IN THE SUPREME COURT OF NEW ZEALAND

SC 5/2007
[2007] NZSC 105

KEVIN JACK NGAN

v

THE QUEEN

Hearing:	14 August 2007
Court:	Elias CJ, Blanchard, Tipping, McGrath and Anderson JJ
Counsel:	A Shaw and C W J Stevenson for Appellant J C Pike and M D Downs for Crown
Judgment:	13 December 2007

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS

	Para No
Elias CJ, Blanchard and Anderson JJ	[1]
Tipping J	[39]
McGrath J	[70]

ELIAS CJ, BLANCHARD AND ANDERSON JJ

(Given by Blanchard J)

Introduction

[1] The issue on this appeal is whether any breach of s 21 of the New Zealand Bill of Rights Act 1990 occurred when the police opened a zipped pouch found in a crashed car belonging to and driven by the appellant, Mr Ngan. A quantity of methamphetamine was discovered in the pouch. Mr Ngan has been convicted of possession of that drug for supply but contends that as a consequence of a breach of s 21 by the police in searching the pouch, the evidence of the discovery of the drugs should not have been admitted against him. The appeal raises questions concerning the lawfulness and reasonableness of so-called inventory searches of property which has come into the possession or control of the police.

Facts

[2] Mr Ngan crashed his car near Marton on State Highway 1 on the evening of Sunday 6 February 2005. He had to be rescued from the vehicle which was on its roof at the roadside. He was conscious and identified himself before being taken to hospital. An officer of the Police Highway Patrol, Senior Constable Burden, had taken control of the scene. The vehicle needed to be righted and moved. But scattered about inside and around it was a large amount of money in $20, $50 and $100 notes and some other items of property, including an open satchel containing a computer and what appeared to be a soft sunglasses pouch that was zipped up.

[3] Once Mr Ngan was taken away to hospital, Constable Burden set about gathering up the cash and other items the constable had identified as valuables. Without having counted the bank notes he put them and the pouch into the computer satchel for safekeeping and closed the satchel.

[4] Because Constable Burden did not normally undertake enquiries in relation to vehicle crashes as part of his duties, he had called a local member of the police, Senior Constable Johnson, to the scene. He handed Constable Johnson the satchel, partially unzipping it to show him the large amount of money inside. Constable Johnson put the satchel in the boot of his patrol car for safekeeping while Mr Ngan's vehicle was being righted. He and Constable Burden collected further cash and personal effects lying in and around the vehicle. Constable Johnson, who suspected by this point that the money found scattered about might be drug money, then opened the satchel to check its contents in the presence of Constable Burden. He opened the pouch. In giving a pre-trial ruling on admissibility the High Court Judge accepted Constable Johnson's explanation that he did so for safekeeping reasons, not because he suspected the presence of drugs.[1] He thought from the feel of the pouch that it might contain more money and therefore wanted to open it in the presence of a witness.

[5] The Court of Appeal, dismissing Mr Ngan's appeal against conviction, summarised the evidence of the two police officers about the procedure that was followed:[2]

> The officers explained that it is normal police practice to take custody of and catalogue property that appears to be valuable at an accident scene, where no-one from the vehicle is in a condition to do so themselves. The police do so for safekeeping. Cataloguing involves opening anything that appears to contain valuables, and counting money. For example, if a wallet is found the police will open it, count any cash, and itemise the cash along with any credit cards. This is normally done in the presence of a witness. The police use a property record sheet (police form 268). It is a standard form used for property that is seized or taken with or without warrant, as an exhibit, for safe keeping, or as deceased property. There is provision for signature of the officer who completes the form and a witness. The form provides that the original is to be supplied to the person from whom the property was seized or taken.

The counting of the cash (which totalled $9400) and the completion of property record sheets in fact occurred back at the police station in the presence of another

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1 *R v Ngan* (High Court, Wellington, CRI 2005-054-1295, 27 June 2005, Miller J) at para [23].
2 *R v Ngan* (CA 220/06, 1 December 2006) at para [14].

officer, Senior Constable Ahern, who had also been at the crash scene. It does not appear that any of the police officers had a property record sheet with them at the scene.

Lower court proceedings

[6] The Crown's pre-trial application concerning the admissibility of the evidence of the discovery of the drugs in the pouch was determined in the High Court by Miller J. The Judge found that the police had been conducting a search that was without statutory authority and was therefore illegal. But he considered that it had not been an unreasonable search and so there was no breach of s 21. He also said that, even if there had been a breach, he would have admitted the evidence on the basis of inevitable discovery.

[7] Miller J's ruling was appealed. The Court of Appeal said that the police were entitled "in exercise of their common law powers and duties" to take possession of items of property from a crashed vehicle "where the owner is in no condition to do so".[3] That was an incident of the police's function of protecting the community's property. Given that obligation, the Court said, it followed that there must be an equivalent entitlement to identify what it was the police had secured so that it could be duly recorded and ultimately accounted for. The Court found it unnecessary to give its opinion on the lawfulness of what the police had done as it agreed with Miller J that the evidence would have inevitably been discovered and therefore was admissible even on the basis that a breach of s 21 may have occurred.

[8] Following Mr Ngan's trial he appealed to the Court of Appeal against his conviction, saying that there had been a miscarriage of justice because the evidence should not have been admitted. The Court of Appeal said that it was "content to treat the matter on the basis that there was a search of the pouch" without actually determining that point.[4] It recorded the acceptance by

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3 *R v Ngan* (CA 241/05, 24 November 2005) at para [23].
4 CA 220/06 at para [25].

Mr Stevenson, counsel for Mr Ngan, that he (or more properly, in our view, his client) was bound by Miller J's findings that when Constable Johnson handled the pouch he did not think it contained sunglasses but thought it might contain more cash and that he had opened it for safekeeping reasons and that it would have been opened for that purpose at the police station had it not been opened at the scene.[5] After reviewing authorities from Canada and the United States,[6] the Court of Appeal said that Mr Ngan's property in question came into the possession of the police because of the accident in which he was injured and that the police had a duty at common law to protect this property. The common law power of the police in such a situation extended, in the Court's view, to cataloguing possessions over which they were taking control as long as this was reasonably required in the circumstances. It had been contended for Mr Ngan that the pouch could have simply been put into a tamper-proof sealable bag. But the Court said that it might be necessary to check what was actually inside a receptacle for identification purposes, for information about relatives or for medical reasons. It might also be necessary to check contents in case in their preservation in storage they were capable of doing harm. It might also be appropriate, depending on the circumstances, to catalogue what was contained in receptacles to ensure the proper preservation of the property and to minimise the potential for allegations subsequently being advanced that property had been tampered with while in the custody of the police. The cataloguing of possessions applied particularly to cash and valuables and this was in accordance with standard police practice.

[9] The Court said that the police were confronted by an extraordinarily large amount of cash which was littered around and in the vehicle which had been in the accident. There were many thousands of dollars and in those circumstances the police action in checking what else was in the wreck, recording what was there and securing it was no more than was reasonably required by the police officers. What occurred was lawful and reasonable. The appeal against conviction was therefore dismissed. It is from that decision that the present appeal comes.

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5 At para [28].

6 *R v Caslake* [1998] 1 SCR 51, *Colorado v Bertine* 479 US 367 (1987) and *Florida v Wells* 495 US 1 (1990).

[10] It assists with the resolution of this appeal first to look generally at the common law duties of the police and at the position at common law of someone who finds or is left to look after the property of another.

Common law duties of police

[11] The office of a constable, functioning as a "conservator of the peace", has long been recognised by English common law.[7] Subject of course to express statutory modification, the common law duties of a constable and the powers necessarily incident to their discharge attach to members of the police in New Zealand.[8] In speaking of such duties, it is, however, most important to recognise that they are public law duties. They are directed to the protection and welfare of the public at large.[9] They should not be confused with a private law duty, such as a duty of care, which may give rise to civil liability to an affected individual.[10]

[12] The common law duties are extensive. At their core is the duty which has been described as "an absolute and unconditional obligation" upon the police "to take all steps which appear to them to be necessary for keeping the peace, for preventing crime or for protecting property from criminal injury".[11] It is for the police, however, to exercise their judgment as to the manner in which adequate response is made to reasonably apprehended "breaches of the peace". The public law duty to afford protection to both persons and property from imminent criminal injury, which is undoubted, is necessarily limited by the extent of the resources available to the police and by the urgency of conflicting claims upon their services. The nature of the protection to be supplied must therefore primarily be left to the police to determine.[12]

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7 *Enever v R* (1906) 3 CLR 969 at pp 975 and 991, approved in *Fisher v Oldham Corporation* [1930] 2 KB 364 at p 372.

8 *Minto v Police* [1987] 1 NZLR 374 at pp 377 – 378 (CA) per Cooke P; see s 5(6) of the Police Act 1958.

9 *Thomas v Sawkins* [1935] 3 KB 249 at p 254 (HC).

10 *Ancell v McDermott* [1993] 4 All ER 355 at pp 362 and 366 (CA); *Haynes v Harwood* [1935] 1 KB 146 at p 161 (CA) per Maugham LJ.

11 *Glasbrook Brothers Ltd v Glamorgan County Council* [1925] AC 270 at p 277 per Viscount Cave LC.

12 *Glasbrook Brothers* at p 285 per Viscount Finlay and pp 306 – 307 per Lord Blanesburgh.

[13] As well as this "absolute" duty, it has been said that the police have further public duties which are "discretionary".[13] This is not an entirely apt expression. Indeed, a discretionary duty would seem to be something of a contradiction in terms. What is being referred to is the range of things that the police customarily do for the benefit of the public in furtherance of their general responsibility to protect life and property, but which are not directly associated with the prevention or detection of crime.[14] The common law accords the police powers and immunities necessary for them to undertake such activities, which are regarded as part of their public law responsibilities. In *Haynes v Harwood*[15] the examples given were directing traffic, helping blind and infirm people to cross the road, directing people who had lost their way and preventing accidents arising from the presence of uncontrolled forces in the street, if the police were in a position to do so. The activities performed by the police officers in the present case in relation to Mr Ngan's property are of this character. There was no immediate or imminent danger of the wrecked vehicle causing further serious accidents or being itself subject to criminal injury. But that did not mean that the police officers attending the crash scene were thereby in the same position as "mere lookers-on".[16] Obviously, left where it was, Mr Ngan's property, which included large amounts of loose cash, might well have been dishonestly taken by some passer-by or have been damaged or lost through the actions of rain or wind. The general public would naturally expect the police to control the scene of a motor accident, to arrange or supervise the taking away of a wrecked vehicle and to gather up and take custody of items of personal property at the scene which their owner is unable to look after because he or she has been taken to hospital. Indeed, the public would rightly be critical if the police, in the exercise of their discretion, failed to take reasonable steps of this nature.

[14] Notwithstanding that police officers may be expected to intervene in a case like the present, any interference with private liberty or property by the police is unlawful unless it can be justified either "by the text of the statute law, or by the

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13 *Haynes v Harwood* at p 162; see *Ancell v McDermott* at p 362 and *Duley v Police* (High Court, Auckland, CRI 2007-404-0090, 6 July 2007) at para [29].

