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

SC 31/2024

BETWEEN	**KORO PUTUA**
	Appellant
AND	**ATTORNEY-GENERAL OF NEW ZEALAND**
	Respondent

APPELLANT'S SUBMISSIONS

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TĒNA KOUTOU E NGĀ KAIWHAKAWĀ

Introduction

1 This case provides the Court with an opportunity to review whether there should remain a gaping hole in remedy for judicial breach of the New Zealand Bill of Rights Act 1990 ("**the Bill of Rights**").[1] Since the decision of a 3-2 majority of this Court in *Attorney-General v Chapman* ("***Chapman***"),[2] there has been a carve-out from the general principle that damages may – in an appropriate case – be available for breach of the Bill of Rights.[3] The carve-out applies where the breach is by a judge, and – if this appeal is not allowed – anyone connected to the work of a judge ("**judicial breach**").[4]

2 There are good reasons to revisit *Chapman*: (1) there have been relevant legal developments in (i) the views of the Human Rights Committee, (ii) the European Court of Human Rights and United Kingdom legislation, (iii) the New Zealand law on interpretation of and remedies for the Bill of Rights, (iv) international standards on arbitrary detention, and (v) other comparable jurisdictions; (2) *Chapman* was an outlier rather than a culmination of a series of cases; (3) there are reasons to doubt the soundness of the reasoning of the majority in *Chapman*, including the sustainability of some central distinctions in the case; (4) *Chapman* has skewed the development of the law; and (5) the effects of overruling *Chapman* do not act as counterweights to justify the Court declining to overrule *Chapman*.

3 This Court should overrule *Chapman*, leaving damages available for judicial breach where such damages would be an effective and appropriate remedy on the facts of the particular case. The policy considerations raised in *Chapman* may be considered on a case-by-case basis, where damages are sought, but they do not justify a categorical carve-out. In the alternative (and in order to achieve consistency with art 9(5) of the Covenant), the Court should at least allow damages for judicial breach where the breach (as here) pertains to

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[1] See the leave judgment: *Putua v Attorney-General* [2024] NZSC 92.
[2] [2011] NZSC 110, [2012] 1 NZLR 462.
[3] A principle established since *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA) ["***Baigent's case***"].
[4] See *Chapman*, above n 2, at [8] (per Elias CJ) and [187] (per William Young and McGrath JJ).

arbitrary detention (s 22), noting that arbitrary detention can arise from (i) the unlawfulness of the detention; or (ii) elements of the detention that render arbitrary an otherwise facially 'lawful' detention. If this is not accepted, the Court should allow damages for breaches by actors who are not judges but merely are connected to the work of judges, or for acts not protected by judicial immunity stricto sensu. Any of these approaches would result in the restoration of Justice Ellis' award of $11,000 in damages (the quantum of which is not disputed).[5]

Essential facts

4 The key facts are not in dispute and need not be fully recapitulated here. After Mr Putua had been sentenced in the District Court on 15 September 2016 on 16 charges, the Deputy Registrar mistakenly recorded that a three month sentence on one of the charges was cumulative, rather than concurrent, on the sentence for another charge.[6] As a consequence, Mr Putua's sentence was wrongly extended by three months. The sentencing judge signed the warrant without identifying the mistake. Mr Putua told staff in prison of the mistake on his arrival. He maintained that he should have been released on 11 November 2020 but was not released; then, on 14 December 2020, a registrar prepared a corrected warrant, signed by the sentencing judge, and Mr Putua was released that day. He spent 33 more days in prison than he should have due to error. The Crown accepted that Mr Putua was unlawfully and arbitrarily detained, in contravention of s 22 of the Bill of Rights. Mr Putua sought a declaration and $11,000 in damages in the High Court.

The decisions below

5 In the High Court Ellis J noted that the Crown accepted that Mr Putua's detention beyond the statutory release date was unlawful and in breach of s 22 of the Bill of Rights.[7] The High Court set out the decisions in *Chapman* and *Thompson v Attorney-General* ("**Thompson**"),[8] said to be impediments to Mr Putua's claim.

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[5] *Putua v Attorney-General* [2022] NZHC 2277, [2023] 2 NZLR 41 ("**HC judgment**") at [69]. There has been no application to support the Court of Appeal's judgment on other grounds.
[6] Ibid at [1]–[2].
[7] HC judgment, at [11].
[8] [2016] NZCA 215, [2016] 3 NZLR 206.

Thompson had involved an error by a Deputy Registrar that was said to be superseded by a judicial act. Justice Ellis said "[o]n the state of the law as it presently stands" (perhaps anticipating some Supreme Court review of *Chapman*),[9] no claim for public law damages for judicial breach of the Bill of Rights was possible, but the position was less clear-cut in relation to error by the Deputy Registrar. The Judge found that the act of the Deputy Registrar in preparing a warrant of commitment was not a judicial act.[10] Further, the policy justifying judicial immunity should not extend to insulate the state from liability for acts of registrars.[11] Justice Ellis considered that the Deputy Registrar's creation of a warrant had clear and known consequences, which was sufficient to ground Bill of Rights liability; the Judge's signature on the warrant was not a superseding cause of Mr Putua's detention.[12]

6 Her Honour then considered damages at some length, after finding that Mr Putua was entitled to a declaration. After considering the Prisoners' and Victims' Claims Act 2005 and the factors therein, Justice Ellis concluded that an award of damages was a required effective remedy.[13] Following consideration of analogous case law, the High Court observed that $11,000 was an appropriate quantum, along with interest.[14]

7 The Court of Appeal, in a unanimous judgment given by French J, allowed the appeal. The judgment began with a discussion of judicial immunity, and case law on the policy underlying judicial immunity, including reference to *Chapman* and *Thompson*. The Court said there were difficulties with the High Court's analysis on judicial immunity: one error relating to the warrant attracted immunity and the other did not; and it was not right, including due to the case law on the matter (in particular, *Chapman*), to delineate a judicial act by reference to the existence of a discretion.[15] Relying in particular on (the pre-Bill of Rights case of) *Crispin v Registrar of the District Court*,[16] the Court found that the Deputy Registrar's task was judicial and part of judicial business.[17] Attaching

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[9] At [27].
[10] At [33].
[11] At [34]–[39].
[12] At [42].
[13] At [62].
[14] At [66]–[67].
[15] *Attorney-General v Putua* [2024] NZCA 67 at [41]–[43].
[16] [1986] 2 NZLR 246 (HC).
[17] At [57].

liability for Bill of Rights damages to registrars would undermine judicial independence,[18] and principles of judicial immunity were engaged by the claim.[19]

8 Given the Court's conclusion, it was not strictly necessary to address causation, but the Court nevertheless addressed the point. The Court did accept a causal link between the Deputy Registrar's error and Mr Putua's unlawful detention.[20] But the Court found it would be "highly likely" that an unsigned warrant would not have been accepted by a prison.[21] Under well-established causation principles deriving from tort and contract, which the Court took to apply, the Court accepted that there may be multiple causes of the error, which contributed to the harm suffered.[22] The Judge's responsibility was "primary" but the failure to check was not an intervening cause breaking the chain of causation; what occurred was within the scope of the risk created by the Registrar.[23] Accordingly, the Deputy Registrar's error could be considered an operative cause, even if it was not the only cause. Nevertheless the appeal was allowed and the decision of the High Court was set aside.

The decision of this Court in *Chapman* and post-*Chapman* legal developments

9 Before considering the judgments in detail, a few points about *Chapman* should be stated:

(a) *Chapman* was not a s 22 of the Bill of Rights case;
(b) The acts that were the subject of the Supreme Court's judgment were entirely that of judges (the position of the Court of Appeal Registrar was expressly not decided);[24]
(c) There was limited reference to international human rights jurisprudence;[25]

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[18] At [58].
[19] At [64].
[20] At [79].
[21] At [86].
[22] At [90].
[23] At [91].
[24] *Chapman*, above n 2, at [208] per McGrath and William Young JJ.
[25] There was no reference, for example, to the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International

(d) The case arose after questions of law were removed into the Court of Appeal without the benefit of a more detailed investigation of the facts;[26] all of the Bill of Rights jurisprudence up until *Chapman* had emphasised the discretionary nature of Bill of Rights damages (which would allow for an assessment on particular facts of whether compensation was appropriate).[27]

(i) The judgments in Chapman

10 The majority in *Chapman* is made up the joint judgment of McGrath and William Young JJ, and the separate judgment of Gault J. McGrath and William Young JJ accepted that the ex parte procedure (deployed by the Court of Appeal as a matter of practice, in which the Court of Appeal refused legal aid and dismissed an appeal on the papers)[28] breached Mr Chapman's rights to appeal and natural justice under ss 25(h) and 27(1) of the Bill of Rights. But the judgment found that breach of the Bill of Rights by a judicial actor could never result in an award of damages, essentially for three reasons: authorities had not established the availability of Bill of Rights damages for judicial breach; allowing a claim in damages for judicial breach would be "inimical to" principles of judicial immunity; and there was no "particular need" for financial remedies for judicial breach of the Bill of Rights.[29] Their Honours said: "the reality is that the case also turns on a policy judgment."[30]

11 Their Honours noted the separate judgment of William Young J in the Court of Appeal in *Brown v Attorney-General* (not joined by other judges)[31] concluding that Bill of Rights damages were unavailable for breach of fair trial rights, and then reviewed the judgment in *Baigent* and considered the case only applied to

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Human Rights Law and Serious Violations of International Humanitarian Law, a resolution adopted by the United Nations General Assembly on 16 December 2005, A/RES/60/147.

[26] See *Chapman v Attorney-General* (HC) CIV 2006 409 1409, 19 March 2008; and *Attorney-General v Chapman* [2009] NZCA 552, [2010] 2 NZLR 317.

[27] See, eg, *Baigent*, above n 3, at 703 per Hardie Boys J; *Link Technology 2000 Ltd v Attorney-General* [2006] 1 NZLR 1 (CA) at [34]–[37] per O'Regan J; and *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 ("***Taunoa***") at [255] per Blanchard J and [318] per Tipping J.

[28] A practice found to be contrary to legislation and the right to appeal under the Bill of Rights in *R v Taito* [2003] UKPC 15, [2003] 3 NZLR 577.

[29] At [97].

[30] Ibid.

