IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA534/2021
[2022] NZCA 375

BETWEEN	RAEWYN WALLACE Appellant
AND	ATTORNEY-GENERAL First Respondent
AND	COMMISSIONER OF POLICE Second Respondent

Hearing:	31 May 2022 – 1 June 2022
Court:	Miller, Gilbert and Goddard JJ
Counsel:	G E Minchin and C J Tennet for Appellant P J Gunn, N J Ellis and B M McKenna for Respondents
Judgment:	15 August 2022 at 11.30 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The cross-appeal is allowed. The declarations made in *Wallace v Attorney-General* [2021] NZHC 1963 at [646] and [647] are set aside.

C No order as to costs.

REASONS OF THE COURT

(Given by Miller J)

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Introduction

[1] On 30 April 2000 Steven Wallace went on a violent rampage in the town of Waitara, attacking the police station, a patrol car and numerous retail premises, and threatening bystanders. That led to two armed police officers approaching and attempting to reason with him. Mr Wallace advanced on one of the officers, Constable Keith Abbott, with a baseball bat. Constable Abbott shot and killed him.

[2] The Crown decided not to prosecute Constable Abbott, the Solicitor-General having concluded that he acted in self-defence.

[3] Mr Wallace's parents, James and Raewyn Wallace, believed the Constable did not act in self-defence, and if he did his actions were not reasonable. They also believed the police homicide investigation that followed was not independent or impartial. They obtained consent of the High Court to lay an indictment charging the Constable with murder. The Solicitor-General declined to take over the conduct of the prosecution or to fund its conduct by counsel briefed by the Wallaces. The Constable was acquitted. The jury must have decided, at minimum, that the prosecution failed to exclude the reasonable possibility that he acted reasonably in self-defence in the circumstances as he understood them to be.

[4] Subsequent investigations by a Coroner and the Independent Police Complaints Authority (IPCA) identified deficiencies in police handling of the incident that ended in Mr Wallace's death, but they took it as settled that Constable Abbott acted in self-defence.

[5] In this proceeding, brought 14 years after Steven died and almost six years after the IPCA investigation concluded, Mrs Wallace sued for vindication, in the form

of declarations and damages.[1] The claim rested principally on s 8 of the New Zealand Bill of Rights Act 1990, which provides that "[n]o one shall be deprived of life except on such grounds as are established by law and are consistent with the principles of fundamental justice".

[6] Mrs Wallace contends that s 8 was breached for two reasons. First, she says that Mr Wallace lost his life unlawfully because the Constable did not act in self-defence. As will be seen, the pleading and conduct at trial of this part of the claim have caused serious difficulty. The parties had agreed that the documentary record of the criminal trial and investigations were admissible as evidence. This included the police statements, depositions or trial evidence of many witnesses, including Constable Abbott. The substance of this evidence was that, as Mr Minchin acknowledged before us, Mr Wallace "had been on a destructive rampage and was advancing with a baseball bat on [Constable] Abbott". Very few witnesses were called before Ellis J, the trial Judge in this proceeding. The Judge was asked to make certain findings which had not been pleaded. The substance of those findings was that, contrary to the approach taken in the criminal proceedings, Constable Abbott was the aggressor and was not acting in self-defence in the circumstances as he understood them to be when he killed Mr Wallace. Some of the allegations the Judge was asked to accept had never been put to Constable Abbott or any other witness. In these circumstances she found it impossible to make some findings requested of her. She felt able to and did find that the Crown had proved Constable Abbott acted in self-defence and reasonably.[2] On appeal, Mrs Wallace says the Judge was duty-bound to make the factual findings requested and wrong to find self-defence was made out.

[7] Second, Mrs Wallace says that s 8 was breached because the police did not conduct the operation that ended in Mr Wallace's death in accordance with their own procedures and good practice: had they complied, the officers would not have carried firearms; alternatively, they would not have used the firearms. The Attorney-General, who is a necessary and sufficient defendant,[3] does not accept that the s 8 right extends

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1 *Wallace v Attorney-General* [2021] NZHC 1963 [Judgment under appeal]. James Wallace brought the proceeding on 18 September 2014 as administrator of Steven's estate and Raewyn Wallace has since been substituted as plaintiff.

2 At [374].

3 Counsel did not distinguish between the Commissioner of Police and the Attorney-General for

to planning and control of police operations. Ellis J found that the right does extend so far but was not breached on the facts.[4]

[8] Mrs Wallace further contended that implicit in s 8 is a further right, to an investigation into Steven's death that is independent, impartial, prompt, thorough, effective, credible and transparent. Because the obligation is derived from art 6 of the International Covenant on Civil and Political Rights, we will call this an "ICCPR-compliant investigation".

[9] Ellis J held that such obligation is inherent in s 8 and found that it was breached.[5] The original police investigation was not independent,[6] the criminal trial was not ICCPR-compliant because it was not instigated or supported by the Crown,[7] the jury's verdict did not result from a compliant investigation,[8] and the IPCA and coronial investigations, while independent, failed to investigate self-defence but took the jury verdict to be conclusive.[9] She declared accordingly that there had not been an inquiry that complied with the investigative obligation inherent in s 8.[10] She declined to award compensation.[11]

[10] The Attorney accepts that under international law the State must establish mechanisms to ensure ICCPR-compliant investigations into potentially unlawful deprivations of life by State actors, but says that it has done so through other means, including criminal trials, police investigation, complaints processes, and coronial investigations. He says there is no justification for reading a positive obligation to investigate into s 8, and he further maintains that the several investigations separately and collectively met the State's obligation in this case.

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purposes of the first two causes of action. We agree that it is not necessary to do so. The Attorney is appropriately sued for the Crown on all three causes of action. The Crown accepted in the High Court that it is liable for the actions of police officers as its servants or agents and the Attorney-General is the correct defendant. For this reason it is usually convenient to speak of "the Attorney" when referring to the respondents in this judgment.

4 At [550] and [573]–[575].

5 At [384] and [515]–[516].

6 At [478].

7 At [418]–[422].

8 At [422].

9 At [506] and [509]–[511]. The Judge held that the deficiencies in the investigations could not be remedied by considering the inquiries collectively: see [516].

10 At [646].

11 At [624].

[11] Mrs Wallace challenged the decision of the Solicitor-General to refuse to take over the private prosecution. Again, the pleading has caused difficulty. She pleaded that the Crown acted in breach of the right to justice by failing to direct a Crown prosecution. Ellis J dismissed that claim, but she accepted an alternative claim, advanced for the first time at trial, that the Solicitor-General had failed to give reasons for declining to assume conduct of the prosecution. She made a declaration accordingly but declined compensation.[12]

[12] Mrs Wallace has appealed and the first respondent has both cross-appealed and supported the judgment below on alternative grounds. It will be convenient to address the substantive issues in the following way. First, we will examine the s 8 right, inquiring:

(a) Can a claim be brought under s 8 where the planning and control of police operations can be said to have caused or risked death, notwithstanding that the actions of those immediately responsible for the death — in this case, Constable Abbott — may be lawful; and if so, what is the standard against which official conduct is to be judged?

(b) Where the killing is said to be in self-defence, what are the elements of the defence?

(c) On whom lies the burden of showing that a killing was justified for purposes of s 8?

(d) Does s 8 incorporate a subsidiary right to an ICCPR-compliant investigation into a killing that may have breached s 8?

[13] Second, we will consider whether the various investigations, beginning with the original police inquiry and ending with the Coroner's report, met the State's obligation to provide an ICCPR-compliant investigation.

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12 At [618] and [647].

[14] Third, we will consider whether justification was proved, and also whether the planning and control of the operation was so deficient as to breach s 8. The latter includes an allegation that first aid was not provided in the aftermath of the shooting.

[15] Fourth, we will assess whether the pleading and evidence permitted the Judge to find the Attorney liable on the ground that the Solicitor-General did not give reasons for refusing to assume conduct of the private prosecution.

[16] Finally, we will make some observations about the respondents' limitation defence.

[17] Before turning to the substantive issues, we must provide a timeline of events. We confine ourselves to what is necessary to decide the appeal and cross-appeal. Recourse should be had to the careful judgment of Ellis J, and the decisions of the Coroner and IPCA, for a fuller account of the facts. We must also spend some time discussing the pleadings, the trial before Ellis J, and the grounds of appeal.

Narrative

[18] The narrative falls into two parts. The first concerns the events leading up to and including Mr Wallace's death. It is drawn substantially from an agreed statement of facts in the High Court, a joint chronology in this Court and the judgment of Ellis J. The second concerns the subsequent investigations, including the criminal trial.

The events of 30 April 2000

[19] Mr Wallace became upset in the early hours of 30 April. His behaviour at home caused family members to leave and Mrs Wallace to call 111, though she hung up before speaking to the operator. It is unclear why he became upset, but it is evident that he had some grievance against the police because he drove to the Waitara police station and began smashing windows, yelling at police to come out. He was armed with golf clubs and a baseball bat. The police station was unstaffed at that hour. Neighbours called 111 at 3:45 am.

[20] Sergeant Fiona Prestidge was the supervising non-commissioned officer on duty at New Plymouth. Acting on her orders the police communications centre dispatched a patrol car containing Constables Jason Dombroski and Jillian Herbert. Constable Dombroski asked that Constable Abbott, who lived in Waitara and was off duty, be called to assist.

[21] By this time Mr Wallace was smashing windows at retail premises in the town centre on McLean St. He also behaved aggressively towards others in the vicinity. He crossed the road and smashed the driver's window of a passing taxi, and he twice moved aggressively towards a car driven by some young people who knew him and had attempted to intervene.

[22] When the patrol car pulled up alongside Mr Wallace, he hit the windscreen with a golf club and smashed the driver's window. Constable Dombroski reported the attack at 3.57 am, stating that the man attacking them was smashing windows, had a golf club, and was "going nuts". He asked that Constable Abbott be told to bring a gun. Constables Dombroski and Herbert retreated in the patrol car, driving to the police station.

[23] Meantime, Constable Abbott had left the police station after seeing the broken windows and headed to McLean St. There he saw Mr Wallace attack the patrol car. He mistook Mr Wallace for another local man, David Toa, whom he knew. He returned to the station, having independently decided that he needed a firearm for self-protection. He met the other officers there. Constable Dombroski had also decided to uplift a firearm for self-protection. Constable Herbert was sent back to McLean St in the patrol car to observe, while the other two constables armed themselves with pistols. Neither signed the firearms register and they did not ask Sergeant Prestidge for permission to uplift firearms, though she knew they were doing so. Both also had pepper spray and Constable Abbott had his baton.

[24] At 3.58 am Constable Herbert reported that Mr Wallace was running around smashing anything he could find. Sergeant Prestidge ordered that a dog handler called out from New Plymouth, and a decision was made to order another local officer to

assist. It appears that Constable Abbott, the senior officer on the scene, was not made aware of these decisions.

[25] At 4.01 am Constable Herbert reported that Mr Wallace had got back into his car and driven further along McLean St, where he was smashing more windows. Constables Abbott and Dombroski arrived by car and got out of the vehicle. Constable Dombroski shouted that they were armed police and ordered Mr Wallace to drop his weapons. At that point Mr Wallace was holding a golf club and the baseball bat.

[26] 64 seconds later Constable Abbott had shot Mr Wallace. There are two very different accounts of what happened during that period.

[27] Ellis J found, consistent with the findings of all previous tribunals, that Mr Wallace was threatening the officers and advancing on Constable Abbott, who was trying to calm him down. The Constable was addressing Mr Wallace as "David" or "Dave", believing that he was dealing with Mr Toa. He ducked the golf club when it was thrown in his direction.[13] He then holstered his baton and drew and racked his pistol, warning Mr Wallace that he was armed. He fired a warning shot into the air but Mr Wallace continued to advance.[14] The Constable feared he was running out of room to retreat because he was backing towards a gutter.[15] He fired two groups of two shots at Mr Wallace in rapid succession.[16] All four bullets hit Mr Wallace, who stumbled and fell slowly to the ground.[17]

[28] Mr Minchin argued that this account of the confrontation relied on police and eyewitness evidence which was false in important respects. Constable Abbott was not acting in self-defence at all. Mr Wallace did not threaten the officers; on the contrary, he said nothing to them. Prosecuting counsel at the criminal trial had erred by admitting that such threats were made, and witnesses who had spoken of these threats at the criminal trial or in depositions or statements should not be believed. Mr Wallace

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13 At [79].
14 At [80].
15 At [82].
16 The practice of firing a group of two shots is described in the record as a "double tap".
17 Judgment under appeal, above n 1, at [83].

had ceased to behave aggressively; he had "dropped his shoulders" and the bat and club were hanging down. It is true that Constable Abbott thought he was confronting Mr Toa, but his claim that he had a rapport with Mr Toa was untrue. The Constable spoke threateningly, saying "we have been after you a long time, Dave". Contrary to their claims that they deployed firearms for reasons of self-defence, the officers were attempting an armed arrest, which needlessly increased the risk to Mr Wallace's life. They could have adopted a cordon and contain strategy while backup and the dog unit arrived. Constable Abbott had not been backed up against the gutter; rather, he and Mr Wallace were in a straight line down the middle of McLean St. The Constable advanced on Mr Wallace, not the other way around. The warning shot was not a warning shot at all, because it gave Mr Wallace no time to react. The bat flew out of Mr Wallace's hands after the first group of two shots struck him, and if the Constable had been acting in self-defence until then, he was no longer doing so. The third shot was fatal and the fourth hit Mr Wallace in the back.

