ("***Baigent***" or "***Baigent*'s case**").

[83] Many cases in which plaintiffs have sought public law damages might be fairly characterised in this way, as instances of systemic failure in which multiple state actors have contributed to breach of rights in factual contexts where contribution

31. *Baigent* is replete with references to the liability of the state in general.[84] That was intentional and significant: to distinguish state liability from other concepts such as vicarious liability and the liability of individuals;[85] to align carefully domestic law with the obligations on the New Zealand *state* in international law; and to underscore the overriding and indivisible responsibility and obligation assumed by *the state* with respect to the actions of all state actors. It is no surprise that courts since *Baigent* – including this Court – have regarded public law damages for breach of the Bill of Rights as liability against *the state*, and that liability has been articulated in such language.[86]

32. It would be formalistic, wrong in principle, and misleading in the specific context of this case to assert (as is foreshadowed in her leave submissions) that the overturning of *Chapman* was not pleaded and so cannot be raised. Pleadings centrally concern facts, rather than matters of law; it was well-flagged in the High Court that *Chapman* posed a potential impediment to the claim;[87] and counsel advised the Court of Appeal that the appellant reserve

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to breach may be difficult to disaggregate: including *Baigent*, *Taunoa*, *Chapman*, *Thompson*, and this case.

[84] *Baigent*, at 677 (Cooke P), 697 (per Hardie Boys J), 704 (per Gault J), 718 (per McKay J).

[85] Note that recently the High Court of Australia had no difficulty in delineating the personal liability of a judge at common law from the *consequences* of the acts of the judge and the remediation of such acts by appeal and executive compensation: see *Queensland v Stradford, The Commonwealth of Australia v Stradford & His Honour Judge Vasta v Stradford* [2025] HCA 3.

[86] In *Taunoa*, the phrase "**the state**" was used on at least 17 occasions: at [170], [231], [233], [241], [253], [255] (twice), [261], [262], [263], [294], [295], [296], [338], [339], and [366]. See also *Currie v Clayton* [2014] NZCA 511 at [80] (a claim for public law damages involves "direct liability of the Crown – **the state** – in public law as a guarantor of the rights and freedoms contained in the NZBORA") and *Combined Beneficiaries Union Inc v Auckland City COGS Committee* [2008] NZCA 423, [2009] 2 NZLR 56 at [60] ("Bill of Rights damages are paid by **the state**. There is a public interest in ensuring that **the state** abides by the Bill of Rights Act.") Emphasis added. The same language, of a public law action "against the state", is used in Canada: see eg *Henry (SCC)*, at [34].

[87] See [3] of the HC judgment.

the right to pursue the *Chapman* point on appeal in this Court, as the Attorney accepts in her leave submissions.[88]

It is important not to import judicial review concepts when considering whether a breach of the Bill of Rights has occurred

33. The Court of Appeal in this case noted the Court of Appeal and Supreme Court decisions in *Osborne v Worksafe New Zealand* ("***Osborne***"),[89] in considering the basis on which courts might review decisions to prosecute. The Court acknowledged that Mr Fitzgerald's case "is not an application for review of the prosecutor's decision to prosecute",[90] but appeared to consider that the *Osborne* principles remained relevant, and that "in an appropriate case an application might be made to review a decision to prosecute".[91] The Court went on to say "the issue raised is not the decision to prosecute, but the decision to prosecute for the particular offence charged."[92] The reasoning of the Court on this point is, with respect, difficult to follow. But it seems that the Court attempted to understand the claim in this case in light of judicial review precepts, when the Court went on to say:[93]

> There is no suggestion that the decision to prosecute was made for improper purposes, or on the basis of considerations that could not properly be taken into account …. Rather, what is alleged is that the prosecutor failed to take into account matters that should have been taken into account in deciding to proceed with a charge of indecent assault.

