IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA **SC107/2024**

BETWEEN	**DANIEL CLINTON FITZGERALD**
	Appellant
AND	**ATTORNEY-GENERAL OF NEW ZEALAND**
	Respondent

RESPONDENT'S SUBMISSIONS ON APPEAL

4 March 2025

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

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Issue

1. This case is about prosecutorial liability. Mr Fitzgerald was sentenced by a High Court Judge to a disproportionately severe sentence, in breach of s 9 of the New Zealand Bill of Rights Act 1990 ("**NZBORA**"). The issue on appeal is whether damages liability attaches for the prosecutorial act of laying the charge.

Summary of argument

2. The specific breach of fundamental rights in this case is the imposition of a disproportionately severe sentence by the sentencing judge. The Court of Appeal unanimously held prosecutors could not be liable for the judicial act of sentencing. The Court was right to dismiss prosecutorial liability for two mutual reinforcing reasons of fundamental principle:

    2.1 Separation of powers: to hold a prosecutor liable for the consequences of a sentence imposed by the judiciary, pursuant to a mandatory sentencing scheme enacted by Parliament, confuses the constitutional division of responsibility and the constitutional role of prosecutors.

    2.2 Causation: the judicial act of sentencing was the effective cause of the grossly disproportionate sentence, so the prosecutor cannot be legally responsible for the sentence.

3. The appellant's attempt to invoke an amorphous concept of "the state" – unknown to the common law and nowhere found in the terms of NZBORA – does not answer the essential questions for determination, and would carry us to uncharted constitutional waters. This novelty cannot be utilised to confuse or sidestep the fundamental division of constitutional power between the branches of government. The NZBORA makes clear that a legally cognisable interference with protected rights can only be committed by the legislature, executive or judiciary, or a s 3(b) actor.[1] It is necessary to examine who did what in order to identify the nature of the interference, establish legal responsibility, and consider how the interference may be

[1] New Zealand Bill of Rights Act 1990 ["**NZBORA**"], s 3. Other provisions also recognise distinct constitutional actors: eg ss 7-7B, 25(a), 27(3).

vindicated.

4. The Court of Appeal was right to recognise the appellant's case as impermissibly blurring fundamental distinctions. The High Court judgment the appellant seeks to reinstate involved marked deviation from basic constitutional principles. The High Court erred in attributing the prosecutor with a "Bill of Rights duty" that supplanted the prosecutorial discretion with a charging mandate. The High Court also erred in holding a sentence imposed according to law, and corrected on appeal, involved arbitrary detention. The quantum of damages the appellant asks this Court to reinstate is well beyond accepted scales for public law damages; the High Court departed from the legal framework established by this Court in *Taunoa v Attorney-General*.[2]

5. The issues in this appeal do not require departure from *Attorney-General v Chapman*,[3] given the focus in these proceedings has always been, and remains squarely on the prosecutor's acts. If the focus shifts to liability for judicial acts, the respondent maintains *Chapman* is good law. But even if this Court narrows or departs from the general damages immunity for judicial breaches, damages should not be given. Mr Fitzgerald's rights were vindicated by exercise of his appeal rights; any judicial breach was in good faith; and lessons have been learned: the three strikes law at issue in this appeal has been repealed and replaced with a more discretionary regime. More generally, courts should be cautious not to impose liability where a judicial breach is only identified in hindsight, after an appellate court alters received understandings of general law.

Facts

6. On 3 December 2016 Mr Fitzgerald approached two women walking down Cuba Street, Wellington. He knew neither of them. He grabbed one of the women and pulled her "really close but really tight".[4] He said he wanted to kiss her. He pulled her close to him to kiss her on the lips. She moved her face so that his kiss landed on her cheek. As Mr Fitzgerald persisted, the

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2 *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429.

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

4 Case on appeal ["**COA**"] at 301.0168.

second woman intervened.[5] When she tried to pull Mr Fitzgerald away, he grabbed the top of her arms and pushed her into a shop window. She struggled against him and eventually he let go.[6]

7. Mr Fitzgerald was charged with indecent assault and common assault for this offending, and convicted on both offences at a judge-alone trial before Simon France J, as well as breach of an extended supervision order ("**ESO**"). This was Mr Fitzgerald's seventh indecent assault, and his third under the three strikes regime. He was on an ESO at the time of this offending.

8. Mr Fitzgerald had a history of mental illness, and a report was prepared under s 38 of the Criminal Procedure (Mentally Impaired Persons) Act 2003 ("**CPMIPA**") around seven weeks after his arrest. The report recorded he had been compliant with his medication and stable at the time of the offending (as he was at the time of the report). A trial date was subsequently set for 13 July 2017 (seven months after the offending and Mr Fitzgerald's arrest).

9. Mr Fitzgerald's mental health deteriorated as the trial date neared. It was vacated the day before trial and a further report prepared under s 38, CPMIPA, in August 2017. Mr Fitzgerald received a sentence indication in September, at which Dobson J indicated a sentence of seven years, based on the prevailing interpretation of three strikes law at the time. He indicated it would be manifestly unjust for that sentence to be imposed without parole (s 86D(3)), which had also been the Crown's submission.

10. Trial fitness proceedings continued between October and December 2017, with a third s 38 report prepared. Mr Fitzgerald was fit to stand trial, and was tried and found guilty on 19 March 2018. A fourth s 38 report was prepared prior to sentencing, which occurred on 10 May 2018. Mr Fitzgerald was sentenced by Simon France J to seven years imprisonment on the indecent assault charge.[7]

11. Mr Fitzgerald appealed his conviction and sentence. His conviction appeal focused on an argument that he should have been discharged without

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5 COA at 301.0182-3.

6 COA at 301.0183.

7 He was sentenced to three months imprisonment on the common assault charge and convicted and discharged on his breach of extended supervision order.

conviction given the mandatory sentencing consequences of the three strikes regime. His conviction appeal was unsuccessful both in the Court of Appeal and this Court.

12. Mr Fitzgerald argued his sentence breached s 9 of NZBORA. The Crown's position, as it had been since Mr Fitzgerald's sentence indication, was that the sentencing court's discretion not to make a no-parole order was a "safety valve" that gave the court discretion to avoid any breach of s 9.

13. The Court of Appeal found Mr Fitzgerald's sentence was inconsistent with s 9 of NZBORA because it was disproportionately severe. But the majority upheld the sentence as one required by s 86D, as the provision was understood at the time; s 86D had to be given effect in accordance with s 4 of NZBORA. This Court found an exception to s 86D where the mandatory sentence would be a disproportionately severe sentence. That exception applied to Mr Fitzgerald and his sentence appeal was allowed.

14. Mr Fitzgerald was resentenced to a time-served sentence by Simon France J on 1 November 2021, shortly after this Court's judgment, and released.

15. By this time, he had spent nearly 59 months in prison. While all of this was deemed part of his sentence by operation of s 90 of the Parole Act 2002, 17 months had been served before Mr Fitzgerald was sentenced. Nearly three-and-a-half years of this period was served between Mr Fitzgerald's sentencing and successful appeal.

SUBMISSIONS

The prosecutor's alleged responsibility for breach of Mr Fitzgerald's rights

16. The appellant argues the prosecutor is directly responsible for Mr Fitzgerald's sentence because, under the received understanding of the three strikes regime at least before this Court's judgment[8] (referred to throughout these submissions as *Fitzgerald (SC criminal appeal)*), the sentencing judge had no discretion. The prosecutor is therefore said to effectively stand in judicial shoes and sentence the defendant, when the prosecutor files a charge with third-strike consequences. In addition to this,

[8] *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551 ["***Fitzgerald (SC criminal appeal)***"].

the prosecutor "materially contributed" to the breach of s 9 arising from Mr Fitzgerald's sentence. He argues the Crown pursued an indecent assault charge when a lesser charge was available and sought to achieve a rights-breaching outcome. He also argues that since the Prosecution Guidelines required Bill of Rights consideration, this amounted to an overriding duty to consider whether any resulting sentence would be inconsistent with s 9, and to prefer an alternative charge if so.

17. The answer to these propositions lies in the evidence and in New Zealand's constitutional arrangements and the respective roles and responsibilities of the three branches of government. This was the approach of the Court of Appeal.

The prosecutor's constitutional role in criminal proceedings

18. It is the court that is responsible for the adjudication of guilt and the punishment of defendants. Lord Steyn said "a decision to punish an offender by ordering him to serve a period of imprisonment may only be made by a court of law"—a position adopted "by our legal system since at least 1688".[9] This is entirely consistent with Winkelmann CJ's observation in *Fitzgerald (SC criminal appeal)* that "[s]entencing for criminal offences is the constitutional role of the third branch of government – the judicial branch."[10]

19. This can be contrasted with the prosecutor's role:[11]

> In deciding whether to bring or not to bring a prosecution, the Director [of Public Prosecutions] is not settling any question or dispute or deciding rights or liabilities; he is simply making a decision on whether it is appropriate to initiate a prosecution. If he does, it is afterwards for the courts to decide whether a conviction may be sustained.

20. These remarks of the Supreme Court of Ireland have been echoed by the High Court of Australia:[12]

> [Presenting an indictment] is not a judicial decision because it makes no adjudication upon rights or duties or liabilities, or, indeed, upon

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9 *R (Anderson) v Secretary of State for the Home Department* [2002] UKHL 46; [2003] 1 Cr App 523 at [51]. See similar statements in Canada: *R v Anderson* 2014 SCC 41, [2014] 2 SCR 167, and Australia: *Magaming v The Queen* [2013] HCA 40 at [26].

10 *Fitzgerald (SC criminal appeal)* at [117].

