**IN THE HIGH COURT OF NEW ZEALAND**
**WELLINGTON REGISTRY**

**I TE KŌTI MATUA O AOTEAROA**
**TE WHANGANUI-A-TARA ROHE**

**CIV-2021-485-628**
**[2022] NZHC 2465**

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| UNDER | the New Zealand Bill of Rights Act 1990 |
| BETWEEN | DANIEL CLINTON FITZGERALD<br>Plaintiff |
| AND | ATTORNEY-GENERAL OF NEW ZEALAND<br>Defendant |

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| Hearing: | 15–16 March 2022, further submissions received 30 March and 12 May 2022 |
| Counsel: | A S Butler and D A Ewen for Plaintiff<br>A Powell, M McKillop and R McMenamin for Defendant |
| Judgment: | 27 September 2022 |

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**JUDGMENT OF ELLIS J**

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[1] Mr Fitzgerald wrongly spent over four and a half years in prison as a result of what the Supreme Court has held was a misinterpretation of the statutory provisions governing the sentencing of "third strike" offenders.[1] The Court held the seven year sentence imposed on him following his conviction for indecent assault was in breach of his fundamental right to be free from grossly disproportionate punishment, as confirmed by s 9 of the New Zealand Bill of Rights Act 1990 (NZBORA).[2]

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1 *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551 [*Fitzgerald* (SC)]. The "three strikes" regime was established in 2010 by inserting ss 86A to 86I into the Sentencing Act 2002. Those provisions (and the three strikes regime) have, in the last month, been repealed by the Three Strikes Legislation Repeal Act 2022. Although sch 1AA, pt 4, cl 15 of the Sentencing Act bars claims for compensation arising from the repealed regime, the entitlement to bring a claim for breach of the New Zealand Bill of Rights Act is preserved.

2 Both the High Court and the majority in Court of Appeal considered that the three strikes regime compelled the sentencing Court to impose the maximum sentence of seven years: *R v Fitzgerald*

[2] In these proceedings, Mr Fitzgerald claims the undisputed breach of s 9 gave rise to a further infringement of his fundamental rights. He says his imprisonment in breach of s 9 rendered his detention arbitrary and now seeks damages for a breach of s 22 of the NZBORA.[3]

[3] But the Supreme Court's earlier decision in *Attorney-General v Chapman* is a potential impediment to this claim.[4] In *Chapman* the Court (by a three: two majority) held there is no jurisdiction to hear NZBORA claims relating to judicial acts or omissions. Although that decision has since been questioned by the United Nations Human Rights Committee,[5] counsel for Mr Fitzgerald acknowledge that it remains binding unless and until it is revisited by that Court.

[4] So the focus of this proceeding is not on the retrospective error in Mr Fitzgerald's original sentencing, but on what he contends was the wrongful exercise of discretion by the Crown prosecutor when deciding to prosecute him for a third strike offence in the first place. Mr Fitzgerald says this decision did not comply with the Solicitor-General's Prosecution Guidelines (the Prosecution Guidelines)[6] and it was reasonably foreseeable at the time that it would lead to a grossly disproportionate sentence and (so) to his arbitrary detention.

[5] These arguments raise novel and difficult questions, at least in a New Zealand context. Before turning to consider them, however, it is necessary to begin with some important matters of context, and then with the facts.

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[2017] NZHC 2206 [*Fitzgerald* (sentence indication)]; *R v Fitzgerald* [2018] NZHC 1015 [*Fitzgerald* (sentencing)] at [17]; and *Fitzgerald v R* [2020] NZCA 292, (2020) 12 HRNZ 234 [*Fitzgerald* (CA)] at [8] and [74].

3 Mr Fitzgerald's claim was heard together with a similar (but not identical) application for damages by Mr Koro Putua. I have recently delivered a separate decision on Mr Putua's claim: *Putua v Attorney-General* [2021] NZHC 2277.

4 *Attorney-General v Chapman* [2011] NZSC 110, [2012] 1 NZLR 462 [*Chapman* (SC)]. The decision will be discussed in more detail later in this judgment.

5 *Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No 3162/2018* UN Doc CCPR/C/132/D/3162/2018 (7 June 2022).

6 Crown Law Office *Solicitor-General's Prosecution Guidelines* (1 July 2013) [Prosecution Guidelines].

## The Solicitor-General's 2013 Prosecution Guidelines

*Constitutional underpinnings*

[6] The Prosecution Guidelines were issued in 2013, following the 2011 *Review of Public Prosecution Services*.[7] In his introduction to those Guidelines the Attorney-General explained the relevant constitutional context as follows:

> 1. Under our constitutional arrangements, the Attorney-General is responsible through Parliament to the citizens of New Zealand for prosecutions carried out by or on behalf of the Crown. In practice, however, the prosecution process is superintended by the Solicitor-General, who, pursuant to s 9A of the Constitution Act 1986, shares all the relevant powers vested in the office of the Attorney-General. These arrangements have renewed force with the codification of the Solicitor-General's responsibility for public prosecutions in s 185 of the Criminal Procedure Act 2011.
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> 2. Unlike most similar jurisdictions, New Zealand has no centralised decision-making agency in relation to prosecution decisions. In respect of Crown prosecutions, prosecutions are mainly conducted by Crown Solicitors – private practitioners appointed to prosecute under a warrant issued by the Governor-General. …

[7] The Attorney-General went on to explain that the way in which the Solicitor-General retains oversight of and control over Crown prosecutions is through the Prosecution Guidelines. He said:

> 3. The absence of a central decision-making process underscores the importance of comprehensive guidelines, and the acceptance of core prosecution values. The Review of Public Prosecution Services also reiterated the important role the Solicitor-General's Prosecution Guidelines play in setting core and unifying standards for the conduct of public prosecutions. The revised Guidelines reinforce the expectations that the Solicitor-General and I have of all prosecutors who prosecute on behalf of the State.
>
> 4. New Zealand is fortunate to be served by a public prosecution service that is professional, open, fair and responsible. These standards will continue through the day-to-day adherence to the values reflected in these Guidelines.

[8] The Prosecution Guidelines themselves state that they "reflect the aspirations and practices of prosecutors who adhere to the United Nations Guidelines on the Role

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7 John Spencer *Review of Public Prosecution Services* (Crown Law Office, September 2011).

of the Prosecutor (1990) and the International Association of Prosecutors Standards (1999). The former document provides:[8]

> 12. Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, *and respect and protect human dignity and uphold human rights*, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.

*Statutory underpinning*

[9] The Prosecution Guidelines also state that compliance with them "is expected in respect of public prosecutions and Crown prosecutions" and is "a condition of the warrant held by each Crown Solicitor".[9] Moreover, and as noted by the Attorney-General in the passage quote above, the role of the Solicitor-General and her relationship with the Crown prosecutors is now statutorily recognised in the Criminal Procedure Act 2011 (CPA). Thus, s 185 of the CPA provides:[10]

> **185 Solicitor-General responsible for general oversight of public prosecutions**
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> (1) The Solicitor-General is responsible for maintaining general oversight of the conduct of public prosecutions.
>
> (2) In discharging his or her responsibility under subsection (1), the Solicitor-General may—
>
> (a) *maintain guidelines for the conduct of public prosecutions*; and
>
> (b) *provide general advice and guidance to agencies that conduct public prosecutions on the conduct of those prosecutions.*
>
> (3) Nothing in this section requires the Solicitor-General to supervise the conduct of any particular public prosecution or makes the Solicitor-General responsible for the conduct of any public prosecution.
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> …

[10] Section 187 of the CPA provides that "the Solicitor-General must assume responsibility for and conduct every Crown prosecution from the time or stage in the

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8 UN Committee on Crime Prevention and Control *Guidelines on the Role of Prosecutors* (1990).
9 Prosecution Guidelines, above n 6, at [1.2] and [2.2].
10 Emphasis added.

proceedings prescribed in regulations" but that this duty may be performed by any Crown prosecutor.[11] And importantly, s 188 states:[12]

> **188 Duty of Crown prosecutor to comply with Solicitor-General's directions**
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> A Crown prosecutor who conducts a Crown prosecution under s 187 *must conduct that prosecution in accordance with any directions given by the Solicitor-General* (either generally or in that particular case).

[11] The framing of the s 188 obligation is wide ("any directions", including those given "generally") and logically encompasses the Prosecution Guidelines. In other words, s 188 appears to have created a legal duty incumbent on Crown Solicitors to comply with the directions set out in the Prosecution Guidelines.

*Prosecutorial discretion*

[12] The Prosecution Guidelines address the question of prosecutorial discretion by setting out the "test for prosecution" as follows:

> 5.1 Prosecutions ought to be initiated or continued only where the prosecutor is satisfied that the Test for Prosecution is met. The Test for Prosecution is met if:
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> 5.1.1 The evidence which can be adduced in Court is sufficient to provide a reasonable prospect of conviction – the Evidential Test; and
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> 5.1.2 Prosecution is required in the public interest – the Public Interest Test.

[13] The first—evidential sufficiency—limb of this test is not in issue in the present case and I do not consider it further.

[14] In terms of the public interest, the Prosecution Guidelines begin by acknowledging "it is not the rule that all offences for which there is sufficient evidence

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[11] The relevant regulations are the Crown Prosecution Regulations 2013, which provide (among other things) that any criminal proceeding transferred to the High Court becomes a Crown prosecution at that time. And at the time the charges were laid against Mr Fitzgerald, s 86D of the Sentencing Act provided that "a proceeding against a defendant charged with a stage-3 offence *must* be transferred to the High Court…". The provisions of the CPA presently under discussion therefore applied to Mr Fitzgerald's case.

[12] Emphasis added. 'Crown prosecutor' is defined in s 5 of the CPA to include "a Crown solicitor or a lawyer representing a Crown solicitor".

must be prosecuted".[13] Prosecutors are required to exercise their discretion as to whether a prosecution is necessary in the public interest.[14]

[15] The Prosecution Guidelines then include a non-exhaustive list of public interest considerations that favour prosecution and those that count against it. One example of the considerations that favour prosecution is the seriousness of the offence:[15]

> The predominant consideration is the seriousness of the offence. The gravity of the maximum sentence and the anticipated penalty is likely to be a strong factor in determining the seriousness of the offence

[16] And included among the 13 listed public interest considerations counting *against* prosecution are:[16]

> Where the defendant was at the time of the offence or trial suffering from significant mental or physical ill-health
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> …
>
> Where there are any proper alternatives to prosecution available.

*The memorandum of understanding with Police*

[17] The Prosecution Guidelines contain a section entitled "Relationship between Crown Prosecutors and Enforcement Agencies". Under that heading they provide:[17]

> **The Police or other investigator**
>
> 28.1 Crown prosecutors appear in the criminal courts in two distinct capacities, namely on instructions from the person or government agency who commenced the proceeding or, in respect of Crown prosecutions, as the Crown's representative.
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> 28.2 When acting on instructions, the Crown prosecutor is instructed in that capacity as an agent or officer of the Crown and should still act in accordance with the applicable guidelines. While Crown prosecutors are expected to consult closely with and take into account the views

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13 Prosecution Guidelines, above n 6, at [5.5]. See also [5.6]: "In a time honoured statement made in 1951 Sir Hartley Shawcross QC MP, the then United Kingdom Attorney-General, made the following statement to Parliament in relation to prosecutorial discretion: 'It has never been the rule in this country … that suspected criminal offences must automatically be the subject of prosecution.'"

14 At [5.5].

15 At [5.8.1]. There are 17 further considerations listed.

16 At [5.9.9] and [5.9.13].

17 Emphasis added.

> of the investigator or officer in charge of the case on all significant matters, it is also the Law Officers' expectation that government agencies who commence proceedings will follow the advice of the Crown prosecutor as to the nature of the charges and conduct of the prosecution.
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> 28.3 *The relationship between the Crown prosecutor and the agency who commenced the proceeding should also be conducted in accordance with any Memorandum of Understanding or similar agreement between the Solicitor-General and the chief executive of that agency.*
>
> **Recipients of advice**
>
> 28.4 *Due to the increasing complexity of the criminal law and considerations arising from the New Zealand Bill of Rights Act 1990, many criminal or regulatory investigations will require specialised legal advice from the earliest stages.*
>
> 28.5 *In this regard, Crown Solicitors are expected to have and maintain sufficient capacity to give advice as and when necessary*, and to develop and maintain appropriate relationships with the locally based government agencies to ensure effective legal advice is sought and given.
>
> 28.6 In giving investigative advice, the solicitor-client relationship is modified to the extent that the investigators to whom the advice is directed are expected to act in accordance with that advice.

[18] A Memorandum of Understanding of the kind contemplated by paragraph [28.3] was entered into between the Solicitor-General and the Commissioner of Police in 2013 (the MOU).[18] Among other things, it dealt with the prosecution of third strike offences. It required that:[19]

> The Police, at Police cost, will refer all prosecutions involving a stage-3 offence as defined in s 86A of the Sentencing Act 2002 to the Crown Solicitor for peer review either pre-charge or by the second appearance.