34. In attempting to shoehorn the argument into administrative law categories, the Court was led astray. This is not a judicial review case. It concerns state liability for a breach of the Bill of Rights. Because of *Chapman*, Mr Fitzgerald was constrained to identify a

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[88] Respondent's Submissions on Leave, 29 November 2024, at fn 36.
[89] *Osborne v Worksafe New Zealand* [2017] NZCA 11, [2017] 2 NZLR 513; *Osborne v Worksafe New Zealand* [2017] NZSC 175, [2018] 1 NZLR 447.
[90] CA judgment at [99].
[91] Ibid, at [100].
[92] Ibid, at [101].
[93] Ibid.

material contribution by the Crown prosecutor to the breach of rights. Plainly the prosecutor did make such a material contribution. She failed in her legal duty to consider s 9 of the Bill of Rights; that failure led her to proceed with a third strike offence charge in circumstances where the received understanding was that conviction would require sentence that (plainly) would breach s 9. In so proceeding, the Crown prosecutor materially contributed to the breach of Mr Fitzgerald's ss 9 and 22 rights.

35. Ellis J was correct in the High Court to observe that this case does not, properly understood, concern the scope of prosecutorial discretion, since there is no discretion to act unlawfully.[94]

36. Moreover, it would be odd to introduce a new carve-out from state liability for prosecutorial breach of rights, when that form of liability has been recognised overseas; see, for example, *Henry v British Columbia (Attorney General)*.[95] Arguments about the need for restraint in Bill of Rights review of prosecutorial discretion are better dealt with at the remedial stage, where the Court can consider what is appropriate and effective remedy.

What the Prosecution Guidelines, when read in conjunction with the Bill of Rights and other relevant law, required in this case

37. This is a case involving a quite unusual combination of circumstances. It involves:

    (a) A legislative scheme – the three strikes regime – that is:

        (i) Designed to remove judicial discretion.

        (ii) Because of that, is particularly mechanical in its operation, rendering sentencing outcomes (that

[94] See HC judgment at [76].
[95] *Henry v Attorney General (British Columbia)* 2016 BCSC 1038 (*Henry (trial)*), $8,086,691.80 consisting of $530,000 compensatory damages for wage loss, $56,691.80 special damages and $7,500,000 damages to serve both the vindication and deterrence functions. In *Henry* there had been egregious non-disclosure breaches in a criminal trial.

can include egregious breaches of rights) particularly capable of prediction in advance.

(iii) Because of that, built on an assurance that a prosecutorial safety valve would be in place to prevent egregious sentencing outcomes.

(b) A process for reviewing charges that was formalised in:

(i) The Solicitor-General's Prosecution Guidelines;

(ii) The Memorandum of Understanding between the Police Commissioner and the Solicitor-General (which made explicit reference to review in three strike cases).

(c) A set of facts where the prosecutor was on multiple occasions put on notice that an egregious seven year sentence would follow conviction on the indecent assault charge and given opportunities to prefer an alternative:

(i) The prosecutor had to review the Police decision to charge, on which legal advice (the content of which is unknown) was given;

(ii) The defence lawyer proposed an amendment to the charge, on 7 April 2017 and 10 April 2017, which the prosecutor rejected (including specific reference to doing an indecent act instead);

(iii) The prosecutor was aware of the sentencing consequences, as noted in the email of 10 April 2017 at 4.59pm in which the procedural implications of the sentence (the need to transfer the case to the High Court for trial) were noted;

(iv) The sentence indication of Dobson J on 12 September 2017 made crystal-clear that a court would impose a sentence of seven years' imprisonment if the charge were maintained; and

(v) There was a "received understanding" of the three strikes regime that it was not possible to interpret the scheme to avoid injustice, meaning that a period of seven years' imprisonment would have to be ordered in the event of a third strike offence being committed.[96]

38. In these circumstances – where members of the legislature had urged the use of prosecutorial review as a safety valve, rigorous review by prosecutor was required by general guidelines as well as a specific MOU, and the prosecutor was on notice that a term of seven years' imprisonment would follow from conviction on the nominated charge – ss 9 and 22 of the Bill of Rights required the prosecutor (a state actor subject to the Bill of Rights) to prefer a different charge that would have avoided an egregious breach of rights, which was not only reasonably foreseeable but also inevitable and obvious.

