IN THE COURT OF APPEAL OF NEW ZEALAND

CA590/2014
[2016] NZCA 215

BETWEEN	CAMILLE IRIANA THOMPSON Appellant
AND	THE ATTORNEY-GENERAL Respondent

Hearing:	24 February 2016
Court:	Wild, French and Cooper JJ
Counsel:	H A Cull QC and D A Ewen for Appellant S M Kinsler and A C Walker for Respondent
Judgment:	23 May 2016 at 3.30 pm

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(Given by Cooper J)

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Introduction

[1] The appellant, Camille Thompson, failed to appear in the Wellington District Court on a day when an application by a probation officer for cancellation of a sentence of community work previously imposed on her was called. Unbeknown to the Judge, the application for cancellation of the sentence had previously been dealt with and the sentence cancelled. A warrant for Ms Thompson's arrest was issued by the Judge and executed by the police. When she was brought before the Court the following day, having been detained for over 15 hours, the duty solicitor successfully applied for her release.

[2] Ms Thompson advanced four tortious claims in the High Court alleging respectively false imprisonment, breach of statutory duty, negligence and a claim for "systemic negligence". A fifth cause of action alleged breach of her rights under s 22 of the New Zealand Bill of Rights Act 1990 (Bill of Rights Act) not to be arbitrarily arrested or detained.

[3] The claims were made against the Attorney-General on the basis of alleged vicarious responsibility for the omission of a Deputy Registrar serving in the Wellington District Court's bail room to note the cancellation of the sentence on the Court's file in circumstances discussed below. There was no claim against the Attorney-General for breaches of the Bill of Rights Act as a result of judicial error.

[4] All Ms Thompson's claims were rejected by the High Court.[1] She now appeals, alleging that Mackenzie J erred when he held:

(a) the Attorney-General was immune from liability in tort by virtue of s 6(5) of the Crown Proceedings Act 1950;

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1 *Thompson v Attorney-General* [2014] NZHC 2333, (2014) 10 HRNZ 51 [High Court judgment].

(b) there was an insufficiently proximate relationship between Ms Thompson and the Registrar to give rise to a duty of care;

(c) there was no negligent act or omission; and

(d) Ms Thompson had not been unlawfully detained.

[5] The appeal raises issues concerning the proper interpretation of s 6(5) of the Crown Proceedings Act, and the barrier it erects to proceedings against the Crown in respect of acts or omissions by those discharging responsibilities of a judicial nature or in connection with the execution of judicial process. We also consider the extent of the immunity from suit afforded to judicial officers at common law, discussed in *Attorney-General v Chapman*.[2]

Facts

[6] In the High Court the essential facts on which the claim was based were the subject of an agreed statement of facts. In addition, relevant evidence as to processes in the District Court was called by Ms Thompson from Mr James Keegan, previously employed by the Ministry of Justice as a Court Registry Officer, and by the Attorney-General from Ms Anna Graham, one of three Court Services Managers at the Wellington District Court.

[7] Ms Thompson was sentenced to 100 hours' community work and nine months' supervision on 28 July 2010. On 15 May 2012, a probation officer, Ms Hanita, filed what was described in the agreed statement of facts as an application to review the sentences. The application was not in the case on appeal but the backing sheet of the application was provided by counsel, showing that it was an application made under s 68(1)(a) of the Sentencing Act 2002 to cancel the community work sentence.

[8] The application was called on 6 June, when it was adjourned by Judge Hobbs until 25 June because there was no proof of service. On 25 June, the matter was called before Judge Barry and further adjourned to 9 July, in the absence of proof of

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

service. On 9 July, the matter was again adjourned this time by Judge Treston, to 23 July.

[9] However, on 18 July, Ms Thompson appeared before Judge Blaikie on unrelated charges on which she was sentenced to 15 months' intensive supervision. A corrections officer employed by the Community Probation Service then asked orally for Judge Blaikie to deal with the application to cancel the sentence at the same time. No prior notice had been given to the Court or registry staff that the matter was to be called on that day and the file containing the original application made by Ms Hanita was not before the Judge. At the Judge's request, the corrections officer present handed up the Community Probation Service's copy of the application. The Judge then granted the application, noting on that copy of the application:

> Order Accordingly
>
> CW sentences cancelled.[3]

The Judge signed these orders and dated his signature 18 July 2012.

[10] Subsequently on that day, the charges on which Ms Thompson had been sentenced to intensive supervision were updated in the Court's electronic case management system (the CMS) and an order for 15 months' intensive supervision was drawn up and signed by the Registrar.

[11] Importantly, however, the Community Probation Service's copy of the review application, signed by Judge Blaikie, was not matched with the original review application before 23 July. The relevant Criminal Record Sheets were not updated to reflect Judge Blaikie's order cancelling the community work sentences. Nor was the CMS updated.

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[3] It is unclear from the facts (including the agreed statement) why he used the plural. We infer however that it was because the appellant had previously also been sentenced to supervision, and the sentence imposed on 18 July was to intensive supervision. Since Ms Hanita's application had been brought under s 68 of the Sentencing Act it related only to the sentence of community work. We do not consider anything turns on this uncertainty.

[12] As a result, the application to cancel was called again on 23 July and when Ms Thompson did not appear, Judge Wainwright, unaware of the orders made by Judge Blaikie, issued a warrant for her arrest. It is common ground that there was no application for that to occur and it is unclear whether there was any appearance on behalf of the applicant.[4]

[13] Ms Thompson was arrested by a police constable on 31 July at about 6.50 pm. She was detained in police custody under the warrant to arrest. The agreed statement of facts records that she was searched on her arrival at the police station and checked five times overnight. Then on 1 August at about 10.12 am she appeared in the Wellington District Court. She was released after the presiding Judge granted an application made by the duty solicitor on that day. Later that morning, the CMS was updated to reflect Judge Blaikie's decision of 18 July cancelling the sentences.