## What happened in Mr Fitzgerald's case

[19] The factual narrative set out below is not disputed.

[20] Since the age of 15 Mr Fitzgerald has suffered from schizophrenia and substance (drug and alcohol) abuse. He has a history of paranoid delusions and auditory and visual hallucinations; he needs ongoing mental health treatment and care.

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

19 Schedule B, art 2.

Prior to his most recent imprisonment he had been admitted to mental health facilities at least 13 times, although he also received treatment in the community. His mental health issues led to difficulty in sustaining accommodation. It might also be observed that those difficulties render a number of the ordinary principles underlying our sentencing regime—such as personal deterrence—inapt, and inapplicable to him.

[21] The incidents that led to his imprisonment occurred on 3 December 2016. They involved Mr Fitzgerald kissing one woman and pushing another during the daytime on a central Wellington street. Both women were strangers to him. Police charged him with indecent assault, common assault and breach of the extended supervision order to which he was then subject. Mr Fitzgerald was remanded in custody; his housing situation meant he had no suitable bail address.

[22] Indecent assault was a qualifying offence under the "three-strikes" regime.[20] Mr Fitzgerald had been found guilty of indecent assault twice before and so the 2016 charge was a "stage three" offence. On its face, s 86D of the Sentencing Act 2002 (the Act) required a sentencing judge to impose the maximum sentence of seven years' imprisonment if Mr Fitzgerald was found guilty on that charge. It was, at that time, commonly thought that the only discretion on sentencing was around whether he would be required to serve that sentence without parole.[21]

*Involvement of the Crown solicitor*

[23] Pursuant to the MOU, Police wrote to the Crown solicitor seeking a peer review of their decision to charge Mr Fitzgerald with indecent assault, on 1 February 2017. Legal privilege has been maintained over the advice but its content can, perhaps, be inferred from that fact that following the review Police confirmed their decision to proceed with that charge.[22]

[24] Shortly afterwards, one of Mr Fitzgerald's lawyers emailed the Crown prosecutor proposing that the charge be amended to one of common assault (which is

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20 Sentencing Act, s 86A(12) (now repealed).

21 Prior to the Supreme Court's decision in Mr Fitzgerald's case, no defendant convicted of a stage three offence had been sentenced to less than the statutory maximum.

22 As noted earlier, under the Prosecution Guidelines, Police are effectively required to follow the Crown prosecutor's advice.

not a qualifying offence) on evidential sufficiency grounds. The Crown prosecutor responded by saying the evidence clearly supported an indecent assault charge and that, given Mr Fitzgerald's history of indecencies, she was not prepared to amend the charge.[23]

[25] Mr Fitzgerald's lawyer next proposed that the appropriate charge was one of doing an indecent act (also not a qualifying offence). There is no record of a response to this suggestion but it is clear that the decision to proceed with the indecent assault charge was maintained.

[26] In accordance with the Crown Prosecution Regulations 2013,[24] the Crown formally took carriage of the prosecution after the proceedings had been transferred to the High Court. It was at that point (following the filing of a Crown Prosecution Notice under s 189 of the CPA) that the Crown prosecutor was required to make an independent judgment under the Prosecution Guidelines as to the appropriateness of the charges.

[27] On 10 April 2017 the Crown prosecutor acknowledged in an email to Mr Fitzgerald's counsel her acceptance that "this is a relatively low level indecent assault."

[28] The Crown prosecutor provided an affidavit in these proceedings addressing the exercise of prosecutorial discretion in this case:[25]

> 21. The Solicitor-General's Prosecution Guidelines, which I am very familiar with, contain a detailed description of relevant public interest factors in relation to the test for prosecution. While it is accepted that the list is not exhaustive, and the exercise requires judgment, my normal practice is to refer directly to the guidelines and consider all issues as set out in the list if they are relevant.
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> 22. I can confirm that *I have no recollection of considering the likely sentencing consequences in my assessment of the public interest test. As sentencing is a matter for the court, considerations as to*

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[23] It may be observed in passing that this statement by and of itself suggests that had Mr Fitzgerald not had such a history the charge *might* have been amended.

[24] See above, n 11.

[25] Emphasis added.

> *sentencing outcomes would not form part of my consideration as to whether the public interest test had been met.* The judgment I exercise as a prosecutor is whether the alleged offender should be brought before the Court and what charge appropriately reflects the offending. It is for the Court to determine if they are guilty and if so, what the sentence or other disposition should be. As I have said the decision to prosecute requires judgment. It is not a case of ticking boxes but I can say that having found evidential sufficiency my principal reasons for concluding prosecution for indecent assault was in the public interest were that:
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> 22.1 the offence was an inherently serious sexual offence which had caused harm to the victim;
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> 22.2 the offender's history indicated that the offending behaviour was likely to be repeated; and
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> 22.3 the offender was subject to an extended supervision order at the time of the offending.

[29] The affidavit does not suggest any consideration was given to Mr Fitzgerald's mental health.

*Sentence indication and sentencing*

[30] In September 2017, Mr Fitzgerald sought a sentence indication. His counsel submitted that a discharge without conviction on the indecent assault charge was appropriate and would avoid the operation of the three strikes regime. That submission was opposed by the Crown on jurisdictional grounds—an argument accepted by Dobson J, who said that the sentencing Court would be required to impose the maximum seven-year sentence.[26] As to whether Mr Fitzgerald would be required to serve that sentence without parole, the Judge noted:

> [9] On that issue the Crown has realistically conceded that given all your circumstances and the circumstances of the offending it would be manifestly unjust to require the whole seven years to be served without you being eligible for parole at any stage. On all the information I have got so far I consider that relatively high threshold of a manifestly unjust outcome would be reached, so the sentence would not be imposed on the basis that you could not qualify for parole at any stage it would be manifestly unjust.

[31] The Judge recorded his view that the indecent assault was "towards the bottom end of the range of seriousness of such offending".[27] Then, he observed that

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26 *Fitzgerald* (sentence indication), above n 2.
27 At [11].

Mr Fitzgerald's mental health problems were also relevant and that expert opinion was that a sentence of seven years' imprisonment would adversely affect his mental health still further, as his time in custody on remand had already done.[28] The Judge concluded: "in combination, those features are sufficient to make a seven year sentence without the prospect of parole one that would be manifestly unjust".[29]

[32] Unsurprisingly, Mr Fitzgerald did not plead guilty following this indication. Instead, after a judge alone trial in the High Court, he was later found guilty on the charge of indecent assault and the other two charges.[30]

[33] Mr Fitzgerald was sentenced on 10 May 2018.[31] The sentencing Judge again noted that the indecent assault was at the "bottom end" of the range and would not ordinarily have attracted a jail term at all.[32] But the Judge agreed with Dobson J that a discharge without conviction was not available and so he was compelled to sentence Mr Fitzgerald to seven years' imprisonment.[33] He also agreed with Dobson J that it would be manifestly unjust to require him to serve that sentence without the possibility of parole and so declined to make that order.[34]

*Court of Appeal*

[34] On appeal to the Court of Appeal, the majority upheld the sentence imposed in the High Court.[35] However, all Judges agreed that a seven year sentence was manifestly unjust,[36] having particular regard to:[37]

(a) the circumstances of the offending—being at "the low end of the range of conduct that amounts to indecent assault" and not sufficiently serious on its own to merit a sentence of imprisonment;

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28 At [12].
29 At [13].
30 *R v Fitzgerald* [2017] NZHC 465.
31 *Fitzgerald* (sentencing), above n 2.
32 At [21].
33 At [11]–[16].
34 At [27].
35 *Fitzgerald* (CA), above n 2.
36 At [43] per Clifford and Goddard JJ and [131] per Collins J.
37 At [34(a)–(d)].

(b) Mr Fitzgerald's impaired mental health, and in particular his inability to regulate his behaviour "in the manner that our society expects", which:

(i) had a "direct bearing on his culpability";

(ii) rendered the deterrence rationale underpinning the three strikes regime inapplicable (given his mental health condition impaired his ability to act on the two warnings previously received); and

(c) the psychiatrist's opinion that Mr Fitzgerald was best placed in a rehabilitation unit under an in-patient order pursuant to the Criminal Procedure (Mentally Impaired Persons) Act 2003; and

(d) the risk of reoffending which, while evident, was not at a level that "requires or justifies a (lengthy) prison sentence in order to protect the community" (other sentencing options in the short term were not only more appropriate, but more likely to reduce the prospect of re-offending in the long term).

[35] The majority expressly considered whether the sentence of seven years imprisonment was inconsistent with his right under s 9 of the NZBORA not to be subjected to disproportionately severe treatment. After noting that the s 9 right was not capable of justifiable limitation[38] and that the threshold for breach was a high one,[39] they said:[40]

> … We consider that the sentence imposed on Mr Fitzgerald crosses this high threshold. A sentence of seven years' imprisonment is grossly disproportionate in this case, having regard to the factors identified … above: offending at the lower end of the range for the offence; reduced culpability by reason of Mr Fitzgerald's impaired mental health; his impaired ability to act on the warnings given under the three strikes regime; and the disproportionately severe effect on him of a lengthy sentence of imprisonment. Mr Fitzgerald should be receiving care and support in an appropriate facility, not serving a lengthy term of imprisonment. He has ended up in prison for a very long term, in circumstances where he should not be there at all. The rationale that underpins this disproportionate response is that Mr Fitzgerald was given warnings that severe consequences would follow if he offended again, and he

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38 At [41].
39 At [42], citing *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429.
40 At [43] (emphasis added).

> should have responded to those warnings. But his ability to respond to such warnings is materially impaired by his significant mental health issues. In these circumstances, *a sentence of seven years' imprisonment goes well beyond excessive punishment, and would in our view shock the conscience of properly informed New Zealanders* who were aware of all the relevant circumstances including Mr Fitzgerald's mental disability.

[36] The fact that Mr Fitzgerald would be eligible for parole after serving a third of his sentence made no difference to this conclusion:[41]

> … Mr Fitzgerald must serve at least two years and four months in prison. He may be required to serve the balance of the seven year sentence. If he is paroled and breaches his parole conditions, he may be recalled to prison. This punishment is grossly disproportionate to the offence he committed, which as noted above would not normally attract a custodial sentence. We note that Mr Fitzgerald became eligible for parole in mid-2019, but was not paroled: he remains in custody some three and a half years into his sentence. His mental health is likely to make it more difficult for him to qualify for parole.

[37] The majority also suggested that s 19 of the NZBORA (freedom from discrimination on the grounds of disability) might be engaged by Mr Fitzgerald's case.[42]

[38] In his dissenting judgment, Collins J agreed with all the majority's observations but considered that a discharge without conviction was an available sentencing option and that the operation of the three strikes regime could have been avoided in that way.[43]

*Supreme Court and resentencing*

[39] Mr Fitzgerald was granted leave to appeal both his conviction and sentence to the Supreme Court.[44] The Court unanimously dismissed Mr Fitzgerald's appeal against conviction.[45] But a majority of four allowed his appeal against sentence on the basis that s 86D could and should be interpreted so as not to require the imposition of sentences that were grossly disproportionate and (so) in breach of s 9 of the NZBORA, as Mr Fitzgerald's was. The Court remitted Mr Fitzgerald's sentencing to the High Court.

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41 At [44].
42 At [45].
43 At [138].
44 *Fitzgerald v R* [2020] NZSC 119.
45 *Fitzgerald* (SC), above n 1.

[40] On resentencing, the Judge observed that Mr Fitzgerald had been detained "way too long" and imposed a sentence of six months' imprisonment, meaning that Mr Fitzgerald was released immediately.[46] By this time, he had already spent some 1,789 days in prison—almost 1700 days longer than he would have been required to serve under his (re)sentence.[47]

*What the Supreme Court said about prosecutorial discretion*

[41] In considering whether s 86D(2) could be given a rights-consistent interpretation (an interpretation that did not require a sentencing judge to impose the stipulated sentence, if it was grossly disproportionate) a central focus of the majority's reasoning in *Fitzgerald* was the parliamentary purpose in enacting the three strikes regime. For example, the Chief Justice said:[48]

> [125] At the Sentencing and Parole Reform Bill's first reading, the Minister of Justice, the Hon Simon Power, said, "the Bill deals with two types of offenders: the worst repeat violent and sexual offenders and the worst murderers". The Bill's explanatory note confirmed that the Bill was aimed at the "worst repeat violent offenders", using this phrase twelve times. This very specific and narrow purpose was reiterated at every stage of the parliamentary process: in select committee, second reading, Committee of the Whole House, and third reading. In the Bill's third reading, the Hon Judith Collins, the responsible Minister for the Bill at that time, said:
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> > Another issue that has been raised is the importance of the appropriate charges being laid by police. The Government is confident that the police have sufficient checks and safeguards in place to ensure that the appropriate charges are laid, particularly at the third stage of the regime. At stage three police will be referring all charges that qualify for the mandatory maximum penalty to the Crown solicitor for review, either pre-charge or by second appearance.
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> [126] ACT Party Leader the Hon Rodney Hide, a strong supporter of the Bill, was likewise confident that the Bill's safeguards were sufficient to ensure it did not overstep its purpose: It is focused solely on the worst violent crimes; it is focused on the few offenders who repeatedly commit violent crime. Unlike the Californian law, people will not receive severe sentences under this law from conviction for relatively trivial offences. The offences on the qualifying list all represent serious crimes.
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> [127] The regime was therefore not intended to apply to those who did not repeatedly commit serious violent offences. *The clear expectation was that if such offenders were incidentally caught by the regime, prosecutorial*

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46 *R v Fitzgerald* [2021] NZHC 2940.