11 *H v Director of Public Prosecutions* [1994] 2 IR 589 at 603.

12 *Fraser Henleins Proprietary Ltd v Cody* (1945) 70 CLR 100 at 120. A similar sentiment was expressed in New Zealand in *Polynesian Spa v Osborne* [2005] NZAR 408 at [62](e): "The conclusion on behalf of a prosecuting authority that an offence has been committed is merely an expression of opinion which is capable of being challenged in Court". See also *Megaming v The Queen* at [39], where the High Court of Australia affirmed that "[p]rosecutorial choice between […] two charges is not an exercise of judicial power".

> anything. It imposes no penalties, though it does expose a person to the possibility of a particular penalty.

21. Likewise in *Megaming v The Queen*, the Australian High Court held that "although the prosecutor chooses which charge to lay, the prosecutor does not choose what punishment will be imposed."[13] The courts do.

22. There are "[g]ood reasons … for observing constitutional boundaries and exercising judicial restraint" in intervening in the prosecutorial decision, as this is a role for the executive, not the courts.[14] That is because once a charge is before the court, the court may control its own processes, including by dismissing the charge on evidential sufficiency grounds,[15] or amending the charge to fit the proof.[16] The court may also make its own public interest assessment in the context of its jurisdiction to stay a charge as an abuse of process (if that very high threshold is met).[17]

23. The distinction between roles lies at the heart of the Court of Appeal's analysis. Having regard to this Court's conclusion the sentencing court was not required to impose a sentence that breached s 9, the Court of Appeal found this meant[18]

> that the responsibility for imposition of the appropriate sentence rests here, as in every case, with the sentencing Judge, and with the court that deals with any appeal. It is not a matter for which the prosecutor assumes responsibility.

24. This was why "the prosecutor cannot be liable for a breach of NZBORA as a result of the sentencing process miscarrying":[19]

> To hold otherwise would be to blur the fundamental distinction between the function of the prosecutor and the sentencing Judge. It was not the duty of the prosecutor to exercise any part of the Judge's sentencing function.

Consistency with Canadian authorities

25. The distinction between the prosecutorial and judicial roles in sentencing regimes with mandatory consequences has been extensively discussed in

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13 *Megaming v The Queen*, above n 9 at [26].

14 *Police v Ormsby-Turner* [2025] NZCA 30 at [53].

15 Criminal Procedure Act 2011 ("**CPA**"), s 147.

16 CPA, ss 133-136.

17 *Fox v Attorney-General* [2002] 3 NZLR 62 (CA), *Moevao v Department of Labour* [1980] 1 NZLR 464 (CA). See also *Osborne v Worksafe New Zealand* [2017] NZCA 11, [2017] 2 NZLR 513 at [36].

18 *Attorney-General v Fitzgerald* [2024] NZCA 419 ["***AG v Fitzgerald (CA)***"]at [122].

19 Ibid.

Canada. A line of Canadian Supreme Court authorities has considered whether the prosecutorial discretion has any role to play in ameliorating the effects of mandatory minimum sentencing regimes that might otherwise produce disproportionately severe results. The Canadian Supreme Court has consistently dismissed this proposition, pointing to both matters of principle and practicality that render the proposition unworkable.

26. In *R v Anderson*,[20] the Canadian Supreme Court rejected the argument that a prosecutor breached Charter rights by failing to consider the defendant's Aboriginal status when electing to charge an offence carrying a mandatory minimum sentence, because the election limited the sentencing options available to the judge. The Court described the argument as "in effect equat[ing] the duty of the judge and the prosecutor" despite "no basis in law to support equating their distinct roles in the sentencing process":[21]

> It is *the judge's* responsibility to impose sentence; likewise it is *the judge's* responsibility, within the applicable legal parameters, to craft a proportionate sentence. If a mandatory minimum regime requires a judge to impose a disproportionate sentence, the regime should be challenged.

27. In *R v Smith*,[22] the Supreme Court rejected the argument a mandatory minimum sentence could be "salvaged" by the Crown exercising its discretion to avoid the charge altogether where the result would be severely disproportionate.[23] To the contrary, the Court saw one of the problems with mandatory minimum sentences as "insert[ing] into the system a reluctance to convict and thus resulting in acquittals for picayune reasons of accused who do not deserve [the mandatory minimum] sentence."[24]

28. In *R v Nur*,[25] Moldaver J (writing for the minority) described the use of the prosecutorial discretion to avoid mandatory sentencing outcomes as an argument about "the Crown's discretion *not to apply the law* – that is, to

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20 *R v Anderson*, above n 9.

21 At [25]. There, the argument was that the prosecutor breached Charter rights by failing to consider the defendant's Aboriginal status when electing to charge an offence carrying a mandatory minimum sentence, because the election limited the sentencing options available to the judge.

22 *R v Smith* [1987] 1 SCR 1045.

23 At [68].

24 At [72].

25 *R v Nur* [2015] 1 SCR 773.

charge a lesser offence or no offence at all".[26] *Nur* concerned "hybrid" offences, where different (mandatory) minimum sentences depended on the prosecutor's election to proceed either summarily or indictably. The majority described the argument as wrongly placing the responsibility for ensuring constitutionality on the "discretionary decision of a Crown prosecutor, who is in an adversarial role to the accused",[27] and affirmed that "[s]entencing is inherently a judicial function".[28] The purpose of hybrid offences was to allow the Crown to screen out less serious offences; but it did not otherwise insulate potentially unconstitutional laws.[29]

29. The Canadian Supreme Court most recently reiterated how untenable it was to rely on prosecutorial discretion as a means of safeguarding sentencing outcomes in *R v Bertrand Marchand*.[30] Again, the issue in that case was whether the prosecutorial discretion to proceed summarily or indictably (with ensuing consequences for mandatory minimum sentences) was an answer to the risk of grossly disproportionate sentences. Observing that "[s]entencing is a judicial function, while Crown prosecutors are in an adversarial role to accused persons",[31] the Court described the idea that the Crown's election would "determine whether an offender receives a fit sentence or an excessive sentence" as an "aspect of the sentencing regime [that] would be intolerable and shocking to Canadians".[32] This was because the prosecutor occupied a fundamentally different role to the judge:[33]

> It is the judge's role to craft a fit and proportionate sentence in light of the circumstances of the offender and the gravity of the offence after being presented with evidence of the offender's background and individual circumstances. In contrast, the Crown prosecutor is tasked with using their discretion to choose a path to conviction with little information about the offender's individual circumstances and while balancing other priorities.

30. The Court observed this system of reliance on prosecutorial discretion would also replace "a public hearing on the constitutionality of [the provision]

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26 At [130].
27 At [86].
28 At [87].
29 At [91].
30 *R v Bertrand Marchand* 2023 SCC 26, (2023) 487 DLR (4th) 201.
31 At [162], citing *R v Nur*, above n 25, at [85]-[86].
32 At [163].
33 At [164].

before an independent and impartial court with the discretionary decision of a Crown prosecutor".[34] A system relying on the prosecutorial discretion rather than judicial sentencing discretion would give rise to a perception of imbalance that "may undermine [the public's] confidence in the administration of justice."[35]

31. The Canadian Supreme Court's observations are apt in the present context. The appellant's argument that the prosecutor did have, or should have, exercised control over the court's sentencing jurisdiction by way of charging choice cuts across the fundamental constitutional division of responsibilities between the prosecutor and judge. As the Court of Appeal recognised, this approach is contrary to the "constitutional architecture" of New Zealand.[36]

The prosecutor's NZBORA duties

32. The Court of Appeal identified the same conceptual problems with the appellant's argument there was a duty on the prosecutor to avoid the indecent assault charge. Properly considered, it was a duty expressing the following requirements:

    32.1 "the prosecutor was obliged by Bill of Rights Act considerations to prevent Mr Fitzgerald having to run the risk of the sentence that Parliament said should be imposed in fact being imposed"; or

    32.2 "the prosecutor [was required] to avoid putting a judge in the position of having to impose the sentence that Parliament had required"; or

    32.3 "the prosecutor would be obliged not to prosecute the offending as an indecent assault so as to avoid the sentence that Parliament had stipulated should be imposed for offending of this kind."[37]

33. The Court of Appeal rightly found[38]

> [n]one of these propositions are appropriate in terms of the architecture of the constitution, the respective roles of the legislature

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34 At [165], citing *Nur*, above n 25, at [86].

35 Ibid.

36 *AG v Fitzgerald (CA)* at [120].

37 At [120].

38 Ibid.

(which enacted the three strikes regime), the executive (the prosecutor) and the judiciary (the sentencer).

34. The argument the prosecutor had a duty to avoid the otherwise-correct indecent assault charge[39] in this case is an argument that the prosecutor should not have put the charge before the court, based on the prosecutor's assessment of how the court might interpret and apply the law.[40] This amounts to a system in which the prosecutor has a "duty" to effectively foreclose or pre-empt the court's constitutional role. It also affords the prosecutor a "dispensing power or duty" to avoid what it perceived as Parliament's intent.[41]

35. If Parliament had intended, and the law required, that sentencing outcomes breach s 9 (a position this Court rejected), responsibility would lie with Parliament. This is the effect of s 4 of NZBORA. If on the other hand that outcome was not intended or required, it was for the courts to so interpret and apply the law—as is exactly what this Court did, applying s 6. It is not for the Crown Solicitor to exercise their charging discretion in order to circumvent the role of the two other branches of government. Prosecutors, like judges, are obliged to apply the law as it stands at the time. Discretion is not exercised properly or legally, if it is exercised to avoid the operation of relevant law.[42]

The three strikes regime did not "invert" the constitutional order

36. The appellant bases his argument about the "inversion" of the constitutional order on the memorandum of understanding between Crown and Police which directed the Crown to peer review any third strike charges before a defendant's second appearance ("**MOU**"). This is said to have vested

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39 The elements of other offences in ss 125 and 126 Crimes Act do not reflect the facts and culpability. Those offences do not involve "assault". The essence of the offending here was unwanted touching (physically grabbing the complainant and struggling to plant a kiss on her lips and then planting it on her cheek). "[B]oth sections [125 and 126] are primarily directed towards exhibitionism, as understood broadly, or display by a person to someone else": *Rowe v R* [2018] NZSC 55 at [32]. This was not a public *display* of indecent behaviour, such that it might be adequately captured by an indecent act charge; it was an assault in circumstances that robust members of the community would think indecent having regard to contemporary norms. Note also s 126 has an additional and specific mens rea element.