[29] At 4.03 am Constable Herbert reported that Mr Wallace was down and called for an ambulance. Constable Dombroski told Mr Wallace that an ambulance was on the way. His assessment, and that of Sergeant Prestidge who had arrived on the scene, was that there appeared to be minimal bleeding and little first aid could be administered. After about 10 minutes a blanket was placed over Mr Wallace and a sling bandage was applied. The ambulance arrived at 4:20 am.

[30] Mr Wallace died at 9:10 am in the operating theatre at New Plymouth Hospital. Doctors were unable to stop bleeding caused by a bullet that had pierced his liver. We must return to this issue, because Mrs Wallace says that first aid was delayed and Mr Wallace might have survived had he not been left to bleed to death.

Investigations following Mr Wallace's death

(a) The police homicide investigation

[31] The Criminal Investigation Branch conducted a homicide investigation. It was supervised by Detective Inspector Pearce from Christchurch. Ellis J examined the investigation at some length. Because we have concluded that the other investigations met the obligation to provide an ICCPR-compliant investigation, we need not review

it in detail. We do note at this point that, as the Judge put it, there was some focus on Mr Wallace himself and his family. Police inquiries extended to the reasons for Mr Wallace's agitation, which commenced at home, and any past history of animosity with local businesses.[18]

[32] DI Pearce issued a report in June 2000 in which he concluded that Constable Abbott had acted in self-defence and recommended that no criminal charges be laid. He expressed the opinion that a cordon and contain strategy would not have been viable and the offices were justified in uplifting firearms, having seen the damage that Mr Wallace was capable of causing. They uplifted firearms to protect themselves, not to arrest or kill Mr Wallace. Dogs could have been used but only one dog and handler were available and events moved too quickly to utilise them. Pepper spray and batons were not viable options when dealing with a subject armed with a blunt-edged weapon.

[33] Another senior officer, Inspector Dunstan, reviewed the findings of this report, concluding that while the safest tactical option on the night would have been for the three constables to observe and contain, this option was never feasible given there were only three officers. Events overtook them once Mr Wallace saw them, and Constable Abbott was left with no other option but to shoot.

(b) The Crown decision not to prosecute

[34] On 16 August 2000 the police published a media statement stating that their investigation into the shooting concluded that no charges should be laid against Constable Abbott. The same day the Acting Solicitor-General announced that Crown Law had independently reviewed the police investigation and the advice of the Crown solicitor at Wellington, and agreed with the decision not to lay charges; the available evidence led inevitably to a conclusion that the shooting was done in self-defence.

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[18] At [106]–[112].

(c) The initial Police Complaints Authority and Coroner's investigations

[35] The Commissioner of Police reported the shooting to the then Police Complaints Authority. An investigation was conducted by a senior police officer appointed to assist. His report has since been lost, and the Authority ultimately never issued a report, having chosen to delay doing so till the end of any coronial hearing. For our purposes all that can now be said is that the authorities promptly and of their own volition initiated an investigation. An inquest was also opened in 2001 but it was adjourned because the officers involved would have to give evidence and the Wallace family had issued a media statement saying that they intended to commence a private prosecution.[19]

(d) The private prosecution

[36] In September 2001 James Wallace laid an information against Constable Abbott for murder. There followed a depositions hearing before two Justices of the Peace at New Plymouth District Court. The hearing ran for almost a month, beginning on 21 January 2002, and it produced 1,200 pages of evidence. The parties were agreed that Constable Abbott should be committed for trial, but at the end of the hearing the Justices declined to do so, deciding rather to discharge him on the ground that he had acted in self-defence.

[37] James Wallace applied to the High Court under s 345(3) of the Crimes Act 1961 for consent to file an indictment for the offence of murder. Elias CJ granted the application.[20] She recorded that she expressed no view about Constable Abbott's guilt or innocence, credibility or strength of the evidence, or the likely outcome of the trial. All of these were jury questions.[21] The Justices had erred by answering them instead of deciding whether there was a case to answer.[22] The Court was concerned only with the threshold question whether, on preliminary review, there was evidence upon which a jury could properly convict.

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19 A Coroner may adjourn an inquest if they have been informed that a person may be charged with a criminal offence relating to the death or its circumstances and is satisfied that to proceed with the inquest might prejudice the person: see Coroners Act 1988, s 28(1) (in force at the relevant time).

20 *Wallace v Abbott* HC New Plymouth, 14 June 2002.

21 At [2].

22 At [23].

[38] Elias CJ surveyed the evidence. She recorded, relevantly for our purposes, that:

> [67] All eye-witnesses are in agreement that Steven Wallace did not drop his bat or golf club in response to the police requests. They differ in whether he was holding the bat up against his shoulder, or had it by his side, or (as Constable Dombroski had it) was waving the bat. Steven Wallace walked in the direction of the police officers, who moved back in front of him keeping a distance variously estimated but about 20 metres. Descriptions of his manner differ. He did not run. Some witnesses have him walking slowly, others "determinedly".

[39] The prosecution case, the Judge recorded, was that there was evidence upon which the jury could exclude self-defence because the force used was not reasonable in the circumstances. The prosecution alleged that there was no immediate danger to the safety of others which made it necessary to make an immediate armed approach on foot, Constable Abbott was needlessly confrontational and aggressive, choosing to take a stand rather than withdraw, and the firing of the second group of two shots was reckless and excessive.[23]

[40] Elias CJ observed that only in an exceptional case would it be proper to keep questions of fact from the jury. She was satisfied that there was clearly sufficient basis for jury determination of whether the prosecution had excluded self-defence; specifically, it would be open to a jury to decide that the force used was not reasonable.[24]

[41] The Solicitor-General had refused to assume carriage of the private prosecution following the Justices' decision to discharge Constable Abbott. Counsel for the Wallace family, John Rowan QC, renewed the request following the High Court decision, asking that the Crown either take over the prosecution or agree to fund it. By letter of 16 July 2002 the Deputy Solicitor-General declined, stating that this was a classic private prosecution. The police had investigated and after taking legal advice, including a review of that advice by the Crown Law office, decided not to prosecute. The Solicitor-General was of the view that "the public interest factors here should operate to leave the prosecution of Mr Abbott at trial as a private prosecution".

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23 At [94].
24 At [102]–[103].

The Solicitor-General did not respond to further correspondence from Mr Rowan emphasising that the Wallace family had very limited resources.

(e) The trial

[42] Constable Abbott stood trial in the High Court at Wellington on 18 November 2002, before Chambers J and a jury. The trial ended in his acquittal on 3 December. Mr Rowan, Michael Behrens QC and Debbie Goodlet were prosecuting counsel. The addresses of counsel and the Judge's summing-up have been lost, but it seems clear that the prosecution case remained focused on the allegation that Constable Abbott had used excessive force in self-defence, resorting unnecessarily to firearms and firing more shots than necessary. Expert evidence to that effect was led.

[43] That Mr Wallace had been advancing on the Constable and making threats immediately before he was shot evidently was not in dispute at the trial. A number of witnesses deposed to that. The trial record also includes admissions of fact signed by Mr Rowan. The document recorded that two witnesses, Julian Abrahams and Wayne Cash, had heard Mr Wallace say "I'm going to fuck you up" immediately before the gunshots. Another witness, Thelma Luxton, had seen Mr Wallace moving up McLean St and heard him say "you've pushed me too far". The statements of these witnesses were among a number read into evidence at the trial by consent.

[44] Constable Dombroski was one of a number of police witnesses called by the prosecutor. He explained that after he and Constable Abbott got out of their car on McLean St, Mr Wallace began walking towards them, armed with a golf club and baseball bat and threatening to kill. He threw the club at Constable Abbott, who began retreating. Constable Dombroski had his own pistol out and positioned himself so that the three remained in a triangle position. Constable Abbott racked his pistol, and as Mr Wallace continued to advance he fired a warning shot. Mr Wallace then sped up and "made a beeline" for Constable Abbott, who shot him. Constable Dombroski was asked about procedures they might have used to avoid killing Mr Wallace, but it was not suggested that Constable Abbott was the aggressor.

[45] Constable Abbott gave evidence. Mr Rowan challenged him about the decisions to uplift firearms and confront Mr Wallace instead of seeking to contain him.

Counsel put it to the Constable that Mr Wallace was intent on walking towards him and was moving at a constant pace. Counsel suggested that the Constable might have continued a tactical retreat, but instead provoked Mr Wallace by racking his pistol (an audible warning that the weapon has been readied to fire) and ordering him to put down his bat.

[46] Counsel also suggested that the Constable moved closer to Mr Wallace before firing the warning shot. The Constable denied it. The prosecutor's questions were evidently based on the evidence of a witness, Keith Luxton, who deposed to seeing the Constable step off the footpath and move three or four yards towards Mr Wallace. But Mr Luxton also said that Mr Wallace, who was cursing and ranting, then advanced quickly on the Constable, who backed up, requested him to stop, then fired a warning shot, following which Mr Wallace continued to advance. The prosecutor did not seek to contradict this account, and it was never put to the Constable that he was not acting in self-defence in the circumstances as he understood them.

[47] Constable Herbert was called as a defence witness. A transcript of police communications at the time recorded her reporting that:

> 4.03.06 am. He's about 20 metres up towards New Plymouth from the Post Shop and he's. he's um, really amped up. He's heading down the road towards Keith [Abbott]. They might have to take him down. Here he comes.
>
> 4.03.33. Yeah he's down. Can we get an ambulance out here?

[48] Constable Herbert was cross-examined about threats she heard from Mr Wallace but her evidence that Mr Wallace was advancing on the Constable was not challenged.

(f) The inquest

[49] As noted above, an inquest had been adjourned pending the criminal trial. In July 2003 Coroner Matenga decided, after hearing from counsel for the Wallaces and Constable Abbott, to resume it on a limited basis. He would examine police policy and procedure as it applied to general staff in dealing with violent offenders in similar circumstances, and he would consider the provision of first aid care, including the actual care provided to Mr Wallace. His decision to resume and limit the inquest in

that way was upheld by Randerson J on judicial review, with the proviso that he must hear evidence tendered by the Wallace family relevant to those issues.[25] The Coroner held a hearing in September 2005. He relied on the evidence at the criminal trial and heard a number of witnesses. His decision was delivered on 3 August 2007.[26]

[50] The Coroner declined to revisit the issue of self-defence, or to consider whether the officers ought to have waited for the dog unit or used batons and OC spray to subdue Mr Wallace, or to find which of the four shots was fatal.[27] He did examine police control of the incident and police processes. He found that Sergeant Prestidge should have exercised more leadership and control and should have authorised the deployment of firearms, but that the decision to uplift firearms was nonetheless appropriate.[28] He found that Constable Abbott, as the senior officer on the scene, could have done more to exercise leadership; the Constable did not discuss with Constable Dombroski how they would handle the situation, whether they should approach Mr Wallace, or whether they would attempt to cordon and contain him. These were failures not of police process but of its application in this case.[29] He found that police guidelines did not give any guidance to general staff as to when dogs should be used, and recommended that they be reviewed.[30] He found no deficiency in police policy to provide first aid when it is safe to do so. The real complaint was that Mr Wallace should have received first aid sooner. He did not make a finding on that, but he did record that an ambulance was called at once; Constable Dombroski approached Mr Wallace and told him an ambulance was on its way; and Sergeant Prestidge briefly examined Mr Wallace and placed a triangle bandage under his shoulder arm about 10–12 minutes after she arrived at the scene.[31] He appeared to accept that earlier attention to Mr Wallace would have demonstrated compassion. But, as each of the medical professionals called before him had deposed, there was nothing the police could have done to save Mr Wallace's life. His wounds were unsurvivable.[32]

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25 *Abbott v Coroners Court of New Plymouth* HC New Plymouth CIV-2004-443-660, 20 April 2005 at [56].
26 *Re Wallace* CorC New Plymouth, 3 August 2007.
27 At [42] and [67].
28 At [57] and [68].
29 At [64].
30 At [65]–[66].
31 At [73].
32 At [78].

