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CIRCUMVENTING *CHAPMAN*: BAD LAW MAKES HARD CASES.

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Contents

Abstract

The Supreme Court decision in Attorney – General v Chapman *precluded the availability of public law damages in respect of breaches of the NZBORA which occur within the judicial process. Two recent High Court decisions in* Putua v Attorney – General *and* Fitzgerald v Attorney – General *circumvent the Supreme Court by attributing responsibility to actors other than the judge. Both decisions are outside the bounds of precedent. The first section of this paper analyses the policy behind* Chapman *to establish that the basis of the Supreme Court decision is unsatisfactory.* Chapman *is bad law. This provides the backdrop for the High Court decisions. The second part of the paper analyses the High Court judgments. The cases demonstrate that* Chapman *has a wide framework due to an obiter statement by the majority. This is why attempts to circumvent the precedent by attributing responsibility for rights breaches to other actors ultimately fall outside precedent. Bad law makes hard cases. As* Fitzgerald v Attorney – General *is being appealed there is an opportunity for the courts to fix the legal position. This essay concludes that if the appeal reaches the Supreme Court, the Court has two options. The Court could overturn* Chapman *as the policy reasons behind the decision are an inadequate basis for precluding public law damages. Secondly, the Court could uphold the decision but provide more robust principles or policies for doing so.*

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I INTRODUCTION

In *Attorney -General v Chapman*[1] the Supreme Court held that the policy justifications of common law judicial immunity applied to claims under the New Zealand Bill of Rights Act (NZBORA) for public law (*Baigent*) damages.[2] On that basis, *Baigent* damages cannot be awarded if rights were breached within the judicial process. A key criticism of the majority decision was that the policy behind judicial immunity is not engaged in these kinds of actions.[3] *Chapman* is a law with no basis. This is why two recent decisions of the High Court, *Putua v Attorney-General*[4] and *Fitzgerald v Attorney – General*[5], engage in circumventing *Chapman.* Ellis J employs clever judicial reasoning to hold that responsibility for the particular rights breaches lie with actors other than the judge in order to award damages.

The first part of this essay explores why Ellis J circumvented the decision in *Chapman* and awarded damages in both cases. The *Chapman* majority's reasons for extending judicial immunity to NZBORA cases are unconvincing. McGrath and William Young JJ gave three policy reasons for precluding judicial liability: finality of litigation, promoting judicial independence and availability of alternative remedies.[6] The circumstances of the High Court cases demonstrate that the policy justifications are too weak to justify precluding an effective remedy for human rights breaches. *Chapman* is bad law.

The second part of this essay looks at how bad law makes hard cases. Ellis J circumvented *Chapman* by attributing responsibility for rights breaches to actors other than the judge. However, neither decision was within the bounds of precedent because of an obiter

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1 *Attorney – General v Chapman* [2011] NZSC 110, [2012] 1 NZLR 462.

2 At [97] per McGrath and William Young JJ.

3 See *Attorney – General v Chapman,* above n 1, at [13], [54] – [56] and [67] per Elias CJ; Phillip A. Joseph "Constitutional Law" [2012] NZ L Rev 515 at 524 – 526; and Stephanie Woods "Judicial immunity: State immunity?" [2012] NZLJ 6 at 8.

4 *Putua v Attorney – General* [2022] NZHC 2277, [2023] 2 NZLR 41.

5 *Fitzgerald v Attorney – General* [2022] NZHC 2465, [2023] 2 NZLR 214.

6 *Attorney – General v Chapman,* above n 1, at [180].

statement in *Chapman* indicating a wide-ranging immunity. The majority opined that to the extent a rights breaching act is giving effect to a judge's decision or superseded by it, it constitutes a judicial act.[7] Consequently, both cases were situations which involved rights-breaching acts that should have attracted judicial immunity. Whilst the judge attempts to narrow the ratio of *Chapman* she is unable to legitimately do so because of the obiter in that case. Ultimately, *Chapman* is inescapable, and the judge was bound to follow it.

As *Fitzgerald* makes its way through the appellate courts there is an opportunity to remedy the legal position. The unprincipled basis of *Chapman* must be addressed. Judge- made law does not have a democratic mandate like the laws passed by Parliament. Accordingly, the common law must be based on robust policy or principles. Ellis J's decision in *Fitzgerald* is currently being considered by the Court of Appeal. Similar to the High Court, the Court of Appeal is bound by the *Chapman* precedent. In contrast to the High Court, it is unlikely that the Court of Appeal will find for Mr Fitzgerald. The analysis in this essay concludes that if *Fitzgerald* reaches the Supreme Court, the Court should either overturn *Chapman* or give more satisfactory policy reasons for upholding it.

II THE POLICY BEHIND THE LAW

In *Chapman*, the question before the Court was whether damages could be awarded against the State for a breach of rights which occurred within the judicial process.[8] This would constitute applying the same kind of reasoning as that employed in *Simpson v Attorney – General* [*Baigent's Case*].[9] *Baigent* concerned a rights breach by police officers. To preserve the statutory and common law immunities of officers, a direct claim was allowed against the State and public law damages were awarded for a breach of rights.[10] Similarly, Judges enjoy immunity from civil suit when acting in their judicial capacity[11] and the

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7 At [208] per McGrath and William Young JJ.

8 At [1] per Elias CJ.

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

10 *Attorney – General v Chapman*, above n 1, at [3].

