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IN THE SUPREME COURT OF NEW ZEALAND SC 107/2024

I TE KŌTI MANA NUI O AOTEAROA [2025] NZSC Trans 7

BETWEEN **DANIEL CLINTON FITZGERALD**

Appellant

AND **ATTORNEY-GENERAL**

Respondent

Hearing:	20-21 March 2025
Court:	Winkelmann CJ Glazebrook J Williams J O'Regan J Mallon J
Counsel:	A S Butler KC, P A Tierney and M D N Harris for the Appellant M F Laracy, J N E Varuhas and Z R Hamill for the Respondent R A Kirkness, D T Haradasa and D Qiu for Te Kāhui Tika Tangata | Human Rights Commission as the Intervener

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CIVIL APPEAL

MR BUTLER KC:

Ata mārie, e ngā Kaiwhakawā. Andrew Butler appearing with Peter Tierney and Max Harris for the appellant.

WINKELMANN CJ:

Tēnā koutou.

MS LARACY:

Tēnā koutou, e ngā Kaiwhakawā, ko Ms Laracy māua ko Mr Varuhas, ko Ms Hamill, e tū nei mō te Karauna. Ms Kiel does not appear as counsel but will assist with ClickShare.

WINKELMANN CJ:

Tēnā koutou.

MR KIRKNESS:

E ngā Kaiwhakawā, tēnā koutou, ko Kirkness ahau, kei kōnei mātou ko Haradasa, ko Qiu, mō Te Kāhui Tika Tangata.

WINKELMANN CJ:

Tēnā koutou. Good morning, counsel. So, there is a preliminary issue that we need to address, so Mr Butler, do you want to?

MR BUTLER KC:

Thank you, your Honours.

WINKELMANN CJ:

So you've raised the Crown's compliance with rule 20A of the Supreme Court Rules 2004?

MR BUTLER KC:

Yes, that's right, your Honour.

WINKELMANN CJ:

So how we thought we would deal with that is as follows. We will hear argument on the points raised and – there is a qualification to that – without any indication that we will deal with those arguments. We are going to reserve our position regarding the compliance with rule, whether rule 20A has been complied with or whether it was engaged and with the significance of non-compliance. Having said that, we see considerable force in many of the points that you make and we would not wish this to become a feature of the Crown's conduct with appeals in future.

We also note the Crown has real difficulty with its argument and it is apparent on the face of it that Mr Fitzgerald contributed to his own, the length of his own detention given what is known about Mr Fitzgerald and the lack of any other factual underpinning for that submission and we reserve to the appellant the right to respond with further submissions in light of any prejudice that is caused to them and we can address that later in the hearing.

MR BUTLER KC:

Thank you for that indication, your Honour. I'm very grateful and I am embarrassed I have to say because the points that I've raised in the memorandum are not ones, the ones that I've taken objection I have not prepared for, for the reasons I've outlined, so I will need to take time with my co-counsel to figure out how I can respond to the indication from your Honours. It may be, just thinking out loud, because I obviously wasn't quite sure how we might deal with it this morning, it may be that when I hear how – so I won't be advancing many arguments I don't think along the way in relation to those points, but it may be when I hear how Crown counsel fare, for want of another verb, with their submissions on those points, it may become obvious that in fact the number of points that I might need to respond to become reduced in light of how your Honours have stated matters and that may mean that we might not have to come back for a further oral opportunity or something of that sort. What I'm trying to get at is some of the issues are quite gnarly and I don't feel – I'm not sure that I will be able to adequately deal with them just by some written submissions because some of them I imagine would need to be teased out.

WINKELMANN CJ:

Yes, that's a fair point. I think I made, I hope I made it clear that the fact we're hearing argument is no indication that we are going to deal with the merits of those arguments because we may just swipe them aside on the basis of non-compliance with rule 20A.

MR BUTLER KC:

I get you, okay, thank you, your Honour. I just wanted to make it clear that I have not, I have not prepared on those points because they are big issues.

WINKELMANN CJ:

Yes, and we understand that point.

MR BUTLER KC:

Thank you. Do you need to hear from the Crown?

WINKELMANN CJ:

Well, I don't know that Ms Laracy – Ms Laracy, did you want to say anything in response, you may.

MS LARACY:

The Crown is prepared to address the section 20A issue, please, and Ms Hamill will address the Court on that.

WINKELMANN CJ:

Well, can I, or perhaps you just want to go there, Ms Laracy. So if you go to counsel's – no, please, I'm speaking to Ms Laracy. Thank you, Ms Laracy. We're not hearing argument on compliance with rule 20. I suppose we'll hear the argument. Yes, we probably do need to hear argument on compliance with rule 20A then, don't we.

MS LARACY:

I think if I can assist the Court without going into any details, the Crown's position is that rule 20A has not been breached and I am somewhat confused

by the Court's indication that it doesn't expect the Crown to continue in this stance in the future. Is that to do with being three pages over for which we did seek leave, or is it for a concern that we have breached the requirement in section 20A? If it's the latter, Ms Hamill is ready to address the Court on that matter, please.

WINKELMANN CJ:

All right, we will hear Ms Hamill.

MS LARACY:

Thank you.

WINKELMANN CJ:

Well, actually, first, we have to hear Mr Butler, don't we.

MS LARACY:

As the Court pleases.

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MR BUTLER KC:

I'm not keen to waste your Honour's time. I set out in my memorandum rather in fulsome form what our position was. I would just emphasise a number of points. Crown Law is one of the, if not the, largest litigation shops in the country. It knows what the rules are and what procedures are. The concept of upholding a judgment on other grounds is a well-known one that's been clarified by the senior courts on numerous occasions. The reasons given by the Court of Appeal for allowing the appeal in the Crown's favour were, in my submission, narrow. The issues that are being raised by my friends on this appeal, or purportedly raised, go well beyond the grounds that found favour with the Court below. I needed to be given fair notice of what was in issue. I myself raised in my submissions in support of leave to appeal a suggested wording noting that the Crown could choose if it wished to support the judgment under appeal on other grounds. So it's not that they've been taken by surprise. Then in my written submissions in support of the substantive appeal I noted in several

footnotes in there in the memorandum that there had not been a notice to support under the other grounds. I was giving them further warning that that was the view that I was taking, that I did not feel I had been given fair notice, and I think not responding and leaving it to the substantive submissions is just fundamentally not fair.

WINKELMANN CJ:

Thank you, Mr Butler.

MS HAMILL:

Tēnā koutou e ngā Kaiwhakawā. I'll just make some brief submissions for your Honours, starting with rule 20A. The respondent's submission is that rule 20A is not engaged in this case because these matters are not new. They are matters that were grounds of appeal in the Court of Appeal, but they were not directly decided upon by the Court of Appeal because it decided matters on the first of the grounds of appeal, the first one to five, which concerned what by shorthand I'll call the constitutional principle point and the separation of powers. The matters that my learned friend, Mr Butler, objects to are matters that follow on if this Court finds that damages liability does attach to a section 3 actor. The questions of whether the breach amounts to a breach of section 22 of the New Zealand Bill of Rights Act 1990, quantum and exercise of remedial discretion all follow on from that.

It follows in the Crown's submission that these aren't matters that support the Court of Appeal's judgment because the Court of Appeal's judgment, as I said, was decided on those constitutional principles that liability did not attach to the prosecutor and therefore there was no liability and damages in this case.

WINKELMANN CJ:

It's supporting the Court of Appeal's – the question is whether it's supporting the Court of Appeal judgment on other grounds?

MS HAMILL:

Yes. So these grounds do not necessarily support the proposition that there is no liability. They follow on from a finding that there is liability. As mentioned, they were grounds of appeal in the Court of Appeal and they were litigated and addressed by the parties in that context. They are also, in the Crown's submission, matters that are engaged directly by the appellant's case because the appellant's position is that there was a breach of both section 9 and 22 and that the High Court judgment, including the compensation awarded, should be reinstated.

So the appellant's submissions also address matters of causation and apportionment which are directly relevant to remedial discretion and damages. Matters of remedial discretion and contributory factors to how long Mr Fitzgerald spent in detention are also matters in the Crown's submission arise following this Court's minute of 24 January asking parties to address alternative scenarios in which *Attorney-General v Chapman* [2011] NZSC 110, [2012] 1 NZLR 462 is no longer the law but in which other scenarios about liability should be addressed, and I pause here to simply note that the Court has also indicated its position in terms of the Crown's submissions on factors contributing to Mr Fitzgerald's length of detention. These will be addressed in submissions but the Crown's position, just to make clear, is not that Mr Fitzgerald was responsible for his own detention; they are submissions that will go to remoteness.

In terms of liability, prosecutorial liability and judicial liability are –

GLAZEBROOK J:

Can I just understand the submission? You say that you're not supporting the judgment on other grounds because, in fact, you're saying there should be a different basis for the Court of Appeal to have come to a conclusion, and that seems to me to be the classic supporting a judgment on other grounds. It doesn't mean to say that you're supporting the result but you're supporting a different result from that the appellant is asking for. It's splitting hairs, isn't it?

MS HAMILL:

Well, let me put it another way, your Honour, to see if I can reframe it. The respondent does support the decision on the grounds on which it was decided. The Crown's submissions extensively canvass that position. The constitutional points and the separation of powers points from which the Court decided that there was no liability of the prosecutor.

GLAZEBROOK J:

And that does not need a section 20A notice?

MS HAMILL:

No.

GLAZEBROOK J:

But anything else, any other argument that you're using does.

MS HAMILL:

Well, if this Court determines that liability does attach to the prosecutor, or to a section 3 actor, the question then arises of whether this was a breach of section 22 and what damages should follow, how they should be apportioned, what remedial discretionary principles apply. These are matters that the appellant does take a position on. He submits that this is a breach, a breach of section 22 and he asks the Court to reinstate the High Court decision in full. The respondent effectively responds to those, to that position and it responds to that position by advancing the same arguments that it did in the Court of Appeal.

GLAZEBROOK J:

But without telling them that's what you're going to do, or the Court.

MS HAMILL:

Well, again, I would simply revert to my submission that these are not matters that ask the Court to reach the same conclusion as the Court of Appeal, namely, that no liability attaches to a section 3 actor. They are matters that follow on if

the Court determines that that is not the position and the Court of Appeal was wrong. The outcome of those submissions would not be to encourage the Court to a position where no liability attaches to anybody. It would be to address the Court on the following matters that the Court presumably must decide.

WINKELMANN CJ:

So you argue that Mr Fitzgerald was in part the author of his own misfortune in the High Court and Court of Appeal?

MS HAMILL:

In the Court of Appeal, the Crown, because of course, and just to take a step backwards, Mr Fitzgerald's sentence of seven years was quashed by this Court, so that aspect of a section 9 breach was addressed in that respect. To the extent that the Court is taking account of the amount of time that Mr Fitzgerald spent in custody and either finding that the prosecutor was responsible for that, or some other section 3 actor was responsible for that, the Crown's submissions on that point address the factors that contributed to it. The Crown's conclusion –

WINKELMANN CJ:

I'm just, can you answer my question, did you argue in the Court of Appeal that Mr Fitzgerald was the author of his own misfortune?

MS HAMILL:

What we argued is the same thing that I'm signalling to your Honour we are arguing here, which is not that he was the author of his own misfortune, but –

WINKELMANN CJ:

To some extent. He could've taken steps to mitigate the situation. Did you argue that he could've – you're quite right, I might have placed, inaccurately summarised your argument. Did you argue in the Court of Appeal that Mr Fitzgerald could've taken steps to free himself from detention?

MS HAMILL:

We argued that, and again, I'm not attempting to allude, not to answer your Honour's question directly, but to put what we argued, we argued that there were rights of bail. We did not attempt to blame it on Mr Fitzgerald that he had not obtained bail, but we pointed to the many contributing factors that would've allowed Mr Fitzgerald some liberty during the course of the process that were not, were not engaged as we know because he spent so long in detention as he did. But they are matters we say are worth this Court's examination if the Court is looking at the amount of time he spent in detention and looking at it for the purpose of establishing whether the prosecutor is responsible for that. So they are matters that go to remoteness in terms of assessing causation and whether the prosecutor could have foreseen how long Mr Fitzgerald would spend in custody, so are matters we did address in the Court of Appeal, to answer your Honour's question, and again, I don't want to get into submissions right now, I don't want to take it any further than that, but that is what the Crown is essentially –

WINKELMANN CJ:

So your point is that these are all, you say that all of these points were argued in lower Courts?

MS HAMILL:

Yes.

WINKELMANN CJ:

Right, thank you.

MS HAMILL:

And it's also a matter that Justice Miller addressed in his separate judgment in the Court of Appeal, to some extent as well, the matters that contributed to the amount of time Mr Fitzgerald was in prison.

WINKELMANN CJ:

So there really wasn't any reason why you couldn't identify that in a notice then, was there?

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MS HAMILL:

The Crown submits that it wasn't a matter that required a notice because they are so directly and inherently engaged in this case. This caused the respondent, the appellant – part of the appellant's submissions are that the amount of time that Mr Fitzgerald spent in detention is why his appeal right did not fully vindicate the breach. Like his position that section 22 is engaged in this case and his position on causation, apportionment and damages, the Crown needs to respond to those. The Crown did not see this as a matter on which it needed to give notice in order to respond.

Just a few brief further points, your Honours. One of the appellant's arguments advanced in *Putua v Attorney-General* SC 31/2024 in terms of revisiting *Chapman* and how that might be done included encouraging this Court towards making a carve-out for cases where arbitrary detention was established. That again, in the Crown's submission, requires the Crown to address whether or not arbitrary detention is established in this case. So again, it's a matter that flows from the general context of this case, but also from the Court's minute of 24 January.

Moving to a separate point. In my learned friend's memorandum, he indicated his position was that the section 22 point had been determined by the Court of Appeal which of course is a slightly different proposition than requiring a notice under section 20A. But the passages referred to by my learned friend were passages from the Court's recitation of the High Court judgment and then a later section commenting on the proportion of ex gratia compensation being paid by the executive. These weren't reasoned comments resulting in a determination and no cross-appeal was required for those as my learned friend had suggested in his memorandum.

Now, your Honours have indicated how you will approach this matter and I have given submissions in terms of our position on section 20A. Just to conclude then with some brief comments about how it might be dealt with. As your Honours have indicated, you can hear the argument and determine the issues again, revisit them later. After hearing from the parties your Honours might wish to hear further submissions or have written submissions filed.

WINKELMANN CJ:

No. We will give Mr Butler an opportunity to file more submissions because he says he is embarrassed by these points being raised.

MS HAMILL:

Yes, yes and for the reasons I've outlined, your Honour, the Crown submission is simply that they are not new points that are unexpected.

WINKELMANN CJ:

Well, so we're just indicating that we are minded to give Mr, we are going to give Mr Butler additional time before deciding the rule 20A point because he says he's embarrassed and needs more time.

MS HAMILL:

Okay. Thank you, your Honour for clarifying. If I can just have a moment to confer with Ms Laracy?

WINKELMANN CJ:

Yes.

MS HAMILL:

Thank you, your Honour. Just to note that if Mr Butler does file further submissions the Crown is likely to seek a reply to those submissions.

WINKELMANN CJ:

And, well, you would have a right, normal course to reply to any submissions he makes.

MS HAMILL:

Thank you, your Honour. As the Court pleases.

MR BUTLER KC:

Not wishing to extend our discussion on this particular issue, but I have just one or two quick points that must be made. The judgment appealed against was a judgment in the Court of Appeal that allowed the appeal. The Court – when you're talking, as your Honours well know, when you're talking about a notice to support on other grounds, you have to distinguish between the judgment under appeal and the reasons, or the grounds, that are laid out in the judgment under appeal. The judgment appealed against was the setting aside, so that's what we appealed against. We appealed against the judgment. We dealt with the grounds that were given in the judgment and rule 20A says: "If a respondent does not wish the judgment," not the reasons, "the judgment appealed from to be varied," well, they don't want it varied, they want it upheld, "but intends to support it on another ground (being a ground that the court appealed from did not decide or decided erroneously), the respondent must give notice of that intention." It's a basic requirement of fairness, natural justice, call it what you will and it hasn't been respected here, I'm sorry to say.

WINKELMANN CJ:

Right, did you have any other points?

MR BUTLER KC:

I do object to the idea that the Crown gets the last word on the issues because if they had followed the –

O'REGAN J:

Oh, for goodness sake, let's just get on with the case.

MR BUTLER KC:

Exactly.

WILLIAMS J:

Yes, come on.

MR BUTLER KC:

I'm just making the note.

WINKELMANN CJ:

Well, wouldn't that be the usual course?

GLAZEBROOK J:

We haven't said the –

WINKELMANN CJ:

Wouldn't that be the usual course though, Mr Butler?

MR BUTLER KC:

I would go first, they would go next and then I would have the last word.

WINKELMANN CJ:

All right, that right, okay, right, quite so, right.

MR BUTLER KC:

That's what I'm saying.

WILLIAMS J:

Yes, but, I mean this is the Supreme Court.

MR BUTLER KC:

Indeed.

WILLIAMS J:

And we're dealing with substantive law here of great importance.

MR BUTLER KC:

Indeed.

WILLIAMS J:

Do we really need to nickel and dime over this?

MR BUTLER KC:

No.

WINKELMANN CJ:

No, and we need to get on.

MR BUTLER KC:

But I didn't propose the nickel and diming.

WINKELMANN CJ:

Right, so we will get on with the substantive.

MR BUTLER KC:

Yes please, thank you.

WINKELMANN CJ:

Draw a line under that argument.

MR BUTLER KC:

I am indeed. May it please the Court. Mr Fitzgerald's claim, we say is a simple one and here I'm just referring to the opening in my written submissions.

WINKELMANN CJ:

So just before you do commence, the Crown has suggested that you and the intervenor have today to deal with your arguments. We've now taken 25 minutes of the day. We can take a slightly shorter lunch adjournment. Say, yes, a shorter lunch adjournment and sit perhaps a little bit longer to make up for that time.

MR BUTLER KC:

I think that would be a good idea.

WINKELMANN CJ:

Right.

MR BUTLER KC:

Thank you.

WINKELMANN CJ:

But you are content with that proposal?

MR BUTLER KC:

I am.

WINKELMANN CJ:

Thank you.

MR BUTLER KC:

He was subjected to a seven year term of imprisonment that the Crown admits was a breach of section 9 of the Bill of Rights and he served more than four and a half years of that sentence. Most of that period of imprisonment was itself a breach of section 9 and in turn, a breach of section 22 of the Bill of Rights. This Court said in *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429: "But breaches of some rights…will inevitably demand a response which include an award of damages whether in tort or under the Bill of Rights Act. The obvious example is any breach of s. 9." That authority should apply here.

In international law, a person subjected to an arbitrary detention is entitled to compensation under Article 9(5) of the ICCPR regardless of which state actor might have caused that breach and there is no need to identify the actor or actors involved. There's no reason for the Bill of Rights to be interpreted inconsistently with Article 9(5), and those of your Honours, the middle three judges, if I can refer to your Honours in that informal way, will be familiar with the arguments that were advanced in *Putua's* case in relation to Article 9(5).

This Court's decision in *Attorney-General v Chapman* should not be relied upon to exclude state liability just because the sentence was imposed by a judge. Mr Fitzgerald says that *Chapman* was wrongly decided and should be departed from for the reasons advanced by Mr Putua in *Putua v Attorney-General.* In short, *Chapman* is inconsistent with the terms of Article 2(3) and Article 9(5) of the ICCPR and with the views of the Human Rights Committee as expressed in *Thompson v New Zealand* (2021) 12 HRNZ 873 (UNHRC) and *Barrio v Spain* No. 3102/2018, CCPR/C/136/D/3102/2018. For your Honours Justice O'Regan and Justice Mallon, there was substantial discussion in *Putua* on those cases and I can of course take your Honours to those at the appropriate point if that is something which your Honours would like me to do. I'm very happy to do so.

O'REGAN J:

We have been given your full submissions.

MALLON J:

Yes, we've read the *Putua* submissions.

MR BUTLER KC:

Thank you.

WINKELMANN CJ:

Justices O'Regan and Mallon have read the submissions.

MR BUTLER KC:

Thank you. That's very helpful. Thank you. Article 9(5), as you will know, was not considered by any judge in *Chapman*, nor did *Chapman* involve breaches of sections 9 or 22 of the Bill of Rights. We say *Chapman*, even if it holds a kernel of truth to it in certain settings, is not one which should be extended to exclude state liability for breaches of sections 9 and 22. The public policy concerns relied upon by the majority in *Chapman* do not arise here and so *Chapman* should not be applied.

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

Liability here does not undermine finality of litigation. The judge's decision and the Court of Appeal's decision was shown to be wrong in the ordinary way. These proceedings, we say, go with, not against, the grain of finality. There is no collateral attack on a judgment.

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But even if *Chapman* were found to remain good law, which we deny, obviously, state liability for the breach of sections 9 and 22 of the Bill of Rights can be sheeted home so long as some non-judicial action can be said to have made a material contribution to the breaches. We say that is consistent with normal human rights law principles, and I've set out a number of the cases in a footnote, and with causation principles operative in other parts of the legal system. Here, there has been a material contribution by the Crown prosecutor. The Crown prosecutor selected a charge of indecent assault. She was candid that she had no regard to section 9 and no regard, no reference in her evidence, to her role of acting as an administrative safety valve as contemplated at the time that the legislation was passed, and just to flag, obviously, I'm going to come and spend a bit of time on that administrative safety valve concept later in these submissions.

State liability arising out of the prosecutor's material contribution to the BORA breaches cannot be evaded just because the sentence was imposed by a judge, particularly when, to use the Crown's language, the Attorney-General's language, the received understanding at the time was that the three strikes regime required a judge to impose the maximum sentence upon conviction for a three strike offence.

The eventual setting aside of Mr Fitzgerald's original sentence by this Court and his release post-resentence brought to an end his ongoing arbitrary detention, and here I make reference to the distinction between Article 9(4) and Article 9(5). Article 9(4) requires there to be a mechanism available to bring an arbitrary detention to an end. Article 9(5) requires there to be compensation for any arbitrary detention that has occurred, and that's a point that comes through very strongly in both the *Thompson* decision of the Human Rights Committee and in the *Barrio v Spain* decision of the Human Rights Committee.

The eventual setting aside of his original sentence did not provide him with redress for the prior period of arbitrary detention that he suffered, and which is a separate requirement set out in Article 9(5) of the ICCPR. We say that damages are what is required to provide appropriate redress for the egregious breach of human rights arising out of the period of arbitrary detention that Mr Fitzgerald actually endured.

So those are the opening remarks I'd wanted to make as a kind of an outline of the major high points of the argument we're wanting to advance. I've prepared two documents which I hope may be helpful. One is a road map and one is what I'm calling Liability Pathways. They've been provided, I think, to Mr Registrar and I'm not sure whether they've been –

WINKELMANN CJ:
We have them.

MR BUTLER KC:
You have them? That's great, thank you.

WINKELMANN CJ:
Yes, we have them in soft form and in hard.

MR BUTLER KC:
And that's great, thank you. So can I just briefly explain what these documents are trying to do for you? So first of all we've got the road map and the road map

really is focused in on what I might call the principally factual matters. So it provides an introduction and overview of the facts, what happened here.

Then I have the next section called "The 3 Strike Scheme", and obviously I need to talk about that quite a bit, and then at the very bottom on the second page I've got what I – I'm just drawing on what this Court recently said in the *Attorney-General v Chisnall* [2024] NZSC 178, [2024] 1 NZLR 768 case about the nature of BORA obligations.

So that's what that road map is about, and then I've got a separate bit of paper which deals with liability pathways with columns for "Prosecutor", "Judiciary" and then "State". The approach that's in that column on the left for prosecutor, that was the approach that was advanced obviously in the Courts below because of *Chapman*. Because of the grant of leave that's been given kindly by the Court that *Chapman* can be questioned, it seemed to me it was appropriate to put in place those columns for judiciary and the third column for the state. That one of the state draws on a proposition that obviously I've advanced that *Chapman's* wrongly decided but it also draws on some of the submissions that have been made by the Intervener, the Human Rights Commission, which has focused quite a bit in its submissions on the concept of the state. So it seemed to me if I was going to be helpful to the Court I should at least set out those three columns, and I also thought it might be helpful to have those three columns because I wouldn't be surprised if from time to time we might move, shift across, and some of the ideas that we have exchanges about, and I thought it would at least provide some stability if I can say: "Well, I think this is more relevant to the prosecutor column or the judiciary column or the state column."

So last time round when I appeared in front of you I talked about worlds. You will be relieved to know I'm not going to talk about worlds A, B, C and D, but I might talk about pathways A, B and C, if that will be helpful. A being prosecutor, judiciary being B and –

WINKELMANN CJ:

Okay, so these are not the worlds, these are the pathways?

MR BUTLER KC:

Not the worlds this time. So that if I need to refer to worlds, we know what I'm referring to. Just for my benefit, I can see your Honour Justice Mallon looking a little quizzical about this discussion of worlds. I don't know whether you and Justice O'Regan have caught up on some of that.

WINKELMANN CJ:

They have read your submissions, so they have.

GLAZEBROOK J:

Not necessarily the world terminology.

MR BUTLER KC:

The worlds weren't in the submissions.

WINKELMANN CJ:

Oh, weren't they?

MR BUTLER KC:

No.

WINKELMANN CJ:

Okay, all right, then they won't have.

MR BUTLER KC:

Right, so I had four worlds. I avoided three worlds because it might lead to obvious first world, second world, third world ideas and I was keen not to convey any such suggestion in my submissions. So world D would be a world where *Chapman* remains unblemished, untouched by this Court and the challenge – and on a premise that the ratio of *Chapman* about which we had quite some discussion, the ratio of *Chapman* is what is set out in the last, sorry, is set out in paragraph 100 – oh, I've just, I just had it in my head. It's the paragraph

where it said that *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA) *Baigent* liability is only available for actions of the executive and that no judicial acts whatsoever can give rise to liability, state liability for breach of BORA and Mr Harris will tell me very shortly I'm sure what that paragraph is and then the alternative ratio of *Chapman* is –

WINKELMANN CJ:

So that's the broad ratio?

MR BUTLER KC:

That's the broad ratio and then there was a potential narrower ratio for *Chapman* which was in fact *Chapman* is confined to sections 25, breaches of sections 25 and 27 in the very particular context that was raised in – oh, thank goodness. So we're looking at, so here is the narrow one that Mr Harris has brought up at paragraph B where question A is answered as follows: "The Court does not have jurisdiction," –

WINKELMANN CJ:

Formal orders?

MR BUTLER KC:

Correct, under the formal orders: "Does not have jurisdiction to hear and determine the respondent's claim for public law compensation for alleged breaches by the judiciary of sections 25 and 27 occurring in the course of determining his criminal legal aid application and his appeal against conviction." So one of the questions for this Court to decide is: is that the actual ratio of *Chapman*, that narrowness?

MALLON J:

I think we've got this some – I've certainly read these various scenarios. It was just the world terminology that was unfamiliar.

GLAZEBROOK J:

Yes.

MR BUTLER KC:

And then I can't remember what the other paragraph –

MALLON J:

It's all right, we have definitely read the –

MR BUTLER KC:

Great.

WINKELMANN CJ:

Have we got the broad ratio paragraph number, Mr Harris?

O'REGAN J:

We will stick with your pathways, I think.

MALLON J:

Yes.

MR BUTLER KC:

Good. So world A simply is *Chapman* is fully set aside and has no application and every case where somebody makes a claim for state, for compensation against the state, for a judicial breach of the Bill of Rights, that nothing is excluded.

MALLON J:

Yes.

MR BUTLER KC:

That's world A.

MALLON J:

Yes.

MR BUTLER KC:

And what I said is over time of course things will become clear as to which sorts of claims are more likely to succeed than others. So, for example, the indication that's been given in natural justice claim type cases, that's going to be a hard one and claims for breach of mere fair trial rights, the process and the course of an appeal, they've got to be hard ones to succeed on. But there won't be a jurisdictional barrier to the claim because that's what the language is, is of jurisdiction.

MALLON J:

Yes.

MR BUTLER KC:

World B says well, whatever may be the case in respect of the width of *Chapman*, in order to achieve compliance with Article 9(5) of the ICCPR, you cannot exclude, you cannot rely on *Chapman* to exclude state liability for arbitrary detention, so you at least allow compensation for arbitrary detention. That's world B.

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World C is where you take a relatively strict approach to *Chapman* and you say when *Chapman* refers to breaches by the judiciary, you very carefully scrutinise who, what the nature of the conduct is in a particular case to see whether in fact it truly deserves the tag of being a judicial act. That was relevant in *Putua's* case because, of course, one of the arguments was whether or not the registrar was truly acting in support of judicial activity or whether what occurred was an administrative error. So that world C is probably not relevant, and that's what I've indicated, is not relevant I don't think on this appeal. So that's what the worlds are.

So pathway A, pathway B, pathway C. So that's what those documents are trying to try and capture, your Honours.

And it may be helpful if I give you a very brief view of those pathways, just a brief, brief sense of it so that when I'm going through the factual background you've got a bit of a sense as to where I'm going with it, and I'm doing this with some trepidation because, of course, when one suggests a brief dipping of the toe into something like this one might end up going for a many-kilometre long swim, but that's not what I'm intending to do. I'm just trying to give you a sense as to what the columns are.

So your Honours obviously will have read the judgments below and you'll know that broadly speaking the approach that her Honour, Justice Ellis, is the approach that had been advanced for by Mr Fitzgerald and that reflects the sort of approach that's set out in the prosecutor column. So it works on the basis that the Attorney has accepted that section 9 has been breached but says the breach wasn't caused by the prosecutor but rather was caused by the Judge and that because it was caused by the Judge *Chapman* means there can be no liability for that breach, and you'll see I've put in my rider which was going to the point about, well, there's no notice has been given of a challenge to the section 22 conclusion of her Honour, but we can park that for the moment.

You'll see just very broadly, before I get into the detail of it, you'll see DF, that's a reference to Mr Fitzgerald, obviously, says that the CP, Crown prosecutor, caused or materially contributed to the breach of section 9 or 22 because the Crown prosecutor was the one who prosecuted the offence of indecent assault as a third strike offence.

(b), the received understanding at the time was that upon conviction the Judge would have "no option" but to impose the maximum sentence.

(c), and this is important that I get this out as early as I possibly can, while the received understanding was that judicial hands had been tied by Parliament, judicial hands had been tied, that was not the case in respect of a Crown prosecutor, and that's probably the point, if you were looking for one where I disagree – who cares whether I disagree – that the error that I say the Court of

Appeal entered into was that it didn't really focus in on the true discretion and safety valve role that was to be played in this scheme by the Crown prosecutor.

My point throughout has always been that the Crown prosecutor had a free hand in determining how to go about charging particular incidents, and I'll take you, you'll see, I've got a number of indents there which I will come to and if your Honours wouldn't mind noting in the indents you'll see there's Roman (i) to (iv). I'm going to add in the new Solicitor-General Prosecution Guidelines that came into effect on 1 January 2025 which, in my submission, confirm a number of propositions that I advance.

WINKELMANN CJ:
You're adding that in as a (v)?

MR BUTLER KC:
As a (v), yes. I'm doing that so as to make sure that I don't forget to do it and also to act as a prompt when I come to it to hand them up.

I describe the Crown prosecutor's role.

At (e), I note, because this is a point that the Court of Appeal rested at least some of its reasoning on as I can tell, is that really this safety valve mechanism was a poor substitute for clearer legislative direction and/or that the MOU or the Solicitor-General Prosecution Guidelines just didn't spell it out clear enough, more clearly. That may well be the case. It's not Daniel Fitzgerald's problem. It's their problem.

We say at (f), there's no defence to say the sentence was imposed by a judge; there was a primary, prior, obligation on the Crown prosecutor to avoid exposing Mr Fitzgerald to a section 9 breach and Parliament recognised that for the reasons that I set out and I would urge upon your Honours that at all times we might get dragged into constitutional separation of powers and principles. I'm very happy to be in that space unsurprisingly. We might get dragged into roles of prosecutor and Court in cases, in particular cases. Everything needs to,

however, come back to this particular scheme and this is a claim for breach of rights and it is important that we keep a rights centred focus.

Then the judiciary column works on a different notion. You'll see that the Attorney has accepted that section 9 was breached by the judge, judges, but denies the section 22 breach. Obviously, we'll see how that plays out later in the day over the next couple of days.

If we then go down and say, to what it is that Mr Fitzgerald says, he says *Chapman* no longer represents New Zealand law. Here is where I make the reference, your Honours to the worlds A and B. That's why I wanted to talk about them, advance them, they weren't mysterious references. So if the Court does overturn *Chapman* and adopts either world A or B as per the argument in *Putua* then Mr Fitzgerald succeeds because we've got an admitted breach of section 9. *Taunoa* says that section 9 BORA will almost always result in an award of compensation. I've got you the references there.

There is a breach of section 22 BORA which qualifies for compensation as of right as per Article 9(5) and I've got extracts. Her Honour, in the High Court, considered the question of compensation.

Over the page, the setting aside of the sentence imposed by this Court, this Court setting aside of the sentence imposed is not sufficient vindication of Mr Fitzgerald's rights. Here the sentence wasn't simply wrong, it caused a Bill of Rights wrong. That's the point. It's not now open to the Attorney to contend that he should have applied, that Mr Fitzgerald should have applied for bail earlier and is therefore not entitled to damages. That's in my submission an unattractive in principle argument and not available for reasons of procedure.

And a point I do want to emphasise quite strongly is that when you are in this space of Bill of Rights compensation claims, you are not wearing a tort headset. You're not looking to blame somebody. It's not like a tort where you're saying; "Oh, let's find the tortfeasor here and give them a shellacking." That's not what this is about. Remember, this Court in *Taunoa* made it quite plain that the job

of Bill of Rights compensation is to vindicate rights, not to punish the state. So I want it to be understood very clearly, and I'm sure your Honours will understand it because I hope my written submissions conveyed it, but nobody is pointing a finger at any judicial officer here and we say that's entirely consistent with the jurisprudence.

And then the state column works at a level of saying, look, this Court doesn't need to say: "Oh, it was the prosecutor, oh, it was the judge." All that's required is for there to be a conclusion that Mr Fitzgerald here suffered a section 9 breach, suffered a section 22 breach and the state is liable. You don't need, in other words, to go around attributing responsibility. There is an acceptance that through an unfortunate series of circumstances this happened to him and the state pays.

So they are the three pathways in broad outline and I don't know whether that was helpful to give your Honours a bit of a feel for how I see the case. There may be variations on the theme, but I thought if we had a bit of stability in terms of our nomenclature like we did in *Putua's* case, it can be quite handy just so that we can just check in and just see are we talking about the same thing or not.

O'REGAN J:

Your C, state, that does depend on some interference with *Chapman*?

1050

MR BUTLER KC:

Yes, it does. Yes, it does. Absolutely, quite right, Sir, because *Chapman*, to explain, I think it's probably pretty obvious but it's worth saying, what *Chapman* does require you to do in cases like this is to make an inquiry as to is there a judicial act in play and if there is, does that judicial act convert to immunity for the state on the facts of a particular case. So it encourages you to look for, well, it encourages the Crown I should say obviously, to look for judicial involvement and attribute as much responsibility to that judicial arm of

government, the judicial branch of government as is possible in the circumstances so as to minimise exposure for the state.

WINKELMANN CJ:

Can you just help me with what the difference between column "Judiciary" and column "State" is?

MR BUTLER KC:

So the judiciary one focuses in on the judge as the principal actor responsible for the breach of rights. The C says look, it could be a, you could look at it from the point of view of a range of contributions to the outcome. It's an, as I said, I described it as being an unfortunate series, set of circumstances contributed to by state actors which has resulted in a breach of section 9 and section 22.

WINKELMANN CJ:

So these are factual, these are just simply factual analyses applying to this case?

MR BUTLER KC:

That's right.

WINKELMANN CJ:

But the third column accords with the approach taken in some of those English cases which are systemic.

MR BUTLER KC:

Yes, it does and it reflects probably more of an internationalist perspective because all you're concerned with is, is the state responsible for the breach of rights rather than saying is an individual component of the state responsible. So it's just a variation on a theme.

MALLON J:

And do any of the columns lead to a different defendant?

MR BUTLER KC:

No. I say the defendant will always be in an action like this with the Attorney-General because the Attorney-General represents the state in litigation of this sort and that was a, that was a conclusion that was reached by this Court in *Chapman's* case. That's the one part of *Chapman* we do agree with. I can give the references if that would be helpful.

MALLON J:

No, that's all right.

MR BUTLER KC:

So, your Honours, with that outline of pathways could I take you to the road map, please?

WINKELMANN CJ:

Go ahead.

MR BUTLER KC:

Thank you. So what I'm proposing to do is you'll see I've got a number of headings and I've got the references and I thought it would be helpful for your Honours, because I'm the one who is introducing the bundle and the factual background, that I should take you to that material and if your Honours tell me: "Look, we're all across it," and I know three of you were in the, obviously were in *Fitzgerald* first time round, so you may feel it's a bit tedious. It's not intended to be tedious. It was just more intended to get us back into the facts of the particular case. So I was just intending to go through these headings and cross-refer.

WINKELMANN CJ:

I think you should go through them. Go through them, Mr Butler.

MR BUTLER KC:

Thank you. So, and you'll know that because I'm Mr Hardcopy I will just be a little bit slower perhaps. I hope you will indulge me a little at least.

So who is Mr Fitzgerald? Mr Fitzgerald, Daniel Clinton Fitzgerald, obviously is many things and there are many aspects to who he is and what his life amounts to. But for the purposes at least of this case, there's a reasonable description of his history as is relevant to the circumstances of this case set out in this Court's judgment at paragraphs 15 and 157.

Mr Fitzgerald suffers from longstanding and serious mental illness. That began when he was 15, so well over 30 years ago now. He's been admitted to mental health facilities, so committed, 13 times, but otherwise has been treated in the community. He suffers from schizophrenia and substance abuse. He has a history of paranoid delusions and auditory and visual hallucinations and needs ongoing mental health care. Mental health issues have led to difficulty in sustaining accommodation and as your Honours will know as well from reading the materials, they play a large role in the sort of conduct that he has repeatedly engaged in on the streets.

If we can go next to 157. Oh, yes, okay, so it's referred to exactly – can we just skip through that? Yes, that is the point I wanted to bring up. So to be added to the fact that he didn't have any real support from family or friends. So when you look through his reports you'll see that he's somebody who really lacks supports.

The most up-to-date report that we've got on his circumstances so far as I've been able to locate in the bundle is the report of Dr Rosie Edwards which is at 302.0295. This was a report that was prepared for the benefit of this Court, to update this Court on his current condition, and I would obviously commend the report to you in terms of giving you more detail around his circumstances.

In terms of then moving to Mr Fitzgerald's offending history, that's dealt with at paragraph 156 of this Court's decision. When he offended he was 43 years of age and had an extensive criminal record, dating back to 1991. He had many convictions for offences such as shoplifting, disorderly conduct, wilful damage, common assault, indecent exposure, indecent assault. He had been sentenced to many terms, numerous terms of imprisonment, but almost all of them were

short terms. All but three were for six months or less, and then were set out what the exceptions are: eight months, eight months and 11 months.

So what was the incident then that led to the imposition of the seven-year sentence? Well, you've got the verdict of his Honour at 301.0207 and obviously your Honours will have regard to the verdict when you see it, but it's probably worth just bringing it up.

So it's 301.0207. So paragraph 1, just to recall that there were three charges that Mr Fitzgerald was facing arising all out of the same incident, and your Honours will know the incident was on Cuba Street. There were two ladies walking, two women walking down Cuba Street. He was walking up and he approached them and basically wanted to kiss or whatever one of them who was obviously not too keen on that prospect. He went in and while trying to give a kiss to her but she turned it meant that his lips brushed against her cheek. Her friend came to her aid and he grabbed her and pushed her up against a wall. He had been drinking at the time.

So the three offences were the offence relating to the cheek. I don't like calling it a kiss because – but engaged – whatever, whatever we call a kiss –

WINKELMANN CJ:
Contact.

MR BUTLER KC:
Contact. Thank you, your Honour. Then the assault on the friend and then the breach of the supervision order that he was subject to. All those offences, everyone is clear, that the more serious – if we weren't looking at three strikes, the most serious of the three offences was the assault, the one of grabbing the friend and pushing her up against the wall. That offence, the sentencing Judge decided, warranted a three months' term of imprisonment. Of the contact with the cheek, which was prosecuted, as your Honours know, as an indecent assault, his Honour said that putting to one side aggravating circumstances to do with the offender, and presumably also mitigating factors which would have

had to have been taken into account, it would not have warranted a term of imprisonment, and that's at paragraph 21 and we go off the sentence decision. "Concerning the offence itself, the nature of the indecent assault is at the bottom end of the range. The actual act was a kiss on the cheek; the attempted act an unwelcome and undoubtedly traumatic attempt to kiss a stranger on the mouth. Standing alone, and leaving aside aggravating features of the offender, it would not attract a jail term."

1100

Any judge who has looked at this assault, this indecent assault, has used language to the effect that it is at the lower end of the range. That's the phrase from the Court of Appeal first time round.

The sentence indication of his Honour Justice Dobson, which is at 302.0093. Hold on, I've done it the wrong way. He referred to it as: "This indecent assault as being towards the bottom end of the range of seriousness of such offending." And then I do want to be heard to say that of course that's not to minimise the impact it might have had on the victim or anything of that sort. I'm not seeking to minimise or say it was a nothing event and all judges have said the same thing.

GLAZEBROOK J:

And there were particular characteristics of the victim that made it particularly distressing for her.

MR BUTLER KC:

Yes, that's right. So there is one impact, victim impact statement in the bundle and as I remember, that was relating to this. I think I'm right in saying that was relating to the friend who was pushed up against the wall rather than the victim of this incident itself.

WINKELMANN CJ:

Yes.

MR BUTLER KC:

I'm not saying that that means anything that it didn't matter to her or anything of the sort. I obviously would never wish to be thought to say such a thing.

WINKELMANN CJ:

Right, we've got that. We've got that, Mr Butler.

MR BUTLER KC:

Thank you. So what happened from charge to sentence? Well, this is dealt with probably most conveniently in the High Court below in this proceeding between paragraphs 19 and 50 and also in the chronology that's been helpfully prepared by my friends and aspects of it are obviously also dealt with in the Crown prosecutor's brief of evidence. So if we just turn perhaps to the Court below, paragraphs 19. So what happened in Mr Fitzgerald's case, the factual narrative not disputed. If we move through we say both women are strangers, police charged him with indecent assault, common assault and breach of the extended supervision order to which he was then subject.

Just in passing, I should note that of course it's, when I come to talk about the wide range of discretion the prosecutors have got when it comes to what charges they choose to advance, it's interesting, to me at least it's interesting to note that the assault against the friend was charged as a common assault rather than what might potentially have been a possibility which was male assaults female which would have carried a double. So two years as opposed to one year. I just simply note that by the by.

So the police charge with those three, those three offences, he was rounded into custody, his housing situation meant he had no suitable bail address. Indecent assault was a qualifying offence under the three strikes regime. This would be his stage three, or third strike offence, and then we get to paragraph 23, the involvement of the Crown Solicitor.

So pursuant to the MOU that your Honours will know about, the police wrote to the Crown Solicitor seeking a peer review of their decision to charge him with

indecent assault. Privilege has been maintained, so we haven't seen that advice, but the charge was proceeded with.

Shortly after that Mr Fitzgerald's then lawyers emailed the Crown prosecutor proposing that the charge be amended to one of common assault which is not a qualifying strike offence on evidential sufficiency grounds. The Crown prosecutor responded by saying the evidence clearly supported an indecent assault charge and that given his history of indecencies, she would not amend the charge.

So then the next proposal that came was, well, okay, let's change the charge please to one of doing an indecent act, which is not a qualifying offence. So that could be doing an indecent act in public under section 126, I think it is, of the Crimes Act 1961, or doing an indecent act with intent to offend, which I think is also an offence under the Crimes Act, section 125, if I remember correctly. Both of those two crimes carry a maximum term of imprisonment of two years but importantly neither of them is a qualifying offence under the third strike legislation.

So at 26: "In accordance with the [relevant] Regulations, the Crown formally took carriage of the prosecution after the proceedings had been transferred to the High Court," as they were required to be. At that point there was a filing of the Crown prosecution notice under section 189, and this was the point the Crown prosecutor was required to make an independent judgment under the Prosecution Guidelines as to the appropriateness of the charges.

Of relevance, at 27, the Crown prosecutor acknowledged that the incident was a relatively low level indecent assault.

We see at paragraph 28 – this means I don't have to take you to the affidavit so that's why I'm just sticking with this recitation – reference is made to: "The Solicitor-General's Prosecution Guidelines, which," the Crown prosecutor said, unsurprisingly, she was a highly experienced Crown prosecutor, "I am very

familiar with, contain a detailed description of relevant public interest factors in relation to the test for prosecution."

And then at 22 she said: "I can confirm that I have no recollection of considering the likely sentencing consequences in my assessment of the public interest test. As sentencing is a matter for the Court, considerations as to sentencing outcomes would not form part of my consideration as to whether the public interest test had been met. The judgment I exercise as a prosecutor is whether the alleged offender should be brought before the Court and what charge appropriately reflects the offending. It is for the Court to determine if they are guilty and if so, what the sentence or other disposition should be." The decision to prosecute requirements judgment, not a case of ticking boxes "but I can say that having found evidential sufficiency my principal reasons for concluding prosecution for indecent assault was in the public interest were that: the offence was an inherently serious sexual offence which had caused harm to the victim; the offender's history indicated that the offending behaviour was likely to be repeated; and the offender was subject to an extended supervision order at the time of the offending." Now I just simply notice that, I should have said at the time, when sentenced in respect of the ESO, there was no, no penalty was imposed for that offence.

And at 29: "The affidavit does not suggest any consideration was given to Mr Fitzgerald's mental health."

So the next relevant incident or episode event was September 2017 when Mr Fitzgerald sought a sentence indication, and what was advanced at that hearing on his behalf, because everyone was proceeding on the received understanding, by now it was plain the Crown was proceeding with indecent assault, recall that the received understanding at the time of September 2017 was that conviction on a third strike offence would mean the imposition of the maximum penalty, here seven years, so the submission that was made was perhaps there is an opportunity for there to be a discharge without conviction on the indecent assault and that would be a way to avoid the three strikes regime. The Crown opposed on jurisdictional grounds, which, as part of the

sentence indication his Honour, Justice Dobson, accepted, and he made it plain that the sentencing Court would be required to impose the maximum seven-year sentence, and again I'm relying on the footnote references here. I'm not taking you to the sentence indication because the cross-references I think are adequate.

At 31: "The Judge recorded his view that the indecent assault was 'towards the bottom end of the range of seriousness of such offending'. Then, he observed that Mr Fitzgerald's mental health problems were also relevant and that expert opinion was that a sentence of seven years' imprisonment would adversely affect his mental health still further, as his time in custody on remand had already done." And these were factors he took into account to indicate that were he to be the sentencing Judge, while Mr Fitzgerald would have to be sentenced to seven years, it would be manifestly unjust to require that sentence to be served without the possibility of parole.
1110

"Unsurprisingly," as her Honour says: "Mr Fitzgerald did not plead guilty following that indication." The matter went to trial and he was convicted.

He was sentenced, your Honour, at 33: "Mr Fitzgerald was sentenced on 10 May 2018. The sentencing judge again noted that the indecent assault was at the 'bottom end' of the range and would not ordinarily have attracted a jail term at all." But discharge was not available and "he was compelled to sentence Mr Fitzgerald to seven years' imprisonment." But agreed with Justice Dobson that it would be manifestly unjust to require Mr Fitzgerald to serve that without the possibility of parole.

So if we go over the page and we get the recitation of what happened in the Court of Appeal and then this Court. One of the things I think I can usefully do here is you will see at paragraph 34 of the judgment there's reference to: "All judges agreed that a seven year sentence was manifestly unjust having particular regard to." That's a cross-reference. You can't see it I don't think. Max, can you just go down to the bottom of the page. There should be a

cross-reference I think to paragraph 34(a) to (d) of the Court of Appeal's judgment first time round and I think we should probably go there.

So, for your Honours, that's in the bundle at 302.0244. So it's worth reading this and having the implications of it say sink in: "If s 86D(2) contained a safety valve provision that enabled a court to decline to impose the maximum sentence for the offence where it would be manifestly unjust to do so, the same factors would be relevant." And these are the factors that the Court has identified as being applicable, for example, as a result of the *R v Harrison* [2016] NZCA 381, [2016] 3 NZLR 602 case, which is on the previous page.

Max, do you just want to take their Honours to that. The *Harrison* case was dealing with the section 86E safety valve which was a judicial safety valve and here are the factors that are set out at paragraph 33. Of course, the understanding was that when it came to third strike that 86D(2) did not contain a judicial safety valve.

So back to 34: "If section 86D(2) contained a safety valve provision that enabled a Court to decline to impose the maximum sentence for the offence where it would be manifestly unjust to do so, the same factors would be relevant. We consider that the safety valve would plainly apply in the present case."

Now, you will know where I'm going with this language of safety valve and the language of plainly. The Court is saying if it were a safety valve, but we're not, but not to spoil the surprise, we will come and talk about who actually was the safety valve in this scheme. "We consider the safety valve would plainly apply in the present case. The sentence imposed on Mr Fitzgerald is manifestly unjust having regard to the circumstances of the offence and of the offender: (a) The offence was … at the low end of the range of conduct that amounts to indecent assault. It would not of itself be sufficiently serious to merit a sentence of imprisonment. (b) Mr Fitzgerald's ability to regulate his behaviour in the matter that our society expects is severely compromised by his longstanding mental health conditions. This bears directly on his culpability." And then there is a reference to the relevant sentencing principle from the Act.

"(c) Mr Fitzgerald's mental health condition also renders largely inapplicable the deterrence rationale that underpins the three strikes regime: that offenders understand and can respond to the warnings they are given." That's the whole point behind the requirement for Judges to give people notice of strikes. "It is profoundly unjust" – "profoundly unjust" – "to punish Mr Fitzgerald more severely because he had received warnings which his longstanding mental health condition impaired his ability to act on."

"A report prepared by a consultant psychiatrist … advised the High Court that Mr Fitzgerald was becoming 'more unwell in Prison … requiring not only more anti-psychotic medication but also increasing doses of anxiolytic medication'."

WINKELMANN CJ:
Although he later stabilised, didn't he?

MR BUTLER KC:
He later stabilised, but that was what he was experiencing at that time.

And then (e): "There is clearly a risk of Mr Fitzgerald re-offending, in light of his record. But his offending is not at a level that requires or justifies a (lengthy) prison sentence in order to protect the community: other sentencing responses are more appropriate in the short term, and are more likely to reduce the prospect of re-offending in the longer term."

