IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA **SC 88/2025**

BETWEEN	**MAXWELL RICHARD ALLEN PARORE**
	Appellant
AND	**ATTORNEY-GENERAL**
	Respondent

RESPONDENT'S SUBMISSIONS

6 March 2026

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COUNSEL FOR THE RESPONDENT CERTIFIES THAT, TO THE BEST OF THEIR KNOWLEDGE,
THESE SUBMISSIONS CONTAIN NO SUPPRESSED INFORMATION AND ARE SUITABLE FOR PUBLICATION

CONTENTS

The issues

1. This appeal concerns:

   1.1 whether the Court of Appeal applied the correct approach in determining whether the appellant was entitled to damages under the New Zealand Bill of Rights Act 1990 (the **Bill of Rights Act**) for breach of his right to a fair trial; and

   1.2 whether the Court was right to conclude that damages were not an appropriate and proportionate remedy in the circumstances of this case.

Summary of argument

2. The appellant's right to a fair trial was breached and he was entitled to an effective remedy. That remedy came in the form of a stay of his prosecution which "prevented the real mischief of an unfair trial from proceeding",[1] and ensured that he would not face conviction and sentence for the crimes of which he was accused. He also received a declaration of a rights breach which, "reinstates the rule of law by marking the breach".[2]

3. The Court of Appeal applied the correct approach to the question of whether damages were also required and concluded that on the facts of this case they were not.

4. The correct "rights-centred"[3] approach to "public law damages" was established by the Court of Appeal in *Simpson v Attorney-General [Baigent's Case]*,[4] approved by this Court in *Taunoa v Attorney-General*,[5] and is consistent with the approach of courts in other common law jurisdictions.

5. According to this distinctive public law approach, the primary objective of damages is to vindicate the right that has been breached and to deter further breaches. It is the approach mandated by the Long Title to the Bill of Rights Act which requires the courts to "affirm, protect, and promote" rights.

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1 *Attorney-General v Parore* [2025] NZCA 328, 2 NZLR 751 at [90].
2 At [88].
3 *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 at [367].
4 *Simpson v Attorney-General [Baigent's Case]* [1994] 3 NZLR 667 (CA).
5 *Taunoa v Attorney-General,* above n 3.

Therefore, before awarding damages, the Court must consider whether the right has been appropriately vindicated in other ways.

6. Breaches of fair trial rights will generally be effectively vindicated by remedies provided in the criminal process. The domestic and wider common law authorities do not suggest that damages should never be awarded for breaches of fair trial rights. However, the few cases in which damages have been awarded have involved very significant rights breaches that called for a response beyond that provided through the normal remedies available in the criminal courts. They generally involve a loss of liberty (that is causally connected to the breach), although it is not a necessary or sufficient factor.

7. To the extent that the conduct of prosecutors may be a factor, consideration should always be given to their distinctive constitutional role. Where bad faith is alleged, it should be clearly particularised and supported by good evidence to avoid damages claims being used as a vehicle to harass prosecutors and advance collateral attacks on their decisions.

8. In this case, the Court applied the correct approach to damages and concluded that in light of "the factual circumstances here, we do not consider it is appropriate to award public law damages to vindicate Mr Parore's right".[6]

9. That conclusion was justified in light of the following factors: (i) the appellant received the effective remedies of a stay and a declaration; (ii) the decision to prosecute him was wrong ("ill-advised") but not reckless; (iii) but for the breach, the prosecution was properly brought, being in the public interest and brought on the basis of sufficient evidence; (iv) the infringement of the right to silence was not of the most serious nature; and (v) his liberty was not restricted during the criminal proceedings.

10. Significantly, the Commissioner of Inland Revenue (the **Commissioner**) has changed his policy to ensure that future, similar breaches do not occur. Therefore, in this case, damages are not required to deter.

11. In order to justify an award in this case, the appellant argues that damages should be awarded on a compensatory basis, particularly for financial loss.

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6 *Attorney-General v Parore*, above n 1, at [100].

However: (i) this is contrary to the approach approved in *Baigent's Case* and *Taunoa* and would therefore involve a complete reset of the jurisprudence; (ii) his submissions do not invite this Court to depart from its approach in *Taunoa* nor do they seek to establish the factors that might justify this Court in departing from one of its previous decisions; (iii) the appellant advances no mechanism to reconcile damages to fully compensate for financial loss with the more modest, vindicatory damages awarded in *Taunoa* and subsequent cases in which rights breaches have caused more serious but intangible harm; (iv) the appellant's approach is wrong in principle, conflating questions of public and tortious liability and using damages for rights to fill perceived gaps in the common law in the way that this Court in *Taunoa* found was impermissible; (v) his approach would lead to particular problems in relation to damages for breach of procedural rights, including those affirmed by ss 25 and 27 of the Bill of Rights Act; and (vi) the facts of this case do not provide an appropriate opportunity for this Court to consider damages for financial loss. Here the loss complained of is the cost of criminal proceedings, which is governed by statute.

The facts

12. The respondent adopts the facts and procedural history as set out in paragraphs [8]–[36] of the Court of Appeal's judgment.

13. Through his submissions and chronology, the appellant has provided an account of the facts with which the respondent does not, on all points, agree. However, much of that factual background is inessential to this appeal. Relevant matters of fact are addressed as they arise in the course of these submissions.

The Court of Appeal applied the correct, rights-centred approach to damages

14. The Court of Appeal's approach to damages is set out at paragraphs [52]–[75] of its judgment.

15. In accordance with that approach: (i) Bill of Rights Act damages are a public law remedy, available not as of right, but if the Court considers it appropriate and proportionate in the circumstances of the case;[7] (ii) the "principal

[7] At [83].

objective" of the remedy is to vindicate ("affirm, promote and protect"[8]) the right;[9] and (iii) this requires the Court to consider whether vindication has already been achieved.

16. This approach was established in *Baigent's Case* and other cases of the Court of Appeal, affirmed by this Court in *Taunoa v Attorney-General* and is consistent with overseas authorities.

Foundational domestic authorities

17. In *Baigent's Case* and other judgments preceding *Taunoa*, the Court of Appeal established the nature of the Court's remedial jurisdiction for rights breaches. The Court found that the essential task of the Court was to find remedies to vindicate rights breaches and that breaches of fair trial rights could be vindicated through remedies found within the criminal process.

18. In *Ministry of Transport v Noort*, the Court recognised the need to develop the law "where necessary" to give the Bill of Rights Act "practical effect".[10] This led it to conclude that evidence obtained following a breach of s 23(1)(b) should be excluded and the resulting convictions overturned. However, Cooke P said, *obiter*:[11]

> … the conduct of both appellants in the driving episodes in question was plainly such that in my view there could be no question of compensation. Their avoidance of blood or breath-alcohol convictions is itself ample redress. The Bill of Rights would fall into disrepute if they were entitled to compensation as well.

19. In *Baigent's Case* the Court of Appeal confirmed that "the ordinary remedies" will be available for the "enforcement and protection" of rights under the Bill of Rights Act, but that the Act might require the development of the law "when necessary".[12]

20. The fact that the breach in *Baigent's Case* was not a breach of fair trial rights was not coincidental. It was because the breach took place outside the context of court proceedings that the ordinary remedies were not available and it was necessary to provide damages as an alternative form of redress.[13]

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8 From the long title of the Bill of Rights Act, said by Cooke J to be the meaning of "vindication" in this context.
9 *Taunoa v Attorney-General*, above n 3, at [366].
10 *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA) at 270.
11 At 275 lines 14–18.
12 *Simpson v Attorney-General [Baigent's Case],* above n 4, at 676 per Cooke P.
13 At 676 per Cooke P.