40 The proposition is also contrary to the fundamental obligation of prosecutors to ensure the proposed charge reflects the essential criminality of the conduct as disclosed by the facts: Prosecution Guidelines 2013 paras [8.1] and [18.6.1].

41 *AG v Fitzgerald (CA)* at [123].

42 *Morgan v R* [2022] NZCA 112.

responsibility for sentencing outcomes in the prosecutor through their choice of charge.[43]

37. This proposition is squarely at odds with this Court's conclusion that the courts did retain a discretion to sentence according to ordinary principles where application of s 86D of the Sentencing Act would breach s 9 of NZBORA. Winkelmann CJ described this as giving effect to the (ordinary) constitutional framework of New Zealand:[44]

> …the direction given by Parliament is to the judicial branch of government, and instructs judges how they must sentence. Sentencing for criminal offences is the constitutional role of the third branch of government – the judicial branch. Although, in New Zealand, Parliament is responsible for enacting laws of general application, including the Crimes Act and the Sentencing Act, it is the courts that are responsible for deciding the application of that legislation in the individual case.

38. This Court's discussion and conclusions on the legislative history does not support the appellant's argument either. In *Fitzgerald (SC criminal appeal)* this Court observed the legislative history reflected an intent to avoid disproportionately severe sentencing outcomes, which were possible because of the breadth of the regime. The response to this was "putting in place … administrative arrangements to ensure a screening by the Crown Solicitors of prosecutions in respect of strike offences."[45]

39. The Court had "distinct reservations as to whether this was a sensible and principled way of addressing concerns about inappropriately harsh outcomes."[46] "Rule of law considerations suggest that such concerns should have been addressed within the legislation rather than left to ad hoc administrative arrangements."[47] Glazebrook J described the administrative process as having "failed in this case".[48]

40. The Court of Appeal considered this Court's remarks about the failings of the administrative process as what[49]

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43 Appellant's submissions dated 17 February 2025 at [16] and [44].

44 *Fitzgerald (SC criminal appeal)* at [117], per Winkelmann CJ.

45 *Fitzgerald (SC criminal appeal)* at [326] per William Young J.

46 At [326] per William Young J; endorsed by Winkelmann CJ at [127], fn 174 and Glazebrook J at [248], fn 355.

47 At [326], fn 411.

48 At [248], fn 355.

49 *Fitzgerald v AG (CA)* at [129].

> led to the conclusion that the way to avoid injustice was through the application of s 9 of the Bill of Rights Act by the state actor responsible for the imposition of the penalty, namely the sentencing Judge. That would have led to a result according with both justice and constitutional principle.

41. Had Parliament intended to "fundamentally invert[] the normal constitutional division of roles between court and prosecutor",[50] it might have been expected such a seismic constitutional shift would have been explicitly spelled out in the legislation itself:[51]

> Whatever … was said about prosecutorial discretion in Parliament, nothing in the legislation endorsed such an approach. And the assurance under which the legislators apparently operated that prosecutorial discretion would limit the impact of the legislation was not reflected in anything provided the Guidelines or Memorandum. If the acceptability of penal provisions is to depend on omission from their coverage of categories of defendants, the legislation should provide for that, or at the very least secondary rules should be put in place whose substantive content gives assurance that result will be achieved.

42. The appellant's characterisation of the prosecutor's role rests on the assumption the three strikes law gave judges no discretion, even where s 9 would otherwise be breached. This Court clarified that was not the proper interpretation of s 86D(2). What this means is that the prosecutor—as well as defence counsel, the sentencing judge and the Court of Appeal hearing Mr Fitzgerald's conviction and sentence appeal—held a mistaken view of the law. It is therefore unreal to maintain, as the appellant does, that the Crown was "actually" responsible for the sentence because the sentencing court's hands were tied. The reality is that they were not. Even before this Court's decision, the option to stay the prosecution as disproportionately severe, an abuse of the Court's process, was always there.

43. The respondent does not suggest the prosecutor was a passive player in the criminal prosecution. But it is one thing to acknowledge the Crown Solicitor proceeded with a charge it (wrongly) understood to carry mandatory sentencing consequences, and quite another to find the prosecutor responsible for Mr Fitzgerald's conviction, following a fair trial and founded

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50 Appellant's submissions dated 17 February 2025 at [16].

51 *Fitzgerald v AG (CA)* at [123]. Indeed, according to the principle of legality, express words would be positively required to signal such a radical departure from constitutional norms.

on proper evidence, and with sentence imposed by an independent judge.

Novel concept of "state" does not displace separation of powers

44. A core premise of the appellant's argument for liability is the idea that *Baigent* damages are damages against "the state", involving "state liability". An apparent aim of this argument is to de-emphasise or sidestep the separation of powers between different constitutional actors, and principles of legal responsibility (as well as to ground a case for overruling *Chapman*).[52]

45. However, in New Zealand constitutional law there is no juridical entity known as "the state". Absence of such concept is a defining feature of the common law tradition, that sets it apart from civilian systems such as France,[53] whose *droit public* is premised on a conception of state, which is a defining feature of the French system – and sustains a longstanding field of state liability (*responsabilité de l'administration*).[54] Some common law systems have adopted a conception of state or an analogous concept to represent the body politic. But that has been done via a written constitution which systematises the new juridical entity through the legal system. Consider "the Commonwealth" as a juridical entity within the Australian system, that owes rights and obligations and can be a party in litigation.

46. Importantly, even in common law systems that do have something approximating a concept of state, that does not supplant or involve departure from the constitutional separation of powers or displace issues of attribution: the Australian Constitution adopts a clear separation of powers, and there is no such thing as "state liability" of the Commonwealth.[55]

47. Where New Zealand judges have relied on the concept of "state liability" in the context of *Baigent* damages it would be surprising if they were intending to create a new juridical entity and thereby effect radical constitutional recalibration. Rather that phrase is shorthand for the simple proposition that

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52 Appellant submissions dated 17 February 2025 at [30]-[31].

53 JWF Allison *A Continental Distinction in the Common Law* (Oxford University Press, Oxford, 2000) at chs 5-6; J McLean *Searching for the State in British Legal Thought* (Cambridge University Press, Cambridge, 2012); JNE Varuhas *Damages and Human Rights* (Hart Publishing, London, 2016) at 171-179; AL Young *Turpin and Tomkins' British Government and the Constitution* (Cambridge University Press, Cambridge, 2021) at 13-14.

54 J Bell and F Lichère *Contemporary French Administrative Law* (Cambridge University Press, Cambridge, 2022) at ch 8.

55 Albeit in France there is a distinctive conception of the separation between executive and judicial branches specifically, which does *not* involve the same emphasis on judicial independence familiar in common law systems: *Continental Distinction*, above n 53, at ch 7.

Bill of Rights liability is not vicarious, but direct liability of *the Crown*.

48. NZBORA itself does not adopt a monolithic concept of state. Rather, s 3 states that the legislature, judiciary and executive are bound as discrete actors, retaining the orthodox separation of powers, also reflected in the Constitution Act 1986. Putting to the side s 3(b) actors, as there is no *Baigent* damages liability for legislative or judicial breach, what "state liability" means is liability of *the Crown*, which denotes *executive government*, and it is best to refer to these recognised concepts to avoid confusion and legal error.[56] The Attorney-General defends *Baigent* claims, as she is *the Crown's* Senior Law Officer. The Crown is a concept recognised in NZBORA, in s 27(3).

49. NZBORA breaches are committed by specific constitutional actors. It is important to recognise this to avoid transgression of the separation of powers, as this case starkly illustrates. It is critical to full understanding of specific breaches to identify the specific actor and the nature of their acts, while different remedies and remedial principles apply depending on the constitutional actor. Rights-breaches do not occur in the ether. The appellant's own argument demonstrates the inevitability of notions of legal responsibility in any liability system, given his submissions set out a sustained account of why he says the prosecutor is responsible. This also demonstrates why an undifferentiated concept of state is a red herring here, because there is no impediment to analysing the responsibility of specific constitutional actors.

50. In international law "the state" features prominently, including to ground international law concepts of state responsibility.[57] But the state as the basic unit of international law is distinct from the question of whether municipal law knows a juridical entity known as "the state". To adopt such novelty would raise myriad issues including: What is the state? Can it initiate legal proceedings? Would prosecutions be brought by the state or the Crown? Could the state be sued directly in tort? Does the state owe obligations

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[56] This is how the Crown is, for example, understood in s 6 of the Treaty of Waitangi Act 1975. Compare *Attorney-General v Chapman*, above n 3, at [14], [79]-[92], and [205].

