NOTE: THE ORDER OF THE DISTRICT COURT MADE ON 23 NOVEMBER 2007 PERMANENTLY SUPPRESSING THE NAME AND IDENTIFYING DETAILS OF THE WITNESS REFERRED TO IN THIS JUDGMENT AS "L" REMAINS IN FORCE.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA341/2013
[2014] NZCA 511

BETWEEN	PHILIPPA CURRIE First Appellant
	AND
	RAYMOND DONNELLY & CO Second Appellant
	AND
	THE CROWN SOLICITOR AT CHRISTCHURCH Third Appellant
	AND
	THE ATTORNEY-GENERAL OF NEW ZEALAND Fourth Appellant
AND	VINCENT JAMES CLAYTON First Respondent
	AND
	LINDA JOYCE WESTBURY Second Respondent

Hearing:	30 April 2014
Court:	Randerson, Wild and White JJ
Counsel:	J C Pike QC and M J Lillico for Appellants P N Allan for Respondents
Judgment:	5 November 2014 at 11.30 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The cross-appeal is allowed. The order of the High Court striking out the respondents' cause of action for misfeasance in public office is set aside. That cause of action is reinstated.

C The appellants are to pay the respondents' costs for a standard appeal on a band A basis with usual disbursements.

REASONS OF THE COURT

(Given by Wild J)

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Introduction

[1] The two issues for decision on this appeal and cross-appeal from a judgment of Priestley J delivered in the High Court at Christchurch on 23 October 2012 are:[1]

(a) Did Priestley J err in striking out the respondents' cause of action against the appellants for misfeasance in public office?[2]

(b) Did the Judge err in not striking out the respondents' cause of action against the appellants for public law compensation for breach of their rights under the New Zealand Bill of Rights Act 1990 (NZBORA)?[3]

[2] These two questions are a distillation of the four questions of law upon which Priestley J on 15 November 2012, by consent, granted leave to appeal to this Court.[4] We have set those four questions out in a footnote.[5]

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1 *Clayton v Currie* [2012] NZHC 2777, [2013] 1 NZLR 263 [High Court judgment].

2 On this issue Mr Clayton and Ms Westbury are the cross-appellants. For consistency we will nonetheless refer to them throughout the judgment as the respondents.

3 *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA) [*Baigent's* case] established the availability of public law damages for breaches of the New Zealand Bill of Rights Act 1990 (NZBORA). These damages are often called *Baigent* damages, *Baigent* compensation, public law compensation or NZBORA compensation.

4 *Clayton v Currie* HC Christchurch CIV-2011-409-1178, 15 November 2012 (interlocutory orders of the Court granting leave to appeal to Court of Appeal).

5 The four questions of law were:
As to misfeasance in public office:
(a) Was the prosecutor exercising either public power or authority or discharging a public duty in purporting to comply with the prosecutor's duty of disclosure?
As to the *Baigent* cause of action:
(a) Did the prosecutor's actions in obtaining on the request of the accused in a criminal trial information of a public nature, (a sentencing indication) held by the Registry in another Court, engage the prosecutor's duty of disclosure in the context of s 25(a) of the NZBORA?
(b) If the answer to the first question is "yes", does the principle of law expressed by the Supreme Court of Canada in *R v Dixon* [1998] 1 SCR 244 apply with the effect that despite the alleged failure to accurately convey the content of the sentencing indication there was no remediable breach of the prosecutor's duty of disclosure?
(c) Despite the answer to the second question, as a matter of policy where, following a finding of prosecutor error, the accused has had the effective remedy of retrial, [or as in this case, the convictions quashed followed by a stay entered by the prosecutor] is public law compensation available against the Attorney-General irrespective of alleged prosecutor "fault"?

Factual background

[3] Along with nine other defendants, Mr Clayton and Ms Westbury were prosecuted in the Christchurch District Court in March 2005. The prosecution resulted from a police investigation called "Operation Rhino". In general terms, the defendants were charged with receiving stolen goods, materials and equipment from building sites in Christchurch and selling them. Mr Clayton faced a large number of receiving and fraud charges, Ms Westbury also several charges of receiving.

[4] A first trial was terminated in October 2006 by the Judge after one of the defendants became ill.

[5] A second trial began in the Christchurch District Court in July 2007, presided over by Judge Crosbie and with an estimated length of six weeks. Mr Clayton was not represented, but the Judge appointed Mr McCall as counsel assisting the Court to ensure Mr Clayton's defence was properly put. Ms Westbury was represented by Mr Ruth. Mr Machirus, a co-defendant who features later in this judgment, was self-represented and did not have counsel appointed to assist with his defence.

[6] A key witness for the Crown was a man whom we will refer to as L because his name is suppressed.[6] In his submissions to us, Mr Allan for the respondents described L's evidence as "the glue that held the Crown case together". The evidence had also been described this way in the Crown's opening at the trial. We understand the gist of L's evidence was that he was stealing to order for Mr Clayton, Ms Westbury and others. L had originally been charged jointly with the other defendants. In April 2005 he pleaded guilty to a number of charges of stealing materials and equipment from building sites. He was sentenced on these charges before the first, October 2006, trial, and received credit for the assistance he gave to police. In the first trial he was cross-examined on the assistance he gave to police and his motivation to lie.

[7] Before or during the second, July 2007, trial, the defendants and their counsel became aware that L had been charged with subsequent, unrelated offences in the

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[6] On 23 November 2007, Judge Crosbie made an order finally suppressing L's name and any details that might lead to his identity being established.

Wellington District Court. The offending had largely taken place after the first trial, with the exception of one charge. The defendants understood L was to be sentenced for this offending in Wellington. They were concerned to have the details of L's sentencing, and in particular to know whether he had received any discount on his sentence for his assistance to the police, including giving evidence for the Crown in the defendants' trial.

[8] Mr Knowles, counsel for the defendant Mr Cullen, unsuccessfully requested the Wellington District Court for information about the sentencing of L. At the request of the defendants and their counsel, Ms Currie made a fresh request to the Wellington District Court. Ms Currie was counsel for the Crown in the defendants' trial. She made her request to the Court on 13 August 2007, on the letterhead of Raymond, Donnelly & Co. Mr Stanaway, a partner in that firm, is the Crown Solicitor at Christchurch. Ms Currie signed the letter "Crown Solicitor, per Philippa Currie, Partner". In response, on 20 August 2007, Ms Currie received from the Wellington District Court a sentencing indication given to L on 31 May 2007 by Judge Radford.[7] Two parts of this indication were relevant to the defendants' concern as to whether L had received a sentencing discount or inducement for his assistance to the police. They were:

> [4] … Accordingly it seemed to me that, while I am not determining the final sentence at this point, a starting point of something in the region of four to four and a half years was appropriate but then significant discounts had to be given to take account of the guilty pleas which did amount to a significant assistance to everybody because of the complex nature of all the offending and of course significant discount for the matter which involves the Christchurch trial.
>
> …
>
> [6] I am prepared to agree with [further remand] and grant such a remand to 28 August 2007 at 9.15 am but I make the following observations:
>
> …
>
> (b) I record that I have indicated the fashion in which I intend to sentence and my reason for doing that is that it must not be thought that the sentence that I am going to impose would be influenced in any way by the course of conduct which may occur in Christchurch. In other words [L] will not influence the sentence that is to be imposed by his conduct in

[7] *Police v [L]* DC Wellington CRI-2007-32-94, 31 May 2007.

> Christchurch. I am making that point clear as much for [L's] protection and so that the prosecution are not left in a position where it might be suggested that he may have to gain some advantage in these proceedings by the evidence that he may give.

[9] The normal and desirable practice is that a person in L's position is sentenced before he gives evidence for the Crown. That holds true notwithstanding the sequence outlined in [6] and [7] above. If that practice is followed, there can be no doubt about the sentence imposed, and whether it reflected a discount for assistance to the police, including in giving evidence for the Crown in the trial of other alleged offenders.

[10] That course was not followed for L. The explanation appears to be Judge Radford's acceptance of a request by L's counsel that L's sentencing be postponed until the defendants' trial had concluded, so that L could be held in the interim in the remand section of the prison where he was incarcerated. Counsel urged on the Judge that L would be safer in that part of the prison.