At 35: "However s 86D(2), as we have already observed, contains no safety valve."

So if we go back then to where we were previously in the High Court, so at paragraph 35 the Judge in the High Court in this proceeding extracts what the Court of Appeal had to say about breach of section 9. You'll see: "We consider that the sentence imposed on Mr Fitzgerald crosses this high threshold." There had been substantial discussion about how high the threshold must be in order for a sentence to breach section 9, and we'll talk a little bit about that later if I need to, but that high threshold obviously comes from *Taunoa* and was applied

by this Court in Mr Fitzgerald's case the first time round. "A sentence of seven years' imprisonment is grossly disproportionate in this case, having regard to the factors identified …" I don't need to repeat them. "He has ended up" – I'm further down, half way down, line 40: "He has ended up in prison for a very long term, in circumstances where he should not be there at all." – "He should not be there at all." – "The rationale that underpins this disproportionate response is that Mr Fitzgerald was given warnings that severe consequences would follow if he offended again, and he should have responded to those warnings. But his ability to respond to such warnings is materially impaired by his significant mental health issues. In these circumstances, a sentence of seven years' imprisonment goes well beyond excessive punishment, and would in our view shock the conscience of properly informed New Zealanders who were aware of all the relevant circumstances including Mr Fitzgerald's mental disability."

And I really do need to pause and emphasise what it means to reach a conclusion of breach of section 9. This Court in *Taunoa's* case was at pains to make sure that the threshold for breach of section 9 was set very high. There are slightly different formulations used in *Taunoa* but each of them, I say, and this Court concluded in Mr Fitzgerald's case first time round, sets a very high threshold, something along the lines of "shocking the conscience of properly informed New Zealanders". So not just excessive, but that standard.

36 moves through a discussion of parole. Her Honour notes the discussion that was had in the Court of Appeal on discrimination, whether discrimination was another way of, another problem with the sentence, and then we get, at 39, to the re-sentence, the Supreme Court's, this Court's decision and the re-sentencing.

1120

As you know, Mr Fitzgerald was sent back for sentencing before the sentencing Judge and the sentence was, if I remember rightly, six months time served, so he got immediate release, and as part of that, from memory, his Honour made reference to the fact that Mr Fitzgerald had been in prison way too long, and

you'll see the amount of time – this is at paragraph 40 – 1700 – yes, indeed, quite right, there it is. It's at paragraph 40. I don't have to rely on my memory. "On resentencing, the Judge observed that Mr Fitzgerald had been detained 'way too long' and imposed a sentence of six months' imprisonment, meaning that Mr Fitzgerald was released immediately. By this time, he had already spent some 1,789 days in prison — almost 1700 days longer than he would have been required to serve under his (re)sentence." Bearing in mind that that six months was higher than the three months that was imposed for the assault and bearing in mind that first time round the Judge had indicated that the indecent assault wouldn't have got a term of imprisonment and that the assault was probably the more serious offending.

In terms of – so I think I've covered what I wanted to say in terms of what happened from charge to sentence. I had a row which reads: "Why or how section 9 was breached here". I've taken you to –

WINKELMANN CJ:

I think you've covered that.

MR BUTLER KC:

– Court of Appeal and then I just simply want to note that obviously that was covered off by this Court first time round at paragraph 3. So let's turn then to the three strike scheme, shall we?

WINKELMANN CJ:

And the Crown conceded a breach of section 9 –

MR BUTLER KC:

It did.

WINKELMANN CJ:

Even in the earlier proceedings?

MR BUTLER KC:

That's correct. So the principal features of the scheme for this case are set –

O'REGAN J:

So there was in fact a breach of section 9 regardless of what this Court later did?

MR BUTLER KC:

That's correct. To me it's really important. I'm so glad your Honour put it that way because one of the important things I think to remember, your Honour I think will remember because pretty much every time I've appeared normally sitting where Mr Kirkness and his friends are sitting I have a line that I always use which is that the Bill of Rights sets a legal standard which is law and it sets the standard, and how we respond to that standard in particular settings takes colour from that setting.

So you'll remember in *Attorney-General v Taylor* [2018] NZSC 104, [2019] 1 NZLR 213, obviously I wasn't able to persuade your Honour but I was able to persuade enough of your colleagues, and remember it was all about, well, the Bill of Rights establishes a legal standard so that it is always possible for me to say: "Yep, section 9 was breached." If this Court hadn't gone the way it had gone in *Fitzgerald's* case, I could still make that claim that section 9 was breached. It's just I wouldn't have been able to do anything about it because section 4 would have been the answer to the breach. So there's a difference between establishing the breach and then the next question which is "so what?", but the answer to the first question is not dependent on the answer to the second question.

WINKELMANN CJ:

So should a Parliament enact legislation that requires the imposition of sentences that reach that high threshold and clearly requires it? On your world would that – so that would…

MR BUTLER KC:

So that would be a breach. I would say that's a breach of section 9 and this Court would reach that conclusion, and then in the "so what?" column the question would be, well, does section 4 save that Act of Parliament? Yes, if it's as clear as what your Honour says, and can there be any claims for compensation –

WINKELMANN CJ:

Yes, that's the question.

MR BUTLER KC:

– flowing on from that? You would then have an argument about whether or not what was being done by the state was, from a domestic perspective, lawful and therefore a bar to a claim for *Baigent* damages. That would be the question. I'm not saying what the right answer would be or what submissions would be made and I don't want to foreclose the possibility of somebody being able to want to make that argument. It's not as weird as it sounds to our ears.

WINKELMANN CJ:

Well, because section 22 – well, not section 22 – the arbitrary detention jurisprudence overseas contemplates that something can be statutorily authorised and yet still arbitrary?

MR BUTLER KC:

Correct. That's exactly right. So the point I wanted to make about the proposition that we've just been discussing might sound strange to our ears because of our traditional adherence and strong view of what parliamentary sovereignty means, but that is not to say that with more understanding of the nature of international human rights obligations that that proposition cannot at least be explored. So, for example, last time I was here in *Putua's* case we talked a little about the European Convention on Human Rights Act 2003 from Ireland. That's just a statute that gives domestic effect to the European Convention. In the Irish system the constitution is supreme law and you can

strike down legislation inconsistent with the constitution. This Act is a bit like the UK Human Rights Act. It sits underneath. It's just statute.

Where a statute interferes with European Convention rights as against the statute, all that is available is a declaration of inconsistency as per the UK Human Rights Act. But, interestingly, a claimant can seek an award of damages for the breach of rights that has been effected by that statute. So that's why I'm just noting –

WILLIAMS J:

You mean in the legislation?

MR BUTLER KC:

Yes, the legislation provides for that, yes. So I'm just noting that just so your Honours understand that ideas are open. Nothing's foreclosed. In this case I don't need to go that far, but it is interesting because what it does is it's another illustration of the point that I'm always at pains to make which is legal standard first: "Has a right been breached here? What is the legal standard?" And then the next question: "So what? What can be done about it?" Two separate questions. But getting the answer to that first question is often really critical and not having it clouded by reference to a rush to get to the second question, to the "so what?" question. Is that helpful, Sir, in terms of the –

O'REGAN J:

Thank you.

MR BUTLER KC:

Because that was initiated by your question.

O'REGAN J:

Yes.

MR BUTLER KC:

Thank you. So the principal features are set out in this Court's decision. I've written down 1 to 25 and then 186 to 202. I think that reference to "1" can't be right because I was meaning to refer to your Honour, the Chief Justice's, judgment which doesn't begin at "1" because 1 is where the summary begins, so that's my bad. It must be 11. It's 11. So it should be 11 to 25 and then 186 to 202.

Could I suggest we go to paragraph 186, please, and this is just tracing through the history, and again if this is tedious, your Honours, I apologise. It's not meant to be, but it's just to remind ourselves as to how it was that the three strikes regime ended up taking the form that it did.

So the three strikes provisions were introduced by the Act under the sub-heading "Additional consequences for repeated serious violent offending". The explanatory note sets out what the purpose was meant to be and the Court will recall from either having participated in the judgment or reading that there was a lot of focus on this concept of serious violent offending in terms of understanding the statutory scheme.

Paragraph 187 sets out what the targets of the regime were, and then we have what the initial qualification to come within the regime was. Initially, the regime would work on the basis that an offender had received a determinate sentence of five or more years' imprisonment, life imprisonment or preventive detention. So you had to have a qualifying sentence, not a qualifying offence, and the qualifying sentence had nonetheless to relate to a specified serious violent offence. But it was the term of imprisonment that you got which would determine whether you fell within the regime or not. Indecent assault was one of the specified serious violent offences but, of course, interestingly, as originally conceived, you'd have to be up the very high end with a seven-year maximum term of imprisonment to qualify, to have a qualifying sentence. Offenders convicted of any third strike offence, except for murder, had to be sentenced to life imprisonment with a non-parole period of 25 years, although in exceptional cases you could get a lesser non-parole period.

Offenders convicted of murder, there were separate provisions made for them. We won't bother with them for the moment.

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If we can just go down to the next paragraph, there was a section 7 report prepared by the then Attorney-General, Mr Finlayson KC, and then at paragraph 190 we have the introduction speech, and the critical thing that happens is that after the Bill, here's 191, after the Bill was read a first time and referred to the Law and Order Committee, and remember there was quite a controversy at the time, why is it going to Law and Order when it should go to Justice? But let's not worry about that for the moment, the Justice Select Committee I meant to say, submissions were received and hearings on the Bill were held throughout 2009. But on 19 January, before the Committee had reported, the Government announced a revised policy to be incorporated into the Bill. I should probably stop there because I see it's 11.31.

WINKELMANN CJ:

Yes, well done. We'll adjourn at this point.

COURT ADJOURNS: 11.31 AM

COURT RESUMES: 11.51 AM

WINKELMANN CJ:

Mr Butler, we've had a chat about the day and our suggestion is that we take an hour at lunch and that we sit through to five and behave otherwise as if we're the High Court adjourning at 3.30 for a 15-minute break. I suggest you speak to the Human Rights Commission about how you split that time up.

MR BUTLER KC:

I will indeed. I'll do that at the lunch break. Thank you very much for that indication, your Honours.

So, your Honours, just in the morning session I made reference to *Chapman* and I couldn't quite find that paragraph, just the broader than narrow ratio. So the relevant paragraph is paragraph 204, and you'll see at 204: "Judicial immunity is now conferred by a combination of the common law and statute law. For the reasons we have outlined, we hold that the public policy reasons which support personal judicial immunity also justify confining the scope of Crown liability," interesting bearing in mind it was called "state liability" in *Baigent*, but anyway, "Crown liability for governmental breaches of the Bill of Rights Act to actions of the executive branch." So that's the broad ratio and that broad ratio appears to be the understanding that certainly the Court of Appeal has had of *Chapman* and subsequent cases like, for example, *Thompson*. So I just thought I should just round that out.

So just before the break I was in the judgment. We were talking about the parliamentary history and I was working with this judgment of Justices O'Regan and Arnold, having begun at 186 to 202, and from memory I was just at the point of introducing what happened at select committee.

WINKELMANN CJ:

So before the committee reported back the Bill was amended?

MR BUTLER KC:

Correct. One point I should have made, I've handed up to your Honours the parliamentary debates. Now the Crown's familiar with these because we have quite some discussion about the parliamentary debates in *Fitzgerald v R (No 1)* [2021] NZSC 131, [2021] 1 NZLR 551 first time around, but I thought you might as well have those with you. They're beautifully presented, bulldog clipped, as I understand, so I apologise for that, but they should be in chronological order.

WINKELMANN CJ:

Very large.

MR BUTLER KC:

Yes, so very analogue. But it's worth noting that point I bring out a number of times is that one of the features of the legislation, which I know will be obvious but it's just important that we know that it was also obvious to parliamentarians, was the intention to remove the discretion of judges.

So, for example, if you're in that bundle, if you look at the first reading, page 1438, we've got the speech of an MP, Jacinda Ardern, of the Labour party. So she's making her speech in respect of the Bill, and remember this is the Bill as introduced, so it's the first reading, so it's not how it ended up being, but this point that I'm making is applicable, I say, to not only the Bill as introduced but also the Bill as it continued to be.

If you look at the bottom of the page you'll see: "What does this Bill, the Sentencing and Parole Reform Bill, do? We have already heard the technical description of the three stages of the strike, so I will not dwell on those. But this Bill does add an additional layer to sentencing. That additional layer essentially removes the discretion of the presiding Judge," and you'll see the interjection from David Garrett of the ACT party, and remember if you read the parliamentary debates you will recall that Mr Garrett was a prime proponent, nothing wrong with that, of the Bill because it was an ACT party measure, it was done as part of the agreement between the National party and ACT. So Mr Garrett says: "That's right." And then Ms Ardern continues: "At the point at which someone comes back before a judge for a third time, it does not matter what the Judge sees before him or her." David Garrett: "That's right." "The Member across the House says that is right and it is what he intends," and so the reason I told you about who David Garrett was is so you understand why the phrase "he intends" because it was effectively his idea.

Of course, that notion of removing judicial discretion, again it's plain, I've already taken you to what was said by the Court of Appeal first time round, no safety valve, but just as an example there's another case in the bundle called *Campbell's* case, *R v Campbell* [2016] NZHC 2817, tab 39, a sentencing decision of his Honour, Justice Toogood, and at paragraph 13, also an indecent

assault case: “Mr Sutcliffe accepts that because you have been convicted of a stage-three offence other than murder, I have no option but to sentence you to the maximum term of imprisonment prescribed for the offence; that is, seven years’ imprisonment. I agree that is very harsh given that what you did was not the most serious assault of its type,” it was grabbing somebody by the buttocks when he was a prisoner and grabbed one of the wardens, he said playfully but that wasn’t believed, he was charged and convicted, “but Parliament has determined that your history of violent offending requires a very stern response to protect the public from you and to act as a deterrent to you and others. It may seem very surprising that this consequence could be required by law for an offence of this kind, but that is the law and I have no option but to enforce it.”

Then I’ve given you a reference also to a case called *Matara v Attorney-General* [2023] NZHC 2888 which is at tab 29. This case your Honours might find interesting just in terms of the “so what?” question. So if we bring it up, so it’s a High Court decision of his Honour, Justice Cooke. Could we perhaps go to the headnotes just to give their Honours – so we don’t have the headnote version. So the plaintiff was sentenced to 10 years and two months’ imprisonment for attempted murder. “The Judge found that she was required to impose this sentence without parole,” which was an – as an aspect of the three strikes regime. “She further indicated that she would otherwise have imposed a minimum period of imprisonment of 40% of the sentence,” if not otherwise – if she had had freedom.

Supreme Court decision in *Fitzgerald* comes out. The Court of Appeal subsequently allows the sentence appeal and says that the non-parole order would be a breach of section 9 and substituted in the 40% minimum period of imprisonment.

So the argument brought in this particular case is there’s a claim for compensation for breach of section 9 on the basis that the sentence itself caused harm to Mr Matara. The claim was dismissed by Justice Cooke not because there wasn’t a breach of section 9 in the circumstances, but that

because he could not show on the facts that he would have been released if the correct parole eligibility date had been adopted by the Judge, and I just wanted to note that by the by, so that when you hear the Crown saying “oh, well, this will mean that in every single case there will have to be compensation for a breach of section 9”, no, not in every single case.

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WINKELMANN CJ:

Do we know how many people were released – re-sentenced and released as a consequence of *Fitzgerald*?

MR BUTLER KC:

The Crown’s got a table at the back of its submissions which covers at least some of those people. What I mean by “covering some of those people” is some of them are High Court decisions and some of them are Court of Appeal decisions, so it's not clear, the Court of Appeal, it's not clear, you know, how they operated vis-à-vis *Fitzgerald* and that’s quite important because you could have had somebody who was sentenced in and around the time of *Fitzgerald*, who has their appeal against sentence determined quite quickly in light of *Fitzgerald*, and therefore didn't actually serve a period of imprisonment that would amount to a breach of section 9, or importantly section 22.

So I can't answer, what I’m saying is, I can't directly answer the question but I think you will hear from the Crown that there will have been quite a number of people who benefited from *Fitzgerald*. What I would say is, that’s as far as you can take the material that they put in front of you, so far as I can read that material.

And the reason I’m referring you at this particular point to *Matara* is to say if *Matara* is right, and in principle I think it is, there’s no reason to suppose that everybody who’s had the benefit of *Fitzgerald* will necessarily get a successful damages compensation claim.

WINKELMANN CJ:

So it does not mean in all those cases the people, the offenders would have served longer in prison than they would otherwise?

MR BUTLER KC:

Correct and so that's what was found in *Matara's* case because what was said there was that, yes, he came up for eligibility, or sorry, he came up for parole release consideration something like 18 months later than he should have done, but when each time he came up he was plainly not the sort of person who was going to be released. So that in effect, his delayed eligibility, his delayed appearance before the Parole Board, did not cause longer detention than what he would otherwise have suffered.

WILLIAMS J:

So but every time there's a section 9 breach in which the release date becomes certain, and is shorter than that which was imposed, there would be eligibility?

MR BUTLER KC:

That would be, it would be in principle, eligibility for compensation, yes, in principle. But and you'll see from the way in which her Honour Justice Ellis went around doing that, you know, that there's a relatively, so as to speak, generous approach to the calculation of what likely period of detention you would have had anyway.

WILLIAMS J:

Well, it would apply to every reduction to a short, to a term, a short term of imprisonment, where you have an automatic release date?

MR BUTLER KC:

Yes, yes, potentially. But I just want to be very clear about, because of the debate you and I had, Sir, in *Putua's* case –

WILLIAMS J:

Did we?

MR BUTLER KC:

Yes, we – about there has to be a breach of rights first, so want to make it plain –

WILLIAMS J:

Oh, yes, sorry, yes, but –

MR BUTLER KC:

My premise is that there has been a sentence imposed that breaches section 9 –

WILLIAMS J:

Correct.

MR BUTLER KC:

– and it was intended to be done. So, we're dealing with that subset of cases. So in answer, yes, that could well be the case, yes.

WILLIAMS J:

So this is your "shocks the conscience" standard?

MR BUTLER KC:

Correct.

WINKELMANN CJ:

That breaches section 9 and was served, because of course sentence –

MR BUTLER KC:

And was, and was served, exactly.

WINKELMANN CJ:

Served, mhm.

MR BUTLER KC:

Exactly.

WINKELMANN CJ:

To the extent.

MR BUTLER KC:

Because you have to have harm, there has to be harm, you know, if you're vindicating the right, you're looking to see, well, so what do I need to do more than setting aside the sentence?

WINKELMANN CJ:

Into the section 9 zone, if we might say, because part of the sentence is not section 9.

MR BUTLER KC:

Correct. And what this Court made clear in *Fitzgerald* first time round was that you could have sentences which would be excessive, perhaps even manifestly excessive, but that would not, they would not be breaches of section 9. So we're talking about a relatively discrete subset, I would say, of sentences, of experiences.

WILLIAMS J:

Except for the difficulty of knowing what shocks consciences these days.

MR BUTLER KC:

Well, quite.

GLAZEBROOK J:

Well, that's why you have the properly informed, I think, standard.

MR BUTLER KC:

Correct, that's right. So back then to the – so I just thought I should note it so we don't have to come back to this case *Matara* at a later point, you'll know why, what I'm talking about – but if we go to paragraphs I think it's 33 of *Matara*, sorry, it's only confusion between myself and my friend because I have the reported version of it.

So what his Honour Justice Cooke is discussing here at this part of his judgment is a proposition that had been advanced by Mr Ellis on behalf of the plaintiff, that the plaintiff's right to be tried by an independent Court had been breached. Why was the Court said not to be independent? It was said not to be independent because effectively its hands were tied when it came to sentencing. And so when his Honour is saying here: "In my view, however, the right is infringed when judicial decision-making is removed entirely, and a mandatory sentence is prescribed that a court must impose. When that occurs it means that the sentence is not substantively determined by the court at all."

WINKELMANN CJ:

Which is not, in terms of other nations' jurisprudence, a judicial act.

MR BUTLER KC:

Quite. And then if we look at 34. In 34: "Here the three strikes regime, as initially implemented ... contained little room for judicial assessment." And then there's a description of that and then if you go down to the bottom of the paragraph: "So the judicial role was apparently limited to the circumstances described ...". And then paragraph 35: "In those circumstances I do not consider that it can be said that the sentences imposed under that regime were determined by an independent and impartial court. They were prescribed by the legislation. Other than under s 86E" – that was what was being dealt with in the *Harrison* case – "the only meaningful decision-making was that exercised by the prosecutor when deciding what charges to lay — that is the executive." And that, I say, is a recognition of the point that I make, which is the significance of the prosecutor's decision as to what to charge, whether to charge particular offending as a third strike offence or not.

So if we go back now and, sorry, I'm skipping around a bit but hopefully your Honours follow, if we could –

GLAZEBROOK J:

That's assuming there was a choice in the particular circumstances, which in some circumstances there would not be a meaningful choice.

MR BUTLER KC:

There may not have been? What, is your Honour saying there may not have been a meaningful alternative charge that could have been brought and that might itself create some other difficulties of assessment? That's not my case, I don't need –

GLAZEBROOK J:

No, no, no. I understand that.

MR BUTLER KC:

Yes, yes, yes. But I understand the point you're making, yes.

GLAZEBROOK J:

Your case is based on this, there being a meaningful alternative charge.

MR BUTLER KC:

Yes, correct. And again, I suppose just to flag that it's one of the points of difference, you might say, your Honour, between the pathway A and pathway C, if that makes sense. Because pathway A says: "I have to look to the conduct of the prosecutor here and decide, well, what can I say about the prosecutor's conduct?" In the example that your Honour has posited, maybe I couldn't have a – say that the prosecutor acted wrongly because there wasn't an alternative, that might be a squidgy question that might be asked. But if I was in pathway C, I wouldn't need to go there because I'm just looking at the combination of what the outcome was and whether or not what occurred was a breach of section 9 and 22.

Does that help? I don't know whether your Honour's on the wavelength. But while I'm under pathway A, I accept I need to be able to say something about what the prosecutor did, because it's their material contribution to the breach of section 9 that I'm focused on.

GLAZEBROOK J:

I suppose so, to an extent, although you might actually get to the stage of there being no choice under the legislation and then in your discussion as to whether nevertheless the breach of section 9 would give you damages.

MR BUTLER KC:

Correct.

GLAZEBROOK J:

But we're not anywhere near there, so.

MR BUTLER KC:

But we're not anywhere near that, that's exactly – and that's one of the reasons why, just was carved it out and said "that's an issue for another day".

GLAZEBROOK J:

You just want that – yes, exactly.

MR BUTLER KC:

You know, there's enough gnarly questions here today, without going that one.

So if we go back, Max please, to the where we were in the Supreme Court's judgment and that was 11 – in paragraph 192, thank you, exactly. And so I just mention that the government, so: "However, on 19 January, before the Committee had reported, the Government announced a revised three strikes policy to be incorporated into the Bill ..." – yes – "... A week later ..." – carry over the next page – " ... the Committee issued an interim report attaching the Bill with the proposed amendments ..." – which were very substantial – "... and invited further submissions ..."

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And as this judgment records: "The two most significant changes for present purposes were: (a) to qualify for the regime, an offender had simply to be convicted of a qualifying offence rather than to have been sentenced to a

determinate sentence of five or more years' ...". And then: "(b) the obligation to sentence a person convicted of *any* third strike offence (except murder) to life imprisonment was removed and replaced by an obligation to sentence the offender to the maximum term of imprisonment for the particular [qualifying] offence [the third strike offence]. This was to be without the possibility of parole unless the court determined that depriving the offender of the opportunity would be manifestly unjust."

So then the judgment records what happened at the various stages in terms of Committee: There was a report back by the select committee on 26 March which recommended that the Bill proceed as amended. You should have a copy, I think, of that Bill, and I just note for you, just so it's noted along the way, that on page 3 of the select committee report, there's a footnote, footnote 1, which records that: "Cabinet also agreed on 1 March 2010 that the Commissioner of Police would direct that all prosecutions involving charges that qualified for stage three of the proposed regime be referred to the Crown Solicitor for peer review. This would not require any legislative change." So that's the reference to the administrative mechanism, for the first time.

WINKELMANN CJ:

Sorry, where is that in the papers?

MR BUTLER KC:

So that's in the select committee report.

WINKELMANN CJ:

Right.

MR BUTLER KC:

Page 3, footnote 1.

O'REGAN J:

Is there anything that says why that peer review was going to take place?

MR BUTLER KC:

Nothing here, but there is in the debates, which is what I want to take your Honour, lead the Court to.

O'REGAN J:

Right, but there's, I mean, in the debates there's parliamentarians saying things but it didn't seem to turn into anything in terms of a hard instruction to anyone to act in accordance with it. I mean, it wasn't in the Solicitor-General's Guidelines, for example?

MR BUTLER KC:

No, it's reflected in the memorandum of – an amendment to the Memorandum of Understanding between the Commissioner of Police and the Solicitor-General.

O'REGAN J:

Yes, but that just says "peer review" again, doesn't it?

MR BUTLER KC:

That's right, exactly.

O'REGAN J:

Yes.

MR BUTLER KC:

So if we go back then to the judgment in this Court. Your Honours will be able to read for yourself the discussions that took place about how it proceeded through, what comments were made along the way about the new regime, the breadth of it, the risk of it capturing relatively minor offending, and what this Court said, for example, if we look at paragraph 248, so if we just go back to the previous page, Max, please. Just go to the heading, just scroll up. So: "Parliamentary purpose." So this is where your Honour Justice O'Regan and Justice Arnold were discussing the parliamentary purpose of the regime. And at –

O'REGAN J:

I think this is a Justice Glazebrook decision.

MR BUTLER KC:

Oh, sorry.

O'REGAN J:

Yes.

MR BUTLER KC:

Have I got that right? Yes, thank you, sorry, it is Justice Glazebrook, I do apologise, sorry. Quite right, I've got other references to your Honour's judgment elsewhere. I'm so sorry, quite right. Shall we just stick with it, since I'm there. Under: "Parliamentary purpose," we look at 248 and traverse the purpose: "Of course, the legislative history makes it plain that this was not in fact Parliament's purpose." – ie, it wasn't the purpose of Parliament to breach the ICCPR and what have you. "The purpose of the regime was that it would apply to the very worst repeat violent offenders and the language was broadly drawn to ensure all such offenders would be included." – in other words, you cast a wide net – "To meet the concerns about possible overreach, an administrative process was put into place to make sure that the regime was properly directed."

At 202, so now I am back to your Honour and Justice Arnold's judgment, half way down, it said: "There was an awareness that the regime might result in disproportionate sentences at stage three but that was considered appropriate, at least to some extent. To meet concerns about potential 'overreach', an administrative process – the review of third strike charges by the local Crown Solicitor – was put in place in an effort to ensure that the regime was applied only to those against whom it was directed."

And at paragraph 22 – have I got the right reference? No, that was my mistake, sorry, 22 is meant to be 202, yes. I beg your –

WINKELMANN CJ:

We've done that, we've done that. We've done 202.

MR BUTLER KC:

We've done 202, exactly, that's right. But your Honour the Chief Justice did note similarly the purpose of it and I'll come to that shortly.

WINKELMANN CJ:

Yes, that's all right.

MR BUTLER KC:

So I just had wanted to make the point about overreach.

WINKELMANN CJ:

I think we've got, yes, we've got the point.

MR BUTLER KC:

Got the point, good. So your Honours will recall that there was a committee, at the committee stage of the Bill, a proposal from the Labour Party that a judicial safety valve mechanism should be introduced, so something that would look like a manifestly excessive exception, but that was rejected at the committee of the whole stage. But importantly, we say, the Minister had earlier assured Parliament about non-judicial administrative mechanisms that would be run through the Crown prosecutors and I just have – what I've done in the box here, that's at the bottom of the page, your Honours, I've just taken relevant parts from there, from the Parliamentary debates and I've given you cross-references in the box on the right.

So this mechanism: "... would 'provide[] an assurance that the appropriate charges will be laid in [stage-3] cases'. This was recognition that, with the changes made at Select Committee, 'what charges were laid, and the charging process itself, would be critical to the operational elements of the new legislation'. During the debate Melissa Lee" – the National Party MP on the Select Committee – "said: 'The Bill will not capture low-level offending ... The

Commissioner of Police [or his delegate]" – you can go back, you can go and read the – I've just done a little bit of editorialising just to fit it in the box – "The Commissioner of Police [or his delegate] will make the decision to implement or trigger the 'three strikes'. So the Commissioner will act as a gatekeeper.' [And then] The Minister at the Committee stage noted that the review process by the [the Crown Prosecutor] was designed to ensure 'there is not an overcharge'."

WILLIAMS J:
Where are you at in the Hansard?

MR BUTLER KC:
I'm in my road map.

WILLIAMS J:
Yes.

MR BUTLER KC:
At the bottom box, I'm sorry, Sir.

WILLIAMS J:
I see, yes, thank you.

MR BUTLER KC:
And I've given you the references in the parliamentary debates. If you want me to take you there I'm very happy to go there.

WILLIAMS J:
No.

MR BUTLER KC:
But what I tried to do is just gather them all together in the box.

WINKELMANN CJ:

The Labour Party recommendation that there be the safety valve, was that, so that was made at select committee or?

MR BUTLER KC:

Yes, because recall, that's why I spent a bit of time about the shift, the change in the policy. Because previously, because it would be, you know, very high, to qualify you had to have a five year determinate sentence, then that was the way of identifying the really worst serious repeat offenders.

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Once you get out of sentence, terms of imprisonment served and you're looking just at qualifying offences, you widen the net very considerably, but create this risk of capturing too many people. So what was the solution? The solution was not a judicial safety valve. The solution was the prosecutor safety valve.

So how did the Court, this Court describe this mechanism first time round? That is what I set out on page 2 of road map and in each of the boxes I've got, I've extracted from a relevant judgment. So if we look under heading: "Purpose of that mechanism described by SCNZ thus," the first box is what your Honour the Chief Justice said about it. It was said: "The clear expectation was that if," and again I've done a little bit of editorialising to fit it in the box, is that: "[offenders like DF] were incidentally caught by the regime, prosecutorial discretion would be exercised so as to avoid gross injustice that the application of the regime would cause. [I]f the administrative safeguard involving the vetting by [Crown prosecutors] of charges laid does what it was intended to do, there should be very few such cases." And what you were referring to is breaches of section 9 and I have given you the references.

What your Honour Justice O'Regan together with Justice Arnold said was, you made reference to: "The sifting mechanism established by the Minister," and you make reference to that in a number of places, the purpose of which was: "To ensure that the regime was applied only to those against whom it was directed." I think I've read that to you before and then you said: "There was

every reason to expect that the administrative process involving the Crown prosecutor would mean that people like Mr Fitzgerald would not fall within the regime."

Justice Glazebrook, I've already read that, so I hope you forgive me for not reading out the first sentence, but what you did say in the footnote to paragraph 248 note 355, you said: "That process seems to have failed in this case."

Then his Honour Justice William Young said that: "Administrative arrangements were put in place as a way of addressing concerns about inappropriately harsh outcomes." That's at paragraph 326.

I simply note that my friend Ms Laracy advised the Court, this is recorded at note 282 and I've given you I hope the correct transcript reference if you needed it.

WINKELMANN CJ:
The reference says a judgment reference 248?

MR BUTLER KC:
So 204 and then it's note –

WINKELMANN CJ:
204, so it's recorded in 204 in the judgment?

MR BUTLER KC:
Yes, that's right. The Crown prosecutor review would include public interests: "Which would include Bill of Rights considerations."

This way of dealing with the issue of the widely cast net this Court remarked upon raised obvious rule of law concerns and I've given you the references to those, but that was the solution that was devised to deal with the problem, or the phenomenon. Plainly, the adoption of such a mechanism had risk.

It needed clear communication as to how it would operate, your point I think to me, Sir.

It could expose someone to a section 9 breach if it's not operated well. It certainly puts a lot of power, what I probably should say is I don't mean to say they are power hungry, what I simply mean is responsibility or obligation in the hands of Crown prosecutors. Not the sort of power they normally get in this type of scenario. This type of scenario is unusual.

And then I've just repeated the extract from *Matara* that I've taken you to already and then I make the point in the next box that even though judicial hands were tied, at no stage were the Crown prosecutor's hands tied. There was no duty to charge a particular offence.

What was interesting in the Court below in this proceeding, what the Court of Appeal did was it made reference to what this Court said in *Osborne v WorkSafe New Zealand* [2017] NZSC 175, [2018] 1 NZLR 447 paragraph 73. So that's on the bundle of authorities at tab 35, 73. Do you see line 29? It begins: "And." "And the prosecution decisions of a public prosecutor must be consistent with the purpose and policies of the legislation which establishes the offence and under which the prosecutor acts."

The simple point I'm trying to advance is I've taken you through what was said, what the risks in the regime were, who was the actor that was expected to play the safety valve role. The judge is not, that was the understanding. The Crown prosecutor was to play that. So when considering, when undertaking prosecution decisions, those decisions had to be consistent with the purpose and policies of this legislation. Not generically, of this legislation with its unique features which establishes the offence and under which the prosecutor acts and again, if I'm going back to what my essential criticism is of the Court below in this proceeding, it is, in my submission, that it approached this question on a generic basis. But this, if right, it would mean that in every case the Crown prosecutor somehow was responsible for the outcome of a sentencing process. That's not the proposition that's been advanced by, on behalf of Mr Fitzgerald.

The proposition that's being advanced is that in the context of this scheme – the nature of this scheme was to cast its web, its net widely to not create a safety valve with an expectation that there would be an administrative safety valve that would do that work.

Now, there are examples of where the system, I submit, did work. So, for example, a case that was referred to by her Honour Justice Ellis in her judgment and that's in the bundle at tab 41. It's a case called *R v Rowe* [2018] NZHC 1087. It has quite striking resemblances with the facts of Mr Fitzgerald's case. So it's a decision of his Honour Justice Jagose and if you look at the introduction, paragraph 1: "Mr Rowe, on 5 March this year, you pleaded guilty to three charges, respectively for assault, doing an indecent act with intent to offend, and assault with intent to obstruct a constable in the execution of his duty, all during September 2017. I am now going to sentence you on those charges. [2] You initially faced a charge of indecent assault arising out of that offending. This would have been a third strike offence, had you been found guilty at trial. But the Crown filed an amended charge on 1 March 2018, substituting the alternative (non-strike) charge of doing an indecent act with intent to offend. You pleaded guilty four days later."

And then your Honours can read through the background, the background facts and the nature of the offending. It involved a young woman. I'm looking here at paragraph 6, Ms A.

If we go to the rest of the background here. She approached you. Sorry: "You approached her. Noticing your bare and dirty feet, she responded compassionately, offering to buy you shoes from the Salvation Army Store." While you were walking there you were making intimate comments et cetera, et cetera, and she gave you cash. The events that follow give rise to the assault charge, so I won't take you through the assault charge. You can read the rest of that.

The second charge is at paragraph 11. This is the charge of an indecent act with intent to offend: "It relates to an incident a fortnight later … Again, around

midday, Ms A was walking on Anglesea Street when you intercepted her, repeatedly making inappropriate comments about her appearance … After she told you she had a meeting to go to, you took hold of her without warning, placing your hands on her back and pulling her pelvis against you. This time, she became aware you had an erection which you were pushing into her. She tried to pull away, but you held her tight by her upper body. Eventually, she pushed herself out, crossed the road, and phoned the police." And you can read on.

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WINKELMANN CJ:

Yes.

MR BUTLER KC:

And if you were thinking about the nature of the conduct and comparing Mr Rowe's conduct and that of Mr Fitzgerald, I feel comfortable making a submission that in terms of indecency, the indecent assault, the experience described here is next level up. Again, I don't appear as a criminal practitioner very often, so I might be being very naive here, but what happens here is that instead of proceeding with the charge of indecent assault, doing an indecent act with intent to offend is substituted so as to avoid the third strike, the application of the third strike. If you look at 41, Mr Rowe had a pattern of behaviour like this.

WINKELMANN CJ:

Is this very, I mean, we get the picture, is it important to go through all the detail?

MR BUTLER KC:

Yes, I'm just trying to create – so, paragraph 41 and paragraph 47 –

WINKELMANN CJ:

I'm just concerned, conscious we have constrained time, so.

MR BUTLER KC:

Yes, of time, yes, so paragraphs 41 and 47 are the Judge's comments on the Crown decision to proceed with the non-strike charge.

WINKELMANN CJ:

Right, so paragraphs 41 and 47, did you say?

MR BUTLER KC:

Yes. See what he says at 47: "I consider the lesser charge (of doing an indecent act with intent to offend) more appropriate than the original charge of indecent assault, especially in a third-strike scenario."

WINKELMANN CJ:

But if they hadn't done that, he would have had no say?

MR BUTLER KC:

Correct.

WINKELMANN CJ:

On the law as it stood at the time.

MR BUTLER KC:

On the law as it, on the received understanding of the law at the time.

WINKELMANN CJ:

Received understanding of the law at the time.

MR BUTLER KC:

And then the last thing I wanted to say in terms of this road map was what I've got under the heading of "BORA obligation": "- Drawing on *Chisnall* ...". But I think I've made the point in response to the question I had from your Honour Justice O'Regan, namely that what you're looking at: "... the obligation on the state is to avoid BORA inconsistent conduct (here s 9). On the received understanding", of the law as it was at the time, "only CP could achieve that."

And the important point from our perspective is: "[There was nothing in the third strike regime that prevented] her from doing so."

So if I put that then to one side, that brings me then to the liability pathways A, B and C and I've given, I've flagged what the submissions are here, so let's just – shall we just go to the columns and see if there's additional points that pop out that your Honours want to test me on? As I said, what I've done here is I've tried to provide some more detail and cross-references to the propositions I'm advancing.

So we look down: "DF says CP caused/materially contributed to the breach of ss 9 and 22 because: (a) CP prosecuted IA as a third strike offence: (i) Knowing it was a third strike offence; (ii) Foreseeing that the only sentence the HC could impose upon conviction was maximum 7 years ...; (iii) Without any regard to whether the likely sentence would breach s 9 ...". In fact, the evidence goes further than that, it says she didn't have regard to the penalty, that was a job for the Court.

That was all at a time when: "(b) The received understanding ... was that upon conviction the Judge(s) would have 'no option' but to impose the maximum sentence." And I've given you the references.

"(c): While *judicial* hands had been ... tied by Parliament" – or had been thought to be, the Crown Prosecutor's hands had not been. "CP still had a free hand in determining how to go about charging particular incidents: ...". And here I make reference to the Prosecution Guidelines: "(i) [Those guidelines] were unaffected by the 2010 legislation; what did change was the MOU between the SG and Police Commissioner included an agreement to consult and liaise on particular matters ..."

WINKELMANN CJ:

Are you going to take us to that?

MR BUTLER KC:

Yes. That's at 301.0012. So you can see the schedule here B: "Agreement to consult and liaise on particular matters," item 2: "The Police, at Police cost, will refer all prosecutions involving a stage-3 offence as defined … to the Crown Solicitor for peer review either pre-charge or by the second appearance."

So over the page, Parliament had been assured that CP, the Crown prosecutor, would act as a form of administrative safety valve to ensure offending like Mr Fitzgerald's was not dealt with as a third-strike offence.

Importantly, neither the guidelines, the Prosecution Guidelines, nor the common law required the Crown prosecutor to prosecute this offending or to charge it as indecent assault. There is discretion, and I have given you the references to the then version of the Prosecution Guidelines and I refer here to *Rowe* as showing how it might work.

The Crown prosecutor retained her discretion to charge an offence that reflected Mr Fitzgerald's criminality. That includes actual seriousness of offending, the mental health issues. The consideration of the anticipated penalty is part of the public interest test.

As indicated, there are now updated Prosecution Guidelines. They came into force on 1 January 2025. Obviously they weren't the guidelines that were in force at the time, so I'm not relying on them to say well, the prosecutor ought to have followed these, simply to illustrate how the Solicitor-General sees prosecutions being undertaken and what considerations are relevant and I think they have been handed up to your Honours. I'm just waiting for my version to come.

WINKELMANN CJ:

I don't know we – do we have them?

MR BUTLER KC:

Oh, I'm sorry, I thought they had been handed up.

WINKELMANN CJ:

Thank you.

MR BUTLER KC:

So you've got, and these are just extracts. I'm sure a full copy can be provided if that would be helpful to the Court. So you will see just generally unsurprising "8.1. Prosecutors should always act in a manner that is fundamentally fair and objective, in accordance with their role as officers of the court to uphold the rule of law."

"8.5. It has never been the case that all offences must be prosecuted. While prosecution will ordinarily be the only appropriate response to criminal offending of at least moderate seriousness, it should be used only where it is a proportionate response to the circumstances of the case."

"8.6. Doing justice to all according to law is key; and law takes account of the specifics of the case at hand."

Over the page, clause 32: "Prosecutors conducting public prosecutions are subject to the New Zealand Bill of Rights Act 1990 (NZBORA). This reflects the prosecutor's role in prosecuting offences on behalf of," interestingly, not the Crown, "on behalf of the state. Prosecutors should make decisions consistently with their particular obligations under the NZBORA."

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If we go to paragraph 47, the heading conveys the point I'm wanting to draw from it which is: "The continuing obligation to review the prosecution decision," so there's not just a one-off, but there's an obligation to obviously review and to make sure in particular that the decision to prosecute remains appropriate to continue with.

And then if we turn to the heading on the last page "The choice of charges": "50. In most cases, the evidence will support charges for more than one offence. The prosecutor will need to decide which charge ... is most appropriate

in the circumstances. That should generally be done prior to consideration of the Test for Prosecution, because ...".

"51. However, prosecutors may determine that a different charge (whether more or less serious than first thought) should be preferred, once the factors in the Public Interest Test have been considered."

"52. Prosecutors do not have to select, or continue with, the most serious charge available on the evidence ... Prosecutors should proceed with charges that: 52.1 accurately and adequately reflect the seriousness and extent of the offending; and 52.2 provide the Court with an appropriate basis for sentencing in light of the facts."

WINKELMANN CJ:
So why are you drawing our attention to these new prosecutorial guidelines?

MR BUTLER KC:
Simply because they articulate in a different way the essence of the obligation that we say Crown prosecutors have generally and which, if exercised in accordance with what's written there, would have led, in our submission, to an outcome whereby Mr Fitzgerald would not have been charged with indecent assault in light of the consequences that sentencing would have for him.

WINKELMANN CJ:
So you're saying these aren't actually new, in the sense that they're creating new obligations?

MR BUTLER KC:
That's correct, that's what I'm saying. It just simply – they're just expressing it in another way, because it was – the reason for putting this out is that in the Court below there was quite a, if I may say, technical approach to the application of the Solicitor-General Guidelines, almost as if they were a statute, not with the overall spirit of the Prosecution Guidelines. I say there's nothing new here, but they express the approach that one would have expected any

prosecutor to approach a case like Mr Fitzgerald's cognizant of, and it should be said that the old guidelines, the 2013 guidelines, they were quite clear that they weren't intending to be exhaustive in their approach or anything of the sort.

So your Honours, I'll just continue down. I say, I've read to you before what I've got at (d): "CP role was to avoid exposing DF to a breach of s 9 ... her evidence shows ...". I say that she didn't approach his case any differently from any other case.

It's "(e) No defence to DF's BORA claim to say [that the] safety valve role was a poor substitute for clearer legislative direction; or was not adequately spelt out in the MOU ... ." If that's the case: "It was the mechanism that was put in place to prevent injustice; DF could expect it to have worked." And in that regard, I mention to you and just remind you of why I took you through some of the interactions between his defence counsel and the Crown prosecutor, in terms of trying to find alternative ways of charging this conduct in such a way that he would be held to account for it but not sentenced to a maximum of seven years' imprisonment.

So that's how I approach pathway A. If we go to pathway B, the focus on the judiciary. I work here on the basis that it's been accepted by the Crown that section 9 was breached by the sentencing Judge and not corrected by the Court of Appeal and the Crown relies on *Chapman* as the stop. The reason that this Court can't do anything in terms of compensation is because of *Chapman*.

I don't think I need to repeat, do I, the submissions I made in *Putua* about why *Chapman* is wrong, or does the Court want me to go through those submissions? I'm really in the Court's hands in that regard. Are there issues that might arise for...

WINKELMANN CJ:

I don't think so.

MR BUTLER KC:

Well perhaps that might, can I pitch it this way, perhaps –

WINKELMANN CJ:

Well, can I just ask one question? There was a breach of section 9 which did not entail a breach of section 22 arbitrary detention. In which of your worlds, if world A was engaged, then would you include within the – you've got an arbitrary detention world, haven't you?

MR BUTLER KC:

I would.

WINKELMANN CJ:

You would include in the arbitrary detention world section 9 as well?

MR BUTLER KC:

Yes, I would, because I would say that detention pursuant to a sentence, a punishment, that meets the standard of shocking the conscience of New Zealanders is something which, even if it had a lawful basis for it, must, or thought to have a lawful basis for it, is something which can be described very easily as an arbitrary detention.

WINKELMANN CJ:

Yes, what say in some horrific future world a judge ordered a sentence which didn't amount to detention but amounted to a torture?

MR BUTLER KC:

I see what your Honour is saying. So yes, I would, I would add to my world –

WINKELMANN CJ:

World?

MR BUTLER KC:

To my world B.

WINKELMANN CJ:

World B.

MR BUTLER KC:

I would add section 9 to world B. I constructed world B on the basis that I was relying effectively there on Article 9(5) of the, of the Covenant as the justification for there being at least world B, a movement towards world B.

But it seems to me, just drawing on what your Honour has said, the case for saying well *Chapman* can't be a roadblock to a compensation claim in respect of a breach of section 9 must be as strong, albeit not, not grounded in Article 9(5) on your Honour's hypothesis because there is no detention as such, but on the basis of what it means to breach section 9 of the Bill of Rights because it is something that shocks the conscience of New Zealanders. So that would be an example where, in terms of world B, I would be relying very much on Article 2(3) of the ICCPR being the remedies' provision obligation to create remedies and it may be that my friends in the Commission would have something to say about the nature of the norms that are reflected in section 9 and the extent to which those two would, would be as powerful as Article 9(5) apart entirely from the general obligation, remedial obligation in Article 2(3) of the ICCPR.

So if I continue on then, I've gone through (a), (b) and I think (c) where the Crown says, well: The judicial act of sentencing was the effective cause of the grossly disproportionate sentence," and then it goes next level up and says: "It is Parliament … and the judiciary … who bear principal responsibility for what happened to Mr Fitzgerald."

Again, I say that when you actually trace through your pathway A, that proposition is a matter of fact and the scheme is not right. But even if they are right in saying: "The judiciary bear principal responsibility for what happened to Mr Fitzgerald," if I succeed in persuading the Court to overturn *Chapman*, then frankly, I don't care about the characterisation of who is responsible.

GLAZEBROOK J:

Sorry, I think I missed that last point.

MR BUTLER KC:

Oh, sorry. So the point I'm making is in this pathway B, I've succeeded in persuading the Court to overturn *Chapman* and at least get into a modified world B, in which case I can take what the Crown has said here that the judge, the judiciary bears a responsibility, or the judicial act of sentencing was the effective cause and that found liability, found state liability for the breach of section 9.

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WINKELMANN CJ:

So that's, your principal submission is that it is, in fact, prosecutorial, the responsibility for the breach is with the prosecutor?

MR BUTLER KC:

Yes, that's right.

WINKELMANN CJ:

And leaving to one side –

MR BUTLER KC:

And that's how I had to argue it below, because of *Chapman*.

WILLIAMS J:

But you'd rather not?

MR BUTLER KC:

I'd rather – frankly, I'd rather be in the third column, the stage we're saying look, let's not play games here and finger pointing. It's just – because we end up having the, can I be frank, the nonsense sort of scenarios where, remember the discussion that was had in *Putua*, oh well, is it the telephone, is it the availability

of a telephone, or the adequacy of legal aid, or something? So you're having arguments about things that don't cut to the chase.

WILLIAMS J:
Well, they might.

MR BUTLER KC:
They might in a particular case, but if that's how you have to, as a matter of starting position, how you have to argue things, you can't actually face up to the elephant in the room because *Chapman* gets in the way, then what you end up doing is scrabbling around trying to find somebody else to blame. You know, could it be said here that maybe I should have sued Crown Law, because the nature of the memorandum of understanding was inadequate? That's who should have been sued, that's who should be responsible. I mean, where does that end?

WINKELMANN CJ:
So your point is, though, your point is that if you're in the last column.

MR BUTLER KC:
Yes.

WINKELMANN CJ:
You don't have those issues inter se –

MR BUTLER KC:
Correct.

WINKELMANN CJ:
– between the different state actors.

MR BUTLER KC:
Yes.

WINKELMANN CJ:

But you still need to be satisfied, you don't try and –

MR BUTLER KC:

Still has to be state action.

WINKELMANN CJ:

Yes, yes.

MR BUTLER KC:

Yes, I accept that.

GLAZEBROOK J:

And there has to be a breach, as you keep saying.

MR BUTLER KC:

And there has to be a breach, correct.

WILLIAMS J:

And that puts, doesn't that – I can see the attraction in principle of not having to pass the player involved for the reasons that you've suggested. On the other hand, that puts your big toe through the door of damages for legislative action.

MR BUTLER KC:

And, as I said, not necessarily because there are – and again, I'm not wanting to argue against myself in the next case, but –

WILLIAMS J:

No, but I mean, if you don't have – if you don't care which one of three branches is involved as a matter of principle, then logically if the legislature is your prime or even only player, damages are still available?

MR BUTLER KC:

An argument might be available for damages in that regard, but what you would be definitely looking at is seeing the extent to which that runs into the roadblock

of section 4 of the Bill of Rights, because section 4 I think would potentially play a role in that regard.

WINKELMANN CJ:

Your point is simply it's not an inevitable corollary of this approach.

MR BUTLER KC:

Correct, it's not and that's what I'm trying to convey, it's not an inevitable corollary, thank you, your Honour.

GLAZEBROOK J:

And there may be other broader constitutional principles that come into play, in any event. Even leaving aside section 4.

MR BUTLER KC:

Correct. Because your Honours will recall that when I was in *Putua's* case, I – or I hope I was clear in conveying the idea that some of, that I wasn't saying that public policy considerations could never have a role when deciding whether in any particular case compensation should be awarded for a breach of the Bill of Rights, I was, I hope I was, clear that I said those considerations could potentially be taken into account in the right case and so that, so I don't have to do a black and white approach. And it could be –

GLAZEBROOK J:

Not a jurisdictional bar.