High Court judgment

[14] MacKenzie J noted that the act or omission forming the basis of the claim was a failure to update the CMS so that the application for cancellation of the sentence would not be listed for hearing on 23 July following cancellation of the sentence.[5] He considered the issue to be whether that failure fell within the ambit of s 6(5) of the Crown Proceedings Act, as being:

> … 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 judicial process.

[15] The Judge's reasoning is encapsulated in the following passage of the judgment:[6]

> The making of the order cancelling the sentence of community work necessarily required that the application to review the sentence be removed from the system. Its removal was part of the process of fully implementing the order. The responsibility for ensuring that was done was a responsibility forming part of, or in connection with the execution of, the judicial process.

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4 The absence of an application for the issue of the warrant was not mentioned in the agreed statement of facts and evidently not brought to the attention of the High Court or relied on there.

5 High Court judgment, above n 1, at [14].

6 At [22].

[16] As this language implies, the Judge thought the responsibilities of the Ministry of Justice employees fell within both limbs of s 6(5) of the Crown Proceedings Act. He had in fact made this explicit in an earlier paragraph of the judgment:[7]

> Removal of the case from the list was part of the Court process, necessary to give full effect to the order which Judge Blaikie made, and without which the making of that order would not have been fully effective. That clearly makes it a responsibility either of a judicial nature, or connected to the execution of judicial process.

[17] This meant none of the first three causes of action — those for false imprisonment, breach of statutory duty, or negligence — could succeed.[8] In case that conclusion was wrong, the Judge nevertheless turned to other aspects of those causes of action.

[18] He held the claim of false imprisonment could not succeed because the plaintiff could not establish that the court staff responsible for updating the CMS would have had the necessary intention to set in train a series of events which would ultimately lead to the plaintiff's arrest. The Judge found there had simply been an inadvertent omission.[9]

[19] The claims for breach of statutory duty and negligence were based on s 13(1) of the District Courts Act 1947. Under the provision, the Registrar must "keep or cause to be kept such records of and in relation to proceedings in the Court as may be prescribed by the Chief Executive of the Ministry of Justice". MacKenzie J considered that provision was not, on the proper construction of the statute, a duty imposed for the protection of a limited class of the public, and intended to confer on members of that class a private right of action for the breach of the duty. Rather, it was a duty imposed for the proper administration of the court, and in the general public interest. Therefore, there could be no claim for breach of a statutory duty.[10]

[20] Insofar as the claim was possibly analysed as an action based on a common law duty of care arising from the imposition of the statutory duty or the performance

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7 At [17].
8 At [23].
9 At [24].
10 At [35], applying *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 (HL) at 730–731.

of it, the Judge noted that would give rise to considerations similar to those needing to be addressed on an ordinary action for negligence at common law.[11] In this case, he considered there was insufficient proximity between the relevant members of the Court's staff and Ms Thompson. Further, even if it did not act directly as a bar to the claim, s 6(5) of the Crown Proceedings Act was an important consideration counting against the existence of a duty of care.[12] For completeness, the Judge indicated that even if he had been satisfied that there was a duty of care, there was insufficient evidence upon which he could be satisfied it had been breached.[13]

[21] The fourth cause of action was described by counsel as one of "systemic negligence". The Judge described the allegation as, in essence, that the Secretary for Justice was required to ensure proper or adequate procedures were in place, including the allocation of sufficient and appropriately trained staff to ensure the proper upkeep of court records. The Secretary was to be fixed with knowledge that a failure to update the court's records on a timely and accurate basis would give rise to a real and substantial risk that an arrest warrant would be wrongly issued and executed as had occurred in the present case. Ms Thompson alleged the Secretary's failure was a substantial contributor to the failure to update the CMS which led to her arrest.[14] The Judge held that the factors weighing against imposition of a duty of care and negligence were even stronger in this cause of action than in the breach of statutory duty and negligence causes of action. There was even less proximity and the policy considerations weighed more strongly against the imposition of a duty of care.[15]

[22] Finally, the Judge rejected the claim of arbitrary arrest or detention contrary to s 22 of the Bill of Rights Act. He found that the detention was not unlawful because it had been effected pursuant to a warrant issued by a judge. While the factual basis on which the warrant was issued was wrong, Judge Wainwright had acted on a reasonable assumption based on the information known to her. Consequently, her decision could not properly be characterised as arbitrary, and the

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11 At [37].
12 At [38]–[39], applying *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [80].
13 At [41].
14 At [42].
15 At [44].

same was true of the subsequent execution of the warrant.[16] As a result, the fifth cause of action also failed.

The arguments on appeal

[23] Counsel for Ms Thompson challenged all of the conclusions reached by the High Court. Because of the view we take on the principal issues it will not be necessary to deal with all the arguments advanced. We can discuss the matters we need to address under the headings of Crown immunity and Bill of Rights Act.

Crown immunity

Ms Thompson's submissions

[24] Ms Cull QC submitted the failure to enter the cancellation of the sentence into the CMS system was not a failure to discharge responsibilities of a judicial nature, nor in connection with the execution of a judicial process. She claimed it was simply an administrative act, and therefore not within the ambit of s 6(5) of the Crown Proceedings Act.

[25] Ms Cull's submission was based on five propositions. First, updating the CMS was not the exercise of a discretionary or evaluative function that could be brought within the compass of responsibilities of a judicial nature or process. Second, at the time when the CMS should have been updated in this case, there was no judicial process in existence. The order for cancellation of the sentence had been made and required no further executory steps in order for it to be implemented. Third, as a matter of law, the application to cancel did not need to be removed from the system: it no longer existed and there was effectively nothing to remove. Fourth, updating the CMS was an administrative step, not required to implement the order: whether or not the CMS was updated did not affect the operative effect of the Judge's order of cancellation. Finally, the only reason there was a need for the administrative step to be taken was that the Ministry of Justice had chosen to implement its administrative responsibilities by creating and using the CMS. That system was neither created nor mandated by the relevant statutory provisions.