However, each of the four justices in the majority held that the criminal law already contained "effective" and "ample" remedies for breach of fair trial rights.[14]

21. The Court's approach was underpinned by the obligation to give effect to the aims of the Act which is to "affirm, protect, and promote human rights".[15] The Court found that to promote and protect was to vindicate.[16] This required the courts to provide "appropriate and effective remedies" for rights breaches.[17] The Court recognised compensation as one remedy that might be employed to provide vindication where other remedies were unavailable or insufficient to vindicate the breach.

22. In *Martin v Tauranga District Court*, the Court of Appeal ordered a stay of criminal proceedings, having found undue delay.[18] In relation to the prospect of damages, Cooke P said that a "stay seems the more natural remedy. Generally speaking, it seems better to prevent breaches of rights than to allow them to occur and give redress".[19] Richardson J said that the choice of remedy should be "directed to the values underlying the particular right…should be proportional to the particular breach and should have regard to other aspects of the public interest".[20]

23. In *Upton v Green (No 2)*,[21] and the appeal in *Attorney-General v Upton*,[22] damages were awarded for breaches of fair trial rights. However, the case has limited precedential value. As Glazebrook J observed in *Brown v Attorney-General*,[23] the question of whether damages should be available for breach of fair trial rights was not in issue, as the Crown appeared to have conceded liability. The case concerned a judicial breach of rights and was decided before the judgment of this Court in *Attorney-General v Chapman*.[24]

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14 At 676 per Cooke P, 692 per Casey J, 703 per Hardie Boys J and 718 per McKay J.
15 At 717 per McKay J and 691 per Casey J.
16 At 676 per Cooke P.
17 At 702 per Hardie Boys J.
18 *Martin v Tauranga District Court* [1995] 2 NZLR 419 (CA).
19 At 425.
20 At 428.
21 *Upton v Green (No 2)* (1996) 3 HRNZ 179 (HC).
22 *Attorney-General v Upton* (1998) 5 HRNZ 54 (CA). Similarly, in *Rawlinson v Rice* [1997] 2 NZLR 651 (CA).
23 *Brown v Attorney-General* [2003] 3 NZLR 335 (HC) at [116].
24 *Attorney-General v Chapman* [2011] NZSC 110, [2012] 1 NZLR 462.

24. In *Brown*, itself, Glazebrook J noted:[25]

> If the remedy of compensation generally is for exceptional cases then this must be even more true if there have been alleged breaches in the trial process...In addition, Mr Brown has had a remedy already for the breach in the quashing of his conviction.

25. On appeal, William Young J went further and found that damages should never be available for breaches of fair trial rights.[26] He considered the rules of trial fairness that had been developed for the purpose of doing justice in the criminal sphere did not lend themselves to compensation, and the prospect that findings of breaches may lead to compensation claims may make courts more reluctant to make them. Therefore the "natural remedy for breach of fair trial rights is in the jurisdiction of appellate courts rather than by way of damages".[27]

26. Whilst acknowledging the strength of William Young J's views, the majority in *Brown* expressed no view on whether damages might ever be available for breaches of fair trial rights.[28] However, the implication of the judgments discussed above is that damages would rarely be justified because fair trial rights would generally be effectively protected through the remedies available in the criminal process.

27. Similarly, in relation to breaches of the right to natural justice, the Court of Appeal, in *Attorney-General v Udompun*, said in *obiter* that damages for breaches of natural justice should not be available as a matter of course, noting that the public law remedies for breach of natural justice would "in normal circumstances" be sufficient, and "[w]here there is already an effective remedy [Bill of Rights Act] compensation is not needed".[29]

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25 *Brown v Attorney-General,* above n 23, at [118].
26 *Brown v Attorney-General* [2005] 2 NZLR 405 (CA). The other justices expressed no final view on this issue.
27 At [142].
28 At [100].
29 *Attorney-General v Udompun* [2005] NZCA 128, [2005] 3 NZLR 204 at [168]–[169].

Taunoa v Attorney-General

The majority approach

28. The lead judgment for the majority in *Taunoa* was, as the Court of Appeal found in *Dotcom v Attorney-General*,[30] given by Blanchard J, with whom Tipping, McGrath and Henry JJ all agreed.[31]

29. Blanchard J held that "the primary task is to find overall a remedy or set of remedies which is sufficient to deter any repetition by agents of the State and to vindicate the breach of the right in question".[32] Vindication was to be understood as defending "against encroachment or interference".[33]

30. Since this could be achieved by "non-monetary means, such as through the exclusion of improperly obtained evidence", damages may be "entirely unnecessary or inappropriate".[34] Therefore, his Honour considered that:[35]

> In determining whether a measure of damages should form part of the remedy in a particular case the court should begin with the nature of the right and the nature of the breach. Some rights are of a kind where a breach is unlikely to warrant recognition in monetary terms. Breaches of natural justice, for example, are likely to be better addressed by a traditional public law means, such as ordering the proceeding in question to be reheard.

31. And for that reason, inquiry into damages:[36]

> … must begin by considering the non-monetary relief which should be given and having done so [the court] should ask whether that is enough to redress the breach and the consequent injury to the rights of the plaintiff in the particular circumstances.

32. His Honour held that damages for rights breaches do "not perform the same economic or legal function as common law damages or equitable compensation" nor should it "be allowed to perform the function of filling perceived gaps in the coverage of the general law".[37]

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30 *Dotcom v Attorney-General* [2018] NZCA 220, [2018] NZAR 1298 at [30].

31 *Taunoa, v Attorney-General*, above n 3, at [299] per Tipping J, [373] per McGrath J and [385] per Henry J.

32 At [253] per Blanchard J.

33 At [253] per Blanchard J citing, with approval Didcott J's definition in *Fose v Minister of Safety and Security* 1997 (3) SA 786.

34 At [256].

35 At [261].

36 At [258].

37 At [259].

33. McGrath J also found "the remedy for breach of protected rights is a public law one", in which focus should be on the "affirmation, promotion and protection" of rights. Therefore:[38]

> The court's principal objective must be to vindicate the right in the sense of upholding it in the face of the State's infringement. Selection of the appropriate remedy from those available will involve the making of a principled choice in the exercise of judicial judgment. An important concern will be to ensure that the rule of law is reinstated through cessation of any continuing breach and securing the future respect of the State for the right concerned.

34. His Honour also held that in the context of criminal law, rights breaches could be vindicated through exclusion of evidence, noting that "[a]n incidental, but significant, effect of the remedy of exclusion of evidence is, of course, redress through the benefit derived by the party aggrieved".[39]

Whether Tipping J approved a different approach

35. The appellant relies on certain passages to suggest that Tipping J held that damages should be generally available for loss caused by breaches of rights.[40] This interpretation arises from a failure to consider those passages in the context of his judgment read as a whole, the judgment of Blanchard J, with whom his Honour agreed, and the approach adopted in *Baigent's Case* that his Honour approved.

36. Tipping J expressed his general agreement with Blanchard J on the approach to liability, agreeing there was no right to damages.[41] Instead it was a matter of discretion ("albeit one that has to be exercised judicially") as to whether damages were necessary to provide a remedy that was "appropriate and proportionate to the circumstances".[42] This would involve considering other remedies:[43] "There will, of course, in some cases be other ways of providing an effective remedy, such as by means of the exclusion of evidence or a stay of proceedings."