MR BUTLER KC:

Because it's a jurisdiction, exactly right. As I kept emphasising in *Putua's* case, you know, *Chapman* says jurisdiction, there is no jurisdiction for a court to hear a claim. That's not to say that once you accept there's jurisdiction, that there may not be good reasons, in a particular setting, or in respect of a particular right, or in whatever the context may be, for public policy considerations to operate as a bar to recovery on the facts of the case.

WILLIAMS J:

So are there UK decisions that, for example, take the word “ineffective” in 4(a) and say that to award damages in that case, in the particular case, would render the legislation, in practical terms, ineffective?

MR BUTLER KC:

I’m not aware of any cases like that. So cases of the sort that we’re talking about are cases under the UK system which would have to go to Strasbourg.

WILLIAMS J:

Yes, right.

MR BUTLER KC:

So in other words, they don’t have a clause like in the Irish legislation which says “let's just keep that in house, let's keep that domestic and you can seek your damages claim against the Oireachtas”, well, effectively against the state, it's not against an individual state act, or against the state, “for what the Oireachtas (the Parliament in other words) has done to you through the legislation”. There’s no similar provision in the UK Human Rights Act 1998 allowing for that, so my understanding is the practice is, is where you claim your Convention rights have been interfered with –

WILLIAMS J:

You go to Strasbourg.

MR BUTLER KC:

You go to Strasbourg. The best you can get in respect of legislation is a declaration of inconsistency. In fact, I’m sure it says the only remedy that is available for a breach of the UK Human Rights – sorry a breach of the Convention, is a declaration of inconsistency, and that would mirror the similar provision that is present in New Zealand. So under the Human Rights Act 1993 – sorry, but this may be helpful in terms of you seeing the overall nature of the argument that would be had, I'll find it after the break, but there’s an express provision. So under Part 1A you can make a claim of discrimination

against any actor identified in section 3 of the New Zealand Bill of Rights Act 1990. But then when you go to the remedy, so that concludes Parliament, legislation, but when you go to the remedies that are available to the Tribunal it's expressly provided that the only remedy available in the case of an enactment that is in breach of the non-discrimination right is a declaration of inconsistency.

WILLIAMS J:

When was that introduced?

MR BUTLER KC:

That was introduced in 2001. So again arguing against myself, but trying to be fair so the Court has a feel for the argument, that would be, I imagine if I was in the hot seat on the Crown side, I would be saying well there's an indication from Parliament as to where it sees the road – sees what you can do in respect of legislation, and when we're operating in the Bill of Rights space, maybe we should operate that in the same way.

WINKELMANN CJ:

There was a Canadian case we discussed in *Putua*, wasn't there, about the state.

WILLIAMS J:

Power.

MR BUTLER KC:

Canada (Attorney General) v Power 2024 SCC 26, so I was going to come to that. So then on the other side –

WILLIAMS J:

Somewhat different.

MR BUTLER KC:

On the other side you've got a different approach where *Power* says, well we're not going to foreclose the possibility of damages arising out of Charter inconsistent legislation, but they set up some pretty significant steps that would have to be gone through before you would be able to successfully make a damages claim against legislation, arising out of legislation sorry.

GLAZEBROOK J:

And in any event the Bill of Rights is constitutional there.

MR BUTLER KC:

Yes, correct, so it's part of the supreme law of that Canadian constitution, exactly. It's a schedule to the Constitution Act 1986, yes. So in the UK the relevant provision that I was thinking of is section 4(6) and I can have this provided to you, which says that a declaration of inconsistency, or incompatibility sorry they call it, "does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given". So that is, so it doesn't expressly say there that the –

WILLIAMS J:

It's pretty close.

MR BUTLER KC:

Exactly, and that's why my understanding is the practice in the UK is if you're unhappy with legislative breaches and you want damages, you've got to go to Strasbourg, and even in Strasbourg you're not guaranteed to get compensation, you need to show that it's required for just satisfaction, and I'll get you that provision from the Human Rights Act 1993 after the lunch adjournment if that would be helpful, just to set the scene.

WINKELMANN CJ:

It would be helpful thank you. So two minutes to go. So how are we going with your submissions? I mean do we come to the end of your submissions at the end of your third pathway or is there going to be…

MR BUTLER KC:

Largely. I'll be told by my juniors what more needs to be covered. What I was going to indicate was, because we had the little exchange, so to speak, at the beginning of the day, and I got a bit discombobulated if I may say, I forgot to say to you how it was that we were going to split up the argument, and so I've identified one or two issues that depending on what arose from the Bench, that I would pass to my friend sitting to my left, and we'll have a discussion over the lunch break as to whether we need to even go there. So depending on the outcome of that we would probably only need another, I would have thought an hour, something of that sort. No more than that.

WINKELMANN CJ:

We'll still come back early from lunch.

MR BUTLER KC:

Yes, I think that would be wise, just in case.

WINKELMANN CJ:

We may not be so punitive about our own – we may let ourselves off earlier than 5 o'clock if you're making great progress, so it won't be a licence to the Human Rights Commission to take up all available time.

MR BUTLER KC:

I'm sure Mr Kirkness will be most disappointed to hear that. Thank you, your Honours. Shall we take the break now?

WINKELMANN CJ:

We'll take the adjournment now.

COURT ADJOURNS: 12.59 PM

COURT RESUMES: 2.01 PM

MR BUTLER KC:

Thank you, your Honours.

WINKELMANN CJ:

Just dealing with practicalities, Mr Butler KC, I have said to the team upstairs that we will be telling it at 3.15 as to whether we need a cup of tea at 3.30.

MR BUTLER KC:

Indeed, quite, thank you.

WINKELMANN CJ:

So we will regroup and I will forget because I'm a hopeless timekeeper.

MR BUTLER KC:

Great, so 3.15 I should note down.

WINKELMANN CJ:

Yes.

MR BUTLER KC:

That's good. I think the good news from our side is that I have had a discussion with my team as to how we can deal with matters and how we have been faring and I would like to think we shouldn't be on our feet for much longer than 30, 40 minutes, if that's helpful to you.

So I have to do, as one often does over the lunchbreak, provide some clarifications, so let me get on with those now. So the first clarification was in relation to the Human Rights Act, the New Zealand Human Rights Act 1993 and remedies for enactments and breach of section 19 of the Bill of Rights. So I've handed up to your Honours, hopefully that's been distributed, an extract from the Human Rights Act 1993.

So if we look at page 77 of the statute book, small number down the bottom of the page, you will see a heading: "Remedies, section 92I: "Remedies. This section is subject to sections 92J and 92K (which relate to the only remedy that may be granted by the Tribunal," that's a reference to the Human Rights Review Tribunal, "if it finds that an enactment is in breach of Part 1A."

And Part 1A is the provision that I said to you before the break gives effect to section 19 of the Bill of Rights and applies to any person caught by section 3 of the Bill of Rights, which includes the legislature.

Now, among the remedies that are available under 92(3) are, if you look down at (c), damages. Then if you turn over the page to 92J you will see what is the remedy for enactments that are in breach of Part 1A: "If in proceedings before the Human Rights Review Tribunal, the Tribunal finds that an enactment is in breach of Part 1A, the only remedy that the Tribunal may grant is the declaration referred to in subsection (2)." So that's the only remedy that can be granted. So pretty clear, at least in that jurisdiction about what the remedy is for an enactment that is in breach of Part 1A.

WILLIAMS J:
Has the Tribunal had to deal with mixed causes?

MR BUTLER KC:
Not that I'm aware of. I'm just trying to rely on the old memory which I'm about to concede in one minute is not as good as I had hoped it would be. That's one of the clarifications to come. I can't think of a case. I know that sometimes you might seek in your statement of claim a declaration and damages and in the alternative, a declaration of inconsistency if in fact it turns out the Tribunal interprets legislation in a way that cannot be interpreted other than to breach the Bill of Rights, section 19 of the Bill of Rights. But I'm not, yes, I can't take it any further than that, I'm sorry, Sir.

You will note that section 92J(4) does say pregnantly however, and this is me preserving my argument for another day obviously: "Nothing in this section affects the New Zealand Bill of Rights Act 1990." But it's for that reason. It's those sections, Sir, that I was getting at to say it wouldn't be necessarily an easy argument to be made, but if you can prove some harm has resulted from legislation that is in breach of the Bill of Rights, that you just breezily walk in and get damages therefore.

So I then, I've already referred you to the UK system. I've handed up an extract from the Irish statute book. I've made reference to the European Convention and Human Rights Act 2003. I misremembered unfortunately the relevant provision I had in mind. I was confusing it with the provisions I talked about last time I was in here in *Putua's* case about getting damages against the judiciary. So the system in Ireland, if you look at – oh, the wrong provision has been photocopied, all right.

WINKELMANN CJ:

All right, you can just tell us what provision it is.

MR BUTLER KC:

Yes. So section 5 of the Irish system says that you can challenge legislation for breach of the European Convention. For that you can obtain a declaration of incompatibility. So they use the UK language. What then is provided for is that the Prime Minister Taoiseach must lay a copy of that declaration of incompatibility before the Houses of the Oireachtas, so before Parliament.

The next section goes on to say that where a person has established a breach by legislation and the government, and makes an application for compensation to the government, the government may refer the question of whether compensation for harm suffered as a result of that breach should be paid on an ex gratia basis and if the government does agree with that, then the question of compensation gets sent to an assessor who will assess what damages should be made and then it is for the government to consider whether or not it will make a payout of compensation in light of what the assessor has found. So it's an ex gratia system, not a, not an as of right compensation system and I erred in suggesting, not suggesting saying it was and luckily I don't have to clarify anything I said about the UK Human Rights Act.

What I said to you about that section 4(6) is the, it's the provision you go to and as your Honour Justice Williams put it to me, it is pretty close to saying that you are not going to get compensation where something has been done to you in pursuance of a legislation that is incompatible with the European Convention

but still cannot be interpreted in a manner consistent with the European Convention.

WILLIAMS J:

Does the ex gratia payment system operate effectively as a non-judicial as of right system?

MR BUTLER KC:

That I can't tell you because there have been so few cases brought in Ireland under the European Convention Act. I can definitely feel comfortable putting that proposition up because normally you would go under the constitution because the constitution allows you to set aside legislation that is inconsistent with the protected rights and most rights that are protected by the European Convention are also protected by the constitution. So you would almost always as a matter of litigation tactics rely on the constitution because then you strike down the legislation. So that's an explanation for why there are very few cases under the European Convention of Human Rights Act in Ireland and I am not aware of, but I can certainly find out, whether there have been any ex gratia payments made in respect of legislation under this, under this system. I probably should do that.

1410

So your Honours, you will recall, I was on the pathways. What I had done in discussion with my colleagues over lunch is I'm going to ask shortly Mr Harris to deal with the third column, pathway C, with reference to *Baigent* and the concept of the state. I'm going to ask him to deal with that, that gives him his few minutes before the Court, and then I'm going to ask my friend Mr Tierney to make submissions briefly to you on the question of causation and –

WINKELMANN CJ:

So Mr Harris is addressing the concept of state?

MR BUTLER KC:

Yes, the concept of state and the nature of what *Baigent* has got to say about the form of liability.

WINKELMANN CJ:

And Mr Tierney?

MR BUTLER KC:

Mr Tierney is going to talk to you briefly about causation.

WINKELMANN CJ:

Right.

MR BUTLER KC:

And all I'll presage in terms of causation, at this point, is that there is much material in the submissions filed by the Crown on the question of causation. Almost all of that material, as I read it, is material that would go to downstream issues, your connection between your what harm was actually done to him, how long actually was he arbitrarily detained for, those sorts of linkages.

What the Court of Appeal purported to do, it would seem, on causation, but Mr Tierney will address this in a little bit more detail, is undertake something that looked like a causation analysis but actually wasn't, it was a this is a separation of powers and we can't comprehend the idea that somehow the Crown prosecutor should be made responsible for the imposition of a sentence, because the imposition of a sentence is a judicial act, and you'll recall – so that was in the majority, sorry, the main, the lead judgment, and then in his separate judgment Justice Miller said, well, plainly the Crown prosecutor's actions were a causing fact of the section 9 breach, but where he advanced some paragraphs suggesting it wasn't a cause in law of the breach, and so it's those aspects that Mr Tierney will touch on.

But I just wanted to presage by saying, you know, causation is a huge field. The only part of causation that we're interested in, and we say that's before you, is that narrower issue, and then when –

WINKELMANN CJ:

The narrower issue in terms of Justice Miller's judgment.

MR BUTLER KC:

And what the lead judgment –

WINKELMANN CJ:

Yes, okay, right the Court of Appeal.

MR BUTLER KC:

Yes, in the Court of Appeal, seems to frame up an issue of causation, but it's best left to Mr Tierney to talk to.

WINKELMANN CJ:

Okay, yes, we don't need you presenting his submissions.

MR BUTLER KC:

Exactly, that's why I'm trying desperately to get away from here. One last point we want to make about separation of powers, that I wish to make, relates to the submission you will hear from the Crown about how section 3 reflects separation of powers, that's section 3 of the Bill of Rights. We have a contrary view to that.

We say that section 3, in fact, is not about setting out separation of powers; rather, what it's about is making sure that there is an aggregation of acts or conduct and making clear "to what does the Bill of Rights apply?" It applies to acts done: "... by the legislative, executive and judicial branches of the government of New Zealand ..." that's (a), and then (b): "... any person or body ..." and ra-de-ra-de-ra, I just can't remember the formulation now.

So what that clause is, what that section is, rather, it's an application section, it's making clear to what does this legislation apply and it was needed, of course, because without a provision like that the general rule that legislation doesn't apply or impose obligations on the Crown would have applied and it wouldn't be able to speak to the primary addressee of the Bill of Rights.

So there's nothing in section 3 that we say is inconsistent with the broad concept of state liability. There's nothing in section 3 that says you have to finger point and identify a particular entity or individual within "the state" before you can conclude that liability should be imposed upon them. That seems to me to be the argument that's being made by my friends. Then if I could reserve the ability, your Honours, after you've heard from my friend Mr Harris and Mr Tierney, to do any washup that might arise out of questions, otherwise you won't need to hear from me again until reply.

WINKELMANN CJ:
Thank you, Mr Butler.

MR HARRIS:
E ngā Kaiwhakawā, tēnā koutou. I'm just going to move through the table as Mr Butler foreshadowed from the right-hand side, that table "Liability Pathways" starting: "DF says (drawing on HRC argument)." I was planning just to make one primary submission about –

WINKELMANN CJ:
Sorry, where are you? So you're in the right-hand column, second block down.

MR HARRIS:
I'm in the "State" column.

WINKELMANN CJ:
Right-hand, I think it's right.

MR HARRIS:

Sorry, yes, the "State" column and the second block down, that's right. But the main point I just want to make, and I won't take very long your Honours, is just that the submission by the Attorney that state liability is novel is overstated, in particular in light of what was said in *Baigent* but also what was said in *Chapman*. So if I may begin with this point your Honours. The Attorney's submission is that to talk of the concept of the state is amorphous, unknown to the common law, and would carry us to uncharted constitutional waters, that's at paragraph 3 of the respondent's submissions, and the appellant's simple submission on this point is that these are not uncharted waters. These waters have been charted specifically by *Baigent*.

So what I propose to do is just give your Honours some references in *Baigent*. In the interests of time I won't take your Honours through *Baigent* unless you'd like me to, but I'll just give some references and then move on to *Chapman*. So at page 677 of *Baigent*, and this is at tab 42 if your Honours would like to note for later reference, at page 677 president Cooke endorses a statement in *Maharaj v Attorney-General of Trinidad and Tobago (No 2)* [1979] AC 385 (PC) and what it says about a claim against a state. Page 677.

At page 691 Justice Casey refers, and this is at line 19, to: "… the state's (ie New Zealand's) undertaking in art 3 …". That's the second helpful reference in *Baigent*, in our submission. Justice Casey on the same page referring to the New Zealand Bill of Rights Act 1990 says legislation of this kind "… with its emphasis on human rights in relation to state activity, is something new in our legal pantheon." Another reference to the state.

Justice Hardie Boys also makes reference to "damages against the state" at page 700 and 701. Justice McKay says: "… the Crown, as the legal embodiment of the state …" that's at page 718, and even Justice Gault has a reference to "the state" at page 701. So those references are pages 677, 691, 700, 718 and 710.

In our submission this argument that there's no concept of liability of the state was also considered and rejected in *Chapman*, and not just by Chief Justice Elias in her dissenting judgment, but Justices McGrath and William-Young in their lead judgment. That's at paragraph 205. Because that is so explicit your Honours I might just take your Honours to that, and that meant there was a majority clearly rejecting the submission.

1420

So that's at tab 16 of the joint bundle paragraph 205: "We are not persuaded by the Solicitor-General's argument that there is no concept of the state in New Zealand domestic law."

So *Baigent* is replete with references to the state and establishes a form of state liability. The argument made by the Crown, by the Attorney here, is rejected in *Chapman*. Chief Justice Elias also addresses it between paragraphs 78 and 92, as does Justice Anderson at 216.

Then your Honours, the appellant says that talk of liability of the state is also well established in other common law jurisdictions, far from being unknown to the common law world and to take just one example of a case that is in the bundle, the case of *Henry v British Columbia (Attorney General)* 2015 SCC 24, [2015] 2 SCR 214 from the Supreme Court of Canada which is at tab 84 refers to liability of the state under the Charter and there are references there at paragraphs 34, 36, 37, 38 and 39, among others.

To take just one example, your Honours, in paragraph 34, this is Supreme Court of Canada: "Such claims are brought by an individual as a public law action directed against the state for violations of the claimant's constitutional rights."

And your Honours, it's the appellant's submission that state liability is well justified not just in authority but in principle for several specific reasons. First, state liability ties together obligations in international law and in domestic law. Second, state liability distinguishes public law liability from vicarious liability, a point made in *Baigent*. Third, state liability underscores the need for

an overarching guarantor of rights. And fourth, state liability discourages the need, and this is a point already made by Mr Butler, discourages the need for this unbecoming enquiry into attempts to disaggregate actors, a process that the appellant says is insufficiently rights-centred and that of course is a phrase from *Baigent* too which appears in the table and as Mr Butler said, this kind of responsibility shifting, finger pointing, does not focus on or centre rights. So affirming state liability can avoid what Mr Butler described as the sort of process of not looking at the judicial elephant in the room.

So that's the simple submission. There is a concept of the state in relation to the law pertaining to the Bill of Rights. It's well grounded in authorities. There are relevant references overseas. A version of this argument was rejected in *Chapman* and the concept of state liability is well justified in principle.

It follows from this to take your Honours back to the table that state liability is not tort liability, a point confirmed in *Taunoa* and there is a series of further points made in the table about what *Baigent* says, and if I can make one further point about the respondent's submissions on the state, it does appear at times that the respondent is not merely making an argument about the scope of the cause of action established in *Baigent*, but rather, the nature of the cause of action itself, and if it seeks –

WINKELMANN CJ:

Can you just repeat that submission, sorry, Mr Harris?

MR HARRIS:

Yes, your Honour. The point is that in parts of the respondent's submissions it appears that there is an argument not just about the scope of the cause of action in public law damages but the nature of the cause of action itself, whether there is a cause of action in state liability, and it is our submission that if the Attorney seeks to overturn *Baigent* it should say so transparently, but *Baigent* is clear and, in our submission, *Baigent* should be followed.

I should add that these points about the state are also expressed in different but complementary ways in our submission and the submissions of Te Kāhui Tika Tāngata, the Human Rights Commission.

So there are further points in the table about what *Baigent* is clear about: that it vindicates the rights of a citizen; that the Bill of Rights affirms the International Covenant on Civil and Political Rights; that the approach should be rights-centred, a point I've already made; that the claim is in public law not private law, and Mr Tierney I think will return to this point, that redress for human rights is in a field of its own; and finally that *Baigent* does not confine state liability to executive action alone.

It is strained, in our submission, to equate the state to the executive, in the same way that it would be strained to say that the reference in the new Prosecution Guidelines that Mr Butler referred to, to prosecutors acting on behalf of the state, it would be strained to suggest that that means prosecutors act on behalf of the executive, and the balance of points in that right part of the table, this is on page 2 of Liability Pathways, simply make the point again that there is no reason on an approach that affirms state liability to adopt this kind of finger pointing and responsibility shifting: "a 'blaming' approach to the state conduct ...".

WILLIAMS J:

Well, the finger pointing is unavoidable, in a sense, isn't it, because you've got to establish what caused the result. The state doesn't exist except as a collection of individuals and the individuals do have to be identified to establish whether there's been a breach, I would have thought, although I think in this case your argument is "four and a half years in jail and you didn't need to be there is all you need to prove". But even so, you're going to have finger pointing, necessarily, in a forensic process. Your problem is not with that, but with using that as a defence.

MR HARRIS:

Yes. Maybe the more accurate way to put it is that certainly there's a need to identify a state actor under section 3(a) of the New Zealand Bill of Rights Act. The finger pointing that we describe there is an exercise focused on laying blame, often in a way to make use of immunities and, in our submission, overturning *Chapman* would establish a better position where there isn't such a focus on trying to sheet all responsibility to an actor that may take the benefit of a state immunity.

That *Chapman*, and these were submissions we made in *Putua*, that *Chapman* invites a kind of "all or nothing" style of argument, where all responsibility is clumped with an actor that can benefit from a carve out, and that an approach beyond *Chapman* can at least spend less time focusing on that kind of finger pointing and focus on the actor and then perhaps more time on the right involved.

1430

WINKELMANN CJ:

So the notion of the state encompassing the judicial branch, is that, that's, I think in *Putua*, we were taken to authorities that made that point in the Human Rights Committee context and perhaps the EHCR context that it is broadly internationally recognised as encompassing the judicial branch.

MR HARRIS:

Yes and I would say *Thompson* and *Barrio* were the Human Rights Committee views that made that clear, but I would also suggest that section 3(a) of the Bill of Rights, which Chief Justice Elias and *Chapman* says reflects an understanding of the state in relation to the Bill of Rights confirms that the judiciary is part of the Government of New Zealand which she said in that case is equivalent to the state. Section 3(a) is domestic authority on top of those *Barrio* and *Thompson* views.

So just to complete these points, all that needs to be able to be said is that the state through various actors has breached the Bill of Rights and there need be

no requirement of fault and that's consistent with past approaches to Bill of Rights. They're not in the bundle, but there are references to *Whithair v Attorney-General* [1996] 2 NZLR 45 (HC) and *Attorney-General v Udompun* [2005] NZCA 128, [2005] 3 NZLR 204. If your Honours need those references –

WINKELMANN CJ:

They're elsewhere in the table, aren't they?

MR HARRIS:

They are referred to in the table in the middle part, but I will just give you some page references if your Honours want to follow those up.

WINKELMANN CJ:

Yes.

MR HARRIS:

So in *Udompun*. It's paragraph 177 that this point is made that the purpose of the Bill of Rights is not to punish. And in *Whithair*, a similar point is made at 57 by Chief Justice Eichelbaum.

And the appellants say further in this table that it's possible to draw on the approach to false imprisonment in *Chief Executive of the Department of Corrections v Gardiner* [2017] NZCA 608, [2018] 2 NZLR 712 where liability albeit in a tortious false imprisonment context was established even though Corrections had acted entirely innocently. There's a discussion there about the relevance of good faith and good faith being no defence in tort.

Just a couple of points to wrap up before I pass over to Mr Tierney. In our submission, this is a simple case that what the respondent had put forward are manoeuvres to minimise liability or attempts to duck liability and the concept of the state shouldn't be accepted as one of those manoeuvres, rejection of the concept of the state.

The Canadian authorities on the prosecutor, in our submission, need to be read very carefully in context and do not support the approach of the respondent when read carefully. Those relate to the constitutionality of provisions and whether a prosecutorial safety valve can save constitutionality of legislation and we say that these other attempts to duck liability shouldn't be accepted. So I will pass on now, if your Honours have no further questions, to Mr Tierney.

WINKELMANN CJ:

Thank you. Thank you, Mr Harris.

MR TIERNEY:

Your Honours, what I'm about to say is – if *Chapman* is overruled, what I'm about to say is otiose. These submissions in relation to causation are put strictly on a contingency basis. You will see in the appellant's submissions that the appellant raises two potential avenues for determination of factual causation, being the "but for" causation or material contribution. I just want to outline three principles about causation that may assist before I then move on to consider the judgment of the Court of Appeal. Firstly, it's established that in a case involving multiple causes of breach of a human right, material contribution is preferable to strict "but for" causation as the criterion to apply and the question – for that question. Your Honours will see the analysis of that issue in *Putua* Court of Appeal at paragraphs 79 to 92 including significantly what's said in paragraph 90.

WINKELMANN CJ:

Sorry, what paragraphs?

MR TIERNEY:

Paragraphs 79 to 92, and focusing on paragraph 90 which is the nub of that proposition. I'm going to move through these relatively quickly your Honours so I can get onto the issue of the Court of Appeal's judgment. Your Honours will also see the same proposition put, perhaps in slightly clearer terms in *Henry*, which was referenced by Mr Harris. That's *Henry v British Columbia*. That's at tab 84, paragraph 98 of the judgment. The second principle is "but for"

causation is a common law concept involving breach of a duty of care which attributes liability for loss in the tort of negligence. At common law it's established that a defendant's breach of duty need not be the sole cause of the harm in issue, and the authority for that is *Bonnington Castings Ltd v Wardlaw* [1956] AC 613 (HL), which your Honours will find at tab 56. At common law it's also recognised that "but for" causation has limitations and can engage difficulties with respect to where multiple actors are involved, and that in those circumstances the alternative of a material contribution criteria is preferable. Two authorities that come to mind, I have copies if your Honours would like to have these handed up, otherwise I'll just give you the citations if I may.

WINKELMANN CJ:

You want us to take the citations or are they among the materials? They're not in our materials?

MR TIERNEY:

They're not in the materials your Honour but there are hard copies at the end of the Bar table which we can provide to the Court and to our friends.

WINKELMANN CJ:

I think we better have those, yes.

MR TIERNEY:

The first case is *Amaca Proprietary Ltd v Booth* [2011] HCA 53, (2011) 246 CLR 36. If I can just deal with that case first. If I can take your Honours to paragraph 70, this is in the judgment of their Honours Justices Gummow, Hayne and Crennan, where their Honours note the proposition that I'm referring to. "The 'but for' criterion of causation proved to be troublesome in various situations in which multiple acts or events led to the plaintiff's injury, for example, where the development of a particular medical condition was the result of multiple conjunctive causal factors." Which was the essence of this case which involved an asbestos related injury to the respondent, and there were three different circumstances in which he experienced exposure to asbestos.

Their Honours then move on to say: “In such cases what may be unclear is the extent to which one of these conjunctive causal factors contributed to that state of affairs. These situations have been addressed by the proposition stated by Lord Watson in *Wakelin v London and South Western Railway Co* that it is sufficient that the plaintiff prove that the negligence of the defendant ‘caused or materially contributed to the injury’.” And your Honour will see reference there going on to *Bonnington Castings*.

1440

The second case, your Honours, is the case of *Henville v Walker* [2001] HCA 52, (2001) 206 CLR 459, and I want to take your Honours to the judgment of Justice Gordon at 60, paragraph 60. Now, this is a case that involved the old Trade Practices Act 1958 but, nevertheless, in this context Justice Gordon was speaking of principles in negligence and her Honour said: “For the purpose of the law of negligence, where two or more events combine to bring about the result in question, the issue of causation is resolved on the basis that an act is legally causative if it materially contributes to that result.”

In like vein, Justice McHugh at 106 said this: “If the defendant’s breach has ‘materially contributed’ to the loss or damage suffered, it will be regarded as a cause of the loss or damage, despite other factors or conditions having played an even more significant role in producing the loss or damage.”

Now, your Honours, I must say that these propositions in negligence are not a perfect fit for human rights jurisprudence because negligence fundamentally is concerned with establishing a loss, it's part of the gist of the tort, and then attributing loss to tortfeasors. So what we have in this case, as Dr Butler has explained this morning, is a human rights-focused approach in circumstances where the international law tells us that the object of redress – so the object of claims in human rights – is vindication, redress, not the attribution of liability.

Thirdly, your Honours, the proposition that I want to now put and hopefully demonstrate to your Honours is even if a “but for” standard of causation were

applied in this case, your Honours can comfortably find that that is made out on the facts of the case.

Now, can I take your Honours to the judgment of the Court of Appeal *Attorney-General v Fitzgerald* [2024] NZCA 419, please. We'll start perhaps with paragraph 85 of the lead judgment. Now in the first sentence, your Honours will see what seems clearly a recognition of factual causation identified by the President and Justice Brown: "First, while it is correct that if the charge had not been laid, the sentence would not have been imposed ..." and –

WILLIAMS J:
That seems kind of obvious, doesn't it?

MR TIERNEY:
It does seem obvious.

WILLIAMS J:
I don't think we need a judicial pronouncement to make that point.

MR TIERNEY:
No. It's something perhaps, Justice Williams, that the Court may simply embrace. In probably clearer terms is what Justice Miller said at paragraph 154. You can see at the start of 154 that Justice Miller finds that: "... the prosecutor's action was a cause in fact of Mr Fitzgerald's sentence." I don't think I need to say anything more about that. So there we have the unanimous finding of the three Justices of cause in fact.

Now, if I can take your Honours to paragraph 123. While that's being brought up, I might just say Justice Miller, having made that finding, then deferred to the President and Justice Brown with respect to their reasoning at 122 and 123.

WINKELMANN CJ:
Cooper.

MR TIERNEY:

So I will start with 123 and you will see what their Honours say in the first sentence. So, again, their Honours found a clear linkage between the decision to prosecute and may I say the choice of charge, the assumed understanding of the time and the imposition of the maximum sentence.

Now, if we go back to paragraph 122 and perhaps if I can just ask your Honours to read that paragraph and then I will speak to it.

WINKELMANN CJ:

Yes.

MR TIERNEY:

What, what's interesting here I think is the language that is used by their Honours, with respect, and it focuses very much on the sentencing process and you'll see, returning to 123, the same language being used. Their Honours, having made the finding of fact, sorry, finding of causative fact, then shift their focus onto the acts of the sentencing judge. That, in my respectful submission, doesn't engage the orthodox approach to causal determination as a matter of fact. What their Honours –

WINKELMANN CJ:

It could be with either approach to common law or the human rights.

MR TIERNEY:

Well, I suppose either approach as in but strict but for causation which would allow certainly the plausibility of more than one cause in fact or material –

WINKELMANN CJ:

I suppose in cause in fact you might describe the, it's hard to see that as an intervening cause.

MR TIERNEY:

Well, that was dealt with in *Putua* and I think the reasoning there, with respect, is very sound. A novus actus interveniens, your Honours, typically occurs in the examples where a third party, or sometimes the plaintiff, engages in some conduct which has an intervening effect.

WILLIAMS J:

Isn't the Court here grappling with the constitutional context within which this is going on?

MR TIERNEY:

That's right.

WILLIAMS J:

It's probably not that helpful to assess this as a tort liability case.

MR TIERNEY:

No.

WILLIAMS J:

Anyway.

MR TIERNEY:

Yes.

WILLIAMS J:

I mean you have to grapple with that constitutional reality. It can't really be avoided or we're deciding circumstances in a completely unrealistic way.

MR TIERNEY:

That's right and there's a great degree of artificiality about what the Crown seeks to say about the approach to causation, they say. But the –

WILLIAMS J:

My comment was to you really.

MR TIERNEY:

Yes.

WILLIAMS J:

That is to say that arguing orthodox causation in fact ideas as if that's all that's going on here is itself somewhat unrealistic. You have to grapple with the constitutional context.

MR TIERNEY:

Yeah.

WILLIAMS J:

And you have to grapple with the implications of a finding that causation is enough to generate damages.

MR TIERNEY:

That's right.

WINKELMANN CJ:

I think that is your submission, isn't it?

MR TIERNEY:

Yes.

WILLIAMS J:

Well, quite.

MR TIERNEY:

And in that sense I can say this. The founding of the charge by the prosecutor, and your Honour said it this morning that the obligations that were implicit on the prosecutor to consider human rights considerations and to keep it under continual review was, I want to say striking in circumstances where there were representations made by Mr Fitzgerald's legal representatives about the nature of the charge. Having set in train the events which then led to Mr Fitzgerald's sentencing, I think it's not only would I say there is material contribution, but it

was a foundational contribution in the sense that that process engaged the jurisdiction of the Court and it directed a trajectory for punishment.
1450

I'm putting this in a slightly different way to Dr Butler, but in effect the Judge's hands were tied. That's our proposition. So it was a powerfully causative action by the prosecutor in, firstly, engaging the jurisdiction of the Court and, secondly, determining, if you like, the outcome because of the nature of the charge.

Unless there is anything further, your Honours, that's all I wish to say.

WINKELMANN CJ:
So just to be clear on your submission, your submission is that this is not, am I correct in understanding it, so tell me if I'm wrong, it's not that causation is in the – using common law concepts of causation does not sit well with human rights?

MR TIERNEY:
I could go on for a long time about that.

WINKELMANN CJ:
Yes.

MR TIERNEY:
But I'm not sure if it's helpful. I'm happy to say a bit more about.

WINKELMANN CJ:
But even were we, but – and the Court of Appeal appeared to apply a common law "but for" concept of causation, even the common law recognises that where there are multiple contributors, you proceed beyond "but for" to material contribution?

MR TIERNEY:
Yes.

WINKELMANN CJ:

And even if it's "but for" that is comfortably met here?

MR TIERNEY:

That's the case.

WINKELMANN CJ:

But you really eschew the usefulness of less causative analysis beyond being a material contribution?

MR TIERNEY:

Yes, the focus of causal fact finding in tort is primarily attribution of responsibility. Now, if we say –

WINKELMANN CJ:

Prior to shifting risk, deciding where risk is allocated?

MR TIERNEY:

That's right. And there is a secondary concept that I should briefly address and that's legal causation. In my submission, that has no role to play whatsoever in a human rights context, because legal causation involves a normative judgment of a judge who determines the scope of duty of care.

WINKELMANN CJ:

And by that, you mean, you're talking about reasonable foreseeability, are you?

MR TIERNEY:

No, foreseeability is a concept that waxes and wanes in tort law but it goes to the –

WILLIAMS J:

Are you talking about proximity?

MR TIERNEY:

Proximity, likewise, is a –

WINKELMANN CJ:

Well, what are you referring to when you talk about legal causation? Because people use these expressions interchangeably in my experience.

MR TIERNEY:

Yes, they do, that's quite right. At common law, it's a value judgment as to whether the tortfeasor should be held liable and that involves an examination of the scope of the duty of care.

WINKELMANN CJ:

Of the scope of the duty of care.

MR TIERNEY:

So we're getting way out into tort law and well away from human rights law which emphasises the universality of human rights.

WILLIAMS J:

But there's a, yes, there's no doubt about that, but there is an analogue there though, if the scope of the duty is about proximity, neighbourhood principle and so-on, or policy factors about how broad the scope should be, then the constitutional factors, including the special role of the prosecutor, are the indicators about how wide that duty should be, in that how liable the prosecutor ought to be. That seems to be a kind of a useful analogue and the question is whether the imposition on the prosecutor, and there's no doubt about this, of a BORA responsibility is in and of itself enough, or are there other countervailing factors that suggest such responsibility should be shrunk? And the one the Crown often argues for is that this is really suing the judges by stealth and that's a constitutional consideration that oughtn't to be undermined, so if –

MR TIERNEY:

Yes, there's an important distinction, I think, your Honour in relation to liability. That's the important distinction, because the overriding principle here is it's state liability for BORA breaches and the function in tort is to identify whether

there's an actionable duty of care that's then proven – for which breach is proven and causation is made out.

Now, in most Australian states that's now been codified so, for example, in New South Wales there are two elements in section 5(d) of the statute that require a plaintiff to prove the legal cause – sorry, factual causation and legal causation. That's the Civil Liability Act 2002. That's a world away from the environment that we're in here.

There are other factors that are in some ways, your Honour I think said "analogous", that is what are the constitutional roles of the actors, but the focus very much is different, because it's on redress, vindication, not attribution of responsibility, and ultimately financial responsibility, bearing in mind that that's the primary, I won't say exclusive remedy in tort, but I have seen a case, I have to say, a federal court judge granted an injunction in Australia with respect to an anticipated breach of a duty of care in immigration detention, but that's a very, very exotic case. I mean 99.9% of the time we're looking at simply paying compensation for the damages as a result of a tort. Here there are wider considerations of responses to BORA breaches, declaration, injunctions, there may be rulings on evidence, all sorts of things that are more aligned with public law remedies, and then there's the separate question of compensation. We have *Baigent's case* as authority on that proposition.

WILLIAMS J:

Yes, but they're not unrelated.

MR TIERNEY:

That's why tort principles on the "but for" tests and material contribution have been important. The – I suppose in one sense I just find it an odd importation given the different routes of the two areas of law. That's my point.

WINKELMANN CJ:

Thank you. We shouldn't stray too far because we might never finish.

MR TIERNEY:

No, that's right. Thank you, unless there's anything further.

MR BUTLER KC:

There are just a few points arising your Honours and then our side will complete.

WINKELMANN CJ:

You're the sweeper.

MR BUTLER KC:

I'm the sweeper, exactly. So a question arose about the state encompassing the judicial branch. My friend Mr Harris made reference to *Thompson* and *Barrio* in the, before the Human Rights Committee, obviously that's right, but there are many others for example in the European Court of Human Rights context, we had *McFarlane v Ireland* Grand Chamber of the ECtHR, Application 31333/06, 10 September 2010 and those cases I took you to including UK cases dealing with delay that were if not fully judicially created, at least contributed to by judicially. So I just thought I'd remind your Honours who sat in *Putua* of those cases and just say them out loud for those of your Honours that weren't on the Bench in *Putua*'s case, and my friend Mr Harris –

GLAZEBROOK J:

Well it's probably the wider point anyway, but of course the judiciary has to comply with the Bill of Rights. Whether damages relate is quite a different issue than whether the judiciary have to comply. They clearly do.

MR BUTLER KC:

Quite, and that goes back to the point I suppose that I made at the outset of the day when I was talking to his Honour Justice O'Regan about, you know, the so what question. There's a subsequent question you've got establish, first of all a breach by a section 3 actor, and then you can ask the so what question. But there can be no doubt about the application of section – of the, well Bill of

Rights to the judiciary, and the fact that the judiciary can, indeed, breach the Bill of Rights. They do unfortunately. It just happens.

WINKELMANN CJ:

Well we did make the point in *Fitzgerald* that the Bill of Rights applies to the judiciary.

MR BUTLER KC:

And just, the reason I get the kind of, you know, and it happens thing, is to make a point which is quite important in the Bill of Rights area, which is breaches of the Bill of Rights which can give rise to compensation can be inadvertent. That's what goes back, the point that your Honour raised with my friend Mr Harris about finger pointing, again where we come at it from is we were using that notion of finger pointing in the pejorative sense.

WILLIAMS J:

Yes, I understand.

MR BUTLER KC:

So it's just really important to emphasise, plainly it must be established that someone within the purview of section 3 has breached –

WILLIAMS J:

Someone did it.

MR BUTLER KC:

Somebody did it. But the reason why, or how it came to be that the breach occurred, can be inadvertent, and in addition to *Udompun* where it was inadvertent, and *Whithair*, which was a question of law, you've got a case called, in the bundle called *Pere v Attorney-General* [2022] NZHC 1069, [2022] 2 NZLR 725 where a gun went off totally, totally inadvertently, total accident, that a police officer arresting a citizen discharged the gun. Fortunately the bullet went into that person's back. Nobody suggested –

WINKELMANN CJ:

So anterior causality enquiry is not required in that situation?

MR BUTLER KC:

Exactly, exactly, so that's tab 36 just so you have it.

WILLIAMS J:

Well *Putua* is itself a case.

MR BUTLER KC:

Indeed, quite.

WINKELMANN CJ:

And *Gardiner*.

WILLIAMS J:

Yes.

MR BUTLER KC:

So then I just wanted to come to the point that my friend Mr Tierney was finishing on with your Honour Justice Williams just around the constitutional point and the separation of powers, because I wouldn't wish it to be understood we've addressed those in our written submissions, but I think it's important perhaps that I say a little –

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WILLIAMS J:

You will have another go at it?

MR BUTLER KC:

No, no, not at all. It was quite rightly, the separation of powers in Australia means a different thing to separation of powers here.

WILLIAMS J:

I completely understand. It will be a different case if we were in Australia.

MR BUTLER KC:

It would be a different case if we were in Australia, so, and Mr Tierney quite rightly has let that one pass through.

WILLIAMS J:

Yes and we appreciate the depth of understanding and the quality of the presentation indicated authenticity.

MR BUTLER KC:

Quite. So what I just wanted to say in terms of the separation of power issues, that is something, I think that is the theme that comes through in paragraphs 122 and 123 of the Court of Appeal's decision and what I was at pains to emphasise hopefully in my submission is that this set of provisions and these powers were outside the norm so that when you are considering what implications constitutional separation of powers ought to have in an ordinary case, that might lead you to one answer. But this case is not an ordinary case. This is –

WILLIAMS J:

The provisions, you mean the three strikes provisions?

MR BUTLER KC:

I'm talking about the three strikes provision.

WILLIAMS J:

Right, yes, yes, I understand.

MR BUTLER KC:

Because they sit on their head and were understood to sit on their head, the normal constitutional separation of powers. That's why I took you through the parliamentary debates where Ms Ardern raised the question, well, this takes away effectively judicial discretion assessment. Yes, that's what it was designed to do. That is the antithesis of our normal approach to separation of powers where we say the job of assessing guilt, plainly still sit with the Court

here, but when it comes to sentencing, it is the task of the judiciary to apply the principles to the individual that appears in front of them. Here, the legislation turned that on its head and so therefore I say that this Court, when considering causation, needs to go with what happened there because otherwise you're giving the Crown the benefit of the ordinary approach to separation of powers in a context where the ordinary approach to separation of powers had been disapplied.

So, for example, when you look at say 122 and 123, it is true to say that the imposition of, let's put aside appropriate sentence, the word appropriate for the moment, that the imposition of a sentence rests on the judge. Parliament didn't take away the function of imposing a sentence from the judge and give it to the prosecutor. What Parliament did do was it took away the function of imposing the appropriate sentence, and by appropriate obviously I mean the sentence that would be appropriate to reflect the nature of the offending and the offender, so that it did take away and what it did is it said the prosecutor gets to choose whether a third strike charge is preferred or not and it's for the prosecutor to choose whether to proceed that way or not.

I'm not going to repeat all of the elements I took you to in terms of the administrative safety valve because that would just be overkill.

WINKELMANN CJ:
Right, yes, we understand.

MR BUTLER KC:
But if we go down – I'm sorry, your Honour, but I just need to make this last point in terms of 123.

WINKELMANN CJ:
Right.

MR BUTLER KC:

So if you look and say: "Well, where is it Butler that you're disagreeing with it with the Court," look down at the Court of Appeal, you see half way down it says: "We shrink from the implications of endorsing such an approach," and that's in reference to the proposition as we see it: "… given that assumption, the only basis on which a decision not to prosecute could be indicated would have been a concern to avoid the impact of s 86D(2) on the sentence. We shrink from the implications of such an approach, which seems to posit the prosecutor having a dispensing power or duty to avoid what Parliament intended – the assumption on which the argument proceeded." But the argument proceeded on not that assumption, the argument proceeded on the assumption that Parliament had identified that the safety valve lay with the prosecutor, not the with the judges.

So far from shrinking from the proposition, in my submission, the Court of Appeal ought to have embraced the proposition and that, in my submission, when you boil it down is where the error lies. I could take you to later similar statements in the paragraphs that follow.

WINKELMANN CJ:

Right, don't think you need to.

MR BUTLER KC:

Thank you.

WINKELMANN CJ:

Thank you, Mr Butler.

MR BUTLER KC:

I'll probably just need a minute or two to get out and to move, shuffle along to make room for the Human Rights Commission.

WINKELMANN CJ:

That's all right. So Mr Kirkness, I'm making the afternoon tea enquiry of you. What's your expectation about timing? How long did you imagine being?

MR KIRKNESS:

We anticipated being between half an hour and 45 minutes in total, but we would be cautious about anticipating precisely how long given the potential for questions that may arise.

WILLIAMS J:

You're going to make us responsible, aren't you?

MR KIRKNESS:

Joint responsibility, Sir.

WINKELMANN CJ:

Just carry on?

O'REGAN J:

Just carry on, yes.

WINKELMANN CJ:

No afternoon tea? This is the sort of thing the Chief Justice of New Zealand has to attend to. Right, carry on, we will not adjourn, so we'll just carry sitting through, we will not be adjourning at 3.30.

MR KIRKNESS:

Thank you, Ma'am. E ngā Kaiwhakawā, tēnā koutou. The Commission wishes to thank the Court for the opportunity to make oral submissions. Thank you, too, to our friends for accommodating us today in the manner that they have, and some of the points that our friends made will necessarily mean we can be faster because they have, helpfully including in that third column of the liability pathways table, captured some of the essence of our written submissions.

The Commission wishes to make four points, Dr Butler has nominated a further point that I can deal with very briefly, but in terms of a road map, if I may, just the core submissions in summary form.

First, close analysis of *Baigent's case* brings into focus the nature of the public law damages remedy for breach of rights affirmed in the Bill of Rights Act.

Second, the public –

WINKELMANN CJ:

Sorry, I'm just – can you just repeat your first submission please, Mr Kirkness?

MR KIRKNESS:

First, close analysis of *Baigent's case* brings into focus the nature of the public law damages remedy for breach of rights affirmed in the Bill of Rights Act.

WINKELMANN CJ:

Thank you.

MR KIRKNESS:

Second, the public law remedy developed by the courts to comply with New Zealand's – was developed by the courts to comply with New Zealand's obligation to ensure an effective remedy for victims of rights violations under the International Covenant on Civil and Political Rights and compliance needs to be maintained.

Third, the Bill of Rights Act aligns domestic responsibility for protecting and promoting fundamental rights with responsibility under international law.

If I could just pause there, your Honour the Chief Justice asked a question about the international law position and it's there that we would seek to provide some of the authorities that we say are helpful and may assist the Court in understanding the way international law might look at the issue of responsibility of the state and what that comprises.

The fourth, and the proposal is that Ms Haradasa deals with this point, the *Baigent* remedy for public law damages focuses on the conduct of the state as a whole, or in Bill of Rights Act terms focuses on section 3 actors. It differs from private law damages which focus on the individual responsibility of individual actors.

So those are the four propositions that we would seek to address the Court on. Obviously, we will cut our cloth to measure. If any of those are not points on which the Court wishes to hear from us, then we won't make submissions.

The nomination from Dr Butler was in relation to the interests, as I understood it, underpinning the section 9 torture right. To the extent it's useful, we would say on behalf of the Commission that as a matter of domestic law the importance of that right is acknowledged, because it is considered to be illimitable. It is not a right to which the usual analysis of limitation under section 5 applies and so that reflects New Zealand law recognition of just how important section 9 of the New Zealand Bill of Rights Act is.

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It is also reflected in the fact that there is an international convention, a Convention Against Torture that was agreed to by States Parties, I believe over 170, to guard against torture which is defined in Article 1 and cruel, inhumane and degrading treatment which is defined in Article 16 and that once again reinforces the importance of those considerations. It is also reflected in Article 7 of the International Covenant on Civil and Political Rights. That's the analogue in that rights document to section 9 of the Bill of Rights Act.

General Comment 20 deals with Article 7 and Article 7 is identified in Article 4 as one of the non-derogable rights in the Convention not to be derogated from in times of public emergency. But perhaps the key point and the one that is perhaps the animating normative force here is that torture is recognised under international law as jus cogens. That means it is a, literally translated, compelling law but referred to normally as peremptory norm. Those are the

highest form of norms in international law. They would override a treaty agreement and you can see from the types of norms, the very few norms in international law that have been recognised as peremptory norms, just how significant that recognition is. The examples that I would give would be genocide, slavery, maritime piracy and torture. Wars of aggression as well. So you have a very, very small class of cases where the rights interest is going to be reflecting a peremptory norm, but that is the normative, the norm that is driving a lot of the developments of international conventions of the New Zealand Bill of Rights Act of the way that norm is treated.

So to take it back to where Dr Butler I think had left it, it would be very strange in my submission if in fashioning effective remedies this Court was to somehow not ensure that it would respond to a breach of section 9 of the Bill of Rights Act in the most emphatic terms possible, including by way of compensation, if it considered that to be appropriate as part of an effective remedy. So that was the footnote that Dr Butler had nominated me to provide.

Turning to the first of the four core submissions and as emphasised in *Putua* and my apologies to the three judges in front of me who had to hear this in *Putua,* the Commission does see ***Baigent's case*** as the key case in *Putua* and in this case and the reasoning there and how that is now working itself out through in the system I think, in my submission, is central to the approach the Commission suggests would be appropriate in this case and that is why the submission is that close analysis of ***Baigent's case*** brings into focus the nature of the public law damages remedy for breach of rights.

The majority, in ***Baigent's case***, explicitly developed a public law damages remedy. That was, as I said in *Putua*, constitutional innovation at the time. Clearly so. But after more than 30 years, 31 years at current count, it is now constitutional orthodoxy. It is part of our constitution that you can get that type of remedy and, in my submission, the *Baigent* remedy is now woven into the fabric of New Zealand law.

It can fairly be described as a constitutional remedy. In the case on appeal you have at tab 39 this Court's decision in *Fitzgerald* and the recognition by your Honour Justice O'Regan and Justice Arnold in your reasons, Sir, that the Bill of Rights Act is a constitutional statute. That's at 221 of *Fitzgerald* and the Chief Justice's similar comments at paragraph 41 about: "The Bill of Rights Act is therefore a statute of constitutional significance."

That applies, in my submission to rights and remedies and to pick up on a point that Justice Glazebrook made in *Putua*, why it's important to stress that it applies to both, we see both as encapsulated within those statements. I think your Honour Justice Glazebrook had indicated that there would be a concern based on the remedy that you might clip or blunt the right and we would endorse that concern as something that should be avoided. One of the reasons why an effective remedy is important is because you do not want to clip or blunt the effectiveness of the rights protection that has been given.

WINKELMANN CJ:
I don't think I understand your submission there Mr Kirkness. Can you just repeat it in another –

WILLIAMS J:
No right without a remedy?

MR KIRKNESS:
No right without a remedy.

WINKELMANN CJ:
Is that all you're saying? Right, okay.

MR KIRKNESS:
Well, I was also trying to expressly link it to a, it was a particular turn of phrase that Justice Glazebrook used that we would endorse about – the effect of it is blunting the right. So if you don't give a proper remedy, it would blunt the right itself. The interlinkage.