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[16] At [47].

The Attorney-General's submissions

[26] For the Attorney-General, Mr Kinsler submitted that updating court records, including the CMS, to reflect a judge's order is an integral part of a single process comprising the exercise by the judge of judicial discretion, and then the recording of the judge's decision. He argued that it ought not to matter for the purpose of the immunity conferred by s 6(5) of the Crown Proceedings Act which actor in the system is responsible for each step, or whether the particular actions carried out are characterised as judicial or administrative since responsibility for the administration of the court record ultimately sits with the court.

[27] Consequently, updating court records to reflect the judge's order should be seen as an element of the judicial act itself, falling within the first limb of s 6(5). Or alternatively, it is a responsibility reposed in registry officials in connection with the execution or "implementation" of the judicial process and therefore within the second limb of s 6(5).

Consideration

[28] Section 6(1) and (5) of the Crown Proceedings Act provide as follows:

> **6 Liability of the Crown in tort**
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> (1) Subject to the provisions of this Act and any other Act, and except as provided in subsection (4A) or (4B), the Crown shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject—
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> (a) in respect of torts committed by its servants or agents;
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> (b) in respect of any breach of those duties which a person owes to his or her servants or agents at common law by reason of being their employer; and
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> (c) in respect of any breach of the duties attaching at common law to the ownership, occupation, possession, or control of property:
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> provided that no proceedings shall lie against the Crown by virtue of paragraph (a) in respect of any act or omission of a servant or agent of the Crown unless the act or omission would apart from the provisions of this Act have given rise to a cause of action in tort against that servant or agent or his or her estate.

…

> (5) No proceedings shall lie against the Crown by virtue of this section in respect of 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 judicial process.

[29] The principal question raised in this part of the appeal is whether the failure by employees of the Ministry of Justice to update the CMS to reflect Judge Blaikie's order, and remove the cancellation application from the list of cases to be called before Judge Wainwright, can be brought within the ambit of s 6(5).

[30] Counsel referred in argument to a number of cases. Ms Cull placed some emphasis on the decision of the England and Wales Court of Appeal in *Quinland v Governor of Swaleside Prison*.[17] In that case, a defendant had been convicted of blackmail and burglary and sentenced to an effective term of two years' imprisonment. At the same time he was sentenced for two other offences which attracted in each case a sentence of three months' imprisonment. The Judge ordered that those sentences be "concurrent to each other but consecutive to the two years". He then summarised the result stating "That means you will serve two and a half years." In fact, the effective term was two years three months. The Judge's misdescription of the length of the effective term went undetected and the order of the Court and warrant of commitment were drawn up to show a sentence of two years six months. Leave to appeal the conviction and sentence was refused, but the Judge who dealt with that application pointed out that having read the record sheets and the components of the sentence as expressed by the Judge, he regarded the sentence as one of two years three months' imprisonment and directed "That should be checked if necessary."

[31] Notwithstanding various attempts by the appellant's solicitors to rectify the problem, registry officials did not take the appropriate action. In the result, the appellant was released on a sentence release date which would have been appropriate had he been in fact sentenced to two and a half years, but six weeks after he should have been released after serving the actual sentence of two years three months.

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[17] *Quinland v Governor of Swaleside Prison* [2002] EWCA Civ 174, [2003] QB 306.

[32] Some years later he commenced proceedings seeking damages for false imprisonment from two prison governors and the Lord Chancellor's Department. The claims against the prison governors were struck out, a decision confirmed by the Court of Appeal.[18] Applying observations of Lord Woolf MR in *R v Governor of Brockhill Prison, ex parte Evans (No 2)*,[19] the Court held that the prison governors were entitled to rely on a warrant apparently "good on its face".[20]

[33] Ms Cull relied on *Quinland*, however, because of what was said in relation to the claim against the Lord Chancellor's Department, which had to be considered in the light of s 2(5) of the Crown Proceedings Act 1947 (UK).[21] All three Judges in the Court of Appeal approved[22] the approach adopted in *Wood v Lord Advocate.*[23] In that case, the Lord Advocate had been sued on the basis of the alleged negligence of an employee in the office of the Sheriff Clerk. The error relied on was a failure to advise a pursuer who had lodged a caveat if and when certain steps were taken in relation to an estate. The Sheriff Principal said:[24]

> *The first question is whether at the time of the negligent act or omission a judicial process existed.* If that question is answered in the affirmative, the second question is whether at the material time the delinquent clerk was discharging, or purporting to discharge, responsibilities which he had in connection with the execution of that process.

Ms Cull emphasised the italicised words claiming there was no extant judicial process here once Ms Thompson's sentence had been cancelled by Judge Blaikie.

[34] Nor was this a case such as envisioned by Clarke LJ in *Quinland* who said:[25]

> I at one time thought that the word "execution" should be construed as limited to execution in the sense of execution of judgments, on the basis that the purpose of the provision was to protect those who execute judgments, such as bailiffs. However, on reflection, I do not think that the words in the section can be so limited. For example, it seems to me to be clear that a person drawing up a court order made by a judge would be exercising responsibilities in connection with the execution of judicial process. Thus

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18 At [18].
19 *R v Governor of Brockhill Prison, Ex parte Evans (No 2)* [1999] QB 1043 (CA) at 1056.
20 *Quinland*, above n 17, at [18].
21 This was in terms almost identical to s 6(5) of the Crown Proceedings Act 1950.
22 *Quinland*, above n 17, at [27], [37] and [41].
23 *Wood v Lord Advocate* 1996 SCLR 278 (Sherriff Court).
24 At 281 (emphasis added).
25 *Quinland*, above n 17, at [33].