(g) The IPCA investigation

[51] In 2008 IPCA, which had replaced the former Police Complaints Authority, accepted a request from the Wallace family to conduct an independent investigation. It delivered a report in March 2009.[33] Its staff interviewed more than 50 people. The report carefully narrated events, but it focused on police actions up to the 64-second period during which Constable Abbott was confronted by Mr Wallace. IPCA did not think it could "review the jury's verdict" on self-defence.[34] It confined itself to examining police conduct against the Police Manual of Best Practice and all relevant General Instructions, and to examining the efficacy and integrity of the police homicide investigation.[35]

[52] IPCA found that the officers breached General Instructions by not completing the firearms register and noted that General Instructions discourage the use of warning shots, but found these actions justified in the circumstances.[36] It was reasonable to uplift firearms. No tactical alternative to approaching Mr Wallace was reasonably available; cordon and containment was not viable and retreat would have exposed members of the public to risk.[37] Pepper spray and batons entailed some risk and likely would have been ineffective in the circumstances. IPCA did not agree with the Coroner that Sergeant Prestige should have done more; her leadership was reasonable and appropriate in the circumstances, and intervention would have distracted the officers on the scene.[38] It did accept, however, that Constables Abbott and Dombrowski should have discussed control of the situation while they were at the police station.[39] With respect to first aid, IPCA found that more should have been done to show compassion and concern for Mr Wallace. Constable Dombroski or Constable Herbert should have remained with him and police should have asked ambulance staff on their way to the scene what first aid they might give. A bystander's offer of a blanket to cover Mr Wallace should have been accepted sooner.[40]

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33 *Report on the Shooting of Steven Wallace* (Independent Police Conduct Authority, March 2009).
34 At [115].
35 At [115].
36 At [133] and [137].
37 At [155].
38 At [174].
39 At [173].
40 At [175]–[178].

[53] With respect to the homicide investigation, IPCA found that the operation was well led and met high standards of professionalism and integrity.[41] However, there were some shortcomings. The bloodstained street had been washed before tapu could be lifted.[42] Media handling could have been better.[43] While the investigation was not biased, interviewing standards at times "fell short of best practice".[44] Police officers who attended the criminal trial and were not witnesses ought not to have worn uniform to show solidarity with Constable Abbott, though the Authority found this was not done in an attempt to influence the jury.[45] Numerous other allegations made by the Wallace family about Constable Abbott and police conduct after the shooting were considered and rejected.[46]

The pleadings

[54] This proceeding was commenced on 18 September 2014. The first cause of action, against the Commissioner, pleaded breach of the rights to life and to a proper investigation. The relief sought was declarations and compensation of $200,000. The second cause of action, against the Attorney, repeated the allegations in the first cause of action and added that the IPCA investigation failed to comment on allegations and advanced a number of false claims. The same relief was sought. The third cause of action, against the Attorney, pleaded that following the decision of Elias CJ, the Attorney failed to direct Crown Law to prosecute Constable Abbott, thereby breaching the "right to justice". This evidently referred to s 27 of BORA. The relief sought was a declaration and compensation of $75,000.

[55] The first cause of action comprised separate allegations against each of Sergeant Prestige, Constables Dombroski and Abbott in their capacities as the senior officer in charge at various junctures. Each was an allegation of failure to follow police procedure, supported by a list of particulars.

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41 At [192].
42 At [182]–[185].
43 At [186]–[188].
44 At [191]–[192].
45 At [193]–[195].
46 At [196]–[228].

[56] In paragraph 3.6, it was pleaded that "[a]s the senior officer at the scene Constable Abbott failed to follow police procedure and good practice as follows". Almost all of the 18 particulars which followed concerned alleged failures to appraise himself of, and act on, standard procedures. Only three of them addressed the 64-second confrontation and of those, two concerned self-defence. Particular (n) alleged that the Constable fired multiple shots when only 64 seconds had elapsed from his first contact with Mr Wallace and there was no immediate danger. Particular (o) pleaded that he did not desist from firing when his first two shots had removed any threat to himself and Constable Dombroski.

[57] These allegations were directed not to the Constable's responsibility in law for Mr Wallace's death, but to that of the Crown for the Constable's failure to follow good process. The first cause of action alleged that Mr Wallace lost his life because police planning and control of the operation was deficient; that is to say, it concerned what we have described at [7] above as Mrs Wallace's second reason for alleging that s 8 was breached. The pleading did not allege that Constable Abbott was not acting in self-defence in the circumstances as he understood them to be. If proved, particulars (n) and (o) would establish that the Constable's use of force was not reasonable, but they were not pleaded in aid of an allegation that he did not act in self-defence at all, or that if he did his use of force was unreasonable. In our view the pleading cannot be said to have put the respondents on notice that Mrs Wallace was running the case summarised at [28] above.

[58] In their statement of defence the respondents admitted many of the facts that led to Mr Wallace's death but denied that the facts amounted to a failure to follow police procedure and good practice. They invoked self-defence in answer to particular (n); they denied there was no immediate danger and alleged that Constable Abbott was justified in shooting Mr Wallace in defence of himself and others.

[59] The respondents' counsel, Mr Gunn, advised the High Court before trial that there did not appear to be large areas of disputed fact, but rather disputes over available inferences and their consequences in law. For those reasons, the respondents accepted Mr Minchin's proposal that evidence in the criminal trial and inquest should be

admitted by consent. It was envisaged that there would be little new evidence, and Mrs Wallace might be the only witness to give viva voce evidence.

[60] We observe that under these arrangements the parties agreed the Judge might rely not only on evidence before previous tribunals but also on their factual findings and opinions.

The trial before Ellis J

The evidence

[61] As it turned out, Mrs Wallace was not the only witness. Mr Minchin also called a private investigator and former police officer, Peter Hikaka, to give evidence on compliance with police processes. The respondents called (now) Sergeant Dombroski and (former) Sergeant Prestidge, and a retired Superintendent, David Trappitt, who was called to give expert evidence on police processes at relevant times. Sergeant Dombroski was evidently called to confirm that he did consider alternatives such as retreat or cordon and contain but believed they were not viable. He deposed that he and Constable Abbott did discuss Mr Wallace's behaviour and followed normal procedure by approaching him in uniform and seeking to talk to him to defuse the situation. It will be seen that such new evidence as there was at trial focused on planning and control of the operation. The record of previous proceedings also included depositions statements and police statements of a number of witnesses.

The submissions

[62] The trial was short. It ran for five days. Mr Minchin submitted that although the proceeding was in form a civil trial it was more in the nature of a judicial review. That was so because the bulk of the evidence had already been given in previous proceedings. He presented the Judge with 108 densely written pages of submissions.

[63] Although loosely framed around the pleaded allegations that each of Sergeant Prestidge, Constable Dombroski and Constable Abbott failed to follow proper process, the submissions invited the Judge to make her own findings on many significant details of the events of 30 April 2000 and the subsequent investigations.

The factual narrative of the incident that Mrs Wallace wanted the Judge to accept was that: the police took a confrontational approach from the start; the officers always intended to attempt an armed arrest; they advanced on Mr Wallace, who was walking away but eventually responded defensively; Constable Abbott spoke threateningly to Mr Wallace; Mr Wallace did not offer threats and did not throw the golf club in Constable Abbott's direction; the first shot was not a warning shot because Mr Wallace was given no time to react; Mr Wallace responded to the first two shots by throwing the bat and was then unarmed; the third shot was fatal and there must have been a delay before the fourth, which struck Mr Wallace in the back as he was turning and falling. The Judge was invited to find that the Constable's misidentification of Mr Toa showed his state of mind must have been affected.

[64] Counsel's approach to the issues and evidence required that the Judge make factual findings about where the actors and witnesses were throughout the incident and what they did, saw or heard. It also required that she accept some evidence, and reject other evidence, by reference to reliability and credibility of witnesses whose evidence she had not heard.

[65] The Attorney did not object that much of the plaintiff's case was unpleaded or that it sought to contradict witnesses whose accounts had not been challenged in evidence before Ellis J, or in some cases at any time. Counsel did not invoke s 92 of the Evidence Act 2006. But neither did the Attorney accept that the Judge could make the factual findings requested of her. In closing arguments, Mr Gunn stated that it was unclear whether Mrs Wallace was asking the Court to resolve any conflicts of evidence about self-defence and whether the "totality of police conduct" on 30 April 2000 was a breach of s 8, but if she was then the Court was in no position to do so on the limited evidence before it.

[66] In memoranda filed after the hearing Mr Minchin sought to advance objections to evidence, addressing among other things whether an inference could be drawn that Constable Abbott had a hostile animus toward Mr Toa and arguing that it was not unfair to do so when the Attorney had chosen not to call the Constable. Mr Gunn responded by reminding the Judge that objections to evidence had been resolved at the hearing on the basis that all the evidence would be admitted de bene esse and the Court

would have regard to the rules of evidence in deciding what weight to give to it. On the question of self-defence, Mr Gunn urged the Judge to rely on evidence given before her and at the criminal trial, discounting the plaintiff's invitation to rely instead on evidence given by some witnesses at depositions.

The judgment

[67] Counsel's attempt to have Ellis J make new findings of fact so long after the event on a complex evidential record posed what the Judge described as "some unique challenges".[47] She accepted that the agreed record was admissible documentary hearsay, of variable reliability, but it left her with difficult questions about weight and how conflicts of evidence should be resolved.[48] She observed that Constable Abbott was neither a party nor a witness before her and recognised that Mrs Wallace sought findings which raised a natural justice concern for the Constable.[49]

[68] The Judge decided she did not have to confront the natural justice problem, for two reasons; she found that self-defence was made out,[50] and she refused to consider a number of claims about the Constable for which there was no support in the evidence and a good deal of contrary evidence.[51] Among the claims which the Judge declined to consider further was whether Mr Wallace was approaching Constable Abbott in a threatening manner. She found that:

> [32] Until the hearing before me, it had never been disputed that Steven was walking towards Constable Abbott in a threatening manner (armed with golf club and bat) as he (Constable Abbott) backed down the main street of Waitara. As I understood it, Mr Minchin's new contention was either that it was Constable Abbott who was pursuing Steven down the street and/or that Steven was not walking directly towards Constable Abbott in a threatening way at the time he was shot. He says that, rather, Steven had simply changed his course slightly in order to avoid the car containing Constable Herbert, which was parked a little further up the road.
>
> [33] Putting to one side the impossibility of interrogating that new theory 20 years after the event, it really makes no difference. As discussed in more detail later, there simply can be no doubt that Constable Abbott perceived that Steven was approaching him menacingly with the bat raised (having already thrown the golf club at him) while threatening to hurt or kill him.

47 Judgment under appeal, above n 1, at [5].
48 At [8]–[10] and [12].
49 At [14].
50 At [14].
51 At [17]–[33].

> The reasonableness of that belief is confirmed by the evidence of the other officers and of bystanders. By way of example only, I note that counsel for the Wallaces at the criminal trial formally accepted that bystanders had heard Steven say "I'm going to fuck you up" a few seconds before the gunshots.

[69] The Judge examined s 8 and found that a killing is lawful and consistent with fundamental justice where it is found to be in self-defence.[52] Under s 48 of the Crimes Act 1961 everyone is justified, for purposes of both civil and criminal proceedings, in using, in the defence of themselves or another, such force as, in the circumstances as they believe them to be, it is reasonable to use.[53] That conclusion, for which she found support in cases decided under art 2 of the European Convention on Human Rights (ECHR),[54] is not in dispute before us. She held, however, that the elements of self-defence differ in one respect; the person's understanding of the circumstances at the time must be not only honest but also reasonable.[55] She also held that the burden of proof of self-defence lay on the defendant.[56] We must return to these points.