11 Phillip A. Joseph *Laws of New Zealand* Constitutional Law (online ed) at [93].

Crown[12] is also immune from vicarious liability for judicial acts.[13] However, the majority declined to extend *Baigent* on the basis that it would be "as inimical to public interest as allowing a direct suit against judges."[14]

Finding nothing in the law that precludes direct Crown liability for judicial breach, the majority's argument for limiting *Baigent* rested entirely on policy considerations.[15] The majority found that the same principles behind judicial immunity would be implicated in a direct claim against the State. The policy considerations are adopted from the Law Commission Report, *Crown Liability and Judicial Immunity.*[16] The majority emphasised achieving finality in litigation, promoting judicial independence and the availability of alternative remedies.[17]

A ACHIEVING FINALITY IN LITIGATION

In the majority's view, the most important reason for precluding judicial liability for NZBORA breaches was preventing collateral challenge to decisions. The basis of this concern is that litigants are particularly aggrieved when a court decision does not go their way. Allowing NZBORA claims presents another avenue for these litigants to challenge binding court decisions. This continuation of the court process has a negative impact on the parties involved. The majority were concerned that challenging court decisions should be left to the appeal process.[18]

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12 Crown and State are used interchangeably.

13 Crown Proceedings Act 1950, s 6(5).

14 *Attorney – General v Chapman,* above n 1, at [97] per McGrath and William Young JJ.

15 At [160].

16 Law Commission *Crown Liability and Judicial Immunity: A response to* Baigent's *case and* Harvey v Derrick (NZLC R37, 1997) at [138].

17 *Attorney – General v* Chapman, above n 1, at [180].

18 At [182].

In her dissent, Elias CJ recognised that the fear of collateral challenge was "overblown".[19] Furthermore, that a blanket exclusion to breach by judicial action would result in preventing actions which pose no collateral challenge.[20] Both *Putua* and *Fitzgerald* fall into this category. *Fitzgerald* in particular is a case where "appeal has corrected an erroneous determination, but the correction does not constitute in the circumstances effective remedy for the breach of right."[21]

On the facts in *Putua v Attorney- General* there was no challenge to the finality of litigation. The criminal process was complete at the time the rights breach occurred. The rights breach occurred because of an administrative error in calculating Mr Putua's sentence.[22] Before the High Court, Mr Putua was seeking a remedy for the 33 days he had been arbitrarily detained before the error was discovered and remedied.[23] Furthermore, the Crown had accepted a violation of s 22[24] of the NZBORA.[25] The question before the High Court was whether damages were available for the accepted breach of rights as the Crown argued *Chapman* precluded the availability of damages.[26] There was plainly no challenge to his original sentence or conviction. Consequently, the finality of the original criminal proceedings remained unimpacted by this rights claim.

Fitzgerald v Attorney – General is also a case where collateral challenge does not arise. The High Court was considering whether Mr Fitzgerald had access to *Baigent* damages given that the time he spent in prison was four and a half years in excess of his re-sentence. This did not present a challenge to the original decision of the sentencing judge. Mr Fitzgerald had already challenged that decision through the appropriate appeal process.

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19 At [70].

20 At [71].

21 At [71].

22 *Putua v Attorney – General,* above n 4, at [2].

23 At [3] – [5].

24 Everyone has the right not to be arbitrarily arrested or detained.

25 *Putua v Attorney – General,* above n 4, at [4].

26 At [6].

Pursuant to a Supreme Court decision finding that the sentence was in breach of s 9 of the NZBORA[27], Mr Fitzgerald was resentenced. The proceedings before the High Court were in respect of the four and a half years Mr Fitzgerald spent in prison in excess of the resentence.

The majority placed an emphasis on the finality of litigation and preventing collateral challenge "for the fair and effective administration of justice."[28] These two cases demonstrate why this policy reason is ill thought out for reaching that aim. Firstly, in both cases the finality of litigation is not engaged. Secondly, the application of the majority's decision, barring damages in respect of rights-breaches within the judicial process, would have been inimical to the fair and effective administration of justice. Without the award of damages, neither Mr Putua nor Mr Fitzgerald would have received an effective remedy for a rights breach.

A further criticism of this policy reason within the scholarship is that there are processes in place to prevent collateral challenge. For example, Elias CJ points out that often abuse of process will prevent a claim where it is a collateral challenge.[29] Additionally, the courts can employ discretion in awarding the remedy, and strike out untenable claims.[30]

B PROMOTING JUDICIAL INDEPENDENCE

The majority identified two ways judicial independence would be impacted by allowing public law damages for a breach of rights within the judicial process. Firstly, judges would be pressured to exercise extra caution so as not to risk state liability.[31] Secondly, the perception of judicial independence would be impacted by the Crown acting in defence of

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27 The right to be free from grossly disproportionate punishment.

28 *Attorney – General v Chapman,* above n 1, at [182] – [183].

29 At [71].

30 Phillip A. Joseph "Constitutional Law" [2012] NZ L Rev 515, above n 3, at 524.

31 *Attorney – General v Chapman,* above n 1, at [185].

judges in court. The prospect of judges cooperating with the Crown would be detrimental to perceptions of independence.[32]

The majority in *Chapman* feared that judges would be extra cautious in decision-making so as not to invoke State liability. Aside from the fact there is no empirical evidence to support that claim, this is a difficult proposition to believe. In his dissent, Anderson J was skeptical of this point and the supposed "timidity" of judges in the face of State liability.[33] Taking the facts of *Fitzgerald,* within the sentencing process there is already an onus on the judge to get the sentence length right. It is a question of how long a person is going to be deprived of their freedom. It is a strange proposition that making damages available against the State for a disproportionate sentence would make the task any more burdensome.

Additionally, obiter from the majority in *Chapman* indicates administrative acts within the judicial process fall within the immunity.[34] By capturing administrative acts, the policy justification of judicial independence becomes even weaker. For example, the facts of *Putua* do not engage the concern for judicial independence in decision making at all. The error resulting in the rights-breach was a purely administrative one. Ellis J opined that "the only obvious consequence of potential NZBORA liability is more care will be taken [whilst preparing a warrant of commitment]." [35] The wide framework capturing administrative acts was crafted to give robust protection to judicial independence and immunity. In reality, it means acts scarcely engaging the policy justifications fall under *Chapman.*

The second concern of the majority is also dubious. Neither case demonstrates a situation where it appears that the judiciary is working with the executive. Judges and the executive do not have to work together in these kinds of cases. The relevant evidence is often well-documented.[36] In *Fitzgerald,* the acts giving rise to the right-breach were set out in prior

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32 At [190].