> the Crown Court clerk who drew up the order in this case on the basis that the claimant had been sentenced to two years six months was, as I see it, doing an act in connection with the execution of judicial process. He was implementing what he thought the judge had ordered and, in my judgment, would be immune from suit under section 2(5).

By contrast, Ms Cull submitted, here there was nothing needing to be done or executed by any member of the court staff. The relevant sentence had been cancelled and the cancellation was effective on pronunciation of Judge Blaikie's order in court. Ms Cull bolstered that submission by reference to *R v Fisher* in which Blanchard J considered the lawfulness of a remand in custody without a formal warrant of commitment.[26] Section 47(1) of the Summary Proceedings Act 1957 relevantly provided:

> Where, pursuant to s 46 of this Act, the defendant is remanded in custody, the Court or Justice shall issue a warrant in the prescribed form for the detention of the defendant in custody for the period of the adjournment.

[35] Blanchard J recorded his view that a remand in custody after an oral order for such a remand had been made would not be rendered unlawful if a warrant of commitment was not subsequently signed.[27]

[36] Ms Cull noted that a similar approach had been taken in *Reekie v Attorney-General*.[28] She recognised that s 74(1) of the Sentencing Act 2002 provides that if a court imposes a community-based sentence on an offender, the particulars of the sentence must be drawn up in the form of an order. However, she pointed out that no similar order was required to be drawn up to perfect the cancellation relevant here. For that, Ms Cull relied on MacKenzie J's finding that the order made by Judge Blaikie cancelling the sentence of community work "necessarily brought to an end the application to review that sentence".[29]

[37] However, as has been seen, MacKenzie J nevertheless considered the subsequent failure to update the CMS record was either an omission to discharge responsibilities of a judicial nature, or an omission to discharge responsibilities held in connection with the execution of judicial process. In reaching that conclusion the

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26 *R v Fisher* HC Auckland T236/95, 4 October 1995.
27 At 7.
28 *Reekie v Attorney-General* [2012] NZHC 1867.
29 High Court judgment, above n 1, at [14].

Judge was influenced by the decision of this Court in *Simpson v Attorney-General [Baigent's Case]* and quoted[30] the following from the judgment of Hardie Boys J:[31]

> I do not read s 6(5) as referring solely to the exercise of judicial power. The expression "responsibilities of a judicial nature" is of wider scope, apt to include all those functions which are to be performed judicially. These would include the issue of a search warrant. The expression "judicial process" must be understood in the light of the earlier expression. It therefore means a process resulting from the exercise of responsibilities of a judicial nature. "Process" is not in law a precise term. It may refer broadly to the procedure of the Court, as in abuse of process, or to a particular step in Court proceedings. The law dictionaries set out what has and what has not been held to be a process; but none of the cases are really in point, for the meaning must always depend on the context. Here the general context is s 6(5) and the particular context is the conjunction of the noun with the adjective "judicial". In *Re Chase* [1989] 1 NZLR 325 the Crown contended that a search warrant was a judicial process, but the Court did not find it necessary to express a conclusion, although Cooke P and Henry J may be thought to have favoured that view. The point now requiring decision, I have concluded that in the context of s 6(5) "process" means an order or authority emanating from a judicial officer exercising judicial responsibilities. That would include a search warrant.

[38] After referring to the other judgments delivered in that case, MacKenzie J held the action which should have been taken by the court staff here to remove the case from Judge Wainwright's list was even more clearly within the scope of the judicial process than the execution of a search warrant.[32]

[39] It is clear the omissions which are the basis of Ms Thompson's claim were actions which should have been taken following Judge Blaikie's order cancelling the sentence. We doubt that the omitted steps could themselves be regarded as responsibilities of a judicial nature, but we consider they clearly fall within the ambit of responsibilities "in connection with the execution of judicial process". In the language of Hardie Boys J, they were steps that should have been taken "resulting from the exercise of responsibilities of a judicial nature". And in the language of Clarke LJ in *Quinland* they were part of implementing what the Judge had ordered. Ms Cull was no doubt correct that Judge Blaikie's order was effective when

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30 At [15].

31 *Simpson v Attorney-General [Baigent's Case]* [1994] 3 NZLR 667 (CA) at 696.

32 High Court judgment, above n 1, at [17]. The reservation "ordinarily" appears in context to have been intended to exclude cases where there was bad faith. There is no allegation of bad faith in the present case.

pronounced, but the CMS was not updated so as to reflect the order, and to that extent the cancellation application was treated as still extant, even though it was not.

[40] Ms Cull's argument that the CMS does not have a direct statutory basis, and that the omitted steps were not prescribed in law is inconsequential. The CMS is adopted by the Ministry of Justice for the purpose of recording the existence of proceedings and steps taken in relation to them. It is self-evident that there must be such a system, because without it the courts could not function. District Courts are courts of record as recognised by s 3(1) of the District Courts Act.[33] In addition, s 13 of that Act provides:[34]

> **13 Record of proceedings to be kept by Registrar**
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> (1) The Registrar of each court shall keep or cause to be kept such records of and in relation to proceedings in the court as may be prescribed by the chief executive of the Ministry of Justice.

[41] It is not surprising that there is no more detailed legislative prescription than this. It leaves to the Chief Executive of the Ministry of Justice the practical task of establishing and ensuring the operation of effective record keeping procedures necessary for the proper functioning of the judicial system. However, we do not accept that the failure to provide more detail in the legislation should result in a narrow interpretation of what constitutes "responsibilities … in connection with the execution of judicial process" for the purposes of s 6(5) of the Crown Proceedings Act. On the contrary, we consider a broad approach is appropriate, extending that concept to all administrative acts necessary to ensure that the court's records, kept in the system mandated by the chief executive, accurately reflect and provide for the consequences of orders made by the judges. Such administrative acts, although performed by Ministry of Justice employees, are a necessary part of the proper

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[33] The High Court, Court of Appeal and Supreme Court are also courts of record: see respectively ss 3 and 57 of the Judicature Act 1908 and s 6 of the Supreme Court Act 2003.