14 *Police v Amos* [1977] 2 NZLR 564 at p 568 (SC).

15 [1935] 1 KB 146 at p 162 (CA).

16 *Haynes v Harwood* at p 162.

principles of common law".[17] An interference with property in the form of a search of the pouch occurred in this case. But was it unlawful? In order to determine whether a particular course of conduct was actually unlawful, it has been said in *R v Waterfield* to be relevant:[18]

> to consider whether (a) such conduct falls within the general scope of any duty imposed by statute or recognised at common law and (b) whether such conduct, albeit within the general scope of such a duty, involved an unjustifiable use of powers associated with the duty.

There may be less justification for any use of such powers where the conduct is not in pursuance of an "absolute" duty and where the apprehended danger is to property rather than persons. Overall, as Cooke P stressed in *Minto v Police*, "[t]he citizen's protection lies in the insistence of the law that the steps should be reasonable".[19]

Obligations of police as bailees

[15] The next question relates to a situation in which the police decide, reasonably and therefore lawfully, to assume control of items of property in circumstances like the present, in which they are acting not in connection with actual or anticipated criminal offending, but in order to protect or preserve property. What then are their private law obligations to its owner? At common law any person who finds an item of property and takes possession of it on behalf of the true owner as a temporary custodian is treated as a bailee of that property and is under an obligation to keep it safe and return it to the owner (if that is possible). In *Gilchrist Watt and Sanderson Pty Ltd v York Products Pty Ltd*[20] the Privy Council quoted with approval a passage from Coke CJ in a case from nearly 400 years ago, *Isaack v Clark*:[21]

> he which findes goods, (is) bound to answer him for them for them who hath the property; and if he deliver them over to any one, unless it be unto the right owner, he shall be charged for them, for at the first it is in his

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17 *Entick v Carrington* (1765) 19 How St Tr 1029 at p 1066.
18 [1964] 1 QB 164 at p 170. See also *Hoffman v Thomas* [1974] 1 WLR 374.
19 [1987] 1 NZLR 374 at p 378 (CA). Further relevant considerations include the immediacy and potential seriousness of the apprehended danger: *Police v Amos* at pp 568 – 569.
20 [1970] 1 WLR 1262 at p 1268.
21 (1615) 2 Bulst 306 at p 312.

> election, whether he will take them or not into his custody, but when he hath them, one only hath then right unto them, and therefore he ought to keep them safely …

After pointing out that it is not etymologically accurate to describe a finder as a bailee because there is no delivery or handing over to the finder, the Privy Council said that there is nevertheless a common element, "because both in an ordinary bailment and in a 'bailment by finding' the obligation arises because the taking of possession in the circumstances involves an assumption of responsibility for the safekeeping of the goods".[22] The circumstances of a case like the present where the owner is known but is unable to take responsibility for his or her own property by reason of injury are analogous, and someone who steps in to look after the property as a custodian is therefore to be treated as a bailee by finding.

[16] Putting aside for the moment the particular position of the police, it is clear that if a private citizen had attended at the scene of Mr Ngan's car crash and had taken possession of the cash and other items of personal property for safekeeping, that person's actions were unlikely to have been unlawful. There would have been an obvious defence to a criminal prosecution and to an action for trespass or for conversion. The handling and transporting of the property for the purpose of keeping it safe would plainly be a justified interference with the property rights of the owner (in so far as it could truly be said to be an interference at all where the citizen was acting in the place of the owner) to the extent it was reasonably necessary in the particular circumstances to fulfil that purpose. What is necessary will often include ascertaining the real nature of the property so that the bailee can know whether particular steps need to be taken for its preservation, as well as to ensure that it does not present a danger to others or their property. The taking of steps of this kind plainly benefits the owner since it minimises the risk that the property will be lost or damaged while in the custody of the finder. In the case of cash, an obvious step is for the finder to count it and record the amount held, as a precaution against pilfering of any of the money by others who may have access to it.

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[22] At p 831. As to bailment by finding see Garrow and Fenton, *Law of Personal Property (*6th ed, 1998), para [5.028].

[17] Such steps to preserve the property are also prudent in the interests of the bailee because, as already mentioned, a bailee owes a duty of care to the owner in relation to the bailed property. The standard expected of a finder is no doubt that of a gratuitous bailee and may therefore be less exacting than that required of a bailee who is acting for reward. But the Privy Council has pointed out in *Port Swettenham Authority v TW Wu & Co (M) SDN.BHD.*[23] that the line between the two standards is a very fine line, difficult to discern and impossible to define and that, after all, "a man of ordinary prudence would presumably take reasonable care of his own goods". The onus is on the bailee to show that the care required by law has been taken.

[18] It is therefore apparent that the taking of reasonable steps to safeguard the property is in the interests of the bailee as well as in the interests of the owner, but that in no way reduces the benefit to the owner.

[19] It is to be envisaged that if the finder does more with the property than is reasonably required for its preservation, for example, using it for the finder's own purposes, the finder may be guilty of the tort of trespass or perhaps even conversion, although the latter requires a denial of the owner's rights. However, nothing of this kind occurred in the present case and no more need be said of it.

[20] The police are of course held to the rather stricter *Waterfield* standard, by which any interference with private property rights requires affirmative justification. But provided they meet this standard when exercising their powers in pursuance of their common law duties, they, like the ordinary citizen, do not act unlawfully in taking possession of lost property or the property of an owner who is incapacitated and temporarily unable to look after it. They too, naturally, must do no more than is reasonable in the circumstances for the preservation of the property.

[21] The difference in approach to *Waterfield* taken in these reasons from that taken in the reasons of Tipping J appears to turn on to what amounts to a prima facie unlawful interference with property. As we consider that the police

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[23] [1979] AC 580 at p 589.

conducted a search of the pouch, we take the view that prima facie there was such an interference. But it was justified in terms of *Waterfield*. However, the difference in approach has no practical significance because it has been overtaken by the requirements of the Bill of Rights Act.

Requirements of the Bill of Rights

[22] The actions of the police must now be tested also against the requirements of the Bill of Rights Act. In relation to a situation of this kind, where the police may have "no positive legal duty" but would normally be expected to intervene,[24] the requirements of the common law as stated in *Waterfield* appear to be entirely consistent with the relevant provision of the Bill of Rights Act, namely s 21, the right to be secure against unreasonable search or seizure. Both the common law and s 21 require of the police officer that he or she should not act unreasonably in dealing with the property, that is, that the officer must act only for the purpose of its preservation, and that what is done with the property pending its restoration to the owner must be reasonably connected with that purpose. If it is necessary to conduct a search of the property in order to ascertain its ownership and/or its nature, that too must not be done unreasonably. An excessive search or one conducted for an ulterior purpose, in order, for example, to obtain evidence of criminal offending, would not be reasonable and indeed might also be unlawful. But if the police officer is genuinely acting for the predominant purpose of preservation of the property, the fact that he or she may suspect wrongdoing associated with the property will not in itself make the dealing with the property either unlawful or unreasonable at common law or under s 21.

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[24] *Haynes v Harwood* at p 161; *Ancell v McDermott* at p 362.

North American authorities

[23] Mr Shaw, for the appellant, drew the Court's attention to the judgment of Lamer CJ, for a plurality of the Supreme Court of Canada, in *R v Caslake*,[25] in which, counsel said, it had been found that an inventory search by police was not authorised by law and therefore violated s 8 of the Canadian Charter of Rights and Freedoms (the equivalent of our s 21). Certainly in that judgment there is a rejection of an argument that there might be an inventory search exception to s 8 for the protection of belongings of someone who has been arrested. But the case is not to be regarded as an authority for counsel's proposition. Lamer CJ in fact said a few lines before the passage to which Mr Shaw drew attention that it was not an appropriate case to decide that question. Because all searches had to be authorised by statute and warrantless searches were prima facie unreasonable, the party seeking to uphold such a search had to be able to "point to a law which authorises the search", a burden which the Crown was unable to discharge. Hence, "for the purposes of the appeal", Lamer CJ held that the particular inventory search, conducted in the context of an arrest, was not authorised and was a breach of s 8. It did not per se serve a valid objective in pursuit of the ends of criminal justice. He went on to add that if the police feel the need to inventory a car in their possession for their own purposes, that is one thing. However, if they wish to tender the fruits of that inventory search into evidence at a criminal trial, the search must be conducted under some lawful authority.

[24] It is questionable whether the police can be said in the case of a true inventory search to be effecting it for their own purposes, even when it occurs as an incident of an arrest. As we have endeavoured to show, a true inventory search is one carried out for the benefit of the owner of the property, more than for the benefit of the police. Such a search is permitted by New Zealand law provided the searcher is acting reasonably and for the purpose of preserving the property. It

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[25] [1998] 1 SCR 51 at para [30].

is not necessary in this country for the police to have to point to a statutory authority if their inventory search is justified in terms of *Waterfield*.[26]

[25] Notwithstanding what was said in *Caslake*, the Canadian courts have in later Charter cases continued to ask whether police were acting within the scope of their common law powers by reference to the test found in *Waterfield* and to uphold their actions if that was so, as can be seen from the recent decisions of the Supreme Court in *R v Mann*[27] and *R v Clayton and Farmer*,[28] which involved searches of people who had been detained for investigative purposes. It is yet to emerge whether this approach will ultimately be taken by the Supreme Court in relation to inventory searches.

[26] In the United States the position is governed by the Fourth Amendment to the Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Applying "the Fourth Amendment standards of reasonableness", the state courts have overwhelmingly concluded that, even if an inventory is characterised as a search, the intrusion is constitutionally permissible.[29] The Supreme Court said in *South Dakota v Opperman* that its own decisions pointed unmistakably to the conclusion reached by both federal and state courts that inventories pursuant to standard police procedures are reasonable.[30] In his concurring reasons in that case, Justice Powell emphasised that such searches "are not conducted in order to discover evidence of crime".[31] The Court has since confirmed that the police may

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26 Two further points can be made about *Caslake*. First, the evidence was admitted anyway on a balancing test conducted under s 24(2) of the Charter. Secondly, there was a dissenting judgment of three members of the Court in which they concluded that the common law power of search incidental to the arrest authorised the particular search.

27 [2004] 3 SCR 59.

28 2007 SCC 32.

29 *South Dakota v Opperman* 428 US 364 at pp 370 – 371 (1976).