37. Having reviewed the relevant authorities his Honour accepted that they gave "at least presentational priority to vindication as opposed to

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38 At [366] per McGrath J.
39 At [369] per McGrath J.
40 Appellant's submissions [4.12] - [4.15].
41 *Taunoa v Attorney-General*, above n 3, at [308] per Tipping J.
42 At [303] per Tipping J.
43 At [300] per Tipping J.

compensation".[44] His Honour nevertheless suggested that vindication and compensation were equally important aims of a money award, that a plaintiff should "receive whatever is necessary to compensate for the breach" and that "compensation for all loss or damage, direct or indirect, is potentially capable of playing a part in the remedial package".[45]

38. These passages indicate a different approach to quantum than that which was approved by Blanchard J.[46] In particular, his Honour considered that damages might be determined by the need to compensate as well as vindicate. However, they do not express any difference of approach between himself and Blanchard J on the prior question of when it was proper to award damages. They were instead said "on the premise that monetary relief is otherwise necessary to vindicate the breach".[47]

39. For the following reasons, the appellant's suggestion that in these passages Tipping J found that damages should generally be available when financial loss is proven, is unpersuasive:

    39.1 It would be inconsistent with the earlier parts of his judgment, in which he found that whether damages are appropriate and proportionate is a question of judgement to be determined in light of the relief provided by other remedies, including a stay of criminal proceedings.

    39.2 It would be inconsistent with what Blanchard J had said on the same issue. Tipping J expressed himself as being in general agreement with Blanchard J as to the correct approach to damages. Henry J was in agreement with both Blanchard and Tipping JJ. Such concurrence is inconsistent with Tipping J having adopted a different approach on fundamental questions of liability.

    39.3 Tipping J expressed disagreement with Cooke P in *Baigent's Case*, but only on a question of quantum and not the principles of liability.[48]

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44 At [317] per Tipping J.
45 At [317] per Tipping J.
46 At [260]–[266] per Blanchard J.
47 As Tipping J said of the passage he cited from *Ramanoop Attorney-General of Trinidad and Tobago* [2005] UKPC 15, [2006] 1 AC 328 at [314].
48 At [301] per Tipping J.

> Had Tipping J departed more widely from the approach of the Court of Appeal in *Baigent's Case*, this would have been clearly signalled.

Subsequent judgments of the Court of Appeal

40. *Taunoa* has since been applied by the lower courts in determining claims for damages.[49] The following judgments of the Court of Appeal are of relevance to the issues in this case.

41. In *Currie v Clayton*, the Court allowed an appeal against strike out of a damages claim under the Bill of Rights concerning non-disclosure by a prosecutor. In doing so, the Court stated:[50]

> Compensation will normally only be appropriate where the rights cannot be vindicated by means other than the award of compensation…Those who have been through the criminal process and have had their NZBORA rights vindicated through remedies such as exclusion of evidence or a stay of prosecution will find it difficult to obtain a further remedy of compensation.

42. In *Attorney-General v Van Essen* the Court overturned an award of damages for an unlawful search warrant.[51] It observed that "in most cases in which damages are eventually awarded, the conduct concerned has involved physical restraint, direct infliction of physical harm, or a prolonged or significant deprivation of liberty".[52] Although it acknowledged some cases in which awards had been made "to reflect equivalence with tortious claims, or on the basis of clear pecuniary loss arising directly from the breach of the right itself", these awards were made "predominantly prior to *Taunoa*".[53]

43. In *Attorney-General v Morrison*,[54] the Court of Appeal found that damages should be awarded following disclosure failures that were "significant and unprecedented"[55] involving disclosure of approximately 20,000 documents,

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49 *Taunoa* has been applied in relation to the awarding of public law damages in the High Court (see, for example, *Lawrence v Attorney-General* [2025] NZHC 719 at [61] and [63]; *Gorgus v Chief Executive of the Department of Corrections* [2023] NZHC 2313 at [193] and [197]; *Pere v Attorney*-General [2022] NZHC 1069, [2022] 2 NZLR 725 at [49] and n 13; and *Taylor v Attorney-General (No 3)* [2022] NZHC 3170 at [443]) and the Court of Appeal (*Attorney-General v Morrison* [2025] NZCA 240, [2025] 2 NZLR 871 at [88]; *Attorney-General v Fitzgerald* [2024] NZCA 419, [2024] 3 NZLR 817 at [145]–[147] per Miller J; *Attorney-General v Van Essen* [2015] NZCA 22, (2015) 10 HRNZ 155 at [80]–[86]; and *Vogel v Attorney-General* [2013] NZCA 545, [2014] NZAR 67 at [77]). A number of cases in which damages were awarded were reviewed by Isac J in *Taylor v Attorney-General (No 3)* at [444]–[446].

50 *Currie v Clayton* [2014] NZCA 511, [2015] 2 NZLR 195 at [82].

51 *Attorney-General v Van Essen*, above n 49, at [58] and [98].

52 At [106].

53 At [107].

54 *Attorney-General v Morrison*, above n 49.

55 At [90].

nine months into a trial.[56] Damages were awarded primarily to vindicate the right, but also to highlight that disclosure failures will not be tolerated.[57] In upholding damages the Court declined to follow the majority of the Supreme Court in *Henry v British Columbia* and find that damages should only be awarded if it could be shown that that the prosecutor intentionally withheld disclosable information when they knew or ought to have known it would prejudice the defence.[58] Like the minority justices in *Henry*, the Court was not concerned about the chilling effect of potential damages since disclosure was an obligation not involving the exercise of prosecutorial discretion.[59] The Court nonetheless accepted that a high threshold had to be met before damages would be considered for breach of process rights:[60]

> Awards (generally very modest) of public law damages are likely to be available in only a very limited number of cases, *involving very serious breaches of a defendant's fair trial rights*. Most breaches are likely to be remedied by trial and appellate courts using criminal law procedures, rather than through an award of damages.

Relevant jurisprudence from other common law jurisdictions

44. The approach of the courts in this country is consistent with that adopted in the United Kingdom, Ireland, the Privy Council (appeals from Trinidad and Tobago) and Canada. They also consider damages for rights breaches as a public law remedy to be awarded, not as of right but when appropriate on the facts of the case. None have endorsed the proposition that damages are generally required to compensate for financial loss. Nor that damages should be generally available for breach of fair trial rights. Although they have not ruled it out in respect of particularly serious breaches.

45. In the United Kingdom, in *R (Greenfield) v Secretary of State for the Home Department*, the House of Lords held that whether damages should be awarded for breaches of the European Convention on Human Rights (**ECHR**) was discretionary and would turn on what was just and appropriate on the facts of the case.[61] In relation to breaches of art 6 (right to a fair trial)

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56 At [12]–[14].

57 At [90].

58 *Henry v British Columbia (Attorney General)* 2015 SCC 24, [2015] 2 SCR 214.

59 *Attorney-General v Morrison*, above n 49, at [82]–[88].

60 At [43] (emphasis added).

61 *R (Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14, [2005] 1 WLR 673. In *R (on the application of Faulkner) (FC) v Secretary of State for Justice* [2013] UKSC 23, [2013] 2 AC 254 the Court awarded damages for breaches of art 5(4). However, the European Convention on Human Rights expressly

Lord Bingham, giving the judgment of the House, said:[62] "Where article 6 is found to have been breached, the outcome will often be that a decision is quashed and a retrial ordered, *which will vindicate the victim's Convention right*." The House did not find that damages would never be appropriate, but that the courts should follow the approach of the European Court of Human Rights and only award damages when it was "just and appropriate" to do so:[63] "The routine treatment of a finding of violation as, in itself, just satisfaction for the violation found reflects the point already made that the focus of the Convention is on the protection of human rights and not the award of compensation."

