IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA574/2022
[2024] NZCA 419

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

Hearing:	8 August 2023
Court:	Cooper P, Miller and Brown JJ
Counsel:	M F Laracy, D J Perkins and Z R Hamill for Appellant A S Butler KC, D A Ewen KC and P A Tierney for Respondent
Judgment:	5 September 2024 at 3.00 pm

JUDGMENT OF THE COURT

A The appeal is allowed.

B The judgment of the High Court is set aside.

C There is no order as to costs.

REASONS

COOPER P AND BROWN J

(Given by Cooper P)

Table of Contents

Introduction

[1] This appeal raises important issues concerning responsibility for breaches of the New Zealand Bill of Rights Act 1990. It requires consideration of fundamental principles about the relationship between the branches of government and the role of prosecutors and judges in the administration of the criminal law and the sentencing process.

[2] The judgment under appeal is a decision of the High Court awarding damages against the Crown for a breach by a Crown prosecutor of their obligation to consider s 9 of the Bill of Rights Act in deciding to prosecute the respondent, Mr Fitzgerald, for indecent assault.[1] At the time of the decision to prosecute, indecent assault was, for him, a stage-3 offence to which s 86D(2) of the Sentencing Act 2002 applied and there was consequently a risk that Mr Fitzgerald would become subject to a disproportionately severe punishment on sentencing. That risk eventuated when

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1 *Fitzgerald v Attorney-General of New Zealand* [2022] NZHC 2465, [2023] 2 NZLR 214 [judgment under appeal].

Mr Fitzgerald was sentenced to a term of seven years' imprisonment.[2] It was a risk that arose from the words used by Parliament in establishing the "three strikes" regime, which on their face, obliged the sentencing Judge, Simon France J, to impose the maximum term.

[3] Mr Fitzgerald appealed unsuccessfully to this Court. This Court held the sentence of seven years' imprisonment breached s 9 of the Bill of Rights Act, which reads:[3]

> **9 Right not to be subjected to torture or cruel treatment**
>
> Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.

However, the majority dismissed Mr Fitzgerald's appeal, finding that the sentence was compelled by the Sentencing Act and a discharge without conviction was not available in this case.[4]

[4] Mr Fitzgerald then successfully appealed to the Supreme Court (*Fitzgerald* (SC)).[5] It was uncontested in that Court that Mr Fitzgerald's sentence breached s 9 of the Bill of Rights Act.[6] Winkelmann CJ, who formed part of the majority, said a rights-consistent interpretation of the three strikes provision meant it "should be read as subject to the proviso that a maximum sentence must not be imposed where to do so would entail a breach of s 9".[7] Accordingly, Mr Fitzgerald's sentence had been imposed in error of law and the Court referred the matter back to the High Court for resentencing.[8]

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2 *R v Fitzgerald* [2018] NZHC 1015 [first High Court sentencing judgment]. Mr Fitzgerald was also convicted of assaulting a second woman who had come to the victim's assistance.

3 *Fitzgerald v R* [2020] NZCA 292, (2020) 29 CRNZ 350 [*Fitzgerald* (CA)] at [42]–[43].

4 At [75] per Clifford and Goddard JJ. Collins J would have allowed the appeal and discharged Mr Fitzgerald without a conviction, at [141].

5 *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551 [*Fitzgerald* (SC)].

6 At [79]–[81] per Winkelmann CJ, [167] per O'Regan and Arnold JJ, [239] per Glazebrook J, and [283] per William Young J.

7 At [139] per Winkelmann CJ. See the concurring opinions of O'Regan and Arnold JJ at [219] and of Glazebrook J at [250].

8 At [140] and [145] per Winkelmann CJ. See the concurring opinions of O'Regan and Arnold JJ at [231] and of Glazebrook J at [252].

[5] The High Court subsequently resentenced Mr Fitzgerald to a term of six months' imprisonment, which by that stage he had already served.[9]

[6] Mr Fitzgerald then brought a claim against the Crown for damages based on the breach of his s 9 right. In the judgment under appeal, Ellis J held that, at the point where Mr Fitzgerald's detention became grossly disproportionate to his offending, his continued detention became arbitrary, and in breach of the right not to be arbitrarily detained in s 22 of the Bill of Rights Act.[10] She held the relevant period of Mr Fitzgerald's arbitrary detention was the approximately 44 months (1,334 days) between 5 March 2018 when he was first arbitrarily detained and 29 October 2021 when he was released.[11]

[7] The Judge did not consider it necessary to determine whether Mr Fitzgerald's claim for damages was based on the breach of ss 9 or 22. Rather, she held the breach of Mr Fitzgerald's rights was the consequence of the action of the Crown prosecutor laying the charge of indecent assault. The prosecutor had a duty to prefer a different charge where proceeding with the charge of indecent assault would result in the foreseeable and likely (because of the operation of the three strikes regime) grossly disproportionate sentence.[12] She found that the Crown was liable for damages to Mr Fitzgerald in the sum of $450,000 together with interest and directed that, in the first instance, the judgment sum should be paid to the Secretary for Justice under the Prisoners' and Victims' Claims Act 2005.[13]

[8] The Attorney-General now appeals, arguing that responsibility for the sentence imposed was solely that of the sentencing Judge and not the consequence of any breach of duty by the Crown prosecutor.

[9] Before dealing with the detail of the arguments it is appropriate to say a little more about the factual context giving rise to the judgment under appeal and to summarise the reasoning in the judgment.

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9 *R v Fitzgerald* [2021] NZHC 2940 [second High Court sentencing judgment].
10 Judgment under appeal, above n 1, at [61].
11 At [71].
12 At [97].
13 At [167].

Background

[10] Under the three strikes regime, offenders who committed a qualifying offence were given a first warning.[14] If they committed a second qualifying offence (other than murder), they were given a second warning and ordered to serve their sentence without parole.[15] If an offender committed a stage-3, or third qualifying offence, at the time of Mr Fitzgerald's offending, s 86D of the Sentencing Act provided relevantly:

> **86D Stage-3 offences other than murder: offender sentenced to maximum term of imprisonment**
>
> …
>
> (2) Despite any other enactment, if, on any occasion, an offender is convicted of 1 or more stage-3 offences other than murder, the High Court must sentence the offender to the maximum term of imprisonment prescribed for each offence.
>
> …

[11] On 3 December 2016, Mr Fitzgerald approached two women who were walking along Cuba Street in downtown Wellington. He grabbed one of the women and pulled her towards him, telling her he wanted to kiss her and then attempted to kiss her on the mouth. She was able to manoeuvre so that the kiss fell on her cheek instead. That conduct led to Mr Fitzgerald being charged and convicted of indecent assault, contrary to s 135 of the Crimes Act 1961. The conviction marked Mr Fitzgerald's third qualifying offence under the three strikes regime and so s 86D(2) was engaged.

[12] As noted, Mr Fitzgerald was sentenced to seven years' imprisonment; the maximum possible sentence for indecent assault.[16] In sentencing Mr Fitzgerald, Simon France J described the offending as falling at the "bottom end of the range" for an indecent assault, but he considered he was obliged to impose the maximum sentence because of the three strikes regime.[17] The Judge also considered that a

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14 Sentencing Act 2002, s 86B(1) (now repealed).
15 Section 86C(1) and (4) (now repealed).
16 Crimes Act 1961, s 135 provides: "Every one is liable to imprisonment for a term not exceeding 7 years who indecently assaults another person."
17 First High Court sentencing judgment, above n 2, at [17] and [21].

discharge without conviction pursuant to s 106 of the Sentencing Act was not available to Mr Fitzgerald on the wording of the three strikes regime.[18]

[13] The Judge thought this obliged him to impose the maximum term. However, the Judge did conclude that, having regard to the nature of the offence, the two earlier offences in respect of which Mr Fitzgerald had received strike warnings, and the state of Mr Fitzgerald's mental health,[19] an order that Mr Fitzgerald serve the whole of the sentence without parole would be manifestly unjust.[20] This was open to him under s 86D(3). The Judge ordered instead that the ordinary parole period should apply so that Mr Fitzgerald would be eligible for parole after serving one-third of his sentence in accordance with s 84(1) of the Parole Act 2002.[21]

[14] The sentence imposed was upheld by this Court.[22] All of the judges considering the appeal concluded that the sentence imposed by the High Court was disproportionately severe in breach of s 9 of the Bill of Rights Act and that breach could not be justified under s 5.[23] The majority, Clifford and Goddard JJ, explained their conclusion on that issue as follows:[24]

> [43] The threshold established by *Taunoa* is a high one. It is not enough that the punishment prescribed for Mr Fitzgerald is, as we concluded above, manifestly unjust or manifestly excessive. It must be grossly disproportionate, and such as to cause shock to properly informed citizens. 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 at [34] 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 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

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18 At [16].
19 At [22] the Judge noted Mr Fitzgerald was a diagnosed schizophrenic and requires constant mental health input.
20 At [27].
21 At [27].
22 *Fitzgerald* (CA), above n 3.
23 At [76] per Clifford and Goddard JJ and [105] per Collins J.
24 See also [131] per Collins J.

> 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.

[15] Despite the strength of this language, the majority concluded, in accordance with the view of the High Court, that s 86D(2) excluded the possibility of a lesser sentence: it was necessary to impose the maximum term because of the words used by Parliament.[25] The majority also accepted that the "maximum term" under s 86D(2) was also the "minimum sentence" for the purposes of s 106(1) of the Sentencing Act, and so declined to discharge Mr Fitzgerald without conviction.[26] Collins J took a different view and would have discharged Mr Fitzgerald without conviction.[27]

[16] The Supreme Court granted leave to bring a further appeal. The approved question for consideration by the Supreme Court was whether the Court of Appeal had been correct to find that s 106 did not apply to Mr Fitzgerald.[28]

[17] In deciding the appeal, all of the judges considered the sentence was so disproportionately severe that it breached s 9 of the Bill of Rights Act.[29] By a majority of four judges to one, the Court held that s 86D(2) could, and should, be given a rights-consistent interpretation that required it to be read subject to a proviso that a maximum sentence should not be imposed where to do so would result in a breach of s 9 of the Bill of Rights Act.[30]

[18] Three of those judges (Glazebrook, O'Regan and Arnold JJ) considered that, where a sentence imposed pursuant to s 86D(2) would be so severe as to breach s 9, a discharge without conviction would be an option available to the sentencing Judge.[31]

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25 At [117] per Clifford and Goddard JJ.

26 At [51]–[52] and [75] per Clifford and Goddard JJ. Section 106(1) of the Sentencing Act provides that the court may discharge an offender without conviction "unless by any enactment applicable to the offence the court is required to impose a minimum sentence".

27 *Fitzgerald* (CA), above n 3, at [141] per Collins J.

28 *Fitzgerald v R* [2020] NZSC 119.