[31] [2005] 2 NZLR 405 (CA) at [127]–[132] and [142].

damages for executive breach of the Bill of Rights.[32] In later post-*Baigent* cases, the availability of Bill of Rights damages for judicial breach was not put into question, but McGrath and William Young JJ stated that the availability of such damages was not established by such case law.[33] The Law Commission's report supported a narrower view of *Baigent*'s holding and raised concerns about damages for judicial breach.[34] The joint judgment did not seek to distinguish the Privy Council's reasoning in *Maharaj v Attorney-General of Trinidad and Tobago (No 2)*,[35] but expressed reservations about its outcome and reasoning.[36]

12 Then, in passages central to the judgment, McGrath and William Young JJ discussed judicial immunity, and stated that allowing claims in public law damages for judicial breach would subvert judicial independence (by producing a perception that judges would be distracted from acting independently), waste judicial resources, and permit collateral attacks that would undermine the finality of judgments.[37] Further, the joint judgment said there exist adequate alternative remedies that mean there is no need for Bill of Rights damages for judicial breach.[38]

13 Justice Gault's judgment joining the judgment of William Young and McGrath JJ was brief. It began with the word "[a]gain" and reiterated his Honour's general opposition to *Baigent* damages (as expressed in *Baigent*),[39] which determined his view that such damages were necessarily not available for judicial breach.[40] As is submitted later, this approach (contrary to subsequent Court of Appeal and Supreme Court jurisprudence) inevitably casts doubt on the quality of Gault J's reasoning. Justice Gault did not consider that *Baigent* had affirmed the availability of damages for judicial breach of the Bill of Rights and found that

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[32] At [129].
[33] At [130]–[139].
[34] At [140]–[145].
[35] [1979] AC 385 (PC).
[36] At [152]–[159].
[37] At [166]. Their Honours also referred to judicial recruitment but did not develop this point.
[38] At [193]–[202].
[39] *Baigent*, above n 3, at 703–715.
[40] At [211].

judicial immunity and judicial independence were "fundamental elements of our constitutional structure".[41]

14 Chief Justice Elias's judgment began by reasserting the emptiness of a right without a remedy, and the importance of rights being vindicated through remedies for the rule of law.[42] For the Chief Justice, effective remedy differs according to the particular breach and circumstances, but there should be no exclusion of Bill of Rights damages for judicial breach. To allow such a carve-out would be contrary to the scheme and purpose of the Bill of Rights, would "leave a large remedial hole" that would undermine rights, would be incongruous with the availability of an international remedy for damages, would be inconsistent with *Baigent* as well as broader New Zealand case law on the need to tailor remedies to the circumstances, and would not engage concerns about judicial immunity.[43]

15 After recounting the background to the appeal, the then Chief Justice addressed at length the structure and text of the Bill of Rights. Courts have developed effective remedies for breach of rights.[44] Public law damages are not merely a backstop claim, available only where there is no other claim.[45] The reasoning in *Baigent* was said to apply equally to acts of the judiciary, and authorities had assumed this to be the position.[46] No exception for the judiciary had been established in other jurisdictions. The Law Commission should be taken, in its report after *Baigent*, to have supported the *Baigent* position.[47]

16 Judicial immunity serves the public interest, is not absolute, has not been reviewed in light of the Bill of Rights, and is not engaged by Bill of Rights damages for judicial acts.[48] State liability for police acts has not been considered inconsistent with police immunity.[49] Policy reasoning underlying judicial immunity is not "self-evidently transposable" to damages for judicial breach of

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[41] At [213].
[42] At [1].
[43] At [8]–[13].
[44] At [27].
[45] At [31].
[46] At [34]-[36].
[47] See [46].
[48] At [54]–[55].
[49] At [59].

the Bill of Rights.[50] Concerns about collateral challenge and finality of litigation were said to be overblown.[51] In closing, Chief Justice Elias affirmed that the Attorney-General was the appropriate representative in cases such as this, and explained her view that the state is the Crown under the New Zealand constitution.[52]

17 Justice Anderson expressed general agreement with the Chief Justice's reasoning.[53] He wrote separately to note that an error giving rise to public law liability would be rare, and that concerns about collateral challenges were misplaced. Damages are unlikely to be available if an appeal is available. Justice Anderson accepted the importance of judicial independence, but did not consider that it would be at risk if by allowing state liability for judicial breach of rights were available.[54]

(ii) Reception of Chapman *and subsequent case law*

18 There has not been particularly extensive consideration of *Chapman* following the decision; nor has there been detailed case law developed building on the holding in *Chapman*. Cases dealing with *Chapman* can be organised into four categories.

19 First are cases with throwaway references to *Chapman*. Where hopeless arguments have been raised about damages for judicial breach, *Chapman* has been briefly invoked to dispose of such arguments.[55] *Chapman* has also sometimes been cited for uncontroversial propositions about judicial immunity.[56]

20 Second are cases where some uncertainty has been expressed about the scope of *Chapman*. The High Court in *Clayton v Currie* was unsure whether public law damages were available for breaches of fair trial rights by prosecutors after *Chapman*, and indeed the High Court refused to strike out the claim on

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[50] At [61].
[51] At [70].
[52] At [92].
[53] At [216].
[54] See in particular [224].
[55] See, eg, *Rafiq v Auckland District Court* [2013] NZHC 2640 at [19]; *Siemer v Deputy Registrar of the Court of Appeal* [2014] NZHC 1687; *Brown v Sinclair* [2016] NZHC 3196 at [183]; *O'Neill v Toogood* [2017] NZHC 795.
[56] *Vernooij v Gallaghan* [2024] NZHC 1974 at [10].

that ground.[57] Palmer J in *Tamihere v Commissioner of Inland Revenue* said it was a "more complex, and less clear, question of whether the District Court can ever be liable in damages for breaches of the Bill of Rights in view of the Supreme Court's decision in *Attorney-General v Chapman*".[58] Justice van Bohemen noted in *Rafiq v Auckland Transport* that there was a question about the position of registrars with respect to public law damages after *Chapman*.[59]

21 The third category are cases where *Chapman* has been used to restrict remedies in a way that exceeds what was expressly said by the Supreme Court majority. *Chapman* has been used, in particular, to bar declaratory relief against judicial conduct for breach of the Bill of Rights,[60] going beyond *Chapman*'s reference to a carve-out for damages for judicial breach of the Bill of Rights. In another case, *Chapman* has been said to stand for the proposition that "[t]he High Court has no jurisdiction to hear a claim under the NZBORA or award damages in respect of judicial acts or omissions", the suggestion being that *Chapman* has barred any claim under the Bill of Rights for judicial acts or omissions, not simply claims for damages.[61] This amounts to a kind of 'carve-out creep', where the holding in *Chapman* has resulted in an expansion in the hole of liability for judicial breach. Cases have not, however, spoken with one voice on the availability of declaratory relief for judicial breach.[62]

22 Fourth are the cases where judges have observed that *Chapman* may come to be revisited by the Supreme Court. Justice Cooke said this in the High Court in

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[57] [2012] NZHC 2777 at [29] and [49]. This was upheld on appeal: [2014] NZCA 511, [2015] 2 NZLR 195 at [92].
[58] [2017] NZHC 2949 at [17].
[59] [2018] NZHC 641 at [4].
[60] *Siemer v Attorney-General* [2013] NZHC 111. Justice Toogood then repeated this analysis in *Siemer v Auckland High Court* [2013] NZHC 3540 at [40]–[42]. The analysis was then applied by Gwyn J in *Siemer v Attorney-General* [2022] NZHC 2789 at [29]. References to "liability" in *Chapman* can be a source of ambiguity as to whether *Chapman* bars only damages for breach of the Bill of Rights or any suit for judicial breach of the Bill of Rights: see *Chapman*, above n 2, at [138], [160], [193], [199], and [204].
[61] *Dunstan v Manukau District Court* [2023] NZHC 2742.
[62] A declaration for judicial breach of the Bill of Rights was issued by Campbell J in *Deliu v District Court at Auckland* [2022] NZHC 3389; the uncertainty on the availability of declaratory relief for judicial breach of the Bill of Rights was noted by O'Gorman J in *Deliu v New Zealand District Court* [2024] NZHC 1693 at [44].

Matara v Attorney-General,[63] prior to the Supreme Court granting leave in this case.

(iii) Thompson v New Zealand

23 In 2021 the United Nations Human Rights Committee, the body charged with interpreting the International Covenant on Civil and Political Rights ("**the Covenant**"), tackled the consistency of *Chapman* with the Covenant. In *Thompson v Attorney-General*,[64] the Court of Appeal had accepted that Ms Thompson had been unlawfully and arbitrarily detained for over 15 hours after a failure by Ministry of Justice staff to update the case management system meant a judge issued a warrant with no lawful basis.[65] The Court held that *Chapman* governed (despite counsel's attempt to limit it) and found compensation was not available. Leave to appeal to this Court was refused (with reference to *Chapman*).[66]

24 The Committee noted that "article 9(5) of the Covenant obliges States parties to establish the legal framework within which compensation may be afforded to victims of unlawful arrest or detention, as a matter of enforceable right and not as a matter of grace or discretion."[67] No system is prescribed under the Covenant, but procedures or systems must be effective to give effect to article 9(5).[68] The Committee described the "exception" in *Chapman* in relation to judicial breach of the Bill of Rights.[69] Release from detention does not discharge the obligation in article 9(5). Policy arguments grounded in judicial independence cannot override the requirement to provide compensation for

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[63] [2023] NZHC 2888 at [41]: Justice Cooke did not dismiss the plaintiff's claims on the basis that Bill of Rights damages are unavailable for judicial breach, noting that the appeal in proceedings involving Mr Fitzgerald might result in the finding in *Chapman* being reconsidered.
[64] [2016] NZCA 215.
[65] At [61], [66], and [68].
[66] *Thompson v Attorney-General* [2016] NZSC 134 at [9]: "We accept that the scope of *Chapman* may be a matter of public importance. But we do not see the present case as an appropriate vehicle for exploring this point. ... Nor do we see any proper basis for revisiting *Chapman*, a relatively recent decision of this Court."
[67] *Thompson v New Zealand*, View adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3162/2018, View adopted on 2 July 2021, CCPR/C/132/D/3162/2018, at [7.3]; reported as *Thompson v New Zealand* (2021) 12 HRNZ 873 (UNHRC).
[68] Ibid.
[69] At [7.4].

unlawful or arbitrary detention under that provision. The provision relates to redress for harm suffered, not judicial culpability. The Committee therefore found a violation of article 9(1) and 9(5) of the Covenant.[70]

25 The Committee ordered New Zealand to provide adequate compensation and to report within 180 days on measures taken to give effect to the Committee's Views.[71] Counsel are unaware of what steps have been taken to implement the Committee's decision (except that this Court declined to reopen its leave decision in response to an application for recall).[72]

26 A number of points can be noted about *Thompson*:

(a) The Committee's views could, on one interpretation, be limited to affirming the terms of art 9(5): once a detention is arbitrary (as was the case there, and is also the case here) then there must be a right to compensation. *Chapman* (in which art 9(5) did not feature) should not be regarded as controlling s 22 claims in respect of judicial breaches.

(b) The Committee's views affirm that at least in respect of a breach of s 22 of the Bill of Rights, the point of compensation is to provide redress for the harm suffered, not – as *Taunoa* suggested[73] – to vindicate public interests.[74]

(c) The Committee's view is that compensation in s 22 cases is of right, not discretion.[75] Again, this is contrary to *Taunoa*.[76]

(d) But the Committee's views should not necessarily be narrowly confined. The logic of the Committee's reasoning suggests that the *Chapman* majority reasoning is suspect and should not only be distinguished in a s 22 case, but be fully revisited.

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[70] At [8].
[71] At [9]–[10].
[72] *Thompson v Attorney-General* [2023] NZSC 27.
[73] *Taunoa*, above n 27, at [116] per Elias CJ; [247] per Blanchard J; [300] per Tipping J.
[74] This may well, of course, relate simply to the fact that art 9(5) of the Covenant refers to an "enforceable right to *compensation*" (emphasis added).
[75] This may, again, be explained by the wording of art 9(5).
[76] See above n 27, at [255] per Blanchard J and [318] per Tipping J.

Approach to overruling in other jurisdictions

27 The Appellant asks that the Court reconsider and overrule *Chapman*. So far as counsel understand the position, this is the first time the Supreme Court has invited overruling of one of its own previous decisions. Before explaining why it is right to reconsider and overrule *Chapman*, it is helpful to consider the approach to overruling in other relevant jurisdictions.