[70] On the evidence, Ellis J found that the burden of proof had been discharged by the defendants. Constable Abbott acted in self-defence in the circumstances as he honestly and reasonably understood them to be,[57] and the force he used was reasonable.[58] It was not in dispute that the Constable believed he was dealing with Mr Toa, and she rejected a claim that the Constable had an animus towards Mr Toa.[59] The Constable believed his life was in immediate danger. She found his belief was reasonable:

> [324] As noted earlier, the art 2 self-defence cases proceed on the basis that the question of reasonableness is viewed merely an indicator of whether the belief as to the relevant circumstances is honestly held. Reasonableness is, itself, to be judged subjectively (on the basis of the matters actually known to the person using force). But even applying a higher, objective, threshold I would find the following matters established on the evidence:
>
> (a) Constable Abbott was awakened at around 3.48 am and instructed to assist Constable Dombroski to deal with a person who had been seen smashing windows.

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52 At [298].
53 See also s 2 definition of "justified".
54 At [296]–[297], referring to *Da Silva v United Kingdom* (2016) 63 EHRR 12 (ECHR) at [250]–[252] and *Bennett v HM Coroner for Inner South London* [2006] EWHC 196 (Admin) at [25].
55 At [306].
56 At [311].
57 At [326].
58 At [333] and [373].
59 At [316]–[319].

(b) When Constable Abbott arrived at the Police Station, he saw that the windows had been broken. This might logically suggest that the person was both targeting, and potentially seeking an encounter with, the Police.

(c) Constable Abbott then witnessed the Police patrol car pull up near Steven. He saw Steven attack the patrol car with force, smashing both the windscreen and the driver's side window. Again, this would logically reinforce any belief that the offender was targeting, and unafraid to encounter, the Police.

(d) When Constable Abbott went to the Police Station to arm himself he met Constable Dombroski, who had himself independently decided to do the same. This would reasonably have reinforced Constable Abbott's own assessment of Steven as a threat warranting an armed response.

(e) Constable Dombroski, who, at that point, had had a closer encounter with Steven, told Constable Abbott that Steven was a "nutcase".

(f) When the two constables confronted Steven, he was holding a golf club and a baseball bat. Either was a potentially lethal weapon.

(g) When Constable Dombroski drew his gun and yelled, "armed police, drop your weapons" Steven did not back down. Rather, he began to advance on Constable Abbott, who was forced to retreat, moving backwards. At that point, a reasonable person would assume that Steven was undeterred by either the Police presence or a loaded gun.

(h) Steven threw the golf club at Constable Abbott, which a reasonable person would take to be a specific act of targeted (and objectively dangerous) aggression. The evidence of eyewitnesses does not support Mr Minchin's submission that the golf club was not thrown at, or in the direction of, Constable Abbott.

(i) Steven did not positively respond to, or back down following, Constable Abbott's attempts to talk to him.

(j) Steven was yelling threats, saying things like, "you've pushed me too far" and, "I'm going to fucking kill you" as he advanced towards Constable Abbott.

(k) It was reasonable for Constable Abbott to keep his eyes trained on Steven and not to check Constable Dombroski's precise position.

(l) There was, in fact, little in the way of clear space behind Constable Abbott and—given that he was moving backwards—there was a real possibility that he might trip if he hit the gutter. The consequences of tripping in that situation were potentially life-threatening.

(m) Steven did not back down after Constable Abbott fired the warning shot but instead continued to advance, at a slightly altered angle. There was a reason for Constable Abbott to believe that Steven might be trying to cut off his escape.

(n) Steven continued to advance determinedly and angrily on Constable Abbott, yelling threats. The distance between them closed to between 4–5 metres. Steven continued to shout threats. He was holding the bat in an axe grip.

[71] The Judge found that it was reasonable to use a firearm and there were no other reasonably available alternatives:

> [329] The other options available to the officers at the time of the shooting have been extensively scrutinised for over two decades now. Despite that, at the hearing before me, Mr Minchin put to Constable Dombroski that he could have tackled Steven from behind. That was rightly rejected by Constable Dombroski. It would not, in any event, have any bearing on whether Constable *Abbott* acted in self-defence: it could not sensibly be suggested that he should have waited for Constable Dombroski to act, in circumstances when he had no way of knowing whether or not Constable Dombroski would, in fact, do so.
>
> [330] I can see no basis for revisiting in any depth or detail the tenability of the other possibilities that have, at various times, been suggested—they have been canvassed enough. So briefly, I consider:
>
> (a) Retreat was not a reasonable option. To turn and run would give rise to an extraordinary risk in such a situation. It would have required either that Constable Abbott holster his gun (rendering him momentarily vulnerable) or to have run with a loaded gun in his hand (also rendering him and any bystanders vulnerable). It would also have meant abandoning Constable Dombroski. It would have risked Steven catching up and attacking him with the bat from behind. So while a "tactical withdrawal" *might* have been possible at an earlier stage, I cannot accept that it was feasible at the relevant time.
>
> (b) The use of the PR24 baton was not a reasonable available option. Evidence was given at trial that engaging an offender armed with a bat with only a PR24 baton would be highly dangerous, even for someone trained for such a confrontation (which Constable Abbott, and almost all of the police force, were not). Again, it would have required Constable Abbott to holster his gun and reach for his baton, making him momentarily very vulnerable.
>
> (c) The use of or the OC (pepper) spray was similarly a dangerous and untenable option. The evidence was that it does not reliably stop a "goal driven" or amped-up offender. And this option, too, would have required Constable Abbott to put himself in harm's way by first holstering his pistol and then finding and activating the spray cannister.

> [331] Lastly, it is important to note that the possibility of adopting a "cordon and contain" approach does not arise in the self-defence context. To the extent the possibility ever reasonably existed (discussed later), it could only have done so at an earlier point in time; by the time of the shooting, it was far too late for such an approach. Steven was, at that point, only around five metres away from Constable Abbott. And he was moving closer.
>
> [332] The fact that he first fired a warning shot also confirms that the shooting was properly viewed by Constable Abbott as a step of last resort: he was reluctant to shoot Steven and, indeed, wanted to exhaust all other options reasonably available to him. For the reasons given in the IPCA report, I do not consider that the warning shot would have further inflamed the situation in any relevant way.
>
> (Emphasis in original.)

[72] Finally, the Judge found that it was reasonable to fire four shots in the circumstances. She thought that the real argument was not that the second two shots were in breach of police instructions and unreasonable, as Mr Minchin argued before her, but that by then the Constable was not acting in self-defence at all.[60] She reviewed at some length the expert evidence as to which of the four shots was fatal and found herself unpersuaded on the balance of probabilities that it was the third shot. That being so, the fatal shot might have been part of the first group of two shots.[61] In any event, she was satisfied that the immediate threat to Constable Abbott had not been averted or materially diminished after the first two shots were fired.[62]

[73] Turning to the obligation to investigate, the Judge held, as we have noted, that s 8 encompasses an obligation to investigate, and she found for various reasons that each of the previous investigations was not rights-compliant.[63] We return to this topic at [133] below.

[74] Ellis J further held that failures of planning and control can breach s 8, but a plaintiff must show that such failure was an egregious and significant failure to do something that the officers could reasonably be expected to do to protect life in the circumstances.[64] It was not necessary to show that a failure caused death; it was enough that it increased the risk to life.[65] The obligation extended to the alleged failure

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60 At [336]–[339].
61 At [354].
62 At [362] and [373].
63 At [515]–[516].
64 At [550]–[551] and [556].
65 At [543]–[546].

to administer first aid.[66] She found that Mrs Wallace failed on the facts.[67] We return to this topic at [171] below.

[75] We have already summarised the Judge's findings under the third cause of action, and address that topic at [190] below.

The appeal and cross-appeal

[76] Mrs Wallace's appeal focused almost entirely on self-defence, inviting us to make most of the findings which Ellis J declined to make. The specific grounds of appeal relating to self-defence were:

> 3.1 The Court erred at paragraph [18] in finding that the plaintiff's case entailed an allegation that the other police officer present had also fired at Steven Wallace, when the plaintiff's final submissions expressly disavowed any such allegation.
>
> 3.2 The Court erred at paragraph [33] in referring to "the impossibility of interrogating that new theory 20 years after the event" when the plaintiff's submissions, that senior constable Abbott was not acting in self-defence, were based on physical evidence, eye-witness testimony and an analysis of the autopsy report.
>
> 3.3 The Court erred at paragraph [33] in finding that the above evidence "makes no difference" to the issue of self-defence.
>
> 3.4 The Court erred at paragraph [33] in finding that a factor supporting self-defence was that "counsel for the Wallaces at the criminal trial formally accepted that bystanders had heard Steven say "I'm going to It will be fuck you up" a few seconds before the gunshots", when the only civilian witness who gave evidence at trial, in regard to anything heard at this point, stated that he "could not pick exactly what was said".
>
> 3.5 The court erred by not factoring the eyewitness testimony that senior constable Abbott had advanced on Steven Wallace before he shot him.
>
> 3.6 The Court erred at paragraph [317] in rejecting eye-witness Barbara George's testimony, that she heard senior constable Abbott say to Steven Wallace, "We have been after you for a long time Dave".
>
> 3.7 The Court erred at paragraph [317] by attributing the hearing of the words allegedly spoken by Stephen Wallace: "You've been after me for too long, I'm sick of it, you've pushed me too far", to bystanders, when this was senior constable Abbott's evidence.

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66 At [578]–[579].
67 At [576]–[579].

3.8 The Court erred at paragraph [317] in rejecting eye-witness' Barbara George and Tim Fletcher's testimony that Steven Wallace was not speaking at this time.

3.9 The Court erred at paragraph [324](h) in holding that the plaintiff's submission was that "the golf club was not thrown at, or in the direction of, Constable Abbott" when it was the plaintiff's submission that it was, and that the position it was located at was physical evidence contrary to the police narrative of events.

3.10 The Court erred at paragraph [324](1) in finding that there was "little in the way of clear space behind Constable Abbott" when Steven Wallace was further down the street than was senior constable Abbott, at the time he was shot and so the constable had the length of the street behind him.

3.11 The Court erred at paragraph [324](m)(n), in which the Court accepted senior constable's evidence of all that transpired between the warning shot and the shots fired at Steven Wallace, by not factoring that the shortest interval between the shots, as heard by civilian witnesses, was about 1 second.

3.12 The Court erred at paragraph [373] in finding that senior constable Abbott was still acting in self-defence, after Steven Wallace had been struck in the arms by the first two shots fired at him.

…

3.17 The Court erred by not addressing the central submission that senior constable Abbott's misidentification of the 23 year old Steven Wallace, for the constable's 38 year old neighbour, David Toa, was relevant to the constable's state of mind.

3.18 The Court erred by not addressing the contradiction in the police narrative, which was that the police officers referred to David Toa as being a "nut case" when uplifting firearms, but senior constable Abbott's rationale for approaching was because he had a "rapport" with him.

[77] Four grounds of appeal addressed control of the operation. They were:

3.13 The Court erred at paragraph [562] in finding chat "no significant failure to comply with [police policies]–was identified by … the Coroner" when the Coroner found there had been a breach of Police Instructions *F059(4),* in that there had been no attempt to get authorisation to uplift firearms, from a superior officer, who was available over the radio.

3.14 The Court erred by finding at paragraph [573] that senior constable Abbott'[s] decision to physically confront Steven Wallace, rather than attempt to cordon and contain, did not significantly increase the risk of Steven Wallace's death.

3.15 The Court erred by finding at paragraph [579] that police could not be "faulted for their provision of first aid on the scene".

3.16 The Court erred in not considering the plaintiffs submissions that the police officers' actions breached General Instructions and in particular that the grounds set out there for an armed arrest, were not met.

[78] It will be seen that most of these grounds invite this Court to correct specific findings of fact going to whether the Constable acted in self-defence at all, or reasonably. To some extent they invite us to go further than Ellis J was asked to do. For example, she was not invited to discount the prosecutor's admission mentioned in para 3.4, let alone to find, as Mr Minchin argued before us, that the prosecutor made a serious error by signing it.

[79] Finally, it was said that the Court erred by not awarding compensation for the two causes of action on which Mrs Wallace succeeded. This we take to refer to the Judge's finding under the first two causes of action that there had not been a compliant investigation and her decision on the third cause of action.

[80] Curiously, given that the notice of appeal and submissions invited us to substitute our own findings of fact for those of the Judge, the relief sought was orders that the proceeding be remitted to the High Court for a rehearing of the unlawful killing cause of action and the fixing of compensation. Before us, Mr Minchin sought to make a virtue of this. He envisaged a more extensive hearing in which evidential deficiencies would be remedied, presumably by calling available witnesses of fact to give viva voce evidence.