46. In Ireland, in *O'Callaghan v Ireland*, the Supreme Court ordered constitutional damages to the appellant whose appeal was unreasonably delayed for two years before his conviction was quashed.[64] The Court held that a declaration was insufficient and that, although the case was marginal, damages were required in light of the fact that the appellant had been in custody throughout the period of delay.[65]

47. For the Privy Council (appeals from Trinidad and Tobago), in *Maharaj v Attorney General of Trinidad and Tobago (No 2)*, the Board recognised the availability of constitutional damages for breach of right not to be deprived of liberty except by due process of law where the appellant was imprisoned with no opportunity to seek bail or appeal before his sentence was served.[66] Subsequent judgements of the Board have clarified that there is no right to damages for judicial breaches of fair trial rights where a plaintiff enjoys the right to apply for bail or habeas corpus whilst awaiting appeal.[67]

48. In *Seepersad v Attorney General of Trinidad and Tobago*, the Board considered the jurisprudence on the right to a remedy for breach of

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provides that persons whose art 5 (right to liberty) rights are breached has a right to compensation, as does art 9(5) of the ICCPR, reflecting and reinforcing a greater willingness of the United Kingdom courts to award damages for art 5 breaches. However, *R (Greenfield)* remains good law as far as art 6 is concerned.

62 At [9] (emphasis added).

63 At [9].

64 *O'Callaghan v Ireland* [2021] IESC 68, [2023] 2 IR 135.

65 At [113] and [116].

66 *Maharaj v Attorney-General of Trinidad and Tobago (No 2)* [1979] AC 385 (PC).

67 *Independent Publishing Co Ltd v Attorney General of Trinidad and Tobago* [2004] UKPC 26, [2005] 1 AC 190; *Hinds v Attorney-General of Barbados* [2001] UKPC 56, [2002] 1 AC 854; and *Duncan and Jokhan v Attorney-General of Trinidad and Tobago* [2021] UKPC 17, [2021] 4 LRC 570.

constitutional rights more generally and found that there was no right to damages since vindication would in some cases be achieved by a declaration and sometimes through mandatory orders.[68] Whether damages are required "will all depend on the circumstances".[69]

Canada

49. In *Vancouver (City) v Ward*,[70] the Supreme Court recognised that damages may be an "appropriate and just" remedy for breach of Charter rights, if it met one or more of the functions of vindication, compensation and deterrence and there were no counter-veiling, good governance concerns.[71] The Court also held that minimum liability thresholds may be appropriate for certain claims. Noting that malice is required to be proven in an action for malicious prosecution the Court indicated that:[72]

> While the threshold for liability under the Charter must be distinct and autonomous from that developed under private law, the existing causes of action against state actors embody a certain amount of "practical wisdom" concerning the type of situation in which it is or is not appropriate to make an award of damages against the state.

50. In *R v Varennes*, the Court found that a constitutional remedy should: "(i) respect the separation of powers; (ii) avoid imposing substantial hardships or burdens on the government; and (iii) avoid negatively impacting good governance."[73]

51. In *Henry v British Columbia (Attorney-General)*, the appellant sought Charter damages following a grave miscarriage of justice that arose following serious disclosure failures.[74] A majority of the Court held that Charter damages for disclosure failure would only be available when it could be shown that the prosecutor intentionally withheld information when it knew, or would reasonably be expected to know, that the information is material to the defence and that the failure to disclose will likely impinge on the accused's

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68 Section 14 of the Constitution of Trinidad and Tobago.

69 *Seepersad v Attorney General of Trinidad and Tobago* [2012] UKPC 4, [2013] 1 AC 659 at [38].

70 *Vancouver v Ward* 2010 SCC 27, [2010] 2 SCR 28, at [32]–[34].

71 Section 24(1) of the Canadian Charters of Rights and Freedoms.

72 *Vancouver v Ward,* above n 70, at [43].

73 *R v Varennes* 2025 SCC 22, [2025] SCJ No 22 at [77].

74 *Henry v British Columbia (Attorney General)*, above n 58, at [4]–[21] per Moldaver J for the majority. Significant disclosure failures leading to convention for grave sexual offences and approximately 30 years sentence served, when later evidence established the plaintiff's likely innocence.

ability to make full answer and defence.[75] This was to ensure prosecutors are not exposed "to an unprecedented scope of liability that would affect the exercise of their vital public function".[76]

52. The minority rejected this threshold, on the basis that disclosure obligations did not involve the exercise of prosecutorial discretion, but a duty to disclose obviously relevant material. However, the minority also recognised that prosecutorial discretion was:[77]

> … a wide discretion long acknowledged by the law. It is as difficult to exercise as it is vital to the effective prosecution of criminal cases. The common law has struck a balance that reflects these complex concerns by allowing claims to be brought against prosecutors for misuse of this discretion, but only if malice can be shown.

Lack of relevant jurisprudence of the UN Human Rights Committee

53. The Views of the United Nations Human Rights Committee (the **Committee**) have "considerable persuasive authority",[78] in interpreting obligations under the International Covenant on Civil and Political Rights (**ICCPR**).[79] However, it has not directly addressed the question of whether compensation is required to provide an effective remedy under art 2(3) when fair trial rights have been breached but already addressed through remedies provided through the criminal process.

54. The admissibility requirement to exhaust domestic remedies before bringing a complaint to the Committee, means that complaints of breaches of fair trial rights considered by the Committee are in respect of breaches that criminal courts of the member state have failed to remedy. The question of compensation has not arisen as a stand-alone issue.

55. In its Views on certain complaints concerning breaches of art 14, the Committee has found that the successful complainant had a right to an effective remedy "including adequate compensation".[80] However, in a

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75 At [31] per Moldaver J for the majority.

76 At [77].

77 At [125] per McLachlin CJ and Karakatsanis J.

78 *R v Goodwin* [1993] 2 NZLR 153 (CA) at [393].

79 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), however, as was found in *Ahani v Canada (Attorney General)* (2002) 208 DLR (4th) 66 (ONCA) at [34]–[40], it is an expert body, not a court, and those views are not binding as a matter of domestic or international law.

80 *Osiyuk v Belarus* 1311/2004, 30 July 2009; and *Perterer v Austria* 1015/2001, 20 July 2004.

number of other successful art 14 complaints it simply indicated that the complainant has a right to an effective remedy, without reference to compensation.[81] There appears to be no pattern that would explain the reference to compensation in relation to some complaints but not others.

56. Nor has the Committee directly addressed the issue in its general comments. Whilst in General Comment No 31 it stated that art 2(3) "generally entails appropriate compensation", it appeared to acknowledge that reparation could be provided in other ways.[82] It did not directly address the issue of compensation for breaches of fair trial rights (beyond noting the obligation to provide compensation for miscarriages of justice, as defined by art 14(9). Nor did it do so in its General Comment No 32, concerning art 14 itself. [83]

The Court of Appeal correctly directed itself on the approach to damages for breach of fair trial rights

57. In this case, the Court of Appeal considered the relevant authorities and concluded that whilst it could not be said that damages would never be available for breach of fair trial rights, "for damages to be available, other remedies would have to be insufficient to vindicate the relevant right, appropriately and proportionately, in the circumstances". Therefore "a stayed criminal proceeding is an unpropitious context for the award of public law damages. But it is not impossible".[84] The Court concluded that the correct approach is:[85]

> to carefully examine what package of remedies is effective to vindicate the relevant right, appropriately and proportionately in the circumstances — taking into account the seriousness and nature of the particular breach, the particular right and the conduct of the particular right-holder.