(i) United Kingdom

28 The 1966 House of Lords Practice Statement remains the primary guidance invoked by the United Kingdom Supreme Court when considering overruling.[77] It acknowledges that precedent is an "indispensable foundation" that provides some "certainty" for individuals, and a basis for "orderly development" of rules.[78] But the Practice Statement says "too rigid adherence may lead to injustice in a particular case" and inhibit proper development of the law.[79] The Practice Statement indicated a shift in practice: previous decisions of the House would be treated as "normally binding" but it would be open for the House "to depart from a previous decision *when it appears right to do so*".[80] The only elaboration of what considerations are relevant to this judgement was the reference to the House bearing in mind "the danger of disturbing retrospectively" the basis of "contracts, settlements of property and fiscal arrangements", as well as "the especial need for certainty as to the criminal law."[81] The Statement made clear that its contents applied only to the House of Lords.[82]

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[77] *Austin v Southwark London Borough Council* [2010] UKSC 28, [2011] 1 AC 355 at [25] per Lord Hope.
[78] [1966] 1 WLR 1234.
[79] Ibid.
[80] Ibid (emphasis added).
[81] Ibid.
[82] See also Lord Reed, 'Departing from Precedent: The Experience of the UK Supreme Court', International Conference on Implementation of the Rule of Law: The Role of the Supreme Court in Modern Conditions, 20 January 2023; and Lord Sales, 'Default Rules in the Common Law: Substantive Rules and Precedent', International Workshop on Default Rules in Private Law, 24 March 2023. The passages on criteria for overruling are similar across these two speeches. Lord Reed notes that the Court will not overrule a decision merely because judges would decide a case differently; is slower to reconsider detailed questions of construction of legislation or documents as opposed to broader questions raising issues of legal principles; and that a court will be more likely to reconsider a recent precedent rather than an older one, on which greater reliance is placed. The Supreme Court will consider whether overruling has wider implications (and

29 One of many possible examples of the UK Supreme Court overruling its own decision, but an insightful one as to the arguments generally considered (as the Court considered overruling two previous decisions of the United Kingdom's highest court, is *Test Claimants in the Franked Investment Income Group Litigation v Commissioners for Her Majesty's Revenue and Customs* ("***Test Claimants***").[83] In a case on the law of limitation, the Supreme Court majority (written by Lord Reed and Lord Hodge) first considered overruling *Kleinwort Benson Ltd v Lincoln City Council* ("***Kleinwort Benson***").[84] The majority said it must give "due weight" to the importance of maintaining certainty and stability;[85] it is not enough that a court considers a previous decision to be wrong.[86] It was affirmed that "a fundamental change in circumstances" or "where a decision has resulted in unforeseen serious injustice" were among situations justifying departure from precedent.[87] The majority considered preserving the authority of *Kleinwort Benson* was not contrary to principle and would not give rise to serious uncertainty; nor would it give rise to serious injustice or impede proper development of the law.[88]

30 On the other hand, the decision in *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* ("***Deutsche Morgan Grenfell***") had had "very unfortunate consequences", defeating the purpose of limitation, operating contrary to the intention of Parliament, and creating incoherence in interpretation (including through producing a "paradox"[89] or particular illogicality).[90] The decision was said to impede the correct development of law.[91] Parliament was unlikely to enact a legislative solution; *Deutsche Morgan Grenfell* should be overruled.[92]

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so whether the matter is left to the legislature), but will also reconsider a decision that impedes proper development of law, causes uncertainty, or gives rise to administrative difficulties or individual injustice. Societal and legal changes since a decision will be relevant.

[83] [2020] UKSC 47, [2022] AC 1.
[84] [1999] 2 AC 349.
[85] At [244].
[86] At [245].
[87] At [246].
[88] At [249].
[89] Discussed at [173].
[90] At [250].
[91] Ibid.
[92] At [252]–[253].

31 Lord Briggs and Lord Sales (with Lord Carnwath agreeing) wrote a dissent, and would have overruled *Kleinwort Benson*. The minority found the House of Lords was "plainly wrong"; it was not enough to overrule *Deutsche Morgan Grenfell*, as *Kleinwort Benson* had put "a serious brake upon judicial modernisation of the common law".[93] The decision in *Kleinwort Benson* "created a new state of affairs which did not fall within the intention or purpose of Parliament" in passing the Limitation Act 1939;[94] it was "a clear misstep".[95] The minority said overruling was an example of the not uncommon phenomenon of the law being changed and developed by the courts: this can happen when the rules of the common law are changed, decisions of the lower courts are overturned, and the highest court overturns the past decisions of the highest court.[96]

32 The minority considered the decision in *Kleinwort Benson* "was wrong for reasons of much greater solidity and significance than a mere intellectual difference of opinion".[97] Overruling *Kleinwort Benson* would "secure the ability of this court to review and amend substantive legal doctrine in the interests of promoting doctrinal coherence and keeping the law broadly in line with changing social expectations and values."[98] *Deutsche Morgan Grenfell* – the decision overruled by the majority – was decided fourteen years before the decision in *Test Claimants*.[99] It is now almost fourteen years since the Supreme Court's decision in *Chapman*.

33 The United Kingdom Supreme Court has also from time to time departed from decisions of the country's apex court in response to decisions of the European Court of Human Rights. A pertinent case in point is *Smith v Ministry of Defence*,[100] where the Supreme Court overturned its own decision in *R (Smith) v Oxfordshire Assistant Deputy Coroner (Equality and Human Rights Commission intervening)*,[101] following the decision of the Grand Chamber of the European Court of Human Rights in *Al-Skeini v United Kingdom*.[102] The key

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[93] At [259].
[94] At [274].
[95] At [285].
[96] At [293].
[97] At [300].
[98] At [303].
[99] The decision was handed down in October 2006 but reported in 2007.
[100] [2013] UKSC 41, [2014] 1 AC 52.
[101] [2010] UKSC 29, [2011] 1 AC 1 (often referred to as the "***Catherine Smith***" decision).
[102] (2011) 53 EHRR 18.

issue was the extent of the extra-territorial application of the Human Rights Act 1998 (UK). The Grand Chamber found that whenever a state through its agent exercises authority and control over an individual outside of its own territory, human rights obligations may apply.[103] The Supreme Court decision brought United Kingdom law in line with the Grand Chamber's reasoning.[104]

(ii) Australia

34 In Australia the approach to overruling remains guided by four matters set out in *John v Federal Commissioner of Taxation*,[105] often referred to as 'the *John* factors'.[106] These are (1) whether an earlier decision rested on a principle carefully worked out in a succession of cases (or a principle regarded as more of an outlier), (2) whether there is a difference between the reasons of the justices constituting the majority in the decision being reconsidered, (3) whether the earlier decision achieved a useful result or led to considerable inconvenience, and (4) whether the earlier decision had been independently acted upon.[107] Justice Edelman has said extra-judicially that the first and second considerations are "concerned with considerations of principles", while the third and fourth relate to "consequences of overturning the legal rule";[108] his Honour has suggested that "greater weight should be attached" to the issues of principle raised by the first and second considerations, than to the consequences raised by the third and fourth matters.[109]

35 An illustration of these factors being applied, and an example of the language and other points relevant to Australian overruling, is the High Court's recent decision in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs*.[110] The judgment of the Court declined to reopen the statutory

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[103] See *Smith*, above n 100, at [49].
[104] At [55] per Lord Hope (Lord Walker, Lady Hale, Lord Kerr agreeing): "... I would hold that the decision in *Catherine Smith* should be departed from as it is inconsistent with the guidance that the Grand Chamber has now given in its *Al-Skeini* judgment ..." See also [153]. The substantive judgment explored the extent of combat immunity.
[105] (1989) 166 CLR 417.
[106] See the considered discussion in: Justice James Edelman, 'Overturning *Al-Kateb v Godwin*: Unanswered Questions about the Rules of Precedent', The Samuel Griffith Society Sir Harry Gibbs Memorial Oration, 25 May 2024, at 5.
[107] As noted in: ibid.
[108] Ibid.
[109] Ibid, at 11.
[110] [2023] HCA 37,

construction holding in *Al-Kateb v Godwin* ("***Al-Kateb***"), but overruled the constitutional holding in *Al-Kateb*.[111]

36 The statutory construction holding was not reopened because of legislative reliance and implicit legislative endorsement,[112] and since the High Court had recently endorsed this reasoning.[113] The constitutional holding in *Al-Kateb* had come "increasingly to appear as an outlier in the stream of authority" flowing from an earlier decision.[114] Legislative reliance and implicit legislative reliance were less relevant in relation to a constitutional holding, as was administrative inconvenience.[115] The Court considered that the principle set out by the majority in *Al-Kateb* was "an incomplete and, accordingly, inaccurate statement of the applicable principle."[116] The constitutional holding rendered the earlier principle laid down in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*[117] "devoid of substance".[118] It was accordingly overruled.[119]

(iii) Canada

37 Unlike the High Court of Australia, the Supreme Court of Canada has not set out canonical considerations that must be considered whenever overruling arises. The Supreme Court has repeatedly noted that the reasons it gives for overruling are non-exhaustive. There must, however, be "compelling reasons" for overruling a decision and overruling is not a step to be lightly taken.[120] It is

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[111] While the judgment is of the whole Court, it did note a separate position of Edelman J at [51]–[54]. The Court may have avoided a separate judgment from Edelman J to strengthen the precedential force of *NZYQ*, in light of the second *John* factor (which renders a precedent less stable if the majority is made up of separate judgments).
[112] Noted at [21].
[113] As noted at [22], with reference to *Commonwealth v AJL20* [2021] HCA 21, (2021) 273 CLR 43.
[114] At [35].
[115] At [36].
[116] At [43].
[117] (1992) 176 CLR 1, 110 ALR 97.
[118] At [45].
[119] For further discussions of overruling in Australia, see Gian Boeddu and Richard Haig, 'Terms and Convenience: Examining Constitutional Overrulings by the High Court' (2003) 31(1) Federal Law Review 167 (which discourages distinguishing as a method where overruling is required); and Matthew Harding and Ian Malkin, 'Overruling in the High Court of Australia in Common Law Cases' (2010) 34 Melbourne University Law Review 519 (discussing, including at 526, whether a "new reason" is required to overrule, and suggesting a fifth factor alongside the *John* factors, relating to whether overruling better connects the law to fundamental doctrines and principles: 538).
[120] See, eg, *Canada v Craig* [2012] 2 SCR 489 at [25].

worth setting out a mere sample of considerations that have been weighed by the Supreme Court when considering whether to overrule its own decisions.

38 In *R v Bernard*,[121] on intoxication and defences in criminal law, the Chief Justice (in dissent but with no disagreement from other members of the Court on this part of the judgment) would have overruled *Leary v The Queen*,[122] for four reasons: the Canadian Charter of Rights and Freedoms came into force after it was decided (and was inconsistent with *Leary*), later cases undermine the position in *Leary*, the decision creates uncertainty, and *Leary* expands criminal liability beyond usual limits.[123] In *R v Henry*,[124] Justice Binnie for the Court observed that a Court should be especially careful to reverse a precedent where the effect is to diminish the protection of rights and freedoms under the Charter.[125] But overruling of an earlier decision was justified here: the courts had "struggled to work with" a distinction laid out in *R v Mannion* ("***Mannion***"),[126] and *Mannion* had undermined the purpose and protection of criminal trial rights.