47 Because a sentence of six months' imprisonment is, in terms of the Parole Act 2002, a short-term sentence, Mr Fitzgerald would have been entitled to release after serving half of it.

48 Footnotes omitted, emphasis added.

> *discretion would be exercised so as to avoid the gross injustice that the application of the regime would cause.* The issue of how the courts should respond in the event that this expectation was not met, and someone who was not a serious violent offender was captured by the regime contrary to Parliament's intention, was left unanswered.

[42] The Chief Justice considered the exercise of prosecutorial discretion was an "administrative safeguard" where there ran a risk of disproportionately severe sentencing:[49]

> [138] In that regard, where it applies, s 86D(2) adds a sentencing principle that recidivism by those caught by the regime is to be viewed as very serious and worthy of a stern sentencing response. Section 86D(2) emphasises the existing sentencing purposes of reducing the risk of harm to the community, holding the offender accountable for their offending, and of deterring the offender or others from committing the same or similar offences. For a stage three offender, that response will call for the maximum sentence, except where such a sentence is disproportionately severe so as to amount to a breach of s 9. The task of setting a sentence which applies these sentencing principles, but does not breach s 9, is not beyond the institutional competence of a sentencing court. The incorporation of the additional sentencing principle that recidivism by those caught by the regime is very serious and worthy of a stern sentencing response ensures that this interpretation does not disapply or nullify the three strikes regime. *And of course it is to be noted that if the administrative safeguard involving the vetting by the Crown Solicitor of charges laid does what it was intended to do, there should be very few such cases.*

[43] Similarly, Arnold J (writing for himself and O'Regan J) referred to the statement by the Hon Judith Collins' in her third reading speech that there would be an administrative process to protect against the laying inappropriate charges, and noted:[50]

> Cabinet had decided on this process on 1 March 2010. Presumably the expectation was that this would operate as a "sifting" mechanism, so that only cases falling within the purpose of the regime as articulated would be caught by it.

[44] The judgment goes on:[51]

> [202] What emerges from this parliamentary history is that the proposed three strikes regime underwent significant changes late in the legislative process, without a s 7 vet of the changes. From the Government's perspective,

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49 Footnotes omitted, emphasis added.
50 At [200].
51 Emphasis added.

> the purpose of the regime was, as the Minister put it in her third reading speech, "to deny parole to, and impose maximum terms of imprisonment on, the very worst repeat violent offenders" … *There was an awareness that the regime might result in disproportionate sentences at stage three but that was considered appropriate, at least to some extent. To meet concerns about potential "overreach", an administrative process – the review of third strike charges by the local Crown Solicitor – was put in place in an effort to ensure that the regime was applied only to those against whom it was directed.* While several members of the Opposition referred in the debates to the Attorney-General's s 7 vet of the Bill as originally introduced, there was no acknowledgement by Government speakers that the amended regime could produce outcomes so extreme that they would breach s 9 of the Bill of Rights or New Zealand's international obligations.
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> …

[45] Arnold J then noted that the application of the regime, intended to deal with "the very worst repeat violent offender", was inapt, given Mr Fitzgerald's low-scale offending and long-standing and serious mental health issues. He concluded:[52]

> The appellant is simply not the type of offender identified by the responsible Ministers in their speeches to the House as the target of the three strikes regime. *Indeed, there was every reason to expect that the administrative process involving the Crown Solicitor would mean that people like him would not fall within the regime.*

[46] In a footnote to the last sentence of [204] the Judges recorded that, during the hearing of Mr Fitzgerald's appeal, the Court was told that the Crown Solicitor had reviewed the police charging decision in this case and that Crown counsel had acknowledged to the Court that the Crown Solicitor's responsibility was to assess the charge in light of the Prosecution Guidelines. The Judges then appeared to editorialise: "[t]his would take into account not just the sufficiency of the evidence, but also the public interest in prosecution, *which would include Bill of Rights considerations*."[53]

[47] In her separate but concurring judgment, Glazebrook J said:[54]

> [247] To accept the Crown's submissions in this case would mean finding that Parliament's purpose in enacting the three strikes regime was to require judges to impose sentences on mentally ill persons, like Mr Fitzgerald, that

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52 At [204] (emphasis added).

53 It is not entirely clear whether this formed part of Crown counsel's acknowledgement or was the Judges' own observation.

54 Emphasis added.

> breach s 9 of the Bill of Rights (a right not subject to any reasonable limits). This is despite both Parliament and judges being bound by the Bill of Rights as a result of s 3(a) of the Bill of Rights, and despite the fact that the imposition of such sentences would mean a breach of New Zealand's obligations under international law. To attribute such a purpose to Parliament would be surprising.
>
> [248] Of course, the legislative history makes it plain that this was not in fact Parliament's purpose. The purpose of the regime was that it would apply to the very worst repeat violent offenders and the language was broadly drawn to ensure all such offenders would be included. *To meet the concerns about possible overreach, an administrative process was put into place to make sure that the regime was properly directed.*

[48] Like O'Regan and Arnold JJ, Glazebrook J noted that the anticipated "administrative process seems to have failed in this case" and that she agreed with the other four judges that reliance on such a process was "neither a sensible nor principled means of addressing concerns around inappropriately harsh outcomes".[55]

[49] William Young J dissented as to the availability of a rights-consistent interpretation of s 86D, namely one that would permit a sentencing judge not to impose the maximum sentence for a stage three offence. But he agreed with the majority that Parliament had intended there would be an administrative regime to ensure that prosecutorial discretion would be exercised in a way that did not lead to the imposition of grossly disproportionate sentences. He said:[56]

> [326] During the parliamentary process it was recognised that, under the regime then proposed, there was scope for second and third strike sanctions to be imposed on some who might not be in the group of offenders intended to be targeted. *As explained in the reasons given by the Chief Justice and Arnold J, the response was the putting in place of administrative arrangements to ensure a screening by Crown Solicitors of prosecutions in respect of strike offences.* I have distinct reservations as to whether this was a sensible and principled way of addressing concerns about inappropriately harsh outcomes. But more importantly for present purposes, the apparent acceptance of this arrangement by Parliament reinforces the view that s 86D should be construed as meaning what it says. If Parliament's understanding (and its purpose) was that sentencing judges must not impose disproportionately severe maximum sentences, there was little need for upstream administrative screening by Crown Solicitors. And if the parliamentary purpose had been to set the courts as a long-stop against the possibility that the Crown Solicitor might get it wrong, that would have been provided for in the legislation.[57]

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55 At n 355.

56 Emphasis added.

57 In a sense, this is the paradox that lies at the heart of the present proceeding.

[50] It is, perhaps, not difficult to see the genesis of Mr Fitzgerald's present claim in these various dicta. It is the Crown prosecutor's alleged failure to live up to Parliament's expectations—the expectations found by the Supreme Court to underlie the three strikes regime—which, he says, resulted in the imposition of a grossly disproportionate sentence and his arbitrary detention, breaching his rights under the NZBORA.

**The issues and my approach to them**

[51] Having set out those contextual matters, I propose to address the issues raised by Mr Fitzgerald's claim in this order and under these broad headings:

(a) the relevant NZBORA breaches;

(b) whether the Crown prosecutor was required to consider s 9 of the NZBORA before charging Mr Fitzgerald;

(c) whether the Crown prosecutor failed to consider s 9;

(d) whether Crown liability can stem from the Crown prosecutor's omission;

(e) whether damages are necessary to provide effective redress; and

(f) if so, how such damages should be quantified.

[52] It is useful to emphasise at this point that the inquiries articulated in (b) and (c) will be undertaken on the basis of the law as it was understood to be in 2017, at the time the decision to charge Mr Fitzgerald with indecent assault was confirmed. In other words, I will proceed on the factual basis that the Crown prosecutor believed that the sentencing Court (as a matter of law) would have no choice other than to impose the statutory maximum sentence on Mr Fitzgerald. That the Crown prosecutor did believe this is evidenced by the position they later took at the sentence indication (arguing that a seven year sentence was required and discharge without conviction was

not an available option) and subsequently at sentencing. It was also the Crown position on appeal to the Court of Appeal, and in the Supreme Court.

[53] Whether that factual premise must be altered as a result of the operation of the declaratory theory (which posits that, as a matter of law, the Supreme Court's decision meant the sentencing Judge always had the ability to decline to impose a grossly disproportionate sentence) will be considered under (d).

**The relevant NZBORA breaches**

*The established breach of s 9*

[54] It is not of course disputed that the sentence originally imposed on Mr Fitzgerald entailed a breach of his right not to be subject to a disproportionately severe punishment under s 9 of the NZBORA. Although (as noted earlier) every Judge to have dealt with Mr Fitzgerald in the course of his criminal proceedings was of that view, it is probably William Young J in the Supreme Court who examined the nature and extent of the breach in the most detail. Because they become relevant later in this judgment, I set out his conclusions on that in full:

> [281] Looking at the situation as it now is, the appellant has served more than four and a half years in prison. I see this punishment as disproportionately severe for two reasons:
>
> (a) It is just too long in light of the only moderate seriousness of the offending. Under ordinary sentencing practice, the appellant would have been sentenced to imprisonment for probably not more than a year. Assuming a sentence of 12 months, he would have been released after six months. This would have been a proportionate response to his offending. As it is, the time he has spent in prison is already nine times what would have been appropriate in terms of ordinary sentencing practice.
>
> (b) No allowance has been made for his mental illness.
>
> [282] Had the appellant been released on parole when first eligible (in April 2019), the time he would have spent in prison (28 months from the time of his arrest) would have been approximately five times the six months or so he would have been required to serve if sentenced in accordance with ordinary sentencing practice. I am inclined to think that this too would have been disproportionately severe.

> [283] If a requirement to serve 28 months in prison constitutes disproportionately severe punishment, it follows that the sentence of seven years' imprisonment imposed was in breach of s 9 of the Bill of Rights. On this approach, there is no need to consider what, if any, allowance should be made for the likelihood of parole being granted when assessing whether a sentence of imprisonment breaches s 9.

*Was there also a breach of s 22?*

[55] It is accepted that Mr Fitzgerald's detention was lawful in the orthodox sense. The claim focuses on whether it was, nonetheless, arbitrary and so in breach of s 22. To reiterate, Mr Fitzgerald claims his detention was arbitrary because it was founded on a breach of s 9.

[56] The word 'arbitrary' in s 22 has two meanings: unlawfulness (contrary to domestic law) or arbitrariness (contrary to standards of appropriate state conduct).[58] In *Nielsen v Attorney-General*, the Court of Appeal observed that:[59]

> Whether an arrest or detention is arbitrary turns on the nature and extent of any departure from the substantive or the 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.

[57] As it happens, the proposition that an otherwise lawful detention can be rendered arbitrary where it entails or results from the breach of another right is not entirely novel. The United Nations Human Rights Committee has held a violation of one right under the International Covenant on Civil and Political Rights (ICCPR) will make a subsequent related detention arbitrary in terms of art 9(1) of the Covenant, and engage an obligation to compensate.[60] Thus in *Jong-bum Bae v Republic of Korea*, the Committee held the imprisonment of Jehovah's Witnesses for their refusal to undertake compulsory military service in breach of their art 18 right to freedom of thought, conscience, and religion was arbitrary in terms of art 9(1):[61]

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58 Dr Petra Butler and Dr Andrew Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [19.8.18].

59 *Nielsen v Attorney-General* [2001] 3 NZLR 433 (CA) at 441.

60 Article 9(1) is broadly equivalent to s 22 and provides: **"**[e]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

61 *Jong-bum Bae v Republic of Korea* UN Doc CCPR/C/128/D/2846/2016 (13 March 2020).

> 7.6 … The Committee considers that deprivation of liberty as punishment for the legitimate exercise of a right protected under the Covenant, including freedom of religion and conscience as guaranteed by article 18 of the Covenant, is ipso facto arbitrary in nature. Consequently, the Committee also finds that article 9(1) of the Covenant has been violated with respect to each of the authors.

[58] And as to remedy:

> 9. Pursuant to article 2(3)(a) of the Covenant, the State party is under an obligation to provide the authors with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State party is obligated to expunge the authors' criminal records and to provide adequate compensation to them."