33 At [224].

34 At [208].

35 *Putua v Attorney* – General, above n 4, at [37] – [38].

36 Phillip A. Joseph "Constitutional Law" [2012] NZ L Rev 515, above n 3, at 524.

judgments. In *Putua,* the warrant of commitment and time served in excess of sentence served as sufficient evidence. Judges did not have to appear in court nor can Judges be witnesses.[37]

C AVAILABILITY OF OTHER REMEDIES

The judges in *Chapman* reasoned that the availability of other remedies made the availability of *Baigent* damages unnecessary.[38]

This policy justification touches on an ongoing debate regarding the function of public law damages. The function of damages is informed by what a person perceives as the primary function of the public law. If public law is perceived as protecting "individual rights" and "personal interests" then a compensatory view is taken to damages. If the primary function of public law is perceived as "regulating public power so it is properly exercised for the good of society as a collective" then damages take on a punitive function.[39] Post- *Taunoa*, the law represents the second position.[40]

However, even under that narrower view of the function of damages, damages are awarded where non-monetary relief is not enough to redress the rights breach.[41] Both cases represent situations where damages were needed to redress the breach. Mr Putua was arbitrarily detained for an additional 33 days because of a mistake on the warrant of commitment. The effects of this breach of rights were not vindicated by his immediate release on the discovery of the error. He ought to receive some compensation to vindicate the rights breach resulting from the 33 days of arbitrary detention. Similarly, in *Fitzgerald* the Court's correction of the mistake through resentencing did not vindicate Mr Fitzgerald's right's breach consequent of the four and a half years he spent in prison in excess of his resentence.

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37 Evidence Act 2006, s 74(d).

38 *Attorney – General v Chapman,* above n 1, at [193] per McGrath and William Young JJ.

39 Jason NE Varuhas "The Development of the Damages Remedy under the New Zealand Bill of Rights Act 1990: From Torts to Administrative Law" [2016] NZ L Rev 213 at 214.

40 At 213.

41 *Taunoa v Attorney – General* [2007] NZSC 70, [2008] 1 NZLR 489 at [258] per Blanchard J.

Democratic societies are premised on the ideals of rule of law and consent. Rights frameworks are an important element of upholding those ideals. They provide a mechanism for ensuring the power of the state is not exercised adversely, and if it is you have a remedy. A right without an effective remedy is hollow. Both cases are an excellent demonstration of that. It is nonsensical to say that the complete remedy for spending extra time in prison is being let out as soon as the error is discovered. That is an inadequate admonishment of the rights-breaching exercise of State power.

D CONCLUSION

Applying the Supreme Court's policy reasons in *Chapman* to real cases demonstrates that there is an inadequate basis for precluding *Baigent* damages for a breach of rights in the judicial process. Denying *Baigent* damages can leave claimants without an effective remedy. Given the gravity of that reality, the Supreme Court needed to be clear in articulating how extending *Baigent* would have an adverse impact on judicial immunity. The unsatisfactory nature of the reasons given explain why Ellis J chose to circumvent the law in *Chapman* in the High Court cases.

The flaws within the policy also present compelling reasons for the Supreme Court to overturn the precedent if *Fitzgerald* comes before the Court. The Court also has the option to provide better policy reasons for upholding it. The legal situation speaks to something bigger than the debate over judicial immunity and effective remedies. The flaws in policy concern the process of making law itself. Judges have a responsibility to create law based on policy or principle. The *Chapman* decision has neither. As it stands, it is bad law.

III HOW WAS CHAPMAN *CIRCUMVENTED?*

In both *Putua v Attorney – General* and *Fitzgerald v Attorney – General* Ellis J awarded damages against the State for a breach of rights which occurred within the judicial process. In doing so the Judge favours a narrow reading of *Chapman.* However, analysis of the cases demonstrates that *Chapman* is inescapable. Both cases concern rights breaching acts which are essentially judicial. *Putua* concerned an administrative error within the sentencing process. *Fitzgerald* concerned a rights breach arising from the imposition of an excessively long sentence. Even if the breaching acts were not judicial, they are situations falling within the Supreme Court's obiter statement. That is, they are acts giving effect to

a judge's decision or being superseded by a decision of a judge. Thus, Ellis J's award of damages in either case did not follow the Supreme Court precedent. The majority's obiter precludes a narrow reading of the case.

Tensions over a narrow and wide reading of *Chapman* decision are reflected in the arguments of counsel in both cases. The crux of the argument in *Putua* and *Fitzgerald* was over attributing responsibility for the rights breaching act. If responsibility lay with an actor other than the judge, then *Chapman* would not apply, and damages could be awarded. These arguments regarding responsibility are essentially arguments vying for either a narrow or wide application of *Chapman*. Displacing responsibility for acts within the judicial process is only available on a narrow reading.

The cases fail to establish a way to legitimately circumvent *Chapman,* but they highlight compelling reasons for overturning the Supreme Court precedent. The biggest criticism of *Chapman* is that the policy justifications for extending judicial immunity to cases for public law damages are inadequate. These two cases demonstrate how the *Chapman* policy justifications become even weaker when complete or partial factual responsibility for the rights breach lies with an actor other than the judge. A judge may be legally responsible for a sentence or warrant of commitment. As a matter of practical reality, the error resulting in the rights breach lay with an actor other than the judge in both cases. As the judge's responsibility for the rights breach itself is minimal, it becomes even more difficult to see how the principles behind judicial immunity are engaged. Denial of damages on that basis is an inappropriate outcome, especially in the public law context.

A PUTUA V ATTORNEY – GENERAL

1 INTRODUCTION

In this case, the Ellis J held that responsibility for the rights breach lay with the registrar and awarded damages to Mr Putua. The *Chapman* decision was circumvented in two ways in order to make this possible. A narrow definition of 'judicial act' was employed. Secondly, Ellis J accepted that the Supreme Court's obiter on "superseding act" was not engaged by the facts.