[81] The respondents' cross-appeal acknowledged a Crown obligation to ensure a death at the hands of a State actor is properly investigated but alleged the Judge was wrong to find that obligation arose under s 8, and wrong to find that it was not discharged on the facts by the police homicide investigation, the criminal trial, the Coroner's inquest and the IPCA investigation, or the combination of them.

[82] The respondents further alleged that the Judge was wrong to find the third cause of action made out on the basis of an unpleaded allegation that inadequate reasons were given for declining to prosecute Constable Abbott.

[83] The respondents also gave notice that they supported the judgment below on other grounds. They contended that a plaintiff bears the burden of proof under s 8 and must exclude self-defence where that is pleaded. And they contended that limitation bars Mrs Wallace's claim for damages, by analogy to the Limitation Act 1950.

[84] We explained at [12]–[16] above how we propose to address the issues. We begin with s 8, which frames the principal causes of action.

The right not to be deprived of life

[85] We begin with the ICCPR, which was ratified by New Zealand in 1978.[68] Article 6(1) states:

> Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of [their] life.

[86] A state party may exercise choice about how the ICCPR is incorporated into domestic law. The House of Lords has also recognised that it is "the legal and political system as a whole and not merely the human rights entrenched in the Constitution which must comply with the [ICCPR]" and the Human Rights Committee has held that a State party is not obliged to incorporate the provisions of the ICCPR into its domestic law.[69]

[87] New Zealand relevantly gave effect to art 6 in the New Zealand Bill of Rights Act 1990. The long title says that the Act aims:

> (a) to affirm protect and promote human rights and fundamental freedoms in New Zealand; and
>
> (b) to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights

[88] Section 8 states:

> No one shall be deprived of life except on such grounds as are established by law and are consistent with the principles of fundamental justice.

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68 International Covenant on Civil and Political Rights 999 UNTS 171 (open for signature 16 December 1966, entered into force 23 March 1967). New Zealand has made certain reservations to the ICCPR but none pertain to art 6.

69 *Matadeen v Pointu* [1999] 1 AC 98 (PC) at 116, referring to Dominic McGoldrick *The Human Rights Committee* (Clarendon Press, Oxford, 1991) at 271.

[89] Most of the caselaw to which we were referred concerns art 2 of the ECHR, which states relevantly:

> 1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided in law.
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
>
> (a) in defence of any person from unlawful violence;
>
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
>
> (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

[90] Two points should be borne in mind when considering authorities decided under art 2. First, art 2(1), like art 6(1) of the ICCPR, positively affirms that everyone has the right to life and states that the right must be protected by law. Section 8 of BORA affirms a right not to be deprived of life.

[91] Second, art 2(2) provides for self-defence and does so in a particular way; it provides that deprivation of life does not contravene art 2 where it results from the use of force that is no more than "absolutely necessary" in defence of any person from unlawful violence. European case law recognises that this standard may differ from that applicable under domestic law.[70] Section 8 is different. Deprivation of life does not contravene s 8 where it is done on grounds that are established by law and consistent with principles of fundamental justice. Lawful grounds are relevantly established by New Zealand domestic law. Section 48(1) of the Crimes Act 1961 provides that:

> Every one is justified in using, in the defence of himself or herself or another, such force as, in the circumstances as he or she believes them to be, it is reasonable to use.

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[70] See for example *McCann v United Kingdom* (1995) 21 EHRR 87 (Grand Chamber) at [151]–[155].

[92] "Justified", in relation to any person, means not guilty of an offence and not liable to any civil proceeding.[71] It is not now in dispute that, as Ellis J held,[72] a killing in self-defence for the purposes of s 48 is a deprivation of life on grounds established by law and consistent with principles of fundamental justice; that is to say, it is not contrary to s 8.

Does s 8 extend to indirect actions of State actors?

[93] The short answer to this question is yes. In *Zaoui v Attorney-General (No 2)* the Supreme Court accepted that s 8 applies to a decision to deport a person where substantial grounds have been shown for believing that the person faces a real risk of being killed at the hands of another State following deportation.[73] The context was different, but we do not think that justifies distinguishing *Zaoui*, in which the Supreme Court expressly recognised that s 8 extends to circumstances where loss of life may be an indirect consequence of the State action in dispute.

[94] This approach is, unsurprisingly, consistent with authorities under the ECHR. *McCann v United Kingdom*, a judgment of the European Court of Human Rights (ECtHR), was the first decision to find that art 2 of the ECHR extended to planning and control of a policing operation and it remains the leading authority.[74] The case concerned a suspected Irish Republican Army terrorist action in Gibraltar. English authorities made plans to foil the attempt and arrest the offenders. Soldiers were assigned to assist police and permitted to open fire on a person if they had reasonable grounds for believing that person was about to commit an action which would endanger life. They were told — incorrectly, as it turned out — that a car bomb was in place and it might be detonated by means of a transmitting device which the three suspects might have concealed on their persons. Believing that each might be reaching for such a device, the soldiers shot them. A Coroner's jury found the soldiers were justified and the ECtHR agreed they were not at fault.

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71 Section 2 definition of "justified".

72 Judgment under appeal, above n 1, at [298].

73 *Zaoui v Attorney-General (No 2)* [2005] NZSC 38, [2006] 1 NZLR 289 at [79]. See also *AR (India) v Attorney-General* [2021] NZCA 291 at [58].

74 *McCann v United Kingdom*, above n 70.

[95] The Court observed that art 2 is one of the most fundamental provisions in the ECHR.[75] It not only safeguards the right to life but sets out the circumstances when deprivation of life may be justified. Article 2 is not concerned exclusively with intentional killing, but also with the use of force which may result, as an unintended outcome, in loss of life.[76] The Court must subject deprivations of life to "the most careful scrutiny, particularly where deliberate lethal force is used, taking into consideration not only the actions of the agent of the State who actually administer the force but also all the surrounding circumstances including such matters as the planning and control of the actions under examination".[77]

[96] Mr Gunn argued that this approach would broaden s 8 beyond its intended scope, submitting that the legislation is concerned with particular actions or omissions of a person responsible for depriving someone of life.

[97] We cannot accept that the section's purpose is so restricted. As we have said, we do not think *Zaoui* can be distinguished. We add that on its face s 8 extends to any loss of life for which the State may be held accountable. It is not limited to the actions of State actors who actually administer lethal force. Mr Gunn's argument would exempt the State from liability for breach of what is perhaps the most fundamental of BORA rights in any case where someone reasonably relied on a State actor to use lethal force in defence of themselves or others, as happened in *McCann*. It might also exempt the State from liability under s 8 in a case such as *R (Amin) v Secretary of State for the Home Department*, where a young person in custody was murdered by a cellmate with a history of violent and racist behaviour.[78] We do not think it is possible to reconcile such a restriction with the purpose of the right.

[98] We do not accept that a finding that s 8 extends to indirect acts or omissions opens the door to what Mr Gunn described as claims of systemic fault, for two reasons. First, to hold the State liable under s 8 is to find that it is responsible for someone being deprived of life without lawful justification. The need for a causal connection between the acts of State actors and a death points to a need for operational error rather

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75 At [147].
76 At [148].
77 At [150].
78 *R (Amin) v Secretary of State for the Home Department* [2003] UKHL 51, [2004] 1 AC 653.

than systemic defects.[79] Second, courts must also allow for reasonable mistakes or errors of judgement, and especially so when dealing with policing operations that are fraught with risk, as Ellis J noted when reviewing European authorities.[80] She accepted, following *Commissioner of Police for the Metropolis v DSD*, that operational failures must be egregious and significant to found liability.[81] That case concerned art 3 (the right to be free from inhumane treatment) and investigative failures, but we agree that the principle is equally applicable to s 8. And as the strong dissenting judgment in *McCann* emphasised, courts must also resist hindsight bias.[82]

[99] It follows that a claim under s 8 might extend to failures in planning and control of the police operation that ended in Mr Wallace's death, notwithstanding that Constable Abbott acted reasonably in self-defence when he killed Mr Wallace. But when assessing alleged failures allowance must be made for what can be seen in hindsight to have been reasonable mistakes or errors of judgement. Any failure that is found must have been egregious and substantial if it is to sound in liability under s 8.

The elements of self-defence in a claim under s 8

[100] Ellis J held that the elements of self-defence in an action under s 8 differ from those in a criminal proceeding. In the latter, the reasonableness of the defendant's actions is assessed against the circumstances as the defendant believed them to be. She held, relying on art 2 cases and English authority on tortious liability, that the

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79 We are concerned here with breach of s 8. We record that we did not hear argument on, and do not decide, whether a remedy is available where the plaintiff lost a real or substantial chance of avoiding harm; as to which, see the discussion in *Van Colle v Chief Constable of Hertfordshire Police* [2008] UKHL 50, [2009] AC 225 at [138]; and *E v Chief Constable of the Royal Ulster Constabulary* [2008] UKHL 66, [2009] AC 536. New Zealand authorities establish that remedies should be effective and adequate, and that they serve different purposes from tort damages, but the causal connection required between breach and harm has not been settled; see *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA) [Baigent's case] at 677, 692 and 702; and *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 at [258]–[262] and [300]–[303]. On the view we take of this case no question of remedy arises.

80 Judgment under appeal, above n 1, at [522]–[529], referring to *Ergi v Turkey* ECHR 23818/98 , 28 July 1998, *Andronicou and Constantinou v Cyprus* (1998) 25 EHRR 491 (ECHR) at [183], *Brady v United Kingdom* ECHR 55151/00, 3 April 2001 at 9, *Bubbins v United Kingdom* (2005) 41 EHRR 24 (ECHR) at [149]–[151] and *Giuliani v Italy* (2012) 54 EHRR 10 (Grand Chamber).

81 At [539] and [551], referring to *Commissioner of Police for the Metropolis v DSD* [2018] UKSC 11, [2018] 2 WLR 895 at [29].

82 *McCann v United Kingdom*, above n 70, at [8] of the dissenting judgment.

defendant's belief must be both honest and reasonable.[83] She emphasised that the claim is founded upon a right not to be deprived of life and Constable Abbott was not at risk of penal sanctions (or, indeed, civil ones).[84]

[101] In reaching this view, Ellis J followed a dictum of this Court in *Leason v Attorney-General*.[85] Citing *Ashley v Chief Constable of Sussex Police*, the Court stated that in a civil law context an objectively unreasonable belief, no matter how genuinely held, would not suffice to establish self-defence.[86] There are good reasons for striking a different balance in civil proceedings, as Lord Scott explained in *Ashley*,[87] but this Court's attention evidently was not drawn to the absence in English law of any equivalent to the definition of "justified" in s 2 of the Crimes Act.[88] In our view the definition is conclusive; if a person's act is justified under s 48 it is justified for civil as well as criminal proceedings.[89] We do not think it matters that the liability of the State under s 8 is direct, not vicarious;[90] what matters is whether Constable Abbott's act was justified in law.

The burden of excluding or proving justification under s 8

[102] Ellis J found that the burden of proving self-defence lies on the Crown in an action under s 8.[91] That was so, she reasoned, because the circumstances are far more within the Crown's knowledge and it would be unfair to place the burden on the plaintiff.[92] She found support for this in *Jordan v United Kingdom*, an ECtHR decision in which it was held that in light of the importance of the protection afforded by art 2

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83 Judgment under appeal, above n 1, at [304]–[306], relying on *Ashley v Chief Constable of Sussex Police* [2008] UKHL 25, [2008] 1 AC 962 at [18], *Da Silva v United Kingdom*, above n 54, and *E7 v Holland* [2014] EWHC 452.

84 At [306].

85 *Leason v Attorney-General* [2013] NZCA 509, [2014] 2 NZLR 224.

86 At [64], citing *Ashley v Chief Constable of Sussex Police*, above n 83, at [18].

87 *Ashley v Chief Constable of Sussex Police*, above n 83, at [18].

88 It does not appear that there is a comparable provision in English legislation governing self-defence. See Criminal Law and Immigration Act 2008 (UK), s 76; Criminal Law Act 1967 (UK), s 3; and *Sheffield City Council v Brooke* [2018] EWHC 1540 (QB).

89 We record that the Attorney did not plead that Constable Abbott's acquittal means that neither he nor the Attorney can be held liable in a civil proceeding for the Constable's use of force in self-defence. His position rather was that self-defence may be relitigated in a civil proceeding but the elements of the defence are found in s 48.