[11] On 21 August Ms Currie emailed a letter to all the defendants (it was addressed to their counsel if the defendant was represented) and to the Registrar of the Christchurch District Court. It stated:

> …
>
> 5. [L]'s counsel suggested sentencing should be after the Operation Rhino trial, the reason being that if he was a sentenced prisoner, there were concerns regarding his safety. As a remand prisoner however, he has enhanced safety and a further remand was therefore sought by his counsel until after Operation Rhino.
>
> 6. Judge Radford was prepared to agree with that and he has recorded:
>
> > *"I record that I have indicated the fashion in which I intend to sentence, and my reason for doing so is that it must not be thought that the sentence that I am going to impose would be influenced in any way by the course of conduct which may occur in Christchurch. In other words, [L] will not influence the sentence that is to be imposed by his conduct in Christchurch. I am making this point clear, as much for [L]'s protection, and so that the prosecution are not left in a position where it might be suggested that he may have to gain some advantage in these proceedings by the evidence that he may give".*

7. Sentencing is scheduled to occur on 28 August 2007.

[12] The advice contained in that letter was obviously incomplete. Ms Currie replicated only one of the two relevant passages in Judge Radford's sentencing indication, set out in [8] above. It was not explained to us why Ms Currie did not simply forward to the defendants all the information she had received from the Wellington District Court.

[13] L was scheduled to give his evidence in the trial on 22 August. In chambers on 21 August there was a discussion between the Judge and counsel about L's proposed evidence. Mr McMenamin, counsel for the defendant Mr Morrell, questioned whether all of the sentencing indication remarks made by Judge Radford had been disclosed by Ms Currie. Mr McMenamin said to the Judge:[8]

> In my submission it would be appropriate that we should have the full statement of the judge's remarks so that we see the full context in which they appeared and are aware of the date on which it occurred in relation to the actual date upon which the pleas were entered. Not pre-empting Your Honour's decision but if Your Honour were to rule that the evidence was still admissible I then would seek further information from the Crown.

[14] Ms Currie's response was:[9]

> Now, enquiries were carried out immediately with the court in Wellington and the details of those enquiries were received I think yesterday and I have put them in a letter and sent them back to all counsel and the court this morning. That is as far as the Crown says its obligations extended and there is no question whatsoever of late disclosure or material being held back.

[15] Later on 21 August Judge Crosbie ruled against an application by the defendants Messrs Clayton and Machirus to exclude L's evidence, confirming it would be given the following day. The Judge's reasons for that ruling, which he gave on 22 August, include the following:[10]

> [31] For the Crown, Ms Currie opposed the application. She took strong objection to any suggestion that the Crown has been involved in the holding of the Wellington documents. Ms Currie stated that the matter has at all times been a Police matter and in the hands of the Wellington Police

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8 *R v Clayton* DC Christchurch CRI-2005-009-7821, 21 August 2007 (Transcript of Legal Discussion and Submissions on 21 August 2007 before Judge M A Crosbie) at 29.

9 At 35.

10 *R v Clayton* DC Christchurch CRI-2005-009-7821, 22 August 2007 (Trial Ruling No 4).

> Prosecution Section. While issues arose relating to inducements during the first trial, the Crown had provided full information in relation to that.
>
> [32] The Crown, Ms Currie submits, was not in possession of any further material relating to [L]'s new charges and forthcoming sentencing. In answer to a letter from Mr Knowles dated 9 August 2007, immediate inquiries were made of the Court in Wellington and that, she submits, is as far as the Crown's obligations extended. The only reason that other matters have come to light is through Mr Machirus's own inquiries. All material requested has been provided and Ms Currie rejected any criticism of the Crown.

[16] L gave his evidence on 22 August. During cross-examination by counsel for two of the defendants, and by Mr McCall as amicus for Mr Clayton, L was asked whether he had received any benefit in return for the evidence he was giving. The following cross-examination of L by Mr Bunce, counsel for the defendant Mr Gilmore, took place:

> Q. What did you hope to gain by talking to the police and giving the evidence that you have against the people in the Court today.
>
> A. Just to get on with my life, get over it and get on with it, rather than dragging out this three years like it has.
>
> Q. Well, did you hope to receive a benefit other than that from giving the evidence that you have in this Court.
>
> A. I've not received any benefits, promises, or anything of those. The only thing I got was a transfer of sentence.
>
> Q. You were aware, weren't you, when you were sentenced in this matter in May 2005, that you gained a significant discount for the co-operation that you were giving to the police. Isn't that right.
>
> …
>
> A. I think I got a discount for my early guilty pleas.
>
> Q. But you were also very well aware, weren't you, that you got a discount for co-operation with the police in giving them information about the burglaries and the people that you say that you committed them with. Correct?
>
> A. I suppose so, there was something there, I would say.
>
> …
>
> Q. Are there any benefits that you anticipate that you may get in the foreseeable future as a result of the evidence that you're giving today.

A. I tell you right here and now, I've had nothing but shit … and when shit hit the fan, they weren't nowhere to help me, so no, I don't get any benefits.

…

Q. You've still got to be sentenced on some subsequent offending haven't you.

…

Q. Is it your hope the same process will operate again at that subsequent sentencing.

A. In the judgment, made by the Judge, at this sentencing before I was remanded for sentence, he made it clear that there would be no advantages, no discounts whatsoever at this trial. This trial would not come into my new case.

[17] Later, the following cross-examination of L by Mr Knowles, counsel for the defendant Mr Cullen, took place:

Q. The next thing you are going to get, or attempt to get will be some further consideration when you go up to Court on your new charges isn't it.

A. No.

…

Q. Just every step to me, [L], seems in the direction of your self-interest, do you agree with that.

A. I'd disagree with that.

[18] L's evidence concluded with this re-examination by Ms Currie:

Q. [L] you have some charges for which you are still to be sentenced. Are you deriving any benefit there in relation to your giving evidence at this trial.

A. No the judge has made it clear that this will definitely not be taken into consideration.

Q. Do you want to be here giving evidence.

A. No not really.

Q. Have you been summonsed.

A. No not that I'm aware of.

Q. Well are you here voluntarily.

A. I am.

Q. Have you gained anything at all from giving evidence at the depositions, the first trial or the second trial in relation to these Operation Rhino matters.

A. I don't think I have.

[19] The Judge's summing up noted the disagreement between the Crown and defence counsel as to L's credibility. The following passages illustrate this:

> [103] The Crown submits that [L] is a credible and reliable witness. The defence position is that he is the opposite – he lacks credibility and that he is unreliable. It is for you to decide what you make of [L] as a witness and of his evidence. In particular, it is for you to decide whether to accept his evidence and what weight you will give to it. In making that decision you should be cautious about whether he may have had his own purpose to serve by giving evidence at this trial and be sure that he was not giving false evidence to advance his own interests.
>
> [104] It is suggested by the defence that his interests might have included receiving, as he did, a reduction in his sentence for co-operation with police. That issue was thoroughly covered in defence cross-examination of [L]…
>
> …
>
> [141] The Crown's view is that the attacks on [L] were "red herrings" designed to muddy the waters and deflect you away from the real issues … The Crown submits that [L] had absolutely nothing to gain in giving evidence. Why, it asks, would he be going through all of this, coming to Court to face the accused unless he was simply telling the truth. Why would he bother and why would he lie?
>
> …
>
> [144] … The Crown submits that the cross-examination of [L] did not reveal that there was any benefit to him in giving evidence and he said as much many times.
>
> …
>
> [169] Mr McCall [amicus for Mr Clayton] challenges [L]'s motivation to give evidence … Mr McCall asked you to recall [L]'s evidence that when he starts something off he finishes it. What had he "started" raised Mr McCall? He answered that by suggesting that [L] was motivated by self-preservation, to look out for "No. 1" and to get what he wanted. That is of course one view, the contrary being that you might think that [L] wanted to see through the process of holding both himself and those he dealt with to account. Entirely matters for you.

[20] Mr Clayton, Ms Westbury and Mr Machirus were each found guilty by the jury on numerous charges of receiving, and Mr Clayton had also pleaded guilty

before trial to 10 counts of fraud. Mr Clayton was sentenced to five years imprisonment, Mr Machirus to three years six months imprisonment, and Ms Westbury to a term of 250 hours community work and nine months supervision.[11]

[21] Subsequently, Mr Machirus became aware of the full terms of Judge Radford's sentencing indication to L. In November 2007 he appealed against his conviction and sentence. In a decision delivered on 11 November 2008 this Court allowed the appeal, quashed Mr Machirus' conviction and ordered a new trial.[12] This Court's judgment included:

> [15] … the disclosure that was made in [Ms Currie's] letter was inaccurate and did not properly apprise the Judge, counsel and Mr Machirus of the true position.
>
> [16] It is a well established principle of common law that the Crown must disclose any factor which might operate as an inducement to a witness to give evidence: be it the fact that the witness is a paid police informer; or has obtained a discount in anticipation of co-operation; or has had a charge reduced to a lesser charge; or has received an immunity; or any other inducement factor. These factors are obviously material to the credibility and reliability of the evidence of the witness. They will inevitably be put to the witness in cross-examination. They are material which the Judge and jury are entitled to know about. They can be the basis for a ruling excluding the witness from the trial. Indeed, that was the application which Judge Crosbie heard on 21 August.
>
> …
>
> [21] We are satisfied that the accused were placed in an unfair disadvantage by the non-disclosure of the sentencing notes of 31 May, as were the Judge and jury and that a miscarriage of justice resulted. There is no doubt that had the Judge and jury been informed of the presence of the discount they would have been much better informed of the context within which L was to give and gave evidence.
>
> [22] We therefore allow the appeal and set aside the convictions. We order a retrial. Mr Machirus can apply for bail to the District or High Court. A copy of this judgment is to be served on Mr Clayton and his counsel, Ms E Bulger.