[34] There does not seem to be any equivalent express provision in relation to registrars in the High Court. It may be assumed that is because the keeping of records is treated as such an obvious function of the registries that it is embraced by the general statement in s 28(1) of the Judicature Act about the powers and duties of registrars and deputy registrars who have "all the powers … and duties in respect of the Court … which Registrars and Deputy Registrars have hitherto performed or which by any rule or statute they may be required to perform". These responsibilities clearly relate to the functioning of the Court: they are reposed "In order that the Court may be enabled to exercise the jurisdiction conferred upon it by this Act".

functioning of the judicial branch of New Zealand's government and must be seen as within the province of that branch.

[42] Consistently with this, s 12 of the District Courts Act provides that a registrar shall be appointed from time to time "for each court", and s 14 makes separate provision for deputy registrars. In the case of the High Court, s 27 of the Judicature Act 1908 provides for the appointment of "such Registrars, Deputy Registrars, and other officers as may be required for the conduct of the business of the Court." Section 72 is an equivalent provision about the appointment of persons for the conduct of the business of the Court of Appeal. Clearly, these persons are appointed to carry out work necessary for the performance of the judicial function.

[43] It is also worth noting what was said by Hale LJ in *Quinland*:[35]

> The Court Service may be an agency of the executive but it exists, in part if not in whole, to facilitate the workings of the judiciary. There are some of its activities over which the judiciary and not the executive must have the ultimate control. Whatever else these may include, they must include the putting into effect of the orders or directions of a court. There is little point in having an independent judiciary if the executive, through the Court Service, is free to pick and choose which of its orders to implement. The ironic but inevitable consequence is that the Crown cannot be liable for its failure to do that in this case.

Those observations are apposite here.

[44] Had the record keeping system worked as it should have in this case, the CMS would have been updated to reflect Judge Blaikie's order thereby ensuring the matter was not called before Judge Wainwright. The omission of those further steps represented a failure to execute the judicial process commenced by Judge Blaikie's order.

[45] We do not consider the England and Wales Court of Appeal's decision in *Quinland* assists Ms Thompson's argument. The relevant errors in that case were those of the Crown Court clerk who drew up the order on the basis that the appellant had been sentenced to two years six months, and the failure of employees in the Criminal Appeal Office to ensure the appropriate action was taken by the full court

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[35] *Quinland*, above n 17, at [41].

(as required under the relevant statutory provisions). These were viewed as, respectively, an error and omission in implementing or discharging responsibilities those concerned had in connection with the execution of the judicial process and were therefore covered by the immunity.[36] However, as the passage from the judgment of Clarke LJ quoted above at [34] indicates, the statutory reference to responsibilities "in connection with the execution of judicial process" was seen as having a broad reach. The fact this case concerns omissions rather than actions is not significant.

[46] We are satisfied that MacKenzie J was correct when he concluded s 6(5) of the Crown Proceedings Act meant that the causes of action based on false imprisonment, breach of statutory duty and negligence could not succeed. The failure to update the CMS was a responsibility in connection with the execution of judicial process. Our agreement with that conclusion makes it unnecessary to discuss the alternative bases on which the Judge rejected those claims.

Bill of Rights Act

[47] Ms Thompson's argument in this part of the case was founded on s 22 of the Bill of Rights Act which is headed "Liberty of the person" and provides that "Everyone has the right not to be arbitrarily arrested or detained."

Ms Thompson's submissions

[48] Mr Ewen submitted that a District Court judge has no power to issue a warrant to arrest other than pursuant to an empowering legislative provision. In this case, the relevant power to arrest was contained in s 72(3) of the Sentencing Act. Under that provision, if an application such as that made by the probation officer in this case has been made to a court:

> … a probation officer or a constable may, for the purpose of having the offender brought before the court dealing with the application, apply to a court or a Registrar for the issue of a warrant to arrest the offender and the court or Registrar may issue a warrant for arrest.

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[36] At [33] and [36].

[49] Mr Ewen argued that since Judge Blaikie had disposed of the application for cancellation, there was no statutory power to issue a warrant for Ms Thompson's arrest when she failed to appear. Since the application had been cancelled, it was impossible for Ms Thompson to be brought before the court "dealing with the application" when Judge Wainwright issued the warrant. The source of the error was the wrongful omission by registry staff to ensure the Court's records were updated and the matter removed from the list of cases called before Judge Wainwright.

[50] Citing this Court's decision in *Tranz Rail Ltd v Wellington District Court*,[37] Mr Ewen submitted that since the warrant was invalid when it was issued, the fact that its issue and execution were reasonable acts could not be a basis to refuse a declaration that it was invalid. Further, the fact that the Judge's erroneous assumption the application remained on foot was reasonable ought not to be elevated to a ground of defence. It was submitted MacKenzie J had wrongly considered the issue from the perspective of the District Court Judge issuing the warrant, rather than looking at the effect of issuing the warrant, an approach said to be contrary to what was required by this Court's decision in *R v Goodwin*.[38]

[51] Counsel also referred to *Manga v Attorney-General* in which Hammond J said:[39]

> [38] A detention of the subject, on a mistaken view of the law, is too serious an issue to permit a defence of that character. And, if mistake of law is not a defence to a crime, why should it justify an illegal detention?
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> [39] The view that an illegal detention is arbitrary has been consistently upheld in the international jurisprudence on art 9(l) of the International Covenant on Civil and Political Rights 1966, against which the New Zealand Bill of Rights was developed.
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> [40] The essence of the position taken in the tribunals, the case law, and the juristic commentaries is that under that covenant all unlawful detentions are arbitrary; *and* lawful detentions may *also* be arbitrary, if they exhibit elements of inappropriateness, injustice, or lack of predictability or proportionality.