[57] And state liability: eg *Brasserie du Pêcheur SA v Germany* [1996] QB 404 (ECJ).

under Te Tiriti o Waitangi? What is the relation between state and Crown?[58]

The Court of Appeal's approach to judicial review principles and the Prosecution Guidelines

51. Contrary to the appellant's claim the Court of Appeal was "led astray" by taking account of judicial review principles, the Court was clear "Mr Fitzgerald's case is not an application for review of the prosecutor's decision to prosecute".[59] But the Court considered it was[60]

> …essentially being asked, after the trial has been concluded, to adopt a supervisory role in relation to the charge selected and to hold that the charging decision should result in a damages award for breach of the Bill of Rights Act.

52. The appellant's argument (accepted by Ellis J) was that NZBORA established a duty that overrode all other considerations in the Prosecution Guidelines. To understand the far-reaching implications of the argument, the Court of Appeal properly took account of both the principles guiding its typical supervisory role over the exercise of prosecutorial discretion, as well as the content of the Prosecution Guidelines, as these provide insights into the constitutional role of the prosecutor, the nature of prosecutorial discretion and distinct roles of courts and prosecutors. This was "*important context* […] explaining the courts' reluctance to interfere with the exercise of prosecutorial discretion and the reasons for it."[61] This included the importance of "observing constitutional boundaries, including the Executive's role in deciding whether to prosecute, and the Court's role in ensuring the proper and fair conduct of trials".[62]

53. The Court went on to illustrate, through its own thorough analysis of the Prosecution Guidelines as against Mr Fitzgerald's circumstances and offending, that the indecent assault charge met both the evidential sufficiency and public interest tests.[63] Having regard to the terms of the

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58 These are deep waters. See: William Wade "The Crown, Ministers and Officials: Legal Status and Liability" in Maurice Sunkin and Sebastian Payne (eds) *The Nature of the Crown: A Legal and Political Analysis* (Oxford University Press, 1999) 23 and Martin Loughlin "The State, the Crown and the Law" in Maurice Sunkin and Sebastian Payne (eds) *The Nature of the Crown* (Oxford University Press, 1999) 23; *Administrative Redress*, Law Com No 322 (2010).

59 *AG v Fitzgerald (CA)* at [99].

60 At [101].

61 At [90] (emphasis added).

62 At [92], citing *Osborne v Worksafe New Zealand*, above n 17, at [34(a)].

63 At [103]-[116].

MOU, the Court also considered it added little to what the Prosecution Guidelines already required, and if it was "intended to assume an important role, it is most unfortunate that it did not specify the purpose of the referral to the Crown Solicitor".[64]

54. It was through this analysis that the Court unpicked the appellant's argument that a Bill of Rights "duty" to avoid charges was either part of, or even consistent with, the Prosecution Guidelines. Instead, the argument purported to displace the Prosecution Guidelines entirely, appearing to[65]

> …direct[ly] conflict with the need to make prosecution decisions in accordance with the criteria set out in the Guidelines in accordance with the approach endorsed by the Supreme Corut in *Osborne*.

55. The Court had no difficulty with accepting that "Bill of Rights Act considerations should inform consideration of the public interest test in commencing a prosecution".[66] But the proposition that NZBORA considerations required a prosecutor to avoid an otherwise-appropriate charge because of a sentencing consequence determined by Parliament was "very problematic".[67] The Court explored why through its enunciation of how the requirement might be expressed, as set out at [32] above.[68] These propositions impermissibly blurred the division of responsibilities between the legislature, the executive and the judiciary, and were in any event unnecessary given *Fitzgerald (SC criminal appeal)*.[69]

The status of the Prosecution Guidelines

56. The Guidelines set unifying standards and principles for the conduct of public prosecutions.[70] In the High Court Ellis J described the Guidelines as having "statutory heft", and as "directions" from the Solicitor-General under s 188 of the Criminal Procedure Act 2011 ("**CPA**").[71] In this Court the

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64 At [118].

65 At [119].

66 Ibid.

67 Ibid.

68 At [120]: "it could be said that in a case such as the present, the prosecutor was obliged by Bill of Rights considerations to prevent Mr Fitzgerald having to run the risk of the sentence that Parliament said should be imposed in fact being imposed. Or, the rule could be expressed as one that required the prosecutor to avoid putting a judge in the position of having to impose the sentence that Parliament had required. Another possibility would be to state that the prosecutor would be obliged not to prosecute the offending as an indecent assault so as to avoid the sentence that Parliament had stipulated should be imposed for offending of this kind."

69 Ibid.

70 *Osborne v Worksafe New Zealand* [2017] NZSC 175, [2018] 1 NZLR 447 at [73].

71 *Attorney-General v Fitzgerald* [2022] NZHC 2465, [2023] 2 NZLR 214 ["***AG v Fitzgerald (HC)***"] at [94].

appellant maintains both ss 185 and 188 of the CPA reflect a "statutory duty" for a prosecutor to conduct a prosecution consistently with the Prosecution Guidelines.[72] The Court of Appeal considered it "probably right" that the Prosecution Guidelines are not directions under s 188 (which provides a specific statutory obligation to comply).[73] But nothing turned on the issue, given the material point for the Court's purpose was the Law Officers' expectation that prosecutions would be conducted in accordance with the Prosecution Guidelines.[74]

57. The appellant's case hinges on breach of NZBORA duties rather than compliance with the Prosecution Guidelines. The respondent does not contest there is a strong expectation on prosecutors to apply the Prosecution Guidelines, but this does not create a statutory obligation to make a particular decision. The Prosecution Guidelines do not have the force of law,[75] and the drafting approach[76] recognises that the content of a prosecutor's decision under the public interest test is highly judgement-based.[77]

The Crown Solicitor's actions in this case

58. Although the appellant now appears to claim the Prosecution Guidelines supported a lesser charge (indecent act), this case is not about the merits of the charge, which has withstood an application to amend the charge at trial,[78] a first conviction appeal, and which the Court of Appeal in the judgment below found entirely justified on its own assessment of the Prosecution Guidelines.[79] This Court itself dismissed Mr Fitzgerald's conviction appeal, and dealt with the matter purely in terms of sentencing.

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72 Appellant's submissions dated 17 February 2025 at [27].

73 *AG v Fitzgerald (CA)* at [43].

74 Ibid.

75 Prosecution Guidelines at [2.3].

76 The public interest test sets out an illustrative, unweighted, non-exhaustive list of factors that "may" be relevant: Prosecution Guidelines at [5.8].

77 For a comparable description of another jurisdiction's equivalent of the Prosecution Guidelines, see *Director of Public Prosecutions v Durham* [2024] UKPC 21 at [42]: "The DPP is responsible for the provision of a Code for Prosecutors in Trinidad and Tobago (March 2012 version) ("the Code"). The Code is not an instruction manual, nor does it purport to lay down any rule of law. But it is the expectation that all prosecutions in Trinidad and Tobago will be conducted in accordance with the guidelines outlined in the Code."

78 Defence counsel in his closing address invited the Court to exercise its power under "s 133" and find Mr Fitzgerald guilty of a lesser offence, on the basis the kiss that occurred was not indecent. Justice Simon France found the facts established indecency, such that Mr Fitzgerald's conduct was an indecent assault: verdict of Simon France J at [22]-[25].

79 *AG v Fitzgerald (CA)* at [112] and [115].

59. Nor is it correct to say, either on the evidence of this case or as a matter of principle, that the Crown Solicitor "sought to achieve" the maximum penalty through charging choice—a charge that best suited the evidence. This proposition mischaracterises the prosecutor's role, which is not to secure a conviction, but rather a duty to act as a minister of justice.[80]

60. The appellant's argument that NZBORA liability can attach to the prosecutor for her advocacy is a novel and fundamentally erroneous proposition. The prosecutor's role as advocate is important in New Zealand's constitutional arrangements, providing the court in an adversarial context with an informed and responsibly-voiced position to assist it in its interpretation and adjudication role. But, deciding what to do with the charge lay in the Court's hands, and the Crown's position on what s 86D required at sentence was a *submission* on the application of the law. Both matters are quintessentially for the court to determine[81]—as this Court's criminal appeal judgment reflects.

61. As a matter of evidence, is it not correct the prosecutor "sought" an "egregious" sentence despite being "on notice" of its character. That suggestion is unfair. It also runs contrary to Ellis J's finding that the prosecutor did *not* act with malice or bad faith.

62. The peer review was conducted at the very early stage of a Police (not Crown) prosecution. Typically, little is known about the circumstances of a defendant at this stage.[82] The information available to the prosecutor is more likely to be relevant to evidential sufficiency than the public interest.[83]

63. Subsequently, the matter became a Crown prosecution at which point the Crown Solicitor assumed responsibility for the particular charging decision

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80 *Director of Public Prosecutions v Durham*, above n 77, at [41]. See also *Randall v The Queen* [2002] UKPC 19; [2002] 1 WLR 2237 at [10(i)], citing *R v Puddick* (1865) 4 F & F 497 at 499; *R v Banks* [1916] 2 KB 621, 623 and *Boucher v The Queen* (1954) 110 Can CC 263, 270 (per Rand J).

81 See *AB v Attorney-General* [2018] NZHC 1096 at [104], where the High Court accepted a prosecutor could not be responsible for a judge's decision to detain a witness in contempt of court, merely for having supported it: "At most the Judge accepts or agrees with the prosecutor's submission, but the breach if there is one is caused solely by the judicial act".

82 *R v Nur*, above n 25, at [97].

83 In this case, particular factors such as Mr Fitzgerald's mental health did not appear to come to the fore until shortly before his first trial date, when his mental health deteriorated and the trial was vacated. Mr Fitzgerald's mental health was not a feature of the resolution discussions between the Crown prosecutor and defence; if anything they were more focused on evidential sufficiency.