[22] Mr Clayton and Ms Westbury then also appealed, separately, with the same outcome, although this time by consent.[13] By the time this Court allowed the

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11 *R v Clayton* DC Christchurch CRI-2005-009-7821, 21 September 2007.
12 *R v Machirus* [2008] NZCA 477.
13 *R v Clayton* [2008] NZCA 493; *R v Westbury* [2009] NZCA 104.

appeals of Mr Clayton and Ms Westbury, Mr Clayton had served 14 months of his sentence of imprisonment and Ms Westbury had completed all of her sentence of 250 hours community service.

[23] Subsequently, the Crown Solicitor at Christchurch entered a stay of the prosecutions against Mr Clayton and Ms Westbury and consented to their discharge under s 347 of the Crimes Act 1961, with the result that they were deemed acquitted of the charges they faced.

The claim brought by Mr Clayton and Ms Westbury

[24] Mr Clayton and Ms Westbury contend Ms Currie's failure to disclose the full sentencing indication given to L in the course of their trial caused them loss. They claim the reputational damage to Ms Westbury consequent upon her conviction forced her to sell three businesses resulting in a loss of $1,004,000, and also that assets worth $100,000 taken by the police have never been returned to them. They claim compensation of $1,104,000 plus aggravated and exemplary damages.

[25] In their statement of claim filed on 22 June 2011, the respondents pleaded three causes of action. First, a breach of s 25(a), (e) and (f) of the NZBORA by Ms Currie not disclosing the actual sentencing indication and thereby misleading both the Court and the respondents. That NZBORA cause of action survives: neither Associate Judge Osborne nor Priestley J struck it out.

[26] Second, a tortious claim in deceit. That cause of action was struck out by Associate Judge Osborne, and that decision was not challenged.[14]

[27] Third, a claim for misfeasance in public office. The respondents plead the first and third appellants (Ms Currie and the Crown Solicitor at Christchurch) were public officers and that the second and fourth appellants (Raymond, Donnelly & Co and the Attorney-General) are vicariously liable for their actions. The allegation is that Ms Currie and the Crown Solicitor at Christchurch knowingly misapplied their powers and/or authorities as public officers, amounting to an abuse of office and, in

[14] *Clayton v Currie* [2012] NZHC 1475 [Associate Judge's decision].

so doing, acted with malice towards the respondents or with knowledge that the conduct was unlawful and likely to injure the respondents.

[28] During the hearing before us it became clear the claim for misfeasance in public office had not been pleaded with sufficient particularity. Lack of particulars had been criticised by Mr Pike QC before Priestley J, and earlier by Associate Judge Osborne.[15] Over opposition by Mr Pike, by minute dated 1 May 2014, we directed the respondents to file full particulars of the allegations that Ms Currie had acted unlawfully, had misapplied her powers and/or authorities amounting to an abuse of office and of the respects in which Ms Currie is alleged to have acted with malice toward the respondents or with knowledge that her conduct was unlawful and likely to injure the respondents. Particulars were filed by the respondents on 9 May, by which stage Mr Allan was no longer representing the respondents. The particulars run to 12 pages and are not, either in substance or in form, what the Court was seeking.[16] However, these "particulars" are given:

(a) Ms Currie was harming all the defence counsel and defendants by denying them the right to a fair trial;

(b) Ms Currie knew she was harming the respondents and intended to cause them damage; and

(c) Ms Currie acted with the purpose of having the respondents convicted, without any regard for the rules and obligations owed by her as a prosecutor.

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15 High Court judgment, above n 1, at [53]; Associate Judge's decision, above n 14, at [94]–[95].

16 The "particulars" filed were a mixture of narrative and submission. The respondents need to do three things. First, read carefully the allegations in paragraphs [42] and [43] of their statement of claim. Secondly, read carefully this Court's minute of 1 May 2014 which sets out the particulars (or details) they were directed to file and serve. Thirdly, file and serve a document which complies with that direction, and which informs the appellants the basis upon which the respondents make each of the allegations set out in [2](1) to (3) of the Court's 1 May minute. The respondents should do this promptly. Any further direction required must come from the High Court, in managing the proceeding toward trial.

Prosecuting counsel's duties, including the duty of disclosure

[29] Well established at common law is the principle that the Crown must disclose to a defendant facing a criminal trial any significant material which may affect the credibility of a prosecution witness,[17] such as any factor which may operate as an inducement to a witness to give evidence.[18] Mr Pike accepted this mandatory obligation exists at common law. The origin of this duty of disclosure is the elementary right of every defendant to a fair trial. [19]

The cause of action in misfeasance

Priestley J's judgment

[30] Priestley J struck out the cause of action alleging misfeasance in public office. He made some comments critical of the pleading, which is:

> 42. Each of the Defendants, jointly and severally, acted deliberately and unlawfully in the exercise of his or her office. Each of the Defendants, jointly and severally, knowingly misapplied their powers and/or authorities amounting to an abuse of office.
>
> 43. Each of the Defendants, jointly and severally, acted with malice towards the Plaintiff or with knowledge by each defendant that his or her conduct was unlawful and was likely to injure the Plaintiff.

[31] The Judge accepted Mr Pike's submission that the nub of the issue is whether Ms Currie, assuming she held a public office, was using the power or authority of her office in relation to her letter disclosing Judge Radford's sentencing indication.[20]

[32] The Judge accepted it is arguable Ms Currie, as a member of the staff of the Crown Solicitor conducting the Crown's business, held a public office for the purposes of the tort of misfeasance in public office. He accepted she and other staff

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17 In *R v Marshall* [2004] 1 NZLR 793 (CA) at [41] this Court noted that the principle is summarised in these terms by the English Court of Appeal in *R v Brown (Winston)* [1994] 1 WLR 1599 (CA) at 1607, an approach subsequently upheld by the House of Lords in *R v Brown (Winston)* [1998] AC 367 (HL) at 377.

18 *R v Machirus*, above n 12, at [16].

19 G E Dal Pont *Lawyers' Professional Responsibility* (5th ed, Thomson Reuters, Sydney, 2013) at [18.50]. The duties of a prosecutor are summarised by the Supreme Court in *Stewart v R* [2009] NZSC 53, [2009] 3 NZLR 425 at [19]–[22], drawing on New Zealand and Canadian authorities. Those duties are reinforced by the provisions of r 13.12 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008. Refer also to [57] below.

20 High Court judgment, above, n 1, at [55].

members could be liable for work they did *outside* courtrooms "in appropriately rare cases".[21] The Judge then said this:

> [61] I consider totally different considerations apply to appearances in court, particularly in the conduct of a criminal trial. In my judgment neither Ms Currie nor the Christchurch Crown Solicitor were exercising any power or authority during the running of the August 2007 criminal trial involving Mr Clayton and Ms Westbury as accused. It is for this reason I consider the tort, as pleaded, cannot succeed.

[33] The Judge's reliance in reaching this conclusion was on two Australian decisions: *Cannon v Tahche* and *Leerdam v Noori*.[22] He observed: "I regard the analysis of the two Australian Courts of Appeal as compelling."[23]

[34] Priestley J drew a distinction between a prosecutor's ministerial function and her role in court. The ministerial function includes deciding what charges a defendant should face and then laying those charges; that is a public role and involves the exercise of public powers. But in any ensuing trial a prosecutor plays the role of an advocate like any other practitioner appearing in court. The Judge observed that this distinction is slightly obscured in New Zealand because we do not have an office such as Director of Public Prosecutions.

[35] The Judge reinforced his decision with two policy considerations. The first hinged on the judiciary's constitutional function of controlling the criminal law process, which included supervisory and disciplinary powers over Crown counsel who appear before it. He said, "In short, as a matter of policy, there is no need to deploy the tort in the circumstances here pleaded."[24]

[36] The Judge described his second policy consideration as a "downstream" one. He expressed concern that availability of the tort in the circumstances of this case would make Crown prosecutors "an easy target", opening the door for the courts to be used for collateral attacks which bypassed "the supervising function of the courts over the criminal justice process".[25]

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21 At [60].
22 *Cannon v Tahche* [2002] VSCA 84, (2002) 5 VR 317; *Leerdam* v *Noori* [2009] NSWCA 90.
23 High Court judgment, above n 1, at [69].
24 At [73].
25 At [74].