Analysis of the case demonstrates that this decision was not open to the Judge because the facts of the case fit squarely within the obiter from the *Chapman* majority:[42]

> To the extent that the Registrar's actions were superseded by decisions of judges, or give effect to what they have decided, there can plainly be no right to Bill of Rights Act compensation. This kind of distinction is difficult to make but it calls for an exercise of judgment commonly undertaken by the court.

Accordingly, *Chapman* could not be circumvented within the bounds of precedent.

Analysis of this case emphasises three key points about the current state of the law. Firstly, *Chapman* has a wide application. Secondly, that wide framework is detrimental to claimants seeking *Baigent* damages because of the interconnected nature of decision-making. For example, administrative acts connected with the judicial process will fall within the framework. Finally, *Chapman* is inescapable. The only way to avoid it is to overturn it.

2 FACTS

The Deputy Registrar made a mistake in calculating Mr Putua's sentence length. One of Mr Putua's charges was recorded as cumulative rather than concurrent on the sentence for another charge. Consequently, the sentence calculated was three months in excess of the time Mr Putua was required to serve. The incorrect sentence length was recorded on the warrant of commitment and signed by a judge.[43] When the error was corrected, Mr Putua had already served 33 days in excess of his sentence.[44] The Crown accepted there is a violation of s 22[45] of the NZBORA because Mr Putua was unlawfully, and therefore, arbitrarily detained for 33 days.[46]

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42 *Attorney – General v Chapman,* above n 1, at [208].

43 *Putua v Attorney – General of New Zealand,* above n 4, at [2].

44 At [3].

45 Securing the right not to be arbitrarily arrested or detained.

46 *Putua v Attorney – General of New Zealand,* above n 4, at [4].

Mr Putua sought a declaration that his rights had been breached and $11,000 in *Baigent* damages.[47]

The key issues in this case were whether the registrar "was performing essentially a judicial function" and whether the "mistake was superseded by that of the judge".[48] An affirmative answer on either point precludes the availability of *Baigent* damages as the rights breaching act would attract judicial immunity.

3 WAS THE PREPARATION OF THE WARRANT OF COMMITMENT A JUDICIAL ACT?

If the preparation of the warrant of commitment is a judicial act, then *Chapman* applies and Mr Putua is unable to access public law damages. This is why Ellis J adopted a narrow definition of 'judicial act'. This definition was not open to her in light of the Supreme Court majority's indications that a wide range of actions will attract judicial immunity and be barred from NZBORA actions. In opting for a narrow definition, the Judge did not adequately deal with the persuasive obiter statement of the Supreme Court.

Instead, Ellis J focused on how the policy behind *Chapman* was not engaged by the registrar's actions. Thus, even in opting for a narrow definition of judicial act, the Judge reasoned she was giving effect to the Supreme Court precedent.[49] This logical line of reasoning was not available to the Judge. The Supreme Court majority thought that judicial immunity would be impacted by actions of administrative actors and plainly intended for the immunity to extend to them. Consequently, Ellis J was unable to adopt the narrow definition of 'judicial act' even if the policy behind *Chapman* remains unimpacted.

Had the *Chapman* obiter not indicated otherwise, Ellis J would have had some leeway to adopt a narrow definition because the law on what constitutes a 'judicial act' for NZBORA

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47 At [5].

48 At [27].

49 At [36] – [39].

purposes is not settled.[50] However, the majority's obiter in *Chapman* indicated that administrative acts would be included. For example, they specifically stated that acts which give effect to what judges have decided cannot give rise to NZBORA liability.[51] This is a clear indication the judges intended that judicial immunity apply to acts within the administrative process. They were clearly attempting to craft a wide immunity so as not to open up liability for judges through the back door.

Chapman's wide conception of judicial acts is similar to the definition within s 6(5) of the Crown Proceedings Act:

> … anything done or omitted to be done by any person while discharging or purporting to discharge any responsibilities of a judicial nature vested in him or her, or any responsibilities which he or she has in connection with the execution of the judicial process.

Ellis J rejected the above definition on the basis that the purpose of the Act was to confer immunity on the Crown for "tortious claims arising out of judicial action."[52] As such, "it has no application to claims brought under the NZBORA."[53] This line of reasoning ignores the similarities between that definition and indications of a wide immunity within *Chapman*. For example, "responsibilities … in connection with the execution of the judicial process" is essentially the same as the majority's statement that to the extent the Registrar's actions give effect to decisions of judges "there can plainly be no right to Bill of Rights Act compensation."

Instead, Ellis J adopted the definition of judicial act from *Royal Aquarium and Winter Garden Society Ltd*:[54]

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50 Andrew S. Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd Ed, LexisNexis, Wellington, 2015) at [5.6.5].

51 *Attorney – General v Chapman,* above n 1, at [208].

52 *Putua v Attorney – General,* above n 4, at [29].

53 At [31].

54 *Royal Aquarium and Summer and Winter Garden Society Ltd v Parkinson* [1892] 1 QB 431 (CA) at 452.

> The word 'judicial' has two meanings. It may refer to the discharge of duties exercisable by a judge or by justices in court, or to administrative duties which need not be performed in court, but in respect of which it is necessary to bring to bear a judicial mind- that is, a mind to determine what is fair and just in respect of the matters under consideration.

Ellis J notes that this definition was referred to in *Baigent.* However, it was only employed to clarify the first aspect of the Crown Proceedings Act definition, "…responsibilities of a judicial nature."[55] It was not used as a definition for judicial act in its own right. Furthermore, it cannot be an applicable definition because *Chapman* indicates a broader immunity.