39 In *Ontario v Fraser*,[127] in a labour law context, the joint reasons of McLachlin CJ and LeBel J and the separate judgment of Rothstein J extensively considered whether the Court should overrule *Health Services and Support – Facilities Subsector Bargaining Association v British Columbia*.[128] The judgment of McLachlin CJ and LeBel J said that to overrule the case would diminish rights protection; the case did not involve a marked departure from prior jurisprudence; and unworkability or intolerable results had not yet been established (the case had been decided only four years earlier).[129]

40 Justice Rothstein's judgment acknowledged that a change in the composition of the Court is not good enough reason to justify overruling;[130] correctness must be weighed against certainty.[131] Justice Rothstein reviewed reasons given in past Canadian decisions, overseas decisions, and academic writing to justify

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[121] [1988] 2 SCR 833.
[122] [1978] 1 SCR 29.
[123] At 850–861.
[124] [2005] 3 SCR 609.
[125] At 634.
[126] [1986] 2 SCR 272.
[127] [2011] 2 SCR 3.
[128] 2007 SCC 27, [2007] 2 SCR 391.
[129] At [83].
[130] At [130].
[131] At [133].

overruling, including that a prior decision is contrary to sound principle or results in unfairness.[132] His Honour cited "intense academic criticism" of *Health Services*,[133] and listed other reasons of principle to justify overruling.[134] Soon after this judgment was handed down, in *Canada v Craig*,[135] Rothstein J for a unanimous Court – in a case on income tax law – overruled *Moldowan v The Queen*,[136] as it was wrong in principle and had been subject to judicial and academic criticism.[137]

(iv) The United States of America

41 The United States Supreme Court has not adopted a consistent framework when consider overruling its own decisions. We set out the approach in *Planned Parenthood of Southeastern Pennsylvania v Casey* ("***Casey***"),[138] involving four inquiries, and considerations raised in the recent decision in *Dobbs v Jackson Women's Health Organization* ("***Dobbs***").[139]

42 In *Casey*, the majority judgment of the Court on the overruling point (written by O'Connor, Kennedy and Souter JJ) said that where a court re-examines an earlier decision, "its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case."[140] In what were listed as only illustrative considerations, the majority said it could consider "whether the rule has proven to be intolerable simply in defying practical workability", "whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation"; "whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine"; and "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of

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[132] At [135].
[133] At [146].
[134] See summary at [275].
[135] See above n 120.
[136] [1978] 1 SCR 480.
[137] At [28]–[31].
[138] 505 US 833 (1992).
[139] 597 US 215 (2022).
[140] *Planned Parenthood*, above n 138, at 854.

significant application or justification".[141] The Court considered *Roe v Wade* through that lens.[142]

43 Having largely upheld *Roe v Wade* ("***Roe***") in *Planned Parenthood*, the Court considered overruling the same case in *Dobbs*. A range of considerations were invoked across the different judgments, which by a 5-4 majority overruled *Roe*. Justice Alito, delivering the opinion of the Court, began with the strength of the reasoning in *Roe*. His judgment stated that *Roe* was an outlier in light of preceding history, academic commentary, and case law. Justice Alito went on to contend that *Roe* was not just wrong, but "egregiously wrong".[143] Its holding was legislative in character,[144] without cogent justification, and has proven to be unworkable, according to Justice Alito for the Court.[145] The holding in *Roe* has distorted other areas of law,[146] the opinion claimed, and overruling *Roe* would not upend reliance interests.[147] The opinion rejected the view that legal or factual change is necessary to overrule a decision.[148]

44 Justice Kavanaugh's concurrence added that experience in intervening decades confirmed the need to overrule *Roe*.[149] Chief Justice Roberts issued a concurring judgment in which he stated that judicial restraint required not deciding more than is necessary to dispose of a case, and he considered that overruling *Roe* was not necessary for disposal.[150] To overrule *Roe* would be "a serious jolt" to the legal system; a narrower decision would be "less unsettling".[151]

45 Justices Breyer, Sotomayor and Kagan in dissent stated that "a very good reason" is required to disturb the Court's own precedent, and none had been provided.[152] Both *Roe* and *Casey* were well-connected to jurisprudence of the

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[141] Ibid, at 854–855.
[142] 410 US 113 (1973).
[143] At 6 per opinion of the Court.
[144] At 49 per opinion of the Court.
[145] At 56–62 per opinion of the Court.
[146] At 62–63 per opinion of the Court.
[147] At 63–66 per opinion of the Court.
[148] At 69–70 per opinion of the Courrt.
[149] At 8–10 of Kavanaugh J's concurrence.
[150] At 2 of Roberts CJ's concurrence.
[151] At 11 of Roberts CJ's concurrence.
[152] At 5–6 of Breyer, Sotomayor, and Kagan JJ's dissent.

Court, far from these cases being aberrations.[153] The judgment of the minority noted the importance of following the Court's own precedents for reasons of stability and integrity.[154] The minority went on state that a "special justification" or "good reason" to overrule a past decision was needed – such as a change in legal doctrine rendering the earlier decision obsolete, a factual change to same effect, or an absence of reliance because the earlier decision was less than ten years old – and no such reason or justification existed in this case.[155] The minority rejected the view that *Roe* had proved to be unworkable,[156] and pointed out that later legal developments since *Roe* reinforced its central holding.[157] The judgment noted that overruling *Roe* would have profoundly disruptive effects (especially for women without money),[158] and that the reasoning of the majority would suggest that a Court with a merely different doctrinal disposition could reach a fundamentally different legal conclusion.[159]

(v) Ireland

46 A recent decision of the Supreme Court of Ireland, *Director of Public Prosecutions v JC*, concerning the exclusionary rule in the law of evidence, revealed the range of considerations relevant to overruling in *Ireland* across six lengthy separate opinions.[160] The case being reconsidered was *DPP v Kenny* ("***Kenny***"),[161] which had laid down a strict rule of exclusion of evidence. The opinions in this decision generally focus on the correctness of *Kenny*, and alternative formulations of the test for exclusion of evidence, treating whether to overrule *Kenny* as a consideration worthy only of briefer analysis in conclusion. This may have been because *Kenny* itself had overruled a previous Supreme Court authority.[162]

47 For O'Donnell J (as the now Chief Justice then was), the decision in *Kenny* had been subject to "penetrating criticism",[163] *Kenny* had become an outlier

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[153] At 6–7 of Breyer, Sotomayor, and Kagan JJ's dissent.
[154] At 30 of Breyer, Sotomayor, and Kagan JJ's dissent.
[155] At 32–33 of Breyer, Sotomayor, and Kagan JJ's dissent.
[156] At 33–36 of Breyer, Sotomayor, and Kagan JJ's dissent.
[157] At 38–43 of Breyer, Sotomayor, and Kagan JJ's dissent.
[158] At 50–51 of Breyer, Sotomayor, and Kagan JJ's dissent.
[159] At 59–60 of Breyer, Sotomayor, and Kagan JJ's dissent.
[160] [2015] IESC 31.
[161] [1990] 2 IR 110.
[162] That being *The People (Attorney General) v O'Brien* [1965] IR 142.
[163] At [94] of Justice O'Donnell's judgment.

compared to the position in other jurisdictions (including New Zealand),[164] and the decision had proved to be difficult to apply practically.[165] The decision should be overruled: it was clearly wrong and cannot be said to have become embedded in the law.[166] Justice Clarke did not consider overruling as a distinct matter, merely addressing the arguments for different formulations of the approach to exclusion of evidence.

48 According to MacMenamin J the Court had in the past been prepared to overrule earlier decisions "said to be at variance with fundamental constitutional principles".[167] His Honour noted that his focus was on whether the original decision had created anomalies, whether "experience now show[s] that the balance of the anomalies outweigh the mischief" that the original decision addressed, and whether there are "now circumstances" making the decision "less warranted than at the time of its adoption."[168] He concluded that there were such anomalies, that the original rules was disproportionate, and that experience in applying the decision required reconsideration and overruling.[169]

49 The minority judgments raised other salient yardsticks for assessing overruling. Justice Murray and Justice Hardiman gave forthright defences of the decision under reconsideration, including in terms of constitutional principle. Justice McKechnie addressed the criteria for overruling at greater length. Justice McKechnie noted that *Kenny* was not a majority judgment; "[i]f it was … any divergence of judicial could be exploited to create an increasing level of uncertainty".[170] Justice McKechnie did not consider the law had changed significantly in the intervening years. He also observed that previous decisions had found the need for a decision to be clearly wrong or profoundly wrong for overruling to occur; or there was a need for the most compelling reasons.[171] Justice McKechnie reviewed decisions in comparable jurisdictions, finding a

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[164] Ibid, at [95].
[165] Ibid.
[166] At [99].
[167] At [15] of his judgment. The paragraph numbering begins afresh in each opinion.
[168] At [18].
[169] The Chief Justice joined these three judgments, but did not write separately, forming a 4-3 majority in favour of overruling.
[170] At [85] of his judgment.
[171] At [87]–[88].

divergence of approach. He found that there was no reason of principle to overrule *Kenny*.

The correct approach to overruling in New Zealand

50 It is helpful to organise some of the considerations relevant to overruling, not to impose a straitjacket on reasoning on overruling, but to ensure some consistency of approach and clarity of justification. Considerations can be listed in a non-exhaustive way, since further reasons to overrule may arise in future that are not envisaged now. It may be, over time, that some considerations are assessed as being more significant than others, a position that may be developing in Australia.[172] Providing some structure for argument can ensure that overruling is not the product merely of a value judgment, but involves the elaboration of reasons. Such structure can also ensure that overruling is not considered through a disorderly grab-bag of factors, and that overruling does not just follow from flourishes of rhetoric.

51 There is limited need for too many preliminary glosses on how a court approaches overruling. The Court may be minded to point out that the decision should not be made lightly, and that the Court's following of its own decisions upholds important values such as stability and certainty. Whether 'good reason' or 'compelling reasons' (the latter being the Canadian standard) are needed may provide superfluous framing that distracts from the substance of the inquiry – though of course it is implicit in what follows, and in the comparative jurisprudence, that the Court must have a sound basis to depart from its general approach to following its own past decisions. There should be no absolute precondition on overruling, such as the need for change in the legal or factual position. No overseas apex court has adopted any such absolute precondition (although it has been at times hinted in the United States that that is or ought to be the position) and to do so would be to shackle the Court rather than to allow for an informed assessment of a range of relevant considerations.

52 There has been some limited occasion for the Supreme Court of New Zealand to comment on departing from previous decisions of the Privy Council and its own previous decisions. In *Couch v Attorney-General (No 2)*, Elias CJ said that

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[172] See above n 109.

the Supreme Court could depart from a decision of its own or of the Privy Council on appeal from New Zealand "if it is right to do so because the rigid adherence to precedent would lead to injustice in the particular case or would unduly restrict the proper development of the law to meet the needs of New Zealand society."[173] Her Honour added that a mere "difference in intellectual preference" is unlikely to be adequate, and the Court would have to come to the view that "an earlier decision is wrong or has become wrong".[174] Chief Justice Elias said "good reason" would be required, and noted that "no new arguments" had been put forward in the case before the Court.[175] Her Honour found that the Court should not depart from the majority in *Bottrill v A* ("***Bottrill***"),[176] but was in the minority on this point.