Counsel's opposing submissions

[37] For the respondents as cross-appellants, Mr Allan submitted Ms Currie was under a duty to disclose all the relevant parts of Judge Radford's sentencing indication. In breach of that duty she had chosen to provide only part of the indication and to assure the Court and the respondents that she had held nothing back. Mr Allan argued Ms Currie had done this as a senior prosecutor acting as an embodiment of the Crown for the purposes of the respondents' trial. Ms Currie had certainly breached her duty to the Court. But, in Mr Allan's submission, that did not exclude a finding that she also breached duties owed to the respondents and the other defendants. Pointing out that *Cannon v Tahche* had not previously been followed in New Zealand, Mr Allan submitted it was clearly distinguishable, because there is room to argue that the New Zealand position was more similar to that applying in England. Relying on the Saskatchewan Court of Appeal's decision in *Milgaard v Mackie*,[26] he submitted this is a matter best resolved at trial.

[38] With one qualification, Mr Pike supported Priestley J's reasoning and decision. He submitted the Judge was correct to hold Ms Currie was not exercising her office of Crown prosecutor when disclosing (incompletely) the sentencing indication. Once engaged in a criminal trial, Ms Currie was not exercising any public power or authority attaching to the office of prosecutor. Rather, she was performing the function of the office of prosecutor. And Ms Currie's only duty when making the disclosure was to the Court; she owed no duty to any of the defendants nor to the public.[27] In accepting that Ms Currie, in making disclosure, owed a duty to the Court, Mr Pike emphasised the Court is "the corrective agency" and it had already corrected the position, first by quashing the respondents' convictions and subsequently by discharging them under s 347 of the Crimes Act.

[39] The qualification to Mr Pike's acceptance of the Judge's reasoning was that he did not accept Priestley J's observation that defence counsel were entitled to rely on Ms Currie's letter. Mr Pike argued defence counsel, who knew from Ms Currie's letter that they did not have the full sentencing indication, had a duty to obtain it and

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[26] *Milgaard v Mackie* (1994) 118 DLR (4th) 653 (SKCA).

[27] *Cannon v Tahche*, above n 22, at [56]–[60], in particular at [57]; *Leerdam v Noori*, above n 22, at [99]–[111].

check the position for themselves. We say more about this submission when dealing with the NZBORA cause of action.

Our decision

[40] The elements of the tort of misfeasance in public office can be summarised thus: [28]

(1) *Standing*: The plaintiff must have standing to sue.

(2) *Public office*: The defendant must be a public officer.

(3) *Unlawful conduct*: The defendant must have acted or omitted to act in purported exercise of her public office unlawfully either:

(a) intentionally, that is actually knowing her actions or omission to act were beyond the limits of her public office;[29] or

(b) with reckless indifference as to whether she was acting or omitting to act outside those limits.[30]

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[28] We have drawn these elements from this Court's judgments in *Commissioner of Inland Revenue v Chesterfields* [2013] NZCA 53, [2013] 2 NZLR 679 at [40]–[44]; *Minister of Fisheries v Pranfield Holdings Ltd* [2008] NZCA 216, [2008] 3 NZLR 649 at [104]–[108]; *Hartnell v New Zealand Meat Producers Board* (2006) 19 PRNZ 713 (CA) at [72]–[77]; *Rawlinson v Rice* [1997] 2 NZLR 651 (CA) at 665; and *Garrett v Attorney-General* [1997] 2 NZLR 332 (CA). We have also derived guidance from *Northern Territory of Australia v Mengel* (1995) 185 CLR 307; *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1 (CA and HL); *Odhavji Estate v Woodhouse* 2003 SCC 69, [2003] 3 SCR 263; Stephen Todd "Abuse of Public Office" in Stephen Todd (ed) *The Law of Torts in New Zealand* (6th ed, Brookers, Wellington, 2013) 1021 at [19.2]; Peter W Hogg, Patrick J Monahan and Wade K Wright *Liability of the Crown* (4th ed, Carswell, Toronto, 2011) at [6.5](c); Erica Chamberlain "Misfeasance in a Public Office" in GHL Fridman (ed) *The Law of Torts in Canada* (3rd ed, Carswell, Toronto, 2011) 839 at 840; and Sarah Hannett "Misfeasance in Public Office: the Principles" [2005] 10 JR 227.

[29] Where the action is done with malicious intention (ie (a) of element (4)), then the actions are likely to be outside the limits of the public office. See Todd, above n 28, at 1025: "A public officer who exercises his or her powers or functions with an intention to injure another knows that he or she has no authority to act for this purpose and, of course, knows precisely who will suffer injury."

[30] In summarising this element of the tort, we have deliberately avoided any reference to "functions", "powers", "authority", "duties" or "obligations", and have therefore avoided expressing any view as to the distinction, if any, between these concepts. This judgment does not require us to express any such view. And, as this is a point in issue in this case, it is preferable not to do so.

(4) *Intention*: The defendant must have so acted or omitted to act either:

(a) with malice towards the plaintiff, that is, with intention to harm the plaintiff; or

(b) knowing her conduct was likely to harm the plaintiff, or people in the general position of the plaintiff; or

(c) with reckless indifference as to whether the plaintiff would be harmed. Subjective recklessness, not objective recklessness, is required.

(Note: (a) is what is often called "targeted malice"; (b) and (c) are often called "non-targeted malice".)

(5) *Resulting loss*: The plaintiff must actually have suffered loss and the defendant's actions must have caused the plaintiff's claimed loss.[31]

[41] Subject to the qualification we add at the end of this paragraph, elements (1), (2), (4) and (5) are not in issue on this appeal. The respondents' standing to sue is not challenged. Priestley J held, and Mr Pike accepted, that for strike-out purposes it is arguable Ms Currie held a public office.[32] The allegations that Ms Currie had the requisite intent must be taken as provable at trial,[33] as must the allegations of resulting loss to the respondents. So the issue for us is whether Priestley J erred in

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[31] We note the following observation by the Chief Justice in a paper "Reflections on the New Zealand Bill of Rights Act" she presented at an Institute of Judicial Studies Conference in Auckland on 16 October 2014:

> [39] … An open question is whether in cases of misfeasance in public office which also entail breaches of the [NZBORA] the [NZBORA] breach can be taken into account in the damages awarded and, if so, whether proof of damage will remain necessary irrespective of the breach of the right, contrary to the view taken by the House of Lords in *Watkins v Secretary of State for the Home Department* [2006] UKHL 17, [2006] 2 AC 395. At present, it seems that [NZBORA] compensation stands apart.

[32] High Court judgment, above n 1, at [60]. What Priestley J said was "I have no difficulty with the submission that a Crown Solicitor, who holds a warrant, together with members of his or her staff who conduct the Crown's business hold a public office for the purposes of the tort. Certainly, for strike out purposes, it is arguable."

[33] Post-hearing, at our request, the appellants provided us with a copy of the record of the disciplinary proceedings against Ms Currie, and a copy was also provided to the respondents. Because that record is at present confidential to the parties to the disciplinary proceedings we say nothing about it, beyond observing that the findings are not helpful to the respondents in terms of establishing the mental element of the tort.

holding that element (3) could not be established here. The qualification we add is this. Although (2) and (3) are distinct elements of the tort, some aspects of what is discussed in the cases in relation to element (2) are perhaps also relevant to element (3). For example, although *Cannon v Tahche* and *Leerdam v Noori* are essentially about element (2), what they say about the need for an identified public power has some relevance for element (3).[34] Similarly, in its judgment in *New Zealand Defence Force v Berryman*, this Court discusses both the scope of "public officer"[35] and whether a claim is only available in relation to the performance or purported performance of public functions.[36]

[42] We do not agree with the High Court's decision that the misfeasance in public office cause of action must be struck out. Applying the well established strike-out principles, we do not accept that Priestley J could be certain the cause of action could not succeed.[37] There are four, interrelated points.

[43] First, Priestley J considered all Ms Currie's impugned actions or omissions were "in Court … in the conduct of a criminal trial".[38] Although Ms Currie's conduct obviously related to the trial, it is at least arguable that it occurred in part outside the courtroom. We agree with the Judge's view, noted in [32] above, that there may be liability for actions taken by a prosecutor outside the courtroom. In the course of oral argument, Mr Pike submitted no liability would attach for anything a prosecutor did in preparing for or conducting a trial. A contrary argument is that only actions "in the fray" of a trial are immune from liability.

[44] Second, Priestley J did not refer to several English, Canadian and New Zealand cases supporting the respondents' argument that their cause of action for misfeasance in public office is tenable. We revert, at [50] below, to the two Australian cases upon which the Judge relied: *Cannon v Tahche* and *Leerdam v*

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34 *Cannon v Tahche*, above n 22; *Leerdam v Noori*, above n 22.