30 At p 372.

31 At p 383. In New Zealand it has never been possible for the police to obtain a search warrant for a purpose other than the prevention or detection of crime, indicating that the legislature has not considered it necessary to regulate reasonable searches carried out for non-forensic purposes.

exercise a discretion whether to conduct an inventory "so long as that discretion is exercised according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity"; an inventory search must not become "a purposeful and general means of discovering evidence of crime".[32]

[27] In *Colorado v Bertine* the Court recognised that inventory procedures "serve to protect an owner's property while it is in the custody of the police, to ensure against claims of loss, stolen or vandalised property, and to guard the police from danger".[33] Knowledge of the precise nature of the property helps to guard against claims of theft, vandalism or negligence and to divert any danger to police or others that might be posed by the property.[34] A police officer is allowed sufficient latitude to determine whether a particular container should or should not be opened in light of the nature of the search and the characteristics of the container itself.[35] In *Lafayette v Illinois* the Court remarked that even if less intrusive means existed of protecting some particular types of property, "it would be unreasonable to expect police officers in the everyday course of business to make fine and subtle distinctions in deciding which containers or items may be searched and which must be sealed as a unit".[36]

Search of pouch lawful and reasonable

[28] There can be no doubting that the police acted both lawfully and reasonably in taking control of Mr Ngan's property left in and around his motor vehicle after he was taken away to hospital. The principal question on this appeal is whether they were then justified in searching his property by opening the pouch. On the findings of fact made below, the police were not acting for the purpose of gathering evidence of a crime. The police did suspect that the large amounts of cash scattered about the car, which they had gathered up for safekeeping, might be the proceeds of drug dealing. However, whilst it is incumbent on a court to scrutinise carefully the conduct and motive of police in

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32 *Colorado v Bertine* at pp 375 – 376; *Florida v Wells* at pp 3 – 4.
33 479 US 367 at p 372 (1987).
34 At p 373.
35 *Florida v Wells* at p 4.
36 462 US 640 at p 648 (1983).

carrying out any form of search, there is nothing in the evidence suggesting that in this case the police believed they would find drugs in the pouch or that they were acting other than for the purpose of making an inventory. Constable Johnson acted in accordance with a standard procedure, opening the pouch in the presence of another officer as witness. All money found and the other items of property were subsequently recorded on property record sheets at the police station. It would have been foolish for the police not to endeavour to locate and count all of the cash which might have come into their possession when they took control of Mr Ngan's property. As we have pointed out earlier, that was an obvious step for the police to take in circumstances of this kind as a precaution against pilfering. That it also provided protection for the police against a claim that money had been lost while in their custody in no way detracted from the benefit to Mr Ngan in having his property preserved.

[29] Mr Shaw submitted that, instead of opening the pouch, the police should have placed it in a plastic bag and sealed the bag. We reject that submission. For the reasons already given, the prudent course was for the police to ensure that if money was present it could be accurately accounted for. Of course, that is not to say that in another situation of this kind, where there is no real basis for suspecting the presence of property of significant value, the police can justify the opening of a container of harmless appearance on the entirely speculative basis that it may possibly contain cash or valuables. In the present case the police had good reason to suspect, and did in fact suspect, that there might be further cash in the pouch and therefore were acting both lawfully and reasonably in checking its contents for the purpose of safekeeping. There was no unjustifiable use of police powers.

Evidence obtained from search was admissible

[30] It was further submitted for Mr Ngan by Mr Stevenson that, even if a search by the police was reasonably conducted for the purpose of making an inventory of property coming into their possession, the product or fruits of the search could not be used for the purpose of a prosecution. In other words, it was

argued, the search was reasonable only so far as its purpose was the making of an administrative inventory. Counsel supported this argument by reference to *Caslake*, and also another decision of the Supreme Court of Canada, *R v Colarusso*,[37] and to the decision of our Court of Appeal in *R v Salmond*.[38]

[31] Counsel's proposition, if valid, would lead to startling results. It would seemingly render inadmissible any evidence found by the police or another public official during a search for a non-forensic purpose unless admissibility was specifically affirmed by statute. It would mean, for example, that if police entered an empty property in search of a lost child and stumbled across unrelated human remains or drugs or stolen property, the evidence of that discovery might be inadmissible in a criminal prosecution. Assuming that the action taken by a law enforcement officer was both lawful and reasonable in the circumstances, that would be an unattractive proposition.

[32] As it happens, counsel's proposition is not supported by either *Colarusso* or *Salmond* and we have already indicated the inadequacies of *Caslake* as an authority in this respect.

[33] *Colarusso* was a case concerning the use which could be made of blood samples taken at a hospital for medical purposes after the appellant driver had been injured in an accident in which the occupant of another car had been killed. The coroner, acting on statutory authority, obtained the samples from the hospital for the purpose of determining the cause of death of the deceased. He later turned the samples over to the police. The question was whether the results of an analysis performed at the request of the police could be given in evidence when the appellant was charged with various offences relating to impaired driving. In uplifting the samples from the coroner it had been the intention of the police to submit them to analysis with a view to using the results in the prosecution of the appellant. Writing for five members of the Supreme Court of Canada, La Forest J concluded that the police had thereby committed a violation of the appellant's Charter right to be secure against unreasonable seizure. The portion of the

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37 [1994] 1 SCR 20.
38 [1992] 3 NZLR 8.

judgment to which Mr Stevenson drew our attention contained an alternative route to the same conclusion. La Forest J was prepared to assume that the coroner's seizure of the samples was reasonable because it was not for the purpose of prosecuting the appellant. But he continued:[39]

> The state cannot, however, have it both ways; it cannot be argued that the coroner's seizure is reasonable because it is independent of the criminal law enforcement arm of the state while the state is at the same time attempting to introduce into criminal proceedings the very evidence seized by the coroner. It follows logically, in my opinion, that a seizure by a coroner will only be reasonable while the evidence is used for the purpose for which it was seized, namely, for determining whether an inquest into the death of the individual is warranted. Once the evidence has been appropriated by the criminal law enforcement arm of the state for use in criminal proceedings, there is no foundation on which to argue that the coroner's seizure continues to be reasonable.

The seizure had therefore become unreasonable and in breach of the Charter. Nonetheless, the judgment concluded that the evidence should be admitted because, having regard to all the circumstances, to do so would not bring the administration of justice into disrepute.

[34] *Colarusso* is readily distinguishable. The police in that case took possession of the blood samples with "full knowledge that they might incriminate the appellant and with the intention of appropriating the results of the analysis for use in the criminal prosecution of the appellant".[40] They were, accordingly, in breach of the Charter right from the outset. In the present case, in contrast, the police had no other purpose in relation to the appellant's property than its preservation at the time when the decision was taken to open the pouch. It was only after the search was lawfully and reasonably conducted and the drugs were discovered inside the pouch that the police first considered prosecuting Mr Ngan because of what they had found.

[35] In *Salmond* the police encountered difficulty in establishing which of its occupants had been the driver of a car involved in a fatal accident. Blood had been found on the driver's seat. A blood specimen was lawfully taken from the accused under the Transport Act 1962 while he was in hospital. After it was

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[39] At pp 62 – 63.
[40] At p 60.

analysed for its alcohol level, it was also analysed to determine the blood grouping. The Crown wished to call evidence of the latter analysis to demonstrate that the blood on the seat came from the accused. The Court of Appeal was of the view that the use of a blood sample taken by compulsion under the authority of the Transport Act must be confined to a purpose which served the object of the Act, road safety. A majority of the Court held that its proposed use in the accused's trial was within that purpose, in that it might identify the driver of the vehicle. However, although there had been no breach of s 21 or any other provision of the Bill of Rights Act, the sample could not have been used as evidence of an offence not connected with the manner in which the vehicle was driven or the condition of the driver, for that was outside the object of the Act.

[36] This view may have been influenced by the fact that the taking of the blood sample ("a sensitive matter of great public concern because of the invasion of individual privacy and bodily integrity"[41]) was an action which would have been unlawful, a trespass to the person, if not authorised by statute for a limited purpose. As Casey J said, the evidence would have been rejected out of hand if the sample had been taken without consent for identification purposes only. But in the present case, the police action, if done reasonably, was lawful without need for any statutory authorisation. There was no use of coercive power by the police.

[37] Before leaving *Salmond***,** we make two observations. The first is that the Court might not have taken the same attitude in a case where, although the interference with person or property required statutory authority and was for a limited purpose, the interference was not of a highly intrusive nature, such as is involved in the taking of blood. The second observation is that post-*Shaheed*,[42] and the confirmation of its general approach in s 30 of the Evidence Act 2006, even in a case like *Salmond* a court would not deny the Crown the ability to adduce evidence emerging from the search without first carrying out a balancing exercise to determine whether exclusion was a necessary and proportionate means of vindicating the breach of a protected right.

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41 At p 19 per Casey J.

42 *R v Shaheed* [2002] 2 NZLR 377 (CA).

Result

[38] We have concluded that there was no reason why the evidence of the finding of the drugs in the pouch should not have been admitted. We would dismiss the appeal.

TIPPING J

[39] Everyone has the right to be free from unreasonable search and seizure at the hands of those whose conduct is subject to the New Zealand Bill of Rights Act 1990. That right, affirmed in s 21, applies in all circumstances. But the circumstances in which a search or seizure takes place are all-important in deciding whether it was unreasonable.

[40] The appellant, Mr Ngan, crashed his vehicle on State Highway 1 in the circumstances and with the consequences described by Blanchard J. Police officers attending the accident scene took possession of a soft pouch belonging to him. In it they found the drugs which led to Mr Ngan's conviction and this appeal. The ultimate question is whether evidence of what the police officers found was properly admitted at his trial. Mr Ngan contends that the evidence should have been excluded because it was obtained in breach of s 21. Alternatively, even if there was no such breach, a question arises whether it was nevertheless unfair to admit the evidence.

[41] By taking possession of the pouch, the police officers seized it and, by unzipping it to examine its contents, they searched it. In saying that I am assuming, because the contrary was not argued, that the actions of the police constituted a search within the meaning of s 21. I would reserve my position on that point. For example, Andrew and Petra Butler argue that if there is no law enforcement focus (usually deliberate evidence gathering in a criminal context),

conduct which might otherwise be described as a search does not fall within s 21.[43] I also leave open whether this proposition has merit.[44] It is, in any event, relevant that the (assumed) search in this case was not of the conventional kind whereby a police officer or some other law enforcement officer is looking for evidence of offending. The first question is whether the seizure and the search were reasonable, as the trial Judge and the Court of Appeal found, or whether they were unreasonable, as Mr Ngan contends.

[42] It is clear from the findings of fact made by the trial Judge that the purpose of the police in seizing the pouch was to keep it safe until it could be returned to Mr Ngan. Their purpose in opening it was to make an inventory of what it contained. The police officers were justified in thinking the pouch might contain money. Both its feel and the presence of so much other cash in and around the crashed vehicle made it likely that there might be more money in the pouch which they should identify and count. On these basic facts, the proposition that the police officers acted unreasonably in seizing and searching the pouch has a distinct air of unreality.

[43] Counsel for Mr Ngan nevertheless sought to persuade us that the police had acted unreasonably. In agreement with Blanchard J, I am satisfied that the police officers did not seize the pouch unreasonably nor did they search it unreasonably. Hence Mr Ngan's rights under s 21 of the Bill of Rights Act were not breached.

[44] When the court is faced with a contention that it was unreasonable to conduct the search or seizure in question, it is logical to consider first whether the person conducting the search or seizure (usually the police) acted lawfully or

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[43] *The New Zealand Bill of Rights Act – A Commentary* (2005), paras [18.9.3] and [18.10.6], citing the Full Bench of the Court of Appeal in *R v Fraser* [1997] 2 NZLR 442 at p 449: "In legal contexts a search generally is an examination or investigation for the purpose of obtaining evidence."