[59] The Supreme Court of Canada's decision in *Henry v British Columbia* is also of some interest here.[62] Although—as I explain later in this judgment—that decision is of some wider significance, for present purposes it is noteworthy because the Court made a connection between a prosecutor's breach of a defendant's fair trial rights (by failing to make proper disclosure) and that defendant's wrongful detention. More particularly, it observed that if prosecuting authorities are apprised of information demonstrating that a defendant who is detained has a complete answer to the charge and fail to act on that information within a reasonable time, damages for (amongst other things) any time spent wrongly imprisoned could be appropriate. Eventual vindication through the criminal process might not, by itself, be a sufficient remedy. The Court said:[63]

> Even if the claimant was acquitted at trial, a Charter damages award would be available where it could be shown that the charges would have been dismissed or withdrawn at an earlier stage of proceedings had proper disclosure been made. In such a case, damages might serve to compensate for time wrongfully spent in custody and any consequential harm suffered as a result of the criminal proceedings.

[60] So in my view there are two equally available ways forward for Mr Fitzgerald here:

(a) as in *Jong-bum Bae*, he could contend that the breach of s 9 rendered his detention arbitrary and in breach of s 22; *or*

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62 *Henry v British Columbia (Attorney General)* 2015 SCC 24, [2015] 2 SCR 214.
63 At [96].

(b) he could simply rely on the breach of s 9 and (as suggested in *Henry*) then seek damages to compensate him for the detention that was a direct and foreseeable consequences of that breach.

[61] In the end, I am not sure it matters much which of the two routes is followed. If the latter, it would be grossly severe punishment to which Mr Fitzgerald was subject that would be the measure of the breach and (potentially) any compensation payable. If the former, the point at which the detention became arbitrary would be the point at which, as a matter of fact, his punishment (continued imprisonment) could be said to have become grossly severe.

[62] Viewing the matter in that way also answers the Crown's principal argument against finding a breach of s 22 here, which was that Mr Fitzgerald's detention could not be said to be "contrary to standards of appropriate state conduct" because it was lawfully imposed and because every successful sentence appeal exposes some form of disproportionality.

[63] I think that submission misses the point. It is beyond dispute that Mr Fitzgerald's sentence was not simply disproportionate, it was grossly so, in breach of one of his most fundamental rights. The vast majority of successful appeals against sentence do not come close to engaging that right. As Arnold and O'Regan JJ said:[64]

> … as *Taunoa* makes clear, there is a difference between sentences that are severe, excessive or disproportionate (and might result in successful sentence appeals) and ones that are so disproportionately severe as to breach s 9.

[64] Moreover, the Crown's submission also invites the Court to ignore the facts. While Mr Fitzgerald *was* released following his ultimately successful sentence appeal, he had in fact already suffered a detention that constituted a rights breaching, disproportionately severe, punishment. The dicta from *Henry* quoted earlier make it clear that ultimate success in the criminal process will not necessarily suffice to remedy such a wrong.

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64 *Fitzgerald* (SC), above n 1, at [203], referring to *Taunoa v Attorney-General,* above n 39.

[65] That said, however, it would be too simplistic to say that Mr Fitzgerald was subject to disproportionately severe punishment in that he was detained arbitrarily right from the start, or from the date the Crown prosecutor determined to prefer the charge of indecent assault or from the date of the (original) sentencing. Rather, it seems more logical to say that the period of his detention became arbitrary began at the time it stopped being a merely disproportionate punishment (judged by reference to the charge laid, the circumstances of the offending and the offender and the "ordinary" sentence he should have received) and became a grossly disproportionate one. So in my view the question is not *whether* his detention was arbitrary but for what period it can be said to be so. That question is not, of course, merely of academic interest, it potentially has a real bearing on his claim for damages in this case.

*The period of arbitrary detention*

[66] At the hearing before me Mr Ewen said the period of arbitrary detention ran from 13 April 2017 (being the date on which Mr Fitzgerald entered his not guilty pleas, following the assumed advice of the Crown prosecutor to continue with the prosecution for indecent assault) until his release on 29 October 2021. This date was earlier than the date he had pleaded, which was 10 May 2018 (the date of sentencing).

[67] The Crown objected to any late amendment of the claim in that respect. The Crown submitted:

> … The pleaded claim suggests that the differential between the "presumptive" (but erroneous) sentence and the correct sentence was a breach of the plaintiff's rights caused by an alleged failure of the Crown prosecutor to take into account the "presumptive sentencing consequences" of the indecent assault charge. The defendant has already conceded that this did not occur. Responding to the new claim, which suggests that arbitrary detention commenced prior to the imposition of the erroneous sentence through executive action or inaction, would require a closer examination of what the various Crown prosecutors involved in the matter did at various points in time between Mr Fitzgerald's remand in custody on 5 December 2016 and his erroneous sentence on 10 May 2018. The defendant's limited evidence responds only to the pleaded claim.

[68] In the end, however, I find it unnecessary for me to resolve that particular issue. Neither approach advocated on Mr Fitzgerald's behalf adequately explains why the relevant period can be taken as a proxy for the time spent *arbitrarily* detained by

Mr Fitzgerald. As I have said, I consider an assessment of that requires consideration of when his detention ceased being merely disproportionate and became grossly so.

[69] The only Judge who appears to have considered that issue so far is William Young J. Despite his dissent as to the outcome of the appeal, he was (as noted earlier) in agreement with the majority that Mr Fitzgerald had been subject to a disproportionately severe punishment. It was in that context that he made the observations I have set out in full at [54] above. By way of reiteration and summary, however, he said:[65]

(a) had Mr Fitzgerald been sentenced to one year's imprisonment, he would have been released after six months;

(b) had Mr Fitzgerald been released on parole when first eligible (in April 2019), the time he would by then have spent in prison (28 months from the time of his arrest) would have been approximately five times that long;

(c) detention that is five times as long as the detention that would have resulted from an appropriate sentence is a disproportionately severe punishment.

[70] As it transpired, Mr Fitzgerald was ultimately (re)sentenced to six months' imprisonment and so would have been released after three. Using William Young J's approach to arrive at a conservative benchmark, therefore, detention for five times that long (15 months) must also be a disproportionately severe punishment.[66] Accordingly, and in the absence of any other helpful or relevant measure I propose to take the start date of Mr Fitzgerald's arbitrary detention as being 5 March 2018, or 15 months from his first remand in custody, which was on 5 December 2016.[67]

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65 *Fitzgerald* (SC), above n 1, at [281]–[283].

66 By "conservative" I mean that it may well be arguable that detaining Mr Fitzgerald for four (or even three) times longer than he should have been detained might also be disproportionately severe.

67 Although I acknowledge this is around two months less than the original pleaded date (10 May 2018) I can see no real prejudice to the Crown in adopting the slightly earlier date. There is no further evidence that might have been called that would affect my conclusion.

[71] Accordingly, I proceed on the basis that Mr Fitzgerald was arbitrarily detained for a period of 1334 days (5 March 2018 to 29 October 2021). For convenience, I round that down to 44 months.

**Was the Crown prosecutor required to consider s 9 before charging Mr Fitzgerald?**

[72] Before turning to this question, there are two preliminary issues needing to be addressed:

(a) whether Crown prosecutors are state "actors" under s 3 of the NZBORA; and

(b) (even if so) whether the Court should refrain from engaging with the issue.

If the answer to (a) is "no" or the answer to (b) is "yes" then there would be no need to go further; either Crown prosecutors would have no NZBORA obligations at all or the Court would have no role in overseeing their compliance with them.

*Are Crown prosecutors state "actors" under s 3 of the NZBORA?*

[73] I begin by recording that the Crown in this case did not seek to argue that Crown prosecutors, when acting in that capacity, were not state actors who fall within the scope of s 3 of the NZBORA.[68] In my view they were right not to do so. Although the Court of Appeal in *Currie v Clayton* merely said that the question was arguable (in the context of refusing to strike out an NZBORA claim against a Crown prosecutor)[69] it seems to me that the constitutional arrangements set out above make the position

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68 Section 3 relevantly provides: "This Bill of Rights applies only to acts done—(a) by the legislative, executive, or judicial branches of the Government of New Zealand; …"

69 *Currie v Clayton* [2014] NZCA 511, [2015] 2 NZLR 195 at [89].

clear.[70] There can be no doubt that, when acting as such, Crown prosecutors are part of the executive branch of Government.[71]

[74] Accordingly, the NZBORA applies to "acts" done by Crown prosecutors. They must, when acting in that capacity, not act inconsistently with the rights affirmed in NZBORA unless to do so would constitute a reasonable limit on the relevant right that is prescribed by law and can be demonstrably justified in a free and democratic society. And as noted earlier, it is trite that a breach of the s 9 right is incapable of demonstrable justification in that way.[72]

*An area for judicial restraint?*

[75] As the law stands in New Zealand, judicial willingness to inquire into the exercise of prosecutorial discretion has undoubtedly been marked by restraint. The accepted justiciability threshold still appears to be one of "exceptional circumstances".[73] So the Crown submits a "hands off" approach is required here.

[76] It is, however, neither necessary nor desirable to get into the rights and wrongs of that position in general terms. I have little hesitation in concluding that an alleged breach by a Crown prosecutor of an obligation arising under the NZBORA would come within that (rare) class of case that warrants intervention by the courts. Analytically, that can be justified in two related ways. The first is that compliance with the NZBORA is a matter of duty rather than choice and so the usual reticence around interference with prosecutorial discretion simply does not arise. The second is that the exercise of prosecutorial discretion in a way that is unlawful is, by definition, justiciable. The caselaw discussed below supports either conclusion.

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70 Above at [6]–[18]. In *AB v Attorney-General* [2018] NZHC 1096 the Crown solicitor accepted (on the basis of *Currie*) that, in performing his public function, the NZBORA applied, and he had no immunity from suit (albeit for the purposes of strike out only). The Supreme Court's decision in *Stewart v R* [2009] NZSC 53, [2009] 3 NZLR 425 at [33] also suggests that a prosecutor can independently breach a defendant's rights.

71 Indeed, the fact that they are part of the executive branch of government has traditionally been given as a reason that judicial restraint should be exercised where review of prosecutorial discretion is sought. See for example *Polynesian Spa Ltd v Osborne* [2005] NZAR 408 (HC) at [61]–[62].

72 See for example *Fitzgerald* (CA), above n 2, at [41].

73 *Polynesian Spa v Osborne*, above n 71, at [62]; and *Osborne v Worksafe New Zealand* [2017] NZCA 11, [2017] NZLR 513 at [35].

New Zealand

[77] Thus, in a New Zealand context:

(a) in *Kumar v Immigration Department* Richardson J (speaking for the Court) made the obiter observation that a discriminatory exercise of prosecutorial discretion (as appeared from the case at hand) would imperil the rule of law and that the courts "may and will" intervene in such cases;[74] and

(b) in *Osborne v WorkSafe New Zealand* a unanimous Supreme Court made a declaration that the exercise of prosecutorial discretion that was founded on an illegal bargain to stifle the prosecution was, itself, unlawful.[75]

England and Wales

[78] In England and Wales there are two decisions of note.

[79] First, in *R v LM* five women who claimed they had been trafficked and forced to work as prostitutes had been convicted at first instance of various crimes.[76] Appeals were brought on the basis that, to the extent that the women's criminal activities were "compelled" as a result of their status as victims of trafficking, and in reliance on art 26 of the Council of Europe Convention on Action against Trafficking in Human Beings, it was wrong to prosecute them. A key contention was that a prosecutorial decision ought to take into account relevant human rights guarantees to avoid procedural impropriety.

[80] The Court of Criminal Appeal observed that specific rules had been made to guide prosecutors when considering whether it would be appropriate to bring charges against victims (or potential victims) of trafficking. It then noted:[77]

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74 *Kumar v Immigration Department* [1978] 2 NZLR 553 (CA) at 558. This observation was applied by the High Court *Solicitor-General v Siemer* HC Wellington CIV 2010-404-8559, 13 May 2011 at [47] and [59].

75 *Osborne v WorkSafe New Zealand* [2017] NZSC 175, [2018] 1 NZLR 447.

76 *R v LM* [2010] EWCA Crim 2327, [2011] 1 Cr App R 12.

77 At [7].

> … in the event that the duty laid on the prosecutor to exercise judgment is not properly discharged, the ultimate sanction is the power of the court to stay the prosecution for what is conveniently, if not very accurately, termed "abuse of process".