(Crown Charge Notice) and had the duty to keep the public interest under review. The facts are that the prosecutor did not consider sentencing outcomes in her initial assessment of the public interest test.[84] But the subsequent Court record shows the Crown Solicitor did not ignore the risk of a disproportionately severe sentence.

64. Less than three months later, at the time of Mr Fitzgerald's sentence indication, the Crown addressed s 9 and sought to ensure NZBORA consistency.[85] The Crown filed submissions drawing the Court's attention to recent case law and invited the High Court to apply the Court of Appeal's approach in *R v Harrison*.[86] The three strikes regime mandated a sentence of life imprisonment without parole unless that would be manifestly unjust. The Full Court of Appeal in *Harrison* considered the manifest injustice exception was intended by Parliament to recognise the breadth of offending captured by the regime could include those whose relatively low culpability or risk of violent reoffending fell outside the purpose of the regime. The Court held "the inclusion of an exception for manifest injustice requires that it be given an interpretation that makes the legislation work consistently with the Bill of Rights Act."[87]

65. The Crown's position at the sentence indication—and thereafter until and including in the Court of Appeal—was that the manifest injustice exception to the general rule against parole at the third strike stage (s 86D(3)) served the purpose of avoiding s 9 inconsistency. Indeed, this was the approach adopted in another indecent assault third strike case cited by the Crown, *R v Campbell*.[88] The Crown's submission in light of these cases was:[89]

> …that having regard to all of the factors identified, in particular the nature of the defendant's present and previous offending and his mental health difficulties, it would be manifestly unjust to make an order that the defendant serve the full sentence without parole.

66. As the Crown conceded in this Court on Mr Fitzgerald's criminal appeal, that

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84 Affidavit of Philippa Kate Feltham at [22].

85 See at [24] and [25] Crown sentence indication submissions dated 8 September 2017.

86 *R v Harrison* [2016] NZCA 381, [2016] 3 NZLR 602.

87 At [106].

88 *R v Campbell* [2016] NZHC 2817 at [21], cited in the Crown sentence indication submissions at [27].

89 Crown sentencing submissions at [33].

position was wrong. But it was an argument drawn from judicial authority and made in good faith. It is not the case that the prosecutor either wholly failed to consider s 9, or actively pursued a s 9-inconsistent sentence.

67. The Crown's argument in this Court was s 86D(2) could not be read consistently with NZBORA (so that the mandatory maximum penalty did apply). This was an argument founded on s 4 of NZBORA (a position with which William Young J agreed). Again, this was an argument advanced in good faith based on an available interpretation of parliamentary intent, and in the Crown's role to provide responsible submissions to assist the Court.

The period of time Mr Fitzgerald served his sentence and the prosecutor's role

68. Mr Fitzgerald's original seven-year sentence was disproportionately severe and itself a breach of s 9. That breach was vindicated through his appeal to this Court. Mr Fitzgerald argues that process did not vindicate the breach of his s 9 right reflected in the amount of time he actually served before his appeal was allowed and he was resentenced.

69. To understand why Mr Fitzgerald spent so long in custody, it is necessary to reconsider the procedural background of his case. Ellis J records that Mr Fitzgerald was not granted bail upon arrest because he lacked suitable housing arrangements.[90] The Crown Solicitor was not involved in the bail application, and a District Court Judge remanded him. The record is not clear on whether any bail applications were made or determined at any later stage of proceedings, including and up to his appeal to this Court.

70. Mr Fitzgerald's first trial date[91] was vacated to explore his fitness to stand trial in light of his deteriorating mental health. These were necessary processes, initiated (presumably) by Mr Fitzgerald and in his interests. This process took five months to complete. Mr Fitzgerald's trial was then scheduled for 19 March 2018, three months after the resolution of CPMIPA matters. Following his trial a further CPMIPA report was prepared and he was sentenced in May 2018.

71. Assessed in isolation, these were not significant systemic delays to the

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90 *Fitzgerald v AG* [2022] NZHC 2465 at [21].

91 This was scheduled for 13 July 2017, just over seven months after Mr Fitzgerald's arrest.

progress of Mr Fitzgerald's proceeding. The greater period of time was the nearly-three-and-a-half years between Mr Fitzgerald's sentencing and the determination of his appeal through the Court of Appeal and this Court.

72. These circumstances were not foreseeable to the Crown Solicitor—whose decisions are made in the context of inbuilt procedural safeguards such as bail, parole and appeal rights—from the outset of the prosecution, and the appellant has not advanced an argument suggesting the prosecutor was directly responsible for them. Even on the appellant's case it is difficult to understand how the filing of a charge, or submission on sentence, can be said to contribute to the time Mr Fitzgerald's matter took to progress through conviction and appeal, and therefore the time for which he was actually detained (despite being eligible for parole after 28 months).

73. The complexity of factors in Mr Fitzgerald's case bears some resemblance to the facts of *Chapman*. Mr Chapman's rights under ss 25(h) and 27(1) NZBORA were breached and he spent three years in prison before his conviction was quashed. The Crown decided not to pursue a retrial. McGrath and William Young JJ referred to "the imponderable issues which litigation of this kind gives rise to" by attracting speculation as to what might have happened if things had been done differently at earlier stages of the proceedings.[92] These "imponderables" were not capable of resolution in a public law claim.

74. In this case, the speculation includes what might have been done differently so that Mr Fitzgerald could have sought or obtained bail or parole pending the outcome of his proceedings. As already observed, there is no answer on the record about why no bail application was advanced, even when the argument during the appeal phase became that Mr Fitzgerald's sentence breached s 9. It suffices to say there were multiple complex factors at play throughout the proceeding, ranging from the public safety concerns Mr Fitzgerald's offending posed, his mental health and the prevailing

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92 *Chapman*, above n 3, at [102]: "If Mr Chapman's appeal had been heard properly the first time around, would he or the Court have picked up the point upon which the case was ultimately resolved in his favour in November 2003? If this point had been picked up and the appeal allowed, would there have been a retrial? Obviously the sooner a retrial was directed, the more likely it would have been to proceed. And if there had been a retrial what would the verdicts have been?". In regard to attributing responsibility for delay, see for example: *Jordan v PSNI* [2019] NICA 61 at [26]-[30] and *Re McEvoy's Application for Leave to Apply for Judicial Review* [2023] NICA 66 at [23]-[33].

understanding of the three strikes regime at that time. It is not plausible to say the prosecutor bears responsibility for these disparate forces and processes which combined to produce the result that Mr Fitzgerald spent as long as he did in custody.

Determining Legal Responsibility: Causation

75. The constitutional argument is dispositive. However, as Miller J found, the conclusion that the prosecutor cannot be legally responsible for the consequences of a judicially-imposed sentence is reinforced by application of orthodox causal principles: the judicial act of sentencing was the "effective cause" of Mr Fitzgerald's detention.[93]

76. Cooper P and Brown J did not expressly rely on causation. However their analysis is consistent with Miller J's analysis, as reflected in their conclusion: "it is axiomatic that a sentence is not the result of the prosecutor's action".[94]

77. Causal principles are the law's mechanism for attributing legal responsibility. Causation is a feature of all fields of liability including tort, contract, equitable compensation and forms of statutory liability, and causal principles are also present in public law.[95] Human rights damages liability is no exception, as courts recognise, in New Zealand and abroad.[96]

78. It is axiomatic that causal principles fall into two categories: (i) factual and (ii) legal causation.[97] Both must be satisfied for a respondent to be held responsible for a consequence suffered by a plaintiff. Causation is judged prospectively, from the defendant's perspective, without hindsight.

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93 *AG v Fitzgerald* (CA) at [155].

94 *AG v Fitzgerald* (CA) at [85].

95 E Rock *Causation in Public Law* (2023) 30 Australian Journal of Administrative Law 56.

96 *Chapman*, above n 3, at [1], [40] and [52]; *Thompson v Attorney-General* [2016] NZCA 215, [2016] 3 NZLR 206 at [75]-[78]; *Putua v Attorney-General* [2024] NZCA 67, 2 NZLR 420 at [79]-[92] ("orthodox causation principles" apply); *Kingsley v United Kingdom* (2002) 35 EHRR 177 at [43]; *R (Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14 at [11]; *R (Faulkner) v Secretary of State for Justice* [2013] UKSC 23 at [7], [20]-[21], [67]; *Alseran v Minister of Defence* [2019] QB 1251 at [958], [969], [979], [981]. *Henry v British Columbia (Attorney General)* 2015 SCC 24, [2015] 2 SCR 214 at [95]-[98]; *Carey v Piphus* 435 US 247, 259, 263-264 (1978); *Memphis Community School District v Stachura* 477 US 299, 306-307 (1986).

97 Stephen Todd, Cynthia Hawes, Ursula Cheer, Bill Atkin *Todd on Torts* (9th ed, Thomson Reuters, Wellington, 2023) at ch 19; Michael Jones, Anthony Dugdale, Jeff Kenny *Clerk & Lindsell on Torts* (24th ed, Thomson Reuters, United Kingdom, 2024) at ch 2; Jane Stapleton, "Cause in Fact and the Scope of Liability for Consequences" (2003) 119 LQR 388; Justice Stevens, "The Role of Causation in Claims for Damages" in *Current Issues in Remedies* (NZLS 2010); Andrew Barker QC, "Remoteness of Damages" in *Torts Update* (NZLS 2019) 19*; Manchester Building Society v Grant Thornton UK LLP* [2021] UKSC 20 at [6]; *Khan v Meadows* [2021] UKSC 21 at [79]; *Strong v Woolworths Ltd* [2012] HCA 5 at [19].