29 *Fitzgerald* (SC), above n 5, at [79]–[81] per Winkelmann CJ, [167] per O'Regan and Arnold JJ, [239] per Glazebrook J, and [283] per William Young J.

30 At [139] per Winkelmann CJ, [219] per O'Regan and Arnold JJ, and [250] per Glazebrook J. William Young J dissented and would have dismissed the appeal, at [324]–[332].

31 At [245] per Glazebrook J and [236] per O'Regan and Arnold JJ. William Young J dissented and found a discharge without conviction is not available where the three strikes regime applies, at [308].

Winkelmann CJ thought that the s 106 power to discharge without conviction would also be available for a third-strike offence even where a sentence imposed pursuant to s 86D(2) would not breach s 9,[32] a point the other judges did not find it necessary to determine.[33] But all the judges in the majority agreed that Simon France J had not been required by s 86D(2) to impose the maximum sentence, and in sentencing Mr Fitzgerald as he did the Judge erred in law.

[19] In the result, the sentence appeal was allowed. The case was remitted to the High Court for Mr Fitzgerald to be sentenced again in accordance with ordinary sentencing principles, including taking into account his significant mental health issues.[34] The judges were unanimous that the conviction appeal be dismissed (a necessary corollary of the decision that Mr Fitzgerald be resentenced).[35]

[20] When the matter returned to the High Court, Simon France J considered whether he should make an order under s 34(1)(b)(i) of the Criminal Procedure (Mentally Impaired Persons) Act 2003 that Mr Fitzgerald be treated as an inpatient under the Mental Health (Compulsory Assessment and Treatment) Act 1992.[36] In the end however he followed the approach that had been contemplated by Glazebrook J in *Fitzgerald* (SC), and decided that a sentence limited to the time Mr Fitzgerald had already served would be the appropriate outcome.[37] He expressed the view that the state owed a duty to provide assistance to Mr Fitzgerald given the history of the matter and his acknowledged mental disorder.[38] The Judge continued:

> [13] The Court's present connection to Mr Fitzgerald is because he has been convicted of an offence. I am required to sentence him today on ordinary sentencing principles. He is not currently mentally unwell and unable to be in the community. I recognise, as everyone does, that whether that continues will be dependent on many factors including him taking his medication.
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> [14] As matters stand, he has served way too long for his offence. The sentence today should confer liberty, and in my view unconditionally so. There is no merit at all in my analysing the proper length. In the circumstances

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32 At [99]–[100] and [106] per Winkelmann CJ.
33 At [245] per Glazebrook J and [237] per O'Regan and Arnold JJ.
34 At [141] and [145] per Winkelmann CJ, [231] per O'Regan and Arnold JJ, and [252] per Glazebrook J.
35 At [142] and [146] per Winkelmann CJ, [237] per O'Regan and Arnold JJ, [238] per Glazebrook J, and [254] per William Young J.
36 Second High Court sentencing judgment, above n 9, at [5].
37 At [11]–[12].
38 At [12].

> I impose a term of six months' imprisonment on the single charge of indecent assault[.] There are no release conditions.

[21] The sentence of six months' imprisonment meant Mr Fitzgerald was immediately released.

[22] We turn now to the judgment under appeal.

The judgment under appeal

[23] Following his successful appeal to the Supreme Court, Mr Fitzgerald filed a proceeding in the High Court. He claimed that the penalty imposed in breach of s 9 rendered his imprisonment arbitrary contrary to s 22 of the Bill of Rights Act and sought damages. Section 22 of the Bill of Rights Act provides:

> **22 Liberty of the person**
>
> Everyone has the right not to be arbitrarily arrested or detained.

[24] The premise of the claim was that the Crown prosecutor should have exercised prosecutorial discretion to amend the charge prior to or at the trial to mitigate or avoid the disproportionate outcome that ensued. Mr Fitzgerald claimed the Crown prosecutor had been obliged to consider alternatives to the charge of indecent assault, having regard to the proportionality of the charge to the gravity of the offending and the presumptive sentencing consequences of an indecent assault charge. Mr Fitzgerald claimed this duty was grounded in both the Solicitor-General's Prosecution Guidelines (the Guidelines) and the Bill of Rights Act.[39]

[25] In analysing the claim, the Judge proceeded on the basis of the law as it was understood to be in 2017, when the decision to charge Mr Fitzgerald with indecent assault was confirmed. This involved the assumption that the Crown prosecutor would have believed that the sentencing court as a matter of law would have no choice but to impose a statutory maximum sentence pursuant to the direction in s 86D(2) of the Sentencing Act. The Judge noted that was consistent with the position that had been

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[39] A claim could not be advanced against the Attorney-General in relation to the imposition of the sentence by the Judge because of the judgment in *Attorney-General v Chapman* [2011] NZSC 110, [2012] 1 NZLR 462 which confined liability for breaches of the New Zealand Bill of Rights Act 1990 to actions of the executive branch.

adopted by the Crown at a sentence indication hearing, at the sentencing itself and in the arguments that followed on appeal to this Court and the Supreme Court.[40]

[26] The Judge identified two possible bases for Mr Fitzgerald's claim. The first was that the breach of s 9 rendered his detention arbitrary and in breach of s 22 of the Bill of Rights Act.[41] The second was that the claim could simply rely directly on the breach of s 9 and Mr Fitzgerald could seek damages to compensate for the detention that was a direct and foreseeable consequence of that breach.[42] The Judge considered it did not matter which approach was adopted, since in either case the starting point was the breach of s 9 and the point at which the detention became arbitrary would be the point at which continued imprisonment could be said to have become grossly severe.[43]

[27] Viewing the matter in that way effectively answered the Crown's argument against finding a breach of s 22, namely 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.[44] Here, Mr Fitzgerald's sentence was not simply disproportionate, it was grossly so, in breach of one of his most fundamental rights, and as recognised by O'Regan and Arnold JJ in *Fitzgerald* (SC):[45]

> … 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.

[28] Consequently, when Mr Fitzgerald was ultimately released following the second High Court sentencing judgment, he had already suffered a detention that constituted disproportionately severe punishment.[46]

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40 Judgment under appeal, above n 1, at [52].

41 At [60(a)], referring to *Jong-bum Bae v Republic of Korea* UN Doc CCPR/C/128/D/2846/2016 (13 March 2020).

42 Judgment under appeal, above n 1, at [60(b)], referring to *Henry v British Columbia (Attorney General)* 2015 SCC 24, [2015] 2 SCR 214.

43 Judgment under appeal, above n 1, at [61].

44 At [62].

45 At [63], citing *Fitzgerald* (SC), above n 5, at [203] per O'Regan and Arnold JJ.

46 Judgment under appeal, above n 1, at [65].

[29] This approach meant it was necessary to ascertain the period for which Mr Fitzgerald's detention was properly to be regarded as arbitrary.[47] In examining this question, the Judge placed considerable reliance on the analysis and conclusions of William Young J in *Fitzgerald* (SC), which Ellis J summarised as:[48]

> (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.

[30] Ellis J continued:[49]

> [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. 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.

[31] This meant that Mr Fitzgerald had been arbitrarily detained for a period of 1,334 days or, rounding down slightly, 44 months.[50] She considered that an award of damages in the sum of $450,000 was necessary to provide him with an effective remedy for the breach of his rights.[51]

[32] Ellis J then turned to consider Mr Fitzgerald's claim that it was the Crown prosecutor who was responsible for this arbitrary detention which amounted to a disproportionately severe punishment. The Judge's approach was clearly informed by observations made in *Fitzgerald* (SC) about the nature of prosecutorial discretion.[52]

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47 At [65].
48 At [69], citing *Fitzgerald* (SC), above n 5, at [281]–[283] per William Young J.
49 Footnotes omitted.
50 Judgment under appeal, above n 1, at [71].
51 At [167].
52 At [41]–[50], citing *Fitzgerald* (SC), above n 5, at [125]–[127] and [138] per Winkelmann CJ, [200], [202] and [204] per O'Regan and Arnold JJ, [247]–[248] per Glazebrook J, and [326] per William Young J.

[33] Central to the Judge's reasoning was her finding that the Crown prosecutor was obliged by the Guidelines to consider s 9 before laying the charge of indecent assault. On this issue there was no contest that Crown prosecutors are state actors for the purpose of s 3 of the Bill of Rights Act.[53] The Judge thought that the majority in *Fitzgerald* (SC) established there was a parliamentary expectation 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".[54] The process agreed by the Cabinet on 1 March 2010 involved referring all charges qualifying for the mandatory maximum penalties to the Crown Solicitor for review.[55]

[34] The Judge found that the Crown prosecutor did not consider s 9 or the sentencing consequence of charging Mr Fitzgerald with his third strike offence.[56] That was "puzzling", in view of the passages in Hansard quoted in *Fitzgerald* (SC) which showed the extent Parliament had relied on the exercise of prosecutorial discretion to ensure the three strikes regime was only used in respect of persons committing serious violent or sexual offences.[57] Ellis J noted that Mr Fitzgerald's counsel had challenged the charging decision made by the prosecutor from the outset.[58]

[35] Ellis J concluded:

> [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. …

[36] The failure by the prosecutor to prefer a different charge meant there had been a breach of the Bill of Rights Act for which the Crown was liable.[59]

[37] Because of their centrality to the Judge's liability finding, we turn now to the Guidelines.

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53 Judgment under appeal, above n 1, at [95].
54 At [92].
55 At [92].
56 At [98].
57 At [41]–[49] and [98].
58 At [24]–[25].
59 At [123].

The Solicitor-General's Prosecution Guidelines

[38] Section 185(1) of the Criminal Procedure Act 2011 provides that the Solicitor-General has responsibility for general oversight of the conduct of public prosecutions. Section 185(2) provides:

> 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.

[39] Section 188 of the Criminal Procedure Act provides:

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

[40] When the current Guidelines were promulgated in July 2013, they contained introductory paragraphs by both the Attorney-General and the Solicitor-General. The Attorney-General at the time, the Hon Christopher Finlayson KC, noted that "[u]nlike most similar jurisdictions, New Zealand has no centralised decision-making agency in relation to prosecution decisions".[60] Rather, most Crown prosecutions are conducted by Crown Solicitors — private practitioners appointed to prosecute under a warrant issued by the Governor-General.[61] He observed: "The absence of a central decision-making process underscores the importance of comprehensive guidelines, and the acceptance of core prosecution values."[62] Referring to the earlier *Review of Public Prosecution Services*, he noted that the review had underlined the important role of the Guidelines in setting "core and unifying standards for the conduct of public prosecutions".[63]

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60 Crown Law Office *Solicitor-General's Prosecution Guidelines* (1 July 2013) [the Guidelines] at 1.
61 At 1.
62 At 1.
63 At 1, referring to John Spencer *Review of Public Prosecution Services* (30 September 2011).