WINKELMANN CJ:

All right, okay, I understand it now.

MR KIRKNESS:

It is in any event this is the *Baigent* remedy, an important feature of human rights law in New Zealand, and one of the tools available to the courts to ensure New Zealand law develops consistently with international obligations entered into by New Zealand. Put simply it furthers the twin purposes of the Bill of Rights Act that is set out in the long title, and to save time, and ensure we are brief, we have, instead of going to *Baigent's case*, prepared a hand up. I understand that the Court has been provided with a copy of it. It should be a single sheet table. If your Honours have a copy of that. Apologies there'll be some overlap with my friend's three columns.

WINKELMANN CJ:

And you're filing that, I'm sure you're filing that electronically as well?

MR KIRKNESS:

We will also be filing that electronically, thank you, but the apology is for the fact that this will overlap in some places with the columns in my friend's table. We hadn't realised it would do so but hopefully both documents are useful, and this is simply to save time, so what we've tried to do here is extract the propositions that we see *Baigent* as standing for, and provide your Honours with the references to where your Honours can find the texts we rely on and decide whether we're right.

The first proposition listed here is that the Bill of Rights Act should be given a generous interpretation to ensure affirmed rights are practical and effective. That's a general approach in our submission to the Bill of Rights Act. You have the references there to the three majority judges who we say endorse that approach. The second is that section 3 of the New Zealand Bill of Rights Act is relevant to the development of an effective remedy. That's a point that I wish to come back to in the third of my four submissions, and we say it's a key point, the role of section 3 and what it seeks to do.

The third proposition that we've identified here is that the Court of Appeal majority relied explicitly on Article 2(3) of the International Covenant to develop a public law damages remedy, and that has two parts to it. The first part relied on by all the Judges in the majority was Article 2(3)(a) of the International Covenant, which is the article that says that New Zealand guarantees or ensures there will be an effective remedy for violations of individuals' rights.

Article 2(3)(b) is also important though and possibly not a focus of the two, although it was referred to in written submissions and oral submissions but that's the point about developing the possibility of judicial remedies, and certainly when we get to the issue of the competence of the courts, and whether the courts are the appropriate place for the response. We say that the, just to foreshadow the submission that the domestic position in New Zealand is that the courts do develop Bill of Rights Act remedies, that is primarily the function of the courts, with the backstop of pure parliamentary sovereignty and legislation where necessary, if Parliament so wishes, but we also say that the domestic position is in fact encouraged by the commitment New Zealand has made under Article 2(3)(b) and Justice Casey is particularly clear on that point.

The shorter point is that one of the purposes of the Bill of Rights act and the long title is to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights and in order to act in accordance with that purpose the courts should seek to develop New Zealand Bill of Rights Act remedies in a manner that aligns with Article 2(3) and the obligation New Zealand has taken on there, and we say that is very much what the *Baigent* majority was seeking to do.

The fourth proposition we say can be drawn from *Baigent* is that public law damages for breach of the New Zealand Bill of Rights Act are a remedy against the state. Obviously that term is one that will need to be unpacked, and I think Ms Haradasa will address your Honours on that, and I will have some comments as well, but that is very clearly, in our submission, what the *Baigent* court was doing at that time.

Then the fifth related point, which is related to the previous one, is that public law damages are not analogous to tort remedy, or subject to the Crown Proceedings Act 1950, as some of the judges commented, they are damages that operate in a public law sphere. But that is a conceptual shift that is not always easy to maintain. It does press on traditional structures of thought and the common law tradition, to crib from Professor McLean's book on *Searching for the state* at chapter 9.

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So those were the points that we say, in our submission, can be extracted from *Baigent*, the majority reasoning in *Baigent*, and those are the points we rely on in that case.

In my submission, there's some ambiguity in the Attorney-General's submissions, in this case, and particularly at paragraphs 44 to 48 of those submissions, where the terms "state" and "state liability" are used in speech marks, and particularly at paragraphs 47 and 48 where they purport to say, in their words, what state liability means and then go on to say that it's executive conduct.

If that is purporting to speak to what the Judges in *Baigent* meant, then the Commission does not consider that appropriate in this case, or to use this case as a Trojan horse to challenge *Baigent* by reformulating what was decided in *Baigent* in a way that changes fundamentally the nature of that public law remedy. This is a point that Mr Harris, I think, was making as well about the nature of the remedy that was established in *Baigent*.

If, however, what the Crown is saying is that those terms should now be understood to mean what they say in that paragraph, then the Trojan horse concern falls away, but the Commission's position would be that that is inconsistent with *Baigent* and a close reading of *Baigent* will expose that error and it's not an approach that should be adopted.

But it's something that, in my submission, it is important to get clarity on, whether that is an attempt to reformulate what was said, or it is a position as to what the Crown submits should now be the understanding.

Those are all the submissions that the Commission wish to make on the first point.

The second overarching submission that the Commission wishes to make is that the public law remedy was developed by the courts to comply with New Zealand's obligation to ensure an effective remedy for victims of rights violations under the International Covenant on Civil and Political Rights and compliance needs to be maintained, that's with the International Covenant.

The obligation to ensure an effective remedy is set out in Article 2(3) of the International Covenant on Civil and Political Rights and as, if we could perhaps bring that up, because Article 2 is a key provision of the Covenant, Article 2(1), if we can just scroll up to it, Ms Qiu, thank you, is the core obligation: "... to respect and ensure to all individuals within [a State's] territory and subject to [a State's] jurisdiction the rights recognized in the present Covenant ..." so that's 2(1).

And then at 2(3), you have 2(3)(a) that: "Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms are herein recognized [in the Covenant and are being] violated shall have an effective remedy ...". And: "(b) To ensure that any person claiming such a remedy ..." – and you go to the end there, the last words, where the states agree that they should seek – "... to develop the possibilities of judicial remedy; ...".

Just a point about the Covenant itself, stepping back from the individual provisions within it, the Covenant obviously is a response, following on from the Universal Declaration of Human Rights, to the atrocities and horrors that were experienced in World War II. Ultimately, you find that manifesting, or the concerns the states have as a result of that experience, manifesting themselves

in human rights instruments like the Refugee Convention and the Covenants and various other human rights instruments.

What is interesting about this, from a state perspective, is that states are recognising here, agreeing and recognising, 174 States Parties have recognised that individuals need to be protected from States breaching their rights and that's a big step for international law to make, but when you look at that from the perspective of domestic law it's an even bigger step, when you come from a tradition where, once upon a time, the King could do no wrong. Now, we're in a place where there are rights that States have agreed exist and should be protected, to be protected from the states themselves.

So what, in my submission, should not be surprising, and again I would refer to Professor McLean's text *Searching for the state* at chapter 9, it should not be surprising that we see pressure on traditional structures of thought as a result of this change, and so that is one of the ways of looking at a number of cases that come up before these courts, that they are the way in which this normative pressure is manifesting itself domestically, because after the Covenants came state efforts to put in place domestic legislation or measures that would implement those.

That stepping back, going back into the –

WILLIAMS J:

Yes, but as a matter of legal history, there hasn't been in common law countries, the propositions they can do no wrong for a very long time.

MR KIRKNESS:

It's been eroded, but there are still –

WILLIAMS J:

But ICCPR is a culmination of that very body of law, really, the body of law that held the King to be responsible at the cost of his head occasionally. So it seems

a little strange that it would be argued there is pressure between the two of them on that count.

MR KIRKNESS:

Sorry, yes, thank you, Sir. Sorry, the submission was unclear. So there is not a suggestion there is pressure between them. The suggestion was, and this is to crib a phrase from Professor McLean, that it's one that we adopt, there is pressure on some of the traditional structures of thought. It's not a tension type of pressure. It's a pressure where as you are dealing with the role of the attorney, for example, you may find that role having to adapt.

WILLIAMS J:

Right.

MR KIRKNESS:

Now, that may be an adaptation that is already occurring and we will say it is and I think that's partly what –

WILLIAMS J:

Separation approach of common law constitutional systems versus the synthesising approach of international law, the state versus the individual, is that what you're talking about?

MR KIRKNESS:

Yes.

WINKELMANN CJ:

And also, for instance, lumping the judiciary in with the executive and perhaps Parliament when you're considering whether the state has committed a wrong, which seems unusual to people who are used to always fastidiously trying to keep these apart.

MR KIRKNESS:

Yes, thank you, Ma'am. So that's the section 3(a) point where we say it is exactly what was deliberately done partly because of the intention to affirm the commitment to the International Covenant on Civil and Political Rights and we will come to that shortly. But yes, thank you, your Honour, that's a good example, a better one than I was finding.

WINKELMANN CJ:

Well, you were probably holding it up your sleeve.

MR KIRKNESS:

That's a very generous interpretation, your Honour, and I will accept it for today's purposes.

WILLIAMS J:

Yes, grab that, they're rare.

MR KIRKNESS:

So Article 2(3)(a), the obligation to ensure an effective remedy was central to the development of the public law damages remedy in *Baigent's case*. This was said to flow from the Bill of Rights Act's purpose of affirming New Zealand's commitment to the covenant. That's long title (b). I've already given your Honours the citations in *Baigent's case* as to where that point was made, so I'm not going to repeat those.

Article 2(3)(b) refers to the obligation to develop the possibilities of judicial remedy. That was also explicitly invoked in *Baigent's case* again. Your Honours have the remedy, the references. *General Comment* –

WINKELMANN CJ:

So what is the: "To ensure that any person claiming such a remedy shall have his right," et cetera, "and to develop the possibilities of judicial remedies," what does "to develop the possibility of judicial remedies," mean?

MR KIRKNESS:

So my understanding of that phrase is that to the extent there are not in existence the possibilities of seeking and obtaining a remedy from the courts of a particular state, the courts would seek to develop the possibility of such remedies being available.

WINKELMANN CJ:

Right. It's not really speaking directly to the judicial branch necessarily. It could be Parliament who decides to do that.

MR KIRKNESS:

That's exactly so, Ma'am. It's speaking to the state, but it is identifying within the state apparatus a particular branch that under the Convention states consider to be an appropriate place for remedies to be developed, I think I could probably go that far.

WILLIAMS J:

Well, it's not speaking only to the legislature.

MR KIRKNESS:

No, it's speaking to the entire state and that would mean the judiciary, the executive and the legislature and any other parts of the state, however domestically arranged a particular state may be.

General Comment 31, if we could bring that up please Ms Qiu, is a general comment that I took this Court to. Again, apologies to the three judges who had to look at this previously in *Putua,* but it's important because this is the Human Rights Committee's explanation of how they approach article 2 and article 2(3) is addressed at paragraph 16 and it says there that: "Article 2, paragraph 3, requires that State Parties make reparation," and we put some emphasis on those words, "to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy which is central to the efficacy of article 2, paragraph 3, is not discharged," and goes on to explore a

little bit the relationship between the general remedies provision at article 2(3) and specific what we call instantiations of that in Article 9(5) and 14(6) and also the types of reparation under international law. Compensation to one type, but when you're fashioning your remedy, seeking to do or make reparation, it is only one strand of what you're seeking to put in place subject to the more specific type of requirements such as 9(5).

The Commission submits that three points can be drawn from this paragraph. The first, the obligation to provide an effective remedy is central to the efficacy of Article 2 and this is the Article that sets out the general legal obligations of State Parties to the Convention: "... to ensure to all individuals within its territory and subject to its jurisdiction [have their] rights recognized," so it is a key part of the architecture of this Convention.

It has been described by the Human Rights Committee as an obligation inherent in the Convention as a whole. The reference for that is *General Comment No. 29* at paragraph 14 which is in the Human Rights Commission's authorities at tab 34 and the short point is, this is a very, very important part of the architecture of the Convention.

The second point that we draw from this, is that the obligation that is owed or has been agreed to is that the state party must ensure an effective remedy to individuals whose Covenant rights have been violated.

Paragraph 17 speaks to the Human Rights Committee's practice of identifying the need for measures beyond a victim-specific remedy, such as measures to avoid repetition of breach, for example, so more general steps that can be taken by a state to prevent repetition of a rights breach.

But the core obligation in Article 2(3) is to ensure that the individual gets an effective remedy. It's not going to be adequate for international law purposes to say "it won't happen again" as a general matter.

The third point is that the obligation to provide an effective remedy requires full reparation. This is stated expressly in paragraph 16, although I've added the adjective just to align it with typical international language. Reparation is a flexible concept. It may include restitution, rehabilitation which can be particularly important in contexts such as, for example, torture, compensation, and/or measures of satisfaction such as an apology or something similar to that, public apology.

A good example of the interrelationship between the different concepts that we're traversing can be found in *Thompson*, in my submission, the Human Rights Committee's views in *Thompson* at paragraph 9, which is in the parties' joint authorities at tab 121 and should be on the screen before you. If we go to paragraph 9, which is the last paragraph, thank you, Ms Qiu – sorry, the second-to-last paragraph.

You see there what is recommended the state does as a result of the findings in *Thompson* and there the Committee says: "Pursuant to article 2(3)(a) of the Covenant, the state party is under an obligation to provide the author with an effective remedy." – so the concept of an effective remedy under 2(3) – "This requires it to make full reparation to individuals whose Covenant rights have been violated." – that's the linkage between effective remedy, what that requires is full reparation – "Accordingly, the state party is obligated [among other things] to provide the author with adequate compensation ..." in that case, we would say. But that's the relationship between those different concepts that we say is operating as a matter of international law.

The concept of full reparation is recognised as a principle of customary international law. You can find authorities for that proposition at footnote 17 of the Commission's synopsis and those authorities there include the *Case Concerning the Factory at Chorzów (Merits)* (1928) PCIJ (series A) No 17, Germany and Poland, which is the leading authority on full reparation under international law.

WINKELMANN CJ:

So full reparation for what?

MR KIRKNESS:

Full reparation for a breach of international law. In this context, a human rights breach, but it would be the same for any breach of international law. It would be the same argument being made in an investment treaty case about breach or expropriation of an asset, and footnote 18, in the synopsis which includes the International Law Commission's *Articles on the Responsibility of States*. Just one point on this, if I could seek of the Court, we've provided a copy of the International Law Commission's *Articles on the Responsibility of States*, just the Articles. There is a twin document also available publicly, that has the Articles plus commentary. If I could have the leave of the Court, we would submit that electronically through the Registry so the Court has the benefit of that commentary from the ILC on the – International Law Commission – on those Articles.

WINKELMANN CJ:

Yes, you have leave.

MR KIRKNESS:

Thank you, your Honour. The principle of full reparation is also a general principle of international law, so in addition to being a principle of customary international law, and we've cited Professor Bin Cheng's seminal text for that proposition at footnote 16 of the Commission's synopsis. I should just flag, Professor Cheng then goes and cites *Chorzów Factory*, which is what you'd expect for the proposition.

Compliance with the obligation to ensure an effective remedy and develop the possibilities of judicial remedies is, in our submission, obviously an ongoing one. It doesn't become exhausted at the time you enter into the Covenant, and New Zealand has a continuing obligation to comply with it as a matter of international law. Similarly if we move down to a domestic level, as long as the Bill of Rights Act continues to have as one of its twin objectives affirming

New Zealand's commitment to the International Covenant on Civil and Political Rights, the Court should give effect to Article 2(3), or should seek to give effect to Article 2(3), and you see this stated explicitly by, among others, Justice Hardie Boys at page 699, lines 36 to 37 of *Baigent*. The reason is that if you were to do otherwise you would be thwarting one of the purposes of the Bill of Rights Act, which is affirming New Zealand's commitment. It could equally be said that it would also run counter to the purpose of promoting human rights in sub (a) of the long title.

So the purpose of that submission is simply from the Commission's perspective, to try to ensure that the international law position is clear. The linkage between an effective remedy and the obligation New Zealand has assumed to ensure one, as well as the full reparation that that requires as a matter of international law, and that is the normative framework that is operating as a matter of international law. The next submission deals with, in our submission, how that's been domesticated.

WINKELMANN CJ:
So when I look at your submissions I see that you're likely to take far more than 35 minutes, but I may be wrong about that.

MR KIRKNESS:
In that case, already at this early stage your Honour, an apology is an order, but that certainly wasn't the intention.

WILLIAMS J:
You're not going to fight her on that.

MR KIRKNESS:
No, Sir, I am not.

WINKELMANN CJ:
I mean I think you're at least another 45 minutes, no, much more than 45 minutes, maybe another hour?

MR KIRKNESS:

No, your Honour, I hope not to be that. I have one more submission.

WINKELMANN CJ:

Okay.

MR KIRKNESS:

And then Ms Haradasa has one submission.

WINKELMANN CJ:

We will plod on then but be it on your head if we're here in an hour and a half's time.

MR KIRKNESS:

Well hopefully, Ma'am, if Ms Haradasa is standing up at that point, it will be on her head.

WINKELMANN CJ:

That's really very responsible conduct by senior counsel.

MR KIRKNESS:

That is a fair assessment your Honour, and I will stand and fall by that. The third submission that I wish to make, which I'll hurry onto, is that the Bill of Rights Act aligns domestic responsibility for protecting and promoting fundamental rights, with responsibility under international law. The Bill of Rights Act is in the Human Rights Commission's authorities at tab 20, and we set some store, as did the *Baigent* court, on section 3 of the Bill of Rights Act. In this case we say the relevant part of that is section 3(a) which talks about: "This Bill of Rights applies only to acts done—(a) by the legislative, executive, or judicial branches of the Government of New Zealand."

The appellants handed up a table earlier, a pathways table, different liability pathways were moved from worlds to pathways. All of the pathways on there relate to section 3(a) actors. So what this case is not, although what this Court

may one day expect to have before it, are cases raising questions about the relationship between section 3(a) and 3(b). So the structural and the functional parts of this, to put a crude distinction in there, but certainly functional in the section 3(b) sense, as well as cases where you might have an issue about the relationship between section 3 actors and private actors. Those are more complicated cases. It is in that sense that we would say this is a straightforward case because it is just section 3(a).

Then in our submission there are three points we wish to make in relation to section 3(a). The first is that the legislature, executive and judicial branches set out here are identified in section 3(a) as parts of a greater whole. That is the Government of New Zealand. It is wrong to look at each of those branches in isolation, or to suggest that this provision seeks to disaggregate them. That's not what this provision says as a matter of its ordinary meaning. It is quite clearly an inclusive provision. The reason each of these branches have been included is because they are parts of the greater whole, and that is why they've been enlisted in the joint project of protecting and promoting fundamental rights and affirming New Zealand's commitment to the International Covenant on Civil and Political Rights. That's the first point.

The second point that we extract from this is that Parliament's decision to make the Bill of Rights Act apply to the acts of the legislature, executive and judiciary aligns the responsibility for protecting and promoting affirmed rights under New Zealand law with the position on attribution of conduct to the state as a matter of international law.

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So if we look at ILC articles, the International Law Commission's articles, Article 4(1), so the Human Right Commission's authorities tab 43, you see there: "Article 4 Conduct of organs of a State." And this is the international law authority, your Honour, that we would refer to and say this is the general position as a matter of international law about why you would always see the judiciary as part of the state, or at least in responsibility terms.

"The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions." And so what we rely on this provision for is to say that this alignment, the clear alignment in our submission between the scope of section 3 of the New Zealand Bill of Rights Act and the international law position on responsibility facilitates compliance in a domestic context with international law and the international obligations that New Zealand has assumed. This is why in our written submissions we said trying to locate a particular entity of the state is a distraction, a juridical entity.

What has happened here is a much more elegant solution which is responsibility is aligned through section 3(a) and the position under international law as codified by the International Law Commission in article 4.1 of the International Law Commission's Articles on State Responsibility.

And we see this in operation in *Baigent's case*, for example. Justice Casey referred to section 3 as creating a focus on public responsibility which suggested to his Honour that, and I quote: "Appropriate remedies for breach could also be in the public law sphere," and his Honour goes on to say that this would fulfil New Zealand's commitment under article 2(3) of the International Covenant on Civil and Political Rights. The citation is page 691 lines 18 to 21 and you see there quite clearly that that entire paragraph starting from line 14 is useful, your Honours, because you have that linkage made express between where section 3 takes you as a matter of your responsibility and the way in which that facilitates, we would say, compliance with the obligation to provide an effective remedy.

And so we set quite a lot of store on this alignment and the fact that responsibility under the domestic law position is going to be broadly mirroring that under international law and therefore, in terms of compliance with international human rights obligations, including under the International Covenant.

You can see in a similar vein President Cooke, page 676 lines 41 to 44, Justice Hardie Boys page 702 lines 35 to 41 and Justice McKay at page 718 lines 27 to 40 and in my submission, it is no accident that the New Zealand Bill of Rights Act which was developed and drafted with international compliance in mind, we know that because of the long title, should mirror the international law position on the responsibility of states.

The third point is that section 3(a) is silent on the respective roles of the different branches in protecting and promoting fundamental rights. So, in our submission, it is in this sense that questions may arise as to the competence of each of those different branches and in our submission, it is well established that development of Bill of Rights Act remedies is primarily undertaken by the courts. This is precisely what happened in *R v Shaheed* [2002] 2 NZLR 377 (CA) as Dr Butler said in *Putua*. This is what happened in *Baigent's case,* it's what happened in *Taylor's* case when the declaration of inconsistency remedy was developed by the courts, or the power to make a declaration was recognised and there are other examples. But the short point is that it is the constitutional position in New Zealand that the courts will develop remedies for breach of Bill of Rights Act.

The related point is that the courts aren't the only actor that are responsible for remedies. Obviously Parliament has the ability, if it chooses, to legislate. It can supplement. It can change. It can exercise that power how it wishes and so it would be wrong to say the courts are the only actor, but they are the primary actor. The first mover, if you will, and Parliament, for example, with *Taylor's* case responded to a position developed by the courts by enacting legislation amending the Bill of Rights Act in the manner that provided a framework for the power the courts had recognised in *Taylor's* case and a process that would then be followed. So an endorsement if you will of what had been recognised.

There were some questions and exchange I think that Justice Williams initiated about the implications of the submissions that the appellants were advancing and I think that came in the context of submissions the appellant was advancing that were reasonably closely aligned to that third column, and therefore the

Human Rights Commission's position, and whether or not that meant that you would, my words now, necessarily have an issue around legislative breach, and we would simply endorse the Chief Justice's point which is that in our submission the position that's been advanced does not make it a logical necessity or corollary of our position that you would have those damages. As Dr Butler, in my view, quite fairly said there are quite obvious counter-arguments, he referred to a couple.

Another counter-argument that, in my submission, is relevant here is that if there is one area where Parliament has indicated a particular interest in New Zealand Bill of Rights Act remedies, it is in the declaration of inconsistency space where Parliament has stepped in and provided that framework and appears to have a particular interest in that remedy as it relates to Parliament because the breach is found by the courts, the declaration is made, the outcome, the response is for Parliament, and so that would be another indication, an argument could be made, along with the points Dr Butler made, that under our constitutional arrangements it may not be appropriate to go there. That's a different case but the arguments are there and could be developed. That would be an issue that a future court would perhaps need to decide.

So, your Honours, unless there are any further questions, those were the three points that I wanted to make and Ms Haradasa will address you on the fourth.

MS HARADASA:

E ngā Kaiwhakawā, tēnā koutou. Good afternoon your Honours. As Mr Kirkness said the Commission's fourth submission is that the remedy for public law damages focuses on the conduct of the state as a whole, or in Bill of Rights Act terms focuses on section 3 actors, and we say that differs from private law damages which obviously focuses on individual responsibility. In support of that overarching submission I would like to make two sub points, and just finally before I finish I would like to pick up on an exchange your Honour Justice O'Regan had with my friend Dr Butler earlier this morning, which I'll come to.

So your Honours, my first point is that the case before the Court today, as Mr Kirkness has said, is a case about section 3(a) of the Bill of Rights, and most specifically whether in a case involving impugned conduct by multiple state actors, the Court should disaggregate the different state actors for the purposes of assigning responsibility for the breach, Bill of Rights breach, or whether it should view the state conduct as a whole. Just to reemphasise, as Mr Kirkness said, this is not one of the more difficult cases where your Honours may have to deal with questions of whether the breach is due to the conduct of core state section 3(a) organs, or functional section 3(b) actors, or the even more difficult case where the Bill of Rights breach may be due to the conduct – the question is whether it's due to the conduct of a section 3 actor or private actor. So those, that latter type of case in particular, will likely require consideration of quite complicated questions of causality, materiality and attribution. But that is not today's case.

In this case, your Honours, the Commission's submission is that the *Baigent* remedy for public law damages requires you to focus on the aggregate. The conduct of the state as a whole, of all section 3(a) actors, and this is for two reasons. First, in our submission an approach that requires disaggregation of individual state actors sits awkwardly with the wording of section 3(a), which as my friend Mr Kirkness said, refers to the legislature, executive and judiciary as branches or parts of a greater whole ie the Government of New Zealand.

That is why, and this is my second point your Honours, the Commission says at paragraph 13 of our synopsis that in the Bill of Rights context this phrase "the Government of New Zealand" is really a synonym for the state, and in my submission, this is clear from the White Paper, which is in the Commission's authorities tab 67, and if I can just ask your Honours to please look at page 21, which should come up on the screen.

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It says: "What would the Bill of Rights do?" The Bill of Rights Act would be a statement of fundamental rights of New Zealanders, if you just scroll down please, … protected against the power of the state. Just right on top of –

WINKELMANN CJ:

Where is that?

MS HARADASA:

Just right at the top.

WINKELMANN CJ:

Got it.

MS HARADASA:

And you'll see just at paragraph 3.7 there: "The Bill would guarantee the rights and freedoms against the state, especially Parliament and the Executive." And I should say there's references to the state littered throughout the White Paper, but again at page 69 the White Paper observes that: "… Bills of Rights [generally] are thought of as documents which restrain the great powers of the state."

You will also find reference to the Bill of Rights Act applying to the state via section 3 in the explanatory note to the Bill at (ii).

WINKELMANN CJ:

Now could you just pause. I don't know why you seem to be much more effective in getting your voice completely into the microphone. Can you maybe move it a tiny bit away.

MS HARADASA:

Sorry your Honours.

WINKELMANN CJ:

It's just you're so highly effective and nobody else seems to be. I'm just finding you a bit loud.

MS HARADASA:

My apologies.

WILLIAMS J:

There's a certain proximity between your mouth and the microphone that Mr Kirkness couldn't really achieve.

WINKELMANN CJ:

So, page 69, Bill of Rights are generally thought of as documents which restrain the great powers…

MS HARADASA:

The great powers of the state. Just to complete that point your Honours, two further authorities which are not in the case on appeal, but we can provide electronic copies, which come from the legislative history, the first is the explanatory note to the Bill that became the Bill of Rights Act at (ii) and also in Sir Geoffrey Palmer's first reading speech in the Hansard. There's reference to the Bill of Rights Act applying to the state via section 3.

This brings me to my second point, which is what does this state as a whole approach mean for the causal inquiry. In the Commission's submission if the public law damages remedy is one against the state in the aggregate, then any inquiry to ascribe responsibility for the breach must also consider the state in the aggregate. It is trite that there must be alignment between the inquiry for breach and the inquiry for remedial responsibility, and that is why the Commission submits in the written synopsis that in a case like this where multiple section 3(a) actors are involved, a simple and we say principled framework is to ask whether but for the state conduct in the aggregate, the Bill of Rights Act breach would have occurred.

In my submission your Honours this framework is particularly appropriate for four reasons. The first reason is that we say this approach avoids the risk of distortion, which in our submission arises on an approach that requires fragmentation, and that risk of distortion arises because a fragmentation approach incentivises a plaintiff to focus on an executive actor in order to clear *Chapman*'s jurisdictional hurdle. It incentivises the Crown to focus on a judicial actor, because then only a declaration is at stake. We say both such incentives distort the analysis and do not reflect the factual inquiry that looks at all relevant state conduct in establishing the breach. We also say that neither incentive is conducive to an approach that seeks to give individuals practical effect to their firm rights.

Your Honours, I am conscious of the time, but I think this point was put best by Chief Justice Elias in her dissent in *Chapman* at paragraph 53. We were tight for space in our written submissions but we thought this paragraph was so important you'll see we've quoted it in full, and it starts line 4 of that paragraph: "In many cases." So Chief Justice Elias says: "In many cases, it will be difficult to separate out judicial breach of rights from breaches by other state actors, leading to arbitrary results and perhaps difficult questions of attribution or materiality. So, for example, delay may be partly the result of judicial conduct and partly the result of executive conduct … unreasonable search and seizure may result both from the granting of search warrants and their execution."

As her Honour goes on to say: "While *Maharaj* is generally viewed as a case concerning judicial breach … it could equally well be seen … as a legislative failure in the provision of appeal rights to enable the system to provide its own correction. Indeed, breach of human rights by officials or others properly within the responsibility of the executive, such as the police, may often be material to judicial outcomes. The public law damages remedy acknowledged to be available in respect of such breaches may properly be claimed unless the claim is an abuse of process." And this is the key point really. "It is necessary to recognise that the distinction between judicial breach and breach by other state actors for the purposes of remedy may be elusive in practice and productive of arbitrary outcomes."

If I can ask your Honours just to, if we can scroll down slightly thank you, footnote 125, because I think it is worth noting that her Honour Chief Justice Elias predicted the very sorts of difficulties that are now before this Court in *Putua* and *Fitzgerald* when she talks about if a fragmentation approach is taken how difficult it would be to distinguish 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.

WINKELMANN CJ:

May I ask you a question about *General Comment No 31*.

MS HARADASA:

Yes your Honour.

WINKELMANN CJ:

About the remedial response, and Mr Kirkness made the point that *General Comment No 31* directs both an individual and a systemic remedial response. So what does *Chapman* mean for that, and what does the need for a paragraph 17 remedial response mean for what we need our processes to do? Are there any incentives that operate either way. I'm just trying to fit paragraph 17 and the need for a systemic – because a system needs to understand how it's gone wrong.

MS HARADASA:

Yes your Honour, and perhaps in my submission I think focusing on state responsibility I would say is more conducive to that, and this is the point I was going to make later on, but Professor Kent Roach of the University of Toronto Faculty of Law has written a bit in this area. This is not in the authorities but I can provide it to you. In 2021 a book called *Remedies for Human Rights Violations* Professor Roach defends the public law understanding of constitutional damages, Charter damages, state liability, rather than a constitutional tort approach that is taken in the US, and the reason for that he says is because that recognises that many human rights violations are

multicausal and systemic. He says: "The traditional tort focus on the conduct of individual officials is at the odds with the bureaucratic nature of the modern state, where many rights violations are the result of systems failures … many human rights violations are caused by complex state systems. The imposition of liability for damages on the state avoids problems of over-deterrence of individual officials. It also allows the state to use its own expertise and knowledge to take a range of steps that can prevent future violations."

Perhaps in more colourful language in a 1993 article Lorne Sossin, now Justice of the Court of Appeal of Ontario, wrote an article about prosecutorial error and in particular he said: "However, the point of constitutional liability for prosecutors, in my view, is not to bring the rotten apples in line, but to keep watch on the barrel. While it may be the actions or omissions of an individual prosecutor that give rise to a constitutional tort claim, it is the Crown prosecutorial system that should be called to account for such breaches."

I suppose where I'm getting with that is in my submission by understanding the *Baigent* remedy as a public law remedy in the public law sphere against state it allows – because the state is being held accountable as a whole it allows the state, I suppose, to look inwards because of those –

WINKELMANN CJ:

I think your submission is that if you're focusing your inquiry as to whether the state as a whole has failed, then it's more naturally supportive of a systemic inquiry.

MS HARADASA:

Exactly your Honour, that's what I was meaning to say, thank you.

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WILLIAMS J:

But there's a – the state isn't the only complex system in Aotearoa or anywhere else, and a lot of torts relate to complex system failures, not just climate

arguments, but more broadly commercial, you know, leaky buildings, so on and so forth. So although the state is a particularly complex system, it's not unique in that regard, yet tort law focuses on individuals. Why is the state so special, why are human rights so special, I guess? Because the danger is that this focus on the corporate whole leads to lazy analysis and that needs to be avoided, or actually you'll contribute to the system failures, not solve them, so how do you deal with that?

MS HARADASA:

If I could just confer with Mr Kirkness, who is, I think, going to give me a helping hand.

WILLIAMS J:

Well, he didn't help you.

MS HARADASA:

Thank you, your Honours. If I can take the Chief Justice's question about paragraph 16 and 17, just to be clear, we said both those aspects are required as part of the full reparation obligation.

WINKELMANN CJ:

Understood that.

MS HARADASA:

And the courts within that, you know, domestic competencies might be able to do some or all of that.

In terms of, I take your Honour Justice Williams' point, I think I would – we would come back to the fact that New Zealand has accepted in full their obligation under Article 2(3) to provide an effective remedy and in our submission that requires a – or I suppose if I take it from the perspective of the victim, Mr Fitzgerald here, perhaps that the best way to look at it, I would assume he would think it doesn't matter who. If you asked Mr Fitzgerald what went wrong,

the state got it wrong and I think his Honour Justice Simon France said that on re-sentencing, the state owes him a duty.

WILLIAMS J:

Yes. In a sense this, the facts in this case, are simple because this is a non-derogable right that stares you in the face, in fact slaps you in the face.

MS HARADASA:

Yes.

WILLIAMS J:

But this, there will be a lot – there are so many other ways in which BORA can be breached, ways in which the complex actors interact and attribution will be important. We have to, however we build this, if we build it at all, it has to be responsive to that reality, too. Not just torture and whatever the other phrase is in section 9, "cruel punishment".

MS HARADASA:

Understood, your Honour. I suppose one point and coming back to Dr Butler's point that's come through about *Putua* is that importance of actually establishing a breach and in many other rights, non-section 9 rights, you will have that section 5 filter as well. Because you can limit rights, generally speaking, as long as it's demonstrably justified and prescribed by law and reasonably proportionate, so maybe that –

WILLIAMS J:

That's your filter, you say?

MS HARADASA:

– allows analysis. And to come back, I suppose, to the tort law point. I think we do see it as important that the *Baigent* remedy is one in the public sphere rather than one sourced in the private law of obligations and that's because in the law of obligations the unit of enquiry is that separate legal entity. The responsibility model is individualistic. An individual defendant is a tortfeasor, is

only held responsible for the impact that their own violation of the law had on the world as they found it. But in Bill of Rights cases, the responsibility model is a collective one and, of course, your Honour, the state acts through the vehicle of individuals, so in that sense all Bill of Rights infringements can inevitably be traced, I suppose, to human error, but in our submission one of the functions served by Bill of Rights Act, as stated in the White Paper, is to protect individuals from the great powers of the state. So we say, through section 3(a), the Bill of Rights Act holds the government of New Zealand as a whole responsible and accountable for the rights breaching conduct of its constituent branches.

WINKELMANN CJ:

Your answer to my question probably is simply that no particular response in terms of analysis is better for arriving at, understanding what, how, the system failed, but the overriding responsibility under Article 2 is to provide an individual with a response to their, to the wrong that has been committed for them?

MS HARADASA:

Yes, your Honour.

WINKELMANN CJ:

And that most, the thing that is most conducive to that is state responsibility?

MS HARADASA:

Yes, your Honour. So I think I've covered all of my points and so just finally, I'm conscious of the time, your Honour Justice O'Regan very early this morning asked my friend Dr Butler whether his liability C pathway jars, I suppose, with *Chapman* and if I could just quickly take that question because in the Commission's submission the liability C pathway is available in this case even if *Chapman* is upheld and that's for the two reasons, or the two points that we make at paragraph 33 of our synopsis, which if I can quickly summarise.

First, and as I understand was accepted eventually by all parties in *Putua*, *Chapman* does not preclude findings and declarations of breach by a judge.

So as part of the factual enquiry to identify a breach you do need to look at all relevant state conduct and *Chapman* does not preclude that. Second –

WINKELMANN CJ:

Well, in fact, in some ways it requires it.

MS HARADASA:

Yes, your Honour. Even if *Chapman* is held to be good law in this case where there are multiple state actors implicated we say that the presence of an executive actor as part of the relevant collection of state conduct means there is no jurisdictional bar to ensuring Mr Fitzgerald, to ensure Mr Fitzgerald an effective remedy including compensation. Indeed, in our submission, the Court should award an effective remedy in order to ensure compliance with the Bill of Rights Act's twofold purposes, namely, to protect and promote fundamental rights which of course requires the courts to give individuals the full measure and practical effect of those rights and (b) to avoid a breach of ICCPR obligations which in the light of long title (b), in our submission, courts should strive to avoid.

So, in our submission, *Chapman's* jurisdictional bar to compensation would only prevent the courts from fashioning an effective remedy if a rights breach was attributable to a judge alone and given the terms of articles 2(3) and 9(5) of the International Covenant, this would ultimately result in New Zealand being found in breach of its international obligations.

GLAZEBROOK J:

Well, when you say "fashioning a remedy", of course there are lots of remedies for judicial breaches. We're only talking about damages.

MS HARADASA:

Yes, your Honour. I suppose I should have said, to be clear, I'm talking about a case where the, if an effective remedy does require compensation to be effective and to talk about a point that Dr Butler mentioned first up, in *Taunoa,*

this Court said that section 9 breaches, that's the type of case where compensation would almost inevitably be required.

WINKELMANN CJ:

So really, I think your point here is that on the Court of Appeal's analysis even, the prosecutor's decision was clearly a contributing factor to what happened. Even if you accepted that the judge's contribution was significant, or more significant, *Chapman* would not preclude providing a remedy to more significant. *Chapman* would not preclude providing a remedy with reliance on the prosecutor's role. In fact Article 2(3) would suggest that it should be.

O'REGAN J:

But that's pathway A, isn't it, not pathway C?

MS HARADASA:

I suppose the point we make is –

WINKELMANN CJ:

Possibly it is, yes. It doesn't really matter though.

O'REGAN J:

No, well, it doesn't matter I suppose.

MS HARADASA:

But any award I think from my perspective should be directed at that state liability arising from the breach.

WINKELMANN CJ:

I mean, that is your fundamental submission.

MS HARADASA:

Yes, yes, not singling out a single actor I suppose.

WINKELMANN CJ:

And so whether it is pathway A or pathway 3, pathway A or C, whatever, the first or the third, your point is that *Chapman* doesn't preclude it even if the judge is a more significant contributor to the –

MS HARADASA:

Yes, your Honour.

WILLIAMS J:

But it does create the need for contortionate behaviour which you say is, would be better avoided if we could avoid a distorted set of principles and laws.

MS HARADASA:

Exactly and I think paragraph 53 of Chief Justice Elias, I would place a lot of weight on that.

WINKELMANN CJ:

Right, so that's your submissions?

MS HARADASA:

Yes, thank you, your Honours. Unless your Honours have any further questions, those are the submissions for Te Kāhui Tika Tangata.

1610

WINKELMANN CJ:

Thank you. Just before we adjourn, Ms Laracy, we're looking at the time then. You okay tomorrow?

MS LARACY:

Yes.

WINKELMANN CJ:

You don't need us to start early or anything like that?

MS LARACY:

No, Ma'am. As I said in my memorandum yesterday, we do anticipate that the Crown will need comparable time. We anticipate it will take a full day, so we may be, we would aim to be, hope to be finished by four, quarter to, maybe at 3.30.

WINKELMANN CJ:

It would be very good if you were.

GLAZEBROOK J:

Need reply.

WINKELMANN CJ:

Need time for reply.

O'REGAN J:

Your second bit was better than your first.

WINKELMANN CJ:

Well, we will need time for reply, so you would have to be finished by –

MS LARACY:

3.30.

WINKELMANN CJ:

3.30. Well, would you like us to start, or we could take a shorter lunch hour, but should we start earlier?

MS LARACY:

It may be, depending on the extent of the questioning, that the time the Crown needs, with any degree of precision can only be ascertained tomorrow. We are entirely in your hands of course. If you wish to start at say 9.30 or assess that at the lunch –

WINKELMANN CJ:

I think we should start at 9.30.

WILLIAMS J:

Yes.

O'REGAN J:

Yes.

MS LARACY:

Thank you. As the Court pleases.

WINKELMANN CJ:

Because extending the time tomorrow evening will not be possible.

MS LARACY:

As the Court pleases.

WINKELMANN CJ:

All right. We will take the adjournment.

COURT ADJOURNS: 4.11 PM

COURT RESUMES ON FRIDAY 21 MARCH 2025 AT 09.33 AM

WINKELMANN CJ:

Good morning, Ms Laracy.

MS LARACY:

Mōrena koutou. This morning, your Honours, I will cover the matters in the submissions that deal with the constitutional division of responsibility between the prosecutor and the court and its application in this case. Mr Varuhas will address the Court on causation, the nature of *Baigent* damages and judicial breach, the importance of identifying the relevant Bill of Rights actor and *Chapman*. If there is overlap on those issues arising from the Court's questions, I may well, with the Court's leave –

WINKELMANN CJ:

Refer to him.

MS LARACY:

Request that those matters be deferred to Mr Varuhas.

WINKELMANN CJ:

Yes.

MS LARACY:

And as with my learned friend, I may seek the Court's permission to sweep up at the end, if that is necessary, and that would be brief.

WINKELMANN CJ:

Yes, that's fine.

MS LARACY:

Thank you. I have this morning provided with you – provided you with a copy of a road map or a summary of the argument that I intend to make in oral submission, so as not to be repeating my written submissions, and focusing on

the key points that have arisen from my learned friend's submissions. So you have that and I will endeavour to follow it reasonably closely, to assist the Court.

So to start, the summary of the Crown's argument. The issue is whether the Crown, via the prosecutor, can be responsible for the sentencing breach of Mr Fitzgerald's section 9 Bill of Rights right, either together with the Judge or separately, and the Crown's answer to that, as with the Court of Appeal, that as a matter of both fact and constitutional architecture, the answer is no. Either separately or together, the answer is no, we say.

If I can ask the Court just to focus, to start, on the words of the particular right and the specific means by which it is claimed the breach occurred. The right of issue is section 9 which is the right, in this context, not to be subjected to disproportionate punishment.

Justice Ellis found that Mr Fitzgerald had been subjected to a breach of section 9 due to two things: one, pursuant to the sentence; second, for a period of months prior to the sentencing when he was on pre-trial remand. That total period of time is relevant to the section 9 equation.

Both sentence and the custody that follows and pre-trial custodial remand are, in New Zealand, exclusively judicial functions and this is because of the fundamental constitutional division of responsibility between judges and other players in the system. And I just refer the Court on this to our submissions from paragraph 18 onward, which contain unambiguous statements to this effect from courts in other jurisdictions with similar legal arrangements and constitutional architecture to ours, including statements to this effect in the mandatory sentencing context, especially from the Canadian Supreme Court.

And just as a positioning statement, I remind the Court that in the *R v Bertrand Marchand* 2023 SCC 26, (2023) 487 DLR (4th) 201 case referenced in our submissions at paragraph 29, the Canadian Supreme Court suggested that the idea that a prosecutor might in any way be responsible for a sentencing outcome, or share the responsibility to ensure an appropriate result at the end

of the post-conviction, would be considered intolerable and shocking to Canadians.

WINKELMANN CJ:

So that's at – which paragraph of your written submissions?

MS LARACY:

That's my submissions at paragraph 29 and I do –

WINKELMANN CJ:

I was just going to ask you, if you could take us to understand what the context, the context in which that was made, because I was thinking that some of those cases at least were made in the context of rights consistency, judicial review of the legislation?

MS LARACY:

They are indeed.

WINKELMANN CJ:

As to whether a prosecutor can bring that into, bring the legislation into compliance.

MS LARACY:

That's correct and if it's suitable to the Court, you'll see that point 5 on my framework is the constitutional framework and what I hope to do, having set the scene for this case prior to that, is at paragraph 5 on my framework go through in some detail explaining those cases and taking the Court to the paragraphs that, in my submission, are most useful. So I will come onto that.

GLAZEBROOK J:

Can I say that looking at that quote on paragraph 29 it is odd in the New Zealand context, because we certainly expect in the New Zealand context to have assistance on sentencing. I know that wasn't the case in the past and I gather is not so much the case in the UK even now.

MS LARACY:

Yes, your Honour.

GLAZEBROOK J:

But we do expect and are given very good assistance on sentencing from both, submissions from both prosecutors and defence.

MS LARACY:

And there is no difference in the Canadian context either. Submissions are made on sentence. The –

GLAZEBROOK J:

Well, that's just not right then, is it, that quote at the end of paragraph 29, in the context of a prosecutor's duty to put the information before the Court, including cases and including a suggested sentence. That was controversial, I think, when I first started but is certainly not controversial now.

0940

MS LARACY:

What the Court is talking about in the context of *Bertrand Marchand* is whether the way the Crown elects to charge could be relevant to whether either the legislation itself or a particular sentence is grossly disproportionate. So can the way the Crown chooses to put a charge before the Court, including choosing to proceed in a way that engages a mandatory minimal penalty, can that be a relevant factor in saving the legislation or the, or is it relevant, and is it relevant to the question of gross disproportionately and who is responsible? And the Canadian Supreme Court cases are consistent on this principle of very clear statement of the division of responsibility when it comes to the act of sentencing.

WINKELMANN CJ:

So what do you, so that's kind of an argument that the discretion, any discretion a prosecutor has in a Canadian model is not sufficient to save the legislation in terms of Charter compliance?

MS LARACY:

Yes.

WINKELMANN CJ:

What do you say to the point that I am sure is going to be made against you, that that's a distinguishable scenario?

MS LARACY:

In terms of looking at legislation as opposed to particular cases?

WINKELMANN CJ:

Well, the context is different, isn't it? The Court is addressing whether the, whether it is fair to expect a prosecutor to always, whether the prosecutor's discretion is sufficient to always bring the legislation into compliance with the Charter.

MS LARACY:

And the Court is very clear that it is never going to be a sufficient mechanism to, to save legislation which is so over-broad in the range of conduct which it captures that in a foreseeable range of cases, not just exceptional cases, but in a foreseeable range of cases, it may result in grossly disproportionate sentences and the reasoning of the Canadian Supreme Court applies equally to, applies equally to individual cases and some of these cases are ones where there have been claims that the sentence itself, quite apart from the legislation, was grossly disproportionate.

WINKELMANN CJ:

So I'm thinking it's a very different constitutional context because there the Court has the power to invalidate the legislation through judicial review and is saying, is saying, in my understanding of these cases, you know, rule of law requirements as such, you can't place upon the prosecutor this heavy duty to bring this legislation into rights compliance on an ongoing basis. That's just placing too much upon the prosecutor in our constitutional settlement.

MS LARACY:

That, that is correct, your Honour and the Canadian authorities suggest that the first port of call must be to challenge the legislation. But there is never a suggestion in the Canadian authorities that that's a result – that where a grossly disproportionate sentence does result in the context of a mandatory minimum sentencing regime, there is no suggestion that it could ever be the responsibility of the prosecutor.

GLAZEBROOK J:

So Parliament was wrong then to say that that was a proper safeguard because that was absolutely clear from the parliamentary materials that this is what they saw as the safeguard and in fact from anecdote and also looking at *Rowe's* case, for example, that is what the prosecutors actually took upon themselves in accordance with the direction from Parliament, at least in terms of parliamentary purpose.

MS LARACY:

Well, I do have a considerable submission to make on that and that's what I propose to assist the Court with at section 3 of my outline. But in short, my submission on that is that my learned friend and potentially this Court in *Fitzgerald* the first time round overstated –

GLAZEBROOK J:

That's rather a bold submission.

MS LARACY:

It is.

GLAZEBROOK J:

Given that we are not going to change.

WINKELMANN CJ:

Well, can we just see what the submission is?

GLAZEBROOK J:

Yes.

WINKELMANN CJ:

I think you are ahead of me. I haven't actually worked out what the submission is yet.

MS LARACY:

Overstated, overstated the, overstated the role of that as a safeguard mechanism and secondly, perhaps Parliament as well as other commentators on that safeguard have not realised what the implications of having a screening test between first and second appearance in practice means in terms of the material that is possibly available in the context of a highly nuanced, sophisticated, very difficult evaluation that needs to be made, namely, is this sentence going to be severe or disproportionate, or is it going to meet that very high threshold of grossly disproportionate? And that's an extremely difficult nuanced question that our Court of Appeal has struggled with on multiple occasions and that the Canadian Supreme Court has had to develop an extremely sophisticated and detailed analytical framework to identify whether legislation or sentences are going to be grossly disproportionate.

WINKELMANN CJ:

So, can I just unpick your statement?

MS LARACY:

Yes.

WINKELMANN CJ:

It wasn't really that this Court or Mr Butler overstated it because in fact all Mr Butler and this Court said was well, when you look at the parliamentary record, it's clear that the expectation was that the prosecutor would exercise the screening role. Your point is really that Parliament proceeded upon a mistaken basis as to the ability of the prosecutor to do that.

MS LARACY:

That is part of my submission. It is also that the essence of my submission on this which is what I will come to, is that if that was the role that Parliament intended, then that's a very, very significant legal safeguard and this Court would, especially if it was to invert, as my learned friend says, the constitutional order, this Court would surely require such words to be expressed in the legislation and I do intend to develop that point.

WINKELMANN CJ:

Thank you.

WILLIAMS J:

The logic of that though is that prosecutors are absolved of compliance with BORA and that's inconsistent with section 3.

MS LARACY:

Well, the logic, the logic is not. The logic, with respect, is that it's an early screen for whether there is at best –

WILLIAMS J:

Well, that's about how you have to do it, how far you have to go. But your argument is you don't have to do it at all, it's the judge's problem relying on, what's the case, *Marchand*, as if the prosecutor has no role here and no BORA responsibility. It's just the judge and that's inconsistent with section 3(a), isn't it?

MS LARACY:

Well, there is a question as to whether at that early screening stage it is a point at which the engagement of any Bill of Rights are grossly can be assessed.

WILLIAMS J:

Yes, how well it could operate at that level is a fair point. That's a practical question about just how much information can be really expected to be available to a prosecutor and the police at that stage between review one and two.

But I'm dealing with the in principle question. You put the submission that there is nothing that the prosecutor can be expected to do in law in terms of section 9. It's all the judge.

MS LARACY:

My submission is that that provision was primarily directed in the very limited words that we actually have in Hansard and I think there's only three very brief references that it was peer review. One of those references talks about as a guard against overcharging.

WILLIAMS J:

But you do accept that the prosecutor carries a BORA responsibility?

MS LARACY:

I do.

WILLIAMS J:

The guidelines say that.

MS LARACY:

I do accept that, but what I do also go on to develop is that what the prosecutor's BORA responsibility is not a responsibility, it's not a generic responsibility. It's not a responsibility in the ether. It's a responsibility that is engaged when a prosecutor is faced with a particular decision and particular information.

WILLIAMS J:

Yes.