58. The Court correctly directed itself on the required approach. As it found, neither domestic nor overseas jurisprudence suggested that damages would

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81 See for example *Dudko v Australia* 1347/2005, 23 July 2007; *Sankara v Burkina Faso Communication* 1159/2003, 28 March 2006; *Currie v Jamaica* 377/1989, 29 March 1994; *Lloydell Richards v Jamaica* 535/1993, 31 March 1997; and *Akhadov v Kyrgysztan* 1503/2006, 25 March 2011.

82 United Nations Human Rights Committee *General Comment Number 31 [80], The Nature of the General Legal Obligation Imposed on State Parties to the Covenant* CCPR/C/21/Rev.1/Add.13 (26 May 2004) at [16].

83 United Nations Human Rights Committee *General Comment Number 32, Aritcle 14: Right to equality before courts and tribunals and to a fair trial* CCPR/C/GC/32 (23 August 2007), concerning art 14, does not address compensation, save in relation to art 14(6), right to compensation for miscarriage of justice. It is not addressed in individual complaints.

84 *Attorney-General v Parore*, above n 1, at [83].

85 At [84].

never be awarded but neither do they suggest that damages should be generally available. Indeed, the courts have approached the issue with great circumspection.

This approach is necessary to manage the risks posed by claims for damages for breaches of fair trial rights

59. A strong thread of judicial concern runs through the authorities about the risks that damages for fair trial breaches pose to the integrity of the criminal justice system and public confidence in that system.

60. The common law has long recognised that the "high content of judgment and discretion"[86] involved in prosecutorial decision-making and the risk of prosecutors being harassed by collateral challenges, demands high liability thresholds in the law of torts.[87] Similarly, in public law, the Court recognises a wide area of prosecutorial discretion within which the Courts will not interfere.[88] That discretion "demands strong deference", although it is not an absolute immunity.[89] When a prosecutor exercises their discretion, they are presumed to do so in good faith.[90]

61. The Court in *Henry* considered that this care in ensuring that prosecutorial independence is not jeopardised by civil proceedings needs to extend to damages for Charter breaches. It recognised that resources involved in responding to Charter damages claims and the financial implications of successful claims for prosecuting agencies may have a chilling effect on prosecution decision-making, notwithstanding the fact prosecutors are not personally liable.

62. Professor Todd has similarly cautioned:[91]

> Lord Steyn's observation in Three Rivers that the elements of misfeasance represented a satisfactory balance between constraining abuse and not allowing public officers to be assailed by unmeritorious actions, must carry considerable weight. Courts should proceed with

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86 *Fox v Attorney-General* [2002] 3 NZLR 62 (CA) per McGrath J at [31] who said that this approach also reflected "constitutional sensitivities in light of the courts own function of responsibility for the conduct of criminal trials".

87 *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1 (HL).

88 *Greymouth Petroleum Ltd v Solicitor-General* [2010] 2 NZLR 575 (HC) at [37].

89 *R v Varennes*, above n 73, at [50].

90 At [45].

91 Todd et al (eds) *Todd on Torts* (9th ed, Thomson Reuters, Wellington, 2023) at 1230.

> caution where their decisions might upset that balance, notwithstanding that there is a breach of a guaranteed right.

63. That damages for breaches of fair trial rights risked undermining the Bill of Rights Act, itself, was recognised by Cooke P in *Noort*, noting damages for those that had been acquitted as a result of orders made to uphold their rights risked bringing the Act into disrepute. It was also recognised by William Young J in *Brown* who considered that courts may be dissuaded from making findings that rights have been breached, out of concern that they will be used to advance damages claims.

64. In addition to such risks, claims for damages may give rise to difficult questions concerning:

    64.1 causation, in light of what Lord Bingham in *R (Greenfield)* described as the "unique feature" of fair trial rights: that they may be breached in the course of prosecutions, the outcome of which may have been the same had the breach not taken place;[92]

    64.2 contribution, since the decisions of multiple actors, including the defendant and his lawyers, may contribute to an unfair trial; and

    64.3 inconsistencies and potential unfairness if those whose right to a fair trial are breached by the actions of the prosecution are entitled to damages, whilst those who are denied a fair trial for some other reason are not.

65. The courts have recognised that breaches of certain types of rights may be more appropriately addressed through damages than others.[93] It may rarely be an appropriate remedy for breaches of fair trial rights, given the difficult questions to which such claims may give rise.

66. Managing such risks to ensure that any damages awards are appropriate, and not contrary to the public interest is a question of judgment to be exercised in the particular facts of each case. However, the following principles emerge from the authorities:

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92 *R (Greenfield*) *v Secretary of State for the Home Department*, above n 61, at [7].

93 *Taunoa v Attorney-General,* above n 3, at [261].

66.1 Breaches of fair trial rights will generally be vindicated through the criminal process. Such vindication is powerful and direct, such as exclusion of improperly obtained evidence or bringing an unfair trial to an end. Therefore, a successful claim is likely to involve a significant failure of the criminal justice process to protect a plaintiff's rights.

66.2 The small number of domestic and overseas cases in which the courts have considered the plaintiffs may be deserving of damages have involved significant failures to remedy an injustice in a timely manner. In *Maharaj (No 2)* the law made no provision for the appellant to apply for bail or have his appeal heard before his sentence expired following a sentence imposed in denial of fundamental principles of justice. In *O'Callaghan v Ireland* delays in the court system meant that the appellant spent two years in custody before his conviction was overturned on appeal. In *Henry* (in which the claim for damages was not determined) the appellant spent years in prison following the refusal of his first appeal. In *Morrison*, the appellants had been on trial for a significant time before it was stayed following unprecedent disclosure failure.

66.3 In contrast, when the criminal justice system has worked effectively to prevent breaches at first instance or cure them on appeal, this effective vindication of rights means that no further remedy is likely to be required.

66.4 Whether the plaintiff's liberty has been restricted during the proceedings may be a relevant factor. However, the appropriate remedy for denial of liberty will generally be the opportunity to apply for bail or habeas corpus, as the Privy Council held in *Independent Publishing Co Ltd v Attorney General of Trinidad and Tobago*.[94] In *Morrison*, the appellants were on bail but had been on trial for nine months when the prosecution was stayed.

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94 *Independent Publishing Co Ltd v Attorney General of Trinidad and Tobago* [2004] UKPC 26, [2005] 1 AC 190 at [92]–[93]

66.5 Serious misconduct of prosecutors may be a relevant factor. However, it would be important to ensure that claims are not used as a vehicle to harass prosecutors or launch collateral attacks on their decisions. The high threshold liabilities established in the tort of malicious prosecution should not be undermined by claims for damages for rights breaches being used to advance allegations of fault to a lower standard of fault or to looser evidential requirements. In *Ward* and *Henry*, the Court considered that heightened liability thresholds may be required for certain types of claims. Not all claims will turn on allegations of prosecution misconduct. However, when bad faith is alleged, it should be properly founded on credible facts and needs to be fully particularised.[95] Allegations of fault that are vague, poorly pleaded and not supported by evidence, cannot support a claim.