35 *New Zealand Defence Force v Berryman* [2008] NZCA 392 at [63].

36 At [64].

37 The criteria for striking out as summarised by this Court in *Attorney-General v Prince* [1998] 1 NZLR 262 (CA) at 267 were endorsed by Elias CJ and Anderson J in the Supreme Court in *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33]. And refer also to the judgment of Blanchard, Tipping and McGrath JJ at [123]–[124].

38 High Court judgment, above n 1, at [61], quoted in [32] above.

Noori. For the reasons we will explain, we do not consider those two cases are in point.

[45] The first of the English cases is *Elguzouli-Daf v Commissioner of Police of the Metropolis*.[39] Although we understand the Judge was referred to this case, he did not mention it in his judgment. In that case, the two appellants had spent varying lengths of time in custody before the prosecutions against them were effectively abandoned. Each appellant sued the Crown Prosecution Service (CPS) for damages for negligence. By way of background, the CPS was established by the Prosecution of Offences Act 1985 (UK). It is an autonomous and independent agency, with the functions of reviewing police decisions to prosecute and conducting prosecutions on behalf of the Crown. Its head, the Director of Public Prosecutions, is appointed under the Act by the Attorney-General in his non-political role as a law officer of the Crown. The relevance of *Elguzouli-Daf* is these comments by Steyn LJ in his judgment:[40]

> Turning to private law remedies there is first of all the tort of malicious prosecution. … It is also necessary to consider the tort of misfeasance in public office. The essence of the tort is the abuse of public office. Potentially such liability might attach to a decision of a CPS prosecutor. But, as the law stands, the plaintiff has to establish either that the holder of the public office maliciously acted to the plaintiff's detriment or that he acted knowing that he did not possess the relevant power. … In this corner of the law our legal system possibly has a capacity for further development … But it would be wrong to say more in this case about this complex area of the law. By way of summary, one can say that as the law stands a citizen who is aggrieved by a prosecutor's decision has in our system potentially extensive private law remedies for a deliberate abuse of power.

[46] The English Court of Appeal's decision in *Jones v Swansea City Council*, to which Mr Allan referred us in the hearing of this appeal, can also be contrasted to that of the Victorian Court of Appeal in *Cannon v Tahche*. The Victorian Court held a *power* to act must be identified in order to determine whether the conduct complained of occurred in purported performance of the functions of a public office. Thus, a power to act is an element of the tort.[41] By contrast, the English Court of Appeal in *Jones* rejected an argument that a decision made by a City Council as a private landlord is not a power having a statutory or public origin, but merely a

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39 *Elguzouli-Daf v Commissioner of Police of the Metropolis* [1995] QB 335 (CA).

40 At 347.

41 *Cannon*, above n 22, at [40]. See also *Leerdam v Noori*, above n 22, at [6].

"private" power.[42] *Jones* can perhaps be distinguished from the situation here, because it involved a City Council and not an individual. Slade LJ stated of the respondent City Council: "The ultimate origin of each power is surely the statute"[43] and "all powers possessed by a local authority, whether conferred by statute or by contract are possessed 'solely in order that it may use them for the public good'".[44]

[47] Turning to Canadian authority, in *Odhavji Estate v Woodhouse* the Supreme Court of Canada expanded the scope of misfeasance in public office to include not only conduct involving the exercise of statutory powers, but also acts done pursuant to a statutory duty.[45] The Court saw no reason to distinguish between a public officer exercising a statutory power as opposed to a situation where a public officer is acting in accordance with a statutory duty.[46] In reaching this conclusion, the Supreme Court had placed some reliance on the decision of the New Zealand Court of Appeal in *Garrett v Attorney-General*, and in particular on the comment of Blanchard J in that case that "[t]he purpose behind the imposition of this form of tortious liability is to prevent the deliberate injuring of members of the public by deliberate disregard of official duty".[47] Commenting on *Odhavji*, Harry Wruck QC observed: "It matters not, therefore, whether the function performed is a duty or a power. Rather the wrongful act is the deliberate and unlawful performance of a public function".[48]

[48] In its judgment in *New Zealand Defence Force v Berryman* this Court acknowledged that decided cases are divided as to the nature of the actions of a public officer which may found a claim for misfeasance in public office.[49] It noted that several cases "accept the possibility of an action for misfeasance in public office in relation to non-public law functions". The Court concluded, in an obiter remark, that: "the actions of a public officer must have some public character before they

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42 *Jones v Swansea City Council* [1990] 1 WLR 54 (CA); reversed by the House of Lords on fact, but not on law: *Jones v Swansea City Council* [1990] 1 WLR 1453 (HL).
43 At 70.
44 At 71, citing William Wade *Administrative Law* (6th ed, Clarendon Press, Oxford, 1988) at 400.
45 *Odhavji Estate v Woodhouse*, above n 28.
46 At [30].
47 At [26] citing from *Garrett v Attorney-General*, above n 28, at 350.
48 Harry Wruck "The Continuing Evolution of the Tort of Misfeasance in Public Office" (2008) 41 UBC L Rev 69 at [33].
49 *New Zealand Defence Force v Berryman*, above n 35, at [63].

can be the subject of a claim for misfeasance in public office".[50] The Court also observed: "there is scope for doubt and debate as to the breadth of the concept of public office for the purposes of the tort [of misfeasance in public office]".[51] In *Slavich v Judicial Conduct Commissioner* Andrews J, having considered this Court's comments in *Berryman*, felt unable to exclude the possibility that a court could hold a Crown Prosecutor, when making submissions in court, was exercising a power of her public office.[52] However, the Judge struck out Mr Slavich's cause of action for misfeasance in public office for other reasons. The question is therefore not settled in New Zealand.

[49] To summarise our second point, the High Court struck out this cause of action without considering the position in England as demonstrated by *Elguzouli-Daf* and *Jones*, or the position in Canada as spelt out in *Odhavji*. In no New Zealand case has the Court, after considering the conflicting positions adopted in Australia on the one hand, and in the United Kingdom and Canada on the other hand, opted for the former approach.

[50] Our third point relates to the two Australian cases on which the Judge founded his decision. Mr Pike relied on the holding of the Victorian Court of Appeal in *Cannon v Tahche* that the ethical obligation prosecuting counsel have to assist the court in ensuring justice is done in a trial is incompatible with the existence of the type of public power or duty, breach of which might support an action for the tort of misfeasance.[53] In *Leerdam v Noori*, the New South Wales Court of Appeal followed *Cannon*, albeit in the context of an Administrative Appeals Tribunal hearing. The defendant solicitor was held not to occupy a position within the scope of the tort of misfeasance in public office.

[51] In contrast to the present case, in both Australian cases the defendants included legal practitioners in private practice. In *Cannon v Tahche* the relevant defendants were the barrister who had prosecuted in Mr Tahche's trial for rape and

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50 At [64].
51 At [63].
52 *Slavich v Judicial Conduct Commissioner* HC Hamilton CIV-2010-419-975, 14 July 2011 at [30]–[32].
53 *Cannon v Tahche*, above n 22, at [59].

the solicitor on the staff of the Director of Public Prosecutions who instructed that barrister. It was alleged they had, in the course of the trial, received information suggesting the complaint of rape could be false, but had deliberately not disclosed it to the Court or defence counsel. It later transpired the complainant had made an almost identical false complaint against another man. As a result Mr Tahche's conviction was quashed and a nolle prosequi entered in relation to the alleged rape.[54]

[52] In *Leerdam v Noori*, Mr Noori had been an officer of the Government of Afghanistan before travelling to Australia and applying for a protection visa. After the Minister for Immigration declined Mr Noori's application, he applied to the Administrative Appeals Tribunal for review of the decision. Mr Leerdam was a solicitor with a firm instructed by the Minister to represent him before the Tribunal. Mr Leerdam's impugned conduct was twofold. First, failing to comply with an order of the Tribunal that the Minister provide details of allegedly criminal offending by Mr Noori while an officer of the Afghanistan Government. Secondly, seeking, during the Tribunal hearing, an order that evidence be taken in secret and that Mr Leerdam's explanation for the failure to provide particulars be given to the Tribunal in secret. Thus, part – perhaps the substantial part – of Mr Leerdam's impugned conduct took place in the Tribunal hearing. In both cases the issue was: were the defendants holders of a public office for the purposes of the tort? As noted at [41] above, Mr Pike accepts it is arguable that Ms Currie held a public office, so this element of the tort is not at issue on this appeal.

[53] The status of the defendant barrister and solicitor was to the forefront of their counsel's argument in successfully opposing Mr Tahche's application for special leave to appeal to the High Court of Australia. The transcript records counsel submitting:[55]

> **MR FARIS***:* If the Court pleases. This application is made in the context of an action against a member of the private Bar, briefed on an ordinary brief, retained on an ordinary brief, to prosecute a criminal trial. Obviously, this happens many times a day every day of the legal year. As is the custom, he was instructed by a paid employee of the Director of Public Prosecutions Office, and these are the two people who are the defendants in the action.