MS LARACY:

That would reasonably appear to engage a right in that context. So, and it's not just section 9. It might be the right to ensure that there is no unlawful discrimination.

WILLIAMS J:

Sure.

MS LARACY:

It might be fair trial rights.

WILLIAMS J:

Or no unlawful withholding of information, for example, to cite a case.

MS LARACY:

Yes.

WILLIAMS J:

But, and as an abstract proposition, it's hard to really take – to cavil with what you're saying. The prosecutor can only do what the prosecutor can do. He or she is not the only player in this game and it's a complex system intention. So then it becomes a question of degree.

MS LARACY:

It becomes a question, that's right.

WILLIAMS J:

In fact and in context, not a question of principle.

MS LARACY:

That's right and I do intend to take the Court through in some detail what the prosecutor can reasonably be taken to know at different states in this process. 0950

WILLIAMS J:

Right.

WINKELMANN CJ:

It will be very helpful, thank you.

MS LARACY:

I'm close to finishing my summary then. The Court, this Court, has said that what happened here was an error of law in sentencing made by the Judge, and

I refer the Court to the Chief Justice's decision at paragraph 140. The conclusion of all of the Judges in the minority reasoning on this was to the same effect. The Judge made an error of law in sentencing and ordinary sentencing principles apply and applied at the time, and the other reference is that, if necessary, I would offer paragraph 232 of your Honour Justice O'Regan and Justice Arnold's judgment and 252 of Justice Glazebrook's judgment.

GLAZEBROOK J:

Can you just slow down, or are you going to take us to this later?

O'REGAN J:

It's in here.

GLAZEBROOK J:

No, no, I understand, but –

WINKELMANN CJ:

Do you want to look at it first?

MS LARACY:

Perhaps if we go to the clearest statement of it, which is at paragraph 140 of the Chief Justice's judgment in this case.

GLAZEBROOK J:

Well, she wasn't the majority, was she?

WINKELMANN CJ:

Well, I was part of plurality, I suppose.

MS LARACY:

The – my submission is that the Court –

GLAZEBROOK J:

Well, that's why I'm asking you to –

MS LARACY:

That the majority of the Court concluded that what had gone wrong in this case was that it was an error of sentencing and the responsibility for that, which was not – is not – was not a question in, obviously, in *Fitzgerald v R (No 1)*, it wasn't considered to be a live issue, but it is implicit and in the judgments that the sentencing was –

GLAZEBROOK J:

Well, can you just take us to the passages –

MS LARACY:

140.

GLAZEBROOK J:

– which, well, that's 140 which is one judgment.

MS LARACY:

Yes. So what I'd just like to point out here: "The sentencing judge was not required [to do this] ... he proceeded on the basis of an error of law. The sentencing Judge is not, of course, to be criticised for this, given that the argument that has [been successful] in this Court was not advanced before him." And then if I can take your Honours to perhaps 232 – perhaps not 232.

WINKELMANN CJ:

I think your junior should be doing some work now.

MS LARACY:

Sorry, to 252.

WINKELMANN CJ:

252.

MS LARACY:

Is the note I have. This is from Justice O'Regan's judgment: "... should have been sentenced in accordance with the ordinary sentencing principles, taking

into account his mental health issues. I agree his case should be remitted to the High Court for this to be done, as his counsel has asked." In my submission, it is implicit in that, that it was for the Judge to get it right at the first instance and it was for the Judge to correct it on a re-sentencing. In fact, that is, I think, the decision of Justice Glazebrook.

GLAZEBROOK J:

Just that the Chief Justice took a different view of what that sentencing should entail, I'm not sure that it matters for your purpose, it's just that if I keep telling the law clerks we actually need to be referred to a majority, which means when there are multiple judgments we need references at least to get to a majority. So it's implicit in 252 that it's for the Judge? Naturally, I can't remember what I said.

O'REGAN J:

That is what you said, 252. 252 was you.

GLAZEBROOK J:

Oh, was it?

O'REGAN J:

Yes.

GLAZEBROOK J:

Well, then we're only at two now, so we need the joint judgment.

WINKELMANN CJ:

But, I mean, it's not a surprising thing that we're saying there, is it.

WILLIAMS J:

No.

WINKELMANN CJ:

So I think we can –

GLAZEBROOK J:
Because the legislation was interpreted differently.

WINKELMANN CJ:
Yes, I think that's not a surprising thing.

MS LARACY:
Perhaps I could –

WILLIAMS J:
You wouldn't overturn a sentencing decision on the basis the prosecutor got it wrong. That would be novel.

WINKELMANN CJ:
Yes.

WILLIAMS J:
I don't think it necessarily helps you much.

MS LARACY:
Well, no, but that is essentially my learned friend's proposition here, where he has said that the sentence was not the result of judicial power.

WILLIAMS J:
Right.

MS LARACY:
Well, if it wasn't the result of judicial power, it must have been and in his submission it indeed was, the result in this unusual context of prosecutor power.

GLAZEBROOK J:
I understood the suggestion to be that it was materially contributed to by the prosecutor, not that it was solely the prosecutor?

WINKELMANN CJ:

Yes perhaps, I think, the submission was that as the Judge understood and as everybody understood the law at the time, the way the charge was laid meant that the Judge had no power to do anything other than to impose that sentence, so he was kind of acting in a ministerial, almost a kind of an administrative role, because of how the legislation was constructed, so the more potent causal factor was, in fact, the prosecutor's decision as to how to charge. On the legislation as it was understood, accepting the declaratory theory of law, but saying in reality as the Judge, as the facts were on the ground at that time, this was the situation.

MS LARACY:

And a couple of things in response, your Honour. Of course, the Crown's position on the Court of Appeal's analysis is that such a proposition, that the Crown prosecutor was materially let alone significantly responsible for the sentencing outcome, is constitutionally anathema, and in terms of that, if I could just –

WILLIAMS J:

Yes, it would be on a conviction appeal, but not on a sentencing appeal. That's the point. I just don't see why that, in principle, helps your argument.

MS LARACY:

If the Court accepts that sentencing in all contexts is a judicial act, must be and is a judicial act, subjecting someone to punishment in the context of a sentencing process is a judicial act, and judicial independence and rule of law principles require it to be an independent sole judicial act, then there can be no role for the prosecutor to have contributed. The –

WILLIAMS J:

Your point is the judges can't have it both ways. You can't have judicial immunity to protect the sanctity of the Judge's sentencing role and then, when you're looking for someone responsible, blame the prosecutor.

MS LARACY:

Well, that would be my point. Mr Varuhas will obviously develop that, but yes. I made the submission that my learned friend had suggested that in this case, so this context, the sentence was not the result of judicial power and I just refer the Court to paragraph 16 of my learned friend's submissions.

WILLIAMS J:

Paragraph 15?

MS LARACY:

Paragraph 16. With respect, the axiom that sentencing: "... is not the result of prosecutorial action ..." in this context did not apply.

WINKELMANN CJ:

So I do think that the position of the appellant is that in just about every case it is the result of judicial power, but in the very particular statutory situation here, it wasn't. This is a very peculiar thing, it's one of those rare cases where Parliament has enacted legislation which effectively requires the court not to act as if it is a court, but rather just simply administratively act, on the legislation as understood at the time, and if it was in another legal context with a written constitution the court may well, although there are different approaches in different areas, may well say "that's not a judicial act, you're actually just making judges behave like nodding automatons".

MS LARACY:

I certainly understand the argument. The Crown would say that on the wording of the legislation before, engaged in this case, the Sentencing and Parole Reform Act 2010, that proposition of essentially what my learned friend calls "constitutional inversion" is not available. That extremely clear words would be required if that was the case and there are indicators in the text and the parliamentary materials that show that the higher courts were, indeed, the ones that were intended to supervise the outcomes on third strike sentencings.

1000

WINKELMANN CJ:

So your point is that if it was intended that at the third strike it was the prosecutor's responsibility to supervise to avoid section 9 breaching outcomes, that would have been put in the legislation?

MS LARACY:

Yes. Yes, and there would have no doubt been a test for that, and the legislation would have had to grapple in a detailed way with the concern that that point responds to, which is over breadth, whereas instead as we know –

WINKELMANN CJ:

Is the issue with that submission that it's really focusing on parliamentary intention as opposed to how the legislation operated?

MS LARACY:

It focuses on the fact that a deliberate decision was made post the select committee to ensure that a much wider and more certain range of offences would be captured by ensuring that it was offence-based, as opposed to sentence-based. Originally, as the Court will recall, the three strikes, the third strike was proposed to be one that might be, that would be triggered where the actual sentence was over five years, and Parliament by its majority was concerned that that would mean that judges might sentence too low or just inevitably because of proportionality principles in sentencing many people convicted of what Parliament intended to define as "serious violent offences", which included indecent assault, would not be captured. So instead it went for the black and white rigid definition of a "serious violent offence" being one that is from that lengthy list of about 40 offences and the trigger is conviction. So it's only if the person is convicted obviously, which is also a judicial process, that the sentencing is engaged, but the expectation was, of course, that mandatory sentences in most of these cases would be imposed, and it would be very exceptional where there were cases that escaped, and I will go –

WINKELMANN CJ:

Sorry, I was just going to ask you a point of detail of fact, which you might be able to assist me with because I haven't picked it up. In the select committee report it notes: "Cabinet also agreed on 1 March 2010 that the Commissioner of Police would direct that all prosecutions involving charges that qualified for stage three …" that all occurred, did it, this would "… be referred to the Crown Solicitor for peer review. This would not require any legislative change". That all occurred, the Commissioner of Police did direct.

MS LARACY:

Yes. Now that's a very unusual thing in itself and if I can just go back, and this is in the select committee report, the explanation for this was that –

O'REGAN J:

I think we're jumping ahead of the summary here. We probably have to wait for the submission.

MS LARACY:

I am, yes. I do…

WINKELMANN CJ:

Oh, I thought we'd finished the summary.

MS LARACY:

I do…

WINKELMANN CJ:

Yes, okay, it was just a detail point.

MS LARACY:

That did happen and it is the MOU, and that was a police-led process.

WINKELMANN CJ:

Yes, so you just go back to your order. I'm sorry if I took you out of your order.

MS LARACY:

That's all right, thank you. I will just complete my summary and then it is all to be unpacked in more detail. The High Court Judge and the appellants responded to the constitutional objection that the Crown raises, and that the Court of Appeal identified, by saying that the charge pursued by the Crown exposed the defendant to the risk of disproportionately severe punishment. I don't want to spend too long on this. That was paragraph 107 of the High Court Judge's decision. On that we say that creating the occasion for risk could never pull a prosecutor into the scope of section 9 for a number of reasons. First, the right is breached by the act of sentencing, not by the exposure to the risk. The imposition of punishment is the act of sentencing. Nor is it disproportionate punishment imposed by judicial remand in custody at any point. Both of those acts, remand and sentencing, are judicial, both are determinative of rights, and as the cases in this Court –

GLAZEBROOK J:

Determinative of, sorry, I didn't catch it, determinative of?

MS LARACY:

Of rights. Whereas the point –

GLAZEBROOK J:

Sorry, do you mean determinative of the requirement to detain? I'm just not sure where rights in this context –

MS LARACY:

Well liberty, liberty rights.

GLAZEBROOK J:

Well they affect liberty rights, is that the…

MS LARACY:

The right to be presumed innocent until proven guilty. The point is, and the cases are very clear on this in the judicial, in the constitution division of

responsibility, proffering a charge, putting up a charge determines nothing. It submits the matter to the Court's jurisdiction for consideration and disposal in judicial manner, whether that's verdict, imposing, making, finding a verdict, or supervising the verdict, coming up with some other method of disposal or sentencing. Those are all the judicial acts that happen upon the prosecutor putting up the charge. My submission is that the convoluted steps that are necessary in crafting a duty on the prosecutor to put aside their independent and ordinary charge decision process in order to ensure that the judge does not breach the law, has no logic or air of reality to it, or legal principles to support it. Importantly the Court of Appeal, in my submission, correctly said at paragraph 102 of its judgment, and this is in our submissions at paragraph 32, that the propositions underlying that alleged duty are unnecessary, and the reason they're unnecessary is that the Supreme Court has confirmed this was an error by the Judge in sentencing, and the Crown to conclude submits that the constitutional role of the Court is therefore the complete answer in this case. The claim in respect of the actions of the prosecutor were founded on the actions of the prosecutor can't succeed and the Crown adopts the careful reasoning of the Court of Appeal in its entirety. We say the Court must focus on what is the wrong here, where is the legal wrong. That must be the sentence.

But I do need, because it is the basis of the claim for liability, to engage with the relevant wrongs that my learned friend has suggested occurred at the hands of the prosecutor, and in essence this is the submission that the prosecutor unlawfully sought an egregious rights-breaching outcome when another, and then second, when another suitable charge was available, and third, knowing that once the charge was put up the Judge's hands were bound, and in my submission each step in that reasoning is wrong.

Now I'm moving on to matters of fact and chronology. Your Honours will have the chronology, which is by no means complete in terms of everything that happened in this case, but it's a fairly useful outline, and that's annexed to the back of my submissions.

WINKELMANN CJ:

Can I just ask you, I'm sorry, can you just go through those steps again, because that's an important part of your submission isn't it? That the prosecutor egregiously sought an inappropriate outcome through the charge. Or are these in your written submissions?

MS LARACY:

No, these are principles which perhaps – this is the understanding we have, and I can refer the Court –

WILLIAMS J:

It seems accurate to me. The argument is –

MS LARACY:

Okay, thank you.

WINKELMANN CJ:

Yes, I'm just asking you to repeat it because I didn't catch it.

MALLON J:

Unlawfully sought an egregious rights outcome knowing another charge was available and it only –

WILLIAMS J:

And knowing the Judge's hands were bound.

MS LARACY:

Knowing the Judge's hands were bound. My learned friend has, obviously this is my learned friend's case, the appellant's case, and it has been expressed in different ways in different parts both in his road map and in the appellant's submissions, so that's my attempt at fairly trying to summarise for the Court the three sort of critical elements to found this route to liability, and what I hope to do is to be able to, by taking the Court through various matters of the record, address those things.

1010

Now just to set the scene, this is paragraph, 2. I don't so much have a submission to make on this, but I do think it's important that the Court hears from the Crown on that early stage where the Crown Solicitor who does not have carriage of the file undertakes the peer review function that is referred to in the MOU with the police and I am, in my submission that it is relevant to the Court to just have a good understanding about what is available at that stage in the process and to be reminded that that is after arrest and first appearance and before second appearance and long before most of the material that will be relevant for trial and certainly relevant for sentencing is available.

As we have said in our submissions, what will generally be available at that point will be matters of evidence so the prosecutor can assess evidential sufficiency. There will be very little material, especially that relates to the public interest, especially bearing in mind that the Crown prosecutor who was doing the peer review is not part of the police and this is a peer review of a police charging decision. So I suggest that a prosecutor will have, they will have a summary of facts, they will have a charge document which has been filed in court. That document will set out what the maximum penalty is. The prosecutor will have the conviction history and from that will be able to see what the broad pattern, or lack of pattern of offending is and I just, just in terms of just a summary of that pattern of offending, this Court, most of the members, are very familiar with this case so you may not need, but there is a useful summary of the conviction history and pattern in my submission.

MR BUTLER KC:

Your Honours, I don't wish to interrupt. I was just waiting for the right time to stand up. Your Honours will be aware that the Crown claimed privilege in respect of the peer review that was done in this particular case, so I don't want to interrupt my friend saying broadly at a generic level what might have been available or not. But the minute it descends to the facts of this case, you can't claim privilege in a document and then seek to intimate in the way in which my

friend is seeking to do what the contents of their actual peer review was initially. So I have to take the objection.

MS LARACY:

The objection is fair if I was to attempt to go into the prosecutor's peer review, but that's not before the Court and I don't have it and that's not what I intend to do. I intend to give the Court a sense of the material that would generally be available.

WINKELMANN CJ:

So is this, is there any evidential basis for this? I mean I know you are very knowledgeable on what prosecutors have et cetera, but –

WILLIAMS J:

They would have had –

MS LARACY:

We know from the Criminal –

WINKELMANN CJ:

Can I just ask that's the answer?

MS LARACY:

We know from the Criminal Procedure Act that certain documents, certain things have to happen at certain stages at first appearance and by second appearance. Second appearance requires the defendant to enter a plea.

WINKELMANN CJ:

But do we know what the systems that were set up by Crown Law to perform this function were?

MS LARACY:

The systems were the MOU. We know that and I can come onto that. The Court of Appeal –

WINKELMANN CJ:

I'm just anxious about us straying beyond factual record.

MS LARACY:

The Court of Appeal at footnote 119 and paragraph 113 has a helpful summary of Mr Fitzgerald's conviction history and pattern. In an ordinary case of course the Crown would have, for the peer review, they would need, they would need some evidence. In this case they would've had the December witness statements of the officer in charge who interviewed the two complainants and we know that at this point, by 25 January, from the chronology, there was one psychiatric report. Now, I'm going to give my learned friend with his concern the benefit of the doubt and suggest that the prosecutor did have that psychiatric report. I don't know. But let's assume the prosecutor did.

WILLIAMS J:

Well, the problem with that is saying what the prosecutor would've had gets pretty close to waiving privilege and you can't run with a hare and hunt with the hounds.

MS LARACY:

We know they did a peer review. They must have had something that can be accepted. What would they have had? They must have known what the charge was, must have had the charging document.

WINKELMANN CJ:

But, no, I mean repeating doesn't actually address the issue, Ms Laracy. I mean we're not trying to be difficult, but the Crown is taking a position and it has to act fairly in respect of it.

MS LARACY:

I'm not suggesting what the prosecutor's advice or opinion was. I don't have that material.

WILLIAMS J:

It would be helpful if we did have it, then we could resolve this, frankly, but, you know, that's your call.

MS LARACY:

That is the Crown's call and it wouldn't be appropriate to waive privilege. But what I say about that psychiatric report, let's assume the prosecutor had that. Dr Heads' report of 25 January confirms that at that point and the Court has identified this yesterday that Mr Fitzgerald was fit, he was stable at the time of the offending, he was stable at the time of Dr Heads' examination, notes that he had used alcohol and cannabis that day and it suggests that there is no link between his mental health and the particular offending.

My suggestion to this Court is that material of that type simply relating to the documents that would have been before the Court and all of those documents would have been before the Court at that time except, except the witness statement. They are largely matters of record. It's not at all plain that there was a wrongful failure at that point to screen out this case because it was going to result in a grossly disproportionate sentence.

What did the Crown know when making an independent decision subsequently when this became a Crown prosecution for which the Crown has to look at the matter afresh and decide whether to charge? Now, that's four months later and as the Court of Appeal suggested, this is probably the more relevant time if the focus is going to be on the propriety of prosecutorial discretion because it is at that point the Crown decides whether or not it will proceed with or lay a different charge.

The crown prosecutor knew, and we know this from her affidavit, that it was a serious offence that had caused harm. Now, I say it was a serious offence. This Court may have a different view of that. You may think it is more nuanced and that matter ultimately is not a question of law or fact that needs to be resolved. But what we understand is a fact from the prosecutor's affidavit that she considered it to be a serious offence that had caused harm, and the Court

of Appeal at paragraph 108 said that it cannot say it wasn't a serious incident or unlikely to be repeated. It said it was serious, at 109.

WINKELMANN CJ:
What was the assessment of the sentencing judge, can you help us with that?

MS LARACY:
Yes. I can –

WINKELMANN CJ:
Because he of course is the person who is most able to assess it.

MS LARACY:
I will take you, I will take the Court to that. The point that I primarily wish to rebut at this stage is my learned friend's reluctance even to refer to this as an indecent assault. He suggested it was better described as contact and the Crown's position at the time through the prosecutor was and remains that the Court of Appeal's assessment of that and Justice Simon France's assessment that this was an indecent assault and that it caused harm are correct assessments.

I refer the Court to Justice Dobson's sentencing indication decision at paragraph 11. There's a lot, there are other passages in here, but in terms of his assessment of seriousness at that stage he notes that it is: "… towards the bottom end of the range of seriousness of such offending ..." That has never been disputed and the Crown doesn't shy away from that now. "… although it is troubling that you were prepared to continue with aggression towards the second complainant after forcing an unwanted kiss on the first complainant. It is also troubling that this would be a further continuation of a pattern of sexual offending which can have ongoing adverse effects for your victims that are a lot more serious and ongoing by way of mental impact on them."
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I also wish to take next the Court to the complainant's trial evidence. We can go through this line by line, but perhaps I can just –

WINKELMANN CJ:

But I mean, how is that relevant when we're talking about what the prosecutor knew?

MS LARACY:

Because the prosecutor's assessment was this was a serious offence that caused harm and one of the ways of undermining that assessment and suggesting that some other charge other than indecent assault was appropriate was because this was so low-level it was best described as "contact". That's –

WILLIAMS J:

But the prosecutor –

MS LARACY:

– that's not the assessment that any judge has come to looking at this matter.

WILLIAMS J:

No, well, that's fair, but the prosecutor had to conclude, because she knew that this was the third strike, that this was a seven-year offence.

MS LARACY:

Yes.

WILLIAMS J:

Because that's what it was, right?

MS LARACY:

Yes.

WILLIAMS J:

The prosecutor had to be satisfied it was a seven-year offence, not just that it was serious in the context of indecent assaults and that might be arguable, but that the result would be a seven-year sentence.

MS LARACY:

Yes and serious in light of this offender's history, as well. That's highly relevant and, in fact, that's critical and that was a factor that she took into account.

WILLIAMS J:

So, yes, okay.

MS LARACY:

So all of those factors go to seriousness and I accept that. But just in terms of the weight that the complainant – the prosecutor, the relevance of finding that this caused harm, it is useful, I suggest, for the Court to have a look at the complainant's trial evidence and, as I say, I won't go through that line by line, but there are some points there that haven't been elucidated so far.

She points, her evidence, is that her husband had just died. This is the first time that she had been out into town since that had happened some weeks or months ago. She describes in her evidence being "shocked" at what happened. There are multiple references to being "scared", including "too scared to help her friend". Her friend described her as "distressed". The incident was "a shock", she said. And Simon France J at sentencing, to respond to your Honour's point, agreed that of its type it was low-level, but it was also an unwelcome and undoubtedly traumatic attempt to kiss a stranger on the mouth.

WINKELMANN CJ:

So what are we dealing with here? Are we dealing with the system, or are you defending the prosecutor's decision in this case? Because I thought we'd started out about how relevant, how reasonable it was to expect the prosecutor to do the screening exercise?

MS LARACY:

This is a challenge to the propriety of the prosecutor's decision to charge indecent assault and the suggestion has been made that this was so low-level that no reasonable prosecutor could have thought that it was serious enough to warrant that charge. My submission is that this was a proper exercise of prosecutorial discretion.

WINKELMANN CJ:

Okay, so you're not explaining the system to us at the moment –

MS LARACY:

No, I am –

WINKELMANN CJ:

– you're defending the prosecutor's decision.

MS LARACY:

No, that's right, I am responding to matters in my learned friend's oral submissions and in his road map and in his written submissions which, in my submission, significantly downplay this and what is important is what the prosecutor made of it at the time.

GLAZEBROOK J:

Totally accept that absent the seven-year maximum it was perfectly appropriate to charge indecent assault, but that's not really what's set against you. I mean, obviously any type of indecent assault, as we know from the findings of the Royal Commission, any type of abuse has major effects on the victim and it probably matters little to the victim that it is at the lower end. Some people may be slightly more robust, if one likes to use that term, which is an appalling term, than others if it is at the lower level of seriousness, but generally, of course, it has an effect on the victim.

But I think the point is not whether it was appropriate to do this, but whether it was appropriate in a rights context for the prosecutor to do this, which is a different matter.

MS LARACY:

I accept that, your Honour, and I will come onto that now. Very important point, that I've written in capital letters on my notes here: the chronology establishes that at the point where the Crown was making the decision whether to charge, there were no further psychiatric reports. In my submission, that is important. So when the Court is thinking about "what information did the prosecutor, at that point, have about Mr Fitzgerald's mental health?" It's the report I've already referred to, the first report of Dr Heads. There is no further information in the record about Mr Fitzgerald's mental health.

GLAZEBROOK J:

I thought we were assuming that the first point the prosecutor might have had access to that report is the –

MS LARACY:

That's right, that's Dr Head's first –

GLAZEBROOK J:

So there's just no further information.

MS LARACY:

I accept that, and I'm – I don't know.

GLAZEBROOK J:

Sorry, there's no further, sorry, I understand now.

MS LARACY:

I don't know, but I think it is fair for the Court to proceed in this case on the basis that the prosecutor, I would hope the prosecutor, had that information on that peer review, in addition to the obvious material which generally forms part of

just the standard Court record, the charging document, the summary of facts, the –

WINKELMANN CJ:

I mean, I just am troubled by you continually telling us how it's fair for us to proceed on the basis of what the prosecutor had when, on the peer review ruling, you haven't waived privilege. Because you're really painting in a picture of what the peer review process for the prosecutor was.

MS LARACY:

Well, what I'm trying to say there is that this is the material that one would expect, in all of these cases, that a prosecutor would generally have at that very early stage of the process. This is before formal written statements have been prepared, which are only, for instance, prepared when a matter becomes – goes to trial.

WINKELMANN CJ:

Well, anyway, even if we take it at the highest, we've got a low-level – at low-level on sentencing Judge's assessment, low-level on sentencing indication assessment, low-level indecent assault with a person who was stable at the time, who had a mental health history, but the information at the time, if we're prepared to bring that into account, was not – indicated that he was stable at the time of the offending and mental health issues were not causative.

MS LARACY:

Yes and then the prosecutor identifies the, in her affidavit, the factor of serious harm, which I have taken the Court through, and the fact that his history was concerning and she did not believe there was any reason to think that he would stop offending, and the third factor is the fact that he was on an extended supervision order at the time.

WINKELMANN CJ:

It is, however, hard – what's the additional information that makes it, which takes us to the point where the Crown concedes, without contestation, that the sentence was a breach of section 9?

MS LARACY:

That was conceded in this Court after the Court of Appeal's decision, obviously, and accepting the Court of Appeal's analysis on that but premised on the basis that the section 9 breach was caused by the Judge –

WINKELMANN CJ:

Yes, but what is the, what is the additional fact beyond what you say was in play at that point which brings the section – what wasn't there in the record, that you –

MS LARACY:

Well, the Court of Appeal has gone through in great detail and I'm not going to, unless it's helpful, repeat what's in the Court of Appeal judgment. It's a very, very careful analysis of the Solicitor-General's Prosecution Guidelines and the relevant factors that favoured, in the Court of Appeal's assessment, prosecuting in this case and the Court didn't question the suitability, in fact, the sole suitability, of indecent assault to fit the elements of this offending.

So that's primarily, that's what I rely on. But if your Honour's point is really you're saying that the Crown is saying that at the early stage, after first appearance, there wasn't a lot for the prosecutor to go on, what about at the point the Crown took over –

WINKELMANN CJ:

Yes, I'm asking, yes, I'm asking what do you say was added to the picture by the – that the prosecutor wasn't aware of when she did the peer review?

MS LARACY:

Well, after the prosecutor took over, there were discussions and engagement between defence counsel and the prosecutor. There are some emails and the Court will need to, if it's interested, look at the sequence of those. There was a question as to whether common assault would be suitable and the prosecutor wasn't prepared to accept that because, in her assessment, this was an indecent assault.

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So there was that sort of, there was that engagement in consideration, and I don't accept the tenor of the appellant's submissions, which is that the prosecutor didn't respond. It's clear from the record and in the Court of Appeal judgment that even post-case review hearing there were resolution discussions, and that's recorded in the Court charging document, that there were resolution discussions. So this was a case where the prosecutor was engaging, was thinking about alternative charges, and formed the view that, notwithstanding those matters, the indecent assault charge was appropriate.

The third matter I'll come to –

GLAZEBROOK J:

Notwithstanding what matters, because my understanding is that the prosecutor took the view that sentence was totally irrelevant to any sort of consideration.

MS LARACY:

That's right, so the –

GLAZEBROOK J:

So it's not notwithstanding, it's actually saying I don't think it's even relevant to consider that, and I'm looking at this as if I would look at a prosecution where the normal sort of sentence would apply, which in this case I think the Judge said would have been a non-custodial sentence, apart from the link to the assault. Which was the more serious charge.

MS LARACY:

That's right, the prosecutor plainly knew, and was aware, that this was a seven-year sentence, so the statement that it wasn't taken into consideration was, relates to – put it this way. The Prosecution Guidelines require a prosecutor in the public interest to consider the seriousness of the offence. The Court of Appeal judgment goes through this matter, and the guidelines then indicate that a key sort of proxy for seriousness is the maximum penalty. The prosecutor says that she didn't weigh that. She didn't take it into consideration. She plainly knew that it was a seven-year sentence, no question of that, but she didn't take it into consideration because the only way to take it into consideration in this case would be to make an incursion into the role of the sentencing Judge, and form a view about the propriety of the sentence that would need to be imposed, and that that was for the sentencing Judge, and then after the morning adjournment I propose to take the Court to what in my submission is a very important part of the record, which is the Crown's sentence indication submissions where it was the party that proposed to the Court how to avoid a grossly disproportionate sentence.

WILLIAMS J:

Do we have those submissions in the record do we?

MS LARACY:

Yes we do.

WINKELMANN CJ:

So in terms of morning tea. I thought we'd break at 11.15, so that gives you about another…

MS LARACY:

Oh sorry.

WINKELMANN CJ:

You were thinking it was 11.30.

MS LARACY:

I think I was.

WILLIAMS J:

It just feels like that.

WINKELMANN CJ:

You feel like you've been there all that time but no you haven't.

MS LARACY:

Apologies.

WINKELMANN CJ:

So you've got plenty of time Ms Laracy.

MS LARACY:

In my submission, so I'm now at 2(d) of my summary, I've glossed over 2(c), but I have – I will come to some of the relevance of the Criminal Procedure (Mentally Impaired Persons) Act processes, but I guess I'm just circling back to 2(c). As I've said at the time of the Crown charge decision, the second and third reports were not available, they subsequently became available, and what's important in my submission is that from there there was a judge-led CP(MIP) process. It involved hearing evidence as to fitness. That evidence was that he was and remained fit. Mr Fitzgerald knew what he was doing at the time. That can be taken from the psychiatric reports. That there confirmed that there was no causative link to the offending. That he understood that he was on a warning from a second strike, and it also records that his health was deteriorating, and the Court was in charge of all the processes that dealt with that material that arose after it became a Crown prosecution.

So (d). As matters advanced shortly after the charging decision within a couple of months the matter came up for a sentence indication hearing before Justice Dobson, and in my submission the record of what the Crown filed in that case, and the submissions it made, which ultimately influenced the sentence

indication, and the sentencing, undermine the proposition that the Crown foresaw or sought a rights-breaching, or grossly disproportionate sentence. That's because the Crown had researched and discussed with defence counsel, it would appear from the emails, and annexed to its submissions in the sentencing indication, the very significant case of *Harrison* from the Court of Appeal, and also *Campbell*.

The significance of *Harrison* is that it was a five-judge case in the Court of Appeal which concluded that the Sentencing Reform Act must be read consistently with the Bill of Rights Act, and that the legislation inherently gave rise to the risk of grossly disproportionate sentences, and the Court of Appeal conceived that it was for the courts to avoid that result. That was a case that involved a similar mandatory framework to the third strike scenario. It was actually a second strike but it was for murder, it was a different – it was – but the statutory provisions are to all intents and purposes identical. On a second strike where the offence is murder, the individual must be sentenced to life imprisonment unless it is manifestly unjust, and the focus from the Court of Appeal was on that concept of manifest injustice and the Court of Appeal conceived of it as the way to avoid grossly disproportionate sentences.

There is a very detailed broader discussion of the legislation, the history of the legislation, and the fact that judges were required under this regime to impose mandatory penalties, and the Court's conclusion that this was the way through it in appropriate cases. The Crown filed its sentencing indication submissions first, and that was on, I think they're variously dated, but that was 5 September, and it put *Harrison* and *Campbell* to Justice Dobson, and there's an extended discussion in the Court's submissions at this point from paragraphs 18 to 27 of the submissions. I won't take the Court to that.

WINKELMANN CJ:

How did they say it could be used?

MS LARACY:

Well maybe I will then. Paragraph 24 of the sentencing indication submissions. These are a little tricky to find in the bundle because they're bundled together at the very end of the case on appeal. I think it's the first document. Sorry, it's the third document in that bundle. So that's this one, 303.0484, paragraph 18. I'll just let the Court read from perhaps paragraphs 18 to 24 is what I have in my notes.

GLAZEBROOK J:

What was the Crown suggesting the Judge did, because there's no manifestly unjust exception.

WINKELMANN CJ:

It's not a stage 2, this is not a stage 2 sentence.

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MS LARACY:

Yes, manifestly – must impose the maximum, must impose the maximum penalty which is seven years without parole unless it would be manifestly unjust to –

WINKELMANN CJ:

No, that's the parole period but not the maximum sentence.

GLAZEBROOK J:

No, it's wrong.

MS LARACY:

That's right and that is the mechanism that *Harrison* says is there to guard against, in appropriate cases, grossly disproportionate sentences. It doesn't allow the Court, it doesn't allow the Court to avoid the maximum penalty, but it does allow the Court to guard against manifest injustice and gross disproportionality and breach of section 9. *Harrison* talks directly about

section 9 and the potential for breach by using the ability, in appropriate cases, to allow parole.

WILLIAMS J:

Your difficulty is that even if there were to be release after a third of the sentence, the finding is that too is grossly disproportionate.

MS LARACY:

Well, that would be two years and four months.

GLAZEBROOK J:

And release here was probably unlikely, wasn't it, because they would have to find somewhere for him to go. They would have to decide he wasn't a danger to the public.

MS LARACY:

My submission is that those factors are the very ones that the Crown –

WILLIAMS J:

That's the point you say.

MS LARACY:

– and even the Court cannot possibly speculate on at this point. Those are for other parts of the system.

GLAZEBROOK J:

Well, I think you could easily speculate on it without much difficulty. He was living on the street. He wasn't being looked after before the offending, as I understand it and we do know there is nowhere for these people to go, or very few options.

MS LARACY:

The Court of Appeal also supported, encouraged the Court to take the approach that had been taken in a similar case of *Campbell* which was also a third strike indecent assault sentencing which is in my bundle.

GLAZEBROOK J:

The Court of Appeal, sorry?

MS LARACY:

Campbell.

GLAZEBROOK J:

No, no, I didn't quite understand the Court of Appeal encouraged the Court?

MS LARACY:

The Crown, sorry.

GLAZEBROOK J:

Oh, the Crown, sorry. The Crown encouraged.

MS LARACY:

Encouraged the, both Justice Dobson and then later on Simon France J on the actual sentencing to follow *Harrison* and to apply it in the same way that the High Court had in *Campbell* an indecent low level, if you will have it that way, indecent assault case on a third strike sentencing where the High Court Judge was of the view that manifest injustice and gross disproportionality, applying *Harrison*, would be avoided by allowing parole eligibility.

WINKELMANN CJ:

Ms Laracy, you said: "If you will have it that way." But the Crown was submitting that way and the sentencing indication was that way and so was the sentence.

MS LARACY:

My, the words "if you will have it that way", was just there is no good language to describe low level indecent assault other than low level indecent assault, that's all I meant.

WINKELMANN CJ:

Okay.

MS LARACY:

It was a, it was a comparable case involving a similar level of criminality on a third strike and the point is that the Crown was aware of this jurisprudential approach to manifest injustice and the way to, that the Court of Appeal had indicated grossly disproportionate sentences on this regime could be avoided in *Harrison* and submitted that that same approach that was taken in *Harrison* and had been applied in *Campbell* and a case that was far more similar to the facts was the appropriate way through this. So this is highly relevant to: did the prosecutor foresee a rights breaching sentence or a grossly disproportionate sentence? Did the prosecutor seek such a sentence? In my submission, a fair reading of sentence indication submissions and the position that was consistently maintained totally gives the lie to that. That's a very unfair submission, in my view. It is not supported by the material that the Crown put up.

WINKELMANN CJ:

Well, that's put it a bit high to say it's an unfair submission, but you say it's wrong.

MS LARACY:

I do go further than that. I do say it's unfair to say, as Justice Ellis did and as my learned friend has, that the Crown sought. The tenor of that submission is that the Crown, knowing full well that charging in this way was going to be a breach of section 9 sought a sentence that would breach section 9 and the record, particularly the Crown's position at sentencing and on the sentencing indication where it was the party that put up this way through which the Court followed in reliance on *Harrison* gives the lie to that. It was not sought. The Crown must have believed that *Harrison*, applied in this case, would avoid section 9 because that's exactly what *Harrison* talks about.

Although *Harrison* was, as I've said, a case dealing with murder, it talks at considerable length about the concern with overreach, not just in terms of just a very broad range of offences captured, but *Harrison* is also useful because it emphasises the second purpose of the Sentencing Reform Act legislation and

this is at paragraph 86 of *Harrison* where it says the cases of murder before it: "… do not fall within the worst murder category." So it identifies that the legislation had serious violent offending which is the worst of its kind as one of the purposes of the Parole Reform Act. But there is a second purpose and that is the: "… persistent repeat offenders who continue to commit serious violent offences," as defined and this is paragraph 86 and the footnote refers to section 3 of that Act for this second purpose. Now, my submission is that Mr Fitzgerald would appear to fall into that second purpose.

The Court at 87, the Court recognises that it is challenging because the breadth of gross disproportionality will capture those persistent repeat offenders in that category who may not have committed extremely serious offences. 87 is also relevant and the Court of Appeal's indication here that the sole jurisdictional qualifier is conviction which is the mechanism by which the overreach of the overbreadth of the legislation operates, conviction for one of those relevant offences and it notices, notes in paragraph 99 that: "… the qualifying offences in s 86A," which include indecent assault will vary widely.

And if I could just take the Court over to paragraph 89, this is in the context of Mr Harrison. So he was a youngish offender. I think he was in his twenties and the problem for the Court here was that his first strike offence, which was just a warning, was for a low level indecent assault.

MALLON J:
He wasn't a young offender.

MS LARACY:
Wasn't he?

MALLON J:
No. I was the trial judge.

MS LARACY:

Sorry. That's right, your Honour's analysis I recall is upheld here. Anyway: "Specifically in Mr Harrison's case, while he," sorry, "while he had a substantial criminal history his only stage-1 offence was an indecent assault involving minor conduct of its kind." And then the second offence was the murder.

So the Court is recognising here in *Harrison*, remembering that this is the case law that is available to the Crown, recognising that low level indecent assaults are captured by the legislation.

If I can just take the Court to a few other passages in here, not in detail but maybe just give the Court some paragraph numbers. We rely for much of our, we endorse the analysis in the *R v Nur* 2015 SCC 15, [2015] 1 SCR 773 decision in the Supreme Court which is referenced at paragraph 91.

GLAZEBROOK J:

Can I just, so, I actually don't really understand the point you are making about 89 because the point was made, wasn't it, that that exemplifies the injustice of the regime?

MS LARACY:

The point the Court of Appeal, well the point I rely on –

GLAZEBROOK J:

So what, what point are you, what point are you making on it?

MS LARACY:

The point I rely on is that practitioners and judges reading this would accept that low level indecent assaults, if that was what they were focusing on, were intended to be captured by the legislation.

GLAZEBROOK J:

And they say that increases the possibility of injustice and damage to the policy's credibility.

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MS LARACY:

Yes.

GLAZEBROOK J:

Injustice and damage to the policy's credibility as –

MS LARACY:

Yes, that's right, and so the Court says that, the Court of Appeal says the courts need to find a way of reading those mandatory provisions that will capture low level indecent assaults, and other low level offending, consistently with the Bill of Rights Act so as to avoid section 9, and if I can – the paragraph relevant to that is paragraph 106 of the judgment, and as we know the way it resolved it there, and the precedent value of this case in other contexts was that where parole eligibility is appropriate, that will be the mechanism that can be used to avoid section 9. So that was the understanding of the law at that time. Of course this Court four years later, four or five years later, said the better way, well –

WINKELMANN CJ:

Another way.

MS LARACY:

Another way to do it is to, having identified that a case does breach the threshold, to resentence according to ordinary principles.

WINKELMANN CJ:

So can I just ask, I'm a little bit confused because you're submitting to us that this was serious offending, so the prosecutorial discretion was exercised appropriately, or you couldn't say it was unreasonable, but then you're saying that the prosecutor's submitted to the Judge that it was low level offending and therefore were doing their best to make sure it wasn't a breach of section 9.

MS LARACY:

Well perhaps your Honour's question, which is an entirely –

WINKELMANN CJ:

I may be wrong. One of my hypotheses, one of my propositions, premises may be wrong.

MS LARACY:

No, I think it's an entirely fair summary really of the multiplicity of, I think the Privy Council has called them polycentric, factors that are engaged in the assessment of the public interest. This was, as the Crown has acknowledged, on a stand-alone basis, a low level indecent assault, and the Crown submitted that. It was also serious enough to warrant prosecution. It was serious in that it had caused harm to the victim and the prosecutor says in her affidavit that was something that was influential in my decision. It was serious enough. It was the culmination of a pattern of, and I won't take the Court to footnote 119 of the Court of Appeal's summary, but I think it was six previous convictions for indecent assault, four for indecent exposure, and a range of other offending. That pattern of offending was also relevant. So all of these factors are what the prosecutor needs to somehow weigh and balance, and –

WINKELMANN CJ:

So what is said against you is all that being so, given that the regime that had been created by Parliament, it was reasonable to expect of a prosecutor to step back from that polycentric decision-making process they have to go through and ask, but when I place this within the three strikes regime, I know that how I decide to charge will have an impact on the sentencing judge, the discretion the sentencing judge has to sentence. Is it an appropriate charging decision to make, there's that extra step, and what is the evidence that she looked at it in that way.

MS LARACY:

Well she gives an explanation for why she didn't weigh, and in my submission that's what's meant by "consider" the penalty. The only way to do that –

GLAZEBROOK J:

Are you going to take us to, at some stage, to what was actually said on that?

MS LARACY:

In the affidavit?

GLAZEBROOK J:

Just wherever you…

MS LARACY:

It's in Ms Feltham's affidavit. It's summarised quite handily in the Court of Appeal judgment at paragraph 70 of the Court of Appeal judgment. So she considered the penalty that must be accepted that she understood it was seven years, the Crown accepts that, and the sentencing guidelines require the prosecutor to consider the seriousness and the guidelines at the time identify that a factor indicating seriousness is the maximum penalty, and then she goes on to say, and it's set out there at paragraph 20: "I have no recollection of considering the likely sentencing consequences in my assessment of the public interest test." And she explains why.

GLAZEBROOK J:

Because she says they're irrelevant.

MS LARACY:

She says there the sentencing consequences are for the Judge.

WINKELMANN CJ:

But she must have known because she did know that the charging decision would potentially have on conviction constrained the sentencing judge.

MS LARACY:

That's right, on conviction, if Mr Fitzgerald was convicted after a series of judicial processes, Justice Simon France, or whomever it was, Justice Cull, Dobson and France were all involved in this process and all reached the same

view of section 86D, their ability to sentence proportionately would be restrained, I think, was that your Honour's word?

WINKELMANN CJ:

Constrained, well restraint, constrained, yes, constraint.

MS LARACY:

Constrained, yes, yes she did understand that.

WINKELMANN CJ:

So how did that – well I suppose – is this a good time to take us to the memorandum of understanding in the prosecutorial guidelines, or do you come to that later?

MS LARACY:

I will come to that. So the factors there that she primarily relied on are in 22.1, 2, 3. Now this is important for the point that once the charge is before the Court, how that charge is handled and the disposal of it and the steps are matters for judicial control and judicial evaluation. So this is my paragraph 2(e). The point I wish to make by taking the Court, and again as quickly as a I can, through a number of steps in that process, is that these were all entirely judge-controlled processes that, depending on what judges made of the question before them on each of these occasions, could have led to a different disposal. My point is not to try and predict whether it should have, but these are judge-led processes in the course of dealing with a matter post-Crown charge. The Crown does not continue to bind the Court in any way as to how the matter is disposed of.

So if I could just point out as an introductory proposition that the sentence of seven years, and the four and a half years in custody, were the actions of judges in different courts, from the District Court, to the High Court, to the Court of Appeal, to the Supreme Court, in my submission all engaging in multiple judicial processes and considering, depending on what was before each of them, different disposal outcomes in ruling on them in a judicial way.

So just to deal with the District Court, there were, this was before it became a Crown prosecution, so the Court may think it is irrelevant, and I understand that, there were remands in custody in the District Court on multiple occasions by a District Court judge. I just want to point out that the Crown wasn't involved in that at all. There was one bail application, that's all we know. There wasn't a suitable address. That was a six-month period in the District Court.

Then it became in –

GLAZEBROOK J:

What was the Crown not involved in, in the decision?

MS LARACY:

In the District Court the remands in custody, the Crown had no part in that. They were bail decisions made by a judge to remand the defendant on each appearance in custody. It's really just a preliminary matter.

The important part starts when, in the High Court it became a Crown prosecution, and as I've said that was variously dealt with by Justices Dobson, Cull and France. The record shows that they explored various disposal options. They remanded him in custody each time, no bail applications were made, and that process took a year, and there are statements in each of those three Judges' decisions that reflect the understanding that are consistent with *Harrison*, that if he, if Mr Fitzgerald, "if" Mr Fitzgerald were convicted, the Court would need to impose the maximum sentence. But Mr Fitzgerald hadn't yet been convicted, so what were the steps that happened prior to that?

1100

First of all, and the Court may find the chronology that we have done helpful for that. Justice Dobson raised the possibility, after the CP(MIP) issues were raised, of a CP(MIP) disposal under section 34(1)(b). This is at document 301.0096.

Now, the significance of this in terms of judicial exploration of an option, which he concluded ultimately was not available, was that it was a community treatment order instead of sentencing at disposal. His Honour – that's at paragraph 15 of the sentencing indication hearing.

The second possible disposal route that was superintended by the, or raised by the Judge, is at paragraph 33. Justice Dobson noted the possibility of inpatient compulsory order under CP(MIP), that's under section 34(1)(a) of the Act, as a special patient. He raised that possibility. The record shows it appears not to have been revisited by counsel and the only other point I make about this, for what it's worth, is that Justice William Young, in his decision in this Court, seems to consider that both of those CP(MIP) routes were, in principle and in law, possibly available.

The third is an important judicial hearing and that is the CP(MIP) involvement hearing and this was before or this was an on the papers hearing dealt with by Justice Simon France. It could have been one with viva voce but it was on the papers in this case and it required a judicial decision from Simon France whether Mr Fitzgerald's involvement in the offending was proven on the balance of probabilities. He found it was.

The fourth is the CP(MIP) fitness to stand trial hearing. This was presided over by Justice Cull. It was a lengthy hearing and the record shows that, from the fact there were 40 pages of expert evidence. A judicial decision was required at the end of that, was Mr Fitzgerald fit to stand trial? And she concluded he was.

The fifth event I refer the Court to is Justice France presiding over the defended hearing at trial. He heard evidence. He had to make factual findings on that evidence and reach a verdict. That took about 30 pages of transcript. He found the charge was proven and he found the charge was appropriate and importantly, and I do wish to take the Court to these documents, the trial judge declined defence counsel's application to amend or substitute the charge to one of assault.

That's very significant, because in an email that request for that possibility to be considered had been made to the Crown prosecutor, she had ultimately decided not to accept it. She didn't think that either common assault was appropriate because it had no element of indecency which was essential to the offending, or an indecent act was appropriate because that had no element of assault, and Justice –

WINKELMANN CJ:
Can you refer us to the decisions?

MS LARACY:
Yes, Justice Simon France, now, so the application was made by Mr Preston in closing. The Crown had already closed, so the Crown made no submissions on this application, and it's document 301.0199.

WINKELMANN CJ:
So the Judge didn't hear them on it?

MS LARACY:
Well, the Judge heard Mr Preston on it, but the Crown had closed, Mr Preston got up to do his closing for Mr Fitzgerald and he submitted to the Court that – and it's on page 2 of the document – first of all, he questions whether the, which is appropriate obviously in counsel's closing, whether the facts as they have come out at trial, whether they were capable of amounting to an indecent assault.

And in that first paragraph, at the top, having raised that point, he says: "Now if that amounted to an attempted indecent assault, if I can term it this way, I wouldn't be looking to make any further submissions on the point, I'd simply invite your Honour to make a finding and use your powers pursuant to section 133."

And the Judge goes on to explain, correctly, that either way it's an indecent assault, and that's the top of page 3. And then he says: "So – yes, I think you have to really address me on the, the underlying proposition to all this [which is] that it's not in this context indecent."

So that's where the application was made and then in the verdict which is at 301.0207.

WINKELMANN CJ:

And do you say that the Judge had a discretion? Because the prosecutor had a discretion in relation to charging, but do you say the Judge had a discretion on the application? I mean, what is the test the Judge was required to apply?

MS LARACY:

Well, it's a – if it was under section 133, which is what Mr Preston relies on, then there's a – it's a broad interests of justice test and there's not a lot of case law, not a lot of case law on it. It would appear from the text of section 133 that it is more directed at amending aspects of a charge in particulars, whereas the substitution of an alternative charge, especially during trial which is where we're at in this stage, is under section 136.

It's unclear whether – it's unclear to what extent the Judge, in my submission, had discretion. We don't have any analysis on that in the material before the Court, but at paragraph 20 of the verdict and this is the important point, Justice Simon France says: "He invited the Court to substitute a conviction for a lesser offence. The final outcome had been a peck on the cheek and by contemporary standards" – and Mr Preston saying – "that was not sufficient to amount to an indecent assault."

And the Judge declines it and says at paragraph 22: "I am satisfied to the appropriate standard it is an indecent assault."

He goes onto say at paragraph 24, which is perhaps more peripheral to this issue: "I have no reasonable doubt that Mr Fitzgerald intended to do what he

did and knew full well the context," and he goes on to say. So he is satisfied that it was the –

WILLIAMS J:
Can you just help me with the –

MS LARACY:
Yes.

WILLIAMS J:
I was taking notes as you went to the transcript. Was the submission made by Mr Preston, was it?

MS LARACY:
Yes, made by, so the Crown, the evidence was complete.

WILLIAMS J:
Yes.

MS LARACY:
The Crown, there's a brief closing statement from the, from the Crown.

WILLIAMS J:
Yes, I'm just wondering what the submission was, was the submission, because there's a technical, set of technical propositions. The Judge is plainly correct applying a technical assessment, as the prosecutor no doubt did too.

MS LARACY:
Yes.

WILLIAMS J:
Was the submission that although there is – the charge is technically made out, for broader contextual reasons it is inappropriate? And if that was the submission – well, first of all, was that the submission?