[44] When I wrote this and the previous two sentences, I was unaware that McGrath J would hold that what occurred in this case was not a search within the meaning of s 21. My purpose was simply to recognise that the Crown had not argued that s 21 did not apply. My stance in that respect should not be construed as suggesting I have any particular attraction for the view which McGrath J has expressed.

unlawfully in doing so. If a seizure or a search was lawfully undertaken, it is unlikely that it was nevertheless unreasonably undertaken. It will seldom be appropriate to regard a lawful search or seizure as unreasonable in itself, although there may be situations where the use of a lawful power to search could be said to be an unreasonable use of the power in the circumstances. A lawful search might also be unreasonable because of the manner in which it was effected or because of some other circumstance, such as the time at which it was undertaken.[45] Because I consider the search in this case was lawful, it is not necessary to address the converse issue of when an unlawful search may nevertheless not be unreasonable.

[45] Although the primary focus of the argument was on the search dimension, it is useful to examine first the lawfulness of the seizure. In this case, and in most cases engaging s 21, seizure involves simply taking possession of the object concerned. To take possession of the goods of another without lawful justification or excuse is a trespass to those goods and hence unlawful.[46] One way of addressing the question whether the police committed a trespass to Mr Ngan's goods when they took possession of his pouch is to ask whether they had an affirmative power to do so. The police did not, however, need any such power to seize the pouch, whether deriving from statute or common law, if, in doing so, they were not otherwise acting unlawfully.[47] If a private citizen could in present circumstances have lawfully taken possession of the pouch, a police officer should not be in any different position.[48] I do not find persuasive Mr Shaw's submission that the position should be different in the case of a police officer who is on duty. Nor do I find persuasive the submission that the police officers should be treated as prohibited from opening the pouch without express authority.

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45 See generally *R v Maihi* (2002) 7 HRNZ 126 (CA) and *R v Williams* [2007] 3 NZLR 207 (CA).

46 Todd (gen ed), *The Law of Torts in New Zealand* (4th ed, 2005), para [12.2.01].

47 See *R v Fraser* [2005] 2 NZLR 109 CA at paras [18] – [19] dealing with trespass to land but the position with goods must logically be the same.

48 See the implied licence case of *Transport Ministry v Payn* [1977] 2 NZLR 50 at p 59 (CA) per Woodhouse J ("Like any other citizen every traffic officer is certainly entitled to do that [enter onto private property to make inquiries]"); and *Cunnard v Auckland City Council* (1987) 2 CRNZ 459 (HC, Barker J) which involved the taking of a photograph by a traffic officer of the driver of a motor vehicle and proceeded on the implicit basis that if this was not unlawful (admittedly in the criminal sense) for a private citizen it was not unlawful for a traffic officer.

[46] In present circumstances I consider any person coming upon the accident scene would have been justified in law in taking possession of the pouch provided he or she was doing so for the purpose of keeping it safe and returning it to its owner as soon as reasonably possible. A good Samaritan should not in present circumstances be branded a trespasser.[49] Putting that sentiment into legal terms, a person has justification and is not a trespasser if in good faith he or she takes possession of another's goods in the reasonable belief that it is necessary to do so to protect or safeguard them and intending to return them as soon as reasonably possible. I do not see why, uniquely, law enforcement officers should be denied that justification.

[47] My analysis does not cut across the principles stated in *R v Waterfield*.[50] That case was concerned with whether an assault on a police constable took place while he was acting in the execution of his duty. Without seeking to arrest or charge a man who was attempting to drive a car away, the constable sought to prevent him from doing so because he understood that the car had been involved in a serious offence and he wished to detain it. The assailant was convicted by a Recorder. The Court of Criminal Appeal allowed the appeal on the basis that the constable was not acting in the execution of his duty. In giving the judgment of the Court, Ashworth J cited from the judgment of Wright J in *R v Lushington*; *ex p Otto*:[51]

> In this country I take it that it is undoubted law that it is within the power of, and is the duty of, constables to retain for use in Court things which may be evidences of crime, and which have come into the possession of the constables *without wrong on their part*.

The emphasis on the concluding words is mine.

[48] Ashworth J then went on to say:

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[49] See *Dehn v Attorney-General* [1988] 2 NZLR 564 at p 578 (HC) where I discussed justification by necessity as a defence to an action for trespass to land and cited a passage from Lord Devlin's book *Samples of Lawmaking* (1962) at p 90 where the author observed "the good Samaritan is a character unesteemed by the English law". While that may be so in general terms, I cannot accept that this lack of general esteem should go so far as to deny lawful justification to the actions of someone who fulfils the requirements I have identified.

[50] [1964] 1 QB 164 at pp 170 – 171.

[51] [1894] 1 QB 420 at p 423.

> In the judgment of this court it would be difficult, and in the present case it is unnecessary, to reduce within specific limits the general terms in which the duties of police constables have been expressed. In most cases it is probably more convenient to consider what the police constable was actually doing and in particular whether such conduct was prima facie an unlawful interference with a person's liberty or property. If so, it is then relevant to consider whether (a) such conduct falls within the general scope of any duty imposed by statute or recognised at common law and (b) whether such conduct, albeit within the general scope of such a duty, involved an unjustifiable use of powers associated with the duty.

[49] This formulation involves two inquiries. The first is whether the conduct in question was prima facie unlawful. The second, which arises only if the first question is answered in the affirmative, is whether despite the prima facie unlawfulness of the conduct, it is nevertheless, after considering points (a) and (b), ultimately lawful. The concept of prima facie unlawfulness involves asking whether the conduct would be unlawful were the person involved not a police constable.[52] The implication is that some things which might be unlawful if done by an ordinary citizen may be lawful if done by a constable; it is not the reverse, namely that some things which are lawful if done by a private citizen may be unlawful if done by a police officer.

[50] *Waterfield* was decided at a time when the sole focus was on lawfulness. Today s 21 puts the focus on reasonableness and, as part of that inquiry, the court will generally first ask whether the conduct was lawful. In *Waterfield*'s case a private citizen would certainly not have been acting lawfully if he or she had done what the constable did. Hence the constable's conduct in *Waterfield* terms was prima facie unlawful. Nothing was identified which rendered it nevertheless ultimately lawful.

[51] In the present case, as we have seen, a private citizen could lawfully have done what the constables did. Hence the conduct in question was not prima facie unlawful under the *Waterfield* analysis. The matters referred to as (a) and (b) do not therefore arise. It is, however, worth pointing out that even if issue (b) is not reached under a *Waterfield* analysis, similar considerations may arise when

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[52] This analysis of *Waterfield* is supported by the reasoning of Hardie Boys J in *Williams v Police* [1981] 1 NZLR 108 at pp 111 – 112 (HC) (another case of assault on a police officer in the execution of his duty).

considering the reasonableness of the conduct under s 21. As I have already said, the lawful exercise of a search or seizure power may, albeit rarely, nevertheless be an unreasonable exercise of that power.

[52] The analysis which I am adopting means that if an ordinary citizen can lawfully do something, so can a police officer, unless that officer is under some statutory or other constraint which does not apply to the private citizen. Section 21 of the Bill of Rights Act is a good example of such a constraint. It applies to police officers but not to private citizens. Hence a police officer conducting a lawful search or seizure must pass the statutory criterion of reasonableness. What is lawful when done by a private citizen is also lawful when done by a police officer; but, and here comes the additional control which s 21 provides, the fact that it is done lawfully by the police officer does not automatically mean it is done reasonably.

[53] While private citizens are not subject to a reasonableness criterion in addition to one of lawfulness,[53] police officers, and others whose conduct is subject to s 21 of the Bill of Rights Act, must act reasonably (more accurately not unreasonably) as well as acting lawfully. Parliament has deliberately not made lawfulness the ultimate touchstone for the purposes of s 21. If a police officer's search is otherwise lawful, but unreasonable, the officer is then acting unlawfully in that the conduct involved amounts to a breach of s 21.

[54] I would describe anyone taking possession of another's goods in the circumstances I have identified[54] as a bailee of necessity. Leaving aside cases of so-called involuntary bailment, a bailment arises when someone who is not the owner of goods willingly takes possession of them. A contractual relationship is not a necessary ingredient. Nor does there have to be any delivery, formal or otherwise, by bailor to bailee. The duties which a bailee owes necessarily include a duty to return the goods to their owner at some time in the future. All bailments therefore involve a separation between possession and ownership – possession of

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53 Unless reasonableness is relevant to lawfulness.

54 In para [46] above.

the goods resides in the bailee, ownership resides in the bailor.[55] Any lawful relationship which demonstrates these characteristics may properly be described as a bailment without necessarily having to be brought within any pre-existing category.

[55] As Turner J indicated in *Motor Mart Ltd v Webb*, the categories of bailment are not closed:[56]

> I think, however, that it would be a mistake to conclude that the transaction of bailment is one which has refused, and can still refuse, to undergo the evolution and adaptation which the common law imposes upon every legal institution; and although the bailments known to Roman Law were sufficient for Lord Holt C.J. in 1703 [in *Coggs v Barnard* (1703) 2 Ld Raym 909; 92 ER 107], I decline to assume that, under the pressures and stresses of modern legal necessity, some new mutation may not have burst into flower, of a quality to startle the author of the *Institutes* [the Digest and Institutes of Justinian] were he privileged to behold it.

[56] The possession which is taken of the goods of another in circumstances like the present is similar in principle to the possession taken by a finder of lost goods.[57] That view is supported by *Palmer on Bailment*.[58] The present circumstances are, however, more aptly described as a bailment of necessity rather than as a bailment by finding. Mr Ngan had not "lost" the pouch. He had by force of circumstances been obliged temporarily to abandon it. The reference to necessity is linked with the idea that reasonable necessity can be a defence to trespass.

[57] There is no basis for concluding that the lawful actions of the police in seizing the pouch were nevertheless unreasonable and on that basis a breach of

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55 See generally Garrow and Fenton, *Law of Personal Property* (6th ed, 1998), ch 5, pp 217 and following.

56 [1958] NZLR 773 at p 784 (HC).

57 As to which see *Gilchrist Watt & Sanderson Pty Ltd v York Products Pty Ltd* [1970] 1 WLR 1262 (per Lord Pearson for the Privy Council) citing *Thompson v Nixon* [1966] 1 QB 103 at p 108 (per Sachs J for the Divisional Court) and *Isaack v Clark* (1615) 2 Bulst 306 at p 312 (per Coke CJ).

58 N E Palmer, *Bailment* (2nd ed, 1991), p 1422. The author notes the obvious similarity between a finder and a person who takes possession of goods to save them from a sudden emergency. He notes that the latter is regarded as a bailee for the purposes of the criminal law, citing *Leigh*'s case (1800) 1 Leach CC 411 and Pollock and Wright, *An Essay on Possession in the Common Law* (1888), pp 143 and 163.

s 21. Indeed, counsel for Mr Ngan did not seriously contend that the seizure of the pouch was in itself unreasonable.