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[54] A nolle prosequi is a stay of the prosecution entered, in the case of *Cannon v Tahche*, by the Director of Public Prosecutions. It is not equivalent to an acquittal.

[55] *Tahche v Cannon* [2003] HCA Trans 524 at 10 and 11.

> …
>
> We say, and we contend strongly, that the judgment of the Court of Appeal is impeccable, that its analysis is correct. We say that the principal issue in this application is whether or not our two clients were public officers and we say we get to the resolution of that question, as did the Court of Appeal, by analysing whether they exercise any public powers. To put it in a rhetorical way, what is the public power that a member of the private Bar briefed to prosecute a criminal trial exercises? What public power does he exercise? Sitting there, what public power does his instructing solicitor exercise?
>
> Now, we are not talking about the Director of Public Prosecutions, who holds a statutory office, a Crown Prosecutor who holds a statutory office, and attached to those public offices are duties and functions. By accepting a brief, we submit that a barrister does not become a public officer, certainly not in the context of this tort, and there is no public power exercised in the course of a trial. …

[54] The High Court of Australia refused the application for leave to appeal, noting that the duties which Mr Tahche alleged were owed to him were actually duties to the court. Delivering the Court's judgment, Gleeson CJ stated an appeal would necessarily fail because the sanction for breach of those duties was for the trial court or appellate court to make orders to prevent or remedy any miscarriage of justice resulting from breach of duty.[56] Such orders might include the quashing of the conviction and direction of a new trial.

[55] In *Leerdam v Noori* Spiegelman CJ made these comments:[57]

> However, a person whose capacity to act is entirely a creature of contract with the executive arm of government is not, in my opinion, thereby constituted a public officer for purposes of the tort …

Also:[58]

> The position of the solicitors, or of his firm, could not be characterised as a "public office".

Later:[59]

> In any event, it is not appropriate to describe the duties of a solicitor representing a party as "public duties" for the purpose of characterisation of the position held by the solicitor as a "public office".

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56 At 17.
57 *Leerdam v Noori*, above n 22, at [18].
58 At [21].
59 At [25].

[56] The observation of Steyn LJ in *Elguzouli-Daf*, cited in [45] above, concerned the status of a Crown prosecutor in the CPS. In New Zealand prosecutions for serious offences are undertaken by Crown Solicitors, who hold prerogative office under a warrant from the Crown (the warrant is generally signed by the Attorney-General, as first law officer of the Crown). Ms Currie was one of the prosecutors on the staff of the Christchurch Crown Solicitor. Her position in the respondents' trial is arguably closer to that of a Crown prosecutor in England, than to the prosecuting barrister in *Cannon v Tahche* or the solicitor appearing in *Leerdam v Noori*. This potentially distinguishes the position in New Zealand from that in the two Australian cases.

[57] The fourth point is that Ms Currie's impugned actions concerned disclosure. In [29] we have referred to Ms Currie's common law duty to disclose any significant material affecting the credibility of L. Section 13 of the Criminal Disclosure Act 2008 now imposes on a prosecutor a duty of full disclosure of the information stipulated in the section.[60] Unsurprisingly s 13 does not specifically mention a sentencing discount or inducement of the type received by L, but s 13(3)(d) does require disclosure of "any convictions of a prosecution witness that are known to the prosecutor and that may affect the credibility of that witness". The Solicitor-General's Prosecution Guidelines, as at 9 March 1992, contained a detailed section on a prosecutor's disclosure obligations.[61] That section included the following paragraph:

> 10.6 Disclosure of any Inducement or Immunity given to a Witness
>
> The defence must always be advised of the terms of any immunity from prosecution given to any witness. Likewise the existence of any other factor which might operate as an inducement to a witness to give evidence should be disclosed to the defence. This includes the fact that the witness is a paid Police informer. *R v Chignell* [1991] 2 NZLR 257 [(CA)].

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60 The Criminal Disclosure Act 2008 was not in force at the time of the relevant trial, and so did not apply to Ms Currie's actions at trial.

61 Crown Law "Solicitor-General's Prosecution Guidelines as at 9 March 1992" (Crown Law, Wellington, 1992) at [10]. Those Guidelines were in force at the time of the trial. The Solicitor-General's Prosecution Guidelines as at 1 July 2013 (the current guidelines) also contain such a detailed section at [16].

[58] Given the common law duty of disclosure, New Zealand's statutory regime for criminal disclosure and the Solicitor's Prosecution Guidelines as to disclosure, it is at least arguable that Ms Currie's impugned actions when disclosing the sentencing indication had the requisite "public character". If Ms Currie had a prosecutorial duty to disclose the sentencing indication, we consider it arguable she did so exercising the powers and authority attaching to her public office as prosecutor.

[59] We note here Mr Pike's reliance on the comment of Blanchard J in this Court's judgment in *Garrett* that the tort of misfeasance in public office "should not be allowed to overflow its banks".[62] The comment needs to be put in its context. In *Garrett* it was held that foreseeability of damage is not enough to establish liability in misfeasance, and that actual appreciation of the consequences for the plaintiff or people in the general position of the plaintiff, or reckless indifference as to those consequences, is needed.[63] The whole paragraph which the quote comes from reads:[64]

> In our view this intentional tort should not be allowed to overflow its banks and cover the unintentional infliction of damage. In many cases the consequences of breaking the law will be obvious enough to officials, who can then be taken to have intended the damage they caused. But where at the time they do not realise the consequences they will probably not be deterred from exceeding their powers by any enlargement of the tort. As Clarke J observes, they may well think that they are acting in the best interests of those persons whom they actually have in mind. In any modern society administration of central or local government is complex. Overly punitive civil laws may oftentimes deter a commonsense approach by officials to the use or enforcement of rules and regulations. We prefer to err on the side of caution and not to extend the potential liability of officials for causing unforeseen damage. To do so may have a stultifying effect on governance without commensurate benefit to the public.

[60] Although the quote relied on by Mr Pike was referring specifically to the need to avoid extending misfeasance to cover situations more appropriately covered by other torts such as negligence, we acknowledge the need for caution where a court is possibly extending the scope of tortious liability. However, we make two points about this need for caution. First, it is not appropriate to avert the risk of the

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62 *Garrett v Attorney-General*, above n 28, at 350.
63 At 349.
64 At 350.

tort overflowing its banks by striking out when application of the tort is arguable, which we consider to be the case here. Second, there has not in New Zealand been a flood of misfeasance in public office claims.

Conclusions on the misfeasance issue

[61] We summarise. Mr Pike rightly accepts a Crown Prosecutor in New Zealand has no general immunity from suit.[65] Arguably, some of Ms Currie's actions occurred outside the courtroom. We agree with Priestley J that liability may attach for those actions. In holding there was no liability for Ms Currie's actions in the courtroom, the Judge relied upon the two Australian cases he cited. Critical to the result in those two cases was the fact that the lawyers involved were private practitioners instructed by the Crown. Those cases can be distinguished because that was not Ms Currie's position. The Judge did not consider the English or Canadian cases which take a different view about the potential liability of a Crown Prosecutor. Ms Currie's position was close to that of the Crown Prosecutor referred to in the English case *Elguzouli-Daf*.[66]

[62] This Court in *Berryman*[67] noted these conflicting positions and the scope "for doubt and debate" as to which is correct. Further, Ms Currie's statutory and common law disclosure obligations arguably gave her actions the requisite "public character" referred to in *Berryman*. The policy considerations which weighed with Priestley J certainly warrant consideration. But the Court's powers to sanction and control the actions of lawyers in court and the duties a prosecutor owes the court arguably do not redress a situation where, as here, the plaintiffs have served all or part of the sentences imposed on them, in the case of Mr Clayton part of a term of imprisonment.

[63] In the face of all this, potential liability for all Ms Currie's actions, whether within or without the courtroom, cannot be ruled out. For those reasons we consider Priestley J erred in striking out the respondents' cause of action for misfeasance in public office because, as we said above at [42], we are not satisfied he could be

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65 We elaborate on Mr Pike's concession in [67] below.

66 *Elguzouli-Daf v Minister of Police of the Metropolis*, above n 39.

67 *New Zealand Defence Force v Berryman*, above n 35.

certain the cause of action would not succeed. We therefore allow the cross-appeal. At trial, it will be for the Judge, in the context of the full factual background of this case, to determine exactly what is the scope of element (3) of the tort, and to decide also whether Ms Currie falls within that scope.