[81] The Court discussed recent cases where stays had been ordered, noting that such cases would be rare:[78]

> …the limitations upon the jurisdiction must be understood. Criminal courts in England and Wales do not decide whether a person ought to be prosecuted or not. They decide whether an offence has been committed. *They may, however, also have to decide whether a legal process to which a person is entitled, or to which he has a legitimate expectation, has been neglected to his disadvantage.*

[82] The Court discussed the nature of the duty on the prosecutor, and the oversight of the Court, in such circumstances:[79]

> We make it clear that the occasions for the exercise of this jurisdiction to stay ought to be very limited once the provisions of the Convention are generally known, as by now they should be becoming known. Moreover, the jurisdiction to stay does not mean that the court is entitled to substitute its own view for that of the prosecutor upon the assessment of the public policy question whether a prosecution is justified or not. The power to stay is a power to ensure that the Convention obligation under art 26 is met. The Convention obligation is to provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities to the extent that they have been compelled to do so. Thus *the Convention obligation is that a prosecuting authority must apply its mind conscientiously to the question of public policy and reach an informed decision. … If however this exercise of judgment has not properly been carried out and would or might well have resulted in a decision not to prosecute, then there will be a breach of the Convention and hence grounds for a stay. Likewise, if a decision has been reached at which no reasonable prosecutor could arrive, there will be grounds for a stay. Thus in effect the role of the court is one of review. The test is akin to that upon judicial review.*

[83] The decision in *LM* was referred to by the High Court of England and Wales in *R (on the application of E and Ors) v Director of Public Prosecutions*, which was concerned with an alleged failure by a Crown prosecutor to comply with Crown guidelines when choosing to prosecute a vulnerable individual (in that case, a child who had been groomed and then prompted to sexually abuse their two younger siblings).[80] The complainants sought to argue that the Crown prosecutor's failure to

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78 At [15] (emphasis added).

79 At [19] (emphasis added).

80 *R (on the application of E and Ors) v Director of Public Prosecutions* [2011] EWHC 1465 (Admin), [2012] Crim LR 39.

apply the relevant guidance in principle made it an appropriate case for judicial review.[81] Ultimately, the Court found that the Crown prosecutor in that case had failed to consider many important relevant considerations referred to in the guidelines and accordingly quashed the decision to prosecute.[82]

Canada

[84] I have already referred to the Canadian case of *Henry* in the context of the breach of s 22.[83] The decision is also relevant here because it confirms there is a material difference—in terms of the Court's readiness to intervene—between a case involving a prosecutorial duty (such as the duty to make disclosure) and one concerned with the exercise of prosecutorial discretion, strictly so called. In that case, the Canadian Supreme Court confirmed that because of a defendant's right to make full answer and defence, guaranteed under ss 7 (right to liberty and security of the person) and 11(d) (fair trial) of the Canadian Charter of Rights and Freedoms, disclosure by a Crown prosecutor in criminal proceedings is a constitutional obligation. [84] And because it was an *obligation* it did not fall within the ambit of prosecutorial *discretion* at all.

[85] That same distinction between obligation and discretion had been made by the Canadian Supreme Court one year earlier in *R v Anderson.*[85] There, the Supreme Court rejected the submission that there was a constitutional obligation on a prosecutor to consider the Aboriginal status of a defendant when deciding whether or not to seek a mandatory minimum sentence for impaired driving. One of the reasons given was that the duty to impose a proportionate sentence (itself a principle of fundamental justice) rested upon judges, not Crown prosecutors. So it differentiated the argument before it from a case involving non- disclosure:[86]

> Manifestly, the Crown possesses no discretion to breach the Charter rights of an accused. In other words, prosecutorial discretion provides no shield to a Crown prosecutor who has failed to fulfil his or her constitutional obligations such as the duty to provide proper disclosure to the defence.

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81 At [40].
82 At [62] and [63].
83 *R v Henry*, above n 62.
84 At [31], [59] and [82].
85 *R v Anderson* 2014 SCC 41, [2014] 2 SCR 167.
86 At [45].

[86] The question of who bears constitutional responsibility for proportionate sentences also arose in the slightly later decision of *R v Nur*.[87] Moldaver J (who had written the reasons for judgment in both *Henry* and in *Anderson*) again expressly addressed the role of the Crown prosecutor in a mandatory sentencing context. In that case, the statute in question provided for mandatory minimum sentences for certain offences, but only where the Crown chose to proceed by indictment, rather than summarily. Writing for himself and two other judges, Moldaver J noted that the summary option "all but ensured" that offending that was qualifying, but less serious, would not attract mandatory minimum sentencing because the Crown prosecutor would *elect* to proceed summarily in those cases. Parliament had turned its mind to the possibility that the mandatory sentencing regime could catch less serious offending and conferred a prosecutorial choice to act as a 'shield' from grossly disproportionate sentences.[88]

[87] So rather than striking down the minimum sentencing regime itself (as the majority had done) Moldaver J said:[89]

> … the proper analytical framework should focus on the safety valve — the Crown's discretion to elect summary proceedings in the least serious cases. I will describe that framework in detail below. Briefly, it has two stages. First, the court must determine whether the hybrid scheme adequately protects against the imposition of grossly disproportionate sentences *in general*. Second, *the court must determine whether the Crown has exercised its discretion in a manner that results in a grossly disproportionate sentence for a particular offender*.

[88] The Judge differentiated the statutory provision at issue from that considered in *R v Smith*, where Parliament had imposed a seven year mandatory sentence for importing narcotics.[90] He said:[91]

> Like s 95, it covered a wide array of conduct, from large-scale drug smuggling to the hypothetical "young person who, while driving back into Canada from a winter break in the USA, is caught with … his or her first 'joint of grass'" … . *However, … that offence did not include the option for prosecutors to proceed summarily. Parliament had not turned its mind to the possibility that the offence might catch less serious cases that would not merit a seven-year custodial sentence. Rather, Parliament targeted the problem of narcotics*

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87 *R v Nur* 2015 SCC 15, [2015] 1 SCR 773.
88 At [155]–[156].
89 At [150] (emphasis added).
90 *R v Smith* [1987] 1 SCR 1045.
91 *R v Nur,* above n 87, at [154] (emphasis added).

> *importation with the blunt instrument of a straight indictable offence carrying a long mandatory term of imprisonment. The scheme did not adequately protect against the imposition of grossly disproportionate sentences, and the Court rightly struck it down.*

[89] But *because* Parliament had plainly intended that the Crown prosecutor make a choice, it would be an abuse of process if that choice were exercised to proceed by indictment, if to do so would—by dint of the mandatory sentence that flowed from that choice—"undermine society's expectations of fairness in the administration of justice".[92] Thus the Crown prosecutor was again seen as being subject to a constitutional *obligation* which, in the event of abuse, permitted the Court to intervene. Proof of bad faith or malicious intent by the Crown would not be required.

*What was the Crown prosecutor in Mr Fitzgerald's case obliged to do?*

[90] The statutory provisions creating the three strikes regime did not, of course, expressly provide for a choice of the kind at issue in *Nur*.[93] The Crown sought to rely on this point of distinction to argue that the decision by the Crown prosecutor in this case remains out of reach.

[91] I am unable to agree with that. The position in Canada is different. First, the New Zealand courts do not have the more radical constitutional option of striking down the regime, as the majority did in *Nur*. It is the absence of that option that means that prosecutorial discretion may have more constitutional work to do.

[92] As well, all four Supreme Court judgments in *Fitzgerald* are clear that the New Zealand Parliament did *expect* that there would be an administrative process, involving the exercise of prosecutorial discretion, that would fulfil the s 9 "safety valve" role, and ensure that the three strikes regime did not result in the imposition of rights-breaching sentences.[94] The Court noted this process had been agreed by Cabinet on 1 March 2010 and involved "referring all charges that qualify for the mandatory

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92 At [167].

93 That they did not do so was the subject of express criticism by the Supreme Court in Mr Fitzgerald's case.

94 See generally above [41]–[49].

maximum penalty to the Crown solicitor for review either pre-charge or by second appearance".[95]

[93] It is also plain that by the time Mr Fitzgerald's case arose, this administrative process (or the means by which it could be given effect) in fact existed. Thus:

(a) the MOU required Police to refer prosecutions for stage three offences to the relevant Crown prosecutor;[96]

(b) as Crown counsel acknowledged before the Supreme Court, such a referral would require an assessment of both the evidential sufficiency for, and public interest in pursuing, a stage three prosecution by reference to the Prosecution Guidelines.

[94] Moreover, this process cannot be seen as "simply" administrative. Section 188 of the CPA gives the Prosecution Guidelines, and compliance with them, statutory heft.

[95] As footnoted in *Fitzgerald*, consideration of the public interest limb of the test for prosecution under the Prosecution Guidelines "would include Bill of Rights considerations".[97] That is (with respect) obvious. Crown prosecutors are state actors for the purposes of the NZBORA. Sentencing under the three strikes regime gave rise to clear NZBORA implications. The Prosecution Guidelines themselves refer (in the paragraphs immediately following the reference to MOUs) to the need for Crown solicitors to have NZBORA expertise.

[96] If a reference by Police to a Crown prosecutor under the MOU and the public interest inquiry mandated by the Prosecution Guidelines necessarily included consideration of any NZBORA implications of a proposed prosecution, consideration of s 9 must have been required. In light of what were then the foreseeable sentencing

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95 *Fitzgerald* (SC), above n 1, at [125] and [200], citing the Hon Judith Collin's speech moving the third reading of the Sentencing and Parole Reform Bill 2009: (25 May 2010) 663 NZPD 11228.

96 There would have been no stage three offences prior to 2013.

97 *Fitzgerald* (SC), above n 1, at n 282.

consequences,[98] the relevant inquiry required consideration of whether prosecution in any particular stage three case would be likely to result in a sentence that:

(a) contravened fundamental notions of justice and risk undermining the integrity of the judicial process (potentially rendering the prosecution itself an abuse of process); and

(b) was so severe "as to shock the national conscience".[99]

[97] Where a grossly disproportionate sentence was the foreseeable and likely result of laying a particular charge then I consider there was no prosecutorial discretion to exercise. Rather, there was a duty to prefer a different charge. This approach is consistent with the authorities discussed above.

**Did the Crown prosecutor fail to consider s 9?**

[98] The Crown prosecutor did not consider s 9. The evidence is that they did not consider the sentencing consequences of charging Mr Fitzgerald with a stage three offence at all. This is puzzling. Even putting to one side the existence of a process by which such consideration *would* occur (and Parliament's expectation that it would be used as an effective safety valve) sentencing is usually a matter on which the Crown prosecutor takes a position.[100]

[99] Nor will it just be later in the criminal process—after a conviction is secured—when such a position is taken. In this case, for example, the Crown prosecutor knew from an early stage that Mr Fitzgerald's counsel was centrally concerned with the laying of a charge that would lead to a sentence that was, at that time, believed to be mandatory under s 86D; that was the whole point of the April 2017 communications between them. Those concerns were rejected by the Crown prosecutor essentially by

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98 As explained earlier in this judgment, I say "what were then the foreseeable sentencing consequences" because I deal with the effect of the declaratory theory separately and later in this judgment.

99 This is the definition of "disproportionately severe" adopted by Tipping J in *Taunoa v Attorney-General*, above n 39, at [289].

100 All the Prosecution Guidelines say about the Crown Prosecutor's role in sentencing is (at [21.1]): "[t]he prosecutor should be prepared to draw the attention of the Court to the proven or accepted facts of the case and any binding or relevant sentencing principles."

a reference to evidential sufficiency. And well before trial, at the sentence indication, the Crown's position was that the apparently mandatory seven year sentence was required to be imposed; the possibility of avoiding it through a discharge without conviction was actively opposed by them.

[100] As well, my experience is that likely sentencing outcomes often do play a part in charging decisions, for obvious reasons.[101] By way of one example only I refer to the sentencing notes in *R v Rowe*—a case with facts not dissimilar to the present—where the Crown prosecutor did exercise his discretion to reduce the charge, implicitly to avoid the operation of the three strikes regime.[102] Thus, at sentencing Jagose J expressly recorded:

> [2] You initially faced a charge of indecent assault …. This would have been a third strike offence, had you been found guilty at trial. But the Crown filed an amended charge on 1 March 2018, substituting the alternative (non-strike) charge of doing an indecent act with intent to offend. You pleaded guilty four days later.

[101] Beyond recording those matters, however, I cannot (and need not) take them further. The Crown prosecutor was not required for cross-examination and so their understanding of the administrative "safety-valve" and the reasons why they did not consider the apparently mandatory sentence relevant to their charging discretion could not be explored. In any event, the short and signal point is that the evidence makes it clear that the Crown prosecutor did not consider s 9 here. Had there been such consideration, it would have been concluded that the indecent assault charge could not—as a matter of fundamental justice—have been laid. Subject to my discussion of the declaratory theory below, that seems to me to be the necessary upshot of the Supreme Court's decision in Mr Fitzgerald's case.

**Can Crown liability stem from the Crown prosecutor's omission?**

[102] Given my conclusion that the Crown prosecutor is a part of the executive and a state "actor" in terms of s 3, it is, I think, indisputable that it is the Crown (represented by the Attorney-General) who bears liability for any actuating NZBORA breach by

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101 Although, perhaps, not always with the anticipated effect—see *Troon v R* [2019] NZCA 265.

102 *R v Rowe* [2018] NZHC 1087. The facts of Mr Rowe's offending were of making intimate comments to a stranger who had been kind to him and hugging her hard "chest to chest" (against her wishes) on several occasions.

the Crown prosecutor here. So the question is whether there was, in fact, such an actuating breach.

[103] This requires consideration of the twin pillars of the Crown's defence:

(a) the operation of the declaratory theory; and

(b) whether the sentence imposed involved a "superseding" decision.