MS LARACY:

No, well, the submission is as we have it, that's all we have. But what –

GLAZEBROOK J:

Which frankly was rather sort of confused. I know you took us through it quickly, but it was very difficult to understand what the submission actually was.

MS LARACY:

I accept, I would agree.

WINKELMANN CJ:

I think the submission was, was that it, in these day and age –

GLAZEBROOK J:

It wasn't real.

WINKELMANN CJ:

– is a peck on the cheek an indecent assault? And the Judge says well, look, I'm satisfied he was trying to kiss her on the lips and therefore –

MS LARACY:

And not just that it's technically met, but my submission is that Justice Simon France's decision, including that paragraph at 24, confirm that in his view indecent assault was, indeed, the appropriate charge. So, that's a relevant application and a judicial decision to focus on, in my submission.

1110

I have almost finished these judicial events. Of course, number 6 in my list, Justices Dobson and France heard submissions at different stages on whether the case could be disposed of without conviction exercising their power to discharge without conviction. There were judicial decisions on that and they both concluded that that wasn't available in that context and finally, in terms of actual, the way it was in fact disposed of again by way of judicial decision at my number 7, both Justices Dobson and France agreed with the Crown's

suggestion of applying *Harrison* to achieve a Bill of Rights consistent sentence and make the legislation work consistently.

The only other point just on 133, 136 is this Court in its leave decision on *Fitzgerald* the first time around was one of the grounds, the third ground of leave and if we could bring up the leave decision please, Olivia. The third ground was that the Court of Appeal, was that an error occurred because the High Court hadn't substituted a lesser, a lesser charge and what was relied on at that point it seems to be was section 136, the in trial substitution charge and this Court, if you could just go down to the next page please, the third ground, paragraph 4: "The third ground was not raised in the Court of Appeal." And the Court goes on to say that it doubts it would, it is: "…sufficient prospects of success on these facts to justify leave." Those are the only other references to that power in the record that I have been able to find.

The sentencing process obviously culminated, number 8 in my list, with the Court of Appeal and undoubtedly the Court of Appeal acted wholly independently. That total period from sentence to the Supreme Court decision involving multiple judicial decisions was three and a half years.

I can deal with 2(f) very quickly. The essence of my learned friend's argument is that once, given the mandatory sentence, once the charge was before the Court and once all these other disposal considerations presumably had been gone through and once Mr Fitzgerald was convicted the judge's hands were bound and in my submission that cannot be correct. You have got all those judicial points that I've identified where the Court could have gone a different route had it thought they were available. The prosecutor had no control over that. But more importantly –

GLAZEBROOK J:

Well, what's the different route for the Court to have substituted a different charge?

MS LARACY:

Well, it was judicial evaluations and judicial decisions as to involvement.

GLAZEBROOK J:

I just want to know what –

MS LARACY:

Well, those are the routes, what I've just gone through.

GLAZEBROOK J:

So they could have granted bail, but there hadn't been an application. They could have what, substituted a different charge. What else could they do?

MS LARACY:

The submission that's made by my learned friend in essence is that once the prosecutor proffers the charge to the Court the judge's hands are bound, and what I –

WINKELMANN CJ:

I think the only, in that narrative I think the only one that really bears on the outcome was the judge's refusal to substitute a charge because the rest is just bail decisions, considering disposition that's not available.

WILLIAMS J:

Well, 147.

MS LARACY:

Verdict.

WINKELMANN CJ:

Oh, 147.

WILLIAMS J:

106 for that matter.

MS LARACY:

Reaching a verdict, finding the charge proved, finding an involvement, finding he is unfit.

WINKELMANN CJ:

Well, those are all questions of law though, aren't they?

MS LARACY:

They're all judicial evaluations as to how, what course this case should go on.

WINKELMANN CJ:

But I'm asking what's the discretion though. Where do you say in that narrative the judge actually had a discretion? Once the charge is laid, judges don't act on whim. They are applying the law. The Crown offers proof. The judge applies the law.

MS LARACY:

Yes.

WINKELMANN CJ:

Where, where, I mean so that's a big menu of points that you say the judge really did have control, could have averted a breach of section 9, but where do you say they really, the judge is operating with a discretion sufficient to do that?

MS LARACY:

Well, I don't suggest at that point the Court was even necessarily – its objective was not in each of those stages to avoid a breach of, avoid a breach of section 9. My point is simply that the constitutional framework is that the prosecutor puts up a charge. At that point the Court has complete control of how it is dealt with before the Court that is constitutionally proper and the Court does that independently with no shared responsibility sitting on the prosecutor and each of these steps are, in my submission, matters of judicial process and judicial evaluation that only the judge controls. Then having ultimately reached

the point of conviction, the judge does not have discretion other than with respect to taking a *Harrison* approach.

GLAZEBROOK J:
Well, the judge doesn't have discretion on conviction if the charge is proved.

MS LARACY:
No.

GLAZEBROOK J:
So either the charge is proved or it's not, or if unfit either the person was involved or not.

MS LARACY:
Yes.

WILLIAMS J:
But for section 106.

MS LARACY:
The proposition then would be that –

GLAZEBROOK J:
Well, but that's at sentencing.

MS LARACY:
– the Crown shouldn't submit the matter for determination, that the charge should not be brought before the Court for a judge to determine whether the offending has been made out. That's the logical consequence of the proposition, that the case needs to be kept away entirely from the Court and the judicial processes.

GLAZEBROOK J:

Well, that's not the submission that is made. It's that a different charge has been substituted and in fact, the prosecutor does have a discretion not to put it before the Court.

MS LARACY:

I'm not saying the –

GLAZEBROOK J:

And they've exercised that in the public interest.

WINKELMANN CJ:

Well, just let Ms Laracy answer and then we will take our morning tea adjournment or else I will get into trouble with my colleagues.

GLAZEBROOK J:

Sorry.

WILLIAMS J:

True, with the union.

MS LARACY:

I'm not saying the prosecutor obviously doesn't have discretion, but I do say that the prosecutor's exercise of discretion in this case can't be, cannot be impugned because on the basis that she should have refused to put this case before the Court on this charge because he might be convicted and then a Court might breach section 9. My submission that that is the constitutional anathema that the cases shy away from and that is a shocking proposition. In terms of whether even once upon conviction –

WINKELMANN CJ:

Oh, are you still answering the question?

MS LARACY:

This is the critical point, upon conviction where the judge's hands are bound did he have to breach, did he have to sentence in a way that was inconsistent with section 9 and the answer to that must be no primarily and perhaps the complete answer, this Court's decision in *Fitzgerald* confirms that the Court always had the power to sentence according to normal sentencing principles and that what happened here was an error. It always had that power.

Second, there is always a power, once a matter is before the Court, for the Court in its inherent jurisdiction to control its own processes and to prevent an abuse of process. I don't intend to make submissions on whether this was in fact an abuse of process, but the argument must surely be able to be made that if it were realised that convicting and proceeding to sentence would breach section 9, that would be an abuse of the Court's process because it requires the Court to be the body that uses its process to impose a disproportionately severe penalty in a way that is anathema to the judicial function.

WILLIAMS J:

Can you see the circularity, the difficult circularity of that argument because if what was being done was an abuse of Court, the Court's process then there is an abuser? The abuser is the prosecutor.

WINKELMANN CJ:

You're saying that's your least favoured submission, aren't you, Ms Laracy?

MS LARACY:

Well, the Canadian authorities would suggest that if it's an abuse of process, if what the judge has to do in sentencing, putting the charge up is not an abuse of process, finding Mr Fitzgerald guilty is not an abuse of process. Making sentencing submissions is not an abuse of process. The only possible abuse of process comes having convicted, sentencing in a way that is inconsistent with section 9. So that act of sentencing, that is an abuse of process.

WILLIAMS J:

That is an abuse of result, not process.

MS LARACY:

Well –

WILLIAMS J:

Abuse of process is about the process.

MS LARACY:

That is something that peculiarly and solely the judge has control over.

1120

GLAZEBROOK J:

I suspect this is not an argument you would want to put up on another occasion, so perhaps that is the time to –

WINKELMANN CJ:

Well, no, also unusual for the Crown to make, but it's your least favoured argument in any case?

MS LARACY:

I'm not commending it. I'm just saying that this is –

WILLIAMS J:

It is available.

MS LARACY:

If the Court is of the view that a *Harrison* approach is not going to save it and given that the judge appears not to, and we know, did not realise that he was able to sentence. This Court subsequently said he could in *Fitzgerald*. My submission is that it is not a stretch to say that the judge might have thought that therefore he was breaching section 9 and could not lend – it was an affront to the Court's sense of justice and could not lend his, lend his powers to that

process. That is an abuse of process and the remedy sits with the judge in the High Court.

Finally, the only other option would be to dismiss the charge under section 147 which –

WINKELMANN CJ:

So we really need to take the morning adjournment. Have you – is that a good point to take it?

MS LARACY:

That is.

WINKELMANN CJ:

I mean you've been on your feet quite a long time. I am sure you need a cup of tea and everything.

MS LARACY:

Yes, thank you. Happy to.

COURT ADJOURNS: 11.21 AM

COURT RESUMES: 11.38 AM

WINKELMANN CJ:

Ms Laracy.

MS LARACY:

Thank you. I am going to endeavour to finish at 12.30.

WINKELMANN CJ:

We'll endeavour to be quiet.

MS LARACY:

My – not at all, that's – I am going to –

WILLIAMS J:

Don't look that gift horse in the mouth, Ms Laracy.

MS LARACY:

I'm going to go – on second thoughts, I'll take that gift horse – but yes, my learned friend will need two and a half to three hours so the timing really does mean I should sit down at 12.30 and I'm planning to do that and it may mean that at the end I just give the Court some paragraph references.

The next topic that I come to in my outline is the administrative arrangement that was anticipated in Parliament and the MOU that followed between the Solicitor-General and the Commissioner of Police.

The MOU in its entirety, with this amendment to it, is in the bundle of materials. A relevant paragraph is a brief one and it says this: "The police, at police cost, will refer all prosecutions involving a stage-3 offence as defined in s 86A of the Sentencing Act 2002 to the Crown Solicitor for peer review either pre-charge or by second appearance."

1140

So what's apparent from that is that what is in the MOU very much reflects the very limited steer as to what was intended. That can be found in the, I think it's three extracts where this process is referred to in Hansard. It also emphasises, as the Court is very well aware, that it is very early in the process after the first appearance and before the second that it is a police prosecution. At that point the Crown doesn't determine the charge. It does provide a peer review and I have already explained the minimal information that is likely to be available in the generality of cases at that point.

This Court indicated that the mechanism was not a suitable legal mechanism given what was at stake in terms of the rule of law and the right. That's the right that was engaged and the Court of Appeal dealt with this in considerable depth from paragraphs 1, 2, 4 onward. I don't propose to take the Court through that

because that is so clearly in the judgment under appeal and the Court accepts, the Crown accepts what the Court of Appeal said about it there.

What I do wish to just point out, that the Supreme Court of Canada in the *Nur* decision is even strongly, and I will take the Court to a couple of paragraphs. But *Nur*, the thrust of *Nur* is that on this it is wrong to rely on prosecutorial discretion to charge in a different way to save a statutory regime or a sentence from being a breach of the Charter. There are constitutional and practical reasons for this which the judgment goes into. They engage things like the concern for the separation of powers, the fact that it is too early to expect the Crown prosecutor in their decisions about whether to charge and to elect what route to charge to have the information that's relevant to the Charter question. They make the point the prosecutor has certain information, but not all the information that a sentencing judge has. But most importantly is a concern that it puts the power and unpredictability in variable outcomes in the hands of prosecutors and that is the responsibility for judges in this context.

At 97 there is a reference to the fact that even in the Canadian context typically at that point where prosecution is making decision, little is known that will be relevant to this Charter question. That's paragraph 97.

If I could also take the Court to just a couple of paragraphs while I'm here in *Nur*. Paragraph 89. This Court emphasised, that's in *R v Anderson* 2014 SCC 41, [2014] 2 SCR 167 which is before your Honours: "That sentencing is a judicial function, and opined that the fact a mandatory regime may require a judge to impose a disproportionate sentence does not alter the prosecutorial function in electing the mode of trial." Cites from approval from a unanimous previous Court of Appeal decision in *Anderson* that the appellant's argument there which is to rely on, is to rely on prosecutorial discretion: "…in effect equates the duty of the judge and the prosecutor, but there is no basis in law to support equating their distinct roles in the sentencing process."

The Court at paragraph 91, at the end of that paragraph goes on to make a point that: "To paraphrase *R v Ferguson* 2008 SCC 6, [2008] 1 SCR 96," this is

the end of 91, “bad law, fixed up on a case-by-case basis by prosecutors, does not accord with the role and responsibility of Parliament to enact constitutional laws for the people of Canada”.

My submission is, as I’ve said, that if this was a key feature, if this was a key safeguard that Parliament intended to provide some clear direction to the exercise of prosecutorial discretion, particularly if it was to take responsibility away from the sentencing judge, it needed to be in the legislation in clear terms and the principle of legality and far more fundamental even constitutional principles would support that.

The touchstone for the law on what is required is the statutory text and purpose and in this particular context it is very important in my view that on the third strike the legislation created a specific role for the High Court to exercise on sentencing only in this third strike context and that’s why we have relatively minor offending that may not ordinarily even result in a conviction, let alone a –

GLAZEBROOK J:

You are actually reprising the submissions that the Crown made in *Fitzgerald* and were rejected in *Fitzgerald* because the finding at least of the majority was that the statutory purpose was not to impose sentences that breached section 9.

MS LARACY:

That’s right and this Court continued – and the way to do that is to sentence in these cases according to ordinary sentencing principles.

GLAZEBROOK J:

Well, no, it just said there was an exception and because – but that was in accordance with statutory purpose. So I’m just not sure what your submission is, I’m sorry.

MS LARACY:

My submission is that what we know from the statutory text is that the High Court, even in respect of minor offending and offences at the lower end of that section 86A list like indecent assault, they were put in the charge of the High Court to deal with in a supervisory direction and the select committee identifies this in its report as the – essentially providing a feature of this, an important feature of this legislation is that only the higher courts can sentence on third strikes, the High Court, the Court of Appeal and the Supreme Court and in my submission, that statutory indicator of the High Court's role on sentencing is a far greater and more relevant textual indicator as to who is responsible for the decision as to, upon conviction, how the case is disposed of and that responsibility sits expressly with the High Court judge in the legislation.

My submission is that Hansard is by no means clear as to what should happen for repeat offenders who victimise in a relatively low level way but where the offence is captured and defined as a serious violent one and I refer the Court to *Harrison* and the passage I've already taken you to where it identified that conundrum of that second statutory purpose and that's at paragraphs 86 to 88 of *Harrison.*

There is also no suggestion in anything in Hansard that it was intended that an inappropriate offence should be charged in order to avoid the legislation. My submission is looking at the brief references to what was intended by the administrative arrangements is that if it was plainly a case of overcharging and I think the Minister Judith Collins at one point refers to, you know, if there are negligent charging decisions and overcharging, they would be weeded out by the sifting process. That's not the situation we have here, in my submission. The Courts, including this Court in dismissing the conviction appeal, have been consistently satisfied that indecent assault was the appropriate charge here.

Finally on this I make the point that there is now a very well developed quite complex body of Canadian and New Zealand appellate law identifying that one of the problems for sentencing judges and appellate courts is trying to work out what sentences will breach the section 9 threshold. At what point does

sentencing and on what factors does a sentence go from being very severe or disproportionate to being grossly disproportionate? And this comes back to the point that it is impossible, totally impossible and if Parliament thought otherwise, it was wrong that a prosecutor could do that before second charge.

1150

The case law on this, and I've given you some of the cases that indicate some of the factors in an addendum to my submissions, the case law shows that this is a highly nuanced, sophisticated, difficult judicial evaluation.

We also know that these cases that fall outside Parliament's intention, which this Court thought might be rare in *Fitzgerald*, have not proven to be rare. There is a great number of strike three and strike two cases that have come before the appellate courts. This is a very common feature nowadays of –

WILLIAMS J:

Well, there are lots of people who try but, you know, the bright-line is "shock the conscience of the nation" under section 9 and that's not very nuanced. That's really got to smack you in the face.

MS LARACY:

I understand there are at least 10, 10 have been allowed, I understand. If I could just explain some of that nuance and I won't go into any case detail, but it does confirm that it's highly fact intensive, so fact intensive it's the sort of thing that only a sentencing judge would be able to assess.

WINKELMANN CJ:

Well, and it is highly fact intensive but, nevertheless, there are facts to look at and a prosecutor can look at the facts, too. Because why I was asking you about "what had changed", from when the assessment came to the situation wherein we have a sentence imposed in breach of section 9, is what has changed? Why weren't the facts apparent to the prosecutor, that lead a court later to say "this is a breach of section 9", what has changed in the process? So that's probably the – this is probably the logical point to ask that question.

MS LARACY:

One of the things, for instance, that the Court looks at is not just the sentence imposed but how long the person has, in fact, spent in prison or is likely to spend in prison and these factors are identified in Justice Miller's judgment at the end, in the context of his comments about causation. But they're highly relevant to making that very difficult evaluation at an early stage where the Crown has got control of the case. How can the Court possibly – how can the Crown possibly assess all of the relevant factors? So if I –

WINKELMANN CJ:

So is your answer –

GLAZEBROOK J:

Well, the relevant factors are third strike and seven years.

MS LARACY:

If I can just, well, if I can just, so factors –

WINKELMANN CJ:

Well, can I just ask you the follow-up question, is your answer then really that – sorry, I just lost my train of thought, is your answer that really the prosecutor didn't, couldn't know how the sentence was going to play out, in fact, because in fact Mr Fitzgerald had these difficult situations, difficult situation, he couldn't be released because of his mental health problems and no appropriate place to be?

MS LARACY:

Well, there are many factors. One is that, at the time of charging, the material on his mental health, in my submission, wouldn't have suggested that it was inappropriate to charge indecent assault. His mental health subsequently deteriorated and the Court has got the second and third reports on that.

The Crown then filed at sentence indication submissions signalling its position early on that it considered the way to avoid a grossly disproportionate sentence

was to ensure that he was parole eligible. The Crown had no idea or control over whether or not he applied for and got parole.

The factors that the Court looks at are factors such as the mandatory sentence relevant to the what's called the "but for" sentence. It considers the nature of the sentence that would have otherwise been imposed, so whether it's custodial or some other sentence, and compares it to the mandatory sentence. It looks at differences in lengths. It has, in different cases, the court applies a multiplier from the "but for" sentence to the mandatory sentence and, in some cases, three, three and a half times an increase has been held to be grossly disproportionate and others, in others, not so. The courts are varied as to whether the relevant point in considering the sentence is the maximum sentence or the point at which the person would become eligible for parole.

All of these factors go into the assessment of whether a sentence is grossly disproportionate and they are singularly and, I would say, just plainly matters only for judicial evaluation.

So what was intended by the MOU, in my submission, was an early sift for obvious negligent, perhaps, or sloppy overcharging and that's all that could be done at that stage in the process. This Court didn't have the benefit of extended submissions on this and it may be that what I've explained about the timing and the material available is not considered influential but, nonetheless, these are my submissions and they reflect the Court of Appeal's finding that this wasn't an appropriate mechanism and that, really, looking at the MOU and the administrative process doesn't help us. What we need to look at here is who was responsible for the sentencing.

I'd also point out that the select committee report confirms that multipliers of up to 10 times the sentence could occur under the regime. That hasn't been the New Zealand experience but it is relevant to what, prior to this Court's decision, might have been thought of as reaching the threshold for grossly disproportionate sentences.

WILLIAMS J:

Ten times what?

WINKELMANN CJ:

The appropriate sentence.

MS LARACY:

So 10 times the "but for" sentence.

WILLIAMS J:

So 10 times the third, "the third strike", shall we call it, not 10 times a first time?

MS LARACY:

No. No, no, so the effect – yes, in the third strike context. This was a concern raised by the minority before the select committee.

As I have said in terms of just turning to my point 4, very briefly, as I've – perhaps to just to conclude and my learned friend will develop this point, if the Court's concern is what were the factors that contributed, just as a matter of objective fact, to what happened in Mr Fitzgerald's case and the, I think, 10 other ones where the Court has allowed appeals, my submission is that the starting point should be the Judge and a contributory factor is the clarity of the legislation, and if the legislation was intended to weed out cases like Mr Fitzgerald's, then it needed to be a lot clearer and in the text.

In terms of the right charge, we've covered that in different ways, and sufficiently I think.

I have handed up to the Court the decision of this Court in *Rowe v R* [2018] NZSC 55, [2018] 1 NZLR 875. That wasn't available at the time, it's two years after the charging decision here, and that's to do with the elements of what's the essence of doing an indecent act under sections 125 and 126, not under section – the indecent assault provision which is 135?

So the Court's focused on 125 and 126 and essentially it confirmed the view which, in my submission, was taken by the Crown prosecutor here, that those sections which she was asked to substitute an offence for under one of those sections, they are not apt. They primarily relate to exhibitionism or display. They don't involve touching, they don't involve an assault and the Court, among other things in the *Rowe* decision, just identifies and, in my submission, puts some weight on the fact that all of these offences are in Part 7 but the indecent act offences in 125 and 126 are under a subheading "Crimes against morality and decency" and indecent assault is in the subsequent subheading section which involves a wide range of sexual offences and under the heading "Sexual crimes".

The Court has said that there was a failure to consider the Bill of Rights in this case and the submission I made in response to that is that the Crown accepts that the Bill of Rights will often be engaged in prosecutorial decision-making. It may be engaged at the time a decision to charge is being made.
1200

I acknowledged in the Supreme Court, and it's recorded in a footnote to the judgment, that the public interest is so broad that of course it would capture the Bill of Rights, but that begs the question in what way in any particular decision was the Bill of Rights engaged, and what can be reasonably understood to have been known by the prosecutor about the way the Bill of Rights was engaged. For all the reasons that I've gone through at that early MOU stage it's very – it's not sustainable, in my submission, to suggest that it could have possibly been appropriate, it could have been open to the Crown prosecutor in her peer review to the police to have considered that this could be a breach of section 9, we don't know what's in that advice, but I say that that's an unreasonable proposition to put on the Crown prosecutor, and that what is not helpful is just suggesting that prosecutors need to take Bill of Rights into account in a stand-alone or generic way. It's always highly context specific.

The new Prosecution Guidelines in 2024 do have a small section on the Bill of Rights, and my learned friend has quite properly put them to the Court.

Paragraph 32 of that document says: "Prosecutors should make decisions consistently with their particular obligations under the NZBORA (while recognising that others—especially those exercising judicial power—have distinct obligations under the NZBORA." This is about the context in which decisions are being made and the clear identification of where the prosecutor's role interacts with the Bill of Rights.

It goes on to say that there is an expectation that prosecutors will be aware of developing Bill of Rights jurisprudence, "how it might inform both their role and the role of the court, and should be prepared to bring this to the court's attention" and of course my submissions have identified how the prosecutor did that.

WILLIAMS J:

Does the submission about the MOU stage being too early really lead inexorably to well then there needs to be a later check when there is enough information?

MS LARACY:

And there is an independent decision which is made, obviously, when it becomes a Crown prosecution, and then the Crown charge notice was filed in June, and the Prosecution Guidelines have always said that when an agency prosecution transfers to the Crown, it needs to be a fresh independent decision whether to prosecute. The Crown prosecutor is never bound by the decisions that have been made by the agency, whether it's police or another prosecuting agency. The expectation is that the prosecution essentially starts afresh, and our Criminal Procedure Act reflects that because not only does the Crown have to file a notice to say it's taken over the case –

WINKELMANN CJ:

So which prosecutor are we looking at, all prosecutors?

MS LARACY:

Well under the Criminal Procedure Act?

WINKELMANN CJ:

Well in this case. There are multiple windows of opportunity for the prosecutor to take a view is something you've just said.

MS LARACY:

Yes, so the prosecutor who dealt with matters up to the case review hearing and who decided on the charge was Ms Feltham, and she's filed an affidavit in this matter. From there, as her affidavit says, it was dealt with by Ms Gisler.

WILLIAMS J:

So the information poverty point you make at the MOU stage, do you make it again at the Crown prosecutor taking over stage, or do you argue constitutional propriety at that stage?

MS LARACY:

There is more information for the Crown prosecutor to assess at the time it becomes a Crown prosecution file. So the entire file that's relevant for trial, including the more detailed witness statements, will be sent to the Crown prosecutor by the police. So that material is available, any updating reports would be available, and I explained to the Court in the chronology that in fact there was no updating mental health material at the point the charging decision was made. Shortly after that CP(MIP) reports were ordered and the Court then took over carriage of the various CP(MIP) processes that we've already looked at.

The next critical point in the Crown's development of its case, and preparation for trial, and considerations of resolution, the key critical point, in my submission, is when the Crown Solicitor, which is the term I prefer to use because everything the Crown prosecutors do is done in the name of the Crown Solicitor, when the Crown Solicitor filed those sentencing indication submissions suggesting to the Court how it could manage the section 9 implications in this case.

WILLIAMS J:

Could it be said that the prosecutor ought to have obtained further information and reports, the Crown Solicitor as you call her. At that point that was the doorway into the charge that was going to stick and be run with. Should there have been a more careful recheck at that point, including further reports?

MS LARACY:

I'm not sure what reports the Crown could have got at that point.

WILLIAMS J:

Well the CP(MIP) reports that were got by the Court, that style of –

MS LARACY:

The CP(MIP) process, and there's a –

WILLIAMS J:

Yes, I know the CP(MIP) processes itself, but that doesn't stop the Crown doing what the Crown can do to ensure that the system is, protects itself from abuse as…

MS LARACY:

The Crown charge notice was filed on 21 June, that's in the chronology. So that's where the charge was settled on. On 12 July the – on the application – by defence counsel, who obviously acted for and knew Mr Fitzgerald, asked the Court to vacate the trial date, that's 12 July, due to mental health issues being identified, and at that point the further reports were ordered. It can't be for the Crown to, on the basis of no information being, to suggest that somebody before the Court should be engaged in further mental health assessment. That's not the Crown's role.

WILLIAMS J:

Were there discussions about…

MS LARACY:

Well we don't have the detail of that. What we do have in the Court record is the note of Judge Harrop on 13 April in respect of this indecent assault charge. It's there on the Court charge document. That there were discussions with a view to resolution. Next call must be in the High Court. So there were discussions and that's recorded there.

WILLIAMS J:

I'm really thinking about in terms of system design, what kind of safeguards might have led to a less problematic decision being made at charge stage, and then what kind of systems ought to have been applied once the judge takes over. Because you, if your argument is essentially you were fact poor, that isn't an immovable situation, it could have been fixed. The question is, what could have been done to fix it so that better decisions were made.

MS LARACY:

I don't accept that the Crown charging process was fact poor in terms of what the Crown needed to do at that point.

WILLIAMS J:

Oh, I thought that was your argument?

MS LARACY:

No. All I'm saying is that the appellant's argument, and the way this has consistently been presented, is that from an early stage the Crown should have foreseen that a rights-breaching sentence was going to be imposed. On the material and facts available to the Crown Solicitor, that submission cannot be upheld. That's my point. Nor was it ever an understanding in the law, or I'm sure in the mind of the Crown prosecutor, the Crown Solicitor even, that it was for the Crown to choose a sentence that would avoid the Judge making a, what this Court has said is a judicial error.

1210

WINKELMANN CJ:

Choose the charge. Sorry, we better let you move on, because where are you up to, are we still on four?

MS LARACY:

So now I'm on the –

WINKELMANN CJ:

I feel we've kind of dealt with four, haven't we?

MS LARACY:

I'm on the constitutional framework, section 5, and I'm – all I wish to do here is just identify, summarise what these cases are about very briefly and refer the Court to a few paragraphs and I think I can do that in 10 or 15 minutes.

WINKELMANN CJ:

Well, it seems to me we've got – haven't we covered most of this material?

MS LARACY:

So the decisions that I suggest are useful for the Court are *Nur, Marchand*, *Anderson, Henry*, and *Director of Public Prosecutions v Durham* [2024] UKPC 21, [2024] 1 WLR 3900. And as I say, all I intend to do, if it's helpful, is identify some key paragraphs and if it's not I'll take the Court's indication.

WINKELMANN CJ:

No, give us the para, well, we don't know what the paragraphs are, so we'll be guided by you, Ms Laracy.

MS LARACY:

These cases are all discussed in our submissions.

WINKELMANN CJ:

Yes.

MS LARACY:

So *Nur* concerned the constitutionality of the legislation providing for mandatory minimum sentencing in a firearms regime context. The majority decision was six of the nine Judges there and it turns on the view that the fact the legislation specifically allowed the prosecution to exercise discretion and elect whether to charge summarily, or charge indictably which led to upon conviction the mandatory sentence, whether that election and reliance on prosecutorial discretion to get it right in the particular cases, even though it was written into the legislation that election, whether that would be sufficient to save the scheme and whether it would sufficient to protect against the risk of gross disproportionality.

The paragraphs that I suggest are most useful to the Court on this are 87 where the Court confirms that: "Sentencing is inherently a judicial function." And this is in the mandatory minimum imprisonment context. The Crown, and that case it was the Attorney-General seeking to defend the legislative regime, it wasn't the prosecutor: "The Crown's submission is in effect an invitation to delegate the courts' constitutional obligation to the prosecutors employed by the state, leaving the threat of a grossly disproportionate sentence hanging over an accused's head."

Paragraph 87 – or sorry, that was 87 that I've just read out. Paragraph 89 I've already taken the Court to previously, that's disavowing the idea that in any way the role of the prosecutor in this context can be equated with that of the Judge.

Paragraph 91: "The argument of the Attorney's General ..." oh, sorry, the end of 91 was the particular passage I was going to refer the Court to, but I have already cited that. That's the idea that bad law can't be fixed up. The courts shouldn't be looking to bad law to be fixed up on a case-by-case basis by prosecutorial discretion.

WILLIAMS J:

If you've got the power to strike it down.

MS LARACY:

"Does not accord", yes, that's right.

WILLIAMS J:

It's quite an important distinction, don't you think?

MS LARACY:

It's also an important distinction, in my submission, your Honour, that this legislation expressly gave the prosecutor that discretion to exercise, plainly as a safeguard, and the Court notwithstanding the fact that the statutory words and purpose were clear says: "This is not a safe way of seeking to protect from gross disproportionality." It certainly is highly relevant to the Court's assessment, in my view, of –

WINKELMANN CJ:

But what do you say about what's said in *Chisnall* about how every state actor has an obligation to exercise, use their powers, the most rights compliant fashion? Because this approach doesn't really address that point, does it?

MS LARACY:

And I don't have *Chisnall* before me and I might leave my learned friend to deal with that.

WINKELMANN CJ:

Mr Varuhas might have to answer that.

MS LARACY:

But I understand that our submission is likely on that to be that the Bill of Rights doesn't exist in an ether and where a particular state actor has a particular legal responsibility, a responsibility that is engaged by a particular provision of the Bill of Rights, then they do need to act consistently with the Bill of Rights, and what I'm suggesting to the Court is that where section 9 is engaged is at the time a judge sentences, that is not the prosecutor's responsibility and this is consistent with that.

Paragraph 94 is a very strong statement about the proposed framework which is the minority judgment which would rely, in individual cases, on prosecutorial discretion to save the regime. The majority says: "The proposed framework would be a radical departure from the constitutional framework in these cases, and offers scant protection from grossly disproportionate sentences being imposed on offenders."

WINKELMANN CJ:

You see, you probably don't need to take us to any more authorities to this effect, because I think within the context of validity, whether the prosecutorial discretion saves legislation from being ruled invalid or in breach of the Charter, so just an indication, because I think we got that point, yes.

MS LARACY:

And my submission, of course, is that proposition goes further. It's not just about the – it's not just a principle relevant to invalidating legislation, it's an explanation of why what is proposed by the appellant is this case, which is that prosecutorial discretion should have been the focus of whether the – should have been seen as the key point at which the sentence ultimately imposed might engage or avoid section 9. That is, as a matter of principle, that is an unacceptable constitutional proposition.

WINKELMANN CJ:

So, I wasn't indicating to – I wasn't criticising reliance on this, I was just saying we've got that point.

MS LARACY:

Thank you.

WINKELMANN CJ:

So it would be interesting to see this point being made in a different context.

MS LARACY:

Paragraph 90 talks about not being able to use the discretion to screen out lower end offences, and paragraph 97 reflects a point that I have made which is that the charge, the point of the charging decision and the discretion exercised there is before the full facts are known.

Marchand is the next case I wish to briefly cover. This is an extended analysis, among other things, of the sophisticated process in the Canadian jurisprudence for determining sentencing regimes and sentences, assessing whether they're grossly – whether they will breach the Charter protection against grossly disproportionate sentences and it also talks about the role of the prosecutor and the role of the Judge, with the role of the Judge being the one to craft a proportionate sentence based on offending and offender and because of this Court's reasoning, of course, in *Fitzgerald*, that's exactly what the Court found, that it was for the Court to craft that proportionate sentence.

Anderson, I don't think there's anything in there that I further need to delay the Court with. *Anderson*, in my submission, is a very significant case, because it's a very developed discussion of what falls within the ambit of prosecutorial discretion and the distinction between prosecutorial discretion and constitutional duty. And the Court there concludes, in this unanimous decision, that all matters to do with choosing whether to charge, what to charge, how to charge, roots to the various elections as to whether it's summary or indictable, which engage the mandatory penalty regimes in Canada, all of those matters are prosecutorial discretion and that the separation of powers requires a high level of deference to the prosecutorial discretion and the Court has concluded there that prosecutorial discretion can only be reviewed for abuse of process.

GLAZEBROOK J:

How is that helpful to you?

MS LARACY:

How is that helpful here? It's helpful in terms of talking about did the prosecutor – if I can just step back, in Canada a combination of various statutory

provisions and the Supreme Court's decision in *R v Gladue* [1999] 1 SCR 688 set expectations, requirements, that players in the criminal justice system, including prosecutors, take account of an individual's Aboriginal status when dealing with them in the court process and the argument that was made there was that the Crown had not taken account of Mr Anderson's Aboriginal status when deciding whether to charge him with the, I think it was the summary, summarily or indictably in the indictable process, or the election that the Crown had brought its decision making to had led to this higher mandatory penalty. 1220

So the argument that was raised there was, for the appellant, this isn't a prosecutorial discretion, this is a duty and you can't, you can't avoid a, you can't avoid statutory duties. So I won't try and summarise the judgment, but the Court is very clear that all of those types of matters to do with charging and election, even if they might lead to a grossly disproportionate sentence, all of those matters are within the realm of prosecutorial discretion not constitutional duty and that it is the Court's duty, given the principle of separation of powers, the Court's duty to make sure that outcomes are consistent with the Charter.

WINKELMANN CJ:

The issue I see with that is that doesn't, don't, doesn't legislation et cetera proceed on the basis that people, the various actors within the constitutional order perform roles in a particular way? I mean the problem I see with applying it in this context is that this legislation assumed that prosecutors would perform their role in a particular way and clearly assumed, proceed on the basis that prosecutors would take into account the Bill of Rights Act implications in prosecutorial decisions. So although you might say they are making a constitutional decision, they're making a decision which is bound by the Bill of Rights Act and which the system has ordered on the basis that they will take in a particular way.

MS LARACY:

I, my challenge with what your Honour is putting to me is that I can't accept the starting premise which is that the legislation envisaged that the prosecutor would deal with these charges in a particular way.

WINKELMANN CJ:

Well, and your point about that is simply that it is not expressly dealt with and I think that is a good point.

MS LARACY:

Well, yes, it is not in the legislation and it was an administrative process that's referenced in a few snippets of Hansard in Parliament and it was given effect to. But whether it was adequate. This Court has suggested that it wasn't an adequate administrative process and that, in my submission, that process which was something the Crown needed to put in place and did put in place insofar as the direction went, that process doesn't give, if it fails, that doesn't give rise to a failure to fulfil a constitutional duty on the part of the Crown prosecutor. That's the essence of my submission on that.

So there's actually, there's a lot in *Anderson* and I've now, I've only got six minutes to my –

WILLIAMS J:

Can you just help me with this because it seems a case that's pretty closely on point as you say? What led the appellant to be arguing this instead of a later, a later point in the process? Was that because once it was laid indictably there was no discretion below a minimum?

MS LARACY:

Yes.

WILLIAMS J:

Why did this person not argue the judge got it wrong?

MS LARACY:

I am not, on my feet, able to answer your Honour's question.

WILLIAMS J:

All right.

MS LARACY:

But the way the appeal was –

WILLIAMS J:

Well there is no avoiding it, I will have to read it.

WINKELMANN CJ:

Well, Mr Varuhas.

MS LARACY:

But perhaps I can help with just pointing to the way the appeal was put and that's on –

WILLIAMS J:

There's a note coming to you there.

MS LARACY:

That's on page 16 –

WINKELMANN CJ:

If you can read it on that tiny piece of paper. Perhaps you should get a larger pad of stickies, Mr Varuhas.

MS LARACY:

Well, page 168, just in terms of the way the appeal was put: "This appeal raises two issues," and I think, I think in the spur of the moment that's all I can do there.

Also, it's a very significant case, in my submission both for not only for distinguishing between constitutional duty and discretion and talking about the breadth of discretion, of prosecutorial decision making which this Court considered had become somewhat confused under prior Supreme Court jurisprudence. But the other thing it does which is useful is it identifies a number of what it calls good governance, or what we would probably call public policy reasons for why relying on prosecutorial discretion and for why non-interference and non-review of prosecutorial discretion is highly important. So that's the, that's –

WINKELMANN CJ:
I think the answer is it's a mandatory minimum sentencing regime.

WILLIAMS J:
Those have already been ruled out, haven't they?

WINKELMANN CJ:
No. That's why it was been attacked as a, through the prosecutorial decision because the judge had no discretion.

MS LARACY:
Henry is the second to last case. Now, that was a breach of disclosure case and the Court's decision, its ratio turns very much on the fact that disclosure is a duty, it's not a discretion and the *Anderson* reasoning is consistent with that.

The facts are quite extraordinary in terms of what was withheld knowingly by the prosecution leading to an individual spending 27 years in prison and one of the things that no doubt informed the Court's, the tenor of the Court's judgment in here was the fact that the documents in question were ones that sometimes disclosure is a very difficult evaluation exercise as to what is relevant in this particular context. There was no difficult evaluation exercise. It was basic forensic material and witness statements. So that's its context, but it does talk about the heightened threshold for determining whether the Crown is in breach of its constitutional obligations even where it does have a duty and that's

because of the various public policy reasons that need to be given effect in order to ensure that prosecutors are independent from the Court and are not exercising their discretion in a way that might have a chilling effect on them, are not fearful of liability and it also notes that in response to the suggestion that well, these public policy concerns don't really arise too much, do they, whether where a damages award is made in respect of prosecutors because it is not paid by the prosecutors, it's paid by the executive.

The Court also identifies the basic point that damages claims against the state in respect of prosecutors' actions are no answer because they, like other professionals, guard their reputations fiercely. So the public policy reasons are spread over paragraphs 69 to 94.

And *Durham* also, which is a Privy Council decision. It's a very recent one. It's a strong statement of prosecutorial discretion. It confirms a very high standard of review, judicial review. It does comment on prosecution guidelines at 42 and a bit like one of the other Canadian cases I – oh yes, a bit like *Anderson* at 56, it just identifies that the role of guidelines is to guide consistent prosecutorial behaviour and set standards, but it doesn't have the force of law.

At 71 in *Anderson*, the Court makes the point that in the context of prosecutorial decision making the criminal process itself generally will be able to provide the adequate remedy and in my submission, that's exactly the situation that was available here as we know from this Court's sentencing decision. The available remedy to what we now know as a section 9 breach was for the Judge in the context of the Judge's ordinary sentencing discretion to identify a breach.
1230

GLAZEBROOK J:

So is that just to say the remedy – sorry, you're saying the remedy would have been to impose a sentence that wasn't the seven years, is that the submission?

MS LARACY:

We now know that is the remedy, yes Ma'am.

GLAZEBROOK J:

All right, but that didn't happen, so there was arbitrary detention presumably?

MS LARACY:

I will leave my learned friend to deal with that. That's probably a – the Crown's position on arbitrary detention in a nutshell is obviously, as we've stated, that because Mr Fitzgerald was detained pursuant to a lawful order of a court exercising judicial decision-making functions, it was not arbitrary, but the nuance in that is definitely for Mr Varuhas to cover.

Unless there's any further questions for me, those are the submissions for the Crown.

WINKELMANN CJ:

Mr Varuhas.

MR VARUHAS:

Tēnā koutou your Honours. You will have had handed up the outline for my oral submissions.

WINKELMANN CJ:

Yes.

MR VARUHAS:

And you'll see that I plan to make some preliminary remarks, then address causation, the nature of *Baigent* damages, prosecutorial liability, judicial liability question mark, and arbitrary detention, also probably should have a question mark after it. Your Honours, I'll make a number of preliminary points to start, and if it were, I'd be grateful for –

WINKELMANN CJ:

We'll not interrupt you, just so long as you can be clear when you stop making your preliminary remarks.

MR VARUHAS:

Yes, I won't keep going forever. So I want to start by addressing a few points that my friends suggested the Crown was putting to the Court, which we don't in fact support. The Crown does not seek to overrule *Baigent*. The Crown does not say *Baigent* is vicarious liability. The Crown does not say that *Baigent* is not a public law field. So none of that is part of the Crown's case, and you will find no claims like that in our written submissions. What is part of the Crown's case is that it's unavoidable that the constitutional separation of powers and attribution of legal responsibility must be confronted in the BORA context, and therefore those matters need to be addressed in a considered way, and that is the case irrespective of state liability and like notions.

So one reason we must pay regard to the particular actor that breached the plaintiff's rights, is because remedies, different remedies are available for different actors' breaches of the Bill of Rights.

So where Parliament is responsible only a declaration of inconsistency is available. Where the executive is responsible, judicial review remedies, equitable remedies such as injunctions and declarations, as well as damages, are available.

Where the judiciary is responsible on the current law damages are not available but other forms of remedy are, such as error correction via appeal, or control of the Court's own processes.

Those variations reflect constitutional principle. There is no liability in damages for parliamentary acts because Parliament is supreme and sovereign. There is no damages liability for judicial acts because of the concern to ensure judicial independence. In contrast damages are a well-established remedy for executive acts and because damages are only available for acts of certain actors, one must determine which actor is legally responsible to know whether damages are available.

Even if in a brave new world damages liability became available for the acts of any branch of government, that would not obviate the separation of powers concerns, or concerns of attribution, and that is because in respect of each actor there would be discrete constitutional considerations that arise in regard to the different actors, and which would likely lead to different liability standards in respect of each actor, and to know which liability standards apply one would need to identify the actor in particular that was responsible.

So in the Canadian case of the *Attorney-General v Power* the test for damages liability for legislative breach is clearly unconstitutional or bad faith. The reason for those thresholds is to guard against interference with Parliament's constitutional function, including to protect parliamentary privilege, and that is notwithstanding that in Canada is not supreme.

Where judicial liability has been established, including in systems with long histories of state liability such as France, it's often on the basis of a high liability threshold. So in France the standard is gross fault, and that reflects concerns peculiar to the judiciary, including finality and judicial independence.

WILLIAMS J:

So the liability there you're speaking about in France is liability of the judges rather than the legislature, or is the standard the same?

MR VARUHAS:

I would have to check that your Honour. I would have to check the standard for legislative breach, if there is legislative breach.

WILLIAMS J:

You were speaking only of judicial breach?

MR VARUHAS:

That's correct. Now in regard to the executive, the approach to liability may vary depending on the specific actor. So distinct concerns arise in relation to the potential for liability to be imposed in respect of prosecutorial discretion, as

my learned friend was just addressing, because of concerns over the constitutional principle of prosecutorial independence as well as other policy concerns, and we know that in Canada prosecutorial liability under the Charter for the exercise of prosecutorial discretion is set at a malice standard, as established in the *Henry* decision.

WILLIAMS J:
I thought *Henry* stood for the opposite proposition? Malice isn't required.

MR VARUHAS:
For acts at the core of prosecutorial discretion such as laying a charge –

WILLIAMS J:
I see. Not disclosure.

MR VARUHAS:
That's correct. So it's important to recognise that distinction, that in regard to prosecutorial discretion the standard is malice and the Court was quite deliberate in saying that in regard to issues of disclosure because that is a mandatory requirement, or a matter of duty, a different threshold applies, but nonetheless a high threshold which involves an intention to withhold material that's known to be material to the other side.

So the point that I wanted, I hope I've got across in a preliminary way, as I will come back to it, is that confronting, or engaging with the separation of powers is inevitable, as are issues of legal responsibility, and to work out damages liability one has to address the liability of each actor, whether or not the liability is styled as a state liability, because different considerations apply in respect of each actor.
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There is no field to which the separation of powers is not relevant because it is a fundamental of our system. There is no liability system that I have encountered, and I unhealthily live and breathe the law of liability. There is no

liability system that I have encountered that does not have principles of causation including comparative systems of state liability, and systems of state responsibility in international law. We have to take a human rights context seriously. But as Justice Williams, his Honour Justice Williams said yesterday, there are some dangers in thinking in terms of human rights exceptionalism.

So these are the inevitabilities that need to be addressed. My learned friend Mr Butler yesterday for the appellant said he didn't care about characterisation of who is responsible, but I'm afraid that it's unavoidable that we must care. My friend Mr Harris might say, as he did yesterday, that redress for human rights is in a world of its own, but BORA does not exist in a void. It exists within our legal system, and that legal system is defined by fundamentals such as the separation of powers, and those fundamentals cannot simply be airbrushed away.

Now on the other hand Mr Butler yesterday did say that how human rights law responds to different settings reflects those settings, and with respect I agree. That is why we need to understand which actor did what, as different actors engage different considerations.

So the final point before my period of immunity for questions ends, is that if *Baigent* liability is to be workable, we need to address separation of powers, and issues of attribution, and have a framework that's principled and understandable, and what was striking yesterday was the lack of detail in relation to how the proposed models advanced would, in fact, work in practice.

WINKELMANN CJ:

Well that may well be because that was addressed to a hearing.

MR VARUHAS:

Your Honour there were submissions yesterday at a relatively high level of abstraction that if there's a breach, and the state is involved in some way which does not require consideration of any substantive principle of causation, that liability should attach. That is quite a radical proposition –

WINKELMANN CJ:

I don't think it was the proposition. That's your note of it.

MR VARUHAS:

That's how I understood it, and the point is –

GLAZEBROOK J:

I think the submission was rather if one of the 3(a) actors was involved there will be difficulties of causation if a section 3(b) or a private person was involved, but not so much, or not at all, if it's one of the section 3(a) actors.

MR VARUHAS:

Yes.

GLAZEBROOK J:

In this case just the executive or the judiciary because I don't think there's been a submission that, at the moment that damages would arise out of parliamentary breach.

MR VARUHAS:

No, that was merely foreshadowed, but in regard to the three actors, I agree with your Honour's characterisation of the arguments yesterday, that when it comes to the section 3(a) actors it was suggested that the only possible principle of causation is material contribution to harm, which is the application of no principle of causation, because that's an exemption from the "but for" test that applies for factual causation, and I'll come to that, and we would submit that we need a little more in terms of skin on the bones, in terms of attribution of legal responsibility if the system is to be workable because, as I've said, even in regard to 3(a) actors, it's unavoidable that one needs to analyse the act in light of the actor who perpetrated them.

So your Honours I'll move first to causation, or principles of legal responsibility. So causation is the law's means of determining legal responsibility and application of those principles, in our submission, reinforces the conclusion

reached on application of constitutional principles that the prosecutor cannot be held to have breached the Bill of Rights. So the causal principles are presented as a further lens through which to analyse the role of the prosecutor and the role of the judiciary and Parliament's role.

WINKELMANN CJ:

Where are you in your written submissions Mr Varuhas? Are you at 22?

MR VARUHAS:

Paragraph 75 your Honour.

WINKELMANN CJ:

Page 22, 75.

MR VARUHAS:

Paragraph 75, yes, page 22. So when examining the causal principles, as a further lens through which to analyse whether the prosecutor can be said to be responsible for a Bill of Rights breach in this case, but of course consideration of causation, as Justice Miller noted in the Court of Appeal, is also of more general significance in the field of Bill of Rights Act damages liability in terms of developing the further worked out framework of principle. Causation is inherent to any liability system. If one has to be able to work out who is responsible for a given wrong or a consequence. So if a defendant can't be said to be responsible, then there isn't a juridical basis for imposing liability, and the invariability of addressing causation within any liability system is illustrated by the fact that causal principles characterise every field of liability. Torts, including torts protective of basic rights such as false imprisonment. Contract, equity, statutory liability, and causal principles are also recognised in our own human rights jurisprudence, and in comparative human rights jurisprudence, and in international human rights jurisprudence, for example that of the European Court of Human Rights. Causal principles also apply in criminal law. So basically causation applies wherever a consequence is going to be imposed on a defendant for its acts. So while there are causal principles in tort, causation is not exclusively a feature of tort, rather –

WINKELMANN CJ:

I mean I think you can accept we have a grasp of these kinds of principles, so perhaps if we move to the field of focus.

MR VARUHAS:

Very good your Honour. I just make those points because my friends seemed to be suggesting yesterday that the Bill of Rights was in a league of its own, and so it wasn't possible to look to other fields of liability for learning as to how we might approach issues of legal responsibility in human rights also. Those were the reasons that I was making those points, and I think that is an important point, that we should be careful about unduly siloed thinking that would cut off insights that might be derived from fields which have had 1,000 years of experience with issues of causation.

WILLIAMS J:

Good and bad.

MR VARUHAS:

Good and bad but hopefully course correcting over that millennium. One may hope.

WINKELMANN CJ:

Although the point that was made, and I can't recall whether it was Mr Butler or other counsel, Mr Tierney, was that one has to be careful not to apply principles which are really to do with attribution of risk in a private context, and attribution of blame and to serve other policy purposes without thinking.

MR VARUHAS:

Yes your Honour I agree that when one is looking across fields one must take seriously the normative concerns that underpin each field, but that is not to the exclusion of looking across fields with great experience of particular subject matters. I should say, because it did come up a few times yesterday, that my learned friends for the appellant said that in the Bill of Rights context it's not about blame. Causation is not about blame, it's about legal responsibility.

Blame goes to liability standards. So negligence, are you at fault through negligent act, for example.

So I want to distinguish factual causation and legal causation because as your Honour the Chief Justice observed quite rightly yesterday, there is some variability in the use of these concepts. So factual causation considers the role of the defendant's act in historical series of events, and "but for" is the familiar test. Legal causation, on the other hand, concerns the question whether the defendant ought to be held responsible in law for a given wrong or consequence.