[41] The Solicitor-General's introduction noted that Guidelines were intended to address the findings of the review and to reinforce the Solicitor-General's oversight of all public prosecutions. A key way in which that oversight would be discharged was by application of the Guidelines.[64]

[42] We consider these observations were consistent with ss 185 and 188 of the Criminal Procedure Act. Ellis J held that the consequence of s 188 was to impose a statutory duty on Crown Solicitors to comply with the directions set out in the Guidelines.[65]

[43] In this Court, Ms Laracy, for the Attorney-General, challenged the Judge's approach. She claimed the Guidelines were based on s 185(1) and (2) of the Criminal Procedure Act, as a means by which the Solicitor-General discharged the responsibility of maintaining general oversight of the conduct of public prosecutions; they were not instructions of the kind contemplated by s 188, subject to a specific statutory obligation to comply. We consider Ms Laracy is probably right about that, but do not think the point is of any significance. It is clear that there was an expectation by both the Attorney-General and the Solicitor-General that prosecutions would be conducted in accordance with the Guidelines, and cl 2.1 of the Guidelines themselves explicitly requires that.[66]

[44] We note further that in *Osborne v Worksafe New Zealand*, the Supreme Court discussed the Guidelines in a way which is only consistent with the view that the Guidelines are effectively binding on those bringing public prosecutions.[67] The Court noted, for example, the fact that WorkSafe accepted that an agreement not to prosecute in return for a sum of money was contrary to public policy and the Guidelines and was "illegality that would justify judicial review to quash a decision based on it to offer no evidence".[68] The Court then proceeded to discuss the requirements of "test for

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64 The Guidelines, above n 60, at 2.

65 Judgment under appeal, above n 1, at [11].

66 The Guidelines, above n 60, cl 2.1: "All public prosecutions and Crown prosecutions, whether conducted by Crown prosecutors, government agencies or instructed counsel, should be conducted in accordance with these Guidelines."

67 *Osborne v Worksafe New Zealand* [2017] NZSC 175, [2018] 1 NZLR 447 [*Osborne* (SC)] at [24]–[37] per Elias CJ, William Young, Glazebrook and O'Regan JJ.

68 At [24] per Elias CJ, William Young, Glazebrook and O'Regan JJ.

prosecution", and the consideration of its two elements, the evidential test and the public interest test, observing:[69]

> [30] The Guidelines require each test to be "separately considered and satisfied before a decision to prosecute can be taken". They are to be considered in sequence, with the evidential test being satisfied before consideration of the public interest test.

[45] Apart from cl 2.1 we consider the key provisions of the Guidelines are as follows.

[46] Clause 4.1 provides:

> 4.1 The universally central tenet of a prosecution system under the rule of law in a democratic society is the independence of the prosecutor from persons or agencies that are not properly part of the prosecution decision-making process.

[47] Clause 5 deals extensively with the decision to prosecute. Clause 5.1 provides:

> 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:
>
> 5.1.1 The evidence which can be adduced in Court is sufficient to provide a reasonable prospect of conviction — the Evidential Test; and
>
> 5.1.2 Prosecution is required in the public interest — the Public Interest Test.

[48] Under cl 5.2 both aspects of the test must be separately considered and satisfied before a decision to prosecute can be made. The clause emphasises that the prosecutor must analyse and evaluate all the evidence and information thoroughly and critically.

[49] Clause 5.3 deals with the evidential test. It provides that there is a reasonable prospect of conviction if:

> … in relation to an identifiable person … there is credible evidence which the prosecution can adduce before a court and upon which evidence an impartial jury (or Judge), properly directed in accordance with the law, could reasonably be expected to be satisfied beyond reasonable doubt that the individual prosecuted has committed a criminal offence.

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69 Footnote omitted.

It is plain on the facts of the present case that no issue arose as to the evidential test.

[50] Clauses 5.5 to 5.11 deal with the public interest test. The Guidelines acknowledge that even where there is sufficient evidence to provide a reasonable prospect of conviction, it is necessary to consider whether the public interest requires a prosecution.[70] Clause 5.7 states that there is a presumption that the public interest requires prosecution where there has been a contravention of the criminal law. That is the "starting point" for consideration of individual cases. The clause continues:

> In some instances the serious nature of the case will make the presumption a very strong one. However, prosecution resources are not limitless. There will be circumstances in which, although the evidence is sufficient to provide a reasonable prospect of conviction, the offence is not serious and prosecution is not required in the public interest. …

An example is given, requiring prosecutors positively to consider the appropriateness of any diversionary option, particularly if the defendant is a youth.

[51] Clauses 5.8 and 5.9 detail public interest considerations which favour prosecution, and public interest considerations suggesting that prosecution should not take place.

[52] In the former category, it is relevant to mention the following clauses:

(a) 5.8.1, which provides that "[t]he predominant consideration is the seriousness of the offence". This provision continues:

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

(b) 5.8.2, which refers to cases where the offence involved "serious or significant violence".

(c) 5.8.3, which posits where there are grounds for believing the offence is likely to be "continued or repeated, for example, where there is a history of recurring conduct".

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70 The Guidelines, above n 60, cl 5.5.

(d) 5.8.4, where the defendant has "relevant previous convictions".

(e) 5.8.5, where the alleged offending occurred when the defendant was on bail or subject to a sentence, or otherwise subject to a court order.

(f) 5.8.11, where the victim suffered "personal attack, damage or disturbance".

[53] Turning then to cl 5.9, the public interest considerations against prosecution include:

(a) 5.9.1, cases in which the court is likely to impose "a very small or nominal penalty".

(b) 5.9.2, where the harm can be described as minor and the result of a single incident.

(c) 5.9.3, where the offence is not of a serious nature, and is unlikely to be repeated.

(d) 5.9.9, where the defendant was at the time of offending suffering from "significant mental or physical ill-health".

[54] Clause 5.10 makes it plain that the considerations are not intended to be comprehensive or exhaustive. And under cl 5.11, there is reference to cost considerations when making an overall assessment of the public interest.

[55] We mention next cl 8.1 of the Guidelines, which deals with the choice of charges:

> The nature and number of the charges filed should adequately reflect the criminality of the defendant's conduct as disclosed by the facts to be alleged at trial. …

[56] We refer now to the requirement of cl 9.1, which provides that wherever "necessary and practicable", the charges to be filed should be reviewed by a "senior

prosecutor". Then, under cl 9.2 the prosecutor has an obligation, after charges have been filed and before the trial, to determine whether the charges should be prosecuted or whether they should be amended to bring them into conformity with the evidence available, whether other charges should be added and any charges should be withdrawn.

[57] We note also cl 9.3, which states that when Crown prosecutors assume responsibility for a Crown prosecution, they should undertake an independent review of the charges. The clause continues:

> It is for … the Crown prosecutor to decide what of the original charges should remain, be amended or withdrawn, and what additional charges are required. The charges should be founded on the available evidence, and should reasonably reflect the criminality disclosed on the evidence.

[58] We refer next to cl 18 which deals with plea discussions and arrangements. The Guidelines accept the appropriateness of the prosecutor engaging with defence counsel in a process concerning the disposition of charges by plea.[71] Under cl 18.6, plea arrangements may be contemplated in cases where the charges filed are "clearly supported" by the evidence. The overarching consideration is the interests of justice, but particular mention is made of whether the charges agreed to "adequately reflect the essential criminality of the conduct" and "provide sufficient scope for sentencing to reflect that criminality".[72]

[59] Clause 28 of the Guidelines sets out provisions concerning the "relationship" between Crown prosecutors and enforcement agencies (including the police). Clause 28.1 refers to the two distinct capacities in which Crown prosecutors appear in the criminal courts: one, on instructions of the person or government agency who has commenced the proceeding and second, in respect of Crown prosecutions, as the representative of the Crown. Clause 28.3 provides that the relationship between the Crown prosecutor and the relevant agency should be conducted in accordance with any "Memorandum of Understanding" or similar agreement arrived at between the Solicitor-General and the chief executive of that agency.

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71 Clause 18.2.
72 Clauses 18.6.1 and 18.6.2.

Memorandum of Understanding

[60] It is appropriate here to record that a Memorandum of Understanding was in fact entered into between the Solicitor-General and the Commissioner of Police on 1 July 2013 (the Memorandum).[73] The Memorandum recorded the process which the Solicitor-General and the Commissioner of Police had agreed in order to discharge their respective roles and responsibilities for the conduct of criminal prosecutions commenced by the police.[74] Clause 5 of the Memorandum recorded the expectation of the Solicitor-General and the Commissioner of Police that all Crown prosecutors and police employees would comply with the agreements recorded in the Memorandum, while noting that it did not create legally enforceable rights or obligations.

[61] Subsequent clauses of the Memorandum dealt with general communication and liaison between the police and Crown Solicitors,[75] provision of information to the media,[76] and referred to schedules which recorded further agreements between the parties.[77] Schedule A contained provisions about the conduct of Crown prosecutions, Schedule C dealt with "miscellaneous appearances" and Schedule D with Crown appearances in the Youth Court.

[62] But of particular relevance here is Schedule B, which was headed "Agreement To Consult And Liaise On Particular Matters". This dealt with protocol offences (that is, category 2 and category 3 offences under the Criminal Procedure Act covered by the protocol established by the Chief High Court Judge and Chief District Court Judge as to the court of trial), and also made reference to the prosecution of stage-3 offences under the three strikes regime. Clause 2 of Schedule B said:

> 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.

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73 Crown Law Office *Memorandum of Understanding Between the Solicitor-General and the Commissioner of Police* (1 July 2013) [the Memorandum].
74 Clause 1.
75 Clauses 8–13.
76 Clauses 14–15.
77 Clauses 16–17.

[63] No doubt this provision contemplated that the Crown Solicitor would take a close look at the prosecution of stage-3 offences, but of itself it did not add anything to the substance of what was involved in assessing the public interest in proceeding with a prosecution as set out in the Guidelines.

[64] Further, and despite what was said during the enactment of the three strikes regime, it does not seem to us that anything was added to the Guidelines with specific reference to the enactment of the three strikes regime. This meant that the expectation of legislators that there would be a robust system for assessing whether there would be grossly disproportionate sentencing outcomes, and avoiding them, was not met. That was demonstrated by the way the Guidelines were in fact applied in Mr Fitzgerald's case.

How the Guidelines were applied in this case

[65] The prosecutor, Ms Feltham, was an experienced prosecutor who had been employed by the Wellington Crown Solicitor as a Crown prosecutor since July 1994. In her affidavit, Ms Feltham said that the police wrote to the Wellington Crown Solicitor on 1 February 2017 seeking a peer review in accordance with the Memorandum. Privilege in the advice given to the police was maintained. However, Ms Feltham noted that following the peer review, the police confirmed their decision to proceed with the charge of indecent assault. Subsequently, Mr Fitzgerald entered a not guilty plea to the indecent assault and common assault charges and was remanded to a case review hearing in the District Court.