In *Thompson*, which addressed both a civil suit and an NZBORA issue, the Court of appeal used the s 6(5) definition. In that case, the Registrar's omission to update the case management system was found to be "in connection with the execution of the judicial process.".[56] Similarly, to this case, it was not an act requiring "discretion or judgment". Updating the case management system is merely an administrative requirement. The act fell within the s 6(5) definition because this type of administrative act is "a necessary part of the proper function of the judicial branch … and must be seen as within the province of that branch."[57]

That analysis of the Court of Appeal is applicable to the facts of *Putua*. The preparation of the warrant of commitment can similarly be seen as an administrative act necessary for the proper functioning of the judicial branch. Which also makes it an act giving effect to the decisions of Judges within the *Chapman* obiter.[58] The purpose of the warrant is to have an authoritative record of what the judge decided. It comprises an essential administrative part of the sentencing process. Had Ellis J noted the similarities between what the majority's

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55 *Simpson v Attorney-General,* above n 9, at 689 per Casey J, and at 695 – 696 per Hardie Boys J; and Laura O'Gorman (ed) *Sim's Court Practice* (online ed, LexisNexis) at [CPA6.6].

56 *Thompson v Attorney – General* [2016] NZCA 215, [2016] 3 NZLR 206. at [39].

57 At [41].

58 *Chapman v Attorney – General,* above n 1, at [208].

obiter indicated and the Crown Proceedings Act definition, the Judge could not have distinguished *Thompson.*

Applying her narrow definition, Ellis J held that preparing the warrant is not judicial act because it does not require any "discretion or judgment". The warrant is a mandatory administrative requirement, and it contents are "predetermined".[59] The reasons the judge gives for the preparation of the warrant of commitment not being a judicial act are exactly the reasons the majority wanted to include it within the immunity. It does not require an exercise of discretion because it is an act simply giving effect to what the judge decided. To keep liability open for the administrative act but not the judge's decision would undermine judicial immunity in the *Chapman* majority's view.

The reason the judge adopts the narrower definition are policy based. She points to the policy reasons behind the *Chapman* decision[60] and finds that because the underlying error was not made by a judge, the policy of judicial immunity is not engaged.[61] This is a rejection of the *Chapman* obiter which does include administrative acts and clearly sees them as engaging judicial immunity.

The finding that the registrar's actions did not constitute a 'judicial act' goes against the precedent in both *Thompson* and *Chapman.*

4 WAS THE JUDGE'S SIGNATURE A SUPERSEDING CAUSATIVE ACT?

The judge's signature on the warrant of commitment arguably constituted a superseding act. Thus, applying the majority obiter in *Chapman*, the act attracts judicial immunity. The Crown adopted that line of reasoning in arguing that "the Judge signing the warrant was an intervening cause that operated to negate any liability for the Deputy Registrar's mistake."[62]

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59 *Putua v Attorney – General*, above n 4, at [33].

60 At [37].

61 At [36] and [38].

62 At [40].

Ellis J rejected this argument because the creation of the warrant had "sufficient legal heft" to make it an independent act. This is because judge who makes the order can be different from the judge who signs the warrant,[63] and the warrant can be lawfully relied on for a period of time without a judicial signature.[64]

The aspect of the majority's obiter pertaining to superseding act lacks specificity and creates confusion. It allows Ellis J to make technical arguments about why the signature did not constitute a superseding act. However, these technical arguments can be made either way. The judge relied on *AB v Attorney – General* as authority for the proposition that a warrant of commitment is valid without signature.[65] However, Simon France J in *AB* emphasised practical considerations for proceeding without a signature, such as the difficulty of processing a prisoner if required to wait for a signature. The case does not state that a signature is not required at all. In fact, the judge acknowledges that not receiving a signed warrant is a risk.[66] The fact that a signature is what gives the warrant authority could mean it is a relevantly superseding act.

This aspect of the judgment can be argued either way. However, given the framework created by *Chapman,* the more robust argument is that the signature did constitute a superseding act. Ellis J's technical arguments are not convincing enough to overcome the *Chapman* obiter.

5 CONCLUSION

Putua demonstrates the flaws with *Chapman.* It is a case where the error is entirely administrative. Had the Judge followed *Chapman,* Mr Putua would have been denied public law damages as an effective remedy for his rights breach because of an imagined threat to judicial immunity. Although the decision is not in line with precedent, it is not difficult to see why Ellis J made the finding that damages were available.

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63 Sentencing Act 2002, ss 91 (6) – (8A).

64 *Putua v Attorney – General,* above n 4, at [42].

65 At [13] – [14].

66 *AB v Attorney – General* [2018] NZHC 1096 at [82].

There is an undeniable logic to Ellis J's policy-based decision. The Judge clearly sets out that the policy behind judicial immunity is not engaged in this case because it is an entirely administrative error.[67] The context of s 6(5) of the Crown Proceedings Act bars tortious actions for administrative acts within the judicial process. As the judge noted, that is a different context to NZBORA actions which arise in respect of fundamental human rights. Unfortunately, at the High Court level, Ellis J is bound by the Court of Appeal and Supreme Court precedents.

The analysis of this case demonstrates that *Chapman* has a wide framework which is detrimental to claimants seeking damages in relation to actions within the judicial process. This sets the scene for the analysis of *Fitzgerald* and the ultimate aims of counsel for Mr Fitzgerald.

B FITZGERALD V ATTORNEY- GENERAL

1 INTRODUCTION

This section of the essay focuses on analysing the High Court decision in *Fitzgerald* to determine what the Court of Appeal may do and what the Supreme Court ought to do. As *Putua* demonstrates, *Chapman* is inescapable. The only way to legitimately avoid the precedent is to overturn it. Only the Supreme Court has that power. Before the High Court and the Court of Appeal, the most counsel for Mr Fitzgerald can do is attempt to circumvent *Chapman.*

Counsel are engaged in a battle of attributing responsibility for the rights breach to an actor other than the judge. Ellis J in the High Court held *Chapman* did not apply and awarded damages. It is unlikely the Court of Appeal will affirm that decision. Primarily because in this case the rights breach occurred because of the imposition of a disproportionate sentence. Given that judges are central to sentencing, counsel for Mr Fitzgerald face an uphill battle in the Court of Appeal.