90 Baigent's Case, above n 78, at 677 per Cooke P and 718 per McKay J.

91 Judgment under appeal, above n 1, at [307]–[311].

92 At [309].

the court must subject deprivations of life to the most careful scrutiny. The ECtHR concluded that:[93]

> Where the events and issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as for example in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries and death which occur. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation.

We observe that the ECtHR did not go quite so far as to say that the legal burden was reversed.

[103] Respectfully differing from Ellis J, we hold that the legal burden of proof remains with the plaintiff in a claim under s 8. That is so because justification is not an affirmative defence in such a claim under s 8. Rather, the plaintiff must show that the right to life was breached without lawful justification. In an earlier decision on a strike out application, this Court cited two extracts from Constitutional Law of Canada which we respectfully adopt:[94]

> Who bears the burden of proof of factual issues in Charter litigation? At the first stage of Charter review, the court must decide whether a Charter right has been infringed. This issue is subject to the normal rules as to burden of proof, which means that the burden of proving all elements of the breach of a Charter right rests on the person asserting the breach. In the case of those rights that are qualified by their own terms, for example, by requirements of unreasonableness or arbitrariness, the burden of proving the facts that establish unreasonableness or arbitrariness, or whatever else is part of the definition of the right, rests on the person asserting the breach.
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> …
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> The better view is that s. 7 confers only one right, namely, the right not to be deprived of life, liberty or security of the person except in accordance with the principles of fundamental justice. The cases generally assume that the single-right interpretation is the correct one, so that there is no breach of s. 7 unless there has been a failure to comply with the principles of fundamental justice.

[104] Reversal of the legal burden which would otherwise fall on a plaintiff is an exceptional course, as this Court recognised in *Accident Compensation Corporation v*

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93 At [310], quoting *Jordan v United Kingdom* (2003) 37 EHRR 2 (ECHR) at [103].

94 *Wallace v Commissioner of Police* [2016] NZHC 1338 at [48], quoting *Constitutional Law of Canada* (Thomson Reuteurs, Toronto, 2007) at [38.4] and [47.2]. We note the reference to "one right" in the latter paragraph refers to a debate as to the meaning of s 7 which is not relevant for our purposes. We rely on it to the extent it suggests that proving a breach of s 7 involves showing there was a failure to comply with the principles of fundamental justice. Compare *Ashley v Chief Constable of Sussex*, above n 83, which was a case of negligence and false imprisonment.

Ambros.[95] It is far from self-evident that it is necessary to do so in a s 8 claim. Facts relevant to justification need not be peculiarly within the Crown's knowledge, as this case demonstrates. It is true that self-defence puts a person's state of mind in issue, but civil proceedings not uncommonly require proof of knowledge or intent. The plaintiff's task is eased, compared to that of a prosecutor in criminal proceedings, because the standard of proof is the balance of probabilities and the defendant must make discovery and (subject to the privilege against self-incrimination) is a compellable witness. A court may also make robust and flexible use of evidential burdens in civil proceedings, effectively compelling a defendant to offer evidence to avoid inferences which would otherwise follow from an act or event.[96] To the extent facts are within the State's knowledge but not that of the plaintiff, an evidential burden may be consistent with effective enforcement of the right to life.[97]

[105] Finally, to shift the legal burden from plaintiff to defendant within a proceeding is to risk problems of classification when it comes to proof of facts. That can be seen when considering the Judge's approach to the fatal shot. We referred to this at [72] above. She assumed (in our view correctly) that Mrs Wallace must prove which shot was fatal.[98] But on the Judge's approach to the legal burden, proof arguably lay on the defendants. It was not in doubt that police gunfire killed Mr Wallace. The decision about which of the four shots was fatal mattered because Mrs Wallace alleged the third and fourth were not fired in reasonable self-defence.

Can the State's obligation to investigate potentially unlawful deaths be enforced under s 8?

[106] So far we have been viewing s 8 through the lens of claims that Mr Wallace was killed without lawful justification and his death also resulted from the actions of police officers responsible for planning and controlling the operation that ended in his death. We now turn to an obligation said to have arisen in the aftermath.

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95 *Accident Compensation Corporation v Ambros* [2007] NZCA 304, [2008] 1 NZLR 340 at [56].

96 See the authorities discussed in *Accident Compensation Corporation v Ambros*, above n 95, at [56]–[62].

97 *R (Amin) v Secretary of State for the Home Department*, above n 78, at [20(3)]; and *Jordan v United Kingdom*, above n 93, at [103].

98 Judgment under appeal, above n 1, at [354].

[107] The Attorney accepts that the State must conduct an ICCPR-compliant investigation into potentially unlawful deaths for which the State may be held accountable. But he says that this obligation arises at international law and is not enforceable by action under s 8. Rather, the obligation is met through discrete processes, such as Coroner's investigations, which the State has chosen to establish for the purpose. So the question may be framed as whether, given these other processes, a plaintiff may use s 8 to enforce the State's obligation to conduct an ICCPR-compliant investigation in a particular case, or must rely on those other processes (coupled with the possibility of judicial review to ensure they are conducted lawfully).

The ICCPR obligation to investigate

[108] The obligation to investigate is not expressly recorded in the ICCPR or in the ECHR. It has been read into the ECHR on two grounds. The first is that art 2, like art 6 of the ICCPR, goes on to prescribe that the right to life shall be protected by law. The European authorities hold that the positive obligation to protect certain rights in law sustains the implication of secondary duties, including the procedural duty to investigate.[99] As the ECtHR held in *McCann*:[100]

> The obligation to protect the right to life under [article 2], read in conjunction with the State's general duty under [art 1] of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alios, agents of the State.

[109] The second reason, which underpins the first, is that a duty to investigate is necessary to secure the right to life. In *Amin* Lord Bingham cited with approval an opinion of the European Commission of Human Rights which was cited in *McCann*:[101]

> Having regard therefore to the necessity of ensuring the effective protection of the rights guaranteed under the Convention, which takes on added importance in the context of the right to life, the Commission finds that the obligation imposed on the state that everyone's right to life shall be "protected

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99 See for example *McCann v United Kingdom*, above n 70, at [151] and [161]; and *Jordan v United Kingdom*, above n 93, at [105]. See also the authorities listed in *R (Amin) v Secretary of State for the Home Department*, above n 78, at [20(1)].

100 *McCann v United Kingdom*, above n 70, at [161].

101 *R (Amin) v Secretary of State for the Home Department*, above n 78, at [19], referring to *McCann v United Kingdom*, above n 70, at [193].

> by law" may include a procedural aspect. This includes the minimum requirement of a mechanism whereby the circumstances of the deprivation of life by the agents of the state may receive public and independent scrutiny.

[110] In *Amin* the House of Lords recognised that the duty to investigate is secondary to the duties not to take life unlawfully and to protect life, in the sense that it only arises where death or life-threatening injury has occurred, but added that it is not a minor or unimportant duty where a death has occurred in custody.[102]

Section 8 and the obligation to investigate

[111] Article 6 of the ICCPR speaks of the inherent right to life, while s 8 of BORA speaks of a right not to be deprived of life. Nothing turns on this.[103] The Attorney accepts that s 8 affirms the inherent right to life. But s 8 does not record a positive obligation to ensure that the right to life is protected by law.

[112] Ellis J acknowledged this,[104] but she held that the obligation to investigate is implicit in s 8 for the second reason relied on in the ECHR authorities; it is necessary to secure the right to life.[105] She reasoned that "[t]he prohibition on depriving others of life is toothless without a parallel obligation to interrogate and test the circumstances in which such a deprivation has occurred in the individual case".[106] She found that approach consistent with the long title to BORA, which states that the Act's purpose is to protect rights, and the traditionally generous approach to interpretation of BORA.[107]

[113] The Attorney takes issue with this conclusion for two reasons. He contends that a positive obligation to investigate should not be read into s 8. And he says that it is not necessary to do so to ensure the State conducts an ICCPR-compliant investigation.

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102 At [31].
103 As Ellis J acknowledged: see Judgment under appeal, above n 1, at [280].
104 At [379].
105 At [380]–[384].
106 At [382].
107 At [383].

[114] We accept that, as Ms McKenna submitted for the Attorney, a distinction must be drawn between New Zealand's international obligations under the ICCPR and obligations which can be enforced through a claim in a domestic court. Domestic legislation should be read in a way that is consistent with international obligations, but the legislation must prevail to the extent it is in conflict.

[115] Counsel argued that to read a positive procedural obligation into s 8 is to go beyond a generous interpretation, and to break new ground. We were told that such an expansive interpretation has not previously been given to a negatively framed right under BORA. Many protected rights assume the existence of a supporting infrastructure, but it does not follow that such infrastructure is a requirement of the relevant right. Counsel instanced the right to vote, which implies an organised electoral system, political offices to which persons may be elected, and rules enabling successful candidates to govern. These have not previously been seen in New Zealand as emanations of the underlying right to vote. Nor is it permissible for courts to add to the substantive content of a protected right.

[116] We accept that care must be taken when considering whether to read a procedural obligation into BORA. Decisions about how to design and resource investigations are the prerogative of the other branches of government. Care must also be taken when the right will operate in an area of the law for which Parliament has separately legislated. In *Re McKerr* the House of Lords was invited to establish a freestanding common law right corresponding to the investigative right inherent in art 2.[108] (This happened because the Government had chosen not to hold a further investigation following an ECtHR finding that the original investigation did not comply with art 2.[109]) Lord Nicholls held that the courts have always been slow to develop the common law by entering a field regulated by legislation. To do so might be to supplement or override legislation relating to Coroners' inquests.[110]

[117] However, it is not in dispute that the State must conduct an ICCPR-compliant investigation where life has been lost at the hands of a State actor. The obligation

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108 *Re McKerr* [2004] UKHL 12, [2004] 1 WLR 807.
109 *McKerr v United Kingdom* (2002) 34 EHRR 20 (ECHR).
110 *Re McKerr*, above n 108, at [32]–[33].

arises as a necessary incident of art 6 of the ICCPR; that is to say, it is necessary to give effect to the inherent right to life. So the obligation exists. The question is whether it must be read into s 8 in circumstances where New Zealand law already provides for investigations. The Attorney's argument that it is unnecessary to do so requires that we consider whether ICCPR-compliant investigations can be relied upon to happen under existing processes.

The qualities of an ICCPR-compliant investigation

[118] We accept that an ICCPR-compliant investigation must be independent, impartial, prompt, thorough, effective, credible and transparent.[111] We now examine those qualities, confining ourselves to those relevant to the Attorney's argument.

[119] We begin with effectiveness, making two points. First, where the deprivation of life is in issue, an effective investigation must be capable of leading to a determination of whether force used was lawful, and if it was not, to the identification and punishment of those responsible.[112] It need not deliver those outcomes, but it should be a means of achieving them.[113] Second, the authorities should act of their own motion once the matter has come to their attention.[114]

[120] Turning to independence and impartiality, the ECtHR has held that those responsible for the investigation should be independent from those implicated in the events, which requires both absence of hierarchical or institutional connection and practical independence.[115]

[121] The ECtHR has not prescribed any particular procedure for an investigation under art 2. Rather, there are "a range of procedural systems which may, in spite of their variety, be compatible with the Convention, which does not impose any particular model".[116] We accept that a combination of investigations can collectively meet the obligation in practice.

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111 *Jordan v United Kingdom*, above n 93, at [106]–[109].
112 At [107].
113 At [106]; and *Tunç v Turkey* ECHR 24014/05, 14 April 2015 (Grand Chamber) at [253].
114 At [105].
115 At [106].
116 *Tunc v Turkey*, above n 113, at [232]; and *Jordan v United Kingdom*, above n 93, at [106].

Do existing processes oblige the State to conduct an ICCPR-compliant investigation?

[122] The Attorney relies on legislation governing the police, IPCA and Coroner's investigations, arguing that separately and collectively these statutes impose an obligation on the State to investigate deaths at the hands of State actors, with the consequence that it is neither necessary nor appropriate to find that such an obligation is also implicit in s 8. We examine each in turn.

(a) Police investigations

[123] The Attorney points to s 9 of the Policing Act 2008, which provides that the functions of the police include, among other things, law enforcement. However, the Act goes on to say that nothing in s 9 imposes particular duties on the police.[117] Policing powers are vested in the Commissioner, who is generally responsible for carrying out police functions and the conduct of the police.[118] Police officers must comply with general instructions issued by the Commissioner and lawful instructions given by superior officers.[119] Generally, these powers confer a high degree of independence and discretion on the police in the exercise of all their functions, including law enforcement.