[66] In April 2017 there was correspondence between counsel for Mr Fitzgerald and Ms Feltham concerning whether there was sufficient evidence to support the charge of indecent assault. On 10 April 2017, Ms Feltham wrote that in her view the evidence clearly supported a charge of indecent assault. Further, she wrote that given Mr Fitzgerald's "history of indecencies" she was not prepared to amend the charge to one of common assault.

[67] In a further email, counsel for Mr Fitzgerald recorded her disagreement that the evidence satisfied the requirements for the charge of indecent assault and asked

whether an amended charge of doing an indecent act could be considered.[78] It appears there was no written response to that suggestion, but there may have been a telephone discussion about it. In any event, Ms Feltham said in her affidavit that she would not agree to alter the charge to doing an indecent act because that would not accurately reflect the offending. In her view, Mr Fitzgerald's conduct was "not just indecent behaviour, it was an assault".

[68] Ms Feltham acknowledged that when the matter was transferred to the High Court on 13 April 2017, the prosecution formally became a Crown prosecution for which the Crown Solicitor became responsible.[79] A Crown prosecution notice was duly filed. At that point, as Ms Feltham accepted, a Crown prosecutor was obliged to make an independent judgment in accordance with the Guidelines as to the appropriateness of the charges.

[69] Ms Feltham was not the prosecutor at the trial, and she acknowledged she had "quite limited" memories of her decision-making in the early stages of the prosecution but consulted the file to refresh her memory while preparing her affidavit. She gave evidence that her normal practice was to refer directly to the Guidelines and consider all issues set out in the list if they were relevant.

[70] She continued:

> 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 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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78 Pursuant to s 125 of the Crimes Act. Doing an indecent act was not a qualifying offence under the three strikes regime.

79 In accordance with Crown Prosecution Regulations 2013, rr 4(1)(d) and 5(d).

22.2 the offender's history indicated that the offending behaviour was likely to be repeated; and

22.3 the offender was subject to an extended supervision order at the time of the offending.

[71] Ms Feltham appeared at the trial callover at the High Court on 2 May 2017 when a trial date of 13 July was confirmed. Following the callover, a colleague took over the matter and she prepared a Crown charge notice dated 21 June 2017. In accordance with the standard practice of the Wellington Crown Solicitor, Ms Feltham checked the Crown charge notice before it was filed and in doing so, confirmed the decision she had made to proceed on the charge of indecent assault.

[72] Ellis J noted Ms Feltham's affidavit did not suggest any consideration had been given to Mr Fitzgerald's mental health.[80] It was Ms Feltham's evidence that she could not recall considering the likely sentencing consequences in her assessment of the public interest test.

The arguments on appeal

[73] The principal argument advanced by Ms Laracy for the Attorney-General was that Mr Fitzgerald's rights were breached by his being sentenced to a disproportionately severe punishment imposed by the High Court. As a matter of law the sentence was unavailable in this case: the Supreme Court held in *Fitzgerald* (SC) that if the application of s 86D(2) would breach the right not to be subjected to disproportionately severe punishment, courts should sentence in accordance with ordinary principles. Mr Fitzgerald was resentenced by the High Court and the error was therefore corrected by ordinary appellate processes.

[74] In light of *Fitzgerald* (SC), it was apparent that a number of actors involved had made the same mistake in thinking that s 86D(2) required the imposition of a seven-year term of imprisonment: the prosecutor, counsel for Mr Fitzgerald, the High Court, Crown counsel on appeal, and this Court. Ms Laracy pointed to what she described as an air of unreality in the Judge's analysis in the judgment under appeal leading to the conclusion that the Crown should be liable for damages.

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80 Judgment under appeal, above n 1, at [29].

[75] Had the sentencing Judge adopted the same rights-consistent interpretation of s 86D(2) as the Supreme Court did in *Fitzgerald* (SC), the breach of Mr Fitzgerald's rights would have been avoided. Ms Laracy submitted it was wrong for Ellis J to find that the prosecutor should have preferred a lesser charge, so the opportunity for the sentencing Judge to make this error did not arise. She emphasised that prosecutors do not impose punishments, that being a function of the courts. Lawyers cannot be held accountable for errors made by a court, even if, as here, the prosecutor made submissions that the maximum penalty had to be applied in accordance with the statute and the Judge accepted those submissions. Prosecutors determine the charges to be brought and place defendants before the court for trial. The court imposes sentence in the event of conviction. The remedy is an appeal and that is the remedy that Mr Fitzgerald successfully pursued.

[76] For Mr Fitzgerald, Mr Butler KC relied on the statements in *Fitzgerald* (SC) that the three strikes regime established an appropriate administrative process to ensure that people such as Mr Fitzgerald would not fall within the regime and be subject to disproportionately severe sentences. There was, as the Chief Justice put it, a clear expectation that prosecutorial discretion would be exercised to ensure that those who did not repeatedly commit serious violent offences were not incidentally caught by the regime, thereby avoiding the gross injustice that application of the regime to them would cause.[81] O'Regan and Arnold JJ also noted there was every reason to expect that the administrative processes involving the Crown Solicitor would mean that people like Mr Fitzgerald would not fall within the three strikes regime.[82]

[77] Mr Butler also submitted that Crown prosecutors should have known of the risk of injustice, and the need to avoid it, because it had been referred to in Parliament during the passage of the legislation. This Court had also specifically adverted to the possibility for unjust outcomes arising from the three strikes regime in *R v Harrison*.[83]

[78] Mr Butler contended the Attorney-General's submission had ignored the division of roles between prosecutor and judge. The duty of ensuring the appropriate

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81 Referring *Fitzgerald* (SC), above n 5, at [127] per Winkelmann CJ.
82 At [204] per O'Regan and Arnold JJ.
83 *R v Harrison* [2016] NZCA 381, [2016] 3 NZLR 602 at [87]–[88].

charge is laid lies not with the judiciary, but with the prosecutor. The belief which all shared prior to *Fitzgerald* (SC) — that a seven-year term would be mandatory — meant that it was the prosecutor's duty to ensure that outcome was avoided. The mandatory nature of the sentence meant that its imposition by the sentencing Judge did not "supersede" the wrongful actions of the prosecutor.

[79] Mr Butler submitted that the High Court had correctly determined that the Guidelines were directions for the purposes of s 188 of the Criminal Procedure Act. He argued that, where a sentence outcome is mandatory, it must be a requirement that the Crown prosecutor take that into account in considering whether the prosecution for that offence is in the public interest, particularly when the mandatory sentence would result in a breach of s 9 of the Bill of Rights. Here the prosecutor had a duty to prefer a different charge. This was especially so given Mr Fitzgerald's serious mental illness.

Analysis

[80] The kernel of the Judge's analysis of the prosecutor's conduct is set out in the judgment under appeal under the heading "What was the Crown prosecutor in Mr Fitzgerald's case obliged to do?"[84] The answer she gave to that question was founded on the fact that all of the four judgments delivered in *Fitzgerald* (SC) were clear in stating that Parliament expected 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".[85] The Supreme Court had also noted that the necessary process had been agreed by the Cabinet in March 2010, and involved "referring all charges that qualify for the mandatory maximum penalty to the Crown solicitor for review either pre-charge or by second appearance".[86]

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84 Judgment under appeal, above n 1, at [90]–[97].

85 At [92].

86 At [92], citing *Fitzgerald* (SC), above n 5, at [125] per Winkelmann CJ and [200] per O'Regan and Arnold JJ, both citing (25 May 2010) 663 NZPD 11228.

[81] As Ellis J noted,[87] the importance of a vetting process conducted by the Crown Solicitor was referred to by O'Regan and Arnold JJ in the following passage:[88]

> [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, 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.

[82] It is consistent with this that, at the time of Mr Fitzgerald's offending, there was a process put in place in the Memorandum whereby the police referred prosecutions for stage-3 offences to the relevant Crown prosecutor. As the Crown acknowledged before the Supreme Court, such referral would require an assessment of both the evidential sufficiency for, and the public interest in pursuing, a stage-3 prosecution by reference to the Guidelines.[89] Ellis J held the latter assessment under the Guidelines would include Bill of Rights Act considerations, as had been envisaged by O'Regan and Arnold JJ.[90]

[83] Ellis J continued:[91]

> [96] If a reference by Police to a Crown prosecutor under the [Memorandum] and the public interest inquiry mandated by the Prosecution Guidelines necessarily included consideration of any [Bill of Rights Act] implications of a proposed prosecution, consideration of s 9 must have been required. In light of what were then the foreseeable sentencing consequences, the relevant inquiry required consideration of whether prosecution in any particular stage three case would be likely to result in a sentence that:

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87 Judgment under appeal, above n 1, at [44].

88 *Fitzgerald* (SC), above n 5. Footnote omitted, emphasis in original. The "significant changes occurring late in the legislative process" referred to in this paragraph included the fact that to qualify for the three strikes regime, an offender simply had to be convicted of a qualifying offence, rather than be convicted and sentenced to a term of imprisonment of five years or more, as had been proposed under the initial Sentencing and Parole Reform Bill 2009 (17-1).

89 Judgment under appeal, above n 1, at [93].

90 At [95], referring to *Fitzgerald* (SC), above n 5, at [204], n 282 per O'Regan and Arnold JJ.

91 Footnote omitted.

(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".[92]

[84] The Judge went further. In her view, where a grossly disproportionate sentence was the foreseeable and likely result of laying a particular charge, there was "no prosecutorial discretion to exercise". Rather, the prosecutor's duty was to proceed on a different charge.[93] At its heart, the Judge's reasoning rests on the proposition that because the inevitable sentencing outcome of charging Mr Fitzgerald with the offence of indecent assault was the imposition of a grossly disproportionate seven-year term of imprisonment, the prosecutor was obliged not to proceed with that charge. We consider there are real difficulties with that approach, which we will now endeavour to explain.

The respective roles of prosecutor and the court

[85] First, while it is correct that if the charge had not been laid, the sentence would not have been imposed, it is axiomatic that a sentence is not the result of the prosecutor's action. Rather, it is the result of the exercise of judicial power. As the Chief Justice said in *Fitzgerald* (SC): "Sentencing for criminal offences is the constitutional role of the third branch of government — the judicial branch."[94] This is the corollary of the fact that the decision whether or not to prosecute is for the prosecutor, with a very limited potential for judicial review. We think it is clear that the breach of Mr Fitzgerald's rights was the consequence of the sentence imposed by the Judge. If the Judge erred, that is because he applied the statutory language in its terms, an approach which this Court upheld on appeal from the first High Court sentencing judgment.[95] It was not until the decision of the Supreme Court in *Fitzgerald* (SC) that the implications of s 9 of the Bill of Rights Act were brought to bear. The decision holding the prosecutor responsible for the events that occurred in the sentencing process puts to one side the role of the Judge in a way which we think is wrong in principle. It was, after all, the Judge who imposed the sentence.