[58] The next question is therefore whether by opening the pouch to find out what it contained the police were acting lawfully. As bailees of necessity, the police possessed all the powers reasonably necessary or incidental to fulfilling the purpose of the bailment.[59] That, in short, was to keep the pouch safe and to restore it and its contents to Mr Ngan as soon as he was able to receive them. In the present case at least, I consider it was reasonably necessary and incidental to both the safekeeping and the restoration purposes of the bailment for the police to ascertain and record what the pouch contained. There were many thousands of dollars in cash littered in and around the vehicle. The police would have been subject to justified criticism if, in such circumstances, they did not take steps to collect and record valuable property on behalf of the owner. It was entirely reasonable for the police to think the pouch might contain more money which it was desirable to count and record to rebut any suggestion of a shortfall on return.

[59] Whether a bailee of necessity is entitled to open and examine the contents of a closed container will depend on the circumstances. Any "inventorising" must be reasonably necessary for or incidental to fulfilment of the purpose of the bailment. A bailee of necessity would not, for example, be entitled to open a closed suitcase (the ownership of which was known) in the absence of some circumstance suggesting a need to do so. On the other hand, the finder of a lost wallet would be entitled to look inside it for evidence of the identity of the owner. For reasons I will give, there is no basis upon which the lawful conduct of the police in this case can nevertheless be characterised as unreasonable, and therefore, on that basis, a breach of s 21.

[60] Before I address the particular circumstances of the present case, it is helpful to look more generally at s 21 of the Bill of Rights Act. The section

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[59] In view of the adventitious nature of bailments of necessity and by finding it is appropriate to restrict the possessory rights and powers of bailees of this kind in this way in order to accommodate the privacy interests of the owners of the goods concerned. If such a bailee exceeds these powers that will remove from the bailee the defence to an action for trespass to the goods that would otherwise be available.

protects citizens from unreasonable conduct on the part of state officials. Two interests are generally at stake. The first, which relates primarily to search, is the interest citizens have in being free from the prying eyes of state officials. The second, which relates primarily to seizure, is the interest citizens have in the security of their property and their uninterrupted possession of it. Hence the section requires that officials of the state do not by unreasonable search or seizure interfere with the property and privacy interests of citizens. It is privacy interests which are usually at the forefront when issues of unreasonable search arise. Privacy interests are, however, of differing strengths. They differ according to what is being searched and in what circumstances. It is generally accepted that privacy interests are stronger in relation to a home than a vehicle.[60] If, as in this case, a vehicle owner has lost control of it, and is necessarily reliant on others to keep it and its contents safe from loss or harm, the privacy expectation the owner might otherwise have in the vehicle and its contents must be reduced. While there will usually be some residual privacy expectation in these circumstances, other considerations and values may well prevail when determining what is unreasonable for the purposes of s 21.

[61] In the present case the search was lawful. Mr Ngan's reasonable expectation of privacy was at a low level. The intrusion into his privacy occasioned by the search was at a low level. The purpose of the search was related to the safekeeping and return of the pouch and its contents. The intrusion upon Mr Ngan's reasonable privacy expectations was well short of being unreasonable in the circumstances.

[62] I do not find any weight in the appellant's argument that the search was conducted without an authorising warrant. As the purpose of the search was not forensic, there was no occasion to consider, let alone obtain a warrant. In a sense the finding of the drugs was coincidental. The absence of a warrant cannot in these circumstances logically be regarded as an indicator of unreasonableness.

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[60] See for example *R v Jefferies* [1994] 1 NZLR 290 at p 310 (CA) per Richardson J; *R v Maihi* at para [34]; and *R v Williams* at para [113]. Also see Rishworth and others, *The New Zealand Bill of Rights* (2003), pp 444 and following.

[63] I now address the submission that even if the police reasonably seized the pouch, and reasonably searched it for the purpose of making a list of what it contained, the fruits of the search should not have been admitted in evidence. Counsel effectively argued that the search was reasonable only to the extent that it enabled an inventory to be made, and that the police could not make use of the fruits of the search for any other purpose. I am bound to say that I find this argument as unpersuasive as the first. I do not consider that what would otherwise be a reasonable search can become unreasonable on account of the particular use which is made of the resulting evidence. If there is nothing unlawful or unreasonable about the way police officers come into possession of evidence of a crime, why and on what principle should that evidence be excluded?

[64] Although counsel for the appellant did not rely on common law exclusion, I can think of no other basis. At common law all relevant evidence was prima facie admissible, but subject to exclusion if it was unfair to the accused to admit it. For the reasons which I will give, I have come without difficulty to the view that there was no unfairness to Mr Ngan in the disputed evidence being admitted.

[65] I agree with Blanchard J's discussion of the cases of *Colarusso* and *Salmond* and the points he has made about them.[61] The key distinction between the present case and *Salmond* is that in *Salmond* the accused was required by statute to permit a blood specimen to be taken for the purpose of a blood alcohol analysis. By refusing he would have committed an offence. The issue was whether the blood specimen so obtained could also be used to prove that the accused was the driver of the vehicle. All the Judges, either expressly or implicitly, considered that it would have been unfair to the accused to use evidence which he had been compelled to provide against himself for a purpose which was not contemplated by the enabling statute. The majority were of the view that use of the blood specimen for identification purposes was within the contemplation of the statute because such use came within the general statutory purpose of road safety. The minority considered that use beyond showing blood

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[61] See paras [30] – [37] of Blanchard J's reasons.

alcohol content was not within the statutory purpose. Hence, on the majority's view, as the intended use conformed with the statutory purpose, it was not unfair to the accused to admit it for identification purposes. In the present case no such issues arise.

[66] If evidence has been obtained lawfully and without any breach of the Bill of Rights Act, it must, prima facie, be fair to admit it. It is obviously neither necessary nor desirable to attempt to categorise cases where, despite that being the case, it would be unfair to admit the evidence. In my view there was no unfairness to Mr Ngan in having the evidence of what the police lawfully and reasonably found in his pouch admitted against him. It would be altogether too tender a view to hold that it would be unfair to admit evidence coincidentally obtained in the course of making a legitimate inventory.

[67] Although the relevant events and Mr Ngan's trial took place before the coming into force of the Evidence Act 2006, it is instructive to refer to that legislation because in relevant respects it substantially reflects the common law and it will, of course, govern all cases tried after its commencement on 1 August 2007.[62] Furthermore, if there were to be a retrial in this case, it would take place under the Act. Subsections (1) and (2) of s 7 provide in combination that all relevant evidence is admissible except evidence that is inadmissible or excluded under the Act or any other Act.[63] Neither the Evidence Act nor any other Act renders the evidence in question in this case inadmissible, so the question is whether it should be excluded.

[68] Section 8 of the Evidence Act requires the exclusion of evidence if its probative value is outweighed by the risk that it will have an unfairly prejudicial effect on the proceeding. That cannot be said of the evidence involved in this case. Subpart 3 of Part 2 of the Act deals with exclusion of particular types of evidence. The only relevant provision in the subpart for present purposes is s 30

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62 Sections 203 – 214 came into force on 18 July 2007.

63 Note the distinction, inherent in the common law but often overlooked, between evidence which is inadmissible and evidence which is admissible but excluded.

which empowers the Court to exclude "improperly obtained" evidence in these terms:

> **30 Improperly obtained evidence**
>
> (1) This section applies to a criminal proceeding in which the prosecution offers or proposes to offer evidence if—
>
> > (a) the defendant [or, if applicable, a co-defendant] against whom the evidence is offered raises, on the basis of an evidential foundation, the issue of whether the evidence was improperly obtained and informs the prosecution of the grounds for raising the issue; or
> >
> > (b) the Judge raises the issue of whether the evidence was improperly obtained and informs the prosecution of the grounds for raising the issue.
>
> (2) The Judge must—
>
> > (a) find, on the balance of probabilities, whether or not the evidence was improperly obtained; and
> >
> > (b) if the Judge finds that the evidence has been improperly obtained, determine whether or not the exclusion of the evidence is proportionate to the impropriety by means of a balancing process that gives appropriate weight to the impropriety but also takes proper account of the need for an effective and credible system of justice.
>
> (3) For the purposes of subsection (2), the court may, among any other matters, have regard to the following:
>
> > (a) the importance of any right breached by the impropriety and the seriousness of the intrusion on it:
> >
> > (b) the nature of the impropriety, in particular, whether it was deliberate, reckless, or done in bad faith:
> >
> > (c) the nature and quality of the improperly obtained evidence:
> >
> > (d) the seriousness of the offence with which the defendant is charged:
> >
> > (e) whether there were any other investigatory techniques not involving any breach of the rights that were known to be available but were not used:
> >
> > (f) whether there are alternative remedies to exclusion of the evidence which can adequately provide redress to the defendant:
> >
> > (g) whether the impropriety was necessary to avoid apprehended physical danger to the police or others:

> (h) whether there was any urgency in obtaining the improperly obtained evidence.
>
> (4) The Judge must exclude any improperly obtained evidence if, in accordance with subsection (2), the Judge determines that its exclusion is proportionate to the impropriety.
>
> (5) For the purposes of this section, evidence is improperly obtained if it is obtained—
>
> > (a) in consequence of a breach of any enactment or rule of law by a person to whom section 3 of the New Zealand Bill of Rights Act 1990 applies; or
> >
> > (b) in consequence of a statement made by a defendant that is or would be inadmissible if it were offered in evidence by the prosecution; or
> >
> > (c) unfairly.

On the view already expressed para (a) of subs 5 does not apply; nor does para (b). Hence the only basis for excluding the fruits of the search would be if the Court were to hold that those fruits were obtained unfairly in terms of para (c). I have already explained why I do not think it was unfair, under the common law test, for the evidence to be admitted. Those reasons apply equally under the Evidence Act 2006.

[69] The law already gives accused persons significant evidential protection. It should not be overlooked that society as a whole has a proper interest in having those who commit crimes brought to justice. That public interest must be taken into account, as well as the interests of accused persons, when evidentiary issues are being considered. I am of the view that as at common law, so under the Evidence Act the evidence in question was not unfairly obtained and it would not therefore be unfair to admit it. For the reasons I have given I would dismiss the appeal.

McGRATH J

The issue

[70] The ultimate question in this appeal is whether the discovery by the police of controlled drugs in a sunglasses pouch, found inside Mr Ngan's wrecked motor vehicle, was admissible at his trial on a charge of possession of a class A drug for supply. The appellant's broad contention is that the discovery was made during a search of the appellant's personal property undertaken at the roadside by the police without a warrant. More specifically, his counsel submits that the searches of a closed computer satchel, the closed sunglasses pouch and other closed receptacles within the satchel were all unlawful, unreasonable, and in breach of s 21 of the New Zealand Bill of Rights Act 1990.

[71] I adopt the account of the relevant facts set out in the reasons of Blanchard J.

Police powers and duties

[72] In upholding the High Court's decision to admit the evidence of the discovery of drugs and the conviction of Mr Ngan, the Court of Appeal reasoned that, if the events at the roadside which culminated in the discovery of the drugs amounted to a search, then it was reasonable and not in breach of Mr Ngan's rights. In taking this approach the Court of Appeal acknowledged that the exact metes and bounds of the concept of "search" was an arguable question, but considered that this issue was not one that Court had to determine.[64]

[73] I prefer, however, to start my consideration of the appellant's argument by ascertaining whether the police actions were lawful. That requires analysis of what the legal authority was for the police to gather up, inventorise and generally secure the appellant's property at the accident scene. The question of whether

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64 *R v Ngan* (Court of Appeal, CA 220/06, 1 December 2006) at para [25].

what happened amounted to a search can then be answered and, if applicable, the further question of whether any search was unreasonable and in breach of Mr Ngan's protected rights can be addressed.