The cause of action for breach of NZBORA rights

Priestley J's judgment

[64] The Judge began by summarising the argument Mr Pike had put to him for the appellants:[68]

(a) There remained far too many "but for" factors to be cleared off before it could be said the respondents had been denied the right to a fair trial. A finding that they had not received a fair trial meant the administration of justice had entirely failed. Denial of a fair trial was to be contrasted with a case where the trial had been affected by irregularities.

(b) Although s 25 NZBORA issues had been raised before the Court of Appeal in *Machirus*,[69] the Court's judgment was based on a miscarriage of justice, not denial of the right to a fair trial.

(c) The constitutional remedy of *Baigent* damages should not be available in a situation where, as here, the defendants knew Judge Radford's sentencing indication was available but did not ask for it to be disclosed.

(d) The Court should apply the Canadian Supreme Court's decision in *R v Dixon*, and hold that the respondents must "call for the statements [ie the sentencing indication] or live without them".[70] In *Dixon* the accused's counsel had been provided with copies of police reports which included a summary of statements given by four witnesses.

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68 High Court judgment, above n 1, at [45] and [47].
69 *R v Machirus*, above n 12, at [18].
70 *R v Dixon*, above n 5, at [277].

Those statements were not provided to defence counsel and they did not request them. The present situation, where Ms Currie quoted from the sentencing indication, but did not provide defence counsel with a copy of it, is indistinguishable.

(e) The Associate Judge erred in concluding the respondents in their trial "might have been at an unfair advantage", as the Court of Appeal found in *Machirus*.[71] *Baigent* compensation is not available as of right and the Court's supervisory jurisdiction is wide. The Associate Judge's conclusion was not open in the face of such imponderables as whether, on a retrial, L's evidence would have been admitted or excluded by the Judge or believed or disbelieved by the jury.

(f) The respondents had already obtained a remedy by their convictions being quashed and there being no retrial. They thus had no sufficient basis to claim discretionary NZBORA compensation.

[65] Priestley J was unimpressed by the fourth of these arguments, (d), based on *Dixon*. He considered it unrealistic in the context of the respondents' trial. In his view defence counsel were entitled to assume from Ms Currie's letter that disclosure had been fully made. A request to Ms Currie for a copy of the full sentencing indication would carry the clear inference that Ms Currie's disclosure was not to be trusted and run totally counter to the ethos of the Bar. To impose such a requirement was "unreal".[72]

[66] But the Judge saw "much force" in some of Mr Pike's other submissions.[73] He found it hard to see how the respondents' s 25(a) right to a fair trial had been breached to the extent that they were entitled to compensation over and above the quashing of their convictions and their deemed acquittal. Priestley J then said this:

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71 This Court's finding in *Machirus*, above n 12, at [21] was: "We are satisfied that the accused were placed in an unfair disadvantage by the non-disclosure of the sentencing notes of 31 May, as were the Judge and jury and that a miscarriage of justice resulted".

72 High Court judgment, above n 1, at [46].

73 At [48].

> [49] That said, although my personal view is that the plaintiffs have drawn a long bow to the extent that the bow string will snap, for strike out purposes the pleadings suffice. It is indeed arguable that Ms Currie's partial disclosure placed the plaintiffs at an unfair disadvantage during their trial. And the issue of whether *Baigent* NZBORA damages are available in respect of criminal procedure breaches has yet to be determined by a higher policy court.

He therefore upheld the Associate Judge's conclusion that this cause of action should not be struck out.

Counsel's opposing submissions

[67] Mr Pike made several concessions. He accepted Ms Currie, acting in her official capacity as a Crown prosecutor, had made a mistake in not disclosing the whole of the sentencing indication. He accepted a New Zealand prosecutor did not have the immunity or privilege enjoyed to a qualified extent by Canadian prosecutors, and absolutely by their United States colleagues. He accepted also that he could not challenge this Court's findings in *Machirus* – that all the accused in the trial had been placed at an unfair disadvantage by the non-disclosure.

[68] Mr Pike invited us, as he had Priestley J, to follow *R v Dixon* and hold that the respondents' failure to obtain the full sentencing indication for themselves disentitled them to *Baigent* compensation.

[69] Then Mr Pike developed the submission he had put to the High Court that *Baigent* damages should not be available for the sort of "irregularity" that had occurred here. He argued that in Canada, damages under the Canadian Charter of Rights and Freedoms are confined to cases of fundamental breach, such as wrongly bringing a criminal prosecution. He cited a number of cases in support of this proposition.[74] Mr Pike invited us to follow the Canadian approach, which he submitted restricted a Charter damages claim against a prosecutor to cases of mala fides or recklessness.

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[74] *McGillivary v New Brunswick* (1994) 92 CCC (3d) 187 (NBCA) which, at 191, refers to *Nelles v Ontario* [1989] 2 SCR 170; *Proulx v Quebec* 2001 SCC 66, [2001] 3 SCR 9; *Miguna v Ontario* (2005) 262 DLR (4th) 222 (ONCA); *Wiche v Ontario* (2001) 83 CRR (2d) 179 (ONSCJ); aff'd [2003] OJ No 221 (ONCA); and *Brown v Stott* [2003] 1 AC 681 (PC).

[70] Mr Pike referred to the Supreme Court's judgment in *Attorney-General v Chapman.*[75] He accepted *Chapman* concerned judicial immunity, but submitted some of the policy reasons that had weighed with the majority in refusing *Baigent* damages in that case should also apply to a claim such as this one.

[71] Drawing all this together, Mr Pike argued NZBORA damages are not available for breach of the prosecutor's duty of disclosure, when the defence knows of the existence of the relevant document. Such a claim is available only for grave flaws in the trial process, not a mere irregularity such as had occurred here. A degree of unfairness did not amount to a breach of the obligation to provide a fair trial. Mr Pike also pointed to the existence of other remedies such as the torts of malicious prosecution or misfeasance in public office, although of course he had submitted that the latter is not available here.

[72] In responding, Mr Allan was at pains to point out what had happened in the trial: defence counsel querying whether they had been provided with all the information and Ms Currie assuring counsel and the Court that nothing had been held back.

[73] Mr Allan submitted that the respondents' fair trial rights had, prima facie, been breached entitling them to pursue a claim for *Baigent* compensation. He contended that the facts, assessment of any contribution or responsibility the respondents might have for what had occurred, and appropriate remedies, were all matters for trial.

Analysis

[74] We deal first with the issue whether prosecutors in New Zealand enjoy immunity from claims for damages or compensation for breach of rights under the NZBORA.

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

(a) Are prosecutors immune from suit?

[75] The New Zealand courts have not given any definitive consideration to this issue in relation to the liability of prosecutors but the Supreme Court has addressed both barristerial and judicial immunity. It abolished barristerial immunity in *Chamberlains v Lai*[76] without any apparent flood of claims in consequence. In contrast, the majority of the Supreme Court in *Attorney-General v Chapman* held there was no claim for public law compensation for alleged breaches by the judiciary of ss 25 and 27 of the NZBORA.[77] The majority of the Supreme Court considered the public policy reasons for dispensing with barristerial immunity differed from those relevant to judicial immunity.[78] Elias CJ was one of the two Judges who dissented. Some of the policy reasons the Chief Justice advanced for extending liability to the judiciary are equally applicable to prosecutors, namely the difficulty of separating judicial (and, it might equally be said, prosecutorial) breaches of rights from breaches by other state actors, leading to arbitrary results and difficult questions of attribution or materiality.[79]

[76] In Australia, immunity for advocates, in relation to the conduct of a case in court or for associated work, remains. The primary reason is the public interest in the finality of proceedings.[80] In the United Kingdom, the position is the same as it is in New Zealand; barristerial immunity has gone.[81]

[77] In Canada, the issue of public law remedies for prosecutorial non-disclosure is due to be considered by the Supreme Court on 13 November 2014 in *Henry v British Columbia*.[82] We also mention *Nelles v Ontario* below.[83]

[78] In the United States, the majority of the Supreme Court in *Imbler v Pachtman* held a prosecutor is absolutely immune from federal damages actions (available

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76 *Chamberlains v Lai* [2006] NZSC 70, [2007] 2 NZLR 7.
77 *Attorney-General v Chapman*, above n 75.
78 At [183].
79 At [53], and also *Attorney-General v Chapman* [2009] NZCA 552, [2010] 2 NZLR 317 at [79]–[80].
80 *D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12, (2005) 223 CLR 1.
81 *Arthur J S Hall & Co v Simons* [2000] 3 All ER 673 (HL).
82 On appeal from *Henry v British Columbia (Attorney-General)* 2014 BCCA 15, 6 CCLT (4th) 175.
83 *Nelles v Ontario*, above n 74. We refer to this case in n 88 below.

against anyone who acts under colour of state law to deprive a person of their constitutional rights) when the actions arose out of the prosecutor's initiation of prosecution and presentation of the State's case.[84] The Court also suggested this absolute immunity would attach to activities that "were intimately associated with the judicial phase of the criminal process".[85] The Court accepted that drawing a line between prosecutorial functions and other more administrative functions was a difficult task, but concluded prosecutorial functions that were of a quasi-judicial or advocatory nature should be afforded absolute immunity. The Court stopped short of holding that similar immunity should attach to "administrative" or "investigative" functions.