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92 Citing *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 at [289] per Tipping J.
93 Judgment under appeal, above n 1, at [97].
94 *Fitzgerald* (SC), above n 5, at [117] per Winkelmann CJ.
95 *Fitzgerald* (CA), above n 3.

[86] Five judges of this Court considered the different roles of the prosecutor and the courts in *Fox v Attorney-General.*[96] Writing for a unanimous Court, McGrath J addressed "the constitutional position" as follows:

> [28] In our system of government, the discretion to prosecute on behalf of the state and to determine the particular charges a defendant is to face is part of the function of Executive Government rather than the Courts. That allocation of the function recognises the governmental interest in seeing that justice is done and community expectations that criminal offenders are brought to justice are met.

[87] McGrath J continued by referring to the various mechanisms which exist for the accountability of those making prosecutorial decisions, including the roles of the Attorney-General and the Solicitor-General. He observed:[97]

> [30] A decision by a public official to prosecute in any case involves the exercise of a discretionary public power. There are prosecution guidelines issued by the Solicitor-General which discuss that discretion and indicate how it is to be exercised. The current Prosecution Guidelines are reproduced in *Criminal Prosecution* (New Zealand Law Commission Preliminary Paper 28 (1997), Appendix B). When considering whether to prosecute, para 3 of the Law Commission paper states "there are two major factors to be considered: evidential sufficiency and the public interest". The latter aspect requires consideration of "whether, given that an evidential basis for the prosecution exists, the public interest requires the prosecution to proceed" (para 3.3.1).
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> [31] The Courts traditionally have been reluctant to interfere with decisions to initiate and continue prosecutions. In part this is because of the high content of judgment and discretion in the decisions that must be reached. But perhaps even more so it also reflects constitutional sensitivities in light of the Court's own function of responsibility for conduct of criminal trials. This reluctance to interfere on the ground that the prosecution is thought to be inappropriate is widely apparent in the common law jurisdictions …

[88] The issue in *Fox* was whether a prosecution should be stayed as amounting to an abuse of process. McGrath J referred to the judgment of Richardson J in

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96 *Fox v Attorney-General* [2002] 3 NZLR 62 (CA).

97 Citations omitted. The Court referred to *Director of Public Prosecutions v Humphrys* [1977] AC 1 (HL) at 46 per Lord Salmon; *Barton v R* (1980) 147 CLR 75 at 94–95 per Gibbs CJ and Mason J; *R v Jewitt* [1985] 2 SCR 128 at [25] per Dickson CJ; and *R v Power* (1994) 89 CCC (3d) 1 at 13–20 per L'Heureux-Dubé J.

Moevao v Department of Labour summarising the basis upon which the power to stay a prosecution for abuse of process is exercised:[98]

> The concern is with conduct on the part of a litigant in relation to the case which unchecked would strike at the public confidence in the Court's processes and so diminish the Court's ability to fulfil its function as a Court of law.

And Richardson J's further observations that:[99]

> The justification for staying a prosecution is that the Court is obliged to take that extreme step in order to protect its own processes from abuse. It does so in order to prevent the criminal processes from being used for purposes alien to the administration of criminal justice under law. …

[89] McGrath J referred to authorities in which *Moevao* was cited with approval by both the High Court of Australia and the House of Lords.[100] He then said:

> [37] These principles set a threshold test in relation to the nature of a prosecutor's conduct which warrants a decision to end a prosecution, prior to trial, as an abuse of process. Conduct amounting to abuse of process is not confined to that which will preclude a fair trial. Outside of that category it will, however, be of a kind that is so inconsistent with the purposes of criminal justice that for a Court to proceed with the prosecution on its merits would tarnish the Court's own integrity or offend the Court's sense of justice and propriety. The power of stay is not available for disciplinary purposes nor to reflect a Court's view that a prosecution should not have been brought. …

[90] The authorities discussed to this point provide an important context by explaining the courts' reluctance to interfere with the exercise of prosecutorial discretion and the reasons for it.

Review of decisions to prosecute

[91] This Court had occasion to consider the basis on which the courts might review decisions to prosecute or not to prosecute in *Osborne v Worksafe New Zealand.*[101] At issue in that case was a decision not to continue the prosecution of Peter Whittall

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98 *Moevao v Department of Labour* [1980] 1 NZLR 464 (CA) at 482 per Richardson J, as cited in *Fox*, above n 96, at [32].

99 *Moevao*, above n 98, at 482 per Richardson J. See also at 470–471 per Richmond P and at 476 per Woodhouse J, as cited in *Fox*, above n 96, at [34].

100 *Fox*, above n 96, at [36], citing *Williams v Spautz* (1992) 174 CLR 509; *Jago v The District Court (NSW)* (1989) 168 CLR 23; and *R v Horseferry Road Magistrates' Court, ex parte Bennett* [1994] 1 AC 42 (HL).

101 *Osborne v Worksafe New Zealand* [2017] NZCA 11, [2017] 2 NZLR 513 [*Osborne* (CA)].

for his role in the management of the Pike River Coal Mine, in circumstances where Mr Whittall had entered into a conditional arrangement to pay reparation to families of those who lost their lives in the fatal explosions on 19 November 2010.

[92] The Court emphasised that good reasons exist for the exercise of judicial restraint in the review of prosecutorial discretion. Kós P, writing for the Court, referred amongst other things to 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".[102] Reference was made in this context to the important role of judgement and discretion in prosecutorial decisions, the undesirability of collateral challenges to criminal proceedings which might disrupt due process and the High Court's inherent power to stay or dismiss a prosecution for abuse of process.[103] The Court also observed that a stronger case for restraint exists where the prosecutorial decision is one that a prosecution should proceed because:

> [36] … The risk of collateral interference with the criminal justice system is greater. The rights or wrongs of the prosecution, so far as the culpability of its subject are concerned, will be established by the conclusion of the criminal case. Mechanisms internal to the criminal jurisdiction are available, such as a stay of prosecution or discharge under s 147 of the Criminal Procedure Act. Collateral challenge serves little useful purpose. …

[93] A further contextual consideration can appropriately be mentioned in relation to decisions to prosecute. That is the role of the jury, where trial by jury is the likely mode of trial. Respect for the constitutional role of the jury is inherent in the observations in *Osborne* just quoted.

[94] In *Osborne* this Court noted different considerations would be in play when the decision sought to be challenged was one *not* to prosecute or to discontinue a prosecution already commenced.[104] Notwithstanding these considerations, it is clear that the Court contemplated in an appropriate and exceptional case, subject to what it said about the need for judicial restraint, that the court could review a decision to prosecute where it could be established that the decision was affected by relevant and significant error.

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102 At [34(a)].
103 At [34(b)–(d)].
104 At [37].

[95] When *Osborne* went to the Supreme Court, the focus was on whether this Court had been correct to hold that the conditional arrangement made by Mr Whittall to pay reparations was not an agreement to prevent prosecution, but rather an offer of a voluntary payment which WorkSafe was entitled to take into account in making its decision not to continue with the prosecution.[105] The Supreme Court held on the evidence that the arrangement was an unlawful bargain to stifle a prosecution and allowed the appeal.

[96] Professor Philip Joseph discerned in the Supreme Court's decision a move away from earlier authorities confining the review of "prosecutorial decisions" only to circumstances which were exceptional, such as where a defect or error was fundamental, or where the decision was taken in bad faith or for a collateral purpose, to a greater willingness to intervene.[106] For this, he relied on the Supreme Court's reference to:[107]

> … the public interest in ensuring that decisions to prosecute are made lawfully and reasonably in the public interest to achieve public determination of responsibility for transgressions of law.

[97] We doubt the Supreme Court intended to herald a more expansive scope for the review of prosecutorial decisions generally. The passage relied on by Professor Joseph appeared in a part of the judgment that was headed "Bargains to stifle prosecution". That was the focus of the Court's discussion, beginning with the statement of principle that because of the public interest in the prosecution of offences, the law has long regarded private bargains to avoid prosecution through payment or provision of other benefit as unlawful.[108] The authorities relied on for the discussion of that issue were not of recent origin.[109] The Court also emphasised the provisions of the Guidelines as setting out "core and unifying standards for the conduct of public

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105 *Osborne* (SC), above n 67, at [25] per Elias CJ, William Young, Glazebrook and O'Regan JJ.

106 Philip A Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, Wellington, 2021) at 22.6.1(1).

107 At n 263, citing *Osborne* (SC), above n 67, at [74] per Elias CJ, William Young, Glazebrook and O'Regan JJ.

108 *Osborne* (SC), above n 67, at [70] per Elias CJ, William Young, Glazebrook and O'Regan JJ.

109 At [70], n 69 per Elias CJ, William Young, Glazebrook and O'Regan JJ. Prominent among the authorities cited by the Chief Justice for the majority were *Keir v Leeman* (1846) 9 QB 371, 115 ER 1315 (Exch Ch); *Jones v Merionethshire Permanent Benefit Building Society* [1892] 1 Ch 173 (CA); and *The Bhowanipur Banking Corp, Ltd v Dasi* (1941) 74 Calcutta Law Journal 408. Reference was also made to decisions of the New Zealand courts, decided over the years since 1910, including *Mall Finance & Investment Co Ltd v Slater* [1976] 2 NZLR 685 (CA).

prosecutions", intended to "promote public confidence in the system of public prosecution".[110] It is also relevant to note the Court's statements that public prosecutions are undertaken by public officials, on behalf of the community in vindication of law and to protect rule of law values such as equality of treatment; and that the "prosecution decisions of a public prosecutor must be consistent with the purpose and policies of the legislation which established the offence and under which the prosecutor acts".[111]

[98] This is the context in which the Supreme Court's decision in *Osborne* must be read. The judgment amounted to a disagreement with this Court's decision over the application of settled principle. No comment was made about the broader discussion in this Court's judgment in *Osborne* about the circumstances in which prosecutorial discretions to prosecute might be subject to review. Nor was there any suggestion that what this Court said about decisions to prosecute was wrong.

[99] Mr Fitzgerald's case is not an application for review of the prosecutor's decision to prosecute. Such an application might have been made at the stage before the trial when it was contended the prosecutor should have proffered a lesser charge, which could have avoided what was then understood to be the inevitable consequences of a conviction for indecent assault. But that course was not taken. That may simply be the result of a failure to consider that possibility, given Mr Fitzgerald's conduct fell readily within the ambit of indecent assault and it did not occur to his counsel that any relevant prosecutorial misconduct could properly be alleged. And even with the benefit of hindsight, it is far from clear that an application for a stay of the prosecution, or to seek an amendment of the charge whether before or at the trial, could have been successfully advanced, especially given the view then-prevailing that s 86D(2) was an inflexible rule requiring imposition of the maximum penalty.[112]

[100] It is however clear that, subject to the cautions sounded by this Court in *Osborne*, in an appropriate case an application might be made to review a decision to

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110 *Osborne* (SC), above n 67, at [73] per Elias CJ, William Young, Glazebrook and O'Regan JJ, citing the Guidelines, above n 60, at 1 and 2.