Factual causation

79. Factual causation is concerned with the defendant's role in bringing about a given consequence, as a matter of fact. The usual test is the "but for" test. This is accepted as the relevant test at common law in regard to fundamental rights,[98] and in the law of human rights damages.[99]

80. The test is not satisfied on the present facts. On the balance of probabilities, it was inevitable that the prosecutor would lay the charge that she did:

80.1 it was the correct charge;

80.2 the prosecutor could not have sought to actively subvert the three-strikes legislation, a valid Act of Parliament, as it was then understood; and

80.3 questions around s 9 could not have caused the prosecutor to change course from bringing the correct charge – given the then-received understanding of the three-strikes scheme, including that *Harrison* indicated the manifest injustice rider rendered the scheme consistent with s 9.

81. The appellant appears to suggest the "material contribution" test governs cases of multiple causes. That is wrong. Every event is the product of multiple causes – and "but for" applies. Application of material contribution in place of "but for" is "exceptional" and a "radical step",[100] confined to narrow circumstances, namely cases of causal overdetermination, scientific uncertainty,[101] or fraud.[102] This is not such a case.

Legal causation

82. Even if factual causation is established, that is insufficient to attribute responsibility, as legal causation must also be satisfied. However, the cause-

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98 For example in relation to the right to liberty: *Lewis v ACT* [2020] HCA 26; *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245.

99 See, for example: *Matara v Attorney-General* [2023] NZHC 2888 at [14], [20]; *Henry v British Columbia (Attorney General)*, above n 96, at [95]-[98]; J Edelman, A Higgins and JNE Varuhas *McGregor on Damages* (22nd ed, Thomson Reuters, Wellington, 2024) at [51-162]-[51]-[169] (for examples of "but for" in respect of damages under the Human Rights Act 1998).

100 *Clements v Clements* 2012 SCC 32 at [13], [16]-[17], [23], [33], [46]; *Strong v Woolworths*, above n 97, at [17]-[30]; *Adeels Palace Pty Ltd v Moubarak* [2009] HCA 48 at [54]-[57]; *Lewis v ACT*, above n 98, [152]; *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32 at [40].

101 *Fairchild*, above n 100; *Bonnington Castings Ltd v Wardlaw* [1956] AC 613.

102 *Lewis v ACT*, above n 98, at [152]; *Gould v Vaggelas* (1984) 157 CLR 215 at 236, 250-251.

in-law of Mr Fitzgerald's grossly disproportionate sentence was the judicial act of sentencing, not the prosecutorial act of laying a charge. Application of principles of legal causation leads to that conclusion:

82.1 The "direct and immediate"[103] cause of Mr Fitzgerald's grossly disproportionate sentence was the judicial act of sentencing: "[d]irect cause excludes what is indirect".[104] Indeed, the judge was the only person with legal and constitutional capacity to effect a violation of s 9, as only he could impose a sentence. It is trite law that liability cannot attach to the prosecutor for doing something which merely provided the occasion for another's wrong,[105] thus the distinction between *causa causans* and *causa sine qua non*.[106]

82.2 The judicial act of sentencing is a *novus actus interveniens* that breaks any causal chain between the prosecutor's laying of the charge and Mr Fitzgerald's detention. Authority is clear that an independent decision-making process breaks the causal chain; that is, "a different and separate process".[107] A judicial process is the ultimate example of an independent process, and is well-recognised as an intervening cause.[108] It was the judge who had control over the imposition of the sentence, and he was in no sense an agent of, or under the power of, or acting in collaboration with, the prosecutor.[109] The judge is "no mere conduit pipe through which consequences flow from A. to C.".[110] That the sentence imposed was rights-breaching only reinforces that the judicial act

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103 *Weld-Blundell v Stephens* [1920] AC 956 at 982; *Iqbal v POA* [2010] QB 732 at [24]-[27], [79]; *Leame v Bray* (1803) 3 East 593; *Reynolds v Clarke* (1725) 93 ER 747. Under the UK Human Rights Act 1998 "directness" has featured as an indicator of legal causation in respect of damages: *McGregor on Damages*, above n 99, at [51]-[176]. And see *Thompson v Attorney-General*, above n 96, at [76].

104 *Weld-Blundell v Stephens*, above n 103, at, 983.

105 *Gray v Thames Trains Ltd* [2009] 3 WLR 167 at [54].

106 *Weld-Blundell*, above n 103, at 998.

107 *Harnett v Bond* [1925] AC 669, 682, 686-687, 689; *NSW v Cuthbertson* [2018] NSWCA 320 at [46]; *Weld-Blundell,* above 103*; Davidson v Chief Constable of North Wales* [1994] 2 All ER 597; *Iqbal v POA,* above n 103 at [79].

108 *Chapman*, above n 3, at [208]; *Caie v Attorney-General* [2005] NZAR 703 at [141]; *Lock v Ashton* (1848) 12 QB 872; *Harnett v Bond* [1924] 2 KB 517, 565; *Diamond v Minter* [1941] 1 All ER 391, 397-398, 404; *Cuthbertson*, above n 107, at [133]-[134]; *Carlisle v Chief Constable, Royal Ulster Constabulary* [1988] NI 307; *Henry v British Columbia (Attorney General)*, above n 96, at [90]; *McGregor on Damages*, above n 99, at [43-028] ("A court of justice … cannot be the agent of the defendant since it acts in the exercise of its own independent judicial discretion, and thus by acting introduces a new cause which relieves the defendant of liability for further damage").

109 *Harnett v Bond,* above n 107, at 682, 686-687, 689; *Weld-Blundell,* above n 103, at 976, 986-987.

110 *Weld-Blundell,* above n 103, at 986.

was a *novus actus*. Another way to put this point is in terms of "scope of liability": the prosecutor, when laying a charge, does not assume responsibility for risks that may materialise from independent judicial acts, which are beyond prosecutorial control, including the risk of a judge getting the law wrong.[111] The point is only reinforced by the fact that the Court of Appeal upheld the sentence – the prosecutor cannot plausibly be said to be legally responsible for a sentence and then an appellate decision upholding that sentence, any more than the prosecutor is legally responsible for the Supreme Court ultimately quashing the sentence.

82.3 As Miller J recognised, Mr Fitzgerald's time in custody was due to multiple decision-making processes and factors outside the prosecutor's control, such as Covid-19 delays in the appellate system, the failure to get parole, and the process for determining Mr Fitzgerald's fitness to stand.[112] These were either further intervening acts beyond the prosecutor's control or render the consequences suffered by Mr Fitzgerald too remote from, or insufficiently proximate to, the prosecutor's laying of a charge.[113]

82.4 The consequences suffered by Mr Fitzgerald are too remote: at the time of laying the charge, it was not reasonably foreseeable that Mr Fitzgerald would suffer a wrongful detention[114] given the then-prevailing understanding of the three-strikes scheme, and given the scheme was contained in a valid Act of Parliament.[115] Alternatively, it was not reasonably foreseeable that the judge and Court of Appeal would get the law wrong and impose a wrongful sentence on Mr Fitzgerald.

83. Not only did Ellis J's judgment, by holding a prosecutor responsible for a

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111 *AG v Fitzgerald (CA)* at [122].

112 At [149]-[152], [155].

113 Put another way, there is insufficient "causal nexus": *BNZ v NZ Guardian Trust Co Ltd* [1999] 1 NZLR 213 at 241.

114 The maximum sentence would be grossly disproportionate, but not *wrongful* as it was viewed as being required by a valid Act of Parliament.

115 *AG v Fitzgerald (CA)* at [154]-[155].

judicial act, involve misunderstanding of constitutional principle, it also misplaced basic causal principles. Miller J rightly identified these errors.

Prosecutorial Liability

84. The respondent does not accept the prosecutor was legally responsible for breach of Mr Fitzgerald's rights. However, this section considers what principles apply if the Court reaches a different view, addressing remedial discretion and quantum. While the Court is unlikely to reach these issues, given the constitutional and causal arguments are conclusive on settled law, the Court is encouraged to nonetheless re-state basic principles governing NZBORA damages, given the High Court mislaid those principles.

Remedial discretion

85. NZBORA damages are discretionary. As such, whether they ought to be awarded requires the weighing of factors relevant to remedial discretion.

86. This case involves s 9, a right of fundamental importance. But this is an unusual s 9 case, as any violation was without fault: the Crown Solicitor in pursuing the case as a Crown prosecution approached the exercise of discretion in good faith based on the law as then understood. That is a significant point, given insufficient consideration by Ellis J, who neglected the general law governing prosecutorial discretion. The general standard of civil liability in respect of prosecutorial discretion is malice, and that high standard coheres with the high threshold for judicial interference with prosecutorial discretion in judicial review and statutory rules governing award of costs against prosecutors.[116] These legal principles reflect persistent and pressing institutional and policy concerns which do not end where NZBORA begins.[117]

87. The Canadian Supreme Court has held malice a necessary threshold for imposing Charter liability in regard to decisions falling within the core of prosecutorial discretion, such as the decision whether to initiate a prosecution: the correct focus with discretion is whether the prosecutor was

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116 Costs in Criminal Cases Act 1967, s 7(2).