The appellant's proposed approach to damages

67. The appellant contends that damages should be generally available to compensate for all loss arising from breaches of rights and that "a remedy is not effective unless compensation has been achieved".[96] There are insurmountable obstacles to the adoption of this approach:

67.1 It is contrary to authority. Although he cites passages from *Baigent's Case* and the judgment of Tipping J in *Taunoa*, he cites them out of context. Understood in context, they provide support for the rights-centered approach that was approved by this Court in *Taunoa.* Insofar as the appellant invites this Court to depart from its approach in *Taunoa*, he needs to establish compelling reasons capable of persuading the Court to take the significant step of departing from one of its own judgments. Indeed, the appellant's approach would involve reconsideration not only of *Taunoa* but also *Baigent's Case*.

67.2 In *Couch v Attorney-General* this Court held that it would only depart from one of its judgments in compelling circumstances where it is

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95 *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2013] NZCA 53, [2013] 2 NZLR 679 at [86]; and *Hong v New Zealand Lawyers and Conveyancers Disciplinary Tribunal* [2020] NZHC 2205 at [82].

96 Appellant's submissions at [4.10].

"evident that the previous decision was or has become clearly wrong, rather than simply representing a preferred choice with which the current Bench does not agree".[97] The apex courts of other common law jurisdictions have adopted similarly stringent approaches to departure from their previous decisions.[98] The appellant has not sought to address any of the established factors that might justify a Court in departing from one of its decisions, nor engaged in an analysis of *Taunoa* required for the issue to be properly before this Court for the purposes of this appeal.

67.3 The reliance placed on *Taunoa* by the lower courts in determining damages strongly militates against departure.[99] If the Court were to depart from *Taunoa* (and *Baigent's Case*) and approve the loss-based approach damages for which the appellant contends, it would lead to awards that are significantly in excess of the modest, vindicatory awards that the Court approved in *Taunoa*,[100] including for grave breaches of rights and also with awards that have subsequently been made by the lower courts in reliance on the *Taunoa* approach.[101] Further, the appellant proposes no mechanism to ensure that damages to compensate financial loss do not outstrip damages awarded to vindicate breaches of ss 23(5), 9 and 22, where plaintiffs may have suffered more serious but intangible harm.

67.4 The appellant's preferred approach is wrong in principle. It impermissibly conflates a public remedy that is intended to uphold rights, with private loss-based compensation, but without the

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97 *Couch v Attorney-General (No 2*), above n 21, at [105] per Tipping J and [51] per Blanchard J. In that case this Court considered departure justified on the bases that: (i) the Privy Council in *Bottrill* was clearly wrong, by reference to inconsistencies in that Court's judgment; (ii) *Bottrill* was inconsistent with the leading authorities of *Rookes v Barnard* and *Broome v Cassell & Co Ltd*; (iii) *Bottrill* was inconsistent with the approach taken by other common law jurisdictions; and (iv*) Bottrill* had been subject to significant academic criticism.

98 *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2020] UKSC 47, [2022] AC 1; *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* [2006] UKHL 49, [2007] 1 AC 558; and *R v Bernard* [1988] 2 SCR 83.

99 *Taunoa* has been applied in relation to the awarding of public law damages in the High Court (see, for example, *Lawrence v Attorney-General*, above n 49, at [61] and [63]; *Gorgus v Chief Executive of the Department of Corrections*, above n 49, at [193] and [197]; *Pere v Attorney-General*, above n 49, at [49] and n 13; and *Taylor v Attorney-General (No 3)* , above n 49, at [443]) and the Court of Appeal (*Attorney-General v Morrison*, above n 49, at [88]; *Attorney-General v Fitzgerald*, above n 49, at [145]–[147] per Miller J; *Attorney-General v Van Essen*, above n 49, at [80]–[86]; and *Vogel v Attorney-General*, above n 49, at [77]).

100 *Taunoa v Attorney-General,* above n 1, at [269].

101 *Taylor v Attorney-General (No 3)*, above n 49, at [444]–[446].

doctrines developed by the common law to limit tortious liability and fairly apportion loss. It invites the Court to treat damages for breaches of rights as "gap filling" where the general law provides no remedy. Yet, this is precisely what this Court in *Taunoa* cautioned against.[102]

67.5 Applied to breaches of fair trial rights and breaches of the right to natural justice (s 27), the appellant's approach would render the risks discussed at paragraphs [53]–[59], above, unmanageable. Whilst the appellant concedes that the courts should retain some discretion to decline to award damages, he submits that it should be exercised "with caution" and only "where there is proper cause to refuse relief".[103] What such cause might be is not addressed—but on the appellant's case it could not include the fact that relief has already been provided by remedies provided by the criminal courts. It would open the way to damages claims being widely claimed for breaches of fair trial rights and the right to natural justice, by plaintiffs who have already received effective relief in criminal or in judicial review proceedings.

67.6 The appellant's argument that the current approach leaves him undercompensated must be considered in light of the purpose of damages awarded under the Bill of Rights Act. Parliament has not chosen, through the Bill of Rights Act, to provide that those whose rights are breached should be fully compensated. What it has done is establish that rights should be affirmed, protected and promoted. Vindication for breaches of rights is therefore the primary objective that Parliament has mandated. The question of whether damages for breach of fair trial rights should be awarded on a purely compensatory basis must be a matter for Parliament.

67.7 This is not an appropriate case to consider the general principles that should govern the recovery of financial loss. First, because the loss claimed in this case arises from costs in criminal cases which cannot,

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102 *Taunoa v Attorney-General*, above n 1, at [261] per Blanchard J.

103 Appellant's submissions at [4.16].

for the reasons set out at paragraphs [96]–[99], below, be claimed as damages. Second, this case concerns breaches of fair trial rights. Damages for fair trial breaches are subject to particular public interest consideration and should be considered in light of the principles established by the domestic and common law authorities, discussed at paragraphs [59]–[66], above.

67.8 In this case, addressing and affirming the current approach to the availability of damages for breaches of fair trial rights, should take priority over the question of whether any award should reflect financial loss. This is both because it is the logically prior question in this or any damages claim, but also because in this area of public law, the role of different public law remedies in addressing breaches of rights is an issue of more compelling public importance than the issue of financial loss. Financial loss for breach of rights is seldom the subject of damages claims under a bill of rights act that does not affirm the right to property.[104] In this case it arises only because the statutory regime for costs in criminal cases does not allow for costs to be claimed following a stay.

The Court of Appeal properly determined that damages were not required to provide the appellant with an effective remedy

68. The Court of Appeals' reasons for finding that damages should not be awarded are set out at paragraphs [79]–[100] of its judgment.

The right that was breached

69. The Court correctly found that the right breached was the right to a fair trial that is affirmed by s 25(a).[105] It is, as the Court also found, an important right.[106] However, it is not within that small group of rights the breach of which will almost invariably cause profound harm.[107] The seriousness of the breach of a right to a fair trial should be assessed in the particular circumstances of the case.

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104 In *Attorney-General v Van Essen*, above n 49, at [106]–[108] the Court of Appeal noted that most cases in which damages were awarded involved physical restraint, direct infliction of physical harm, or prolonged or significant deprivation of liberty.

105 *Attorney-General v Parore*, above n 1, at [36]–[45].