[74] In considering what authority the police had for their actions at the accident scene, the logical starting point is whether any statute confers a relevant power on the police. There is, however, no statutory provision which confers such a power or function. The New Zealand Parliament has never made general legislative provision for police powers and, in exercising their public functions, the police do not always act under statutory authority.[65] Our statute law does, however, acknowledge that the members of the New Zealand police have the powers of a constable under the common law. Section 5(1) of the Police Act 1958 empowers the Commissioner of Police to appoint such members of the police as the Commissioner thinks necessary for the efficient exercise of police functions, duties and powers. After providing in s 5(5) for the Commissioner to have certain powers of an employer in respect of members of the police, s 5(6) states that:

> (6) Nothing in subsection (5) of this section shall limit or affect the powers and duties conferred or imposed on the office of constable by common law or any enactment.[66]

[75] By this drafting technique the statute protects and continues, for sworn members of the New Zealand police, the application in New Zealand of the common law powers of constables. This is of course subject to any statutory intervention. It is accordingly necessary to consider whether any common law powers cover the police actions in this case.

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65 Young and Trendle, "The Police" in Tolmie and Brookbanks (eds), *Criminal Justice in New Zealand* (2007) 99, para [5.6] point out that there is little regulation of the manner in which search and seizure powers are exercised.

66 Section 57A, which does confer a power on members of the police (to search persons in lawful custody), includes a similarly expressed provision protecting and thus recognising that the section does not limit the "right" of a constable at common law to search any person upon that person's arrest. See also s 6 in relation to non-sworn members of the police.

Common law duty to protect property

[76] The Court of Appeal held that the police had a common law duty to protect property which gave rise to a power that in the present case extended to roadside cataloguing, opening and searching all of the appellant's possessions which they had collected. On behalf of the appellant Mr Shaw accepted that the police have a common law duty to protect property where it is in danger. Counsel did not, however, accept that there is an associated power which authorises the police to open and search through closed personal receptacles in a motor vehicle, as in the circumstances of this case.

[77] *The Laws of New Zealand* includes the following general summary of the functions of the police:[67]

> **44. General functions of the Police**
>
> Every sworn member of the Police holds the office of constable, therefore, the common law powers and duties of a constable attach to members of the Police in New Zealand. The paramount duty of a member of the Police is to prevent crime and to detect and bring offenders to justice. Flowing from that duty is the duty to control traffic on public roads and the duty to prevent the obstruction of such roads. Further powers and duties are not exhaustively defined, but include the following: the duty to preserve order and the public peace; *the duty to protect life and property and to act where the constable apprehends, on reasonable grounds, danger to life or property*; and the duty to act where there is a reasonable apprehension, objectively assessed, that a breach of the peace will occur. While there is no obligation on a citizen to take action in situations, a constable has both a moral and a legal duty to do so. [Emphasis added]

[78] The authority cited in support of a common law duty of the police to protect life and property is *Police v Amos*.[68] The appellant appealed against his conviction by a Magistrate for obstruction of the police in the execution of their duty. Mr Amos, who was sailing a 30 ft yacht, was told by the police to get out of the way of a nuclear powered warship which was endeavouring to enter the port at Auckland. He had refused to comply with the police requests, submitting that the

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67 *The Laws of New Zealand*, *Police*, para [44] (footnotes omitted).

68 [1977] 2 NZLR 564 (SC, Speight J).

police actions had involved interference with his individual liberty. The police relied on their duty to preserve life and property as authority for their instructions to Mr Amos.

[79] On appeal Speight J referred to *Haynes v Harwood*,[69] a case involving a claim for negligence by a policeman who had been injured while stopping runaway horses. The defendant's servant had left the horses unattended in a busy street. The question was whether the policeman was acting under a duty so that the defence of volenti non fit injuria was unavailable. In the High Court Finlay J (in a passage cited in *Amos*) said:[70]

> I do not doubt all the police owe, a general duty to the public to preserve life and property …

[80] As well, Speight J referred to passages from concurring judgments delivered in the Court of Appeal in *Haynes v Harwood*. In the Court of Appeal Maugham LJ made reference to "a general duty to protect the life and property of the inhabitants" and "a discretionary duty to prevent an accident arising from the presence of uncontrolled forces in the street, if they are in a position to do so."[71]

[81] In *Amos* Speight J also cited the well-known statement of the English Court of Criminal Appeal in *R v Waterfield*:[72]

> [It is] difficult … to reduce within specific limits the general terms in which the duties of police constables have been expressed. In most cases it is probably more convenient to consider what the police constable was actually doing and in particular whether such conduct was prima facie an unlawful interference with a person's liberty or property. If so, it is then relevant to consider whether (a) such conduct falls within the general scope of any duty imposed by statute or recognised at common law and (b) whether such conduct, albeit within the general scope of such a duty, involved an unjustifiable use of powers associated with the duty.

[82] Speight J then concluded:[73]

> [I]t is beyond argument that the police must interfere to stop or prevent unlawful conduct, actual or apprehended. In addition circumstances may

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69 [1934] 2 KB 240 (HC); [1935] 1 KB 146 (CA).
70 At p 252.
71 At p 162.
72 [1964] 1 QB 164 at pp 170 – 171.
73 At p 569.

> arise where there is a common law duty on a policeman to take steps which would otherwise be unlawful if he has apprehension on reasonable grounds of danger to life or property, but the limits to which he may go will be measured in relation to the degree of seriousness and the magnitude of the consequences apprehended. There could be less justification for taking what would be prima facie unlawful interference with private rights for the protection of property than there would be in the case of danger apprehended to persons.

[83] These decisions indicate that the common law recognition of a constable's "duty" to protect life and property has been developed in cases in which the limits of police authority had to be determined where it had been exercised in a manner that intruded on individual rights. In the end, Speight J decided that there had not been sufficient findings of fact in the lower Court for him to conclude that Mr Amos had breached any navigation rules or that life or property were in such danger that the police were under a duty to act. His conviction for obstruction of the police in the course of their duties was set aside.

[84] *Waterfield* was an appeal against a conviction on a charge of assault of a police constable in the due execution of his duty. The appellant had attempted to drive a car from a public carpark, while a police officer was trying to prevent him from doing so. The appellant succeeded because, although the police had power to stop a vehicle, that power did not permit them to attempt to detain a stationary vehicle in a carpark. An analysis of police behaviour according to the test set out in *Waterfield* is only necessary where the police are acting under a duty set out in statute or the common law. Where there is no such duty to act the *Waterfield* test is not relevant.

[85] While *Amos* contains dicta which indicate that there is a common law duty to take protective steps when life or property is seen to be at risk, the sole authority cited for that proposition is *Haynes v Harwood*. The judgment in that case recognised that there was a "duty" of sorts, of a discretionary nature, which was sufficient to put the plaintiff constable outside of the category of volunteers when he intervened to bring the horses under control. The decision does not, however, offer a sound basis for recognition of a general common law duty on the police to protect private property at an accident scene.

[86] *Amos* was not concerned with deciding whether there was a duty on the police, that being assumed. It was rather concerned with the limits of police powers deriving from common law duties, where the exercise of those powers intruded on individual rights. That is why Speight J relied on *Waterfield*, which outlines a basis for the Court to determine whether the police trespassed outside of the limits of their powers. As with the authority it relies on, *Amos* does not support the existence of a common law duty that would provide the authority for police actions in relation to Mr Ngan's property at the accident scene.

[87] A judgment of the House of Lords that is also often cited as authority for the police having a general duty to protect property is *Glasbrook Brothers Ltd v Glamorgan County Council*.[74] The passage in the House of Lords speeches most often cited in this context is that of Viscount Cave LC who said:[75]

> No doubt there is an absolute and unconditional obligation binding the police authorities to take all steps … for preventing crime, or for protecting property from criminal injury;

[88] The issue in *Glasbrook* was whether the police could claim from an employer certain costs of protection of employees who had been continuing to work mines during a strike. The working employees had made plain that unless police protection were provided for them, in the manner they said was necessary, they would refuse to work. This would have resulted in the mines being flooded within a few days. The police told the employer that a less costly form of protection would be adequate, but in the end the police provided what was requested. They then sought reimbursement from the employer of the cost of the additional protective measures. This turned on the extent of the police duty, the police being unable to claim reimbursement of costs for a service they were bound to provide. A majority of the House of Lords found in favour of the police claim, holding that their duty to protect property did not extend to protecting the mines against flooding, to the extent necessary to persuade the employees concerned to continue to work. The police had no duty to provide any more services than they concluded were necessary for the protection of the public.

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74 [1925] 1 AC 270.
75 At p 277.

[89] The context in which a protective duty in relation to property was recognised by the House of Lords in *Glasbrook* was a volatile situation in which violence from striking employees was seen to be likely, putting the employer's property at risk. The case can therefore be seen as one invoking the duty of the police to enforce the law. While the passage in Viscount Cave's speech most often cited is that set out above, there is a more precise formulation of the duty by Viscount Cave where he considers whether action was necessary for "the protection of life and property from violence".[76] But as with the other cases discussed, there is little discussion in the speeches delivered in *Glasbrook* of the basis of the common law duty.

Scope of the duty

[90] The conclusion I reach is that the common law duties of police in relation to protection of property are not of a broad general kind but are rather specific to the particular types of situations addressed in the cases recognising there was a duty. I accept Mr Shaw's submission that the common theme is a situation in which property is in danger. I do not regard the limited situations in which the common law duty applies as including the aftermath of a normal motor accident scene.

[91] In attending at Mr Ngan's motor vehicle accident the police constables were not exercising functions of law enforcement.[77] As an academic observer once put it, while the police do spend significant periods of time enforcing the law, they also spend much of their time in activities that are more accurately described as "situation-handling".[78] They are well suited to such tasks:[79]

> Readily identifiable, available 24 hours a day and perceived as having the power to compel compliance whenever necessary, the police are called upon to deal with a wide range of emergencies, many of which have

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76 At p 281.

77 I do not regard this categorisation of what the police were doing in this case as contradicted by the fact that aspects of their work might become evidence in a prosecution for a road traffic offence.

78 Arnold, "Legal Accountability and the Police: The Role of the Courts" in Cameron and Young (eds), *Policing at the Crossroads* (1986) 67, p 70.

79 Arnold, p 70.

> nothing to do with breaches of the criminal law – except to the extent that any situation has the potential to escalate … . Generally it is the police who are first on the scene, who freeze the situation and who make the initial decisions. In such situations the police invoke the formal processes of the law relatively infrequently, and then principally because those processes are believed to offer the only viable means of dealing with particular problems.