117 As the Canadian Supreme Court observed in *Henry v British Columbia,* above n 96 at [80], that Charter damages are a liability of the Crown rather than personal liability does not alter the potency of the concerns that underpin the malice threshold. The concerns are surveyed in *Henry*, and see also: *Clerk & Lindsell on Torts*, above n 97, at [15-03]-[15-04]; *Director of Public Prosecutions v Durham*, above n 77, at [60]; *Chapman*, above n 3, at [181]-[182].

motivated by improper purpose.[118] The Court distinguished discretion from disclosure cases on the basis the latter involve mandatory obligations, but even so adopted a heightened liability threshold for disclosure cases.[119]

88. In addition to good faith, other factors strongly tell against awarding damages. Mr Fitzgerald's right has been publicly vindicated by non-monetary remedies (his appeal against sentence was successful in the Supreme Court), and there is no risk of repetition – and therefore no basis in deterrence for an award[120] (the old three-strikes scheme has been repealed, and the new scheme provides protections against breach of s 9).[121] *Baigent* damages are an uncommon, subsidiary remedy.[122] They are an even more exceptional remedy than usual for breaches in the trial process, especially where there are clear grounds for laying charges, that led to conviction.[123]

89. Further, it is Parliament, which promulgated a statutory scheme that was on its face inconsistent with s 9, and the judiciary, which imposed the sentence, who bear principal responsibility for what happened to Mr Fitzgerald. It is unfair and unprincipled to pick out the prosecutor for liability because she is the only actor who can possibly be sued for damages. In the language of apportionment, the prosecutor's act is overwhelmed by the "causal potency" of the acts of Parliament and the judiciary. And one must also recall all the other factors and processes that contributed to the overall duration of Mr Fitzgerald's imprisonment.[124]

Quantum

90. Ellis J's assessment of damages was affected by fundamental error. Specifically, her Honour assessed damages according to the private law methodology in false imprisonment and adopted scales well outside the

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118 *Henry v British Columbia (Attorney General),* above n 96, at [59], [84]. See also *Currie v Clayton* [2014] NZCA 511.

119 *Henry v British Columbia (Attorney General),* above n 96, at [58]-[62], [70]-[94].

120 *Taunoa v Attorney-General,* above n 2, at [371] (no basis for award in deterrence as "cause of the breaches of rights was an institutional one, which was addressed in the course of proceedings").

121 Three Strikes Legislation Repeal Act 2022; Sentencing (Reinstating Three Strikes) Amendment Act 2024.

122 *Taunoa v Attorney-General,* above n 2, at [243], [258]; *Currie v Clayton,* above n 118, at [81]; *Combined Beneficiaries Union Inc v Auckland City COGS Committee* [2008] NZCA 423, [2009] 2 NZLR 56 at [63], [66]; *Attorney-General v Van Essen* [2015] NZCA 22 at [82].

123 *Brown v Attorney-General* [2003] 3 NZLR 335 at [118]; *Currie v Clayton,* above n 118, at [87].

124 Above at [6]-[15], [68]-[74].

accepted range of *Baigent* damages, while misplacing the basic framework of principle established by appellate courts that governs the nature and quantification of public law damages.

91. Several axiomatic propositions should be recalled:[125]

91.1 NZBORA damages do not perform the same function as private law damages.[126] The focus is vindication and deterrence, not redress.[127] *Baigent* damages should not be used to fill perceived gaps in the law,[128] noting dedicated and tightly constrained private (and public) law actions available in relation to prosecutorial acts and compensation and costs schemes for the same. If those mechanisms are unavailable as a matter of law, it is problematic for the Court to create a new and blunter route to pecuniary remedy.

91.2 NZBORA damages are modest, and scales are not to be equated with those in private law.[129] The Supreme Court has rejected the type of timescale-based formula applied by Ellis J.[130]

91.3 Reflecting the plural functions performed by NZBORA damages, courts have recognised a range of considerations can affect quantum including other relief given, whether measures have been taken to prevent repetition, whether the breach was deliberate, and wider public interest concerns such as preserving public funds and community expectations.[131]

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125 For an overview of key cases and principles see A Powell, "Remedies for Breaches of the New Zealand Bill of Rights Act 1990 – Theory and Practice" in *Human Rights Law – New Frontiers* (NZLS 2019).

126 *Taunoa v Attorney-General*, above n 2, at [243], [253], [259], [318], and [385]; *Combined Beneficiaries Union Inc v Auckland City COGS Committee*, above n 122, at [60] and [63].

127 *Taunoa v Attorney-General,* above n 2, at [249], [253], [259], [366], [369]; *Combined Beneficiaries Union Inc v Auckland City COGS Committee*, above n 122, at [62]-[63]; *Attorney-General v Van Essen*, above n 122, at [128].

128 *Combined Beneficiaries Union Inc v Auckland City COGS Committee*, above n 122, at [60].

129 *Taunoa v Attorney-General*, above n 2, at [230], [257], [258], [265], [274]; *Attorney-General v Van Essen*, above n 122, at [82]. Regard must be had to the fact that pre-*Taunoa* awards may have been on a higher scale: *Attorney-General v Van Essen*, above n 122, at [107] (see the table of pre- and post-*Taunoa* awards annexed to the judgment). The sum paid to an individual should not be inflated for systemic failure: *Taunoa* at [263].

130 *Taunoa v Attorney-General*, above n 2, at [270], [386]; *Chief Executive of the Department of Corrections v Gardiner* [2017] NZCA 608 at [63].

131 *Taunoa v Attorney-General*, above n 2, at [247], [254], [262]; *Combined Beneficiaries Union Inc v Auckland City COGS Committee*, above n 122, at [64]-[65], [79], [83]; *X v Chief Executive of Oranga Tamariki* [2022] NZCA 622 at [101]; *Pere v Attorney-General* [2022] 2 NZLR 725 at [55].

92. Two comparators demonstrate how far outside the accepted range Ellis J's award of $450,000 was.

93. First, in *Taunoa* Mr Taunoa was awarded the highest award of $35,000 (approximately $50,000 adjusted for inflation)[132] for 32 months on the BMR regime. While a majority of the Supreme Court held Mr Taunoa did not suffer breach of s 9, minority judges held he did, and majority judges considered his treatment came close to breach of s 9.[133] By comparison, the proportion of Mr Fitzgerald's sentence that was grossly disproportionate was longer, 44 months. However, Mr Taunoa's conditions of confinement were far worse, given the draconian nature of BMR, so the award in the present case should properly be on a lower scale. But even if one simply adjusted Mr Taunoa's award proportionately to account for the time Mr Fitzgerald was imprisoned, accounting for inflation, that would give a sum of approximately $69,000.[134] The award made by Ellis J was 6.5 times that sum. The sum awarded to Mr Fitzgerald is also many times in excess of awards in cases involving deliberate assaults (eg $30,000 in *Falwasser*).[135]

94. Second, the courts have cross-checked *Baigent* awards against measures such as average New Zealand salary, as a litmus test to ensure awards are legitimate in the eyes of everyday New Zealanders.[136] The median salary in New Zealand, before tax, is $1,343 per week.[137] The award made to Mr Fitzgerald is equivalent to what an average person would earn if they worked for 6.44 years. The average New Zealander would in fact have to work substantially longer to earn $450,000 *net of tax*. Damages are not taxed.

95. Not only should Ellis J's award be varied as it was aberrant relative to recognised scales, but damages should be further reduced based on factors

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132 Reserve Bank inflation calculator <https://www.rbnz.govt.nz/monetary-policy/about-monetary-policy/inflation-calculator> (adjusting $35,000 from 2007 Q3 to 2022 Q3, using the General CPI parameter, gives $53,878.23). Note the date parameters are based on the dates of the respective judgments in the Supreme Court in *Taunoa* and in the High Court in this case. If the relevant date is date of breach, the adjusted sum is lower.

133 *Taunoa v Attorney-General*, above n 2, at [273] and [374].

134 This comparison is provided simply as a point of reference, noting the courts have warned against reducing damages to an arithmetic exercise which could skew final awards: *Chief Executive of the Department of Corrections v Gardiner*, above n 130, at [69].

135 *Falwasser v Attorney-General* [2010] NZHC 410

136 *Taunoa v Attorney-General*, above n 2, at [260], [329] (and see *Taunoa v Attorney-General* [2005] NZCA 312 at [172]); *Combined Beneficiaries Union Inc v Auckland City COGS Committee*, above n 122, at [64]; *X v Chief Executive of Oranga Tamariki*, above n 131, at [106]

137 <https://www.stats.govt.nz/information-releases/labour-market-statistics-income-june-2024-quarter/>.

identified in the context of discretion above. Any award should be a solatium, akin to an enhanced declaration.[138] Taking into account the awards in *Taunoa*, community expectations and discretionary factors, the proper range is $25,000-$50,000 (assuming no damages for judicial breach).

Judicial Liability?

96. The Chief Justice's Minute of 24 January 2025 directs that the panel in *Putua* will address the Court's approach to deciding whether to depart from one of its precedents, and the status of *Chapman*. The Minute directs that Counsel in this appeal should address submissions both on the assumption *Chapman* remains good law, and on the alternative assumption that it does not.

97. The Attorney-General considers *Chapman* remains good law for the reasons advanced by the Crown in the *Putua* appeal. Judicial immunity recognised in *Chapman* cannot be distinguished on the present facts, as *Chapman* articulates a *general* immunity from damages for judicial breaches.[139]

98. The Attorney-General records she is placed in a constitutionally inappropriate position in being required to defend both the prosecutor, a member of the executive, and judicial officers, including the sentencing judge and the judges of the Court of Appeal that upheld Mr Fitzgerald's sentence. These are distinct constitutional actors, and it undermines actual and/or perceived judicial independence for judicial officers to be represented by the Crown's senior law officer in contested proceedings, and to defend judicial officers alongside executive officials (especially where responsibility and apportionment for what went wrong is disputed).

99. The Attorney-General has no instructions from individual judges or the Chief High Court Judge or President of the Court of Appeal, nor have any judges had the opportunity to give evidence. The sentencing judge has since passed away. In addition, the pleadings are silent as to judicial breach.

100. Even if damages were in-principle available for judicial breach (opposed), multiple factors tell against an award. Any breach was in good faith, based

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138 *Taunoa v Attorney-General,* above n 2, at [255].