106 At [85].

107 The right to life affirmed by s 8, and the rights affirmed by s 9.

The stay and declaration constituted an effective remedy

70. The right affirmed by s 25(a) is to a fair trial in "relation to the determination of the change". As the Court of Appeal found, the stay "prevented the real mischief" of the trial continuing and the appellant facing the prospect of conviction.[108] Its benefit to the appellant can hardly be overstated. It ensured he would never be convicted of the crimes of which he was accused, even though there remained admissible, available and untainted evidence to meet the evidential threshold. The nature of the benefit that the appellant has received is underscored by what the Supreme Court of Canada said about the remedy of the stay in *R v Babos:*[109]

> … a stay of proceedings is the most drastic remedy a criminal court can order. It permanently halts the prosecution of an accused. In doing so, the truth-seeking function of the trial is frustrated and the public is deprived of the opportunity to see justice done on the merits. In many cases, alleged victims of crime are deprived of their day in court.

71. Cooke P in *Martin*, Tipping J in *Taunoa* and, more recently, the Court of Appeal in *Currie v Clayton* all described the stay as an effective remedy to vindicate fair trial rights. In *R (Greenfield)*, Lord Bingham focussed on a successful conviction appeal as an effective remedy to vindicate the right but a stay at first instance, is more powerful, since a successful appeal can lead to a re-trial.

72. A stay will also have a powerful declaratory and deterrent impact. A similar decision in *R v Safi* led to the Commissioner to change her policies to ensure that the commencement of civil proceedings would not risk fair trial rights (albeit that change came too late to benefit the appellant).[110]

The Court of Appeal erred in finding that the stay was not part of the vindication

73. The Court of Appeal considered the seriousness of the breach in light of the stay.[111] However, at paragraph [97] of its judgment, it erred in treating the stay as part of the background against which an effective remedy was to be considered, but not part of the remedy itself.

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108 *Attorney-General v Parore*, above n 1, at [90].

109 *R v Babos* 2014 SCC 16, [2014] 1 SCR 309 at [30], influential in this Court's decision in *R v Wilson* [2015] NZSC 189, [2016] 1 NZLR 705 see [55]–[62], and the reference to a stay as a drastic remedy at [80].

110 On 22 July 2020 the Commissioner issued policy statement CS 20/04 concerning the civil disputes procedure and protection of fair trial rights. **[[BOD 302.0590]]**

111 *Attorney-General v Parore*, above n 1, at [90].

74. This involved a false dichotomy between upholding the integrity of the criminal justice system and vindicating the appellant's right to a fair trial—it was through that vindication that the integrity of the criminal justice system was upheld. As McGrath J said in *Taunoa*, measures to protect and uphold rights may be ultimately intended to benefit society but in doing so, benefit the rights holder.[112]

75. At paragraph [97] the Court of Appeal found that Wylie J had held that the purpose of the stay was to uphold the integrity of the criminal justice system, not to vindicate the appellant's rights. But Wylie J cited that passage of this Court's judgment in *R v Wilson* in which the Court said that a stay "can also provide a remedy to a defendant in cases where the conduct involves a breach of a defendant's rights".[113]

The appellant's liberty was not restricted during the criminal proceedings

76. During the criminal proceedings the appellant's liberty was never restricted; he was not on bail and was not held in custody. The proceedings last approximately two years but during this time the appellant attended Court for approximately two days.

77. This factor was not expressly referred to by the Court of Appeal (although it cited the observation made in *Van Essen*, that damages are usually only awarded in cases involve loss of liberty or physical harm).[114] However, loss of or restrictions on liberty is highly relevant to the gravity of the breach and is a feature of most cases in which common law courts have imposed damages for breaches of fair trial rights.

The prosecution decision was not reckless

78. The Court of Appeal concluded that the decision to prosecute the appellant, following the commencement of civil proceedings, was wrong ("ill-advised"). The Crown accepts that characterisation. However, the appellant goes further and invites the Court to characterise the breach as "reckless". For the

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112 *Taunoa v Attorney-General,* above n 3, at [369] per McGrath J.

113 *Commissioner of Inland Revenue v Parore* [2021] NZHC 3405 at [53] citing *R v Wilson*, above n 109, at [43]–[50]. See also *Fox v Attorney General*, above n 86, at [37].

114 *Attorney-General v Parore*, above n 1, at [56].

following reasons the Court of Appeal was right to find that this had not been proved.[115]

The nature of the allegation and the relevant evidence

79. The appellant's pleaded case was that "From 26 August 2019 at the latest, the Commissioner knew that pursuing the Charges would constitute a breach of Mr Parore's right to silence".[116] This appears to be an allegation of intentional breach, albeit cast in terms of institutional knowledge.

80. At first instance, Gwyn J found that the decision to prosecute was "highly reckless at best".[117] Her Honour arrived at this characterisation by considering the various standards of fault that may be relevant in relation to the exclusion of improperly obtained evidence, under s 30(3)(b) of the Evidence Act 2006.

81. Although her Honour did not state the standard of recklessness that she adopted, the ordinary meaning of the term in New Zealand law,[118] the statutory context of s 30(3)(b) and her own language suggests that it is subjective recklessness. This is a state of mind that must repose in an individual not an institution, and is one to which blameworthiness attaches.[119] As the House of Lords held in *Three Rivers District Council v Governor and Company of The Bank of England (No 3*), it is a form of bad faith.[120] Therefore, a finding that the decision was made recklessly was required to be supported by good evidence as to the state of mind of the decision-maker. It was not enough to show that they made a wrongful decision.

82. The decision in question was the final decision to prosecute, made approximately nine months after the service of his Notice of Proposed Adjustment (**NOPA**), following an internal review of prosecution decisions at the Inland Revenue Department (**IRD**), prompted by the *R v Safi* judgment. It

115 At [96].
116 Appellant's Statement of Claim at [63]. **[[BOD: 101.0010]]**
117 *Parore v Attorney-General* [2023] NZHC 1010, (2023) 31 NZTC 26-003 at [80].
118 *Whangarei District Court v Daisley* [2024] NZCA 161, [2024] 2 NZLR 660 at [115]. This case has been appealed to this Court, with judgment reserved. However, not in relation to the general meaning of recklessness, stated at [115].
119 *Couch v Attorney-General*, above n 98, at [100] per Tipping J.
120 *Three Rivers District Council v Governor and Company of the Bank of England (No 3),* above n 89.

was described at paragraphs [76]–[80] of the affidavit of Clint Tully, the crucial passage being:

> After considering the advice and discussing it further with IRD Legal Services and my Team Lead, my Team Lead and I formed the view that the *Safi* decision was distinguishable and that Mr Parore's fair trial rights would not be breached in a prosecution. My Team Lead approved my decision to carry on with the prosecution of Mr Parore.

83. A finding of recklessness must have involved a finding that this part of Mr Tully's evidence was untrue and that he was aware that the decision to prosecute would risk the appellant's fair trial rights. There was no sound basis for such a finding:

83.1 although Mr Tully was cross-examined on a number of topics, this part of his evidence was never challenged;

83.2 Gwyn J did not find that he was not telling the truth in relation to his decision, although she made a number of other findings that were critical of his evidence and conduct of the investigation;

83.3 the decision was made following an internal review process to which a number of individuals contributed. There were ultimately two decision makers, Mr Tully and his Team Lead, who approved his decision. The Court received evidence only from Mr Tully; and

83.4 privilege was not waived over the legal advice they received.

Whether the failure to follow Skinner *and* Safi *was proof of recklessness*

84. The appellant suggests that recklessness can be inferred from the decision to prosecute in light of *Skinner and Rowley v R* and *R v Safi*.

85. In *Skinner and Rowley v R*, the Court identified the risks to rights if civil proceedings are advanced before criminal proceedings under the Tax Administration Act 1994 (**TAA**).[121] However, the relevant passage was a statement of law at a level of generality. It required interpretation and application to the facts of this case. The evidence did not indicate what level of awareness Mr Tully or his Team Lead had of it, still less what their understanding of it was.