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There is some variation of language, sometimes referred to as scope of liability for example. There are a number of principles that come under this umbrella, but the most common are remoteness and novus actus and to impose liability, both most be satisfied.

Now importantly, causation is judged at the time of the allegedly wrongful acts without the benefit of hindsight, so causation. It is axiomatic that causation is judged prospectively, not retrospectively because if you were asking in hindsight was that risk foreseeable once it had already materialised, you would always reach the conclusion, or there is a risk that you would always reach the conclusion that it was a predictable risk and one may only – it's only fair to hold defendants responsible for risks that could in fact have been anticipated.

The last point I want to make on this introduction on causation is that causation has not that often come up in our human rights damages' jurisprudence and that's because human rights interference has generally involved direct interferences. So, for example, yesterday the case of *Pere v Attorney-General* was discussed where a gun accidentally went off, an officer's gun, and shot a person. In that case, it's not that causation doesn't apply. It's that causation is clearly established, so no causal issue needs to be disputed or traversed. But it still has to be the case that it was an officer who, on a "but for" basis, shot the

gun and it hit the other person and there wasn't, for example, an intervening cause.

So moving then to factual causation, let me first address material contribution. So the orthodox test of factual causation is "but for". The material contribution to harm test comes from the law of torts and in fact I think it's only been applied in that context and it essentially involves non-application of factual causation because the test is so thin. So what the test denotes is did the defendant's wrongful act make a more than insignificant contribution to the consequence suffered by the plaintiff? And the reason that's a deviation from "but for" is because "but for" requires that the defendant's act was a necessary pre-condition for a particular consequence materialising. Whereas, if you apply material contribution to harm, the defendant can be held liable without their act having been a necessary pre-condition for the suffering of a consequence and the authorities are very clear that this test is an exceptional deviation from "but for".

So, for example, in the *Clements v Clements* 2012 SCC 32, (2012) 346 DLR (4th) 577 case from Canada, the Supreme Court of Canada, the Court observes that the test has never been applied in Canada and it says it would be a radical deviation from the requirement that factual causation needs to be established and the two paragraph references are 16 and 28 and there are similar statements in the laws of our comparator jurisdictions, the UK and Australia and those are at footnote 100 of our submissions.

WINKELMANN CJ:

This however would meet the "but for" test.

MR VARUHAS:

Sorry?

WINKELMANN CJ:

This prosecutorial decision would however meet the "but for" test.

MR VARUHAS:

I will come to that, your Honour.

WINKELMANN CJ:

I was just wondering if we need to spend too much time on this.

MR VARUHAS:

I see. Well, I mean it was a core plank of my friend's submission, so that's why I'm addressing it. But I can say very quickly it's exceptional. It's never been applied in Canada and it's limited to a very small band of cases, right. One is scientific uncertainty, right, by the *Fairchild v Glenhaven Funeral Services Ltd* [2022] UKHL 22, [2003] 1 AC 32 type asbestos case. Another is deceit and the reason for application of a thin standard of factual causation is the blameworthiness, the serious blameworthiness of the defendant's behaviour and the other context which is mentioned at 46 of *Clements*, paragraph 46 of the *Clements* case is causal overdetermination and that's an old example where you sort of have five people pushing a car off a cliff and if you ask "but for" in relation to each of them, you will get a negative answer in relation to each because the pressure of the other four would've been enough to get the car over the cliff.

WILLIAMS J:

It depends on how big the car is.

MR VARUHAS:

It does, your Honour. So in previous examples I've given like that I've said 10 people. Maybe that's more, maybe that's more appropriate. So those are the very narrow bands of cases where material contribution to harm applies and that this case is not one of them. It's very common for cases to involve multiple factors, multiple causes. "But for" applies except in those exceptional circumstances.

WINKELMANN CJ:

What about human rights cases, what about the discussion in the case law, is there just none?

MR VARUHAS:

No, there is. There in, you will see in footnote 99 of our submissions, for example, in the UK, as discussed in *McGregor on Damages*, the chapter on human rights, the "but for" test is the test that applies in the UK. It's also the test that's discussed by the Supreme Court of Canada in *Henry* paragraphs 95 to 98.

WILLIAMS J:

It would make sense, wouldn't it, because as you say, in most cases it's not a controversial issue except where it is because like the asbestos cases and others that you will know much more about than me, where you have complex systems, attribution can be very difficult even if it's clear the system has broken down?

MR VARUHAS:

Your Honour, I would be, and I will come to this later in my submissions, cautious about sort of a generic appeal to the system. But it's true to say that in certain circumstances like complex delay cases, for example, there can be a lot to unpack, right. However, the very fact of multiple causes in itself is not a reason to depart from "but for". It's just that application of "but for" might not lead to liability for certain actors, but it may lead to liability for other actors. So the fact of multiple causes is not sufficient in itself because every event is the consequence of multiple acts, like leaking building cases where there might be an architectural defect and the builder also performs negligently. "But for" would still be applied there. It's not an exceptional case and one must also bear in mind that "but for" is not exactly a high threshold.

WILLIAMS J:

No.

MR VARUHAS:

It's, it's, it's not that hard to, to satisfy.

WILLIAMS J:

So I think that was the point the Chief Justice made that isn't the suggestion was that there's no doubt that the "but for" test is met here anyway.

MR VARUHAS:

Well, I will come to that now.

WILLIAMS J:

You said, you said rather menacingly you were coming to that.

MR VARUHAS:

I didn't mean to be menacing, but there was certainly a sense of foreboding. So, turning then to factual causation, so I'm aware we're one minute away from 1 pm.

WINKELMANN CJ:

Two minutes. Keep going.

MR VARUHAS:

Okay, very good.

WINKELMANN CJ:

You're going to have to be finished, well, let's talk about when you have to be finished perhaps is a useful thing.

MR VARUHAS:

Yes.

WINKELMANN CJ:

Because the Crown has quite a generous allocation of time now.

MR VARUHAS:

So broadly, I mean the day leaving time.

WINKELMANN CJ:

You're aiming to be finished by when?

MR VARUHAS:

3.30 is what we discussed, is what I believe my learned friend discussed with your Honour yesterday and that would be a broadly commensurate time with my friends yesterday, leaving time for the reply.

WINKELMANN CJ:

Well, why don't we aim for 3.15 and we will take just an hour for lunch?

MR VARUHAS:

Very good, your Honour.

WILLIAMS J:

Or were you assuming an hour for lunch?

MR VARUHAS:

I was assuming. Yes.

WINKELMANN CJ:

I think 3.15. We started at 9.30. Yes, 3.15 and we will take the lunch adjournment just an hour.

MR VARUHAS:

Yes. Will that be taken now, your Honour, or?

WINKELMANN CJ:

Yes, I think, given it is only now a minute I think it's fair enough.

COURT ADJOURNS: 12.59 PM

COURT RESUMES: 2.01 PM

WINKELMANN CJ:

So, as I indicated, Mr Varuhas, you're going to have to cut your cloth to – your garment to meet your cloth, because we can't sit past four.

MR VARUHAS:

Yes, I – your Honour, I timed things out and I should be able to finish by 3.30, but I may need that bonus 15 minutes after 3.30.

GLAZEBROOK J:

Can you perhaps bring the microphone over.

MR VARUHAS:

Sorry.

WINKELMANN CJ:

Well, perhaps just focus on the critical issues.

MR VARUHAS:

That is what I intend to do, your Honour.

WINKELMANN CJ:

Right.

MR VARUHAS:

And I've timed it out. Okay, so factual causation was where we left off before the break. And so yesterday, my learned friend Mr Tierney took you to passages of the Court of Appeal judgment where it was said that the disproportionate sentence suffered by Mr Fitzgerald would not have been suffered if the charge had not been laid and, of course, that's correct. But the relevant enquiry for "but for" analysis revolves around the wrong, so you have

to ask “but for the wrong, would the particular outcome have transpired?” And so that requires definition of the wrong.

It's not entirely clear what the wrong is. I mean, we say the wrong is the Judge imposing the sentence and that only the Judge could commit the section 9 wrong because only they could impose a grossly disproportionate sentence.

Through these proceedings, other formulations have been advanced. For example, that there is a duty not to lay the charge, right, and that's those different formulations are at paragraph 32 of our submissions, obliged by the Bill of Rights not to lay the charge, for example.

If the duty is not to lay the charge, then I think “but for” would be unfulfilled. But the problem is that that duty would nearly completely negative prosecutorial discretion and it would effectively be a duty to subvert the three strike scheme, as it was then understood, right, because the duty would be don’t lay the charge so as not to allow the third strike scheme to operate as it was then perceived to be intended to operate, and it would also be problematic because it would require the prosecutor to effectively be performing a sentencing function, which is only for the judiciary. So that’s the problem with the duty not to lay the charge formulation.

It could be argued there was a duty to take the Bill of Rights into account, right. But this Court has held in *A (SC 70/2022) v Minister of Internal Affairs* [2024] NZSC 63 at paragraphs 131 to 141, that’s *A v Minister of Internal Affairs* decided last year, at 131 to 141, judgment of the Honourable Justice O’Regan, that the Bill of Rights is not a mandatory relevant consideration, but rather whether it's taken into account, or not, by a decision-maker is something that ultimately has to be assessed in terms of substantive breach.

But that’s where we say it falls down, because only the Judge can commit a substantive breach of section 9, because only they, in our constitution, have the capacity to impose the sentence, and furthermore, if the obligation is to take the Bill of Rights into account, we say the Bill of Rights was taken into account, as

evidenced by the submissions on sentencing, but it was thought at the time that because of the *Harrison* case the manifest injustice rider at the third strike rendered the scheme consistent with section 9.

Or alternatively, the prosecutor could not have subverted the three strikes scheme. So if her view was that indecent was the charge, she couldn't alter that just to subvert a valid statutory scheme which section 4 of the Bill of Rights, at that time, was considered to support, or did support on the understanding of three strikes at that time. So we therefore –

GLAZEBROOK J:

Why did you say the Judge should have imposed a sentence in accordance with our decision in *Fitzgerald*, but the prosecutor shouldn't have anticipated the decision in *Fitzgerald*? I just think you can't have it both ways?

MR VARUHAS:

Well there's, causation has to be judged at the time of the alleged wrongdoing.

GLAZEBROOK J:

Well, it might be judged at the time, but the law was always a fiction, but the law was always as stated in *Fitzgerald* Supreme Court. So at the time, that was the law.

MR VARUHAS:

Yes, well, I think –

GLAZEBROOK J:

What people thought was law was, was actually irrelevant.

MR VARUHAS:

We don't accept that, your Honour, because causation has to be judged at the time of the alleged wrongdoing and even if there was a doubt in one's mind about whether there was, in fact, this section 9 rider on the three strikes scheme by applying section 6, it was for the Court to determine that. Because on the

received understanding of the authorities at that time, it was a mandatory scheme without the section 9 caveat and the prosecutor couldn't have been expected to proceed on any other basis.

WINKELMANN CJ:

All right.

MR VARUHAS:

Okay, so the point there is –

GLAZEBROOK J:

But the sentencing Judge should have done, was the submission that was made by Ms Laracy, as I understood it.

MR VARUHAS:

I think it's true to say that the Supreme Court's view of the law was always the correct view, is how we would put it.

So the, I suppose, if there's an overarching point there, it's that the issue of "what is the duty" is somewhat complex and also that that has ramifications for how "but for" analysis may apply and whether it can be fulfilled.

WINKELMANN CJ:

Go ahead, I'm not asking you a question.

MR VARUHAS:

Right, so going on to legal causation then, and I'm going to deal with this fairly briefly because a lot of the arguments will rise or fall on your Honour's view of the factual background that my learned friend Ms Laracy has set out previously. The principles that we state here are not controversial. They are basic principles of legal causation. So, I am going to just go through each and just explain how we say it would apply and I'm going to do it in bullet style fashion.

WINKELMANN CJ:

Where are you in your written submissions?

MR VARUHAS:

Yes, where we are on the screen.

WINKELMANN CJ:

82, right, okay, got it.

MR VARUHAS:

82, yes, and then the first, going to the first subparagraph 82.1. So one test of legal causation is what was the "direct and immediate" cause of the consequence or wrong. Here, we say it's the Judge's act of imposing the sentence, which is the direct interference with Mr Fitzgerald's right and direct causes supplant indirect causes and, as I have said, it was only the Judge, we say, who could have breached section 9 here because only they could have imposed a grossly disproportionate sentence, and that is principle applied in vindicatory torts, for example, like false imprisonment, as well, so it's not an evidence point. On novus actus, the authorities, there was a long line of authorities that hold, and they're collected in the footnotes, 108 in particular. That where some act is done, here the prosecutor's act, and then there is some consequence at the end, the detention of Mr Fitzgerald, if an independent decision-making process enters in between then that will break the causal chain as a novus actus and the authorities are consistent that a judicial act, including judicial act of sentencing will invariably break the causal chain.

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WILLIAMS J:

Are those authorities in the context of compulsory sentence regimes?

MR VARUHAS:

No, they're not in the context of compulsory sentencing regimes, but in many of the cases, well, they're not the cases concerning the judges. There are cases where, for example, prisoners go on a strike, so it's inevitable that the governor

of the prison will have to confine the prisoners to their cell. So it's inevitable the governor's hands will be forced. But the governor's act of issuing an order confining the prisoners to the cell will be a novus actus. It's just the fact of an independent decision making process and the judicial decision making process is the paradigm case of it.

WILLIAMS J:

Well, provided it is a decision, that's the problem.

MR VARUHAS:

So the counterargument could be the automaton argument that the judge was mere automaton and we would say that this Court's judgment showed that there was room for decisional manoeuvre. My learned friend Ms Laracy has taken you through instances where there were offramps. But it would also say that there was no open and shut case.

So even if you have the clearest rule, like you can't exceed 50 kilometres in the speed zone, we all know that how that will be applied, even if it is stated in those absolute terms will depend on judicial judgment. What if you have to speed up to avoid killing someone? What if a fly is in your face? So on and so forth. So even the clearest rule on its face does not oust legal reasoning, or scope for legal judgment because those provisions of statutes can only be operationalised through judicial interpretation which engages all of the key normative principles and forces of our legal system. So we would resist the idea that a judge, even in a mandatory sentencing scheme is an automaton.

Now, there is the scope of liability argument and this is the idea that in laying the charge the prosecutor doesn't assume responsibility for risks that may materialise from judicial acts and this draws on the language of the Court of Appeal at paragraph 122 of the Court of Appeal where they use that language of assuming responsibility. It can't be said that the prosecutor, by laying the charge, assumes responsibility for what the sentencing judge did and then also assumes responsibility for what the Court of Appeal did anymore than it can be

said that the prosecutor assumed responsibility for what this Court ultimately found on appeal.

In terms of length of detention, the argument here is that there were multiple, as your Honours have already heard, there were multiple different forces operating which led to the particular length of time that Mr Fitzgerald was detained, including fitness to stand processes, various judicial processes. The most time that he spent detained was during the appellate process between the sentencing decision and ultimately when he was re-sentenced following this Court's decision. So the multiple processes, either we say render the consequence, the ultimate consequence, too remote, or those are all novus intervening acts which operate to break the causal chain and Justice Miller took that view in the Court of Appeal relevant paragraphs 149 to 152 and 155.

Then the last argument on legal causation, the last principle invoked is reasonable foreseeability. So at the time of laying the charge it was not reasonably foreseeable to the prosecutor that Mr Fitzgerald would suffer a section 9 breaching sentence, one, because the Act was seen to mandate it. So section 4 of the Bill of Rights provided that that was lawful and not wrongful, but also because of the understanding that followed from the *Harrison* case.

So we say that as Justice Miller did, that applying the causal lens is another way of shedding light on what occurred here and which the application of those principles tell against the imposition of responsibility on the prosecutor.

So, your Honour, your Honours. Sorry, I was in the High Court earlier this week. So, your Honours, I want to move then to the issue of damages and what has been referred to as state liability. So I will take this point in two parts. One, analytical framework and two, nature of *Baigent* damages. So on analytical framework, this really picks up the theme that I commenced with.

WINKELMANN CJ:

So there is no need to repeat that in your submissions.

MR VARUHAS:

I, your Honour, I wouldn't think of repeating the same points, but there are a couple of additional points which I will deal with, with expedition and I'm sure your Honour will tell me if I am repeating myself. But the key point here is the Bill of Rights breaches do not occur in the abstract. They are the result of acts of people who work in public roles and section 3(a) of the Bill of Rights refers to acts done and section 3(a) refers to the different branches of government reflecting an intent that the Bill of Rights would fit into our constitutional system rather than be an exception to it.

WINKELMANN CJ:

How do you square that submission with those cases, recent English cases, mainly arising out of the Privy Council's jurisdictions where the focus is upon systemic failure?

MR VARUHAS:

Yes, your Honour, I will come to that, to that point. So the main argument here is that to properly analyse any Bill of Rights claim, including claims for damages, one needs an analytical framework, an analytical structure and that must start with the act, who did the act, which rights were engaged, how those rights are said to be breached, responsibility and causation, identification of available remedies.

GLAZEBROOK J:

That is a second stage, isn't it, because, well, I'm not sure where the submission is going, but it's absolutely clear that all three branches of government have to comply with the Bill of Rights, doesn't it, with the exception possibly of the legislature in terms of parliamentary sovereignty, but that is dealt with in the Act itself?

MR VARUHAS:

I think with that, with that caveat, your Honour, that's right.

WINKELMANN CJ:

In your submission.

MR VARUHAS:

In our submission, sorry, and with respect, respectfully so.

GLAZEBROOK J:

We don't need the words around that, or I don't need the words around that.

MR VARUHAS:

So, okay, yes.

WINKELMANN CJ:

He wasn't marking your comments though.

MR VARUHAS:

So, yes, we don't say that any of those actors are outside the Bill of Rights, or the Bill of Rights doesn't apply to them, but what we submit is that one needs to work through a particular analytical structure.

GLAZEBROOK J:

But why would you need to do that in order to just see whether the rights are breached, because don't you – I mean I can understand the submission when it relates to remedies, but that's the second stage, not the first stage.

MR VARUHAS:

So, there are a number of reasons. I mean the points I've made, just made about but for causation perhaps illustrate the point that one must start with the particular acts and what legal duties they are said to have breached otherwise the waters can be, can be, can be muddied. It's also important because, and this goes to the systemic breach point, what might in a sort of non-legal way be referred to as a systemic breach might ultimately be a breach of one particular actor and then that might be relevant all the way through the analysis.

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So, for example, in the *Putua* hearing which I naturally took an interest in, there was reference to the absence of an appeal right and a statute being a systemic breach. That's a breach by Parliament because Parliament didn't put the appeal right in there and that why it's important to just be careful about looking at the particular acts, what was the particular actor that was said to breach the right, how was the right supposed to have been breached, otherwise one can – that can otherwise distort the analysis, because if you just referred to that as a systemic breach, you could reach the conclusion that damages should be given because it's, one has passed over who the relevant constitutional actor is and that damages don't apply to them. But also, for example, when you're analysing section 5, right, one must ask the question of deference, and in regard to Parliament deference might be owed to Parliament because of its democratic credentials. Parliament might, has the capacity to reach decisions based on broad moralistic and political judgements. The executive might be in a different situation. It might be only able to rely in a particular context on its technocratic legitimacy. It can't come to court and say, we were just making a broad political judgement about sustainable fish catch under a statutory power. They would have to rely on their technocratic expertise, and then when it comes to the judiciary, we may find out or we may not find out how section 5 analysis would apply in the case of a judiciary, but the judiciary certainly couldn't rely on broad political or moral judgements or democratic legitimacy to ground a deference argument. So that's one illustration of why it's important to understand who –

WINKELMANN CJ:

Well it depends on your view about the constitutional settlement as to whether the judiciary can rely on democratic legitimacy.

MR VARUHAS:

That is a large question your Honour.

WINKELMANN CJ:

So my concern about this, the way you're taking us through this and you're slicing it into a lot of different bits, and it makes me think of the early comments

made by Lord Cooke about the application of the Bill of Rights and you can't strangle it through rigid legal – rigid formalism, and it's beginning to sound rigidly formal. I mean all your points are sort of – obviously the particular actor is, bears upon how, your assessment of the act. It's slicing and dicing it rather a lot.

MR VARUHAS:

Well I would refer to the slicing and dicing as the separation of powers and I don't think it's, I wouldn't say it's –

WINKELMANN CJ:

No, it's your analysis of the cause of action is my point.

MR VARUHAS:

Well one needs an analytical framework, and I recall this Court's comments or statements in the *A v D* [2024] NZSC 161, [2024] 1 NZLR 579 case last year about fiduciary duties. That one can't simply say, you know, this case calls for justice and reverse engineer a fiduciary duty –

WINKELMANN CJ:

No, you need a framework but does it have to have 25 different parts is my point.

GLAZEBROOK J:

Because isn't it just simple enough to say has there been a breach of the Bill of Rights, and then was it committed by one of the section 3 actors.

MR VARUHAS:

The issue, your Honour, is that one would have to identify the particular act that breached the right.

GLAZEBROOK J:

But why? Only, you say, because damages is not available in respect of two of the branches.

MR VARUHAS:

It's not only that point. It's that the particular constitutional actor and their characteristics is a fundamental aspect of the context which will shape the analysis all the way through but also the discussion we've just had about the nature of the wrong here, and whether it's the prosecutor or the judge, illustrates that a degree of attention is required as to what is the particular act, and how does it breach the right.

WINKELMANN CJ:

As to whether there's a breach. You have to know who the actor is before you know whether there's a breach.

MR VARUHAS:

That's right, and the breach is not committed by an abstraction, but by the acts of public actors. So for that reason it's, in our submission, it's unavoidable to work through the structure, and the intention is not – your Honour, we would say that it's a fairly loose structure but has the essential elements necessary for making out any Bill of Rights claim.

We also say that when it comes to the remedial discretion, one of the factors to be taken into account is whether the act was in good faith or deliberate, for example, and the public interest is also relevant to weighing on remedies, but also remedies in the Bill of Rights context are an accountability mechanism. So there is a public value served in identifying which branch, which actor, ran awry and whether they've taken steps to correct the act so it doesn't happen again.

I'll just take your Honours to, I'm nearly done on this point, take your Honours to the Human Rights Commission's submissions at paragraph 31 of their submissions. Their first line there: "The present appeal offers a useful illustration. Parliament enacted the three strikes regime; the prosecutor laid a charge aware of the consequences of conviction on a stage-3 offender; and the sentencing Judge imposed (and a Court of Appeal majority upheld) a disproportionately severe sentence."

Then my friends go on in their submissions to say that how causation should operate in that sort of scenario is that you ask, taking all those acts in aggregate, but for all of those acts, would the consequence have transpired, and the issue, your Honours, we would say is plain, that Parliament is mentioned there, and that illustrates the issue that if you bundle up all the actors –

WINKELMANN CJ:

Well perhaps it does illustrate the issue against you because this kind of approach might lead to you concluding that there's no remedy, even though the system has delivered a breach of section 9.

MR VARUHAS:

This case is not such a case because the acts of the different actors can be analysed in the orthodox fashion, and the fact that all counsel here have focused on the prosecutor's acts, the facts surrounding those acts, the context, gone through and been able to apply ordinary principles to those acts, illustrates that. So it's not a case where it is possible to disaggregate the acts but we know that in the end there's been a breach.

WILLIAMS J:

I mean the essence of your argument is that we accept there's a breach but the separation of powers means even though it was unavoidable and we're dealing with it in retrospect, rather than in a preventative sense, there's nothing you can do about it.

MR VARUHAS:

There will be cases where there, nothing can be done either because it's found there isn't a breach, or because remedial principles lead to that –

WILLIAMS J:

But you've accepted there's a breach here.

MR VARUHAS:

Yes.

WILLIAMS J:

And it was after the event. Prosecutor can't be controlled in the manner being suggested. Neither could the judge. The system took its course, four and a bit years. Sorry.

MR VARUHAS:

How close does that get to saying Parliament created the risk, and it's Parliament that knocked off the domino effect.

WILLIAMS J:

Well that's really the point, you see, this is the three people pushing the car off the cliff. The legislature, the judiciary, and the prosecutor. In truth.

MR VARUHAS:

Your Honour, we would say that the judiciary is the actor that directly interfered with the rights, and we can identify that.

WINKELMANN CJ:

So can you just be clear what you're saying, what's the problem with what's set out at paragraph 31 of the HRC submissions?

MR VARUHAS:

The problem is that grouping all the actors together and saying there was a breach, and then going through legal responsibility on the basis on a whole of state theory, will inevitably risk passing over constitutional fundamentals, which is the point I made out the outset, because only particular remedies are available for particular actors, and particular constitutional considerations inform both the Bill of Rights analysis of primary liability, and also inform judgments as to remedies. So – and it may be too easy to go to the systemic breach idea. With a little work one might be able to work out the particular acts

involved, and if one does that in a clear-eyed way, one will be able to avoid inadvertently transgressing or rubbing up against the separation of powers.

WINKELMANN CJ:

So that's your analytical framework?

MR VARUHAS:

Yes. So moving to the nature of *Baigent* liability. So this is an important issue, a large issue, but I will go through it reasonably quickly. So a lot was said yesterday about what the Crown's view of *Baigent* damages is. Our view is that's supported by the case law. It is not vicarious. It is a direct liability of the Crown, and the Crown means the executive government.

1430

At times in the jurisprudence the notion of state is used in a loose way as a shorthand to denote the idea that the liability is direct rather than vicarious. But that shorthand cannot be said to found an entire constitutional theory. It can't bear that weight. The concept of the state is not found in our most important legislation, the Constitution Act. It's not in the Bill of Rights stated. It's not in the Crown Proceedings Act, and it's not in the Treaty of Waitangi Act 1975. The only authority invoked by my friends in favour of the concept is *Baigent* and *Chapman*, and we would say that –

WILLIAMS J:

And the obviousness of the point. I mean you're not suggesting there is no such thing called the state of New Zealand?

MR VARUHAS:

It depends what one means your Honour.

WILLIAMS J:

Well yes, I thought you might say that. But as a political fact it is, that's why we're called, when we sign up to international agreements, states parties, because we're States and the state is the essential building block of

international law, and it's also, in political truth, the way in which we're arranged. We happen to inherit the complexities of the English common law constitutional system, but that doesn't change the fact.

MR VARUHAS:

So viewed from the perspective of international law, there is a State of New Zealand, because that concept is a recognised meaning in that setting. When international law looks at the state it sees it as a black box, but the concept is accepted, but within our order, as I say, in a generic, well we use state in all sorts of different ways, you know, state immunities, act of state doctrine, so on and so forth, but the –

WILLIAMS J:

State housing.

MR VARUHAS:

Yes, but the point is that there is no recognised juridical entity, legal person, known as the state in our law.

WILLIAMS J:

Yes, that's a statement of technical legal position but in a BORA context the question we have to ask ourselves is in the context of fundamental rights whether that is, to be colloquial, your get out of jail free card.

MR VARUHAS:

That's not how we intend to use it, and the point that – what I would say about the get out of jail free card, and the finger pointing point which was made yesterday, is that when it comes to concepts like judicial immunity and parliamentary supremacy, those are based in constitutional fundamentals, and they have to be taken seriously.

WILLIAMS J:

We're also talking about torture, cruel treatment, and disproportionate punishment. You see there's, that's what challenges these basic ideas,

because someone spent four and a half years in jail they should never have spent there, and we have to be careful about applying constitutional niceties, important though they are, ancient though they are, to that bitter reality. Without thinking very hard about it.

MR VARUHAS:

Yes, I think your Honour here we know that the judiciary breached the Bill of Rights by imposing a section 9 sentence.

WILLIAMS J:

Yes.

MR VARUHAS:

No damages remedy can be given because of judicial immunity.

WILLIAMS J:

Well that's in question in another case.

MR VARUHAS:

That's right, and the point is that's being considered. So there may at times be countervailing considerations, which overcome the need to give a remedy, and that's something that's being considered in the *Putua* appeal, but – and have to necessarily be considered because it raises issues of judicial independence, but I'm not sure what the concept of state really adds because it can't avoid that analysis. It can't avoid the separations of powers considerations.

WILLIAMS J:

The question is really, does the separation of powers that underpins this, on this point I agree with you, that even if you're talking about a corporate state, you still have to deal with the constitutional dynamic because those are fundamental to the way the system is operating.

MR VARUHAS:

Yes.

WILLIAMS J:

But you're dealing with not just fundamental rights but in this particular case deeply fundamental rights and you have to be careful about what constitutional niceties you deploy to avoid taking responsibility for the breach of those rights.

MR VARUHAS:

We would not frame it in terms of avoiding responsibility, we would –

WILLIAMS J:

Well that's the fact of it.

MR VARUHAS:

Well, that is not how we would frame it.

WILLIAMS J:

No, but that's the fact of it. I mean you win, Mr Fitzgerald doesn't get any money.

MR VARUHAS:

The other way to frame it is that it upholds the constitutional distinction.

WILLIAMS J:

I understand that. I understand that.

MR VARUHAS:

And those are the things we're wrestling with.

WILLIAMS J:

Yes.

MR VARUHAS:

And I agree that the importance of human rights is an important part of the equation. We're operating in that context.

WILLIAMS J:

Well this form of human rights, this form of human rights.

MR VARUHAS:

That's right, yes.

WILLIAMS J:

Not just unfair trial.

WINKELMANN CJ:

Now we've got to look at the time. You've got 45 minutes left.

WILLIAMS J:

Sorry, I was enjoying that.

WINKELMANN CJ:

I know you're seeking an hour, but you're dealing with a lot Mr Varuhas, and we've got to be fair to Mr Butler who's going to have to have time to reply as well, and the Crown has had a lot of time today, it's not you being cut short at all.

MR VARUHAS:

I am confident your Honour that I will get there by 3.30.

WINKELMANN CJ:

I said 3.15. You keep on trying to negotiate with me.

MR VARUHAS:

No I had, to be fair, it wasn't a sneaky route, I had signalled at the outset.

WINKELMANN CJ:

I know, I noticed that, I didn't agree to that.

MR VARUHAS:

Yes your Honour, I'm in your hands on that, but I will move through.

WINKELMANN CJ:

Well, Mr Butler, how long do you anticipate to be in reply?

MR BUTLER KC:

I'm just doing a quick calculation to see how much time I was given yesterday, and I calculate that I was given just over, a smidgen over three hours yesterday, so I just would reinforce the point, I suppose, that your Honour has given in terms of a fair crack of the whip for the Crown already, so I didn't jump up and object to a 3.15 suggestion, because I kind of thought well, you're allowing them to talk about some issues that I didn't need to address, and which I say they shouldn't need to address. But 3.30 is going to make it pretty fine. I've done what I did in *Putua* your Honours, which is prepared a table, which will capture a number of the points, but I would have thought in the ordinary way I'd be getting a bit more time since the issues are not tiny, that have come up. But I'm honestly in your Honour's hands.

WINKELMANN CJ:

Right, well I mean you should aim to finish by 3.15, but if you finish by 3.30 we might give leave to Mr Butler to file additional written submissions in reply.

MR VARUHAS:

Your Honour, yesterday were all submissions that were broadly making –

WINKELMANN CJ:

Yes, but all the same, even so.

MR VARUHAS:

In the same, and I'm not sure if Mr Butler took into account his junior counsel's time spent but.

MR BUTLER KC:

I certainly did.

MR VARUHAS:

I am aiming to move with due expedition but the, I mean the Crown's points also do need to be heard and they are significant issues.

WINKELMANN CJ:

Yes, they are certainly, you've certainly had plenty of time for them to be heard. Carry on.

MR VARUHAS:

Yes so I think the point with the state is really that it would perhaps obscure more than it illuminates because it does not have a set meaning in our system. It would raise a number of large questions. The Chief Justice in *Chapman* considered that a concept of the state could be birthed into the law, and it could be confined to the *Baigent* context, but inevitably when something so significant as a new constitutional actor is added to public law in this country, it will have ripple effects through the system, and difficult questions will arise, including the relationship between the state and the Crown. Does this new concept of the state owe obligations under the Treaty of Waitangi, for example. Can there be direct liability in tort against this new entity. Can this new entity, like in other countries, bring prosecutions, or is it the Crown only that can bring prosecutions. Where a new concept of the state has been created in common law systems, it's been by written constitution which then systematises that concept through the whole system. So, for example, in Trinidad and Tobago not only is the state a juridical entity created by the constitution, but they have a State Proceedings Act, for example. So your Honours it's a word of caution about whether we really need to go there. How much is going to be added to our system, given we have the plain text of section 3(a).

WINKELMANN CJ:

Although it does do one thing, doesn't it, which is make clear that the state as a whole has a responsibility to move together to ensure rights compliance.

MR VARUHAS:

The actors each have that obligation in any case.

WINKELMANN CJ:

The collective does.

MR VARUHAS:

There are some issues with the idea of the collective. So, for example, the Chief Justice –

WINKELMANN CJ:

No, my point is the undertaking we make at international law is for the collective to comply. Collectively the entirety of the organs of government will be in compliance with it.

MR VARUHAS:

Yes, that goes to my point about international law seeing the state as a black box. So international law doesn't care which actor it is, it just wants the state of New Zealand, the concept in international law, to comply. What international law doesn't have to deal with is the separation of powers and a framework of settled constitutional principles within our legal order, which need to all fit together in a coherent way.

1440

Your Honours, I would say, I won't go through all of the passages, but in *Baigent's case* it was repeated many times that the Act – sorry, that the Bill of Rights claim in damages is a public law remedy directly against the Crown. The concept of the state can be word clouded from the judgment. However, many of those references to the state refer to the *Maharaj* case and comparative jurisprudence such as Irish jurisprudence where there is a concept of the state written into the Constitution, or refers to international law, concept of the state in international law, and in *Chapman* itself Justices McGrath and William Young did say we'd be surprised if there wasn't a concept of the state, but they repeatedly conflated the state with the Crown. They saw them as the same thing.

WINKELMANN CJ:

What's wrong with that, because the Crown is in multiple, in multiple iterations in our, in New Zealand, isn't it.

MR VARUHAS:

Well I suppose one issue is why the state is needed if you have a recognised concept of the Crown, but what –

WILLIAMS J:

Because the Crown is older than the state, is the truth of it. We are the Queen's Judge's, Parliament involves the Crown sitting in that chair, and Her Majesty is thousands of civil servants.

MR VARUHAS:

Yes. It is a –

WILLIAMS J:

It works and no one has decided to do what the Americans have done, or the Trinidadians have done because we don't need to.

MR VARUHAS:

Yes.

WILLIAMS J:

Except in these circumstances where avoidance, that's the question for you, inappropriate avoidance is achieved by failing to acknowledge the singularity. Now whether that's inappropriate or not is a matter for your argument of course, and I agree there are very good arguments why that might not be the case, but that's what you've got to confront.

MR VARUHAS:

Yes. Your Honour I believe –

WILLIAMS J:

This isn't business as usual, this is a breach of section 9.

MR VARUHAS:

I believe we have confronted it, your Honour, through our arguments, and our argument is that there is a clearly defined actor that breached the Bill of Rights and that was the judiciary. But the act of judicial sentencing cannot be sheeted home to the prosecutor because there is a fundamental distinction between those two entities, but we can identify the breach.

WINKELMANN CJ:

Okay.

MR VARUHAS:

Now the last point I just wanted to make about sort of conflating the Crown and the state is that her Honour the Chief Justice in *Chapman* in her dissenting judgment said multiple times that in our system the Crown generally denotes the executive government, but she nonetheless wanted to make the move where the state meant the Crown and the Crown means all three branches. I would just say there are some dangers with that because the Crown is generally understood to refer to the executive government, and in particular, and really significant context, like the Treaty of Waitangi for example, section 6 of the Treaty of Waitangi Act in particular, that's what the Crown has taken to mean. So if the judiciary is brought under the umbrella of a concept which is often associated with the executive government, it could lead to problematic perceptions in terms of judicial independence.

WINKELMANN CJ:

It is under the concept of the Crown though, isn't it, we're the King's Judges and et cetera.

WILLIAMS J:

The King's Judges, sorry, yes.

GLAZEBROOK J:

I thought you were a bit out of date.

WILLIAMS J:

You're not the only one that thinks that. What does section 6 of the Treaty of Waitangi Act tell you about all of this?

MR VARUHAS:

It's about the jurisdiction of the Waitangi Tribunal.

WILLIAMS J:

Yes, I'm quite familiar with that.

MR VARUHAS:

Yes, of course.

WILLIAMS J:

But doesn't that make the point? It applies not just to the executive Crown, it applies to every arm of the so-called Crown and treats it as if it is the Crown.

MR VARUHAS:

It separates them out. It refers to the House of Representatives and it refers to the Crown and its promulgation of policies and so on. The Waitangi Tribunal's view, and your Honour will know better than I, is that the Crown there means the executive government. So, for example, the Tribunal hasn't launched inquiries into the judiciary for example.

WILLIAMS J:

Yes it has.

MR VARUHAS:

Well that's my understanding of the position. I may be mistaken. But when it said that the Crown owes obligations –

WILLIAMS J:

Yes, it's launched inquiries into legislation, proposed legislation, and into judicial acts on numerous occasions.

MR VARUHAS:

I'm not familiar with those particular examples, but the fact remains that when, for example, president Cooke in *Baigent* was referring to "the Crown" he was referring to the executive government, and if one looks, for example, at the Public Finance Act 1989 the interpretation section there about the Crown, it's about Ministers and their servants, Crown Proceedings Act, it's about servants and officers of the Crown. It deliberately excludes the judiciary because it would be inappropriate for the judiciary to be viewed as a servant or officer of the Crown, understood in the way it's understood in the Crown Proceedings Act

WINKELMANN CJ:

I don't know how much further you're going to take this.

WILLIAMS J:

We get all that.

MR VARUHAS:

Yes, well I was going to end there. Yes, as I'll return to –

GLAZEBROOK J:

Well one could argue deliberately excluded the judiciary is actually an indication that otherwise they would be included.

MR VARUHAS:

That was the Chief Justice's argument in *Chapman* but as I say I think it would be –

WINKELMANN CJ:

I think it was her reasons, she wasn't arguing it.

MR VARUHAS:

Yes, sorry, but I think it would cause some issues because as the Chief Justice recognised in that judgment the Crown is generally taken to denote the

executive government in our system, and judicial independence is absolute subject to parliamentary sovereignty only, so it has to be taken seriously.

So moving on to prosecutorial liability very briefly, and I'm not going to spend too much time on this, so these are arguments if your Honours decide to overturn the Court of Appeal, and find that there is liability in this case. I'm not going to spend too much time on them because they are set out in the submissions, but in regard to the way remedial discretion would work if the prosecutor was liable here, we say that the sorts of considerations that inform a high threshold for intervention in judicial review, and also a maliciousness standard in civil liability need to be taken into account, and were taken into account in the *Henry* case regarding Charter damages where a malice standard was adopted. We also say that there are factors counting against the making of damages, including Mr Fitzgerald's rights have been publicly vindicated by this Court. There is no risk of repetition because the new three strikes scheme includes safeguards for section 9. It's Parliament which promulgated the scheme and the judiciary which imposed the sentence which bear principal responsibility, and other factors and processes contributed to the overall time in prison.

On quantum I just say that Justice Ellis' judgment represented a very serious deviation from the orthodox framework governing Bill of Rights damages. Her Honour did not seriously engage with *Taunoa* or leading authorities from the Court of Appeal such as *Attorney-General v Van Essen* [2015] NZCA 22, (2015) 10 HRNZ 155 and *Combined Beneficiaries Union Inc v Auckland City COGS Committee* [2008] NZCA 423, [2009] 2 NZLR 56. That is perhaps illustrated most starkly at paragraph 124 of Justice Ellis' judgment. "The leading authority remains the Supreme Court's decision in *Taunoa* … but it is difficult, with respect, to discern in the various judgments either a majority approach or one that is of much practical assistance to a first instance judge."

GLAZEBROOK J:

My understanding, and you can correct me if I'm wrong, but if you have a pure administrative error and somebody stays in prison longer, there's effectively a daily rate that's applied. Do you say that's wrong?

MR VARUHAS:

That is the approach sometimes taken in false imprisonment with the caveat that it shouldn't be applied in a mechanical fashion.

GLAZEBROOK J:

Exactly.

MR VARUHAS:

But it's false imprisonment whereas this Court in *Taunoa*, and the Court of Appeal in *Gardiner*, specifically disavowed that sort of approach in regard to *Baigent* damages, and one reason for that would be that in private law damages are loss-based, so the time spent is a good proxy for the amount of loss, whereas *Baigent* damages are principally vindicatory and deterrence-based with an ancillary redress of function. So that neglects the nature of the award.

GLAZEBROOK J:

Well, you say it's only deterrence rather than compensation?

MR VARUHAS:

There is, they're a mix of functions.

GLAZEBROOK J:

Leaving aside the time, so let's say you take off the time on bail, or whatever you're going to take off, are you saying you don't say, well, if you were there by administrative error you'd get X dollars a day.

MR VARUHAS:

I think the Courts in –

GLAZEBROOK J:

Whereas if you're here because of a *Baigent* breach of some sort, you don't get X dollars a day?

MR VARUHAS:

Your Honour, I believe that is the debate that is being had in *Taunoa*, and thereafter the view is that *Baigent* damages cannot be equated with damages in private law, and have a distinct methodology.

GLAZEBROOK J:

So, in fact, those things for administrative error, which then lead to an arbitrary detention, they should not be on a, how long extra you've been detained, because you are looking at a 9(5) under the ICCPR aren't you?

MR VARUHAS:

I think that was a question that was addressed in the *Putua* appeal about whether *Baigent* would – a *Baigent* approach would comply with the requirements of Article 9(5). It is a principle that the approach to compensation is a matter for the forum, so the mention of compensation in Article 9(5) must be broad enough to contemplate different legal traditions and different approaches to monetary compensation, across all of the countries of the world. 1450

It's also the fact that her Honour did not cross-check the sums or work from the sums. In important cases like *Taunoa*, the sum is well outside the accepted range for *Baigent* damages and there was no cross-checking of the award against other measures which reflect the expectations of responsible members of New Zealand public, such as annual salary or the maximum amount that can be paid under ACC –

WINKELMANN CJ:

And we went, if we did that, where will we arrive at? Because that's now quite high, isn't it?

MR VARUHAS:

Your Honour, in our submissions, we –

WINKELMANN CJ:

I mean, cost of living, reasonable expectation about what people expect to earn these days. I mean, it's all drifted up quite considerably.

MR VARUHAS:

Yes, well, we've taken into account inflation. We've taken into account in our written submissions inflation and the current salary, the current average salary of New Zealanders, and we go through and analyse all of that. So, for example, the award made to Mr Taunoa in *Taunoa*, which was said to come very close to a section 9 breach, in today's money would be, if you took that and extrapolated it out in terms of time to match that which *Fitzgerald* was in custody, it would be 69,000 and that's just as a proxy, and that takes account of inflation, whereas Justice Ellis awarded 450,000. It would take an average New Zealander about 10 years to earn 450,000 net of tax. The maximum sum in the veteran's compensation is around 250,000 for complete loss of function. In ACC it's about upper-end upper-100s.

So that's just to give some context and we go through in the submissions and reach a range that we think is appropriate, taking into account other operative factors and also discretionary factors which are relevant to *Baigent* damages.

Now, your Honour, I will move on to judicial liability, because bearing in mind the minute of the Chief Justice that counsel is directed to consider the position if *Chapman* does hold, and that's what we've been doing to this point, and what is the position if *Chapman* does not hold.

So, a few preliminary points. So, and yes, and we've got the – it's paragraph 96 onwards in our submissions. So, the Crown restates the position from *Putua* that *Chapman* remains good law and your Honours have the Crown's submissions in that case.

We observe that this proceeding from the outset has been focused on the prosecutor. Because judicial breach was not pleaded, it's simply a fact that there are no – we have not received any instructions from individual judges or the Chief High Court Judge or the President of the Court of Appeal, bearing in mind that the sentencing Judge imposed the sentence and the Court of Appeal affirmed it, so we assume that the Court of Appeal also breached section 9 through that affirmation, and so there has been no opportunity for any judge to give evidence.

WINKELMANN CJ:

Well, I don't know if that's right. It's the operative cause is sentence and they simply failed to correct it, it's not that they breached it. They don't reimpose –

MR VARUHAS:

They upheld the order.

WINKELMANN CJ:

They don't reimpose the sentence, do they?

MR VARUHAS:

They upheld the order.

WINKELMANN CJ:

Mhm, they're not reimposing the sentence, they're simply failing to – anyway, it's probably neither here nor there.

MR VARUHAS:

Well, I think it is an interesting question that may need to be addressed, should *Chapman* be caveated, and a not easy one. I mean, also in the Court of Appeal there was a minority judgment which reached a different view, but not in the view the Supreme Court ultimately reached. It's not clear how that should play into the analysis, but it's – I think there are some questions there, but the key point I'm making is we don't have instructions and the point hasn't been pleaded.

We also say: “The Attorney-General records that she is placed in an ... inappropriate position, in being required to defend both the prosecutor, a member of the executive, and judicial officers, including the sentencing judge and the judges of the Court of Appeal who upheld Mr Fitzgerald’s sentence.” We repeat the submissions from *Putua* that such a situation undermines actual or perceived independence of judicial officers because the Crown, meaning the executive government’s senior law officer, is representing judges alongside executive officers in contested proceedings where there are issues of responsibility and apportionment. Those are issues that were recognised by Justices McGrath and Young in *Chapman*, paragraphs 184 and 190.

We say that those points made there are not clearly wrong. It cannot be said that there is no risk of a perceived undermining of judicial independence from the Crown’s, meaning the executive government’s –

WINKELMANN CJ:

Yes, I don’t think we need to – aren't you repeating the argument that was made in *Putua*?

MR VARUHAS:

Well, I’m stating it on the base, on the facts before us, because it's a live issue here because the Attorney-General is –

WINKELMANN CJ:

No, but with the issue –

MR VARUHAS:

Sorry, the Attorney-General is representing here judicial officers and executive officers, which was not the case in *Putua*.

WINKELMANN CJ:

Yes, so the issue of general principle was dealt with in the argument in *Putua*.

MR VARUHAS:

Yes.

WINKELMANN CJ:

Are you addressing the question of general principle?

MR VARUHAS:

I am saying that those issues of principle that were put by the Crown in *Putua* are brought squarely into focus on the facts of this case.

WINKELMANN CJ:

Well, perhaps just, I think, just focus on how, on that aspect of it, you don't need to sort of rehearse in short, in condensed form, because it would have to be condensed form, the argument there.

MR VARUHAS:

Yes, yes. Well, so, I've made the point that I was going to make on that. Now, the second point, again looking at judicial independence concerns from the perspective of this case.

WILLIAMS J:

Sorry, I just have a question.

MR VARUHAS:

Yes.

WILLIAMS J:

You referred to the judgment of Justice Young?

MR VARUHAS:

Justices McGrath and Young – William Young, sorry.

WILLIAMS J:

Right, yes, good, thank you. I just want to make a note of it, the paragraphs?

MR VARUHAS:

Yes, 184 and 190.

WILLIAMS J:

Thank you.

MR VARUHAS:

We also observe that if damages were given here against the judiciary, it would be the executive government that would pay them and it's not clear how that serves the vindicatory or deterrence or accountability functions of *Baigent*, where there's one branch of government breaching the Bill of Rights but the executive branch is paying.

Now following on from those points, this case does bring into focus again concerns around perceived judicial independence and incentive effects.

GLAZEBROOK J:

And what effect?

MR VARUHAS:

Incentive effects. So, in this case, the High Court interpreted the three strikes scheme according to precedent. It's mandatory, there's no section 9 off ramp. The Court of Appeal upholds that, that's consistent with previous Court of Appeal authority. Then it comes up to this Court and this Court finds the correct legal position is applying section 6 of the Bill of Rights, there is in fact a section 9 rider to the mandatory scheme.

GLAZEBROOK J:

Well, actually, only the Chief Justice applied section 6, the rest of the Court in *Fitzgerald* just applied ordinary principles of statutory interpretation.

MR VARUHAS:

My understanding is that the judgment of Justices Arnold and O'Regan used section 6 and purposive interpretation, and the Chief Justice relied on section 6, so that would be a majority.

GLAZEBROOK J:

I don't think so.

WINKELMANN CJ:

Doesn't matter.

O'REGAN J:

It doesn't matter.

GLAZEBROOK J:

Anyway, it doesn't matter.

WINKELMANN CJ:

There's probably an academic article there.

MR VARUHAS:

It would take some unpacking. So, in terms of what happened therefore was that the lower Courts effectively, you know, they made mistakes of statutory interpretation, obviously with significant ramifications for rights, but the mistake they really made is a matter of interpretation and how they interpreted the strikes scheme, whether section 6 or purposive interpretation.

So, in a world where *Baigent*, sorry, *Chapman* must – not imagine a world without *Baigent* which is my favourite case, by the way – but in a world without the *Chapman* judgment, there might be incentive effects or perceived incentive effects for lower court judges, real or perceived, to adopt expansive approaches to section 6 interpretation, so as to avoid being found to have breached the Bill of Rights if a higher court finds a rights consistent interpretation which the lower court which could not identify.

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In terms of higher court judges, there may be a real or perceived incentive against departing from received understandings of law for fear of generating mass judicial liability for judgments delivered based on formerly received understandings of the law.

WILLIAMS J:
That's all about the clarity of the line, isn't it, though?

MR VARUHAS:
I'll be grateful if you could elaborate?

WILLIAMS J:
Obviously wasn't clear. But that's all about how you describe the line dividing liability from non-liability.

MR VARUHAS:
Yes and I will come to that point, but –

WILLIAMS J:
But it's a complete answer to that proposition, which I agree in the abstract is potentially a problem, unless the line is clear, in which case those incentives are removed.

MR VARUHAS:
Do you mean by "the line", the liability standard?

WILLIAMS J:
Yes.

MR VARUHAS:
So we would say, your Honour, that – and we'll come to the liability – it's a bit hard to argue because we've got the multiple worlds and so on, but in one world which my friends favoured in *Putua* it would just come down to discretion in

every case. So in that world, these risks would be real and they have to be taken seriously, because judicial independence is of such fundamental importance and is an absolute, and it's very hard to dismiss any risk of incentive effects because, you know, different people, some people are cavalier, some people are risk-averse.

WINKELMANN CJ:

The appeal process is quite a big issue for us then, isn't it?

MR VARUHAS:

Sorry?

WINKELMANN CJ:

I said, the appeal process is quite a bit risk for us then, isn't it?

MR VARUHAS:

It is, your Honour, so that's a part of our submission that that's something that –

WINKELMANN CJ:

No, I mean at the moment, judges are always careful in their decision-making because they bear in mind that they must be right, so they agonise to be right.