53 Justice Tipping, in the majority on this point, did find that the Court should overrule *Bottrill*. In his view, "compelling circumstances" are required.[177] How compelling the circumstances need to be may depend on the type of case and the time that has passed since the decision.[178] Whether there are significant reliance interests, whether a decision is unanimous, and whether decisions have become out of date due to policy or social circumstances are all possibly relevant.[179] In all cases caution would be required and a previous decision must have been or become "clearly wrong".[180]

54 In *Clayton v Clayton*,[181] the majority of the Supreme Court confined the application of its earlier decision in *Ward v Ward*.[182] The decision of Glazebrook J for the majority did not expressly overrule *Ward v Ward*, but plainly supplemented and clarified the effect of that earlier decision.[183] Only in a

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[173] [2010] NZSC 27, [2010] 3 NZLR 149 at [32]. There is a clear similarity here to the approach of the United Kingdom courts, albeit inflected with the language of the Supreme Court Act 2003.
[174] Ibid.
[175] Ibid.
[176] [2002] UKPC 44, [2003] 2 NZLR 721.
[177] At [104].
[178] At [105].
[179] Ibid.
[180] Ibid.
[181] [2016] NZSC 30, [2016] 1 NZLR 590.
[182] [2009] NZSC 125, [2010] 2 NZLR 31.
[183] At [51]. See also [52]: "... the Court's approach should be seen as applicable only to the particular circumstances in *Ward*."

footnote did the majority judgment expressly resile from one aspect of the earlier decision.[184]

55 Informed by the approaches adopted in other jurisdictions and limited judicial comment on this matter in New Zealand,[185] arguments about overruling can be organised under five heads: (i) changes in the relevant legal and factual context since the decision being reconsidered; (ii) the provenance of the case being reconsidered, including how it relates to the broader law; (iii) the cogency and stability of the reasoning in the decision being reconsidered; (iv) consequences of the decision being reconsidered, including for judicial decision-making; and (v) the effects of overruling the decision, including the field of law in play.

(i) Changes in the relevant legal and factual context

56 Change in the relevant context may prompt reconsideration and provide good reason for overruling. As has occurred in Canada,[186] a significant legislative or constitutional or common law development may require that an earlier decision – and its reasoning – is viewed through a new lens. International law developments may shift a country's legal obligations or require a legal position to be considered in a different light. As has been relevant in Ireland, developments in comparable jurisdictions may illuminate difficulties in reasoning in a case under reconsideration or supply reasoning not originally considered in the decision that is the subject of an overruling inquiry. Wider social developments, which should be evidenced with care, may necessitate review and reconsideration of reasons given in a decision being re-examined.

(ii) The provenance of the decision being reconsidered

57 Drawing on a factor of especial relevance in Australia (but also alluded to in the United States, Ireland and elsewhere), it is salient to consider whether the

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[184] See fn 100: "Contrary to what was said by this Court in *Ward*, we do not see this subsection as supporting the interpretation that the comparison is between the position at the time of settlement and that under the dissolution." The approach of the Court was discussed in Douglas White, 'Originality or Obedience? The Doctrine of Precedent in the 21st Century' (2019) 28 NZULR 653 at 660.

[185] It should also be noted that the Court of Appeal has departed from previous decisions that it concludes were wrong: *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA) overruled *Re the Ninety Mile Beach* [1963] NZLR 461 (CA).

[186] See above n 123.

decision under reconsideration was the culmination of a series of decisions or was an outlier or aberration. Where a case followed a series of decisions, the case may appear to have a deeper grounding in case law; an outlier or aberration represents a departure from earlier case law and might be more readily reconsidered, since its overruling is unlikely to effect such a change in the drift and direction of the common law. Of course, as has been clear in the United States, a single decision can be characterised as a culmination of case law or as an aberration; but that is merely to confirm that this is an important area for argument, and a well-reasoned view should be taken of the law as a whole. This second head of argument may help to calibrate the strength of reasoning needed to overrule a judgment: where a case is the culmination of a series of decisions, the Court may require more compelling reasons to overrule it.

(iii) The cogency and stability of the reasoning

58 While it may not be sufficient that a later Court takes a different view of a judgment, the cogency and stability of the reasoning of a case under reconsideration remains relevant. The Court can make particular structured inquiries of a case so that departure from a previous decision is more than simply a value judgement. It will be pertinent that (a) a key distinction drawn in a judgment can now be understood to be logically defective, perhaps in light of legal and factual developments; (b) a central reason given in the judgment has less force than was considered at the time of the original decision, or a principle can be seen to be incompletely or inaccurately stated; or (c) an important consideration (such as the relationship to legislation or the wider common law) was not assessed, prompting a different result.

59 The Court may consider, too, (d) whether the original judgment was unanimous, or a majority decision made up of different opinions, as is a separate factor in *Australia*. This need not be the focus of its own head of argument, but it is the case that a majority comprising separate opinions may be less stable, and may be viewed differently from a single unanimous judgment. When considering the cogency and stability of the reasoning, the Court can consider whether the original judgment was plain wrong, but that ought to be the conclusion of the inquiry under this head of argument, rather than a matter stated by way of bald assertion.

(iv) The consequences and receipt of the decision

60 This head of argument overlaps with consideration of the nature of reasoning, but it relates specifically to experience in applying the reasoning from the original case and how the case has been received. First, the practical experience of judges seeking to apply the case under reconsideration may reveal a distinction or approach in the case to be unworkable; unworkability is explicitly a consideration in overruling in the United States. Second, the extent of law, including legislation, developing around the original case may be relevant to how deeply embedded it is in the law (a consideration arising in Australia). Thirdly, the Court can appropriately consider whether a decision has distorted the law: resulting in anomalies, marked injustice or unfairness, inhibition in proper development of the law (the latter relevant in the United Kingdom) or skewed legal development. Fourthly, whether there has been legislative reliance, whether the decision has been the subject of academic criticism (a point raised by Canadian and Irish authorities), and the force of that criticism, may be assessed under this heading.

61 The relevance of experience in applying the decision, and the need to assess the decision's consequence, may rightly prompt the Court to be slow to reconsider a decision very soon after it is handed down. But the relevance of legal development around a decision may also mean that the Court is slow (but not entirely resistant) to overturn a decision of some decades' standing.

(v) The effects of overruling the decision, including the relevance of the field of law in play

62 The Court can consider under this head whether overruling a decision will bring enhanced coherence to the law, or ensure greater consistency with fundamental doctrines and principles (a point discussed in Australian commentary). Whether overruling would significantly undermine reliance on a decision may be raised in this area of argument, though some caution is needed towards unevidenced claims or predictions.[187]

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[187] See discussion in White, above n 184, at 672–673. For another useful discussion of general considerations relevant to overruling, see BV Harris, 'Final Appellate Courts

63 So, for example, it is not clear, contrary to the position in the United Kingdom, whether some areas of law – such as contract, property, or matters bearing on fiscal arrangements – warrant particular circumspection in relation to overruling. This appears to place some areas of law on a higher pedestal, and may be based on unarticulated (and contestable) assumptions about the importance of settled commercial arrangements overriding correct law. Certainty is undoubtedly a value in criminal law, but it may be more relevant in criminal overruling contexts to consider the effect on particular individuals and trials, rather than general rules of thumb being adopted in the abstract. There has been a vigorous debate in Canada about whether the fact that a matter raises issues of constitutional law should make overruling more or less likely. (Claims about the ease of constitutional amendment are part of the debate in that jurisdiction, which do not arise – at least not in the same way – in New Zealand.) Considerations of constitutionality may point in both directions – correction of a matter of constitutional law may be more important and necessary (because of far-reaching effects), but that a matter of constitutional law has far-reaching effects may also prompt caution.

64 As against that it may be the case that an area of law like human rights may be more susceptible to overruling than other areas. That would reflect (1) (in accordance with the Long Title to the Bill of Rights) the need to ensure that New Zealand law meets contemporary international human rights standards as evidenced by subsequent jurisprudence or developing standards; (2) the necessarily dynamic and evidence-contingent nature of a s 5 Bill of Rights assessment or evaluation (a Canadian example is a Supreme Court of Canada decision departing from an earlier decision on assisted dying).[188]

Overruling their Own 'Wrong' Precedents: The Ongoing Search for Principle' (2002) 118 LQR 408.

[188] *Carter v Canada (Attorney General)* 2015 SCC 5, [2015] 1 SCR 331 ("***Carter***"); compare *Rodriguez v British Columbia (Attorney General)* [1993] 3 SCR 519 ("***Rodriguez***"). While the case involved in part whether the trial judge was bound to follow *Rodriguez*, the Court noted that there was "a different legal conception" of s 7 of the Charter (the right to life, liberty, and security of the person) than that prevailing when *Rodriguez* was decided; the law relating to over-breadth and gross disproportionality had "materially advanced" since then: [46]. The "matrix of legislative and social facts" in *Carter* also differed from the evidence before the Court in *Rodriguez*: [47]. The evidence before the Court in *Carter* was capable of undermining the conclusions in *Rodriguez*: [47].

65 Other relevant considerations may have been omitted from the above list, or may become clearer over time. Whether there is prospect of legislative reform in an area of law is a matter, it is suggested, that the Court should refrain from assessing, since it involves an element of speculative prediction. Assertions about what might occasion public confidence in the courts should also be treated with care, since they are rarely grounded in evidence. It is also submitted that there should be no a priori preference for distinguishing a case, as opposed to overruling it, since a move to distinguish (where overruling is properly warranted) may itself distort development of the law or produce artificial distinctions. It may be appropriate to acknowledge that the Court has often developed, adjusted, or refined the law – including through developing, adjusting, or refining its own past decisions – and that overruling a decision represents merely one point on the spectrum of ways in which the Court is engaged in ongoing development, adjustment, and refinement of the law.

Chapman should be overruled or, in the alternative, confined

66 *Chapman* is no longer good law in New Zealand. Changes in legal and factual developments mean it should be revisited and overruled. It was an outlier rather than a culmination of case law. The majority's reasoning lacks cogency and stability: the analogy between damages for judicial breach and judicial immunity is incomplete and illogical; the argument about adequacy of alternative remedies is insufficiently developed; and the majority does not engage with the terms of the Bill of Rights. It comprises two separate opinions, one of which – with respect – proceeded from a premise (that *Baigent* was wrongly decided) that was false. The consequences of *Chapman* have included marked injustice, unworkability, skewed development of the law, and inconsistency with the very international human rights instrument that the Bill of Rights is expressly designed to affirm. There has been no clear legislative reliance on *Chapman* that would make it unfair or wrong to overrule. Overruling *Chapman* would bring greater coherence to the law and none of the reasons against overruling passes muster. What follows is an elaboration of these points; in the alternative, it is submitted that *Chapman* should be confined.