[92] The role the police were undertaking, when attending at the accident scene, falls within this description of their operations which is largely not addressed by the law. It reflects the public need for a government service to handle the incidentals of emergency situations. In this case the police acted in a routine way at the accident scene. They arrived early, made initial decisions and helped deal with the urgent problems, including meeting Mr Ngan's need for medical treatment and observation. They then moved to take possession of private property, including cash, which was strewn around, and found inside the wrecked vehicle. What the police were doing, right up to the time that they discovered illicit drugs in the sunglasses pouch, was not part of their common law duty to protect property. Nor was it part of any other duty recognised by the common law. Accordingly, some other source of authority for these actions must be identified.

Legal authority beyond statute and common law

[93] Parliament has treated the police, or at least its sworn membership, differently in legislation from that covering other parts of the state sector. The police force in its entirety is nevertheless a division of government.[80] Accordingly, the principles under which officials of such departments have authority to act in the course of government have equal application to the police.

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[80] The State Sector Act 1988 does not include the police in the Schedule 1 list of the Departments of the Public Service. Section 44(2)(d) of the Act, somewhat obscurely, stipulates that "the Commissioner of Police shall be the chief executive in respect of the Police Department (civilian staff)". Section 44(1)(c) also excludes the Commissioner from the Act's general provisions for appointment and removal from office of departmental chief executives. The same approach is taken with other chief executives who are expected to act independently of government in exercising certain of their functions.

[94] Since the decision of Megarry VC in *Malone v Metropolitan Police Commissioner*,[81] there has been considerable academic debate over both the existence and extent of a further source of authority (in addition to statutory and common law powers) for government officials to act in the course of the business of government. *Malone* decided that the Post Office could tap the telephones of citizens at the request of the police. At that time there was no applicable legal right to privacy recognised by English law. Megarry VC held that the tapping could lawfully be done in the absence of any statutory or common law power simply because there was no law prohibiting it. This approach is premised on the natural capacity of the Crown, in the person of the Head of State, to act in any manner not precluded by law.[82]

[95] In *R v Somerset County Council ex p Fewings*,[83] Laws J said that any action taken by public bodies "must be justified by positive law".[84] *Malone* was not cited. On appeal to the Court of Appeal the Divisional Court's judgment was upheld.[85] The focus of the judgment of Bingham MR, however, was on the local authority context.[86] It offers little support for the undermining of the principle in *Malone* which applies to central government. The force of Laws J's decision is further lessened by obiter dicta of Lord Hoffmann in *R (on application of Hooper) v Secretary of State for Work and Pensions*,[87] accepting that there "seems to be a good deal of force" in a submission that the Crown has the same right to deal with its property as any other legal person.

[96] There are strong practical reasons for accepting the existence of residual freedom as a "third source of authority" for government action that is distinct from statutory and common law powers. As Professor Harris has pointed out, thousands of government actions take place every day under this form of legal

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81 [1979] 2 Ch 344 at pp 366 – 367. The decision was applied in New Zealand by the Court of Appeal in *R v Gardiner* (1997) 15 CRNZ 131 at p 134. See also the observations in *Rogers v Television New Zealand Ltd* [2007] NZSC 91 at para [110].

82 Joseph, *Constitutional and Administrative Law in New Zealand* (3rd ed, 2007), para [17.3.2].

83 [1995] 1 All ER 513.

84 At p 524.

85 *R v Somerset County Council ex p Fewings* [1995] 1 WLR 1037.

86 At p 1042.

87 [2005] 1 WLR 1681 at paras [43] – [47].

authority.[88] Most are administrative and free from controversy, as they have no impact on the legal rights of citizens. Unless a residual freedom to act is recognised, there will be doubt over legal validity. Requiring prior parliamentary authority generally or in relation to certain types of actions can in theory provide desirable democratic legitimacy,[89] and also better legal certainty, but there are logistic difficulties in making that approach work. Codification of all government power would be a huge task and, if attempted, many powers would inevitably be so broadly expressed as to make the democratic advantages illusory.[90]

[97] The strongest criticism of continued recognition of a third source of power is that it may permit interference with individual rights. It is, however, a residual form of authority which is subject to statutory and common law constraints.[91] It does not permit government officials to act in conflict with the rights and liberties of citizens. In particular the residual freedom of officials is constrained by the Bill of Rights Act. Residual freedom to act can never justify a breach of protected rights. Wherever residual freedom conflicts with a statutory or common law rule it must give way to that rule. No balancing of the relevant interests is permitted because the residual freedom only exists to the extent that there is no other positive law that deals with the circumstances in question.

[98] The exercise of the residual authority is also subject to judicial review on public law principles. As well, the normal institutional framework, involving scrutiny of official action by the Ombudsman, the Auditor-General and Parliament by Select Committees, is available.

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88 Harris, *The "Third Source" of Authority for Government Action Revisited* (2007) 123 LQR 225, p 226.

89 Concern over democratic implications is expressed in Taggart, "The Peculiarities of the English: Resisting the Public/Private Law Distinction" in Craig and Rawlings (eds), *Law and Administration in Europe* (2003) 107.

90 Arguments for and against recognising residual freedom as a third source of government authority are discussed in Harris (2007) at pp 237 – 240.

91 *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508, discussed in Elliott, *The Constitutional Foundations of Judicial Review* (2001), pp 171 – 172; Harris (2007), pp 227 – 228.

[99] Some areas of government activity are obviously better authorised by specific and comprehensive legislation rather than relying on residual freedom, or for that matter the common law. Indeed, this might be said of police powers. *Malone* identified a gap in English law concerning electronic eavesdropping that was later filled.[92] But this is, in the end, a matter for the political process rather than formulation of general rules which require all forms of authority for central government to be specified.

[100] In my view when the police collected property at the scene of Mr Ngan's motor vehicle accident the authority for what they did was their residual freedom as public officials. The next question is whether at any stage before discovery of the drugs in the pouch their actions exceeded that authority.

Was there a search?

[101] The issue then becomes whether the way that the police exercised their residual freedom involved a breach of the statutory or common law rights of Mr Ngan. Mr Shaw argues first that what happened, at least when the police opened closed receptacles, amounted to a search that was in breach of s 21 of the Bill of Rights Act:

> **21 Unreasonable search and seizure**
>
> Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise.

[102] In common parlance a search is an examination of property of a person and a seizure is the taking of what is discovered.[93] The present case did not give rise to a seizure until after the police had opened the pouch and found inside it what proved to be 6.9 g of methamphetamine and two flakes of LSD. On seeing the drugs Constable Johnson formed the view that there were reasonable grounds

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92 The New Zealand decisions concerning police authority to undertake video surveillance arguably disclose a need for a legislative basis for that practice. In particular, *R v Gardiner* and *R v Fraser* [1997] 2 NZLR 442 (CA).

93 *R v Jefferies* [1994] 1 NZLR 290 at p 300 (CA); *R v Grayson and Taylor* [1997] 1 NZLR 399 at p 406 (CA).

for him to exercise the statutory power of seizure.[94] He did so. But there was no seizure prior to the discovery of the drugs. The focus of Mr Shaw's argument on s 21 was, appropriately, that the actions of the two police officers, in retrieving and examining Mr Ngan's property at the accident site, amounted to a search. In particular, when Constable Johnson opened the computer satchel and the zipped pouch, which by then was within the satchel, this was a search.

(i) The meaning of "search"

[103] In its ordinary meaning, "search" is descriptive of an activity undertaken to achieve an end. The activity is in the nature of seeking or looking carefully and the end is to find something not readily at hand, usually because it is concealed or lost.

[104] In this case it is necessary to ascertain the meaning of "search" in its context and in light of the purpose of the provision and of the Bill of Rights Act. In the context of the Bill of Rights Act, the right to be secure against unreasonable search or seizure is concerned with protecting a particular aspect of individual privacy and property rights against state intrusions. In the interpretation of s 21 it is important, however, to bear in mind that no general guarantee of privacy was intended or given in the Bill of Rights Act.[95] The role of s 21 of the Bill of Rights Act is to regulate state acts involving search and seizure against a yardstick of reasonableness. Such protection from improper search and seizure on behalf of the state is founded of course on a well-established common law principle.[96] Application of s 21 will set the point at which privacy rights are limited to accommodate community rights, particularly the public interest in proper law enforcement, including the detection and prosecution of criminal behaviour. An important aspect of this exercise is determining what forms of state activity are covered by the terms "search" and "seizure".

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94 Under s 18(2) Misuse of Drugs Act 1975.
95 *A Bill of Rights for New Zealand: A White Paper* (1985), para [10.144].
96 *Entick v Carrington* (1765) 19 How St Tr 1029.

[105] Most discussions concerning the meaning of "search" tend to merge with whether any search was reasonable in the particular circumstances. In *R v Fraser* the Court of Appeal did, however, address the meaning of "search" and said:[97]

> [I]n broad terms a search is an examination of a person or property. Though sometimes broader, in usage to search means to endeavour to find something not readily at hand or available. The general connotation is of investigation or scrutiny in order to expose or uncover, going beyond or penetrating some degree of concealment. In some instances that may involve intrusion upon privacy but not necessarily so. This corresponds with primary dictionary meanings, as for example in the *Oxford English Dictionary*:
>
> > '2. To look through, examine internally (a building, an apartment, a receptacle of any kind) in quest of some object concealed or lost …
> >
> > 3.2 To examine (a person) by handling, removal of garments, and the like, to ascertain whether any article (usually, something stolen or contraband) is concealed in his clothing.'
>
> In legal contexts a search generally is an examination or investigation for the purpose of obtaining evidence. That is not inconsistent with normal usage. The references in *Black's Law Dictionary* (6th ed) are instructive. Under "Search" there is recorded:
>
> > 'An examination of a man's house or other buildings or premises, or of his person, or of his vehicle, aircraft, etc, with a view to the discovery of contraband or illicit or stolen property, or some evidence of guilt to be used in the prosecution of a criminal action for some crime or offense with which he is charged. *State v Woodall* 16 Ohio Misc 226, 241 NE 2d 755, 757. A prying into hidden places for that which is concealed and it is not a search to observe that which is open to view. Probing or exploration for something that is concealed or hidden from searcher, an invasion, a quest with some sort of force, either actual or constructive. *People v Carroll*, 12 Ill App 3d 869, 299 NE 2d 134, 140.'
>
> The reference goes on to describe to search "in the constitutional sense" as visual observation which infringes upon a person's reasonable expectations of privacy.

[106] This passage offers two meanings of search. The former has the central idea of any investigation or scrutiny in order to penetrate concealment. It is the broader of the two meanings. The latter meaning, often the term's usage in a legal context, has the underlying idea of an examination or investigation for the purpose of obtaining evidence. In *Fraser* it was not ultimately necessary for the Court of

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97 [1997] 2 NZLR 442 at p 449 per Gault J for the Court.

Appeal to choose between the two meanings and decide whether there had been a search. The Court determined that, regardless of whether it was a search, police video surveillance of an accused's activities in the garden of an address where he was not a resident was not unreasonable.