39. The Court of Appeal contended that such a conclusion would not be "appropriate in terms of the architecture of the constitution, the respective roles of the legislature (which enacted the three strikes regime), the executive (the prosecutor) and the judiciary (the sentencer)".[97] This statement appears to regard the Bill of Rights as independent of the architecture of the constitution. But the Bill of Rights helps to contour the architecture of that constitution. That the judiciary also shares some responsibility for the rights breach is not reason enough to find that there was no state liability arising

[96] Respondent's submissions on leave, 29 November 2024, at [34].
[97] CA judgment, at [120].

out of the prosecutor's actions, as the appellant discusses further below.

40. The Court of Appeal stated that a claim about a duty lying on the prosecutor to prefer a different charge cannot "be found expressly or by implication in the Guidelines or the Memorandum".[98] But this is to view the Guidelines and/or the Memorandum in isolation from the Bill of Rights. That is a proposition that is plainly inconsistent with the architecture of our constitution and contrary to what this Court said in *Fitzgerald*. The Guidelines and Memorandum are to be read consistently with the Bill of Rights, including ss 9 and 22. The question is not what the Guidelines and Memorandum of Understanding say, but what the Guidelines and Memorandum require when read consistently with the Bill of Rights. It has already been noted that it is also entirely consistent with the Guidelines for consideration to be given to the nature of the penalty or sentence to be imposed, should a charge be pressed.

41. It is not necessary for this Court to set out any hard-and-fast rules as to when state liability arising out of the actions of prosecutors will be found in future cases. Each case must be determined on its own facts. As the majority of the Supreme Court of Canada in *Henry* has said, when setting out the proper approach to state liability for prosecutorial breach of Charter rights (there the right to disclosure), it would "be unwise to speculate" about what would be required to establish breach in other cases:[99]

> I emphasize 'this context' because, in my view, it is neither prudent nor necessary to decide whether a similar threshold would apply in [other] circumstances … It would be unwise to speculate about other types of prosecutorial misconduct that might violate the Charter, or to fix a blanket threshold that governs all such claims against the Crown. The threshold established in this case may well offer guidance in setting the applicable threshold for other types of misconduct, but the prudent course of action is to address new situations in future

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[98] Ibid.

[99] See *Henry (SCC)*, at [33] (per judgment of Abella, Moldaver, Wagner and Gascon JJ).

> cases as they arise, with the benefit of a factual record and submissions.

42. These words apply with equal force to this case as all of the circumstances co-existing and combining in this case are unlikely to recur in fact or effect.

The correct approach to breach of rights and causation under the Bill of Rights

43. The approach of the Attorney-General in the courts below has been to argue that, even if the prosecutor's actions constituted a breach of rights under ss 9 and/or 22 of the Bill of Rights, the breach was superseded by the sentencing decision of the judge. This latches onto an obiter reference by William Young and McGrath JJ in *Chapman* to the Registrar's actions being "superseded by decisions of judges"[100] and endeavours to turn that passing reference into a doctrine of supersession. The Court of Appeal accepted a version of this point by repeating that "responsibility for imposition of the appropriate sentence rests here … with the sentencing Judge" and "is not a matter for which the prosecutor assumes responsibility".[101] That approach highlights the risk of carve-outs from the BORA, which can be employed beyond an inquiry into the identity of an actor, as an unattractive form of "causation shield" to immunise the state from liability for the acts of other actors.

44. Two points are warranted in immediate response. First, the Court of Appeal was again insufficiently rights-centred in its approach, by focusing on responsibility for the *sentence* instead of considering responsibility for the *breach of rights*, which entailed not only the fact of a disproportionately severe punishment being ordered but also the experience of that treatment or punishment (under s 9), and the undergoing of arbitrary detention (under s 22). Second, the unusual operation of the three strikes regime requires

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[100] *Chapman*, at [208].
[101] CA judgment at [122].

some adjustment to be made to oft-repeated shibboleths about responsibility for sentencing. The received understanding of the three strikes regime was that it tied the hands of judges, restricting their flexibility. The net effect was that the usual division of roles between judge and prosecutor was inverted: the prosecutor's responsibility was heightened, since their charging decision determined whether the three-strikes regime was triggered, with the automatic consequences that flowed upon conviction.