(i) Changes in relevant law and facts are in favour of the overruling of Chapman

67 The Views expressed by the Human Rights Committee in *Thompson v New Zealand* are the first basis for reconsidering and overruling *Chapman*. The Human Rights Committee observed that, notwithstanding the policy arguments raised by the New Zealand Government (the same as those raised in *Chapman*), art 9(5) of the Covenant does not allow for exception to the requirement that States parties pay compensation for unlawful arrest or detention.[189] The Committee added that art 9(5) does not interfere with judicial independence but rather strengthens accountability and trust in the judiciary.[190] The Committee, therefore, found that New Zealand is obliged to provide Ms Thompson with adequate compensation and to review its practices to ensure "individuals who have been unlawfully arrested or detained as a result of judicial acts or omissions may apply to receive adequate compensation, in accordance with the obligation set forth in the Covenant".[191]

68 The Court's grant of leave in this case has allowed the review of the earlier judicial practice. Removing the carve-out disallowing damages for judicial breach will fulfil New Zealand's international obligations. The Views expressed are also suggestive that removing the carve-out for damages for judicial breach is more consistent with the scheme and text of the New Zealand Bill of Rights

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[189] *Thompson v New Zealand* at [7.5].
[190] Ibid, at [7.6].
[191] Ibid, at [9]. The Human Rights Committee has adopted other views relevant to this case: in particular, *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). The author of the communication had been detained for seven months longer than he should have been due to error (relating to the delayed aggregation of sentences), and also noted that the law failed to ensure compensation for breach of arbitrary detention: see [3.1]. The Committee found that unauthorised confinement of prisoners beyond the length of their sentences is arbitrary and unlawful: [9.4]. The Committee reiterated at [9.11] that under art 9(5) States parties must "establish the legal framework within which compensation may be afforded to victims of unlawful arrest or detention, as a matter of enforceable right, not as a matter of grace or discretion." That framework already exists in New Zealand under the Bill of Rights, and through *Baigent*; in this case the Court must merely address the gap in the framework that was opened up by one of its own previous decisions. The Committee added at [9.12]: "in cases of unlawful or arbitrary arrest or detention, compensation to the victim should not undermine judicial independence but should rather strengthen accountability and trust in the judiciary by providing reparation for a wrong." The Committee also noted the art 2(3)(a) obligation on a State party to provide an effective remedy for violation of a right, which "requires it to make full reparation to individuals whose Covenant rights have been violated": [11].

Act 1990 (which, in its Long Title, is said to be an Act "to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights").[192]

69 Second, there have been developments in the European Court of Human Rights, from the British Parliament, and in the structure of the Human Rights Act 1998 (UK) which fortify the case for overruling *Chapman*. Since the decision in *Chapman*, the European Court of Human Rights decided *Hammerton v United Kingdom*, which arose out of serious procedural errors by the Woolwich County Court (resulting in six and a half weeks' imprisonment).[193] Section 9(3) of the Human Rights Act had limited the availability of damages for judicial breach,[194] and the applicant argued that the restriction on damages for judicial acts violated Article 13 of the European Convention, which guarantees the right to an effective remedy. The European Court concluded "that the domestic remedies available in relation to his complaint under Article 6 were not fully 'effective' for the purposes of Article 13, since they were not capable of affording adequate redress for the prejudice suffered by him in the form of the lengthened deprivation of liberty caused by the absence of legal representation in his case."[195]

70 This prompted a report by the Parliamentary Joint Committee on Human Rights, which noted: "We are not convinced that judicial immunity requires UK judges to be deprived of the ability to award damages against the State in the very rare circumstances where no other remedy would be effective for the purposes of Article 13 ECHR in order to remedy a human rights violation."[196] After some further discussions about what would be appropriate remedial action under s 10

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[192] It is noteworthy that the Australian Capital Territory's Human Rights Act 2004 includes s 18(7), a right to compensation for unlawful detention that gives effect to the International Covenant on Civil and Political Rights obligation: "Anyone who has been unlawfully arrested or detained has the right to compensation for the arrest or detention". Australian Capital Territory continues to work through how this provision is to be applied: see *Morro v Australian Capital Territory* [2009] ACTSC 118; 4 ACTLR 78, but see also *Lewis v Australian Capital Territory* [2018] ACTSC 19.

[193] [2016] ECHR 272; (2016) 63 EHRR 2.

[194] At the time of the decision, judicial acts done in good faith could only result in damages if to compensate a person to the extent required by Article 5(5) of the Convention.

[195] At [152].

[196] Parliamentary Joint Committee on Human Rights, 'Proposal for a Draft Human Rights Act 1998 (Remedial) Order 2019' (2018) at 22 (at [7]), available online at https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/1457/1457.pdf (last accessed 13 December 2024).

of the Human Rights Act to respond to the Strasbourg judgment, the Human Rights Act 1998 was amended to allow damages for judicial breach of Article 6 of the Convention.[197]

71 A further case then came before the European Court of Human Rights, *SW v United Kingdom*, considering highly adverse and extraneous findings made by the Family Court against the applicant social worker, who had her employment terminated as a result.[198] No damages were available for the judicial breach, since damages were now limited to select breaches under Articles 5 and 6 of the Convention and there was no suggestion that the judge's actions were not in good faith. The European Court held that "the judgment of the Court of Appeal did not afford the applicant appropriate and sufficient redress for her complaint under Article 8 of the Convention", "the applicant did not have access to an effective at the national level capable of addressing the substance of her Article 8 complaint", and therefore there was a breach of Article 13 (and Article 8) of the Convention.[199]

72 These developments confirm that the blanket exclusion of damages for judicial breach of the New Zealand Bill of Rights Act 1990 is a violation of the entitlement to an effective remedy. That was an argument advanced by Chief Justice Elias in her dissent in *Chapman*, but at that point it was not supported by strong international human rights judgments as is now the case.

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[197] See the Human Rights Act 1998 (Remedial) Order 2020, inserting new s 9(3) of the Human Rights Act 1998 at https://www.legislation.gov.uk/uksi/2020/1160/contents/made. It is contextually relevant that the Australian Capital Territory's Human Rights Act 2004 also contains an express right of compensation for unlawful arrest or detention in s 18(6): "Anyone who has been unlawfully arrested or detained has the right to compensation for the arrest or detention."

[198] (2021), Application No. 87/18.

[199] At [73]. The United Kingdom Government's response to this appears to have been contained in the then Government's proposal for 'A Modern Bill of Rights' in 2022, which included an indication that the Government wished to implement the judgment in *SW v United Kingdom*. The Government said: "We will ... restate section 9 of the Human Rights Act, but include a further amendment allowing for damages to be available where an individual's rights under Article 8 are violated as a result of a judge following an unfair procedure." See UK Government, 'Human Rights Act Reform: A Modern Bill of Rights, Consultation Response', updated 12 July 2022, available online at https://www.gov.uk/government/consultations/human-rights-act-reform-a-modern-bill-of-rights/outcome/human-rights-act-reform-a-modern-bill-of-rights-consultation-response (last accessed 13 December 2024). As far as counsel can ascertain, this reform proposal was not taken forward.

73 Third, developments in New Zealand law since *Chapman* have underscored the need for a robust approach to rights protection and effective remedies under the New Zealand Bill of Rights Act 1990. In *Taylor v Attorney-General*, the need for remedies to be available for breaches of the Bill of Rights for the Bill of Rights to be effective was underscored,[200] as was the need for the ordinary range of remedies to be available to provide such a remedy.[201] In *Fitzgerald v R*, it was affirmed by Winkelmann CJ that the Bill of Rights must be interpreted to give individuals "the full measure" of their enacted rights and freedoms, in order to the make the rights "practical and effective";[202] it was also said that "judges are bound by the Bill of Rights and must respect and affirm the rights and freedoms preserved there."[203] In *Moncrief-Spittle v Regional Facilities Auckland Ltd*,[204] particular emphasis was placed by Ellen France J – in a judgment for the Court – on article 2(1) of the Covenant, and the obligation "to respect and to ensure to all individuals within its territory" the rights recognised in the Covenant, including to take necessary steps to adopt laws or measures necessary to give effect to the rights in the Covenant.[205]

74 Then, through the New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Act 2022, the ability of a senior court to declare that an enactment is inconsistent with the Bill of Rights was affirmed (in what became s 7A of the Bill of Rights), and a process for ministerial and governmental response was set out (in what is now s 7B of the Bill of Rights). This fortified the view, already developed in case law, that appropriate remedies should be available for breach of the Bill of Rights, and that upholding the Bill of Rights is a project in which all the branches of government are to play a part.

75 While none of the three cases mentioned explicitly referred to *Chapman* (since argument was not invited on *Chapman* in any of them), this trio of cases – along with the 2022 legislative amendment – reflects an evolving robust approach to the Bill of Rights in New Zealand law that ensures that the Bill of Rights gives meaningful expression to all rights, including through reference to the availability

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[200] *Attorney-General v Taylor* [2018] NZSC 104, [2019] 1 NZLR 213 at [29] per Ellen France J and Glazebrook J.
[201] At [30] and [38] per Ellen France J and Glazebrook J, and [104] per Elias CJ.
[202] [2021] NZSC 131, [2021] 1 NZLR 551 at [41] per Winkelmann CJ
[203] At [118] per Winkelmann CJ.
[204] [2022] NZSC 138, [2022] 1 NZLR 459.
[205] At [70].

of the usual range of remedies. The executive, legislature, and judiciary must all be engaged in the common project of affirming, protecting, and promoting human rights. That development of the law of the Bill of Rights in recent years renders *Chapman*'s exclusion of the damages remedy for judicial breach increasingly marginalised.

76 Fourth, international standards on arbitrary detention and the right to a remedy have developed since *Chapman*, solidifying the importance of damages being available for judicial breach in cases such as this one. In particular, in 2020, the Human Rights Council adopted the United Nations Working Group on Arbitrary Detention's report, which included Deliberation 10 on reparations for arbitrary deprivation of liberty.[206] In that deliberation it was noted that compensation must be available in an appropriate case.[207] The Working Group also reiterated that "all victims of arbitrary deprivation of liberty are entitled to an enforceable right before the competent national authority to prompt and adequate reparations."[208] No carve-out for judicial breaches was mentioned. This underscores the importance of New Zealand filling the gap in available remedy for judicial breach of the right not to be unlawfully detained in particular.

77 Fifth, the Court should take notice of the recent decision of the Supreme Court of Canada in *Attorney-General v Power* ("***Power***").[209] While there are differences between the Bill of Rights and the Canadian Charter of Rights and Freedoms, two propositions set out in that judgment are of wider relevance and are salient to the law of New Zealand. In a case on whether damages are available for legislative breach of the Charter, in which the Court rejected any immunity for legislative breach, the Court found that the need for a purposive and generous approach to the Charter is equally true for Charter remedies as for Charter rights.[210] The Court also noted: "An award of damages against the state for exceeding its legal powers has long been recognized as an important requirement of the rule of law."[211]

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[206] Human Rights Council, 'Arbitrary Detention: Report of the Working Group on Arbitrary Detention', 24 July 2020, A/HRC/45/16.
[207] Annex I, at [14].
[208] At [6].
[209] 2024 SCC 26.
[210] At [32].
[211] At [41].

78 In New Zealand law, then, the generous and purposive approach to interpretation of the Bill of Rights cannot be disapplied in relation to remedies for the Bill of Rights. It must also be observed that allowing damages against the state for exceeding legal powers is an important part of the rule of law in this country, a precept to which New Zealand has a continuing commitment, as was affirmed by s 3(2) of the Supreme Court Act 2003 (and continued by s 3(2) of the Senior Courts Act 2016). The *Power* case reinforces that *Chapman*'s carve-out undermines the rule of law and a generous and purposive approach to remedies for breach of the Bill of Rights. It strengthens the case for overruling *Chapman*.