[52] Reference was also made to *Neilsen v Attorney-General* where Richardson P, writing for a court of five, observed:[40]

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37 *Tranz Rail Ltd v Wellington District Court* [2002] 3 NZLR 780 (CA).
38 *R v Goodwin* [1993] 2 NZLR 153 (CA) at 172.
39 *Manga v Attorney-General* [2002] 2 NZLR 65 (HC).

> [34] Whether an arrest or detention is arbitrary turns on the nature and extent of any departure from the substantive and procedural standards involved. 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.

[53] Counsel submitted that in *Neilsen* the Court was considering a discretionary exercise of an available legal power, namely the power to arrest without warrant under s 315 of the Crimes Act 1961. Although the power existed, the Court determined that its exercise was not justified, when assessed against proper discretionary considerations.[41] Mr Ewen suggested the present case was stronger, since there was no power to issue the warrant at the time it was issued. This unlawfulness, coupled with departures from the requisite procedural standards preceding the issue of the warrant meant that the resulting arrest and detention were arbitrary.

[54] Mr Ewen referred to the Supreme Court's decision in *Chapman* in which it was decided by a majority that there could be no Crown liability for breaches of the Bill of Rights Act resulting from decisions of the Judges.[42] This issue was not addressed by MacKenzie J, presumably because he considered the Judge's decision to issue the warrant was not arbitrary, and the subsequent execution of the warrant also lacked that quality.

[55] Mr Ewen argued that the ratio of *Chapman* was limited to breaches of ss 25 and 27 of the Bill of Rights Act which provide, respectively, for minimum standards of criminal procedure and the right to observance of the principles of natural justice. The present case should be distinguished because, unlike the breach of fair trial rights which have a potential remedy by way of appeal, there is no appellate remedy resulting from the issue of a warrant to arrest. Counsel relied on art 9 of the International Covenant on Civil and Political Rights (ICCPR) with its reference to the right to liberty and security, its proscription on arbitrary arrest and detention and the stipulation in art 9(5) that anyone who has been the victim of unlawful arrest or

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40 *Neilsen v Attorney-General* [2001] 3 NZLR 433 (CA).

41 At [44]–[48].

42 *Chapman*, above n 2, at [208] where the judgment left open the question of potential liability for the Registrar for public law damages having regard to his role in the unlawful processes followed in that case.

detention shall have an enforceable right to compensation.[43] It would be inconsistent with New Zealand's adoption of art 9 without reservation,[44] and the approach taken to the relevance of international covenants to which New Zealand is a signatory in cases such as *Tavita v Minister of Immigration*[45] and *B v G*,[46] to deny Ms Thompson a remedy in the present circumstances.

[56] Mr Ewen submitted that the decision in *Chapman* should not therefore prevent the Crown being held liable for the breach of Ms Thompson's rights resulting from her unlawful arrest and detention, which were substantially the result of omissions to follow the appropriate procedures by the registry officer.

[57] During the hearing of the appeal, Mr Ewen developed an alternative argument, not apparently advanced in the High Court or mentioned in written submissions on the appeal. This rested on the fact, conceded by the Attorney-General, that Judge Wainwright ordered the warrant for arrest to issue in the absence of any application for such an order on the day. Yet the power she purported to exercise under s 72(3) of the Sentencing Act was only available given an application for the issue of a warrant. Because the Judge acted without jurisdiction, her decision was unlawful, and this was a separate reason for holding the arrest and detention of Ms Thompson was arbitrary.

The Attorney-General's submissions

[58] Mr Kinsler submitted there had been no breach of s 22 of the Bill of Rights Act, noting that the relevant arrest and detention had been made pursuant to the warrant issued by Judge Wainwright. The detention was the result of due process of law, and something more than judicial error was required to render the detention arbitrary. The right affirmed by s 22 should not be construed so as to require infallibility. The police were obliged to execute the warrant, and actions taken pursuant to it were lawfully justified for the purpose of any allegation of false imprisonment, and the immunities set out in s 6(5) of the Crown Proceedings Act,

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43 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976).

44 Mr Ewen contrasted the absence of a reservation such as that made in relation to art 14(6) of the ICCPR considered significant in *Chapman*, above n 2.

45 *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA) at 260 and 266.

46 *B v G* [2002] 3 NZLR 233 (CA) at [43].

ss 43 and 44 of the Policing Act 2008 and s 26(3) of the Crimes Act.[47] The High Court was therefore right to conclude that the detention was not unlawful. Further the District Court Judge's mistake as to the factual basis on which the warrant should be issued was not such as to render the detention arbitrary.

[59] Mr Kinsler noted Ms Thompson's principal argument was based on a claimed excess of jurisdiction by the Judge (because the foundation of her power to issue the warrant had ceased to exist when Judge Blaikie disposed of the application for cancellation), but the claim was against the Attorney-General in respect of the omission of the registry official employed by the Ministry of Justice. This is a "flank attack" which, if permitted, would undermine the principle of judicial immunity. He submitted that the claim could not succeed, applying *Chapman*: the reasoning of the majority could not properly be confined to cases involving ss 25 and 27 of the Bill of Rights Act. Since Judge Wainwright's decision was the immediate cause of Ms Thompson's arrest and detention by the police, it would be inappropriate to hold the Crown liable. The personal immunity of judges was simply part of a principle of judicial immunity which ought to apply to the judicial process as a whole, including its independence from the executive.

[60] The same arguments were deployed against Ms Thompson's alternative argument that the Judge could not lawfully direct the warrant to issue without an application for her to do so.