111 *Osborne* (SC), above n 67, at [73] per Elias CJ, William Young, Glazebrook and O'Regan JJ.

112 Particularly in the latter case due to the restrictions in s 136(1) of the Criminal Procedure Act 2011.

prosecute. This possibility was expressly recognised in *Kumar v Immigration Department*, where Richardson J said:[113]

> It scarcely needs to be said that discretions reposed in the Executive and in particular the discretion to prosecute, must be exercised on proper grounds and for proper purposes. If the exercise of a discretionary power has been influenced by irrelevant considerations, that is, considerations that cannot properly be taken into account, a Court will normally quash the decision. And clearly the Courts may and will intervene where a power has been exercised for collateral purposes, unrelated to the objectives of the statute or the prerogative in question. A discriminatory exercise of discretion without authority infringes the fundamental principle of equal treatment under the law and the equal protection of the laws for every person which has long been recognised as an essential pillar of the rule of law. …

[101] Here, the issue raised is not the decision to prosecute, but the decision to prosecute for the particular offence charged. There is no suggestion that the decision to prosecute was made for improper purposes, or on the basis of considerations that could not properly be taken into account, as our subsequent discussion of the Guidelines will demonstrate. Rather, what is alleged is that the prosecutor failed to take into account matters that should have been taken into account in deciding to proceed with a charge of indecent assault. The Court is 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 a breach of the Bill of Rights Act. This is not because Mr Fitzgerald's conduct was not within the ambit of the indecent assault charge, but because the sentence that would necessarily follow (on the view of the law then held) would be grossly disproportionate.[114] As we see it, that consequence would be the result not of the decision to prosecute, but of the legislative scheme that Parliament had put in place.[115]

The prosecutor's alleged errors

[102] Against this background, we turn to the particular alleged errors of the prosecutor which Ellis J found were the basis for a damages award for Mr Fitzgerald's grossly disproportionate sentence.

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113 *Kumar v Immigration Department* [1978] 2 NZLR 553 (CA) at 558.

114 It should be emphasised that the result of *Fitzgerald* (SC), above n 5, was not that Mr Fitzgerald was improperly convicted of the charge of indecent assault, and the Supreme Court did not direct that he should be discharged without conviction.

115 We proceed at this point on the Judge's assumption that the prosecutor acted on the basis that the maximum penalty would necessarily be imposed.

[103] We address first the Guidelines. We have earlier confirmed that Crown Solicitors must comply with the directions set out in the Guidelines. In doing so, the prosecutor may of course rely on cl 4.1 which asserts that the "central tenet" of a prosecution system is the independence of the prosecutor from persons or agencies that are not properly part of the prosecution decision-making process. Then, under cl 5.1 the prosecutor must consider whether the test for prosecution is met. As has been seen, that test is twofold.

[104] The first question to be addressed is whether the evidence that can be adduced in Court is sufficient to provide a reasonable prospect of conviction. There is no issue that aspect of the test was satisfied in the present case.

[105] The second question for the prosecutor to consider was whether Mr Fitzgerald's prosecution was required in the public interest. In accordance with the Guidelines, the prosecutor needed to address the public interest test set out in cls 5.5 to 5.11. We have already discussed that group of provisions, to the extent we think they are relevant. At this point, we mention again cl 5.7, with its presumption that the public interest requires prosecution when there has been a contravention of the criminal law. The importance of that requirement has been emphasised by the Supreme Court in *Osborne*.[116] The qualification to that presumption mentioned in cl 5.7 relates to resources, and by implication suggests that it will be permissible on occasion not to proceed with prosecution where the offence is not serious, and where diversion might be appropriate if the defendant is a youth.

[106] We doubt whether anything in cl 5.7 should have dissuaded the prosecutor from proceeding in the present case. Ms Feltham said in her evidence that she regarded the offence as "an inherently serious sexual offence which had caused harm to the victim". She also mentioned Mr Fitzgerald's history, which she considered indicated the offending behaviour would likely be repeated, and that he was subject to an extended supervision order at the time the offending occurred. All of these considerations were ones which favoured proceeding with the prosecution in

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116 *Osborne* (SC), above n 67, at [32] per Elias CJ, William Young, Glazebrook and O'Regan JJ.

accordance with the Guidelines, including not only cl 5.7, but also cls 5.8.1, 5.8.3, 5.8.4, 5.8.5 and 5.8.11.

[107] Furthermore, the public interest considerations in the Guidelines against prosecution do not apply here; for example, there was not the likelihood of a small or nominal penalty (because of the prevailing view of the statutory scheme at the time) and it cannot be said that the harm was "minor" or caused by an error of judgement or a genuine mistake.[117]

[108] Nor do we think it can be said that the offence was not of a serious nature or unlikely to be repeated.[118] We of course accept that the offending was not a bad case of indecent assault. But it was a serious incident, as the evidence given by the complainant at the trial shows. She referred to being in Cuba Street at about 9.30 pm on the evening of 3 December 2016, and said that Mr Fitzgerald approached her, glaring at her and her friend. She said he grabbed her and said he wanted to kiss her. He then "darted quickly" towards her and grabbed her by the shoulder, attempting to kiss her. As he did so she moved her face away and tried to pull away from him so that his kiss landed on her cheek. He pulled her "really close" and held her "really tight", persistently saying "I want to kiss you". Her friend began to scream "get off my friend", where upon Mr Fitzgerald grabbed the friend and threw her against a wall while she struggled to get away from him.

[109] We do not consider these events would justify a prosecutor concluding that the offending was not of a serious nature. Nor was it possible to conclude such conduct was unlikely to be repeated, particularly given Mr Fitzgerald's previous offending.[119]

[110] The one consideration in the Guidelines which might have justified the decision not to prosecute was cl 5.9.9, having regard to the defendant's mental health. That is something that should have been taken into account, and there is no evidence that it was. However, we do not consider that failure meant that the prosecutor's

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117 The Guidelines, above n 60, cls 5.9.1 and 5.9.2.

118 A factor in cl 5.9.3.

119 Relevantly, at the time Mr Fitzgerald was charged he had not only two strikes, but six convictions for indecent assault, eight convictions for common assault, five convictions for obscenely exposing a person in public, and 24 other convictions for minor violence offending such as offensive behaviour and intimidation.

decision to proceed was necessarily wrong. And if the argument is that, following consideration of Mr Fitzgerald's mental health, she would have been obliged not to bring the charge because of the sentence to be imposed, that cannot be right. The charge was otherwise appropriately brought before the court, and sentencing was a matter for the sentencing Judge.

[111] Considered overall, we do not think the provisions of the Guidelines would have required the prosecutor not to proceed with the charge.

[112] Clause 8.1 of the Guidelines specifically says the nature and number of the charges filed should "adequately reflect the criminality of the defendant's conduct". In the present case there was clearly discussion before the trial as to whether the events would justify a lesser charge. It is clear from Ms Feltham's evidence that she considered a charge of doing an indecent act, which had been suggested by Mr Fitzgerald's counsel, would not accurately reflect the offending because it would omit reference to the fact that there had been an assault. Ms Feltham was entitled to consider the evidence clearly supported a charge of indecent assault, and to conclude it was appropriate to proceed with that charge having regard to Mr Fitzgerald's offending history.

[113] The nature of Mr Fitzgerald's earlier relevant offending was addressed by Simon France J in a ruling he gave about propensity evidence as part of his verdict after the trial on 19 March 2018.[120] The Judge said:

> [13] The propensity evidence consists of previous indecent assault offending by Mr Fitzgerald. In 2008 Mr Fitzgerald accosted a woman along a footpath. He followed her and as she sought to walk off at pace, Mr Fitzgerald grabbed her buttock. In 2012 the offending was similar but more serious in that Mr Fitzgerald knocked the victim to the ground which caused her skirt to ride up. Mr Fitzgerald fell on top of her and then buried his face in her buttock area while putting his hands there as well. Finally, in 2015 Mr Fitzgerald in short succession slapped or grabbed three women on the buttocks as they walked past him.

[114] The events of 2012 and 2015 generated Mr Fitzgerald's two previous strike warnings. The Judge thought that the incident that had occurred in 2012 was the most

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120 *R v Fitzgerald* [2018] NZHC 465.

serious, and the present offending relatively less so. We have already referred to his description of the current offending as "at the bottom end of the range" for indecent assault.[121] But he also referred to the kiss on the cheek as "an unwelcome and undoubtedly traumatic attempt to kiss a stranger on the mouth".[122] The victim impact statement amply justifies the Judge's comment about the trauma that was caused, to a victim who had been subject to childhood sexual abuse, family violence and intimate partner violence. As she put it:

[REDACTED].

[115] We consider in the circumstances the prosecutor was entitled to take the view that a charge of indecent assault was warranted to reflect the criminality of Mr Fitzgerald's conduct. We are not able to accept Mr Ewen KC's argument for Mr Fitzgerald that the prosecutor was effectively obliged to proceed on a lesser charge of indecent behaviour.

[116] We have already explained that cl 9.3 of the Guidelines provides that when Crown prosecutors assume responsibility for a Crown prosecution, they must undertake an independent review of charges. Here, as we observed earlier, Ngā Pirihimana o Aotearoa | the New Zealand Police originally laid the charges, and the Wellington Crown Solicitor formally assumed responsibility for the charges following transfer of the matter to the High Court. The review that then took place was a review to ensure that the charges were founded on the available evidence, and reasonably reflected the criminality disclosed on the evidence. For reasons we have already addressed, the prosecutor's decision that the charges should survive review under cl 9.3 could not be criticised having regard to this provision of the Guidelines.

[117] We turn next to consider the Memorandum, which was essentially incorporated into the Guidelines by cl 28.3. It will be apparent from the previous discussion that the only provision of the Memorandum which is of real relevance here is cl 2 of Schedule B. Under its terms, the police refer all prosecutions involving a stage-3 offence to the Crown Solicitor for peer review either before the charges are laid (this did not happen here) or by the time of the second appearance (this did happen here).

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121 First High Court sentencing judgment, above n 2, at [21].
122 At [21].