This situation speaks to the two stories that can be told about who bears responsibility for the breach of Mr Fitzgerald's right not to be subject to torture or disproportionately severe

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67 *Putua v Attorney – General,* above n 4, at [36] – [39].

treatment. Ellis J's approach emphasises the factual responsibility for rights breaches. In contrast, the widely framed immunity in *Chapman* is concerned with a legal conception of responsibility for the rights-breaching act. The obiter indicates that any action sufficiently connected to the judicial process is captured by the immunity. *Chapman's* emphasis on capturing acts within the judicial process indicates a cautious approach. The concern for judicial immunity means the relevance of factual responsibility for rights breaches is secondary.

On one construction of the facts the prosecutor is clearly responsible for Mr Fitzgerald's breach of rights. The Prosecutor chose to pursue a charge that constituted a qualifying offence under the three-strikes regime. The Prosecutor knew that if convicted Mr Fitzgerald would receive the maximum penalty for the offence.[68] The legal position at the time was that judges had to impose the maximum penalty under the legislation for a third-strike offence.[69] So, although a judge's decision can be superseding, it was not in this case. The unique statutory regime meant that the Prosecutor's actions were central to the breach of rights. Factually, the Prosecutor bears responsibility for the rights breaching outcome.

The simplest way to view the situation, and the one most in line with what *Chapman* held, is through the lens of constitutional roles. Sentencing is a judicial function, and the judge ultimately bears responsibility. The Prosecutor's choice of charge was superseded by the judge's imposition of the sentence. This construction denies Mr Fitzgerald of an effective remedy. So Mr Fitzgerald's lawyers are engaged in a battle of responsibility. It is an endeavor, ultimately, to establish that where the judge has to impose a mandatory sentence on conviction, the prosecutor bears responsibility for the rights implications.

The facts of *Fitzgerald* ultimately fall within *Chapman.* The rights breach occurred because of the judicial act of sentencing. Alternatively, the judge's imposition of the sentence was a superseding act to the Prosecutor's decision. This means there is little the Court of Appeal can do for Mr Fitzgerald. If the case reaches the Supreme Court, it presents an opportunity for the Court to either reconsider *Chapman* or give more convincing policy reasons for upholding it. Analysis of this case demonstrates why the best outcome would be overturning *Chapman.*

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68 *Fitzgerald v Attorney – General,* above n 5, at [4].

69 At [22].

2 FACTS

In 2016, Mr Fitzgerald was charged with indecent assault by the police after kissing one woman and pushing another to the ground.[70] The incidents occurred during the operation of the three strikes regime, which has now been repealed. Under 86A (12) of the Sentencing Act, indecent assault was a serious violent offence qualifying for the regime. The offence constituted a stage-3 offence under s 86A as Mr Fitzgerald had two previous convictions for indecent assault.[71] Therefore, s 86D (2) of the Act required an imposition of the maximum sentence if Mr Fitzgerald was found guilty. At the time of the offence, the view was that there was no discretion for a sentencing judge to impose a lesser sentence.[72]

Mr Fitzgerald suffered from schizophrenia and substance abuse. He had "a history of paranoid delusions and auditory and visual hallucinations". Mr Fitzgerald required mental health treatment and had been admitted to mental health facilities "at least 13 times". Due to his mental health, Mr Fitzgerald struggled to sustain accommodation. Ellis J observed that these mental health factors rendered traditional sentencing principles inapplicable.[73]

Mr Fitzgerald was found guilty in the High Court. The sentencing judge found s 86D of the Sentencing Act required the Court to impose the maximum sentence of seven years imprisonment.[74] The judge acknowledged that the act was "at the bottom end of the range" of seriousness and was not something which would ordinarily "attract a jail term".[75]

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70 At [21].

71 At [22].

72 At [22].

73 At [20].

74 *R v Fitzgerald* [2018] NZHC 1015 at [17].

75 At [21].

The Court of appeal found that imposition of the seven-year sentence was a breach of s 9 of the NZBORA.[76] The Court also confirmed they were required to impose the maximum sentence per s 86D (2).[77]

In the Supreme Court, the majority found that s 86D could be given a rights consistent interpretation. Where the maximum sentence was so "disproportionately severe as to amount to a breach of s 9" a judge could impose a lesser sentence.[78] The Court held there was a breach of s 9 in this case.[79] The Supreme Court allowed a resentence. Mr Fitzgerald was resentenced to 6 months imprisonment.[80]

In the proceedings before the High Court Mr Fitzgerald sought damages for breach of s 22[81] of the NZBORA on the basis that breach of s 9[82] meant his detention was arbitrary. The length of his detention was four and a half years over the re-sentencing of the High Court. [83]

Post-*Chapman*, the claim could not be brought against the sentencing judge. Instead, the focus was on the Prosecutor exercising their discretion. Liability would be on the basis that it was foreseeable the decision would lead to a "grossly disproportionate sentence and (so) to his arbitrary detention."[84] This argument, as Ellis J observed, stems from the reasoning

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76 *Fitzgerald v R* [2020] NZCA 292, (2020) 12 HRNZ 234 at [43].

77 At [36].

78 *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551 at [138] per Winkelmann CJ.

79 At [3].

80 *R v Fitzgerald* [2021] NZHC 2940 at [16].

81 Right not to be arbitrarily detained or arrested.

82 Right not to be subjected to torture or cruel treatment.

83 *Fitzgerald v Attorney- General,* above n 5, at [1] – [2].

84 At [3] – [4].

employed by the Supreme Court finding the exercise of prosecutorial discretion was not in line with Parliament's expectations.[85]

There were three key issues considered by the High Court. Firstly, whether the Crown Prosecutor was required to consider s 9 before charging Mr Fitzgerald? Secondly, whether the Crown Prosecutor failed to consider s 9? Finally, whether Crown liability can stem from the Crown Prosecutor's decision?