*The impact of the declaratory theory*

[104] Mr Powell submitted that a finding that the exercise of prosecutorial discretion here resulted in a breach of Mr Fitzgerald's NZBORA rights would involve suspending or violating the declaratory theory of law – the legal fiction that judges do not make new law, but merely discover what was already there. He said this theory means that although the sentencing Judge did not (in fact) know it, he *always* had the power to decline to impose a grossly disproportionate sentence on Mr Fitzgerald but simply failed to exercise it. It follows that there could have been no relevant or actuating NZBORA breach by the Crown prosecutor when deciding to charge Mr Fitzgerald with indecent assault. That is because, as an extension of this legal fiction, they can be taken as having *known* (or reasonably expected) that the Court could and would act to avoid a grossly disproportionate outcome in the exercise of its own sentencing discretion.[103]

[105] I am unpersuaded.

[106] First, it is unclear to me that the declaratory theory operates in that way. I accept that, by reason of the theory, the Supreme Court's decision in *Fitzgerald* meant the sentencing Judge could always have chosen not to impose a grossly disproportionate sentence on Mr Fitzgerald, and that the sentence first imposed on him was wrong. I also accept that any other grossly disproportionate sentences imposed for stage three offences prior to the Supreme Court's decision were based on an incorrect reading of s 86D and are also (retrospectively) wrong. And, of course, the

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[103] For a recent example of the declaratory theory "in action", see *Marino v Chief Executive of the Department of Corrections* [2016] NZHC 3074, [2017] NZAR 9.

submissions made by the Crown prosecutor on sentencing, to the effect that s 86D meant what it said, and had to be applied without exception, were also wrong.

[107] What *Fitzgerald* did not change (but rather confirmed) was that the Crown prosecutor had a s 9 obligation not to lay a stage three charge in circumstances where the imposition of the "default" sentence under s 86D would result in a grossly disproportionate sentence. The point made expressly by the Court was that the *primary* safeguard against the imposition of such a sentence was intended to be the exercise of prosecutorial discretion; discretion at sentencing was very much the "long-stop".[104]

[108] If I am right in my conclusion that Crown prosecutors had a discrete constitutional obligation to exercise their charging discretion in a way that would not expose defendants to the risk of a grossly disproportionate sentence, then even on the declaratory theory, the most that could be said is that there were two relevant (s 3) State actors with parallel and mutually supporting s 9 obligations here: the Crown prosecutor and the sentencing court. I do not regard that as a particularly controversial proposition. In the context of criminal proceedings, for example, both the prosecutor and the Court must surely have parallel NZBORA obligations to ensure a defendant has a fair trial.[105]

[109] If the Crown prosecutor's responsibility under s 9 is distinct, as I think it must be, it can surely be no answer to say that a failure by a prosecutor to have regard to a defendant's s 9 right is of no consequence because (by dint of the declaratory theory, rather than as a matter of fact) the prosecutor knew any such breach would be ameliorated through the sentencing process in due course. The most that could be said is that, to the extent the prosecutor's breach might be cured at sentencing (as it ultimately was here, but not until three years after the original sentence, and almost

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[104] Paradoxically (as William Young J noted) if the prosecutorial discretion had been exercised in the way Parliament intended, there would be no need for the judicial long-stop at all: see *Fitzgerald* (SC), above n 1, at [326].

[105] See for example *Procurator Fiscal v Brown (Scotland)* 2001 SCCR 62, [2001] 2 WLR 817.

five years from when Mr Fitzgerald was first incarcerated) there might be an impact on the available remedies for breach.[106]

[110] For these reasons, the declaratory theory cannot in my view be used to absolve the prosecutorial error which, as a matter of fact, occurred. And the theory cannot be used to magic away the undeniable reality that Mr Fitzgerald did, in fact, have a grossly disproportionate sentence imposed upon him or that he was, in fact, wrongly detained for a considerable time as a result. These were not the errors "fixed" retrospectively by the Supreme Court's decision. The proposition that a legal fiction, whose purpose is surely remedial, should operate to deny a remedy for a breach of (or a breach that led to a breach of) Mr Fitzgerald's liberty right is deeply unappealing.[107]

*Was Mr Fitzgerald's sentencing nonetheless a superseding decision?*

[111] In order to examine this aspect of the Crown's defence further, it is necessary to begin by saying a little more about the Supreme Court's decision in *Attorney-General v Chapman* and also something about the later decision of the Court of Appeal in *Thompson v Attorney-General*.[108]

*Attorney-General v Chapman*

[112] *Chapman* involved a claim for public law compensation for breaches of both s 25(h) (right to an appeal) and s 27(1) (right to natural justice) of the NZBORA. The claim was brought against the Attorney-General, but the breaches concerned were judicial acts. Put briefly, Mr Chapman had applied for legal aid in relation to his proposed appeal against conviction. The application was declined by the Registrar of the Court of Appeal. He sought a review of that decision, but it was confirmed by the Court. His appeal was then dismissed without an oral hearing.[109] Following a later,

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106 As will be discussed later, one of the Crown's principal arguments against an award of damages in this case was that the breach had been cured (and the right adequately vindicated) through the criminal process.

107 See the discussion of the restricted patient between the declaratory theory and the liberty right in *Marino v Chief Executive of the Department of Corrections*, above n 103, at [22] and [23].

108 *Chapman* (SC), above n 4; and *Thompson v Attorney-General* [2016] NZCA 215, [2016] 3 NZLR 206.

109 The procedures which had been applied to Mr Chapman's appeal had been applied to such appeals generally in the Court of Appeal for a number of years. They were later held by the Privy Council in *R v Taito* [2003] UKPC 15, [2003] 3 NZLR 577 to have been unlawful and in breach of the Bill of Rights Act.

successful and legally aided appeal, Mr Chapman was not retried and eventually discharged.

[113] A unanimous Court of Appeal had held that the principles of judicial immunity did not operate to bar the claim and that it should be permitted to proceed to trial.[110] But a three judge majority in the Supreme Court disagreed, holding that the public policy reasons which support a personal immunity for judges do not justify extending the scope of Crown liability for NZBORA breaches to include actions of the judicial branch.[111]

[114] Mr Chapman's pleading had also sought to attribute responsibility for what had occurred to the Registrar. This raised the question of "whether, and if so to what extent, the Registrar, who is a public servant, is protected"—a matter with which the Court of Appeal had not dealt.[112] Of the majority judges in the Supreme Court McGrath and William Young JJ left the question open, but noted:[113]

> 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 courts.

[115] It is this passage on which the Crown now relies. The Crown says because the Crown Prosecutor's decision was "superseded" by the sentence imposed by the sentencing Judge, there can be no claim against the Prosecutor here. I return to that submission shortly.

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110 *Attorney-General v Chapman* [2009] NZCA 552, [2010] 2 NZLR 317 at [100]–[101].

111 *Chapman* (SC), above n 4, at [204], per McGrath and William Young JJ; and at [212]–[214] per Gault JJ. The public policy reasons deemed of "principal importance" were the desirability of achieving finality, promoting judicial independence and the availability of effective rights of appeal, rehearing and review: see [179]–[202].

112 At [208].

113 At [208]. Gault J agreed with the outcome arrived at by the majority but did not refer to this issue. Of the minority, Anderson J did not address the issue and Elias CJ merely observed (at [53]) that drawing a distinction between judicial breach and breach by other State actors for the purposes of remedy "may be elusive in practice and productive of arbitrary outcomes". In a footnote to that observation, she said: "For example, according to whether a warrant is issued by a judge or a registrar, or whether breach of fair trial rights is attributed to judicial or prosecutorial misconduct." Although the Supreme Court in *Chapman* referred the question of the registrar's possible liability back to the High Court, I do not know what the outcome of that referral back was.

*Thompson v Attorney-General*

[116] The dicta just referred to came into play in *Thompson v Attorney-General*.[114] But *Thompson* did not involve a claim for alleged breach of ss 25(h) and 27 of the NZBORA but (like the present case) a breach of s 22. Like *Chapman*, however, the *Thompson* claim engaged the actions and omissions of both Judges and/or Registrars.

[117] Ms Thompson's sentence had been cancelled by a District Court Judge but a deputy registrar failed to update the Court's electronic case management system (CMS) to reflect this decision. When the application to cancel was called again before a different District Court Judge, Ms Thompson (understandably) did not appear. Not knowing the true position, the Judge then issued a warrant, pursuant to which she was arrested and detained.

[118] Ms Thompson unsuccessfully advanced four tortious claims alleging false imprisonment, breach of statutory duty, negligence and a claim for "systemic negligence".[115] A fifth cause of action alleged breach of her rights under s 22 of the NZBORA not to be arbitrarily arrested or detained.[116]

[119] As far as the NZBORA claim was concerned, the Court held that Ms Thompson's arrest and detention were arbitrary because, although the issuing judge had made an innocent mistake, there was no basis upon which the warrant could lawfully have been issued at the time.[117] And the Court held responsibility could not be sheeted home to the Deputy Registrar because his omission had no direct impact on Ms Thompson's rights and as a matter of causation could not be seen as leading to her arrest. The Court said:

> [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

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114 *Thompson v Attorney-General*, above n 108.

115 The Court of Appeal agreed with the High Court that the tortious claims were barred by the immunity afforded by s 6(5) of the Crown Proceedings Act 1950 for acts or omissions that occur "in connection with the execution of judicial process".

116 The NZBORA claim was directed at the acts of the Deputy Registrar because *Chapman* precluded a claim based on judicial error.

117 At [65]–[76].

> that a different approach was necessary in this context, and we do not see the facts of this case as requiring it.
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> [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.
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> [77] We noted earlier that the decision in *Chapman* left open the potential for public law damages in respect of actions of the Registrar in that case. 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.

[120] While the outcome in *Thompson* (respectfully) seems plainly right, I confess I find the use of "causation" terminology here potentially confusing. The idea of operative "causes" may well be apt when considering an alleged breach of ss 25(h) or 27 (as in *Chapman* itself) but it is arguably less so when considering a claim for breach of s 22. That is because in the context of the vindicatory tort of false imprisonment—a close analogue of s 22—causation (in, for example, the negligence sense) is not relevant.[118] All that needs to be shown is that the plaintiff was directly and intentionally detained by the defendant (and that the detention was unlawful). And if the claim in *Thompson* were to be viewed through that lens, it would be the absence of any *intention* to detain on the Registrar's part, rather than the absence of a causal link between the Registrar's act and Ms Thompson's detention, that meant there was no breach of s 22 by the Registrar in that case.

[121] In the present case, however, I did not hear argument about the extent of the analogy between false imprisonment and arbitrary detention or about the relevance (or not) of a causation analysis. And in the end, it probably does not matter whether the

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[118] Causation has no real part to play in a vindicatory tort (or a tort actionable per se) such as false imprisonment, because damage is not an essential element of such a claim. See, for example: *R (WL (Congo)) v Home Secretary* [2011] UKSC 12, [2012] 1 AC 245 at 274.

issue is viewed through an intention or a causation lens. This case is very different from *Thompson*. In *Thompson* the Registrar made a mistake that unintentionally and very indirectly led to another person taking a step that resulted in Ms Thompson's detention. Here, and as already explained, the Crown prosecutor had an obligation to make a decision that did not give rise to a foreseeable risk that Mr Fitzgerald would be detained pursuant to a grossly disproportionate sentence. Contrary to that obligation, the Crown prosecutor chose to prosecute him for indecent assault, both knowing and *intending* that he would, on sentencing, be so detained.

[122] I am therefore unable to agree that the "decision" by the sentencing Judge was relevantly superseding. The Crown prosecutor's position at the time they decided to prosecute Mr Fitzgerald was that a grossly disproportionate sentence was the only one available to the sentencing Judge. Moreover, it was that sentence for which the Crown prosecutor actively advocated. In these circumstances it is not open to the Crown to avoid responsibility under the NZBORA by ignoring this reality and simply pointing the finger at the Judge, and judicial immunity.

[123] For these reasons I do not consider that either the declaratory theory or the sentencing operates to shield the Crown from liability here; there is accordingly no impediment to the Court finding liability for breach of both s 9 and s 22, and considering the claim for NZBORA damages.

**Are damages necessary to provide effective redress?**

[124] NZBORA damages are discretionary. There is little by way of guidance in the exercise of that discretion. The leading authority remains the Supreme Court's decision in *Taunoa v Attorney-General* but it is difficult, with respect, to discern in the various judgments either a majority approach or one that is of much practical assistance to a first instance judge.[119]

[125] As it happens, however, in the case of NZBORA claims made by prisoners (or former prisoners) the Prisoners' and Victims' Claims Act 2005 (the PVCA) does

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[119] *Taunoa v Attorney-General*, above n 39.

provide some guidance. The PVCA was the legislative response to the High Court's decision in *Taunoa*.[120]

[126] Before turning to consider that Act, however, it seems useful to make some prefatory remarks.