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121 *Skinner and Rowley v R* [2016] NZSC 101, [2017] 1 NZLR 289.

86. Mr Tully was aware of *Safi* and believed it to be distinguishable.[122] That view may have been wrong, but nevertheless genuine. He was never challenged on this and his evidence on this point was plausible. *Safi* was not, as the appellant contends "identical" to this case.[123] In contrast to the appellant's s 58 defence, which turned on a question of statutory interpretation, *Safi* involved the disclosure of a factual defence (property transactions overseas) and the detailed evidence that supported it.

The need for caution before characterising a prosecution decision as reckless

87. Since prosecutorial decision-making is "as difficult to exercise as it is vital to the effective prosecution of criminal cases",[124] the assumption that prosecutor's exercise their discretion in good faith should not lightly be displaced. The state of the evidence in this case did not permit a finding of recklessness and the Court of Appeal was right to conclude that this allegation had not been proved.

The gravity of the breach of the right to silence

88. The Court of Appeal found that gravamen of the Commissioner's conduct was that she received notice of the appellant's legal defence, and that this was a less serious infringement of the right to silence than notice of a factual defence.[125]

89. The latter findings were correct in the context of this case. The appellant has not challenged it but instead submits that the seriousness of the breach arose from the disclosure of the *actus reus.* This finding of Wylie J was not upheld by the Court of Appeal, who accepted that the *actus* could have been proved through the Commissioner's own records.[126] Therefore, the disclosure of the *actus* could have been cured by excluding the evidence of the NOPA and would not, itself, have justified the stay.

90. The appellant also relies on the fact that the Commissioner obtained evidence from the Official Assignee to respond to the s 58 defence.[127] However, as the

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122 *R v Safi* [2018] NZDC 19698, (2023) 31 NZTC 26-013.
123 Submissions of the Appellant at [5.14].
124 *Henry v British Columbia (Attorney General)*, above n 58, at [127] per McLachlin JC and Karakatsanis J.
125 *Attorney-General v Parore*, above n 1, at [90].
126 At [87]. Put simply, invoices and independent records available to the Inland Revenue Department showing work carried out, combined with the absence of GST payments, in the context of a duty to pay.
127 Appellant's submissions at [2.45(b)].

Court of Appeal found, the s 58 defence turned on a question of statutory interpretation.[128]

Assessing the appellant's claim that the trial should not have taken place

91. In this case, the stay was granted on the basis that the appellant could not receive a fair trial (a "category one" stay as described in *Wilson*) and not on the basis that the misconduct of police or prosecutors "undermines the integrity of the justice process" (a "category 2" stay).[129]

92. This case plainly does not fall within that rare category of cases that involves misconduct of state officials so serious that it may call for denunciation through a Bill of Rights remedy, as discussed in *Wilson*. Aside from the risk generated by the commencement of civil proceedings, the prosecution was proper. It met the tests of evidential sufficiency and public interest. The prosector was not improperly motivated. Had the Commissioner not commenced prior civil proceedings, a fair trial could have taken place and was likely to have taken place.

The policy change

93. As the Court of Appeal found, the Commissioner's policy has changed to ensure that the commencement of civil proceedings does not infringe the right to silence**.**[130] The fact that the Commissioner has changed his practices, is testament to the impact of the stay of the prosecution in *Safi,* which prompted the review which led to the policy change. It suggests that any further deterrence that might be provided by damages is not necessary and one of the primary rationales that would justify an award of damages is absent.

94. If further deterrence was needed, the declaration made by the Court of Appeal formally, publicly and unambiguously stated that the Commissioner had breached the appellant's right to silence and thereby to a fair trial. It is likely to provide a salutary warning of the importance of respecting rights when administering powers under the TAA.

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128 *Attorney-General v Parore*, above n 1, at [88(c)].
129 *R v Wilson*, above n 109, at [63].
130 *Attorney-General v Parore*, above n 1, at [100].

The relevance of the appellant's retention of GST that was subject to the charge

95. The respondent filed a notice to support the judgment of the Court of Appeal on other grounds.[131] The ground in question was the appellant's retention of the GST that was the subject of the criminal charges, should be taken into account when considering whether damages should be awarded. On further reflection the respondent does not invite the Court to do so. The High Court declined to extend the Commissioners request for extension of time within which to challenge the appellant's NOPA.[132] Therefore, pursuant to ss 89H(2) and 109 of the TAA, and the appellant's assessment must be deemed correct for the purpose of all civil proceedings.

Whether the costs of the trial should be awarded as damages

96. The respondent appealed to the Court of Appeal on questions of liability and quantum. Having found for the respondent on liability, that Court did not go on to consider quantum. It is not therefore encompassed within the scope of this appeal. Should the Court find for the appellant in this appeal, it may remit the matter to the Court of Appeal for quantum to be determined.[133] However, it is of course open to this Court to address quantum itself.[134] Since the difference between the parties turns on a single question (whether damages should have been calculated for the costs of criminal proceedings) upon which the Court has the benefit of the judgment of Gwyn J, the Court may consider it appropriate to do so.

97. Damages awards under the Bill of Rights Act should be "moderate", to reflect the gravity of the breach and not approach the level of tortious damages.[135] This would itself preclude damages from being calculated on the basis of costs. To do so would result in an award that is out of step with damages awards made for more serious breaches of rights in *Taunoa v Attorney-General*,[136] and later cases decided under the Bill of Rights Act.[137]

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131 Notice filed on 9 December 2025 under r 20A of the Supreme Court Rules 2016.
132 *Commissioner of Inland Revenue v Parore* [2022] NZHC 488, (2022) 30 NZTC 25-015.
133 Senior Courts Act 2016, s 80.
134 Senior Courts Act 2016, s 79.
135 *Taunoa v Attorney-General,* above n 3, at [265] per Blanchard J.
136 At [269] per Blanchard J.
137 *Taylor v Attorney-General (No 3),* above n 108, at [444]–[446].

98. However, even if the Court finds for the appellant on the general principles that should govern an award of damages, it does not follow that costs may be recovered as damages:

98.1 Costs in criminal proceedings are governed by the Costs in Criminal Cases Act 1967 (**CCCA**),[138] which does not provide for costs to be ordered following a stay.[139] Where Parliament has determined that legal costs are not recoverable in criminal proceedings, a court may not subsequently permit those costs to be recovered as damages in a civil case.[140]

98.2 If it was permissible to calculate damages with reference to the costs of the criminal proceedings, it was necessary to retain parity with cost awards made under the CCCA. Under that Act full indemnity costs "are rarely awarded and generally reserved for cases involving bad faith or gross misconduct".[141] Neither is present in this case.

Costs

99. The respondent does not seek costs in respect of this appeal.

Conclusion

100. For all the above reasons, the Court is invited to dismiss this appeal.

6 March 2026

M Laracy / D Jones / A Goosen
Counsel for the respondent

TO: The Registrar of the Supreme Court of New Zealand.

AND TO: The appellant.

AND TO: The interveners.

138 And, in relation to disclosure issues, by the Criminal Disclosure Act 2008.
139 *D v R* HC New Plymouth T3/96, 24 September 1997.
140 *Anderson v Bowles* [1951] HCA 61, (1951) 84 CLR 323; and *State of New South Wales v Cuthbertson* [2018] NSWCA 320, (2018) 99 NSWLR 120 at [63]–[67].
141 *R v Mather* HC Christchurch T 33-97 and T 34-97, 26 July 1999.

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