[124] We accept that in the exercise of their law enforcement responsibilities the police will always investigate a death at the hands of a police officer. The investigation will inquire into what happened and whether anyone is criminally responsible for it. The investigators *may* be institutionally and practically independent of the officers under investigation. Their work *may* lead to an officer being prosecuted. But the question that interests us here is whether the law obliges the police to conduct an ICCPR-compliant investigation in every case. It does not. All that can be said is that independence, impartiality and effectiveness are questions of fact to be resolved in each case.

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117 Section 11.
118 Section 16.
119 Section 30(1)–(2).

(b) IPCA investigations[120]

[125] Under the IPCA Act the Commissioner must provide IPCA with particulars of any incident in which a police officer kills anyone in the course of duty.[121] It is not necessary that there be a complaint, but if there is it must be referred to IPCA if the Commissioner has not already done so.[122] IPCA may also investigate a death of its own motion where satisfied there are reasonable grounds to do so.[123] The Commissioner must provide such assistance and information as IPCA requests.[124] Following an investigation IPCA must form an opinion on whether any decision, recommendation, act, omission, conduct, policy, practice or procedure which was investigated was contrary to law, unreasonable, unjustified, unfair, or undesirable.[125] It may recommend disciplinary or criminal proceedings.[126] It must convey its opinion, with reasons, to the Commissioner,[127] who need not act on any recommendation but must give reasons for not doing so.[128] If the Commissioner does not take action that IPCA thinks adequate and appropriate, IPCA must report to the Attorney-General and the Minister of Police.[129] These provisions contemplate that an IPCA investigation into deprivation of life by a police officer will happen. We accept that such investigation ordinarily should be ICCPR-compliant.

(c) Coroners' investigations

[126] The purpose of the Coroners Act 2006 is, relevantly, to help prevent deaths and to promote justice through investigations, identification of causes and circumstances of deaths in special circumstances, and to make recommendations or comments that, if drawn to public attention, may reduce the chances of further deaths occurring in similar circumstances.[130] To these ends Coroners receive reports of deaths, decide

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120 We focus here on the Independent Police Conduct Authority, which replaced the Police Complaints Authority in 2007. For our purposes nothing turns on the Authority's empowering legislation as it stood before IPCA began its work in this case in 2008.
121 Independent Police Conduct Authority Act 1988, s 13.
122 Section 15(1).
123 Section 12(1)(b).
124 Section 21.
125 Sections 27–28.
126 Section 27(2).
127 Section 27(2).
128 Section 29(1).
129 Section 29(2).
130 Coroners Act 2006, s 3(1).

whether to open an inquiry and, if one is to be conducted, decide whether an inquest is to be held.[131] The purpose of an inquiry is relevantly to establish the causes and circumstances of a death.[132] It is not the purpose of an inquiry to determine civil, criminal or disciplinary liability.[133] A Coroner must conduct an inquiry if the dead person appears to have been in official custody or care.[134] In other cases, including this one, a Coroner must decide whether to conduct an inquiry, having regard to, among other things, whether the death was due to the actions or inaction of any other person; the existence of and extent of any allegations, rumours, suspicions or public concern about the death; the extent to which drawing attention to the circumstances may reduce the chances of similar deaths; and the desire of any members of the immediate family of the person concerned that an inquiry should be conducted.[135] The Solicitor-General or the High Court may order an inquiry where the responsible Coroner refuses to open one.[136] The Coroner must decide whether to hold an inquest,[137] and when making that decision must consider, among other matters, whether an inquest would assist the inquiry by providing an opportunity for persons who have not been involved in the inquiry to scrutinise evidence considered by the Coroner or offer new evidence in respect of the death.[138]

[127] We accept that an inquiry will almost inevitably be held in any case where a police officer has used lethal force in the course of their duty. The inquiry into circumstances may extend to planning and control of an operation which resulted in the loss of life.[139] Because it must examine evidence bearing on the circumstances and causes of deaths and consider whether anything might be done to reduce the

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131 Sections 4(1) and 57.
132 Section 57(2).
133 Section 57(1).
134 Section 60(1)(b).
135 Sections 62–63.
136 Section 95. See also ss 96–99.
137 Section 80(1).
138 Section 80(2)(b).
139 In *Bubbins v United Kingdom*, above n 80, at [153] the ECtHR held that this is so partly because a relevant consideration is the existence and extent of any rumours and suspicions about the death.

chance of similar deaths, we accept that such inquiry ordinarily should be ICCPR-compliant.[140]

Conclusion

[128] To the extent that the argument before us treated necessity as a question of interpretation of s 8, it invited an answer which would apply to all potentially unlawful deaths for which the State may be held accountable: by way of illustration, the death of one prisoner at the hands of another, or that of a person held in care for infancy or mental health reasons. We do not know whether such deaths would always result in a police investigation. If an inquest into a death were not required under s 60 of the Coroners Act, there is no assurance that the death would result in an investigation being opened when referred to a Coroner. Other agencies may play an investigative role in such cases, and the content of an effective investigation may vary with the circumstances.

[129] That being so, whether any given death has been effectively investigated seems to us a mixed question of law and fact which must be answered in context. The law may require or authorise an investigation at the initiative of the authorities and such investigation may meet the State's ICCPR obligation, so providing a complete answer to a claim under s 8. But the possibility that an investigation will in some way fall short of ICCPR standard cannot be excluded. If it does, the obligation may go unmet unless an affected person is able to bring proceedings. Indeed, the Attorney admits that, though he argues that it can happen through judicial review and emphasises that it will be a rare case where an investigation does not happen or falls short.

[130] We accept that judicial review is an important safeguard. It may be used to force an investigation. But it is not possible in the abstract to gauge its efficacy against that of an action under s 8. Judicial review may precede an investigation while a s 8 claim is likely to examine the investigation in hindsight. And how a private plaintiff

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[140] The ECtHR has accepted that Coroners' inquests in English law include strong safeguards as to lawfulness and adequacy and ordinarily meet the requirements of art 2: *McCann v United Kingdom*, above n 70, at [162]–[163]; *Jordan v United Kingdom*, above n 93, at [125]; and *Bubbins v United Kingdom*, above n 80, at [153]. We note that while Coroners' inquiries are an ancient institution which New Zealand inherited from English law there are material differences in governing legislation, including the use of juries.

enforces the State's obligation to investigate is surely of secondary importance. It is difficult to see any sufficient reason why the obligation may not be enforced in the same way as the right to life itself, in an action under s 8.

[131] We do not think this is to read too much into s 8 or to impose an undue burden on the State. As we have explained, investigations of the kind conducted in this case are provided for in legislation that envisages they will be ICCPR-compliant, and it is only to the extent they are found to have fallen short that a declaration or compensation might be warranted under s 8.

[132] We conclude that there is in s 8 an implied right to have an ICCPR-compliant investigation into potentially unlawful deaths for which the State may be held accountable. The right exists as a necessary incident of the right to life affirmed in s 8. IPCA and Coroners' investigations which must happen where life has been lost at the hands of a police officer acting in the course of duty should ordinarily meet the State's investigative obligation, and a police criminal investigation may be found to do so where it is sufficiently independent, impartial and effective.

Did the criminal trial and the police, Coroner's and IPCA investigations satisfy the art 6 obligation in fact?

[133] We next consider whether the investigations in this case separately or collectively met the State's ICCPR obligation. This inquiry extends to the criminal trial, which we have not examined thus far for the obvious reason that a trial need not follow an investigation. One was held in this case, and the Attorney says it satisfied the State's investigative obligation.

(a) The police investigation

[134] Ellis J found that the police investigation in this case was not rights-compliant. She thought it unlikely that such investigation could be independent.[141] It is partly a question of appearances.[142] On the facts, relations between the police and the Wallace family were difficult. There was a question why Mr Wallace had become angry at the

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141 Judgment under appeal, above n 1, at [434].
142 At [433].

police.[143] An officer who was a friend of Constable Abbott's conducted the investigation for the first two days, during which time the three officers involved and a number of witnesses were interviewed.[144] After DI Pearce assumed control officers who knew Constable Abbott continued to work on the investigation.[145] As Chambers J had remarked, the questionnaire that police gave to local businesses contributed to a sense that the Wallace family was on trial.[146] There was evidence of partiality in the handling of a witness who came forward later.[147] The Judge also identified what she found to be minor concerns about effectiveness, such as the sympathetic nature of Constable Abbott's first interview and the absence of a video record.[148]

[135] Mr Gunn urged that the investigation was independent and effective, but he understandably placed more emphasis on the trial and the other investigations. We are not persuaded that the Judge was wrong. We accept that DI Pearce was independent, but as the Judge found it was not until the third day that he assumed control of the investigation.[149] It appears that work at the scene, which Mrs Wallace says was badly managed, was substantially complete by then. We have noted that IPCA identified shortcomings in the investigation, including the conduct of some interviews.[150] Effectiveness is in part a matter of appearances, as the Judge found. The investigation reasonably extended to why Mr Wallace behaved as he did, but aspects of it conveyed an impression of partiality. The Police Association, which represents police officers, had also released a public statement on 1 May 2000 saying that it fully supported the actions of the officers involved, and it later supported Constable Abbott's defence at the criminal trial.

(b) The criminal trial

[136] As noted above, Ellis J did not take the criminal trial into account when considering compliance with the investigative obligation. She recognised that the jury's not guilty verdict would ordinarily qualify as a "finding" for the purposes of

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143 At [440].
144 At [435].
145 At [436].
146 At [442], referring to *Wallace v Abbott* HC New Plymouth T9/02, 16 September 2002 at [18].
147 At [446]–[447].
148 At [449]–[469].
149 At [435].
150 See at [53] above.

art 2 notwithstanding that the criminal burden of proof applied.[151] But she considered that a *private* prosecution could not meet, or contribute to meeting, the s 8 obligation, which rests on the Crown, not the family of the person killed.[152] Because her findings under this head underpinned her reasoning about other investigations, we quote her reasons. She held that:[153]

> It is that a *private* prosecution cannot, in my view, meet, or contribute to meeting, the s 8 obligation to investigate. That is because the s 8 obligation rests on the Crown, not the family of the person who has been killed. I accept Mr Gunn's submission that, in the normal course, an adversarial criminal trial can properly be regarded as constituting an effective procedure for finding relevant facts and (if proven) attributing criminal responsibility. But a private prosecution does not constitute such a "normal course".

[137] She next reasoned that the fact that the private prosecution was permitted to proceed did not meet the s 8 obligation either:

> [419] Nor could it be an answer to say that the fact that the private prosecution was *permitted* to go forward somehow meets the s 8 obligation. I do not think that reflects the realities here. The Wallaces' private prosecution was required to proceed off the back of a Police investigation that had concluded there was no case to answer. That conclusion was the subject of public statements made by the Police and then by the Deputy Solicitor-General that Constable Abbott had acted in self-defence. Nor, of course, was the prosecution backed by the resources of the Crown. Requests for financial assistance made to the Solicitor-General were unanswered. Indeed, the Crown (through the Police) actively supported Constable Abbott. The search warrants sought and obtained by Police to pursue the "Mrs Dombroski issue" is one example of continued Police assistance to Constable Abbott even after its investigation proper was complete. Moreover, Police officers demonstrated their active support for Constable Abbot during the trial by sitting in uniform in the public gallery.
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> (Footnote omitted).

[138] The Judge cited the ECtHR decision in *Jordan* for the proposition that civil proceedings brought by a private plaintiff do not meet the investigative obligation, because they are undertaken on the initiative of the applicant and do not involve the identification or punishment of any alleged perpetrator.[154]

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151 At [416]–[417].
152 At [418].
153 At [418] (footnote omitted, emphasis in original).
154 At [420], quoting *Jordan v United Kingdom*, above n 93, at [141].

[139] We hold that a private prosecution is capable of meeting the State's obligation to investigate a deprivation of life and establish whether it was justified. It is true that the State did not initiate the prosecution, but the proceeding rested almost entirely on infrastructure provided by the State. Depositions were held. With permission of the High Court, an indictment was presented. A Judge was assigned and a jury empanelled to try the case. Constable Abbott was arraigned. Witnesses were compelled. The trial was designed to establish, and did establish, what happened and whether Constable Abbott was criminally liable for it. If found guilty he would have been sentenced. All of this was done by the State at the instance of the prosecutor.