45. If this Court wishes to expound on principles of causation in the Bill of Rights context, it can be said that a simple 'but for' causation test suffices to ground state liability. This is the approach adopted in *Henry* by the Supreme Court of Canada[102] and at the subsequent civil trial.[103] It is plain in this case that, but for the decision of the prosecutor to elect to charge Mr Fitzgerald with indecent assault, Mr Fitzgerald would not have suffered the harm of a grossly disproportionately severe punishment or treatment, and arbitrary detention. So too in *Henry*: the proximate cause for Mr Henry's detention was the Court's verdict and sentence; but the state could not hide behind that in order to shield itself from liability for the conduct of the prosecutor.

46. If it is considered that the prosecutor and judge shared some responsibility for state liability, as is common in other fields of law[104] and in Canadian jurisprudence on breach of Charter rights,[105] the 'but for' test can be modified to ask simply whether a state actor has made a material contribution to the harm suffered. This is indeed the approach adopted by the Court of Appeal in *Attorney-General v Putua* (though the Court overturned the findings of Ellis J in the High Court on breach): French J (as she then was), for a unanimous court, examined the joint contribution

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[102] *Henry (SCC)*, at [95].
[103] *Henry (trial)*, at [240]-[287].
[104] *W v Accident Compensation Corporation* [2018] NZHC 937, [2018] 3 NZLR 859 at [65]–[68].
[105] *Henry (SCC)*, at [98].

of a deputy registrar preparing a committal warrant and a District Court judge signing that warrant.[106] Justice French found that though "the authority to detain derives from the sentencing decision",[107] the "signing of the warrant was not … devoid of any causative effect".[108] Under orthodox and well-established causation principles, "it is not necessary for there to always be just one cause".[109] The Court said: "There may be multiple causes, each of which has contributed to the harm suffered."[110] The error of the deputy registrar was an "operative cause".[111]

47. Here, the actions of the prosecutor remained an operative cause of the arbitrary detention and disproportionately severe punishment in this case – not merely by exposing Mr Fitzgerald to the risk of a breach of rights, but by triggering a process that would foreseeably breach Mr Fitzgerald's rights (including after being alerted to the availability of alternative available charges).

48. The Court in *Putua* rejected any argument based on an intervening act, for reasons that also apply here. The Court said the judge's failure to check the improperly prepared warrant could not be said to break the chain of causation because "the Judge's error was directly precipitated by or attributable to being provided with a defective draft".[112] "What happened was within the scope of the risk created …," said the Court in *Putua*, adding: "it was a thing very likely to happen".[113] The imposition of a sentence entailing arbitrary detention was within the scope of the risk created by the prosecutor's election in this case. It was a thing very likely to happen once the prosecutor decided to press forward with a

[106] [2024] NZCA 67.
[107] At [84].
[108] At [88].
[109] At [90].
[110] At [90].
[111] At [92].
[112] Ibid, at [91].
[113] Ibid.

charge of indecent assault. The sentencing indication of Dobson J made clear that seven years' imprisonment was likely to follow.

49. Justice Miller, giving a separate judgment in the Court below in this case, contends that the prosecutor's action was a "cause in fact" of the sentence but not a "cause in law".[114] But it is not clear what principles underpin this conclusion, or what distinguishes a cause in fact from a cause in law, especially in light of the acceptance of 'but for' causation in other comparable jurisdictions. Justice Miller also expressed his view in terms of remoteness, but without elaborating on his impression that the time taken between the first and second sentencings was too remote.[115] The arbitrary detention and grossly disproportionately severe treatment or punishment were reasonably foreseeable right from the time that the prosecutor elected to charge Mr Fitzgerald with a stage-three offence. The prosecutor set in train a judicial process, which moved inexorably to its obvious conclusion. The rights consequences were not too remote.