[127] First, Mr Fitzgerald would not have a claim in tort for false imprisonment, malicious prosecution or misfeasance. Because he was always detained pursuant to a sentence lawfully imposed by the sentencing Judge (evidenced by the warrant of commitment) one of the key elements of false imprisonment could not be made out.[121] And despite this claim hinging on the actions of the Crown prosecutor, it is not, and could not be, alleged that the exercise of discretion here was actuated by any kind of malice or bad faith.[122] So the starting point is that it is only an NZBORA claim that offers him any hope of a monetary remedy. By and of itself this differentiates his case from the many (often unsuccessful) claims for NZBORA damages; awarding damages to Mr Fitzgerald gives rise to no risk of "overlap" or "windfall".[123]

[128] Secondly, it must be acknowledged that Mr Fitzgerald's pursuit of his criminal proceedings (culminating in the Supreme Court's decision) did have the effect of bringing the infringement of his rights to an end. I also acknowledge that in many cases the cessation of any continuing breach may be remedially sufficient.

[129] That said, however, had Mr Fitzgerald spent four and a half years in jail as a result of being wrongly convicted—rather than being wrongly charged and sentenced—he would be entitled to apply for compensation under Cabinet's New Compensation Guidelines for Wrongful Conviction and Imprisonment (the

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120 *Taunoa v Attorney-General* (2004) 7 HRNZ 379 (HC) (liability judgment); and *Taunoa v Attorney-General* (2004) 8 HRNZ 53 (HC) (relief judgment). The Court of Appeal later found that some of the prisoners' treatment also amounted to a breach of s 9, a conclusion confirmed on further appeal to the Supreme Court: See *Attorney-General v Taunoa* [2006] 2 NZLR 475 (CA); and *Taunoa v Attorney General,* above n 39.

121 Compare, for example, *Manga v Attorney-General* [2000] 2 NZLR 65 (HC).

122 Nor is Mr Fitzgerald's a case where the Accident Compensation scheme has any compensatory role to play.

123 As to the idea of "overlap" see for example *Dunlea v Attorney-General* [2000] 3 NZLR 136 (CA) at [55]. The related idea of "windfall" was adopted by the Chief Justice in the course of her judgment in *Taunoa v Attorney-General,* above n 39, at [109].

Compensation Guidelines).[124] Although the Compensation Guidelines expressly state that there is no legal *right* to compensation, there is at least an *expectation* that a qualifying applicant will be compensated in accordance with them.[125] And the default position (subject to adjustment for aggravating factors) under the Compensation Guidelines is that the amount of any compensation paid will be assessed by reference to a base rate of $150,000 for each year of wrongful imprisonment.

[130] For policy reasons that, in ordinary cases, are sound enough, the Compensation Guidelines do not contemplate the payment of compensation where a sentence has been reduced on appeal. Payment of compensation in such a case is, instead, left as a matter of executive grace and favour.[126] The Crown has, however, declined to exercise its prerogative power and pay compensation to Mr Fitzgerald.

[131] On the other hand, the very existence of the Compensation Guidelines suggest an acceptance that compensation should be payable to those who can show that they have wrongly suffered a loss of liberty in a way that civil society should not countenance. The Compensation Guidelines which, by definition, apply *only* to claims by former prisoners, recognise that those who are detained as a result of a significant failure in the criminal justice system are to be distinguished from those defendants who are simply acquitted at trial or have an overly stern sentence overturned on appeal. Most obviously that is because those who are acquitted are not necessarily innocent and many who have their sentences reduced are not entitled to immediate release.[127]

[132] Moreover, if Mr Fitzgerald's claim is viewed—whether directly or indirectly—through an arbitrary detention lens, there is a *presumption* of compensation that might be said to attach. The NZBORA was enacted to affirm New Zealand's commitment

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124 Ministry of Justice | Tahu o te Ture *Compensation Guidelines for Wrongful Conviction and Imprisonment* (August 2020) [Compensation Guidelines].

125 By "qualifying" I mean an applicant who satisfies the other relevant pre-requisites, which include establishing, on the balance of probabilities, that they are innocent of the crime for which they were imprisoned: see Ministry of Justice, above n 124, at [17(a)].

126 To my knowledge, no such compensation has ever been sought or paid. But even in the relatively rare cases where a successful sentencing appeal results in the immediate release of an offender, it is highly unlikely that the original sentence would have been grossly disproportionate, such that s 9 of the NZBORA was engaged.

127 That is why drawing an analogy between cases under the Compensation Guidelines and Mr Fitzgerald's could not reasonably be seen as inviting claims for NZBORA damages from every prisoner who succeeds in achieving something of a sentence reduction on appeal.

to the ICCPR, as the preamble to the NZBORA expressly states. The s 22 right to be free from arbitrary detention reflects art 9(1) of the ICCPR. And art 9(5) of the ICCPR provides that victims of unlawful detention have an enforceable *right* to compensation.[128]

*The Prisoners' and Victims' Claims Act 2005*

[133] As I understand it, Mr Ewen accepted the PVCA applied to Mr Fitzgerald's claim. Neither party, however, made detailed submissions on the PVCA and its application here.

[134] Section 3 of the PVCA states that its purpose is to restrict and guide the awarding of compensation to those who make "specified claims".[129] Such awards are to be reserved for exceptional cases and are to be made "only if, and only to the extent that, it is necessary to provide effective redress".

[135] Under s 6 of the PVCA a "specified claim" includes a claim for compensation under the NZBORA based on an act or omission of the Crown, made by a person who "is or was under control or supervision". This is a term defined to include prisoners.[130]

[136] Any compensation awarded pursuant to such a claim is paid, in the first instance, to the Secretary for Justice and a victim of the offender's offending has a right to make a claim against it.

[137] Under s 13(1) of the PVCA a court may not make an award of compensation unless it is satisfied that:

> (a) the plaintiff has made reasonable use of all of the specified internal and external complaints mechanisms reasonably available to him or her to complain about the act or omission on which the claim is based, but has not obtained in relation to that act or omission redress that the court or Tribunal considers effective; and

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128 The use of the word "arbitrary" in art 9(1) and the word "unlawful" in art 9(5) appears to me to reflect a distinction without a difference. In human rights terms, a detention that is arbitrary must also be unlawful.

129 The word "compensation" is used throughout the Act but must be assumed to include what are usually (in an NZBORA context) referred to as "damages".

130 Prisoner is defined under s 4 of the PVCA as "a person … who is for the time being in the legal custody under the Corrections act 2004".

(b) another remedy, or a combination of other remedies, cannot provide, in relation to the act or omission on which the claim is based, redress that the court or Tribunal considers effective.

[138] It is in determining whether a remedy other than compensation is "effective" redress for the relevant act or omission that the courts are required to take into account the non-exhaustive matters listed at s 14(2). These are:

(a) the extent (if any) to which the plaintiff, the defendant, or both took, within a reasonable time, all reasonably practicable steps to mitigate loss or damage arising from the act or omission on which the claim is based; and

(b) whether the defendant's breach of, or interference with, the right concerned was deliberate or in bad faith; and

(c) the relevant conduct of the plaintiff; and

(d) the consequences to the plaintiff of the breach of, or interference with, the right concerned; and

(e) the freedoms, interests, liberties, principles, or values recognised and protected by the right concerned; and

(f) any need to emphasise the importance of, or deter other breaches of, or other interferences with, the right concerned; and

(g) the extent (if any) to which effective redress in relation to that act or omission has been, or could be, provided otherwise and by compensation; and

(h) any other matters the court or Tribunal considers relevant.

[139] I address each factor in turn.

[140] As to the first matter, there can be no question that Mr Fitzgerald (through counsel) availed himself of all the mechanisms open to him to challenge his continued detention. This counts quite powerfully in favour of compensation here.

[141] And as to the second, there is also no basis for a finding that the omission of the Crown prosecutor here was deliberate or in bad faith. I regard this as a neutral factor.

[142] The reference in 14(2)(c) to the "conduct" of the plaintiff was explained by the Court of Appeal in *Chief Executive of the Department of Corrections v Gardiner*.[131] The Court said:[132]

> [56] A court should also take into account the plaintiff's relevant conduct, which requires a clear nexus between his or her behaviour and the defendant's wrong — in this case, the unlawful additional period of imprisonment.47 It includes, for example, any act of the plaintiff that may have caused the defendant to act as it did. As noted, the PVCA was a response to *Taunoa*, in which Corrections was trying to manage especially difficult prisoners, and it appears that the legislature was concerned to ensure that courts must take provocation by the prisoner into account.

[143] Here, there is nothing that could conceivably suggest any link between Mr Fitzgerald's conduct and his arbitrary detention.

[144] The consequences to Mr Fitzgerald of the breach of his right (whether it be a breach of s 9 or of s 22) were that he lost his liberty for approximately 55 months.[133] And Mr Fitzgerald's loss—in itself very significant—is arguably compounded by his particular vulnerability due to his mental health problems, although an assessment of that is not entirely straightforward. I return to that matter shortly.

[145] As for the nature of the relevant rights, the s 9 and the s 22 rights are fundamental. As noted earlier, a breach of s 9 is incapable of being justified in a free and democratic society.[134] And I have noted already that art 9(5) of the ICCPR stipulates an enforceable right to compensation for anyone who has been unlawfully detained.

[146] The need to emphasise the importance of (and to deter other breaches of) or the right concerned goes hand in hand with the nature of the right itself. I reiterate, however, that there has been no suggestion of bad faith on the Crown prosecutor's part. Moreover, the recent repeal of the three strikes regime means that the omission giving rise to Mr Fitzgerald's claim ought not occur again.

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131 *Chief Executive of the Department of Corrections v Gardiner* [2017] NZCA 608, [2018] 2 NZLR 712. Mr Gardiner had been unlawfully detained because, as a result of the Supreme Court's decision in *Booth v R* [2016] NZSC 127, [2017] 1 NZLR 223, his release date had been wrongly calculated.

132 Footnote omitted.

133 This is 55 times the length of Mr Gardiner's unlawful detention.

134 *Fitzgerald* (CA), above n 2, at [41].

[147] It is, however, the penultimate matter in the s 14(2) list that was the focus of the Crown's submissions in this case. I have already rehearsed the argument earlier. In essence, the Crown says that the conclusion of the criminal process—in the form of Supreme Court's decision and then Mr Fitzgerald's resentencing and immediate release—constitutes an effective vindication of his rights. As a result of a combination of those acts, he was freed from his disproportionately severe sentence and he was no longer arbitrary detained. The Crown said this, and a declaration of breach, was the proper—and the only available—remedy here.

[148] I have addressed this already. In many cases where some part of the criminal process has misfired, I accept that error correction within the process itself will be regarded as sufficient vindication of the wrong. But on the unique facts of Mr Fitzgerald's case, that is not enough; his release prior to the original sentence end date mitigates his loss a little, but not a lot. He is not a defendant who was always lawfully detained but whose successful sentence appeal means that he has spent two or three months longer in prison than he should have.[135] Rather, he is a vulnerable person who was wrongly detained for a very considerable period because the decision to prosecute him for a stage three offence was made without any consideration of his s 9 right. The correction ultimately afforded by the criminal justice process inadequately vindicates the rights breached and does not recognise the actual harm inherent in what happened to Mr Fitzgerald. The same can, I think, be said of a declaratory remedy.

[149] All these factors lead inevitably to the view that an award of damages is necessary to provide effective redress here. The only remaining question is, how those damages should be quantified.

**Quantification**

[150] As I have said, I do not consider that it makes a material difference whether Mr Fitzgerald's claim for damages is predicated on the breach of s 9 or a consequential breach of s 22. That is because either he was arbitrarily detained for 44 months (as I

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[135] My own unscientific (but judicially experienced) sense is that the majority of successful sentence appeals do not, in fact, establish this. In most cases a reduction in sentence on appeal will not see a defendant immediately released.

have found) or the principal measure of the damage suffered as a result of the s 9 breach is the grossly disproportionate part of the sentence actually served by Mr Fitzgerald, which I have also found to be 44 months.

[151] Here, Mr Fitzgerald says damages can be quantified by reference either:

(a) to the Compensation Guidelines; or

(b) the calculation of mental health treatment and rehabilitation costs over two years made by Dr Rosie Edwards, totalling $391,300.[136]

[152] I put the second option to one side at the outset. Although there is an instinctive attractiveness about it, there is no evidence before the Court that Mr Fitzgerald would receive the treatment and rehabilitation Dr Edwards says he needs. And while it may be that Mr Fitzgerald's mental health was exacerbated by his imprisonment there is no evidence of a clear causal link between his present treatment and rehabilitation needs and his arbitrary detention.

[153] The first option would necessarily proceed by using the Compensation Guidelines to arrive at a figure based on the 44 month period of Mr Fitzgerald's arbitrary or grossly disproportionate detention.

[154] Before turning to consider whether that is appropriate, however, it is necessary to consider whether, and what, account should properly be taken of the effect of Mr Fitzgerald's detention on his mental health.