(ii) The provenance of the majority judgment in Chapman

79 It is pertinent to whether the majority opinions in *Chapman* should be overruled to note that the majority position was an outlier and an aberration, rather than a culmination of a series of cases. The joint judgment of William Young J and McGrath J analysed relevant authorities to endeavour to demonstrate that *Baigent* damages for judicial breach of the Bill of Rights had not been explicitly endorsed in previous case law.[212] But the only authority positively relied upon in that joint judgment as supporting exclusion of Bill of Rights damages for judicial breach was the judgment of William Young J in the Court of Appeal in *Brown v Attorney-General*, which the joint judgment acknowledged was not joined by other members of the Court of Appeal, and which applied only to breach of fair trial rights.[213] It was also accepted by the joint judgment that the availability of damages for judicial breach had been conceded by the Crown, and accepted by the Court of Appeal, in *Rawlinson v Rice*;[214] and assumed by the Court of Appeal in *Attorney-General v Upton*.[215]

80 The majority in *Chapman* was a break from the direction of Bill of Rights case law. The Court should at least be less cautious in overruling a decision such as *Chapman* where it is not a culmination of preceding case law.

(iii) The cogency and stability of the majority reasoning in Chapman

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[212] At [117]–[145].
[213] See discussion at [115].
[214] [1997] 2 NZLR 651 (CA).
[215] (1998) 5 HRNZ 54 (CA). See [137] and [139].

81 The joint judgment of William Young and McGrath JJ placed great weight on the principles and policies underpinning judicial immunity as reasons to exclude damages for judicial breach of the Bill of Rights. But, apart from the forceful considerations set out in the judgments of Elias CJ and Anderson J, there is a fundamental logical defect in this core plank of the joint judgment's reasoning: it compares the non-availability of *suing* individual judges (due to judicial immunity) with the non-availability of a *particular remedy* against the Crown in the Bill of Rights context. Put another way, the analogy between personal judicial immunity and damages against *the Crown* for judicial breach of the Bill of Rights is incomplete. It is to compare apples with oranges – or, at least, apples with pears. The direct parallel to judicial immunity is whether judges can be sued at all for judicial breach; but *Chapman* preserved intact the possibility that judges could breach the Bill of Rights and that relief could be granted in respect thereof – it simply removed one remedy, damages, for judicial breach.

82 Challenges against judges have continued after *Chapman* was decided, simply (largely) without a claim for public law damages as a remedy. The risks of collateral challenges and the undermining of the finality of judgments were kept in place by the approach taken by the joint judgment in *Chapman*. The theoretical risk that the executive government would have to "defend actions brought in relation to judicial conduct" remains alive.[216] The arguments developed by the joint judgment were arguments for not allowing judges to be sued for any kind of judicial breach of the Bill of Rights, but they were used only to justify exclusion of public law damages for judicial breach. The reasoning of the joint judgment ought to have been directed at why *damages* in particular undermine the principles and policies of judicial immunity. That reasoning was lacking. It is one reason why the judgment is plainly wrong.

83 Further, the reasoning of the joint judgment on the adequacy of alternative remedies failed to meet the threshold required to establish that damages should *never* be available for judicial breach of the Bill of Rights. The reasoning on this point is slight. The joint judgment listed some alternative remedies for breaches of rights, including the right of appeal, exclusion of evidence, and removal of

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[216] At [190].

judges for serious misbehaviour.[217] It noted two further developments in remedial protection in recent years: the establishment of the Supreme Court and the creation of a Judicial Conduct Commissioner and process for investigating complaints against judges.[218] The judgment then observed that the way the appeal in *Chapman* had been argued precluded consideration of adequacy of relief in that particular case, though the judgment did suggest adequate remedies could well have been available, such as rehearing, early release, and the dropping of charges.[219] The judgment acknowledged that the existence of remedies in the case before it does not mean "remedies will invariably be effective", but it concluded that "the high degree of general effectiveness of remedies in the justice system is highly relevant".[220] That of course is cold comfort for someone like Ms Thompson, or more pertinently to this appeal, Mr Putua.

84 Mr Putua submits that before ruling out the possibility of Bill of Rights damages for judicial breach, the joint judgment ought to have established that alternative remedies will *always* be adequate. But no reasoning was given on why alternative remedies will invariably be effective and sufficient, beyond the reference to "the high degree of general effectiveness of remedies in the justice system". No explanation was provided as to why available remedies listed in the judgment met a standard of adequacy, and would meet that standard in all cases (including those possibly arising in future). Whether alternative remedies were adequate in Mr Chapman's case is of little import, as the joint judgment appeared to concede. The joint judgment hence misfired in its reasoning and was decided incorrectly.

85 The joint judgment of McGrath and William Young JJ also does not explain how the conclusion reached on the availability of damages for judicial breach of the Bill of Rights is consistent with the text, scheme, and structure of the Bill of Rights. The then Chief Justice had explained that allowing damages for judicial breach was consistent with the text and scheme of the Bill of Rights.[221] The judgment of Glazebrook J in the Court of Appeal below had also been forthright

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[217] At [193]–[194].
[218] At [195].
[219] At [197].
[220] At [198].
[221] At [78].

that allowing the judiciary to "be excluded from the scope of the Bill of Rights compensation remedy would involve excluding, in part, the judicial branch from the overall operation and the 'application' of the Bill of Rights, contrary to s 3, which states that the Bill of Rights applies (without qualification) to the three branches of government under s 3(a)".[222]

86 The joint judgment appeared to consider that once it had demonstrated that no authority was controlling on the point, it was free to consider the considerations for and against public law damages being available for judicial breach, and to reach its own "policy judgment".[223] But the availability of public law damages for judicial breach was not a matter to be decided in a common law vacuum, untethered to any statutory framework. The question arose in relation to the New Zealand Bill of Rights Act 1990 and its international human rights antecedents. No attempt was made to explain how excluding public law damages for judicial breach was consistent with either arm of the Bill of Rights' Long Title, the International Covenant on Civil and Political Rights (which is mentioned in the Long Title, and contains an explicit guarantee of effective remedy where rights or freedoms are violated),[224] s 2 of the Bill of Rights, s 3 (s 3(a) in particular), or the Act as a whole.

87 In *Baigent* Hardie Boys J noted that the Court of Appeal had been "consistent in the view that the terms of the Covenant and the terms of the Bill of Rights Act itself require a rights-centred response to infringements",[225] and his Honour urged a "rights-centred approach".[226] The approach of the majority in *Chapman* was not rights-centred. It was centred on concerns about the indirect effect of state liability on judges, and on policy arguments, rather than rights.

88 The existence of two separate opinions to constitute the majority is also worthy of consideration when *Chapman*'s overruling is considered. The rule in *Chapman* was not set out in a unanimous judgment. It is noteworthy that Gault

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[222] *Attorney-General v Chapman* [2009] NZCA 552, [2010] 2 NZLR 317 at [78].
[223] At [97].
[224] In art 2(3)(a) of the Covenant each State Party undertakes "[t]o ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity."
[225] *Baigent*, above n 3, at 702.
[226] Ibid, at 703.

J's judgment began by restating the general opposition to Bill of Rights damages that he had expressed in *Baigent*.[227]

89 Without doubt Justice Gault's answer to the particular issues raised by *Chapman* was coloured by his (dissenting) views in *Baigent*. But those views did not reflect New Zealand law as of 2011: *Baigent* has represented New Zealand law since 1994; it had been left in place by Parliament following the Law Commission's review;[228] it was *expressly* recognised by statute (for example, in the Limitation Act 2010, s 12(2)(c); the Prisoners' and Victims' Claims Act 2005, s 6) and implicitly by the Human Rights Act 1993; and it had been affirmed by this Court in *Taunoa v Attorney-General*.[229] Justice Gault's failure to recognise this position casts significant doubt on his judgment. Justice Gault's judgment can be taken to be a de facto attempt to overrule *Baigent*, without any fulsome analysis of the reasons generally taken into account in overseas jurisdictions when departure from past decisions is considered.

(iv) The consequences of the decision in Chapman

90 The decision in *Chapman* has resulted in marked unfairness and particular injustice for persons such as Mr Putua, who have been subjected to arbitrary detention but can receive no award of damages. Acknowledgment of the breach of Mr Putua's rights by a court is neither adequate nor effective as a remedy. It is perverse and anomalous that those suffering arbitrary detention at the hands of a non-judicial actor (such as a Corrections officer) may receive an award of damages but Mr Putua, suffering the same arbitrary detention but at the hands of a judicial actor, may not. To Mr Putua, the identity of the actor – and the pigeonholing of that actor in one branch of the government over another – makes little difference. But under the current law, while *Chapman* remains in force, it affects Mr Putua's ability to obtain an effective remedy.

91 The decision in *Chapman* has also created difficulties, and proven unworkable, where a breach of rights has been caused by multiple actors, such as judges and registrars, or judges and other administrative staff, or judges and

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[227] See [211]–[215].
[228] Law Commission *Crown Liability and Judicial Immunity: A Response to* Baigent's *case and* Harvey v Derrick (NZLC R37, 1997).
[229] [2007] NZSC 70, [2008] 1 NZLR 429.

prosecutors. Such difficulties have arisen in this case, *Attorney-General v Fitzgerald* ("***Fitzgerald***")[230] and *Thompson v Attorney-General* ("***Thompson***").[231] The challenge in distinguishing judicial breach and breach by other actors was explicitly predicted by Elias CJ in *Chapman*, who said the distinction for the purposes of remedy "may be elusive in practice and productive of arbitrary outcomes",[232] and in a footnote[233] gave two hypothetical examples: whether a warrant is issued by a judge or a registrar, or whether breach of fair trial rights is attributed to judicial or prosecutorial misconduct. Those hypothetical examples have become real cases, largely as envisaged, in this case and *Fitzgerald*.

92 The joint judgment in *Chapman* did not discuss at any length the width of the concept of a judicial actor or the judicial branch, for the purposes of establishing a carve-out to the availability of Bill of Rights damages. It supplied no guidance for resolving the difficult cases that have arisen. That has caused significant uncertainty. It has also produced incentives for the Crown to reframe claims as a judicial breach, when it involves multiple actors.

93 Further, in part because of uncertainty in how the rule laid down by the joint judgment was formulated, *Chapman* has resulted in decisions excluding declaratory relief for judicial breach of the Bill of Rights, seemingly going beyond what was decided by the Supreme Court majority.[234]

94 The decision has distorted the law and inhibited its proper development.

(v) The effects of overruling Chapman

95 To overrule *Chapman* would not upend reliance interests, or undermine legislative reliance on *Chapman*. As to legislative reliance, overruling *Chapman* would result in domestic law being better aligned with international human rights norms that the Bill of Rights is designed to affirm. Another way of conceptualising the issue is this: while the majority judges in *Chapman* may

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[230] [2024] NZCA 419.
[231] See above n 8.
[232] At [53] of *Chapman*.
[233] At fn 125.
[234] See above n 60.

have thought the rule they adopted would ultimately reflect where the international jurisprudence would land, they were wrong. That now being plain, *Chapman* can and should be overruled.

96 No great jurisprudence has been built up around *Chapman*. It has not been decided in an area of law requiring any especial caution in overruling, even if it is accepted that an area of law can prompt greater circumspection in overruling.

What should this Court do?