This requirement is likely to have been what the Minister had in mind when making the remarks about administrative safeguards referred to in *Fitzgerald* (SC), which we have already mentioned.[123]

[118] On its face however, cl 2 of Schedule B is procedural in nature and has no substantive content defining what is to be the subject matter of the review or its purpose. In fact, it is unclear whether it adds anything to the review under cl 9.3 of the Guidelines that would take place in any event on the assumption of a prosecution by the Crown. Certainly, the concession made by Crown counsel in *Fitzgerald* (SC) that a referral under the Memorandum would require an assessment of both the evidential sufficiency and public interest tests does not seem to us to take the matter any further than would be involved in the application of cl 9.3 of the Guidelines. We add that, if cl 2 of Schedule B 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.

Should s 9 have led the prosecutor not to proceed on the charge?

[119] Ellis J's reasoning that the review under the Guidelines "would include Bill of Rights considerations" is apparently based upon what was said by O'Regan and Arnold JJ in *Fitzgerald* (SC).[124] We accept that Bill of Rights Act considerations should inform consideration of the public interest test in commencing a prosecution. But reasoning from that — that the result of the review might be to require the prosecutor not to proceed with a charge (that is otherwise appropriate) because it will attract a mandatory maximum sentence determined by Parliament — is very problematic. It has no underpinning in the statute itself. And on the face of it, there would be a direct 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 Court in *Osborne*.[125]

[120] There are a number of ways in which such a requirement could be expressed. For example, it could be said that in a case such as the present, the prosecutor was

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123 *Fitzgerald* (SC), above n 5, at [125] per Winkelmann CJ and [200] per O'Regan and Arnold JJ, both citing (25 May 2010) 663 NZPD 11228.

124 Judgment under appeal, above n 1, at [95], citing *Fitzgerald* (SC), above n 5, at [204], n 282 per O'Regan and Arnold JJ.

125 *Osborne* (SC), above n 67.

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, 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. None of these propositions are appropriate in terms of the architecture of the constitution, the respective roles of the legislature (which enacted the three strikes regime), the executive (the prosecutor) and the judiciary (the sentencer). Nor are they to be found expressly or by implication in the Guidelines or the Memorandum. And the propositions are, of course, unnecessary since *Fitzgerald* (SC). For these reasons, we do not accept that the legitimate exercise of prosecutorial discretion required the prosecutor not to proffer a charge of indecent assault.

[121] Underpinning that view is our perception that properly understood, *Fitzgerald* (SC) stands for the proposition that sentences under s 86D(2) of the Sentencing Act should not have been so grossly disproportionate as to breach of s 9 of the Bill of Rights Act. That is the issue that was determined by the Supreme Court. The easiest way to demonstrate that is by reference to the summary set out at the beginning of the judgment.[126] That makes it plain that:

(a) Mr Fitzgerald's appeal against conviction was unanimously dismissed.[127] This means in our view that Mr Fitzgerald must be taken to have been properly charged with indecent assault.

(b) Mr Fitzgerald's sentence appeal was allowed on what the Court referred to as the second issue:[128]

> … whether s 86D(2) of the Sentencing Act could be interpreted as subject to a limitation that the requirement to sentence an offender to the maximum sentence does not apply where to do so would breach s 9 of the Bill of Rights and New Zealand's international obligations.

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126 *Fitzgerald* (SC), above n 5.
127 At [1].
128 At [2] and [3].

(c) In explaining why the appeal against sentence was allowed on that issue, the Court in *Fitzgerald* (SC) said:[129]

> Winkelmann CJ, Glazebrook, O'Regan and Arnold JJ agree that the appellant's sentence of seven years' imprisonment went well beyond excessive punishment and would shock the conscience of properly informed New Zealanders, and was therefore so disproportionately severe as to breach s 9 of the Bill of Rights. Winkelmann CJ, Glazebrook, O'Regan and Arnold JJ are also agreed that this right is not subject to reasonable limits under s 5. They have held that Parliament did not intend, in enacting the three strikes regime, to require judges to impose sentences that breach s 9 of the Bill of Rights and New Zealand's international obligations. They consider it possible, and thus necessary, to interpret s 86D(2) so that it does not require the imposition of sentences that would breach s 9.

[122] This means 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. We think it necessarily follows that the prosecutor cannot be liable for a breach of the Bill of Rights Act as a result of the sentencing process miscarrying. 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.

[123] Our consideration of the decision to prosecute has examined the prosecutor's decision on the basis that it was assumed at the time that s 86D(2) meant that the maximum sentence would apply. This was the approach taken by Ellis J. As we see it, given that assumption, the only basis on which a decision not to prosecute could be indicated would have been a concern to avoid the impact of s 86D(2) on the sentence. We shrink from the implications of endorsing such an approach, which seems to posit the prosecutor having a dispensing power or duty to avoid what Parliament intended — the assumption on which the argument proceeded. Whatever might be the proper effect of the Guidelines, and what 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 in the

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[129] At [3]. Footnotes omitted.

Guidelines or the 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.

[124] It is relevant in this context to draw attention to what was said on this subject by William Young J in his opinion in *Fitzgerald* (SC):[130]

> [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. …

[125] He added, in a footnote, that:[131]

> Rule of law considerations suggest that such concerns should have been addressed within the legislation rather than left to ad hoc administrative arrangements.

[126] The Chief Justice specifically endorsed William Young J's observations in her own judgment. She referred to speeches in Parliament to the effect that the regime was not intended to apply to those who did not repeatedly commit serious violent offences and there was a clear expectation that if such offenders were incidentally caught by the regime, prosecutorial discretion would be exercised so as to avoid the gross injustice that application of the regime would cause.[132] She then said:[133]

> However, I agree with William Young J that this solution is not satisfactory in light of rule of law considerations … Such concerns should have been addressed within the legislation rather than left to ad hoc administrative decisions.

[127] Similarly, Glazebrook J also said that the purpose of the regime was that it would apply to the very worst repeat violent offenders and the language was broadly

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130 Footnote omitted.
131 At [326], n 411 per William Young J.
132 At [125]–[127] per Winkelmann CJ.
133 At [127], n 174 per Winkelmann CJ.

drawn to ensure all such offenders would be included. She continued that to meet the concerns about possible overreach, an administrative regime was put in place to make sure that the regime was properly directed.[134] But, again in a footnote, she said that the "administrative process seems to have failed in this case" and expressed her agreement with Winkelmann CJ and William Young J that "in any event, the administrative process was neither a sensible nor principled means of addressing concerns around inappropriately harsh outcomes".[135]

[128] We have referred earlier to what was said by O'Regan and Arnold JJ about the legislative purpose. As they said, Mr Fitzgerald was 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".[136] We see these various observations as an essential part of the reasoning which lay behind the Supreme Court's conclusion that Parliament did not intend that persons whose offending did not merit the description of serious repeat violent offenders would be subject to the harsh consequences of the three strikes regime.

[129] It was this that 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. The prosecutor could have brought the charge of indecent assault and then sought the imposition of a penalty that would not have been grossly disproportionate. The defence too could have sought such a penalty. And the Judge could have imposed it. That did not occur because all those involved before *Fitzgerald* (SC) thought it could not, and the maximum penalty had to be imposed. But that is not what the law in fact required, as *Fitzgerald* (SC) demonstrated.

[130] There is no doubt that *Fitzgerald* (SC) altered what had previously been the common understanding of what s 86D(2) required. But the outcome was immanent in the Bill of Rights Act. To recognise that was not to change the law, but to correct a

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134 At [248] per Glazebrook J.
135 At [248], n 355 per Glazebrook J.
136 At [204] per O'Regan and Arnold JJ.

misunderstanding about what s 9 required and to recognise its application as a means of ensuring that Parliament's real intent was achieved. This has nothing to do with the "declaratory theory of law" (criticised by Ellis J as a "legal fiction") on which the Crown had relied in the High Court as part of its argument that the sentencing Judge could have imposed a sentence that did not breach s 9.[137] All that happened was that the Supreme Court recognised the proper implications of the need to apply s 9 in accordance with the direction in s 6 of the Bill of Rights Act. In our view, applying the Supreme Court's authoritative interpretation of statutory provisions does not require any element of legal fiction or retrospectivity.

[131] The same statutory provisions could have been deployed by the sentencing Judge. There can be no criticism that he did not do so, because he was acting without the benefit of *Fitzgerald* (SC) and his approach was endorsed by this Court. Yet it is artificial, as Ms Laracy submitted, to found liability of the prosecutor for proceeding on the basis she did when it was open to the sentencing Judge to mitigate the harsh effect of the law in accordance with the approach adopted in *Fitzgerald* (SC). We cannot accept Mr Ewen's argument that the reality was the sentencing Judge had no discretion. That was not the law.

[132] On the view we take, the judgment under appeal wrongly held the prosecutor liable for the breach of Mr Fitzgerald's rights as a result of the sentence imposed by the first High Court sentencing judgment. It follows that the Crown cannot have a liability to Mr Fitzgerald for damages for that breach based on what the prosecutor did. The appeal must be allowed on that basis.

[133] In the circumstances it is unnecessary for us to consider that part of the judgment that dealt with the quantum of damages. But our conclusion makes it appropriate to add some further observations.

Further observations about compensation

[134] For a variety of reasons, including the form of the three strikes regime enacted by Parliament, the imposition of the maximum penalty of seven years' imprisonment

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[137] Judgment under appeal, above n 1, at [104].

effectively for a low-level indecent assault, and the time taken for the case to wend its way through the ensuing appellate processes down to the second High Court sentencing judgment, Mr Fitzgerald was subject to imprisonment for far too long. We have no reason to differ from Ellis J's conclusion that he spent 44 months in prison subject to a grossly disproportionate sentence. This is a fact that must shock the conscience of properly informed New Zealanders. Parliament has said, in s 5 of the Bill of Rights Act, that the rights contained in the Bill of Rights Act can only be subject to such reasonable limits as can be demonstrably justified in a free and democratic society. There can be no proper or lawful justification for Mr Fitzgerald's loss of freedom for this extensive period.

[135] New Zealand is a signatory to the International Covenant on Civil and Political Rights (ICCPR).[138] As expressly recognised by its preamble, the Bill of Rights Act was enacted to affirm New Zealand's commitment to the ICCPR. Article 9(5) of the ICCPR states that "[a]nyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation".

[136] This Court's decision in the very different circumstances of *Thompson v Attorney-General* was criticised by the United Nations Human Rights Committee for failing to provide a remedy where the error was attributable to the action of the judicial branch.[139] The period for which Mr Fitzgerald was imprisoned pursuant to a sentence imposed in breach of s 9 was greater by far than the brief period of about 15 hours for which Ms Thompson was unlawfully detained.

[137] Quite apart from our reputation in international forums, in a society that prides itself on adherence to the rule of law and the protection of human rights, mechanisms should be in place to provide compensation in circumstances such as have arisen in this case.

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

139 *Thompson v Attorney-General* [2016] NZCA 215, [2016] 3 NZLR 206, as criticised in Human Rights Committee *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).