3 WAS THE CROWN PROSECUTOR REQUIRED TO CONSIDER S 9 BEFORE CHARGING MR FITZGERALD?

Establishing a duty to consider s 9 affords the courts a premise for creating legal liability in respect of the exercise of prosecutorial discretion. In New Zealand there are limited grounds for the courts to interfere with prosecutorial discretion. For example, the leading cases allow intervention for discriminatory exercise of discretion or discretion based on an illegal bargain.[86] Counsel for Mr Fitzgerald opted to establish an obligation to consider s 9 because this creates a stronger basis for arguing that the responsibility for the rights breach lies with the Prosecutor. Ellis J ultimately accepted this argument in holding there was a duty on the Prosecutor to prefer a different charge where "a grossly disproportionate sentence was the foreseeable and likely result of laying a particular charge".[87]

Ellis J relied primarily on the Memorandum of Understanding[88] (the MOU) between the Solicitor-General and the Commissioner of Police to establish the duty. The MOU required the police to refer prosecutions for stage-three offenses to a Crown prosecutor for review.[89] These conclusions are largely based on the Supreme Court's observations in *Fitzgerald v R*. The Court found Parliament's purpose in enacting the three-strikes regime was to target

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85 At [50].

86 At [77].

87 At [97].

88 *Memorandum of Understanding between the Solicitor- General and the Commissioner of Police* (1 July 2013).

89 *Fitzgerald v Attorney- General,* above n 5, at [18].

the "worst repeat violent offenders".[90] In its judgment the Court placed emphasis on the administrative regime, the MOU, put in place to ensure the three-strikes scheme only caught the target category of offenders.[91]

Ellis J found that this administrative process required the Prosecutor to consider s 9 and evidenced a duty to prefer a different charge if a breach of s 9 was "foreseeable and likely".[92] The reasoning employed to establish a legal duty is unconvincing. As discussed above, the Judge relied on the existence of the administrative regime itself. Additionally, the review process under the MOU includes considering the Prosecution Guidelines and the public interest test within them.[93] In Ellis J's view NZBORA considerations were a part of the public interest test within the Prosecution Guidelines.[94] And pursuant to s 188 of the Crown Proceedings Act, Prosecutors were legally required to comply with the Prosecution Guidelines.[95]

The basis for finding a duty on the Prosecutor to prefer a different charge where there is a "foreseeable and likely breach" of s 9 is strenuous. Reference to the NZBORA within the Prosecution Guidelines themselves is minimal. Ellis J referred to a footnote within the Supreme Court judgment[96] which stated the public interest test under the Prosecution Guidelines includes NZBORA considerations.[97] Additionally, the High Court held the NZBORA should be considered as Crown prosecutors are state actors and the Prosecution Guidelines refer to the need for NZBORA expertise.[98] Although the Prosecution

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90 *Fitzgerald v R,* above n 78, at [21] and [125] per Winkelmann CJ.

91 At [125] per Winkelmann CJ, at [202] per Arnold J, at [248] per Glazebrook J and at [326] per 91 William Young J.

92 *Fitzgerald v Attorney – General,* above n 5, at [97].

93 At [93].

94 At [95].

95 At [11].

96 *Fitzgerald v R,* above n 78, fn 282 at the end of [204].

97 *Fitzgerald v Attorney – General,* above n 5, at [46].

Guidelines only contain a non-exhaustive list of considerations, they do not contain reference to the NZBORA rights in the factors against prosecution.[99] For the administrative regime to have imposed such a duty, there needed to be an explicit reference to human rights considerations.

This is a situation where the Crown Prosecutor should have considered the rights implications of pursuing a particular charge. However, there was no legal duty requiring the Prosecutor to prefer a different charge if there was a risk of rights breach. The basis for establishing such a duty is strenuous. This is fatal for the finding in this case that the breach of rights is attributable to the Prosecutor.

4 DID THE CROWN PROSECUTOR FAIL TO CONSIDER S 9?

Sentencing outcomes were not considered by the Crown Prosecutor in exercising the discretion to prosecute. In the Crown prosecutor's affidavit, the public interest factors in favour of prosecution were that it was a sexual offence causing harm to the victim, the behaviour was likely to be repeated and the offender was under a supervision order when he committed the offence. The Prosecutor did not consider sentencing consequences.[100] The Prosecutor's affidavit explicitly stated that the role of a prosecutor is to determine the charge which accurately reflects the offending. The role of the Court is to determine what the sentence should be.[101]

5 CAN CROWN LIABILITY STEM FROM THE CROWN PROSECUTOR'S DECISION?

There are two aspects to the issue of whether Crown liability can stem from the Prosecutor's breach. First, is whether the Crown is the proper basis for liability for the Prosecutor's error. This analysis is not concerned with that issue. Instead, the focus is on

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98 At [95].

99 Crown Law *Solicitor-General's Prosecution Guidelines* (1 July 2013) at [5.8] - [5.11].

100 *Fitzgerald v Attorney – General,* above n 5, at [28].

101 At [28].

the second aspect, whether *Chapman* applies on these facts. This would preclude the Crown from being liable for the Prosecutor's breach.

In its first argument, the Crown relied on the declaratory theory of law. This theory purports law is discovered rather than made by judges. By virtue of the Supreme Court holding that s 86D (2) had a rights consistent interpretation, such an interpretation was always available. By that theory, the Prosecutor in exercising their discretion "can be taken as having known (or reasonably expected) that the Court could and would act to avoid a grossly disproportionate outcome".[102]

Ellis J was not convinced that the theory operated in this way.[103] Furthermore, even if it did, there were "two parallel and mutually supporting s 9 obligations". This obligation is similar to how "the prosecutor and the Court have parallel NZBORA obligations to ensure a defendant has a fair trial."[104] As the prosecutor had a distinct s 9 responsibility, the declaratory theory cannot offer a defence.[105]

The main argument advanced by the Crown was that the judge's imposition of the sentence constituted a "superseding" decision. In accordance with the obiter in *Chapman*, there cannot be a claim against the Prosecutor.[106]

Before considering whether there was a superseding decision, the Court had to consider whether the Prosecutor's actions actually 'caused' the rights breach. In *Thompson v Attorney-General*, the Court of Appeal considered the "proximate or effective cause" of the rights breach.[107] Ellis J considered that test appropriate for rights breaches of the kind in *Chapman* and *Thompson* but not on these facts.