139 Even if this Court adopted a narrow reading of *Chapman* as focused on breaches in legal process, the facts of this case bear analogies to the facts of *Chapman*, and to rights-violations based in delay. See above at [68]-[74].

on then-received understandings of law; we assume that if liability for judicial breach were recognised, a bad faith or "clearly unconstitutional" liability rule would apply. Mr Fitzgerald's rights have been vindicated and any judicial violation cured within judicial process. Factors beyond judicial control affected Mr Fitzgerald's time in custody. It is unclear how the hortatory functions of *Baigent* damages would be advanced in regard to judicial breach by imposing liability on the Crown. These factors apply equally to the sentencing judge and Court of Appeal judges who upheld the appeal, all of whom we assume breached the NZBORA.

101. Courts should be cautious to impose liability where a judicial breach is in good faith and only identified in hindsight following an appellate decision that – while correctly stating the law – does change received legal understandings. Otherwise, apart from generating a flood of claims, this may create perverse judicial incentives or at least the perception of perverse incentives eg a reluctance on the part of higher courts to disturb settled legal understandings, for fear of generating mass judicial liability for prior inconsistent judicial decisions. This concern engages judicial independence.

102. If damages are given for judicial breach (and no award made for prosecutorial acts) the proper range is $35,000-$70,000. This is a higher range than indicated for the prosecutor because of the causal potency of any judicial breach. This is an aggregate for both breaches by both the High Court and Court of Appeal.

103. If damages are awarded for both prosecutorial and judicial breach, separate awards should be made, given prosecutors and the judiciary are distinct constitutional actors with different responsibility on the facts, different liability rules may apply to each, with damages paid from different budgets. If awards are made for both prosecutorial and judicial breaches each award should be reduced given the other, to avoid a windfall.

Arbitrary detention

104. Ellis J considered there were two paths available to Mr Fitzgerald: arguing (i) his sentence breached s 9; or (ii) because his sentence breached s 9, the grossly disproportionate part of the sentence served constituted arbitrary

detention in breach of s 22. Ellis J thought it may not matter which route was adopted. But her Honour nonetheless concluded s 22 was breached.

105. As the Attorney-General argued in the Court of Appeal, Ellis J's conclusion is wrong. There is no breach of s 22.

105.1 Mr Fitzgerald was lawfully detained based on a judicial sentence imposed pursuant to due process.

105.2 Arbitrariness denotes decision-making that is whimsical, capricious or aberrant, or which lacks rational foundation.[140] The judge who imposed the sentence and the Court of Appeal did not act in whimsical fashion. They acted on received understandings of the law and reasoned judgement. Their view of the law turned out to be wrong, but their views were not implausible or lacking rational foundation.

105.3 The legal error in Mr Fitzgerald's case was cured within the same judicial process in which the error occurred.

105.4 To say Mr Fitzgerald suffered breach of s 22 because he suffered a breach of s 9 adds nothing to the requirements of s 9, and simply duplicates its requirements.[141] Put another way, the distinct meaning and function of s 22 must be understood in the light of more specific rights in NZBORA. The UNHRC General Comment on Article 9 gives many examples of arbitrary detention, but does not give the example of a grossly disproportionate sentence, including when the Comment discusses the relation between Article 9 and other rights.[142] In the present case, the only reason for finding a breach of s 22, in addition to s 9, would be to reverse engineer an argument for damages liability based on Article 9(5) ICCPR.

105.5 If it is not accepted that the above arguments tell against a finding of arbitrary detention then, in the alternative, those arguments explain why any arbitrary detention was justified under s 5.

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140 *Neilson v Attorney-General* [2001] 3 NZLR 433 at [34].

141 *Attorney-General v Chisnall* [2024] NZSC 178 at [163].

142 Human Rights Committee *General comment No 35: Article 9* UN Doc CCPR/C/GC/35 (16 December 2014).

Summary

106. Mr Fitzgerald was sentenced to a disproportionately severe term of imprisonment which was corrected on appeal. The appeal corrected a misapprehension about the law which served the necessary deterrent and vindicatory functions for correcting judicial error and preventing recurrence.

107. The respondent does not seek to diminish what happened to Mr Fitzgerald. But damages cannot be given for acts of the prosecutor, simply because they are the only actor who can be sued. The specific breach for which a remedy is sought is breach of s 9 of NZBORA arising from the act of "sentencing". The sentence was directly imposed by judicial act. Responsibility for it cannot be sheeted home to the prosecutor who filed the charge against Mr Fitzgerald. To do so is to infringe the fundamental constitutional principle of the separation of powers.

4 March 2025

M F Laracy | J N E Varuhas | Z R Hamill | T Zhang
Counsel for the respondent

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

AND TO: The appellant.

AND TO: The Human Rights Commission.

Chronology

Date	Event	Document Reference
3 December 2016	Offences occurred	
5 December 2016	Mr Fitzgerald is arrested, remanded in custody	
25 January 2017	First report under s 38, CPMIPA	301.0035 (COA at 187)
1 February 2017	Crown peer review sought under MOU	201.0003 (COA at 149, [7].
7-12 April 2017	Resolution discussions	301.0073-301.0079 (COA at 225-231, PFK-2 and PFK-3).
13 April 2017	Crown Prosecution Notice filed Case Review Hearing	201.0003-5 (COA at 149 at [9]; 150 at [19]; and 151 at [19]).
2 May 2017	Trial callover; Judge-alone trial set for 13 July 2017	301.0080 (COA at 232)
21 June 2017	Crown Charge Notice filed	301.0083 (COA at 235).
12 July 2017	Judge-alone trial date vacated due to mental health issues being identified; further report ordered under s 38, CPMIPA	301.0085 (COA at 237).
28 August 2017	Second report under s 38, CPMIPA	301.0087 (COA at 239).
12 September 2017	Sentence indication given	301.0093 (COA at 245).
27 October – 11 December 2017	Proceedings under CPMIPA as to fitness to stand trial	301.0103,and 301.0150 (COA at 255 and 302).
24 November 2017	Third report under s 38, CPMIPA	301.0107 (COA at 259).
19 March 2018	Judge-alone verdict	301.0207 (COA at 359).
26 April 2018	Fourth report under s 38, CPMIPA	301.0216 (COA at 368).
10 May 2018	Sentencing	301.0220 (COA at 372).
15 July 2020	Court of Appeal decision	302.0244 (COA at 396).
7 October 2021	Supreme Court decision	302.0303 (COA at 455).
1 November 2021	Re-sentencing	302.0420 (COA at 572).
12 November 2021	Current proceeding commences	101.0097 (COA at 132)
27 September 2022	High Court judgment (Ellis J)	101.0050 (COA at 85).
5 September 2024	Court of Appeal judgment (Cooper P, Miller and Brown JJ)	101.001 (COA at 36).

Table of third strike sentence appeals engaging s 9 of the Bill of Rights Act

Case	Charge	Circumstances contributing to breach
Philips v R [2021] NZCA 651, [2022] 2 NZLR 661	Indecent assault	Low-level nature of offending, which would have attracted a 'but-for' sentence of 15 months' imprisonment, meant Mr Phillips was an inadvertent and unforeseen casualty of the regime and fell outside the contemplated scope of s 86D.
Mitai-Ngatai [2021] NZCA 695	Indecent assault	Offending which would have attracted a maximum of 24 months' imprisonment was on the cusp of that which would not breach s 9, but allowed given Crown assessment that the facts were materially indistinguishable from those of Mr Fitzgerald, and time already spent in prison for offending.
R v Morgan [2022] NZHC 790	Detention for the purposes of sexual connection	'But-for' sentence was six years' imprisonment and a two-thirds MPI, which was grossly disparate with the maximum sentence of 14 years when the offending was "moderately serious", and taking into account Mr Morgan's extremely disadvantaged background.
R v Heke [2022] NZHC 755	Burglary and indecent assault (x 2)	The "glaring disparity" (14 months against seven years'), offending at low end of spectrum of indecent acts against young person, mental health impacted on offending, and defendant is an inadvertent and unforeseen casualty of the three-strikes regime.

R v Tikena-Stuchbery [2022] NZHC 1266	Wounding with intent to cause grievous bodily harm and assault on person in a family relationship	Despite the seriousness of the offending, the "considerable difference" (2.7 times) between the but-for (five years and two months') and the mandatory (14 years') sentence, the difference of parole eligibility (two years and one month), and the 14 year sentence will "represent over half of [the defendant's] life", all pointed to the conclusion that the mandatory 14 year sentence breached s 9.
R v Kawhe [2022] NZHC 1852	Robbery	Disparity between 'but for' (17 months) and 10 year mandatory sentence engaged s 9, which was exacerbated by the fact that the 'defendant would otherwise be released after serving half of sentence.
R v Lloyd [2022] NZHC 1044	Using a firearm against a law enforcement officer (x 2)	Section 9 was breached by the 14 year maximum sentence because: when viewed collectively, defendant's strike history "does not obviously fall within the concept of an offender who "continues" to commit "very serious offences"; the longest sentence received had been two years and three months' imprisonment; the 'but-for' sentence of five years and one month, which is a "very large" difference; and that it would account to a third of the defendant's life to date.
Love v R [2022] NZCA 614	Robbery	History of offending (including previous strike offences) was low- level; Mr Love suffered mental health difficulties; and the disparity between 10 months' and 10 years' imprisonment was so great as to shock the national conscience.

Sheers v R [2022] NZCA 618	Aggravated robbery	Large disparity (11 years; 4.7 multiplier) between sentence imposed and 'but-for' sentence, and Mr Sheers's impaired impulse control from FASD, comfortably surmounted high threshold of s 9 breach.