[138] It seems to us that consideration should be given to extending the current compensation scheme that applies to persons who have been wrongfully imprisoned to encompass those whose sentence is shown to have been so disproportionate to the offending that it constitutes a breach of the protections afforded by s 9 of the Bill of Rights Act, where the appeals process has not removed the element of a sentence properly described as grossly disproportionate.[140] There is every reason to suppose that such cases would be few and far between, especially now that the implications of s 9 on the sentencing process are properly understood.

[139] This is of course a matter for the executive, not the courts.

[140] However, for the reasons we have given we are unable to uphold the judgment under appeal.

Result

[141] The appeal is allowed.

[142] The judgment of the High Court is set aside.

[143] We make no order as to costs.

MILLER J

[144] I agree with the reasons of Cooper P and Brown J but write separately, and very briefly, to add some additional reasons.

[145] I wish to focus on Ellis J's central premise that the award of compensatory damages was necessary to supply an effective remedy.[141] That proposition must be tested against the role played by compensatory damages under the Bill of Rights Act, as presently settled, so far as this Court is concerned, by the Supreme Court judgments in *Taunoa v Attorney-General* and *Attorney-General v Chapman*.[142]

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140 Ministry of Justice *Compensation Guidelines for Wrongful Conviction and Detention* (28 February 2023).

141 Judgment under appeal, above n 1, at [149].

142 *Taunoa*, above n 92; and *Chapman*, above n 39.

[146] The starting point is that compensation under the Bill of Rights Act does not serve the same purpose as damages at common law. It is sufficient for my purposes to cite the explanation given by Blanchard J in *Taunoa*:[143]

> … an award of Bill of Rights Act damages does not perform the same economic or legal function as common law damages or equitable compensation; nor should it be allowed to perform the function of filling perceived gaps in the coverage of the general law, notably in this country in the area of personal injury. In public law, making amends to a victim is generally a secondary or subsidiary function. It is usually less important than bringing the infringing conduct to an end and ensuring future compliance with the law by governmental agencies and officials, which is the primary function of public law. Thus the award of public law damages is normally more to mark society's disapproval of official conduct than it is to compensate for hurt to personal feelings.

[147] The guiding principle, which was established by this Court in *Simpson v Attorney-General* (*Baigent's case*) and affirmed in *Taunoa*, is that damages may be awarded where they are necessary to provide an effective remedy for breach of the Bill of Rights Act.[144] When considering effectiveness, the court must begin by deciding whether non-monetary relief is enough to redress the breach and the consequent injury to the plaintiff's rights.[145] Where damages are necessary, the sum awarded should be enough to ensure the defendant and other state agencies have an incentive not to repeat the conduct, and it should not be so modest as to trivialise the breach.[146]

[148] In *Taunoa*, Blanchard J described breaches of s 9 of the Bill of Rights Act as an obvious example where damages should be awarded.[147] That case, as is well known, involved a disciplinary regime adopted by Ara Poutama Aotearoa | Department of Corrections for dealing with difficult or intransigent prisoners. Courts fixed the term of imprisonment in each case but not the conditions of detention, so it was not a case in which a sentence appeal provided an effective remedy. In the present case, an appeal was available and the appellate process

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143 *Taunoa*, above n 92, at [259]. Footnote omitted.

144 *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA) [*Baigent's case*] at 677–678 per Cooke P, 692 per Casey J, 703 per Hardie Boys J and 718 per McKay J; and *Taunoa*, above n 92, at [107] and [109] per Elias CJ, [257]–[258] per Blanchard J, [300]–[301] per Tipping J and [372] per McGrath J.

145 *Taunoa*, above n 92, at [256] and [258] per Blanchard J.

146 At [258] per Blanchard J. See also at [300] and [318]–[321] per Tipping J.

147 At [261] per Blanchard J.

eventually did provide an effective remedy, both bringing Mr Fitzgerald's detention to an end and ensuring that other prisoners would not be sentenced to terms which contravened s 9. The question is why the error was not remedied much earlier, before his detention began to breach s 9.

[149] Mr Fitzgerald's detention began on 5 December 2016, when he was arrested and remanded in custody. He was denied bail at his appearance that day on the ground that he could not discharge the onus under s 12 of the Bail Act 2000 to satisfy the court that he would not offend while on bail.[148] As Ms Laracy observed, the record in this proceeding does not explain why he was not bailed at any later time. He entered a not guilty plea on 13 April 2017 and was transferred to the High Court for trial. It appears he would have been tried in mid-2017 but he was remanded for an assessment of his fitness to stand trial, which was not completed until 14 December 2017. He was tried and found guilty on 19 March 2018 and sentenced on 10 May 2018. I note that Ellis J found his detention began to breach s 9 after 15 months, on 5 March 2018.[149] At that time he had not yet been tried and he was still remanded in custody under the Bail Act. Not until 10 May 2018 was he detained pursuant to the sentence later found to breach s 9 of the Bill of Rights Act.

[150] The Supreme Court delivered its criminal appeal decision in *Fitzgerald* (SC) on 7 October 2021.[150] Mr Fitzgerald was released on 29 October, when he appeared in the High Court for resentencing.[151] At that time he still had a little more than two years to run on the sentence passed on 10 May 2018.[152]

[151] So the period between Mr Fitzgerald's first and second sentencing hearings corresponds approximately to the period during which his detention under the first sentence was later found to have breached s 9. That period was taken up by appellate processes which are under the control of the judiciary. It was also affected by the COVID-19 pandemic.

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148 *New Zealand Police v Fitzgerald* [2016] NZDC 24624 at [6].
149 Judgment under appeal, above n 1, at [70].
150 *Fitzgerald* (SC), above n 5.
151 Judgment under appeal, above n 1, at [66]. See second High Court sentencing judgment, above n 9.
152 Accounting for pre-sentence detention: see Parole Act 2002, ss 89–91.

[152] Ms Laracy argued that the prosecutor could not have foreseen either that Mr Fitzgerald would be denied bail or that his trial would be delayed by fitness to plead issues. It is only in hindsight that it can be seen he served a disproportionately long sentence before he had even been tried. She also argued that subsequent appeals in other cases also show that the line between a very harsh sentence for a repeat offender and a sentence that breaches s 9 is not easy to draw.[153] I interpret this appeal to foreseeability as an argument that the outcome was not within the scope of the responsibility the prosecutor must be taken to have assumed by persisting with the indecent assault charge.

[153] I prefer to view the issue through a causation lens. By way of preface, the approach to causation in public law damages claims is not yet settled. In the absence of argument to the contrary, this Court has held that tortious concepts of causation and remoteness apply.[154] Professor Jason Varuhas has argued that these concepts have little role to play where the claim is closely analogous to a tort, such as false imprisonment, that is actionable without proof of loss.[155] But I need not examine that issue here because compensation was not assessed as a lump sum, or for intangible harms, in this case.[156] It was calculated by analogy to the Prisoners' and Victims' Claims Act using what amounted to a per-month rate for the 44 months of unlawful detention.[157] That approach puts questions of cause in fact and in law, and remoteness, squarely in issue.

[154] I consider that the prosecutor's action was a cause in fact of Mr Fitzgerald's sentence, in the sense that but for her decision to pursue the indecent assault charge he would not have faced a third-strike sentence. Had she turned her mind to it, she must have assumed that on conviction he would be sentenced to the maximum sentence. But for the reasons given by Cooper P at [122] and [123], I agree that she cannot be held responsible for the sentence. The error, as it proved to be, was made by the

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153 Counsel referred to *Phillips v R* [2021] NZCA 651, [2022] 2 NZLR 661; *Matara v R* [2021] NZCA 692, (2021) 30 CRNZ 808; *Mitai-Ngatai v R* [2021] NZCA 695; *Crowley-Lewis v R* [2022] NZCA 235; *Love v R* [2022] NZCA 614; and *Tamiefuna v R* [2023] NZCA 163, [2023] 3 NZLR 108.

154 *Attorney-General v Putua* [2024] NZCA 67 at [89], citing *Thompson*, above n 139, at [75].

155 See, for example, Jason N E Varuhas *Damages and Human Rights* (Hart Publishing, Oxford, 2016) at ch 3.

156 See *Taunoa*, above n 92, at [300]–[301] per Tipping J.

157 Judgment under appeal, above n 1, at [165]–[167], citing *Chief Executive of the Department of Corrections v Gardiner* [2017] NZCA 608, [2018] 2 NZLR 712.

sentencing Judge, who did not recognise that he had authority to impose a lesser sentence if he found the maximum term would breach s 9.[158] The outcome would have been the same had the prosecutor diligently drawn that possibility to his attention, because the Judge would still have thought the legislation left him no choice in the matter. The same likely would have been true had the s 9 argument been advanced on appeal to this Court.[159] The prosecutor cannot be held responsible for the fact that the Court dismissed the appeal.

[155] I conclude accordingly that the prosecutor's decision cannot be regarded as the cause in law of Mr Fitzgerald's detention.[160] Rather, the length of his detention was the product of judicial decisions, first to impose the sentence and then to uphold it on appeal, necessitating a second appeal to the Supreme Court. The same conclusion is reached if the question is seen as one of remoteness. The time taken between the first and second sentencings, which has become the effective measure of loss,[161] was too remote to be attributed to the prosecutor's original decision to pursue the indecent assault charge.

[156] Mr Fitzgerald ought to be compensated for having spent too long in prison. The setting aside of his sentence came too late to vindicate fully the breach of his rights that occurred when it was imposed in the first place. But the need for additional vindication is only part of the inquiry. As explained above, the first question when considering compensation under the Bill of Rights Act is whether it is needed to provide an effective remedy.[162] Effectiveness is normally gauged by reference to the impact of a given remedy on the state agency responsible for the breach of rights. Compensation is not needed to ensure that prosecutors and judges apply the interpretation of s 86D(2) of the Sentencing Act that was adopted by the Supreme Court in *Fitzgerald* (SC). Nor is there anything that the Attorney-General, who would be held liable and represents the executive branch, could do consistent

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158 First High Court sentencing judgment, above n 2, at [13] and [17].

159 The argument that found favour with the Supreme Court was first identified by the Court itself during argument: *Fitzgerald* (SC), above n 5, at [109] per Winkelmann CJ.

160 I adopt for present purposes the distinction between cause in fact and cause in law proposed by Lord Hodge DP and Lord Sales SCJ (with whom Lord Reed P, Lord Kitchin and Lady Black SCJJ agreed) in *Meadows v Khan* [2021] UKSC 21, [2022] AC 852 at [44] and [55].

161 See above at [151].

162 See above at [147].

with institutional judicial independence to ensure judges' future compliance. A decision to award compensation for that purpose would also confront the Supreme Court decision in *Chapman*.[163]

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[163] See *Chapman*, above n 39, at [97] per McGrath and William Young JJ and [214] per Gault J.