50. It seems somewhat desperate for the Attorney-General to rely on the so-called declaratory theory of law to claim that the judge always had the power to avoid the grossly disproportionate sentence.[116] The declaratory theory of law is an account of what judges do in the common law, which many regard to have been debunked over fifty years ago;[117] it is not a limiting device for public law liability. Even if the judge had a power to avoid a rights breach, whether this proposition is phrased in terms of the declaratory theory of law or the outcome being "immanent in the Bill of Rights Act",[118] it is plain that it was foreseeable and likely (if not certain and obvious) at the time of the prosecutor choosing to charge Mr Fitzgerald that a seven year (grossly disproportionate) sentence

[114] CA judgment, at [154]–[155].
[115] Ibid, at [155].
[116] See HC judgment at [104].
[117] Lord Reid 'The Judge as Law Maker' (1972) 12 JSPTL 22.
[118] CA judgment at [130].

would be imposed, entailing arbitrary detention, including because of the "received understanding"[119] of the three strikes regime at the time and as is reflected in Dobson J's sentencing indication. Nor did the prosecutor at any time make submissions to seek to dissuade the Court from imposing the maximum sentence. Plainly that is because the maximum sentence outcome is what the prosecutor sought to achieve. The declaratory theory of law argument is nothing more than an attempt by the Attorney-General to evade recognising multiple contributors to state liability here.

The different possible approaches to *Chapman* in *Putua* and implications for this case

51. The primary submission of the appellant in this case and in *Putua* is that *Chapman* should be overturned in full, a result that would allow a frank and principled acknowledgment of multiple material contributors to Mr Fitzgerald's breach of rights in this case. The overturning of *Chapman* would reinstate an approach to state liability that reduces the need for judgements attempting artificially to dissect and disaggregate the roles of different state actors.

52. Given the direction in the minute of the Chief Justice on *Putua* and *Fitzgerald* to address submissions based on alternative assumptions,[120] we note that *Chapman* could be distinguished, as a case that expressly concerned only ss 25 and 27 of the Bill of Rights, but did not address either ss 9 or 22. (Counsel note that this was not a possibility available below because of the Court of Appeal's interpretation and application of *Chapman* in *Thompson*.) The effect of such a finding would be that this Court would not be prevented by *Chapman* from finding that the prosecutor and judge materially contributed to the breach of Mr Fitzgerald's rights.

53. An alternative, raised in the *Putua* submissions, is that *Chapman* would expressly not extend to breaches of s 22, given the structure

[119] Respondent's submissions on leave, 29 November 2024, at [34].
[120] Dated 24 January 2025.

of art 9(5) ICCPR and the Human Rights Committee's findings in *Thompson v New Zealand*. If the Court were to be minded to adopt this approach to *Chapman*, the judge and prosecutor should be found to have each materially contributed to the breach of Mr Fitzgerald's s 22 rights.

54. If *Chapman* is confined to breaches involving judges (but not other actors in the judicial branch of government), this Court would be bound to find that Mr Fitzgerald's claim rests on establishing the prosecutor's responsibility for the breach of Mr Fitzgerald's rights in this case. It is submitted that a 'but for' approach to causation would remain salient in such circumstances.

Conclusion

55. This case is, in reality, quite straightforward. Mr Fitzgerald's rights have been breached. Such breach should give rise to state liability. The Attorney-General has sought in the courts below to resist liability by reference to *Chapman*, the need for restraint in review of prosecutorial conduct, the architecture of the constitution, and the supersession of prosecutorial breach by judicial breach. None of these arguments should be accepted. The appellant is legally aided, but counsel would wish to be heard on the question of costs if the appeal is allowed. The appeal should be allowed and the judgment of Ellis J in the High Court restored.

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Counsel for the appellant

AUTHORITIES RELIED UPON

Statutes, international instruments etc

New Zealand Bill of Rights Act 1990, ss 3, 9, 22

International Covenant on Civil and Political Rights 1966, arts 2, 9

Cases

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