MR VARUHAS:

And your Honour says –

WINKELMANN CJ:

And that the appellate process says "no, you're wrong".

MR VARUHAS:

Yes, yes.

WINKELMANN CJ:

So judges are actually judging, inevitably, as human beings, with a mind to the appellate process.

MR VARUHAS:

Yes. So, I mean, I think there are concerns that we would say, your Honours, we need to consider as part of the *Putua* calculus or the panel in *Putua* needs to consider around that, because judges – and the Judges here, you know, look at Justice France's sentencing judgment, look at the judgment of the Court of Appeal, the Judges took their task very seriously. They were trying to find pathways around coming to the conclusion that they wanted to – that they inevitably felt they were pressed to come to, and we would say that that is not an appropriate situation where there are, you know, plausible, seriously considered views on statutory interpretation which, in the end, turn out to be incorrect. I think courts would need to look very seriously before imposing liability in such a situation.

WINKELMANN CJ:

Yes.

WILLIAMS J:

I don't think you'd have anyone disagreeing with you on that.

MR VARUHAS:

Pleased. But one last point on that, is we would say and this, I suppose, this just reinforces the point and actually it doesn't need to be said, given the discussion that we've had.

WINKELMANN CJ:

Right, because you've, yes, and you've got to move to "Arbitrary" now.

MR VARUHAS:

One last point is just a point about liability thresholds, which his Honour Justice Williams raised. We do assume that if judicial immunity was departed from, that there would be a liability threshold such as a bad faith or clearly unconstitutional threshold. As I mentioned earlier, in French law the test is gross fault. In EU liability, there is a sufficiently serious criterion which focuses on the clarity of the rule breached by the judge or state actor, so these are

threshold requirements, and in other systems, such as the US, there are qualified immunities which similarly focus on the clarity of the rule breached and whether, you know, it was a matter of discretion or not.

I would observe that and we say, that if *Chapman* were departed from, such a high threshold would be required to meet the judicial independence. Most certainly, the judicial independence and other concerns that the Crown put in *Putua* and which I won't repeat here, but importantly that those standards are not reached in this case.

I also just note the following paragraphs of *Chapman*, 169 and 170. That there are real difficulties in framing liability thresholds in a way that will meet the concerns around judicial independence and other policy concerns and that may be an important reason, and certainly Justices McGrath and William Young thought so, for retaining the immunity.

Now lastly, I just mention the discretionary factors regarding the judge and then I will go on to arbitrary detention. So we again say that judicial liability should not be imposed here, whatever the standard is it shouldn't be imposed.

We've covered the issues around the appellate process and good faith interpretations in errors of law. This will –

WINKELMANN CJ:

Where is that? That's at – what paragraph are you at in your submissions now?

MR VARUHAS:

So that would be – it's in the section starting at paragraph 96, paragraph 100: "... multiple factors ...".

WINKELMANN CJ:

So we have your written submissions there.

MR VARUHAS:

Yes.

WINKELMANN CJ:

Is there anything in particular you wanted to add?

MR VARUHAS:

I just mention, I just do want to acknowledge that section 9, a breach of section 9 is a serious breach, but this is an unusual situation where you have a breach of section 9 but it's inadvertent and based on good faith differences of interpretation of a statute, and in Justice France's case he was following a precedent. There is no deterrence basis for an award. There's no suggestion the Judges were not careful and the new three strikes includes safety valves.

The violation was corrected in the same judicial process and rights vindicated in an important public way by this Court, the highest court in New Zealand.

We also say that the Judge was not solely responsible but that Parliament passed a law that, on its face, was inconsistent with section 9. And we don't say, for the avoidance of doubt, that that generates any sort of damages liability, but we do say it's relevant to judging the responsibility of the Judge, and we also have submissions on quantum.

WILLIAMS J:

How do you weight vindication in that calculus?

MR VARUHAS:

Yes, so I think in that calculus, vindication is what is left.

WILLIAMS J:

Yes.

MR VARUHAS:

So I suppose what we would say is those factors, as well as the appellate issues, tell against the making of an award. When it comes to making the award, one needs to get to a certain range based on the general levels and *Baigent* cases, but then one also needs to look at, for example, those factors all feed into quantum as well. So, a good faith breach would get less than a deliberate breach, for example, but what any damages, if given, would address would be vindication and they'd be in the nature of an enhanced declaration or solatium, is how we would frame it, because there isn't a deterrence function here.

WILLIAMS J:

Well, there is, there's a system deterrence function. Perhaps it's stronger in *Putua* than it is here, but it certainly is present.

MR VARUHAS:

Well, Justice McGrath in *Taunoa*, if my memory serves me correctly, said that, you know, if you have an individual breach which is the product of a systemic breach you don't amend the award, because the award is to the individual, and I could get you that reference –

WILLIAMS J:

Yes, no, we're talking about deterrence.

WINKELMANN CJ:

That doesn't really help.

WILLIAMS J:

You said there's no deterrence here?

MR VARUHAS:

But I meant this –

WILLIAMS J:

The deterrence is system deterrence, for example, the possibility –

WINKELMANN CJ:

Including Parliament.

WILLIAMS J:

The possibility that the Crown prosecutor might, or the Solicitor-General might introduce a deeper vetting system further down the track when a third strike significant sentence is in play, so that extra special care is placed on whether to proceed with – the assessment of whether to proceed with the particular charge, for example.

MR VARUHAS:

So your Honour, I would say that, those issues, aren't reached because Parliament passed the new three strikes which has the section 9 “manifest injustice” rider for all of the mandatory sentencing requirements, so that wouldn't come up.

WILLIAMS J:

There it worked.

MR VARUHAS:

Sorry?

WILLIAMS J:

There it worked.

MR VARUHAS:

Yes. No, the –

WINKELMANN CJ:

I was going to say, I was going to add, Justice Williams, that it's a deterrence of Parliament, too. Because it can see, it brings to life, in the political spectrum

for them, for Parliamentarians, that rights are to be respected and that there are consequences for them not to be respected, not being respected.

MR VARUHAS:

I think that, your Honour, respectfully, that comes dangerously close to saying there are damages for breaches through legislation.

WINKELMANN CJ:

No, I don't think so.

MR VARUHAS:

Well, the awards are given to deter the repetition of the relevant breach, and the relevant breach was a judicial breach, not a breach by Parliament.

GLAZEBROOK J:

You've just said it's a shared responsibility.

MR VARUHAS:

But it's not a breach of the Bill of Rights.

WINKELMANN CJ:

Mmm, you're making a good argument for state responsibility, aren't you, Mr Varuhas.

MR VARUHAS:

Your Honours, that must be resisted, naturally. And there are very significant constitutional differences between our system and other systems, like Canada, which have gone down that path.

WINKELMANN CJ:

Right, right, so you need to move on to your "Arbitrariness".

GLAZEBROOK J:

Can you just give me the reference to what you were going to say about what Justice McGrath said in *Taunoa*, what paragraph you're referring to?

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MR VARUHAS:

Yes, I'll have to – I'm going to have to find that and I'd better –

WINKELMANN CJ:

It was, there was nothing, what was it? There was nothing to be added to the award because it was a systemic…

O'REGAN J:

You can do it afterwards.

WINKELMANN CJ:

You can do it afterwards, Mr Varuhas.

MR VARUHAS:

I think it's, well, I think this is what he says. It's at footnote 120. "No basis for an award and deterrence as cause of the breaches arise was an institutional one which was addressed in the course of proceedings." So I may have abstracted it a bit further.

GLAZEBROOK J:

Paragraph 120.

WILLIAMS J:

Footnote 120.

MR VARUHAS:

My footnote 120 paragraph 371 of *Taunoa* and maybe another paragraph, but I will doublecheck.

WINKELMANN CJ:

Well, anyway, we will look it up. Okay, you're onto arbitrariness now.

MR VARUHAS:

Yes, so onto arbitrary detention and we've made good time. So, arbitrary –

WINKELMANN CJ:

Yes, we have four minutes left.

MR VARUHAS:

So, arbitrary detention, right, so this is most relevant if we're in what I understand to be world B. So if world B is accepted, section 22 is going to have a lot of work to do because that's going to be the touchstone for whether there is damages liability for judicial breaches.

We say s 22 is not engaged for the following reasons. One, Mr Fitzgerald was lawfully detained pursuant to a judicial sentence imposed pursuant to due process. It is an axiomatic part of our justice system, including the appellate system that court orders remain valid until set aside.

The notion of arbitrariness is unwieldly. However, the statement in *Neilsen v Attorney-General* [2001] 3 NZLR 433 (CA), the Court of Appeal decision in *Neilsen* at paragraph 34 is instructive and meets the idea, the general idea of arbitrariness: "An arrest or detention is arbitrary if it is capricious, unreasoned, without reasonable cause: if it is made without reference to an adequate determining principle or without following proper procedures."

We say that the Judge in the Court of Appeal did not act in a whimsical fashion. They acted on received legal understandings and reasoned judgment.

WINKELMANN CJ:

There is a discussion of arbitrariness in *Chisnall*, isn't there. I see your footnote.

MR VARUHAS:

That's right, I'm coming, I'm coming to that and then their view of the law turned out to be wrong, but their view was not implausible or lacking a rational

foundation. The legal error was cured within the same process. It self-corrected and viewed as a whole, the judicial process corrected.

So, Justice Ellis' argument was if a sentence is imposed in breach of section 9, then it must necessarily be a breach of section 22. At 55, paragraphs 55 to 64 her Honour set out the reasoning in support of that. That's paragraphs 55 to 64.

The international authority relied on was a case from the Human Rights Committee where a person of a particular faith was imprisoned for seeking to exercise their religious freedom and the Human Rights Committee reached the view that that was an arbitrary detention. The principle in that case is if you punish someone for seeking to exercise, legitimately exercise their rights, that can be an arbitrary detention. That doesn't support the reading, the direct read across where there's a breach of section 9 to the fact there's a breach of section 22. It's a different principle.

Justice Ellis also relied on the *Henry* decision from the Supreme Court of Canada. That was not a case about arbitrary detention. She also relied on statements in *Fitzgerald* that the sentence was grossly disproportionate and a breach of section 9. That's correct, but it doesn't carry forward the argument.

In terms of the UN Human Rights Committee's general comment, the comment proceeds by giving a lot of examples of arbitrary detention likely because arbitrary detention is difficult to define. None of those examples include a grossly disproportionate sentence.

Now, in terms of *Chisnall*, at paragraph 163 of this Court's judgment in *Chisnall* this Court addressed the submission that detaining someone in breach of section 26(2) necessarily amounts to arbitrary detention and the Court said: "We observe that." It was the majority: "We observe that to the extent the arguments of arbitrariness depend on an inconsistency with the s 26(2) right, they really add nothing to that analysis."

The Court also observes that there is a significant, there is the potential for significant overlap between section 22 and other rights which again there is that potential because it's a very broad right. But we say, as appeared to be the approach of this Court in *Chisnall*, that to render section 22 determinate, it has to be interpreted in the light of more specific rights in the Bill of Rights. It has to be interpreted in light of the statutory scheme as a whole and it doesn't make – it gives section 22 no independent work to do if every time there is a section 9 breach, right, it's also found to be a section 22 breach and the only reason for doing that would really be to reverse engineer liability in world B.

But I think your Honours, sorry, not I think, I submit, your Honours, that one needs to be very careful about delineating the bounds of arbitrary detention if the Court is to choose to go into world B because it's going to have to do a lot of work.

GLAZEBROOK J:
Remind me what world B is again.

MR VARUHAS:
World B is where the only exception to *Chapman* is based on section 22 because of the operation of Article 9(5).

WINKELMANN CJ:
Or perhaps section 9 as well, as was submitted yesterday.

MR VARUHAS:
I mean the world has expanded its original conception.

WINKELMANN CJ:
Well, it does all the time.

MR VARUHAS:
I would say that, just in passing, that grossly disproportionate punishment is not, the right against that is not in the ICCPR. So yesterday when my friend for

the intervener was making arguments about jus cogens or article 2(3), the right is not actually in the ICCPR because article 7 is a narrower right which is the equivalent to section 9. So just note that for completeness.

WINKELMANN CJ:

Grossly disproportionate punishment does not come within the article, is your point.

MR VARUHAS:

Yes. So there may not be the same international law driver, is the argument around that there is for Article 9(5) if one sees that as a driver.

So, your Honours, we also say lastly, if it's not accepted that section 22 is not engaged we say that any interference here is justified under section 5 and we say that court orders remaining valid throughout an appellate process, an appellate process concerning sentence, is a fundamental feature of the system which would ground a reasonable limit.

WINKELMANN CJ:

Thank you, Mr Varuhas.

MR VARUHAS:

Your Honours, unless there are any other questions.

WINKELMANN CJ:

There is nothing left to be said I feel.

MR VARUHAS:

I feel that significant ground has been covered, your Honours, and with only three minutes in excess.

WILLIAMS J:

Or 12 minutes left, depending on where we ended up in that negotiation.

MR VARUHAS:

That's right, your Honour, it is a matter of interpretation, good faith interpretation.

MR BUTLER KC:

No doubt your Honours will be as nearly as exhausted as I am from listening to the world wind tour.

WILLIAMS J:

We're just getting warmed up, Mr Butler.

MR BUTLER KC:

Indeed. But you've been taken on by the Crown and I mean that with incredible respect obviously to my friends. There was a lot that was covered in the time provided. So what I've done is I've done what I did in *Putua's* case which was to try and provide a table to try and capture points. Because of the way in which points came out, there will be an element of randomness to it for which I apologise if it doesn't necessarily follow the most linear pathway and in addition to what you've got in front of you I also have some additional points to be made because this was produced about 45 minutes ago to make sure it would be able to be in front of you for printing out and then some quite astonishing submissions have been made in the time after this was sent for printing and I think I need to address some of those submissions now so that you don't think that I accept much of what you heard.

So let's start with some of the more astonishing submissions you heard that are not addressed in the box and that relates to the issue of quantum and hopefully you can hear me. So, the submission that was made to you was that her Honour's approach to quantum goes well beyond anything that you could possibly discern from a case like *Taunoa*.

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Again, I want to be very clear, I'm just trying to do the best I can on my feet with these issues. I maintain the objection that these issues are not properly before

the Court, but I am taking the opportunity that your Honours said I should take to address them. So don't think that I'm trying to resile from it, but I'm trying to show you why what you've heard from the Crown on such big issues that if in fact they are properly to be considered by the Court, then it will need a matter of more days.

WINKELMANN CJ:

I mean as to that, you are quite free just not to respond on the points that, within that remit of objected to points, and to deal with it by written submission. I mean if, because it may be more coherent for us if you did.

MR BUTLER KC:

I think that is fair, because I was going to say that, look, I think if these are actually on the table, then I need to have an opportunity properly to respond in writing on them, but I would hate to leave the hearing without at least having tried to paint why the issues are big issues.

WINKELMANN CJ:

All right.

MR BUTLER KC:

So on quantum, for example, it is said that her Honour Justice Ellis departed from the guidance that was given in *Taunoa*, and *Taunoa* suggests the right approach that should be taken to damages. There is much to be said about the relevant paragraphs in *Taunoa* which begin at, I think from memory, paragraph 252, and go to roughly about page 263, which deal with when damages should be, *Baigent* compensation should be awarded, and then 263 onwards deal with how you go about tackling quantum issues.

What *Taunoa* set down was certain principles. So, for example, there is not to be double recovery. In many cases of a breach of Bill of Rights there will already be recovery achievable through a common law statutory, other statutory claim. So one of the principles, unsurprisingly, that the Supreme Court was laying down is there's no double recovery. You look to see what else might be

able to be recovered, both compensatory – sorry, non-compensatory and compensatory through other parts of the legal system. It's only then that you look to *Baigent* damages to see, well what role might there be for *Baigent* damages.

Here, of course, you've got the issue that for technical reasons you can't argue false imprisonment, for the reasons that my friend touched on, of the technical barrier to recovery that a decision of a judge is. But that's not to say that when dealing with the facts before her that her Honour couldn't look at the problem that slaps you in the face, to use his Honour Justice Williams' evocative phrase, which is this man spent 1,700 days with a loss of liberty. Mr Taunoa was not facing loss of liberty claim. What he was experiencing was a less than comfortable prison experience. Unsurprisingly it would be a massive difference, you would expect, between the quantum between those two things that you're identifying, never mind the fact that Mr Taunoa's case didn't ultimately reach the section 9 standard.

Of course the approach that her Honour adopted was entirely consistent with what you would expect if you accept the proposition that not only was this a breach of section 9, but that the breach of section 9 inevitably affects the nature, the label that you attach to the detention you accept, as I urge you must, that the detention was arbitrary. Because then you're in section 22 territory, then you're in Article 9(5) territory, and the general comment gives you guidance, paragraph 52, so this is *General Comment No 35*, paragraph 52, and it talks about making sure that there is compensation, and compensation which compensates both for the financial and the non-financial harm that has been caused. So the pecuniary and the non-pecuniary interests that are in play, and that's a loss of liberty.

So what did her Honour draw on to try and quantify damages here? She drew on what exactly you would expect. Orthodox sources of information such as, for example, the Crown's own guidelines arising out of a miscarriage of justice, which quantify, give you a certain sum expressed on an annual basis for the loss of liberty, and then which also recognised there can be additional

recompense in respect of, for example, loss of earning power et cetera et cetera. So in other words the Crown's own compensation guidelines recognised liberty has got a value, and then the loss of liberty can mean that you've got loss of earnings, and there may be other things as well that need to be compensated for. So I say her Honour took an orthodox approach.

She had also before her the *Henry* case. In *Henry* when you look at the quantification of damages looks to a loss of liberty element, but also impact on earning power, and any number of other factors that you would expect a court to have regard to when trying to respond to the type of injury, the type of harm that's before the Court, and there's much more I could say about that.

Then a proposition was put, a relatively adjacent to that submission, about incentives, and that really here the problem is Parliament, and you really need to be thinking about what the incentives are that you send, and that effectively, as I understood the proposition, what was put to you was that you'd be doing something novel here. No you're not. You wouldn't be.

I spent much time before this Court in *Putua*'s case making reference to the *Gardiner* case. You recall *Gardiner* was the case where the Court of Appeal in 2003 in *Taylor*'s case had set out what its interpretation was, and I'm no expert in this area, but can I broadly describe it as end of sentence calculation periods, I think that's broadly how it might be described. It's something to do with that difficult area of law that Mr Ewen was an absolute expert in.

Corrections correctly followed the directions given by the Court of Appeal in *Taylor*'s case, but this Court in *Marino* in 2016, yes there it is, 2016. Yes, *Marino*, I see it's called *Booth v R* [2016] NZSC 127, [2017] 1 NZLR 223, I don't know why it's called that, but anyway, everybody refers to it as *Marino*. Overturned *Taylor* interpreting the Parole Act differently. Now how do you analyse a case like that? The reason the Court of Appeal took one particular view of what the relevant credit provisions was, was based on its interpretation of the statute, and this Court took a different view of the interpretation of the

statute, which rather suggests that the statute wasn't as clear as perhaps it ought to have been.

So who is really at fault for what happened to the plaintiff in this particular case? You might say, on their theory they'd say if it was broad as a section 22 BORA case rather than a false imprisonment case they'd say, ah, it was Parliament that did it. It's Parliament that did it. Or maybe it was the judges who did it because they got it wrong in *Taylor*'s case. But the person who was made liable was Corrections. Corrections had to pay for the judicial decisions and for Parliament's style of drafting. Did that act as a disincentive to this Court to properly interpret the provisions? Is the Crown really saying that as a result of a decision like this then maybe the Court should have not decided this way because maybe next time Corrections won't apply the jurisprudence as it's said to be by the Court of Appeal because who knows, the Supreme Court might overturn it. No. So why does that logic apply in this case but not in that case. It shouldn't because it doesn't. Everybody goes about discharging to the best of their ability, their function.

Just as in *Gardiner*'s case through what you might refer to, abstractly, as a systemic problem, there's liability for a not insubstantial amount of money, and there will have been other people like *Gardiner*. The same holds true here, without having to blame anybody, what you do is you focus on what happened to Gardiner in the same way I say you need to look at what happened to Mr Fitzgerald. So you can put to one side entirely, I submit, the submission you've had on incentives.

WILLIAMS J:

Does that mean the separation of powers is also irrelevant?

MR BUTLER KC:

It's irrelevant in the way in which they wish to deploy it.

WILLIAMS J:

Your learned friends?

MR BUTLER KC:

Sorry, my learned friends, my friends wish to deploy it. The Crown, the Attorney wishes to deploy it, yes. It is. And that's a reflection, I suppose, of the, you know, the column, it just brings us back to that third column, the column on the right-hand side, the aggregate approach. What I'm trying to say by relying on *Gardiner* is that actually without saying it we already kind of do it at common law, because what we do is we pick on the jailor and say, you pick up the bill for the way in which the statute was written with all its problems and the way in which judicial interpretation has waxed and waned over time. We do it at common law, why don't we do it in a case like this under the Bill of Rights, a Bill of Rights which more clearly demands a response like that?

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That's actually adopting, your Honour made reference to what Lord Cooke had to say in the early days of the Bill of Rights, when he adopted what was said by the Privy Council in *Minister of Home Affairs v Fisher* [1980] AC 319 (PC)'s case, and I think was it Lord Wilberforce, I think it might have been, who said in *Fisher's* case, one of the early and leading Privy Council decisions on how you approach a constitutional Bill of Rights, you've got to avoid: "'the austerity of tabulated legalism'".

And I say you heard a lot of tabulated legalism when my learned friends made their submissions to you. It is a case we need to stand back and actually see what the dynamic is, how radical is it, actually, what is being proposed here by Mr Fitzgerald? It's not, in my submission.

Then there was the submission made to you about the role of the Attorney-General in conflicts and everything like that. If that really is an issue for the Crown, of course, then more than capable of briefing out to counsel who are independent of the executive, who can obtain instructions and, in any way, in any event, it's not something which troubled, for example, the English and Wales Court of Appeal. It recently addressed that issue last year in a case called *MTA v Lord Chancellor* [2024] EWCA Civ 965, [2024] 3 WLR 1037, so there initials *MTA v Lord Chancellor*, where arguments similar to the ones that

my friends have raised were advanced and rejected. The so-called "constitutional quandary" argument that was raised by the executive was dismissed pretty summarily by the English and Wales Court of Appeal and that applies, in my submission, here as well.

WINKELMANN CJ:

What arguments were those, you talked about, Mr Butler? You were –

MR BUTLER KC:

The constitutional quandary was "how could it be possible for the Lord Chancellor, a member of the executive, to, for example, settle a Human Rights Act claim where the claim was based on an alleged breach of the Convention by the judicial branch of the government of the United Kingdom". And the answer was "well, the Lord Chancellor would settle the claim in the appropriate way, taking legal advice". As you would expect any Lord Chancellor to do, the Lord Chancellor would be expected to approach the question on a legal basis, free of political influence, because the Lord Chancellor would be wearing effectively, even though a member of the executive, would be wearing that non-executive, non-cabinet member hat.

And that's why, for example, in all DOI cases, the Attorney represents – is, sorry, is the respondent or the defendant in a DOI case, and expressly so under the Human Rights Act 1993, because the Attorney must be given, always, notice of a claim under Part 3A, regardless of whether it's a judicial actor, a legislative actor or an executive actor. They must be given notice of a complaint to the Human Rights Commission of a breach of Part 1A and they must be given notice and have a, as of right, the right to participate in any proceedings involving a section 3A actor and it is always the Attorney who turns up to represent Parliament and defend the legislation, even when it is legislation that was passed by a previous administration and with which that Attorney-General may adamantly disagree and with which the government of that Attorney is a part of absolutely disagrees with, and you had that in *Fitzgerald*.

The Attorney who turned up to represent the Crown in that case was, at the time, was Mr Parker, who had been vehemently opposed to the three strikes legislation, only the Labour Party, for the very reasons that we have traversed and seen in the New Zealand parliamentary debates and which occurred, as they had predicted, to Mr Fitzgerald. We expect a lot of the Attorney. We expect the Attorney to wear many hats, to juggle, and she and he and they do. It's not a reason to avoid liability.

So if I can just return to the table and what I'll try and do is I'll just try and look and see which of these points I need to expand upon orally so as to help you make sense of them, as opposed to ones that I hope you can just read and just absorb.

So, "Responsibility for sentence with judge". Well, you understand what the argument is that I make. I think in respect of box one there's no need for me, I don't think, to elaborate any further on that. What I say the key point I'm trying to make here, is that the question here is not an abstract one, the question here is "who's responsible for the sentence", is not who's responsible for the sentence but whether the state can be made liable for material contribution of the prosecutor, the Crown solicitor, to this breach of rights. That's the key question, here, on these facts, in this case.

Just wanted to make sure, I didn't take your Honours to them and my friend touched on them, but it's important, I think, just to remind you that there were multiple windows of opportunity to offer an alternative charge and I've just made sure that the relevant references are there for you, and I just wanted to make clear that the concept of foreseeability, as I try to deploy it, is it's just simply to make the point, I'm not using "foreseeability" in a true tort sense, I'm just trying to make the point that with the awareness that the Crown prosecutor had that this was a third strike offence, it was foreseeable that a seven-year maximum sentence would be imposed upon conviction.

That's all I'm saying, I'm just trying to counter the point in advance that "how could the prosecutor know?" Well, the precedent said so and the prosecutor

herself in her own sentence indication, paragraph 16, my friend took you to paragraphs 18 and onwards, but didn't take you to paragraph 16, no criticism intended by that, but that's paragraph 16 is where the prosecutor expressly states the judge would have no option but to impose a seven-year maximum sentence.

WILLIAMS J:

What do you say to the *Harrison and Turner* decision which, I haven't read it fully of course, but seems to suggest that sufficient BORA consistency could be achieved by reliance on the parole out-clause.

MR BUTLER KC:

So that case, of course, only dealt with second strike, and second strike murder, so it was not dealing with a third strike, so in the sentence –

WILLIAMS J:

But the parole out clause is still in the third strike, is it not?

MR BUTLER KC:

Yes, yes it is.

WILLIAMS J:

Yes.

MR BUTLER KC:

But the important thing is that in the context of a third strike where what you've got is the maximum penalty must be imposed, you're in a different scenario to the one that was necessarily in front of *Harrison* because, as I understand the scheme, you get whatever the normal sentence would be and then parole then arises. And, of course, when you're dealing with murder you're in a completely different space from a low-level indecent assault type scenario.

So I'm not saying that the Crown prosecutor didn't have regard to binding precedent, because *Harrison* was plainly binding precedent, she correctly drew

it to the Court's attention, but she was also aware of the *Campbell* decision, *Campbell* being the one, the decision of Justice Toogood, where he said at paragraph 13: "I have no option but to [impose] the maximum [sentence of] ... seven years ...", that was also a low-level indecent assault scenario, but then went on to say, but at least – and that's where I think I read it out to you, where he said, you know, some people may regard this to be a "very harsh" sentence and unjust, he says that around paragraph 13. But then he went on at the later paragraphs to at least take advantage of a *Harrison* style approach to the equivalent manifestly unjust parole issue which is available in the context of a third strike offence.

But what the Court of Appeal, first time around, found quite clearly was that this was, this sentence, was a breach of section 9 even when parole eligibility order – sorry, the no parole eligibility order was not made, and I should have probably got it, I didn't actually mention that in my presentation, my oral presentation to you, but I should – it's in the Court of Appeal, first time around, where they expressly address the question of parole and "whether parole eligibility could be seen as a mitigating factor for breach of section 9", and they said "no, it's not, even if, it would still be a breach of section 9".

Of course, in the circumstances of an offender like this, the idea that he was just going to walk out on first go, with no fixed abode, and the nature of the offending that he had, et cetera, it's a bit of a stretch.

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WINKELMANN CJ:

Yes, I should have asked Ms Laracy this, actually, it occurs to me the Parole Board has its own things that it must take into account.

MR BUTLER KC:

Yes.

WINKELMANN CJ:

Doesn't it, which is it has a risk-focus.

MR BUTLER KC:

It's got a risk-focus. As it happens, the question for some, parole comes up in a kind of a funny old way in the matter, because I can accept that in one sense parole, the idea of, you know, well, do you need to consider whether parole is a vehicle to alleviate, you could, something you might look at very much in the abstract, but for reasons we'd give, we'd say same reasons as the Court of Appeal, it's not an answer to anything, because what it does is it says, well, the risk is carried by Mr Fitzgerald, and the Crown says, well, we don't carry the risk of what happens at the parole stage. Well, it's absolutely foreseeable, when you've got a maximum sentence of seven years, it's absolutely foreseeable that the maximum may well be served.

WINKELMANN CJ:

Now, I'm looking at your three pages of reply points, we're only half way through the first one.

MR BUTLER KC:

Yes, I am. I am looking there anxiously, but the good news, from my perspective, is the exchange we've had also deals with the big box towards the bottom of the first page, so I feel we're making some progress.

I don't – so the next box at the bottom of the page where my friend, and I hope she'll excuse me just using her initials, that's just what I use when I'm scratching peoples down and I refer to myself as "AB" so "ML" is just a reference to my friend, it's nothing disrespectful meant by it. So when I say: "ML made reference," it's just been done at such great speed, I would have put something else in.

WINKELMANN CJ:

Well, they are Ms Laracy's initials, so I don't think she'll be offended by them.

MR BUTLER KC:

Yes, no, I just want to make sure nobody thinks I'm –

WINKELMANN CJ:

Yes, being informal.

MR BUTLER KC:

Yes, you understand what I'm trying to say, yes. So, I've made reference to various things: "'serious harm', 'concerning history', no reason to know he would stop, ESO in place ...". The counter to those is actually set out in the Court of Appeal first time around, paragraphs 34(a) to (e) which I took you to.

My friend also said that she was relying on what she referred to as the: "careful assessment of the [Prosecution Guidelines] by CA below". I might agree that they were a careful assessment if we weren't in the context of a third strike offence, but we were and that context simply isn't reflected in the assessment that was undertaken by the prosecutor and, I also submit, is also when you work your way through what the Court of Appeal had to say in terms of analysing the prosecution, through the sentencing – sorry, through the Prosecution Guidelines, you don't see any reference at all, the big elephant in the room, being a third strike offence, seven-year maximum sentence must be imposed.

You can read the next box about *Rowe*.

WINKELMANN CJ:

Well, can I ask you – this is to do with "judicial hands were not tied."

MR BUTLER KC:

Yes.

WINKELMANN CJ:

There was one point when the application was made to amend the charge and the Judge refused to do so?

MR BUTLER KC:

That's right, so I really had wished that – Mr Ewen dealt with this in the lower Courts, because it's his real area of expertise. My understanding and I'll get it

slightly ham-fisted, section 133 and 136, first of all, apply to different time periods.

MALLON J:

Yes, 136 says it – that that's the provision that section – if you're in trial, section 133 doesn't apply.

MR BUTLER KC:

That's it, that's it, so good. So that's where, that's what I was going to say, because that's my understanding. So, one, so when, that's presumably why when Mr Preston makes reference to 133 in the transcript, that Justice Simon France is saying "is that right?"

MALLON J:

Is asking, exactly, because he's in trial.

MR BUTLER KC:

Exactly, because that's pre-trial. So as I understand, so 136 is what would be available in trial, but 136 is about saying, well, though –

MALLON J:

It's only conforming to the proof.

MR BUTLER KC:

Conforming to the proof, exactly.

MALLON J:

Yes.

MR BUTLER KC:

And so the point that his Honour Justice Simon France is making is, well, I've heard the evidence now, and I'm persuaded that plainly there was an assault, but I'm persuaded that it also met the standard of indecency and therefore it's met, so I can't –

MALLON J:

He had no power.

MR BUTLER KC:

"I've got no power", exactly, to downgrade it from, in term, from indecent assault to something else because, well, the relevant elements have been proven, so his hands were tied.

MALLON J:

However, I suppose Ms Laracy might say that the 133 route was available to the various Judges she referred to, throughout the process, before the conviction, before the trial.

MR BUTLER KC:

And look, I can't take that any further, because the Crown didn't call Mr Preston or anything of that sort to try and test and see how that might play out, so I'm just not in a position to be able to take that further. I know there was some discussion about it below and I remember Mr Young had the answer, and I just can't remember what that answer is. So maybe I just could address that very briefly by, in my point in reply subs, beside the to be filed subs, perhaps.

WINKELMANN CJ:

Fine, given that the Crown has a short right of reply.

GLAZEBROOK J:

It may be something to do with the prosecutor's discretion, if available, can't be overturned by the Judge under section 133 or others.

MR BUTLER KC:

That sounds right to me, that sounds exactly right to me, that's it.

GLAZEBROOK J:

And the Canadian case would actually bear that out, in fact.

MR BUTLER KC:

That's right.

WINKELMANN CJ:

Well, in any case, anyway, you can amend, address it, and the prosecutor, sorry, the Attorney-General can reply on that point.

MR BUTLER KC:

Thank you. And there was a discussion at around 10 o'clock this morning with my friend about approaching the – the need to approach it on the basis of that the court's an independent court, the independence of the court, and one of the reasons I made reference to *Matara* is to remind the Court that, of course, Justice Cooke took the view, well, the whole point of the regime, as everybody understood it, up until this Court's decision in *Fitzgerald (No 1)* was that, in fact, the judicial hands were tied and that, in fact, at least insofar as sentencing was concerned, you were not getting a decision of an independent court, at least it wasn't – didn't have any independence on that issue, because the sentence was one that was required by the legislation and there was no ability for the Judge to exercise an independent assessment of culpability of the offender or the nature of the offending and such like.

So I just, I just wanted to make sure that that one, that that contest about how truly independent the courts were, doesn't go unaddressed. It's not often that you hear a judge saying, at a sentencing stage, "I have no option", but that's what Justice Toogood said and the same is said, the same language is used, by Justice Dobson in the sentence indication, and that's highly relevant, it seems to me, when you're thinking about the proposition advanced by my friend, well, that it was significant that the High Court was the Court that was given the job of imposing these sentences. The proposition being, well, the High Court's in a better position to be able to supervise. Well, if judges are saying "we've got no option, effectively our hands are tied", then it's not much of a form of supervision.

I don't need to talk to the, what I say about Hansard, sufficiency of the peer review and –

WINKELMANN CJ:

I think we've got your point about that.

MR BUTLER KC:

I've got my points there, thank you. Oh, yes, there was reference to how we pitched the expose – that the prosecution, the bringing of the charge exposed Mr Fitzgerald to the risk of a breach of section 9. That was just me just being careful and cautious because, of course, the bringing of the charge, there's two elements to the risk materialising: the first was conviction, the second was sentence. So, sentence couldn't be imposed without conviction, so the risk that I was getting at was the conviction risk, as regards the imposition of the maximum seven-year sentence that was a probability upon conviction.

So I just wouldn't wish to be misunderstood in terms of what I was saying, so it might better be expressed that the prosecutor exposed Mr Fitzgerald to the probability of the imposition of a seven-year sentence if he was convicted.

WINKELMANN CJ:

Is it a probability of a seven-year sentence if he was convicted? Didn't it expose him to the certainty of a seven-year sentence if he was convicted, the risk?

WILLIAMS J:

Oh, "but for" *Fitzgerald*, yes.

WINKELMANN CJ:

Yes, "but for" *Fitzgerald*.

MR BUTLER KC:

Yes, "but for", yes, "but for" *Fitzgerald*, obviously, but at the time, yes.

The Canadian authorities, in short, have all been taken out of context. The context was constitutional validity of those statutory schemes, could the existence of prosecutorial discretion be relied upon by the Canadian governments in order to uphold those provisions? No.

Rule of law considerations mean not acceptable way of protecting against a breach of section 12 of the Canadian Charter.

Invalidation of mandatory minimum sentence is not available in New Zealand. Parliament says and Parliamentarians in those debates make it quite plain "we're not putting this issue of dispensation from the application of the regime in the hands of judges".

1550

We can all draw our own conclusions as to why they might think that, in terms of rhetoric. So, who are we going to put in the hands of? Because it was plain they didn't want people like Mr Fitzgerald going down, because they must have known it would put the legislation, raise public concern about the nature of the legislation which of course is exactly what happened after this Court's decision in *Fitzgerald (No 1)* was released. Great dissatisfaction when people realised, wow, it went this broad, wow. So to whom was the task given? The task was given to the Crown prosecutor, and we're just simply asking that that task, having been allocated, that the consequences of it failing to use your Honour Justice Glazebrook's phrase from your judgment in *Fitzgerald (No 1)* that the consequences flow.

The state. Cheap point but why not, we're at the end of the day on a Friday. No reference to the state in the Constitution Act. Section 2 refers to "the sovereign" as the head of State of New Zealand. So there is reference to the state in the Constitution Act. But more to the point, *Baigent*'s full of state. We're well justified in talking about state. My friend Mr Varuhas says well, look, state there sometimes is a reference to the way in which they looked at in Ireland, or Trinidad and Tobago, so don't put too much weight on that. Well there was no Trinidadian or no Irish cases involved in *Taunoa*'s case and state

is referred to 17 times. If you look back at the submissions that I put before this Court in *Putua* there's a footnote which just search 17 and it'll give you the relevant footnote.

WINKELMANN CJ:

Mr Varuhas used quite a nice expression in the notion of a word cloud, that it would be a word cloud.

MR BUTLER KC:

Yes a word cloud, so that's my answer to his word cloud argument, and of course the thing I wanted to raise was, but there's more, because of course what's interesting when we go back to that case *Power* that we had quite some discussion on in *Putua*'s case, Canada has got the same structure. The Crown, so to speak, is at the heart of the Canadian constitution. The argument that well is there a juridical entity of the state in Canada was not seen as a bar to the idea of Charter damages where legislation had interfered with Charter rights. The whole case of *Power* was about saying yes, there can be state liability for breaches of the Charter by legislation, and the notion of state liability is peppered throughout the judgment, even though the state actor in issue is not the executive, but Parliament. So they've been able to make square Charter compliance and the notion of state liability with the notion of a Crown. If they can do it, surely we can do it.

WILLIAMS J:

I wonder if it's because of the source in international law of the rights in contest.

MR BUTLER KC:

And we would say that whatever may be the position outside of the Bill of Rights frame within the Bill of Rights frame to speak of state liability goes with the statute not against the statute. So my friend Mr Varuhas referred to a black box that is the international, in international law the state is looked at as a black box.

WILLIAMS J:

Well the ICCPR treats the state as a black box.

MR BUTLER KC:

And that's what I was just going to say.

WILLIAMS J:

You were going to say that?

MR BUTLER KC:

Exactly what I was going to say. So okay, great, let's work with that. So international law says the whole point of the Bill of Rights is to give effect to New Zealand's commitment, not the Crown's commitment, New Zealand's commitment to the ICCPR. Well one obvious way of giving effect to New Zealand's commitment to the ICCPR is to follow its approach to state liability. To adopt, in other words, a black box approach.

So I will skip over the next part, judiciary is part of the state. So there's one thing I did want to come up with which came out of the exchange with your Honour Justice Williams about, that sometimes we have complex systems even when we're looking at private law. Complex systems are not unique to a public law setting, I think would be, just boiling it down to its essence. In private law we have complex systems and in private law we do look to attribution at the point of liability as to make some sort of attribution. I think that's, hopefully that's a fair short characterisation of the point that your Honour was making and you were suggesting, if I may say, that sometimes it can be important to make sure that if there's going to be system change, that attribution occurs.

Now putting to one side the obvious ripostes, if I may say, that were made by my friend Mr Tierney on our behalf, the submission I would be making is the black box approach is not inconsistent with an ability for systems learning, and the way the systems learning can happen is through, of course, the fact-finding exercise. Let's go back to something like *Gardiner*. One of the learnings that the system might make through *Gardiner* is, hmm, those provisions on pre-sentence detention and so on, not great. We've had to pay out quite a bit of damages, Corrections has had to pay out quite a bit of damages, so maybe what we need to do is go back and make suitable amendments to clarify things.

The same can happen, I say, in the Bill of Rights space. You can find liability, find it in the form of state liability, but through the process of fact-finding, which can occur in some cases but not in every case. Sometimes it will just depend on how the Crown responds through its pleading as to what matters to it. What it decides to put in issue. Like if *Chapman* weren't good law, we probably wouldn't be having many of these discussions. The Crown would just say, yes, there's a breach of section 9 here. It's unfortunate. We probably have to accept that there's a risk of liability and we'd be arguing not so much about whether there's liability, but how much. There'd still be able to be learnings going on. I see I've got two minutes left.

WILLIAMS J:
Four according to my computer.

MR BUTLER KC:
Four, I'll take your Honour's computer then thank you.

WINKELMANN CJ:
Mine says three.

MR BUTLER KC:
Well I better move quickly otherwise I'll be running out of time.

WINKELMANN CJ:
We'll give you until five past because I don't know humanly you can cover this, and I did want to hear you on the whole notion about the threshold from Mr Varuhas.

MR BUTLER KC:
Yes so…

WINKELMANN CJ:
The notion of a variable threshold depending on what state actor, so…

MR BUTLER KC:

Yes, I should come to that. Let's come to how he characterised my causation, the argument around causation. We're not saying there's no principles of causation. Obviously our line was, well there needs to be some sort of material contribution to the breach. That sounds to me like a form of causation analysis. We also said but even if he adopted a but for approach to causation we get home here.

I did want to make sure that your Honours, when looking at this issue of material contribution, that I'm sure it won't have escaped some of you, but it's probably worth saying before this Court that in *Putua*'s case the Court of Appeal took the view when looking at the question of division between the deputy registrar and the Judge, that the intervention of the Judge, the fact that the Judge had a role to play next up the line, did not act – break the chain of causation. So that were *Chapman* to be interpreted as confined to a judge alone and not applicable to a deputy registrar, then the deputy registrar's provision of the flawed warrant of commitment would have been sufficient, and the language that was used was that it was, I'm just trying to see whether we've repeated here, is at paragraph 91 of *Putua*, which is coming up. Sorry, my fault, I should have had it written down here.

So look at paragraph 91: "And that in our view is the causal position here. There was an opportunity for the harm to have been totally avoided had the Judge discharged his clear obligation to check. In some senses, his is the primary responsibility because the very purpose of his checking was to prevent errors, it was his document and the drafter was his subordinate. However, as a matter of impression we do not consider that his failure to check constitutes an intervening cause completely breaking the chain of causation between the error created by the Deputy Registrar and the arbitrary detention. In terms of the authorities on intervening causes, the Judge's error was directly precipitated by or attributable to being provided with a defective draft. What happened was within the scope of the risk created by the Registrar; it was a thing very likely to happen."

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It was a thing very likely to happen. Once this charge was brought a thing that was very likely to happen upon conviction was the imposition of a seven-year sentence. The link here was not remote or tenuous.

You should also be aware that in the *Henry* case the majority, at paragraph 98, talk about "but for" being the normal approach that could be expected to be applied, but said that it could be appropriately modified to material contribution where there were contributions from multiple actors. Exactly like here. So I think it's important when your Honour asked about well are there human rights cases that use this notion of material contribution, yes there are, and you see the use of materially contributed in the last line with reference to *Clements*.

Now threshold. I better deal with that because I'm just looking through my next page, and I don't think I directly address it. So my friend says you need to know who did what in order to know the application of thresholds, and what he did was he invoked the Canadian case law, because it's a feature of the Canadian jurisprudence that different standards are sometimes applied depending on the breach – sorry, the right in issue, and the nature of the actor, and as a description of Canadian law, that's accurate. But one of the points, there's a point of difference between our approach and *Baigent* damages, and the approach in other jurisdictions is that generally speaking we are not looking for malice of intent or anything of the sort. That's why, when I was in front of you in *Putua*'s case, I drew your Honour's attention, the three Judges in the centre, their attention to the *Udompun* and the *Whithair* decisions.

Where you've got an element like parliamentary contributions so to speak to a breach of rights, what the inquiries involved is not whether there has or hasn't been a contribution or whether it supervenes or something of that sort, but rather what's the nature of the contribution to it. That's why I go back to *Gardiner*. Nobody in a false imprisonment case says, crikey, let's go back and see how rubbish this statute, well I'm not saying it was a rubbish statue, but let's see how rubbish the statute was, and see whether that's really the cause and then that should be used as a way of cutting down the damages, and so I'm

saying here why should a similar approach be adopted. So in other words I suppose it's a long-winded way, your Honour, of saying this threshold issue that my friend has offered is a reflection of an approach in a different jurisdiction, but actually on examination is it something which should be a block to a case like this, Mr Fitzgerald's case, for his claim for compensation. I can't eliminate, you can never say never, I cannot eliminate the fact, the possibility that down the road there may be a case which is harder. It may be sufficient if the Court leaves open the possibility that where the responsibility, so to speak, blame can be laid at parliamentary feet, then that is something which will be of interest or relevance when deciding whether or not damages are to be awarded, because remember our approach is a discretionary one, and if so, how much. But what's being proposed by my friends, as I apprehend it, is that parliamentary involvement is a reason to never consider giving damages. That's a different and difficult proposition, it seems to me, to be advancing.

WILLIAMS J:

The comfort that is needed though is you put that toe through the door and you get not a few interesting and difficult cases, but 10,000 of them.

MR BUTLER KC:

But the answer, your Honour, is to have a little bit of a stick so that when you see that toe come in the door you push it back if it's in the wrong door. If it's inappropriate, if it's in the wrong room, that's the answer. The answer isn't to say, no entry to this house, and that's the problem with the approach that's being advocated by the Crown.

WILLIAMS J:

It would be better if you could say, don't worry because you can articulate the dealing with this difficult issue by shaping the door in this way. Meaning that if you don't, if you aren't a particular size you're not going to get through it, and that's what really neither in *Putua* nor here have we got clear guidance on that. I understand how difficult it is.

MR BUTLER KC:

It is difficult, and just on that, for example, the courts have given guidance, I think relatively clear, robust guidance saying, look, if your claim is a claim for a breach of section 27, natural justice, Bill of Rights, you're going to have to work really hard to persuade us to get over the line to award compensation. But there have been one or two cases. So what I'm saying is, the answer hasn't been to slam the door shut. It is simply to say all that's likely to happen in certain situation is you're only going to get your toe in the door, and nothing else. So if that's enough for you to be interested in that room, that's all the space you're going to get in the room.

WINKELMANN CJ:

So I'm not quite sure I understand what your submission is on this point about in response to the notion of thresholds. You're conceding that it may be that in some individual cases it would be appropriate for the courts to say, well, we're not going to give relief here because of…

MR BUTLER KC:

In the exercise of its discretion. Because remember the frame that we have advanced, both in *Putua* and here, is that whether there's relief is a discretionary exercise, that is the exercise her Honour undertook in the High Court, and then also in terms of quantum you look to see, well what's the harm that's been caused by the relevant breach. So I wouldn't, I don't think it would be right for me to be heard to discount the possibility that legislative responsibility, whatever that might mean, because it's a very protean term, the legislative responsibility. I don't even like buying into the idea, that's why I took you to the *Gardiner* case because *Gardiner* could be reframed as a legislative responsibility but it's not how we think about it. Rightly I submit. What I'm trying to say in other words your Honour is I wouldn't be so bold as to suggest you'll never have to encounter the issue, that would be overpromising, and I wouldn't feel comfortable as counsel saying it will never be something you will have to consider, but in most cases I can't see how it's ever going to be a problem, ever going to be an issue. Here we've got a deprivation of liberty. Mr Fitzgerald was

detained. A prosecution was brought. A judge sentenced. It's a breach of section 9 and section 22.

WINKELMANN CJ:

Right, now what else have you got.

MR BUTLER KC:

I just wanted to point out that the last thing I think I should just emphasise are two things. So the Three Strikes Legislation Repeal Act 2022, sorry again my handwriting is terrible, so that should be 2022, has expressly left open, has left open the ability for claims to be brought, and what the legislation says, and the Judges in *Putua* will know this, is that the ability to bring a claim for breach of the Bill of Rights is neither confirmed nor denied. So what I'm trying to say there is no express legislative roadblock on compensation here. I want to make it quite clear that when I was talking about the contact I was trying to describe the episode. I'm not seeking in any way whatsoever to minimise the nature of the incident from the point of view of the victims, I'd be horrified if I have expressed myself in a way that was, that that was what was thought. I was just not wanting to use the word "kiss" because it suggested a level of intimacy that is inappropriate to suggest here, because this was utterly unwanted, unwelcome and not desired.

Costs, Mr Fitzgerald is legally aided, but there are going to be issues in relation to costs and in particular disbursements, so I would ask if we were to succeed on the appeal I would ask for an award of costs and usual disbursements, and then I have an issue to work out with legal aid and then the Crown as to the mechanisms through which any such order should be made. If that sounds too complicated I'd like the question of costs to be reserved. Obviously if we do not succeed on the appeal, because he's legally aided, I think the appeal has been brought responsibly.

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WINKELMANN CJ:

I think we'll have to reserve if you have things to work out et cetera. So, and Mr Fitzgerald is legally aided so the Crown is your point the Crown could not seek costs against him?

MR BUTLER KC:

Correct, unless they say that this appeal hasn't been responsibly brought, then they can't, costs aren't available against – I'm just wanting to make, yes, I've made my point. I would like to seek costs but I have one or two issues in the background I need to sort out with legal aid in that regard.

WINKELMANN CJ:

So in terms of a pathway forward, what did we agree, you would be putting in submissions by the end of next week did we say, or did I not say? It seems so long ago.

MR BUTLER KC:

I'm in the Waitangi Tribunal next week. Could I have two weeks please because there's some pretty meaty issues there.

WINKELMANN CJ:

Two weeks, and the Crown, how long would you like Ms Laracy?

MS LARACY:

If the Court would similarly give us two weeks to respond.

WINKELMANN CJ:

Yes, that's fine.

MS LARACY:

The only other consideration I wonder if the Court might entertain, is suggesting a page limit, five to 10 page maximum.

WINKELMANN CJ:

I think definitely a page limit.

WINKELMANN CJ:

Ten page.

MR BUTLER KC:

Ten.

WILLIAMS J:

I thought that was surrender Mr Butler.

O'REGAN J:

With large type.

GLAZEBROOK J:

Yes, not the thing that seems to be happening, that tiny type.

WINKELMANN CJ:

Yes, large type and ordinary spacing please, because some of us can't read this low typeface.

GLAZEBROOK J:

It has to be said that in this case nobody was guilty of what seems to be happening a lot, with no spacing and very small type.

WINKELMANN CJ:

We thank counsel for their submissions. We did cover a great deal of territory, and I'm sorry if I put each and every one of you under pressure, but I think if I hadn't we might have been here for four days, so thank you. We will reserve our decision and will now retire.

COURT ADJOURNS: 4.12 PM