(b) Section 6(5) of the Crown Proceedings Act 1950

[79] Mr Pike referred us to s 6(5) of the Crown Proceedings Act 1950 which provides:

> **6 Liability of the Crown in tort**
>
> …
>
> (5) No proceedings shall lie against the Crown by virtue of this section in respect of anything done or omitted to be done by any person while discharging or purporting to discharge any responsibilities of a judicial nature vested in him or her, or any responsibilities which he or she has in connection with the execution of judicial process.

[80] We understood Mr Pike to concede s 6(5) did not bar a claim against the Crown for compensation for breach of the NZBORA. That appears to be a proper concession in the light of the nature of the Crown's liability under the NZBORA and the observations of this Court in *Baigent*.[86] The liability of the Crown is not vicarious. Rather, it is a direct liability of the Crown – the state – in public law as a guarantor of the rights and freedoms contained in the NZBORA.[87] Accordingly, it

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84 *Imbler v Pachtman* 424 US 409 (1976).

85 At 430.

86 *Baigent's* case, above n 3, at 677 per Cooke P and at 718 per McKay J. See also Andrew Butler and Petra Butler *The New Zealand Bill of Rights: a commentary* (LexisNexis, Wellington, 2005) at [27.10.1]–[27.10.2].

87 *Baigent's* case, above n 3, at 677 per Cooke P; Todd, above n 28, at [19.3.02]; Grant Huscroft "Civil Remedies for Breach of the Bill of Rights" in Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) 811 at 815.

exists independently from, and is unaffected by, any specific statutory immunities available to individuals, such as s 6(5) of the Crown Proceedings Act.[88]

(c) Are damages available against a prosecutor for breaches of the NZBORA?

[81] *Baigent* damages are an "exceptional remedy",[89] only available in "egregious cases".[90] It is not obvious that the Crown should be liable for all breaches of the NZBORA, especially when the Crown cannot control the actions of various state sector bodies, for example those with financial autonomy.[91]

[82] Compensation will normally only be appropriate where the rights cannot be vindicated by means other than the award of compensation, for example where the breach of the right has resulted in some sort of irreparable harm.[92] Those who have been through the criminal process and have had their NZBORA rights vindicated through remedies such as exclusion of evidence or a stay of prosecution will find it difficult to obtain a further remedy of compensation.[93]

[83] Stephen Todd has compiled the following list of potential remedies:[94] exclusion of evidence, a stay of proceedings, a mandatory remedy, quashing a decision made in breach of a guaranteed right, and a declaration of a NZBORA violation.

[84] The courts in this country have not reached any concluded view on the availability of a remedy in damages for compensation in this context but some obiter

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88 *Baigent's* case, above n 3, at 677 per Cooke P, and at 718 per McKay J. See also Todd, above n 28, at [19.3.02]; Huscroft, above n 87, at 815; Butler and Butler, above n 86, at [27.4.7] and [27.6.6]. We note, however, that in *Nelles v Ontario*, the majority of the Canadian Supreme Court held under a provision equivalent to our s 6(5), that a decision to prosecute is a judicial function rendering the Crown immune from liability for the actions of the Crown Attorney and the Attorney-General in deciding to prosecute.

89 *Brown v Attorney-General* [2003] 3 NZLR 335 (HC) at [118]; Philip A Joseph *Constitutional & Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014) at [27.3.4(2)].

90 *Binstead v Northern Regional Domestic Violence (Programmes) Approval Panel* [2002] NZAR 685 (HC) at [35].

91 Law Commission *Crown Liability and Judicial Immunity: A Response to* Baigent's *case and* Harvey v Derrick (NZLC R37, 1997) at 29–35; Huscroft, above n 87, at 820.

92 Huscroft, above n 87, at 816–817; Todd, above n 28, at [19.3.02].

93 *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 at [256] mentions exclusion of evidence; Butler and Butler, above n 69, at [27.7.3] also mention stay of prosecution.

94 Todd, above n 28, at 1036.

observations should be mentioned.[95] First, in the Court of Appeal in *Brown v Attorney-General* William Young J observed: [96]

> [142] In my view New Zealand Courts ought not to award compensation as a remedy for unfair trial process but rather should require such complaints to be raised with either the trial Judge or on appeal. …

[85] In the High Court in *Brown* Glazebrook J had made these observations:[97]

> [118] I would note, however, that if the remedy of compensation generally is for exceptional cases then this must be even more true if there have been alleged breaches in the trial process, especially where as here there were clearly grounds justifying the laying of the charges, the breach (if any) relates to only one aspect of the trial process and where it is not clear that Mr Brown would have been acquitted in any event, even had the tests been conducted and even if the tests had yielded the same results as were obtained later. In addition, Mr Brown has had a remedy already for the breach in the quashing of his conviction and the discharge.

[86] Similarly, in *Taunoa v Attorney-General*, Blanchard J stated:[98]

> [256] It may be entirely unnecessary or inappropriate to award damages if the breach is relatively quite minor or the right is of a kind which is appropriately vindicated by non-monetary means, such as through the exclusion of improperly obtained evidence at a criminal trial. …

[87] Philip Joseph regards *Baigent* damages as restricted to those rare cases, where no other effective remedy is available and a monetary award is an appropriate admonishment for the breach of rights.[99]

[88] All of this explains Priestley J's view that the respondents "have drawn a long bow to the extent that the bowstring will snap".[100] But, as the Judge correctly pointed out, the issue is not the prospects of this claim succeeding at trial, but whether the Court can be certain that it cannot succeed. We agree with Priestley J,

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95 Relevant to this are some of the observations made by the Chief Justice in her recent paper, noted at n 31 above, in particular:

> [44] It must be expected that in many cases where officials are liable in tort there will be associated [NZBORA] breaches. The compensation awarded in New Zealand under the [NZBORA] is discretionary and available only where other remedies (declarations, exclusion of evidence and so on) are not sufficient to mark the breach of rights.

96 *Brown v Attorney-General* [2005] 2 NZLR 405 (CA).

97 *Brown v Attorney-General*, above n 89.

98 *Taunoa v Attorney-General*, above n 93.

99 Joseph, above n 89, at [27.3.4(2)].

100 High Court judgment, above n 1, at [49].

and with Associate Judge Osborne also, that this cause of action is not plainly unsustainable and should therefore not be struck out.

Conclusions on the NZBORA issue

[89] We summarise. For the purposes of strike-out, it is arguable that Ms Currie, acting in her official capacity as a Crown prosecutor, is a person encompassed by s 3 of the NZBORA. Section 6(5) of the Crown Proceedings Act (or any residual prosecutorial immunity) does not necessarily bar the respondents' cause of action.

[90] It is also arguable Ms Currie breached her duty to disclose to the Court and the accused all information in her possession relating to the sentencing inducement offered to L, and that this breach of duty led to the successful appeal and the subsequent stay of proceedings. Mr Pike conceded that Ms Currie, acting in her official capacity as a Crown prosecutor, made a mistake in not disclosing the relevant parts of the sentencing indication and accepted that the accused in the trial had been placed at an unfair disadvantage by the non-disclosure. Accordingly, it is arguable the respondents' NZBORA rights have been breached and that the respondents have a claim for *Baigent* damages as a result of the breach.

[91] We have noted above at [65] that Priestley J was unimpressed by the argument derived from *Dixon* that there could be no breach of fair trial rights where the respondents, knowing relevant documents existed, failed to obtain them themselves. We tend to agree – defence counsel were entitled to rely on the unequivocal assurances made to them by Ms Currie and it is unrealistic to suggest otherwise.

[92] For the purposes of strike-out, it cannot be said that the essential elements of the NZBORA cause of action are incapable of being satisfied. Whether compensation should be awarded to remedy an unfair trial process, in particular where a stay of proceedings was granted to the respondents, is a matter not settled in New Zealand.[101] Whether compensation is appropriate in the circumstances of this case is a matter for trial.

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[101] See discussion above at [81]–[88].

Result

[93] The appeal is dismissed. The respondents' cause of action claiming *Baigent* compensation for breach of the NZBORA stands.

[94] The respondents' cross-appeal is allowed. That part of the judgment of Priestley J striking out the respondents' cause of action for misfeasance in public office is set aside and that cause of action is reinstated.

[95] The appellants are to pay the respondents' costs as for a standard appeal on a band A basis with usual disbursements.

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