(i) Preferred position: overrule Chapman *entirely*

97 It is submitted that this Court should overrule *Chapman*. The majority decision was legislative in character, removing an entire area of acts by the judicial branch from being able to give rise to damages for breach of the Bill of Rights. The correct position is to revert to the pre-*Chapman* state of the law, where – as in other cases – damages would be in principle available regardless of the identity of the person responsible for the rights breach. The question in each case would simply be whether damages are required for an effective remedy to be provided.[235] Over time, certainty would emerge, as the factors relevant to, and unique to, claims for judicial breach were considered and weighed in individual cases. It may be that in some instances the appellate process has provided sufficient remedy, and/or that alternative remedies are effective. It is for the Court in each case of a judicial breach of the Bill of Rights to decide whether damages are required to provide effective remedy. It should also be made clear that there is no bar on declaratory relief for judicial breach of the Bill of Rights.

(ii) Alternative 1: exempt s 22 claims from Chapman

98 In the alternative, *Chapman* should be confined to its facts and the Court should at the very least state that damages are available for judicial breach of s 22 of the Bill of Rights, for which there is an explicit international law obligation under art 9(5) of the Covenant. While there are passages in *Chapman* that refer more

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[235] As was the position in *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 at [107], [255], [267], [268], [300], [327], [368], [371], [372], [385], and [386].

broadly to damages being unavailable for judicial breach of the Bill of Rights, the question before this Court in that case related only to breach of ss 25 and 27 of the Bill of Rights. That much is clear from the opening paragraph of McGrath and William Young JJ's joint judgment.[236] In their disposition of the case, McGrath and William Young JJ also answered the questions posed in a way that was limited to ss 25 and 27: "we hold that the Court does not have jurisdiction to hear and determine the respondent's claim for public law compensation, for alleged breaches by the judiciary of ss 25 and 27 of the Bill of Rights Act …"[237] This more pinched confinement of *Chapman*, however, risks creating its own distortions and anomalies, as it involves the replacement of one carve-out with another. It is therefore preferable that *Chapman* is overruled in toto, leaving the appropriate and effective remedy to be tailored to the particular case.

(iii) Alternative 2: confine Chapman *to breaches solely attributable to judges*

99 A further alternative is that *Chapman* is limited to excluding damages for the Bill of Rights where *judges* breach rights. Much of the discussion by William Young and McGrath JJ drew an analogy between the personal immunity of judges and judges' breach of the Bill of Rights.[238] On occasion in the joint judgment, it is only the position of judges that is referred to.[239] When discussing policy considerations telling against the availability of damages for judicial breach, the joint judgment says "allowing claims to be made against judges" would result in four deleterious consequences.[240] The issue was elsewhere framed as "whether the Bill of Rights Act, and the courts' duty to fashion remedies identified in *Baigent*, enable … a direct action to be brought for breaches of protected rights by judges."[241] The position of the Registrar of the Court in *Chapman* was not

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[236] At [94]: "We accept that ... [the Court of Appeal in *Taito*] breached Mr Chapman's rights ... under ss 25(h) and 27(1) ... In issue now is whether Mr Chapman has a viable claim against the Attorney-General for compensation under the Bill of Rights Act for those breaches ..."
[237] At [209].
[238] See, eg, [97].
[239] See, eg, [138], where – distinguishing *Lai v Chamberlains* [2006] NZSC 70, [2007] 2 NZLR 7 – the joint judgment says that in that case, "[t]he different nature of the functions of judges did not call for consideration in that judgment."
[240] At [166]. See also [189]: "What would be the impact of this on judges?"
[241] At [178].

fully addressed, and was referred back to the High Court.[242] The decision in *Baigent* also appears to accept that the issue of the warrant – under scrutiny in that case – was "judicial process", and that the fact of a judicial process giving rise to a breach of the Bill of Rights did not invalidate a claim for damages against the Crown.[243]

100 It is therefore appropriate, and in line with the judgments in *Baigent* and *Chapman*, to preserve damages for breaches of the Bill of Rights where the acts in question were not actions of judges. However, this approach raises its own limitations, given the likelihood of breaches by multiple actors, including judges, where the contribution and/or mixed responsibility of multiple actors may be difficult to prise apart.

(iv) Alternative 3: confine Chapman *to cases of true judicial immunity*

101 Another alternative still is that *Chapman* is confined to acts that attract the protection of judicial immunity. This would confine *Chapman* not by reference to the nature of the right (as in the first alternative suggested above), nor by reference to the nature of the actor responsible for the breach (as in the second alternative suggested above), but by reference to the nature of the act and whether it would otherwise be protected by principles of judicial immunity. Such an approach would align with the judicial immunity rationales given by William Young and McGrath JJ in their joint judgment in *Chapman*. It would, however, require some intellectual gymnastics – and add complexity to arguments – by inviting a side-inquiry into how judicial immunity principles would hypothetically apply in order to establish whether public law damages are available for breach of the Bill of Rights. It would also continue to ignore the fact that *Baigent* damages are owed by the state, not individual actors (capable of gaining the protection of particular immunities).

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[242] At [208].
[243] See *Baigent*, above n 3, at 674 per Cooke P: "In common with all my colleagues … I accept that the warrant was judicial process …"

Should the Court need to consider the matter, it should find that the actions of the Deputy Registrar are not protected by judicial immunity

102 If the Court finds that *Chapman* no longer remains good law in New Zealand or that *Chapman* is confined to breaches of ss 25 and 27 (and at least does not apply to breaches of s 22), there becomes no need for the Court to apportion the contribution made by the judge and the Deputy Registrar to Mr Putua's arbitrary detention for 33 days. The legal barrier on public law damages for breach of the Bill of Rights will have been removed. The Court of Appeal acknowledged that the judge signed the warrant in error.[244] This Court can hold that it is not necessary to determine relative contribution or responsibility, and can simply order that Mr Putua is entitled to $11,000 in damages, to be paid to the Secretary for Justice under the Prisoners' and Victims' Claims Act 2005.

103 An alternative, overlapping approach would be for the Court – having overruled *Chapman* – to make clear that there are no blanket exclusions from liability for public law damages on the basis of the policies and principles underpinning judicial immunity. The Court could reiterate that Bill of Rights damages are a public law remedy, not a form of vicarious liability in tort. The question would simply be whether the Deputy Registrar and the judge in this case have breached the Bill of Rights. This Court could note that the Court of Appeal's judgment indicates that it considered that both the judge and the Deputy Registrar were in error,[245] and would have required both to make some contribution had the *Chapman* bar not been in place.

104 It would be preferable for the Court not to review the law on judicial immunity, especially since the common law position has not been reviewed in light of the Bill of Rights (as Elias CJ pointed out in *Chapman*),[246] and this Court would not have the benefit of argument from the lower courts on whether the common law doctrine of judicial immunity is consistent with the Bill of Rights and requires development to bring it into line with the Bill of Rights.

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[244] At [41].
[245] See [91].
[246] See [60] of Elias CJ's judgment in *Chapman*, where her Honour noted that the bounds of the policies behind judicial immunity or police immunity "may themselves require reassessment in the light of the New Zealand Bill of Rights Act".

105 If, however, the Supreme Court accepts the third alternative (or fallback position) set out above – that damages are available only if the act breaching the Bill of Rights is not one that would generally attract judicial immunity – then the Court may have to address in some form the question of whether the Deputy Registrar's actions in this case are protected by judicial immunity.

106 The Court would then have to revisit the reasoning of the Court of Appeal, which found that Ellis J erred by determining whether there was a judicial act through asking whether a discretion existed.[247] The Court of Appeal found that where a registrar undertakes actions that give effect to judicial decisions, judicial immunity applies.[248]

107 It would be open for this Court to find simply that the Court of Appeal has erred in mischaracterising Ellis J's approach. Her Honour considered that determining whether judicial immunity applies turns on the ambit of judicial acts and the policy underlying immunity. Her Honour found that the act of the Deputy Registrar in preparing the warrant of commitment was not a task requiring discretion or judgment, and was better characterised as administrative.[249] Further, the protection of the integrity of the judicial process (which underpins judicial immunity) does not require immunising the Crown's liability for the erroneous acts of the Deputy Registrar. Justice Ellis's approach was correct and should be upheld in the event that the Court considers it is required to ask whether the act causing the breach of rights in this case was one attracting judicial immunity. It is an approach consistent with applying s 6(5) of the Crown Proceedings Act 1950.

108 If the Court preserves a bar on damages for breach of the Bill of Rights by judges, and is left only considering whether the Deputy Registrar's actions constitute a breach of the Bill of Rights, this Court may also have to engage with the Court of Appeal's reasoning on whether the District Court Judge's signing of the warrant was an intervening cause that operated to negate liability for the Deputy Registrar's mistake.[250]

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[247] At [42].
[248] At [48].
[249] At [33].
[250] From [71] of the Court of Appeal's judgment.

109 Justice Ellis in the High Court had found that creating the warrant "had sufficient legal heft to give that act independent life" in Bill of Rights terms,[251] and whereas in *Thompson*, the breach of rights was not a reasonably foreseeable consequence of the Registry's error, in this case the creation of the warrant had "clear … consequences" that were "known to be rights-depriving".[252]

110 The Court of Appeal agreed there was a causal link between the Deputy Registrar's error and Mr Putua's unlawful detention but on a different basis. For the Court of Appeal, a warrant must be signed by a judge under s 91 of the Sentencing Act 2002.[253] The signature may be taken to be a "safeguard as to the correctness of the warrant", said the Court, and the judge is obliged to check its contents.[254] The Court of Appeal found significant the fact that an unsigned warrant would not likely have been accepted by the receiving prison.[255] The signature was not devoid of any causative effect.[256] But – and importantly for Mr Putua – the Court found that under "well-established causation principles" (as in the law of tort), there "may be multiple causes, each of which has contributed to the harm suffered".[257] The Court found that the judge had the primary responsibility because the purpose of the check of the warrant was to prevent errors, but what occurred was within the scope of the risk created by the Deputy Registrar's error in preparing the warrant.[258]

111 It may not be necessary for this Court to comment on whether it prefers the analysis of the High Court or Court of Appeal on causation. However, given that the law on causation in relation to breach of the Bill of Rights is unsettled,[259] it may be helpful for the Court to confirm the (hardly controversial) proposition that it is possible for there to be multiple causes of, and/or contributors to, a breach of the Bill of Rights. It may be sufficient to note that where a breach is a reasonably foreseeable consequence of an act done, and that act done remains a materially operative cause at the time that a breach has crystallised, the act

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[251] At [42] of the High Court judgment.
[252] Ibid.
[253] At [81].
[254] Ibid, at [83].
[255] At [86].
[256] At [88].
[257] At [90].
[258] At [91].
[259] As alluded to by Miller J in his separate judgment in *Attorney-General v Fitzgerald* [2024] NZCA 419 at [153].

can be said to be a cause of the breach of the Bill of Rights. The concept of a superseding cause by a particular actor may be alluring while that actor is affected by an immunity for the state from liability for public law damages, but – especially if any bar on damages for judicial breach of Bill of Rights is overruled – care needs to be taken with such a concept once it is recognised that multiple causes of a breach of the Bill of Rights are possible. The Court may revisit the concept in a case where it is more squarely in issue.

Conclusion

112 *Chapman* no longer remains good law in New Zealand or, in the alternative, should be confined to its facts. New Zealand courts should not countenance rights to exist without a remedy, and excluding – through a carve-out – the availability of damages for judicial breach of the Bill of Rights results in the existence of rights operating without the proper range of remedies being available. The High Court judgment of Ellis J should be restored and this appeal should be allowed.

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