Consideration

[61] We accept that the issue of the warrant was unlawful, on both of the grounds advanced by Ms Thompson. The clear implication of s 72(3) of the Sentencing Act is that there must be, at the time the warrant is issued, an outstanding application for the purposes of which the defendant is to be brought before the Court. The fact that the Court's records did not show the application had been disposed of cannot mean

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[47] Section 43(1) of the Policing Act requires every constable to obey and execute "all lawful criminal court processes", while s 44 provides that police employees acting under a Court process are not responsible for any irregularity or lack of jurisdiction in its issuing. Section 26(3) of the Crimes Act provides that every person duly authorised to execute a lawful warrant issued by any Court is justified in executing the warrant.

that the power to issue the warrant continued to exist. There was no other relevant power available to the Judge. Consequently, the issue of the warrant was unlawful.

[62] It is equally implicit in s 72(3) that the power to issue the warrant requires that there first be an application to the court for its issue. In a case such as the present the statute identifies a probation officer as the person entitled to apply. The requirement that there be an application may be assumed to reflect legislative assumptions that such warrants will not be issued except in case of need, and the applicant will be aware of, and bring to the court's attention, matters relevant to the question of whether a warrant should issue. Issuing a warrant in the absence of an application potentially deprives the court of such information. It is common ground there was no such application here. In the present case had a probation officer been present and asked if a warrant was sought it is not fanciful to suppose that he or she might have been in a position to explain that the application for cancellation had been disposed of or at least confessed to uncertainty. We consider the issue of the warrant was unlawful for this additional reason.

[63] Once it is concluded the warrant was unlawful, the next consideration is whether the arrest and detention may properly be described as arbitrary.[48] On that question the fact that the warrant was unlawful will usually (if not always) be conclusive of arbitrariness. In *R v Goodwin (No 2)* this Court said that in general unlawful detention will be arbitrary detention while leaving open the possibility that there may be some limited exceptions to that principle. Cooke P, writing for the Court, continued:[49]

> We have in mind such cases as detention unlawful yet imperative for the safety of the detainee or other persons, or detention in good faith for reasons falling just short of reasonable and probable grounds under ss 36, 37 or 38 of the Crimes Act 1961, as envisaged in *Duguay*.[50]

[64] The facts of this case are far removed from those kinds of limited exceptions. Subsequently, in *Nielsen* in the passage relied on by Mr Ewen quoted above, this

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48 New Zealand Bill of Rights Act 1990, s 22.

49 *R v Goodwin (No 2)* [1993] 2 NZLR 390 (CA) at 394.

50 The Crimes Act references were to provisions absolving persons for criminal responsibility when arresting persons "believed to be committing crime by night", arrest after the commission of crimes and arrest "during flight".

Court approached arbitrariness by asking whether the impugned arrest and detention could be said to be "capricious, unreasoned, without reasonable cause" and made "without reference to an adequate determining principle or without following proper procedures".[51]

[65] MacKenzie J held that the arrest and detention here could not be described as arbitrary, essentially because the Judge had acted on a reasonable assumption as to the facts as she understood them. He thought this meant the subsequent execution of the warrant was also not arbitrary. However, we have reached a different view. In part that is because of the new argument, raised by Mr Ewen for the first time in this Court, that the Judge had no power to act of her own motion. That seems to us to fall readily within the ambit of an action taken without following procedures, as contemplated in *Nielsen*. However, we also consider the arrest and detention were arbitrary because there was no basis on which the warrant could lawfully have been issued at the time. We accept of course that the Judge did not know the basis on which a warrant could be issued had ceased to exist when Judge Blaikie cancelled the sentence, but the decision now required is whether the arrest and detention were arbitrary.

[66] On that issue the fact the Judge made an innocent mistake (whether it be seen as a mistake of fact or law or of mixed fact and law) cannot be determinative. We see the arrest and detention as arbitrary because they occurred without lawful authority and, in essence, by mistake. The fact there was a mistake as to the existence of circumstances justifying the issue of a warrant lends an element of capriciousness to the arrest which contributes to the arbitrary nature of what occurred. It can also be said there was a lack of predictability about the issue of the warrant (and therefore the arrest), a characteristic of arbitrary action mentioned by Lord Cooke in delivering the judgment of the Privy Council in *Fok Lai Ying v Governor-in-Council*[52] and by Hammond J in *Manga.*[53]

[67] We accept that the police who arrested and detained Ms Thompson overnight were acting in accordance with the warrant. As Mr Kinsler pointed out, their actions

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51 *Neilsen*, above n 40, at [34].
52 *Fok Lai Ying v Governor-in-Council* [1997] 3 LRC 101 (PC) at 113.
53 *Manga*, above n 39, at [45].

in doing so were entitled to the protection afforded by s 44 of the Policing Act. While s 43(1) contains a duty to execute a "lawful" process it is clear that the constable acting in good faith is not obliged to go beyond the face of the warrant.[54] However, that does not mean Ms Thompson's arrest and detention were not arbitrary. To hold otherwise would mean that a warrant good on its face could have the effect of sanitising improper processes prior to the warrant's issue. That would be a result inconsistent with the protections afforded by s 22 of the Bill of Rights Act and not justified on the facts of this case.

[68] For these reasons we have concluded Ms Thompson's arrest and detention were arbitrary and breached her rights under s 22. The principal basis for this conclusion centres on the District Court Judge's decision that a warrant for arrest should be issued.

[69] The new argument advanced in this court based on the lack of jurisdiction to issue the warrant in the absence of an application required Mr Ewen to submit the Supreme Court's decision in *Chapman*[55] should be distinguished, to enable a claim to be brought even if the proximate and effective cause of the unlawful arrest was the result of a judicial act. Having heard argument on that issue, and because it is important, we deal with it albeit briefly.