*Mental health*

[155] No new evidence was called on behalf of Mr Fitzgerald about the impact that his arbitrary detention had on his mental health. Instead, the Court has before it three

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136 Dr Edwards is a psychiatrist who provided advice to the Supreme Court under s 38 of the Criminal Procedure (Mentally Impaired Persons) Act 2003. Her report made it clear that, in the absence of funding, Capital and Coast DHB is "most unlikely to purchase an additional bed for Mr Fitzgerald above those on their waitlist". In the course of her judgment in Mr Fitzgerald's case, Glazebrook J observed that she "would expect Mr Fitzgerald to receive a referral to services to assist with his complex needs outside of the criminal justice system": *Fitzgerald* (SC), above n 1, at [253].

reports prepared about him by Dr Rosie Edwards, prepared in 2017, 2018 and 2021. The 2017 and 2018 reports opine that Mr Fitzgerald's mental health had deteriorated due to his imprisonment and the stress of his appeals. Thus:

(a) in 2017, Dr Edwards noted that Mr Fitzgerald "has slowly declined in his mental health in Prison" and was requiring greater amounts of anti-psychotic and anxiety medication, seemingly due to the stress of waiting for a court determination"; and

(b) in 2018 she said: "[h]e has found being in prison for the last 14 months to be stressful for him and has required increased dose of regular clonazepam".

[156] But it also seems plain that prison afforded Mr Fitzgerald some benefits in terms of regime consistency, and ensuring he remained compliant with his medication and keeping him free from drugs and alcohol. So in in her 2021 report Dr Edwards observed he was "well" at that time.

[157] Although, on the state of the evidence, it is difficult to conclude that prison had an overwhelmingly detrimental effect on Mr Fitzgerald, the more fundamental fact remains. Prison cannot properly be viewed as ever being a suitable place for someone such as Mr Fitzgerald. For the reasons articulated by the Court of Appeal, it is impossible to see how any of the ordinary purposes and principles of sentencing could justify his detention there.[137] I think this can, at least to some extent, legitimately be taken into account when attempting to place a value on the vindication of his right.

*Appropriate quantum*

[158] Despite the unavailability of a tortious claim or remedy in this case, when it comes to quantum, the obvious relationship between detention that is unlawful and detention that is arbitrary arguably makes actual damages awards in false imprisonment claims a useful (albeit not necessarily wholly analogous) comparator.

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[137] As set out at [34] above.

[159] Similarly, there is force in the submission that the Compensation Guidelines are a relevant comparator simply for the reason that those Guidelines also govern payments made to persons whose detention was lawful, but wrong, and who are unlikely to have a basis for a tortious damages claim.

[160] In *Gardiner v Chief Executive of the Department of Corrections*, Dunningham J at first instance regarded compensation of $10,000 was an appropriate reflection of Mr Gardiner's unlawful detention for around a month.[138] She expressed reservations about analogising with the compensation payable to those wrongly convicted under the Compensation Guidelines, preferring to base her analysis on the decision of this Court in *Manga v Attorney-General*.[139]

[161] Dunningham J's figure was upheld on appeal, but the Court of Appeal took a slightly different approach to the quantification exercise.[140] It began by noting that the value of liberty can vary:

> [61] Finally, liberty is a fundamental right and its unlawful loss may justify the emphasis of a damages award, as s 14 recognises, but the amount need not be the same in all circumstances. The community at large places a very high value on liberty and, as Mr Perkins properly accepted, that value is not necessarily less because the plaintiff was lawfully imprisoned for a period. It is proper to begin with that value. But when converted to a per-day rate, the value of liberty may vary both with the length of the sentence lawfully imposed and with the period of unlawful detention. (The shorter the latter the higher may be the per-day rate.)
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> [62] In this regard, it has been held in England that a plaintiff who has plainly demonstrated that he or she places a low value on personal liberty — for example, by committing offences in prison and so risking delayed release — may expect that value to be reflected in the award. We prefer the view, as stated above, that conduct of the plaintiff may be taken into account where there is a clear nexus between that conduct and the additional period of imprisonment.

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138 *Gardiner v Chief Executive of the Department of Corrections* [2017] NZHC 1831, [2017] NZAR 1348 [*Gardiner* (HC)].

139 *Manga v Attorney-General*, above n 121. Mr Manga received compensation of $60,000 ($86,900 if annualised) for 252 days of wrongful imprisonment. Dunningham J found that, given the number of analogies between Mr Gardiner and Mr Manga's case, Mr Manga's compensation was the appropriate starting point, to be taken on a pro-rated basis. Self-evidently, some 20 years have passed since then, which led Dunningham J (in 2017) to adjust upwards by around 30 per cent for inflation: *Gardiner* (HC), above n 138, at [68]–[71].

140 *Chief Executive of the Department of Corrections v Gardiner*, above n 131.

[162] In light of Mr Fitzgerald's mental disorder, it would not be fair to say that he placed a low value on liberty. As the Court of Appeal noted, Mr Fitzgerald's mental disorders impaired his ability to understand the warnings he had previously been given and he was unable to regulate his offending behaviour.[141]

[163] In terms of the quantification exercise itself:[142]

> [63] We approach the exercise by assessing damages for ourselves and comparing the result to that reached in the High Court. We do so because, as we go on to explain, we prefer not to take *Manga* as our starting point. The starting point must be that damages are at large and should not be assessed in a formulaic way.
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> [64] As noted, Mr Gardiner does not claim pecuniary losses. So far as non-pecuniary losses are concerned, he points only to the loss of liberty. We have accepted … that a prisoner may suffer emotional harm throughout a sentence and so may seek compensation when detained too long, but there is no evidence that Mr Gardiner suffered such harm during the period of unlawful detention. Although that period was material, at one month, it was associated with a lawful sentence. It could not be suggested that his conduct somehow caused Corrections to act as it did. Equally, Corrections acted in good faith and there is no need for deterrence.
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> [65] We find *Manga* a useful illustration on particular facts but do not adopt it as a starting point. The annualised figure of $130,000 adopted there was not closely related to any previous case, and it was high relative to the near-contemporaneous 2000 Cabinet Guidelines figure of $100,000 for a wrongly convicted prisoner. It reflected significant emotional harm suffered by Mr Manga and the very long period for which he was unlawfully imprisoned.
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> [66] *Manga* also pre-dated both the PVCA and a number of cases, including *Taunoa*, in which *Baigent* damages have been awarded to prisoners for breach of protected rights. In *Taunoa* Blanchard J emphasised that damages in tort should not be equated with *Baigent* damages because the latter are a form of public law compensation and discretionary. However, the effect of the PVCA is to make tort damages discretionary and exceptional, as already noted. In our view that means claims for *Baigent* damages are an appropriate comparator in this context.

[164] After a review of several other cases in which compensation had been awarded to those who had been unlawfully arrested or detained, the Court said:

> [68] The Cabinet Guidelines are a useful point of reference, but as noted earlier they combine all non-pecuniary losses into one category so the figure of $100,000 must be discounted substantially for a plaintiff in Mr Gardiner's circumstances. He was not wrongfully convicted and imprisoned and he

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141 *Fitzgerald* (CA), above n 2, at [34].
142 *Chief Executive of the Department of Corrections v Gardiner*, above n 131.

> cannot point to the serious emotional harm that such a person would likely suffer. On the other hand, to the extent the guidelines were used an adjustment would also need to be made for the time value of money.
>
> [69] We accordingly approach the assessment on the basis that we are valuing the loss of Mr Gardiner's liberty for about five per cent of his lawful sentence. An award must be large enough to vindicate the important liberty interest, but there is no cause to increase that sum for emotional harm or deterrence. Because we have used neither *Manga* nor the Cabinet Guidelines as our starting point, it is not appropriate to adjust arithmetically for inflation from a given date; that would lend a false air of precision to the exercise and risk producing an end result that is too high when compared to subsequent cases. Rather, we make the assessment as at the date of breach, recognising that an allowance must be made for change in the value of money to the extent that we base the award on older cases.
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> [70] In our opinion an appropriate award would be not less than $8,000 and perhaps as much as $12,000.

[165] As will be apparent, *Gardiner* itself involved a tortious (false imprisonment) claim. But the Court of Appeal's express use of *Baigent* damages as the relevant comparator in cases where such a claim was subject to the PVCA (as it was in Mr Gardiner's case) makes the decision a useful starting point.

[166] Despite the Court of Appeal's warning in *Gardiner* against an adopting an unduly formulaic approach, no other principled approach suggests itself to me here. And notwithstanding the dicta from *Gardiner* noted at [161] above, I am unclear why a *longer* period of wrongful detention might warrant putting a lesser daily value on any relevant compensation. That is not the approach taken under the Compensation Guidelines. And even accepting that it may be appropriate in some cases, there may be others where the opposite is true. So I propose to use the monthly range in *Gardiner* as my starting point, adjusted for the much lengthier period of wrongful detention in Mr Fitzgerald's case. That would result in a damages award of between $352,000 and $528,000 ($440,000 being the mid-point). In my view Mr Fitzgerald's special vulnerabilities warrant an award at the higher end.

[167] The only further question arising is whether some downwards adjustment is then required to reflect the further point noted in *Gardiner*, namely that *Baigent* damages are discretionary and not to be equated with damages in tort.[143] A modest

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143 *Chief Executive of the Department of Corrections v Gardiner*, above n 131.

reduction is warranted on that score. So in my view $450,000 is the appropriate award here.[144] As noted earlier, that sum must be paid in the first instance to the Secretary for Justice under the PVCA.

*Interest*

[168] Mr Fitzgerald also seeks interest on any compensation payable, under s 10 of the Interest on Money Claims Act 2016 running until the date of payment and he is plainly entitled to that. Given that the amount on which interest is awarded was not quantified on the day on which the cause of action arose, however, it is necessary to invite further submissions on the date from which interest should run in terms of s 9 of the Act. Ideally agreement between counsel should be reached about this but, failing that, memoranda are to be filed within 10 working days of this judgment.

**Conclusion**

[169] There is no dispute that Mr Fitzgerald was subjected to a grossly disproportionate punishment. For the reasons I have given, I further conclude that:

(a) the Crown prosecutor, when acting in that capacity, is a Crown "actor" for the purposes of s 3 of the NZBORA;

(b) in the context of a potential prosecution for a stage three offence, and by dint of the prosecution Guidelines, the MOU and s 188 of the CPA, the Crown prosecutor was obliged to consider s 9 of the NZBORA and to exercise their prosecutorial discretion in a way that avoided the risk of Mr Fitzgerald becoming subject to a disproportionately severe punishment on sentencing;

(c) although bad faith was not (and could not be) alleged here, the Crown prosecutor breached that obligation in Mr Fitzgerald's case;

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[144] This can be compared with an uncomplicated application of the $150,000 annual amount in the Compensation Guidelines, which would result in compensation of around $550,000.

(d) although judicial restraint continues to be appropriate in most cases where the Courts are asked to review the exercise of prosecutorial discretion, the obligation to consider s 9 and to act consistently with it was not a matter of discretion;

(e) at the point at which Mr Fitzgerald's detention can be said—as a matter of fact—to have become grossly disproportionate, that detention also became arbitrary and in breach of s 22 of the NZBORA;

(f) alternatively, the breach of s 9 can also be measured by reference to that part of the punishment actually suffered by Mr Fitzgerald that was disproportionately severe;

(g) in either event, the relevant measure of the breach is his detention between 5 March 2018 and 29 October 2021: a period of 1334 days or 44 months;

(h) although the declaratory theory means that the Supreme Court's decision in *Fitzgerald* merely revealed that sentencing judges had always had the power to decline to impose a sentence on a stage three offence that was grossly disproportionate, that theory cannot operate retrospectively to absolve Crown prosecutors of their primary obligation in this area;

(i) similarly the decision of the sentencing Judge does not operate to absolve the Crown from liability for the Crown prosecutor's breach, particularly given it was the prosecutor's intention that the apparently mandatory (but grossly disproportionate) sentence be imposed on Mr Fitzgerald;

(j) although Mr Fitzgerald was (eventually) released as a result of the criminal process *Baigent* damages are necessary to give him a fully effective remedy for the breaches here; and

(k) based on the relevant authorities, the PVCA and factors personal to Mr Fitzgerald, an award of $450,000 is appropriate;

(l) interest on that sum is payable under the Interest on Money Claims Act 2016 running from a date to be confirmed, until the date of payment; and

(m) in the first instance, the amount awarded must be paid to the Secretary for Justice, under the PVCA.

**Costs**

[170] The parties have agreed that the appropriate costs categorisation is 3B. Mr Fitzgerald is legally aided. If the parties cannot settle costs by agreement:

(a) counsel for Mr Fitzgerald is to file and serve a memorandum seeking costs within 20 working days from the date of this judgment;

(b) counsel for the Crown is to file and serve its memorandum within a further 10 working days thereafter;

(c) the Court will then determine the issue on the papers unless it requires to hear from counsel; and

(d) if no costs' memoranda are received within 20 working days from the date of this judgment, then the order of the Court is that there be no order as to costs and the file is to be closed.

Rebecca Ellis J

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