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102 At [104].

103 At [106].

104 At [108].

105 At [109].

106 At [115].

107 *Thompson v Attorney – General,* above n 56, at [77].

Ellis J preferred a test of whether "the plaintiff was directly and intentionally detained by the defendant".[108] The basis for the departure was that in this case there was a breach of s 22, which is closely analogous to the tort of false imprisonment. As the basis for s 22 is a "vindicatory tort", causation is irrelevant. The intention test is made out in this case because the Prosecutor chose to pursue a charge "knowing and *intending*" that if convicted, Mr Fitzgerald would face a grossly disproportionate sentence.[109]

The departure from the causation test was an attempt by the judge to get around the issue that the Prosecutor's decision was not the "proximate or effective cause" of the rights breach. Like in *Thompson,* the Prosecutor's decision had no consequence until the subsequent decision of the judge.[110] Whilst the reasoning helped the judge give Mr Fitzgerald damages, the arguments are strenuous and vulnerable on appeal. Direct and intentional detention is unworkable in this context. Where intention is the result of a sentence it is difficult to say which actor is responsible for "directly and intentionally" detaining the defendant. The test is conceptually confusing.

Ellis J declined to view the judge's sentence as a superseding decision. The Judge found made this finding because of the legal position at the time of the original sentence. The view at that time was that the sentencing Judge was bound to impose the maximum sentence pursuant to the three strikes regime.[111] The decision essentially creates a distinction that where a mandatory sentence exists, the sentence is not attributable to the judge.

On another view, Parliament imposing limits on sentencing does not detract from the reality that sentencing is a judicial act. Parliament regularly imposes limitations on sentencing, for example, minimum and maximum sentence lengths. The existence of a mandatory sentence means the judge does not undertake traditional considerations in determining sentence length. However, sentencing remains an act requiring judicial authority. The legislation acknowledges that sentencing is ultimately judicial. For example, s 3(b) of the

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108 *Fitzgerald v Attorney – General,* above n 5, at [120].

109 At [121].

110 *Thompson v Attorney – General,* above n 56, at [59].

111 *Fitzgerald v Attorney – General,* above n 5, at [122].

Sentencing Act states that one of the purposes of the Act is to provide *courts* with sentencing guidelines.

Chapman cannot be legitimately circumvented because following *Thompson*, the Judge caused the rights breach. Causation is more difficult to establish because of the finding in this essay that there was no legal duty on the Prosecutor to prefer a different charge. Even if causation can be established, the Prosecutor's decision to pursue a qualifying offence was superseded by the Judge's sentence. The facts of the case fall within *Chapman.*

6 CONCLUSION

The High Court decision employs inventive reasoning to circumvent *Chapman.* Many of the arguments are vulnerable on appeal. Ellis J reasoned to give Mr Fizgerald access to a remedy but also to get the case before the appellate courts. Given the complex legal background of the case, both counsel for Mr Fitzgerald and Ellis J were engaged in an arduous task to establish that damages were available. The Court of Appeal is unlikely to uphold the decision.

For Mr Fitzgerald to have access to public law damages, *Chapman* requires responsibility for the rights breach to rest with the Prosecutor. There were multiple issues in constructing Prosecutorial liability on these facts. The most important is Parliament's failure to create adequate safeguards for the operation of the three-strikes regime. The MOU was no an effective mechanism. This is a key reason why liability does not clearly rest with the Prosecutor or the Judge in this construction of the facts. The rights-breaching outcomes, when viewed through the lens of safeguards, occur because of the legislation itself. This presents a problem because Parliament cannot be taken to court.

The only basis for a remedy is to overturn *Chapman.* Even if there was a duty on the Prosecutor, the Judge's imposition of the sentence was superseding. Without *Chapman,* damages could be awarded on the basis that the courts got the law wrong in imposing the rights-breaching sentence. Such a finding is not an admonishment of the courts in imposing and upholding the rights-breaching sentence. This is because it was not until *Fitzgerald* reached the Supreme Court that it was held a lesser sentence could be imposed.

It is likely that *Fitzgerald* will ultimately come before the Supreme Court. Counsel for Mr Fitzgerald are not only engaged in a battle to get their client an effective remedy, but also

to overturn *Chapman* and ensure an effective remedy for others like him. The Court of Appeal cannot give the result that counsel truly seek.

IV CONCLUSION

Chapman got the balance between judicial immunity and an effective human rights regime wrong. As *Fitzgerald* makes its way to the Supreme Court it is important to consider the implications of *Chapman.* Currently, the law denies public law damages where that is an effective remedy. Mr Putua and Mr Fitzgerald had their rights breaches come to an end. That is the bare minimum enforcement of their rights. It is not a remedy for the breach itself. Both people spent time in prison in respect of which, if *Chapman* was applied by the High Court judge, they would not have received any compensation by way of public law damages.

The public law exists in a fundamentally different sphere from common law judicial immunity. The NZBORA framework exists to protect the most basic rights that New Zealand citizens have against the State. There is greater public interest in awarding damages than protecting imagined threats to judicial immunity. These rights, without an effective remedy, are a hollow thing.

If the case reaches the Supreme Court, the Court should overturn *Chapman*. However, if the Court chooses to uphold the precedent, it must give better reasons why NZBORA actions cannot lie in respect of breaches in connection with the judicial process. Without a satisfactory policy explanation, *Chapman* will remain bad law and the tensions outlined in this essay will persist.

Finally, *Chapman* is more than a debate about effective remedies. Critique of the case goes to the heart of how the courts make law. The basis for the *Chapman* decision is inadequate. Judge made law does not have the same democratic mandate as laws made by Parliament. The principles and policy behind judicial decisions are of fundamental importance. So far as *Chapman* is backed by neither, it is bad law.

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