[70] The facts in *Chapman* are well-known and need not be repeated here. It is sufficient to note the case arose in the context of the procedures adopted by the Court of Appeal in disposing of certain criminal appeals on the papers after the Registrar had declined the appellants' applications for legal aid in a process involving consultation with the Judges. The procedures were held to be unlawful by the Privy Council in *R v Taito*.[56]

[71] Mr Chapman was a person whose conviction appeal had been dealt with pursuant to the procedures impugned in *Taito*. In *Chapman* it was held that the High Court did not have jurisdiction to hear and determine a claim made against the Crown for public law compensation for alleged breaches by the judiciary of ss 25(h)

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54 Compare *Baigent's Case*, above n 31, at 688 and *Ex parte Evans (No 2)*, above n 19.
55 *Chapman*, above n 2.
56 *R v Taito* [2003] UKPC 15, [2003] 3 NZLR 577.

and 27(1) of the Bill of Rights Act, occurring in the course of determining the respondent's legal aid application and his appeal against conviction.[57]

[72] The principal issue that had to be determined in *Chapman* was whether there was state liability for actions of the Judges that resulted in breaches of the Bill of Rights Act. For present purposes the significant aspects of the majority judgment delivered by McGrath and William Young JJ are its:

(a) confirmation of the breadth of common law judicial immunity in respect of actions taken in the bona fide discharge of judicial responsibilities;[58]

(b) statement that the principle of judicial immunity means there could be no question of the Crown being vicariously liable for actions of the Judges acting in their judicial capacity, referring to s 6(5) of the Crown Proceedings Act and emphasising that the judiciary are not employees or agents of the Crown. The judgment stated:[59]

> The independence of the judiciary from the executive branch, within a constitution that reflects the separation of powers, has long been seen as inconsistent with judges being employees or agents of the Crown who act on its behalf.

(c) conclusion after a lengthy review of the relevant policy considerations that the principles supporting judicial immunity are properly also applicable to claims against the state for judicial breaches of the Bill of Rights Act.[60] To allow compensation claims for judicial breach of the Bill of Rights Act would be "as inimical to judicial independence as permitting claims to be advanced against judges personally";[61] and

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57 *Chapman*, above n 2, at [209]. Section 25(h) enacts, as one of the minimum standards of criminal procedure, the right if convicted to appeal against the conviction and sentence. Section 27(1) requires observance of the principles of natural justice by any tribunal having the power to make a determination in respect of a person's rights or interests protected or recognised by law.

58 *Chapman*, above n 2, at [161]–[162], citing *Gazley v Lord Cooke of Thorndon* [1999] 2 NZLR 668 (CA).

59 At [175], citing MPA Hankey "The Constitutional Position of the Judges" (1932) 48 LQR 25.

60 At [176]–[192].

61 At [192].

(d) statement that the main reason for not extending the right to claim damages for breach of the Bill of Rights to the judicial branch was that it was unnecessary under the New Zealand court structure to provide financial remedies for such breaches.[62] The preceding reasoning founded that conclusion on other means of what was called "remedial protection" some of which reflect the context in which the case arose, that is breach of ss 25(h) and 27(1). One of those considerations was the ex gratia compensation scheme where a person has served all or part of a sentence of imprisonment before the conviction is quashed on appeal.[63] The other relevant considerations mentioned (including establishment of the Supreme Court and consequent greater availability of further appellate review, enactment of the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004, and the availability of criminal sanctions for the corrupt exercise of judicial power)[64] appear to be equally applicable to a case involving breach of s 22 as in the case of a breach of ss 25 and 27 of the Bill of Rights Act.

[73] One of the bases upon which Mr Ewen sought to distinguish *Chapman* was the absence of an effective appellate remedy in cases such as this in which any unlawful detention has been terminated before it has been possible to commence a proceeding. However, in a case where s 22 is engaged the remedy of habeas corpus can be sought if necessary. This is another protection making public law damages for judicial acts unnecessary.

[74] Overall we can see no basis on which the decision in *Chapman* could properly be distinguished as Mr Ewen argued. Most of the reasoning in the judgment has equal force in the present context. We consider it compels rejection of Ms Thompson's argument that a claim could be made against the Crown for breach of s 22 based on judicial error.

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62 At [206].

63 At [199]–[202]. Mr Kinsler advised that the ex gratia scheme as it currently stands would not extend to the circumstances of this case.

64 At [194]–[195].

[75] Whether or not the Crown could be liable for errors on the part of the registry in this case gives rise to issues relating to causation, a subject frequently encountered in respect of claims in the law of tort, contract and in criminal law, but not specifically addressed (so far as we have been able to ascertain) by cases dealing with public law damages. Counsel did not suggest that a different approach was necessary in this context, and we do not see the facts of this case as requiring it.

[76] On that basis, we consider that nothing omitted by the registry had any direct impact on Ms Thompson's rights and we do not consider as a matter of causation that the omission ought to be seen as leading to the arrest. The omission would not have had any significance but for the earlier adjournment to 23 July, and Judge Wainwright's decision to issue a warrant on her own motion on that day. Consequently, we do not regard the omission as an effective cause of the arrest. Further, the bail officer whose conduct is in issue could not have anticipated that a warrant would be issued (without an application for that to occur) for Ms Thompson's failure to appear on the application for cancellation disposed of by Judge Blaikie. That eventuality was too remote to justify the imposition of liability. Since the claim was pleaded on the basis of the registry omission those conclusions are fatal to the Bill of Rights Act claim.

[77] We noted earlier[65] that the decision in *Chapman* left open the potential for public law damages in respect of actions of the Registrar in that case.[66] We have concluded on the facts that the proximate or effective cause of the Ms Thompson's unlawful arrest was the issue of the warrant, which was a judicial act. Strictly speaking therefore, in this case also, it is unnecessary to decide what the position might have been had we concluded that the bail officer's omission caused the arrest.

[78] The consequence of this judgment is that Ms Thompson has no right to compensation in respect of the period for which she was unlawfully detained. That seems unsatisfactory but unless there is some basis on which the Crown would consider it appropriate to make an ex gratia payment we do not consider the law allows for compensation.

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65 Above n 43.

66 *Chapman*, above n 2, at [208].

Result

[79] The appeal is dismissed.

[80] The respondent did not seek costs and there is accordingly no order for costs.

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