[107] The immediate source of s 21 is s 8 of the Canadian Charter of Rights and Freedoms. The Supreme Court of Canada has held that rights protected by s 8 are not confined to protection of property rights and required assessment of whether in the public interest privacy rights should give way to government interests and in particular law enforcement.[98] On the Canadian approach, ascertaining whether state monitoring of an individual, or examination of property, amounts to a search turns on the accused's reasonable expectation of privacy in the circumstances. In *R v Wise,*[99] it was held that beeper monitoring of the appellant's vehicle by the police invaded reasonable expectations of privacy. Accordingly that activity constituted a search and, in the absence of prior authorisation, would be unreasonable.

[108] The Supreme Court of Canada's analysis in *Hunter v Southam* was influential in the approach taken to s 21 by Richardson J in the Court of Appeal in *R v Jefferies*.[100] I agree with his conclusion that the purpose of s 21 covers protection of privacy as well as property interests. This is consistent with the wording of s 21. Whereas the language of s 8 of the Charter is simply, "Everyone has the right to be secure against unreasonable search or seizure", the scope of the New Zealand provision is extended by adding: "whether of the person, property, correspondence or *otherwise*". A privacy purpose is also consistent with the White Paper commentary on the New Zealand provision.[101]

[109] But, as already pointed out, the New Zealand Bill of Rights Act was not intended to be a general guarantee of privacy. Acknowledgement that the purpose of s 21 includes protection of privacy interests does not assist in answering the

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98 In *Hunter v Southam Inc* [1984] 2 SCR 145 (Dickson J for the Court), applying the approach taken by the Supreme Court of the United States to the scope of the Fourth Amendment in *Katz v United States* 389 US 347 (1967).

99 [1992] 1 SCR 527.

100 [1994] 1 NZLR 290 at p 302. See also Thomas J at p 319.

101 *White Paper,* paras [10.151] – [10.152].

question of to what extent. In this respect the limits of the meaning of "search and seizure" must be ascertained having regard to the text and in light of the statutory purpose.

[110] In the context of an enactment that protects fundamental rights, the limitation of the term "search" to official examinations and investigations that have the purpose of gathering evidence or are incidental to law enforcement would be too confining. It would exclude situations where the state undertakes examinations and investigative activities of a kind that significantly intrude physically on private zones albeit for purposes other than gathering evidence. It is not in accordance with the purpose of the Bill of Rights Act that individuals and their property should only be protected where someone is being investigated for possible criminal behaviour. On the other hand, the wider of the two meanings would cover official activities of a kind which are highly unlikely to engage the values which s 21 protects. That may lead to the general guarantee of privacy entering New Zealand law, via the Bill of Rights Act, when that was not Parliament's purpose in its enactment.

[111] Whether or not in any case a particular activity falls within that meaning of "search" must ultimately turn on a value judgment that considers the nature of the particular examination or investigation by government officials and its impact on the privacy and security of the person subjected to it. This will allow the Court to decide whether that type of activity should or should not be exposed to assessment in light of Bill of Rights Act restraints.[102] A finding that official actions amount to a search entails no judgment on whether in the particular circumstances the search is reasonable. That aspect must the be subject of further inquiry.

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[102] Compare with Optican, "Search and Seizure" in Rishworth and others, *The New Zealand Bill of Rights* (2003) 418, pp 424 – 425. A different approach under which s 21 is directed principally to protecting expectations of privacy arising out of law enforcement intrusions is proposed in Butler and Butler, *The New Zealand Bill of Rights Act: A Commentary* (2005), para [18.10.6].

(ii) Was there a "search" in this case?

[112] Applying this approach to the present case, the meaning of "search" I prefer is capable of covering the kind of the activities the police undertook at the site. It is, however, necessary to consider whether expectations of privacy and protection of property interests in that situation are such that recognising them to be a search will serve the purpose of s 21. The police were undertaking an examination of property at an accident scene at the side of a public road. That location is significant. The courts have always considered that motor vehicles on a public road give rise to a lesser expectation of privacy than do private dwellings, in part because of the practical problems in relation to removal of evidence presented by their instant and rapid mobility.[103] That expectation of privacy, to my mind, diminishes when the vehicle is damaged and property within and lying around it has to be removed from the scene before it goes missing. Overall, the location is not one in which a motorist can reasonably expect official respect for a high degree of privacy.

[113] The degree of intrusiveness involved in the actions of the police is also significant. It involved collecting and securing and later taking an inventory of all property around and within the vehicle which appeared to be of value.

[114] The appellant's argument concerning intrusiveness is at its strongest in relation to the police opening closed receptacles. These included a computer bag and, more particularly, a zipped personal pouch inside which the drugs were found. I accept that, in general, the public have a high level of expectation that the contents of such receptacles will be kept private and that the intrusiveness of police actions was accordingly significant in s 21 terms. Mr Shaw argued that these items could have been secured, in various other ways, without any opening of them.

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[103] *Jefferies* at p 297 per Cooke P and p 327 per Thomas J.

[115] The third and most important feature of the present case is the intention of the police in looking for property at the accident site and within the vehicle. The tenor of the police evidence was that opening closed containers was standard police practice and was necessary for their purpose. Mr Shaw argued that the extent of the intrusion on personal privacy required that this explanation should be the subject of judicial assessment of reasonableness under s 21. This can only be done if the police actions were a search. He also contended that the Crown could not demonstrate the intrusion to be reasonable in the circumstances. He cited, in support of his submission that the police were undertaking a "search", dicta in various decisions of the Supreme Court of the United States concerning inventory type searches in different contexts.[104]

[116] I have earlier characterised the police actions as "situation-handling".[105] They could also be described as exercising a community care role. On the findings of the High Court Judge, the police were not at any stage intending to conduct a criminal investigation.[106] The existence of criminal offending only emerged with the discovery of the drugs. Given the amount of cash already found at the site, there was a distinct possibility of further money or valuable items being found inside the two receptacles they took possession of and secured. This will not be unusual. The primary reason for creating an inventory of all property of value in these circumstances is to protect the owner who is entitled to its return. This inventory also protects the police from subsequent complaints that property has gone missing but this is incidental to the primary purpose. In summary, the police were not engaged in law enforcement, their actions were primarily for the benefit of the owner and were carried out in a "community care" setting. These are all factors strongly indicating that this type of police action is not the sort of behaviour that requires scrutiny under s 21 of the Bill of Rights Act.

[117] Considering these various aspects together, and bearing in mind the need for the police to be free to act effectively in the area of such operations at accident sites, I have concluded that Mr Ngan could not reasonably expect to keep private

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104 *Colorado v Bertine* 479 US 367 (1987) and *Illinois v Lafayette* 462 US 640 (1982).

105 See para [91] above.

106 Miller J held that despite police suspicions that the cash might be drug money, the pouch was opened for reasons of safekeeping.

the contents of his motor vehicle or the contents of the sealed containers within it. Gathering up, identifying and securing property at the site of a motor accident often involves a thorough examination of what is there. I see little point in judicial scrutiny of the reasonableness of caretaking procedures. The degree of privacy reasonably expected in a free society in relation to police activities is not seriously diminished by this conclusion. The Bill of Rights Act accordingly does not have a purpose which includes shielding against this type of activity. It is not necessary that the scope of particular intrusions be subject to judicial restraint according to the circumstances of the case. Although the activities of the police were in the nature of an examination of his personal property, in which he has significant privacy interests, the values underlying s 21 do not arise when the police are situation-handling in the way that they do in law enforcement cases. In this role, when securing and inventorising private property at motor accidents, the ability to determine and record what they have taken possession of and flexibility in the manner they proceed will not infringe search and seizure protections other than in extraordinary situations involving aberrant behaviour. It would be rare for such police activity to amount to a search in terms of s 21.

[118] In New Zealand in *R v Dodgson*,[107] an examination of the engine of a vehicle by getting down in front of the car and looking into an exposed part of the engine, where the appellant had refused to consent to the opening of its bonnet, was held by the Court of Appeal not to be a search. The Court of Appeal said that, in any borderline situation, whether an activity was a search was a matter of fact and degree, to be decided having regard to all the circumstances. These included the reasonable expectation of privacy from an objective viewpoint. Such an expectation was less in respect of motor vehicles than dwellings. The circumstances in that case included the absence of any actual intrusion. The Court's conclusion was that the police were engaged in an external observation rather than undertaking a search.

[119] I have not overlooked the apparent preference in the courts of the United States for treating routine inventories of automobiles as searches and assessing

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[107] (1995) 2 HRNZ 300 (CA) Eichelbaum CJ for the Court.

their reasonableness on a case by case basis. In *South Dakota v Opperman*,[108] the majority of the Supreme Court concluded that caretaking procedures for removed and impounded vehicles that have breached traffic regulations have almost uniformly been upheld by state courts on the basis that on a standard of reasonableness, "even if an inventory is categorised as a 'search', the intrusion is constitutionally permissible".[109] The Court observed in a footnote that in the "benign noncriminal context of the intrusion … some courts have concluded that an inventory does not constitute a search" and others have expressed doubt.[110]

[120] In the end, this is an area in which New Zealand courts must make their own judgment of what the Bill of Rights Act requires, having regard to our own social and governmental circumstances. The conclusion I reach in this case is that the nature of the examination of property at the accident site was not a search in terms of the Bill of Rights.

Evidence obtained for a different purpose

[121] As an alternative it was argued for Mr Ngan that, even if it was reasonable to search the pouch for the purpose of creating an inventory, it was not reasonable to use the evidence obtained for the different purpose of a criminal prosecution. As I have decided that the police actions in this case did not amount to a search and, therefore, are not subject to a reasonableness analysis this argument cannot stand. Had I found that this was a search I would agree with the approach Blanchard J has taken at paragraphs [30] – [37] of his reasons.

Were common law rights breached?

[122] The final basis on which the actions of the police, under the residual freedom, would be unlawful is if they infringed the common law. The police

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108 428 US 364 (1976).
109 At pp 370 – 371 (footnote omitted).
110 At p 370 footnote 6.

actions did not involve a trespass to land and the only way in which the common law might be breached is if they committed a tort in the nature of interference with goods. In reality, of course, this is a highly unlikely eventuality in a situation where the police were acting to protect private property. However, it is a trespass to move goods from one place to another, that involving a direct interference with goods.[111]

[123] Nevertheless, I am of the view that this tort has not been committed by the police. There are a number of recognised defences, including taking steps that are necessary to protect property that is in real or imminent danger.[112] While the cases tend to focus on situations where there are acts in relation to the plaintiff's property which are taken to protect other property, it seems to me that by analogy there must be a defence of necessity where any person interferes with goods of a plaintiff in order to protect from loss or make secure those goods. That is sufficient to dispose of any suggestion that the common law stands in the way of the lawfulness of the police actions.

Conclusion

[124] Accordingly, I conclude that all actions of the police in relation to the uplifting, securing and opening of the pouch, resulting in the discovery of drugs, were lawful, being authorised under the residual freedom. At no stage prior to the discovery of the drugs did the police undertake a search or do anything that infringed Mr Ngan's rights. They had authority for what they did. The Bill of Rights Act is not engaged, nor are any rights at common law.

[125] The evidence was properly admitted and the appeal must be dismissed.

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111 Todd (gen ed), *The Law of Torts in New Zealand* (4th ed, 2005), para [12.2.02].
112 Todd, para [12.7.01].