[140] So the question becomes whether there was something inadequate or ineffective about this particular prosecution. Mr Minchin argued that it was inadequate. He contended first that it was underfunded and so did not explore the issue of self-defence. The difficulty with this submission is that there is no evidence for it. It is true that the family had limited resources while Constable Abbott had the support of the Police Association. Mr Rowan explained in correspondence with the Solicitor-General that the family had exhausted its resources, and he pointed to the cost of bringing witnesses to Wellington. But self-defence was substantially an issue of fact and the witnesses were available. Many had given evidence for the prosecution at depositions. There is no evidence that the prosecutor refrained from calling eyewitness evidence for reasons of expense. The tenor of the correspondence was rather that not all of Mr Rowan's expenses would be met.

[141] Second, and somewhat inconsistently, Mr Minchin submitted that the prosecutor made a tactical decision to focus on excessive force and to accept that Constable Abbott acted in self-defence, thinking this was more likely to appeal to the jury than an argument that the Constable was the aggressor. He argued that this was to "wilfully or negligently accept as fact" extremely prejudicial statements. But the allegation of tactical error is also supposition, unsupported by evidence from counsel involved in the prosecution. We are unable to accept it. The record invites the inference that Mr Rowan's decision to concede that that Mr Wallace was advancing on the Constable armed with a baseball bat while uttering threats reflected the weight of available evidence to that effect. That evidence had been gathered not only during the police investigation but also through the depositions hearing.

[142] Some of the reasons given by the Judge in the passage just quoted suggest the trial was ineffective as an investigation because the police had signalled their support for Constable Abbott in various ways. To the extent that these reasons touch on the quality of the police investigation, we observe that the Judge later declined to find the investigation was relevantly ineffective.[155] To the extent they concern the possible reaction of the jury to police support enjoyed by Constable Abbott, the short answer is that the Judge did not find the verdict was tainted.[156] There is no reason to think that was a real possibility. If it were, it is a reasonable assumption that the Judge presiding over the criminal trial would have addressed it and given appropriate directions at the time.

[143] We conclude that the criminal trial met the State's s 8 obligation to investigate the deprivation of Mr Wallace's life and decide whether it was lawful. We accept that it did not investigate planning and control of the operation; evidence was led to the effect that the situation could have been handled differently, but the trial focused on Constable Abbott's personal accountability for his use of force.

(c) The Coroner's investigation

[144] As noted above, Ellis J accepted that an inquest is often the most apt, and rights-compliant, form of investigation in a case such as this.[157] It was not suggested that the Coroner's inquiry lacked independence or accountability, or that the Wallace family were not adequately involved in it. The Judge found it inadequate for one reason only; the Coroner did not inquire into whether the level of force used was justified, having reasoned that the jury's verdict conclusively established self-defence.[158] She ultimately rested that conclusion on her view that the criminal trial did not meet the State's investigative obligation, with the result that the Coroner was obliged to examine self-defence for himself.[159]

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155 At [449]–[450].

156 See for example [515(c)], where the Judge found the jury's verdict was a "formal and lawful finding that Constable Abbott was not criminally liable for Steven's death", although in her view that finding was not part of an investigation that complied with s 8.

157 At [481].

158 At [488].

159 At [504]–[506].

[145] We agree with the Judge that a criminal trial may not meet the investigative obligation where, for example, the defendant pleads guilty or the trial turns on the defendant's mental state.[160] But we take a different view of the trial in this case, as just explained. In our view it did adequately inquire into the circumstances of Mr Wallace's death and whether he lost his life as a result of lawful self-defence.

[146] The Judge rested her conclusion that the inquest was not rights-compliant on the issue of self-defence. She did not find that it was inadequate insofar as it inquired into planning and control of the operation. We were not invited on appeal to revisit the absence of any finding to that effect. We have explained that the Coroner examined police supervision and command and policies for use of firearms and dog units, and the provision of first aid.

(d) The IPCA investigation

[147] Ellis J accepted that IPCA could have investigated the question of self-defence, but it did not do so on the basis that the jury's verdict meant the investigation could not examine the 64 seconds immediately before the shooting.[161] In some respects — independence, accountability, promptness and family involvement — she found that the investigation was rights-compliant.[162] But because it did not consider self-defence it was not effective. It does not appear to have been suggested that the investigation failed to inquire adequately into the planning and control of the police operation.

(e) The investigations overall

[148] The Judge's ultimate conclusion that there was not an adequate investigation rested on her finding that the criminal trial, which alone examined the issue of self-defence, was not itself ICCPR-compliant.[163] We have found the criminal trial adequate and we have observed that there is no finding below that the Coroner's and IPCA investigations into planning and control were inadequate. In our view the investigations collectively met the State's obligation to investigate both the lawfulness of Constable Abbott's use of lethal force and the adequacy of police planning and

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160 At [493], referring to *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182 at [30].
161 At [509]–[511].
162 At [507]–[508] and [512]–[514].
163 At [515]–[516].

control of the operation which ended in Mr Wallace's death. It follows that the Attorney's cross-appeal on the first and second causes of action must succeed.

Was the use of lethal force justified?

[149] The criminal trial ended in acquittal but as explained at [101] above the Attorney rightly accepts that the jury verdict does not establish that Constable Abbott's use of force was justified for the purpose of civil proceedings, and does not preclude State liability for the use of lethal force in self-defence. On the contrary, the Attorney accepts that self-defence may be considered afresh in civil proceedings. We have held, contrary to the view taken by Ellis J, that the elements of self-defence are as specified in s 48 and that the legal burden of excluding self-defence on the balance of probabilities rests with Mrs Wallace. We now consider whether the Judge was wrong to find that Mrs Wallace failed on the facts.

Limitations of the evidence

[150] We begin by considering what findings are available to us. It is partly a question of pleadings but principally one of evidence. We explained at [57] above that the statement of claim was addressed not to Constable Abbott's responsibility in law for Mr Wallace's death but to that of the Crown for his failure to comply with police procedure and good practice. The particulars did not allege that the Constable was not acting in self-defence in the circumstances as he understood them to be. However, they did allege that he used excessive force. And the statement of defence invoked self-defence in answer to the claim. The Attorney did not take the point before Ellis J, or us, that the pleadings did not extend to whether the Constable was acting in self-defence. As the Judge recognised, evidence going to excessive force could also justify an inference that the Constable was not acting in self-defence.[164] In the circumstances, we accept that the issue of self-defence was live at trial and was not confined to excessive force.

[151] However, as explained at [61] above the pleadings appear to have affected the respondent's approach to the evidence to be led at trial. The Attorney had agreed that

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[164] At [336].

the record of the trial and the investigations were evidence, to be given such weight as the Judge thought appropriate. But he appears to have been taken by surprise by the extensive factual argument presented by Mr Minchin, and he met the argument by contending that on the evidence before her the Judge could not resolve conflicts of evidence about self-defence. In the result, she declined to make such findings.

[152] We noted at [78] above that Mr Minchin argued the Judge was obliged to make contested findings of fact about self-defence and he urged us to do so, alternatively to remit the proceeding to the High Court for what would amount to a new trial. We cannot accept the latter invitation. Mrs Wallace has had the trial to which she was entitled. She cannot seek a second trial on the ground that she is dissatisfied with the way in which her case was pleaded and argued. We also think, as Ellis J plainly did, that it is likely impossible to revisit some of the controversies in this case and that, based on the record of past proceedings, the exercise would not be a productive one.

[153] Nor do we accept that the Judge needed to make findings on some of the factual controversies she was asked to decide.[165] On the contrary, she rightly concluded that she could not do so. These findings went to the allegation that Constable Abbott was not at any time acting in self-defence in the circumstances as he understood them to be. We explained earlier that he was not tasked with that allegation in the criminal trial and he was not called before Ellis J. Nor were the eyewitnesses whose evidence might have sustained inferences about his state of mind.

[154] Under s 92 of the Evidence Act a party must cross-examine a witness on significant matters that are relevant and in issue and that contradict the evidence of the witness, if the witness could reasonably be expected to be in a position to give admissible evidence on those matters. If the duty is not met, the Judge may admit the contradictory evidence but adjust the weight to be given to it, or exclude the contradictory evidence, or make any other order that the Judge thinks just.[166] The rule is obviously concerned with fairness to the opposing party, but at common law it was

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165 At [17]–[33].
166 Section 92(2).

justified on grounds of fairness to the witness. In *Browne v Dunn* Lord Herschell explained that:[167]

> … it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made … that is not only a rule of professional practice in the conduct of a case; but is essential to fair play and fair dealing with witnesses.

[155] New Zealand courts have accepted that there is a third rationale for the rule: accuracy in fact-finding.[168] In *R v Dewar* the Court cited *R v S (CA369/01)*, where McGrath J held:[169]

> [19] What happened in this trial reinforces the fundamental importance of adhering to the rules and practice relating to challenge and confrontation of opposing witnesses under the adversarial system. When there are failures to do so the trier of fact is denied the opportunity to assess from all perspectives conflicting recollections of events and there is the potential for a miscarriage of justice occurring.

[156] The impossibility of making some of the findings urged on us can be illustrated by examining two of them. The first concerned Thelma Luxton, who we mentioned at [43] above. In a depositions statement she had said that she heard Mr Wallace say "you've pushed me too far". Mr Minchin observed that she did not report Mr Wallace's words in her initial police statement. He invited us to find that she changed her evidence when making her deposition because she knew Constable Abbott personally and she had just had five windows of her shop smashed. These allegations have never been put to Mrs Luxton. She did not give oral evidence at trial. She repeated her claim that she heard Mr Wallace say those words in her oral evidence at depositions. Mr Rowan did not suggest to her that she had made up the evidence to support Constable Abbott. He cross-examined her on it only to establish that no police officers were present when she heard the statement. So far as counsel knows, she might have been available to give evidence before Ellis J. No attempt was made to call her.

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167 *Browne v Dunn* (1893) 6 R 67 (HL) at 70.

168 *R v Dewar* [2008] NZCA 344 at [49]. These same rationales were acknowledged in *Solomon v R* [2019] NZCA 616.

169 At [42], referring to *R v S (CA369/01)* (2002) 19 CRNZ 442.

[157] The second concerns the evidence of two witnesses, Julian Abraham and Wayne Cash, both of whom made statements that they heard Mr Wallace say "I'm going to fuck you up" just before they heard gunshots. Mr Minchin argued they could not have heard these words because they were almost 300 metres away. But they were on the move when the incident happened (they jogged up the road to investigate the disturbance they heard) and neither gave oral evidence at depositions or in the criminal trial, at which the prosecutor accepted their accounts. It is not now possible to say exactly where they were when they heard these words and whether they may have been mistaken.

[158] Many of the contested findings in this case raise a concern about accuracy of fact-finding at a long distance in time and on a record which is ill-suited to the task. This concern applies generally to allegations that some witnesses did not hear Mr Wallace say anything. Without a trier of fact having heard from any witnesses on the issue it is not possible for us to make reliable findings about who is mistaken. Some contested findings also raise a question of fairness to a witness whose evidence is now said to be inaccurate or unreliable. This applies to the allegations that Constable Abbott had a hostile animus to Mr Toa, that the Constable was the aggressor in the confrontation, that Mr Wallace was not advancing on the Constable, or was not behaving threateningly or uttering threats, and that the Constable gave Mr Wallace no time to react to the warning shot.

Did the Constable act in self-defence?

[159] It follows that Ellis J was correct to find that she could not make findings, and so would not consider further, allegations that Mr Wallace was not advancing on Constable Abbott and that the Constable's state of mind was affected by alcohol or PTSD.[170] She took essentially the same approach to the allegation that Constable Abbott was not acting in self-defence at all. She found the best evidence of the circumstances as the Constable understood them to be was that of the Constable himself and noted that it had never been suggested to him that his evidence was not credible or reliable.[171] She added that on the evidence Constable Abbott had no hostile

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170 Judgment under appeal, above n 1, at [17]–[33].
171 At [314].

animus towards Mr Toa[172] and accepted that Mr Wallace threatened the Constable.[173] We add that she might have found, and for reasons just given we do find, that it is not possible in the absence of cross-examination, whether before Ellis J or in a previous hearing, to find that the evidence of witnesses who heard Mr Wallace uttering threats was unreliable or lacked credibility.

[160] We agree with the Judge's conclusion that the circumstances as the Constable perceived them to be immediately before the shooting were that his life was in immediate jeopardy, that Constable Dombroski was some distance away, and that he was running out of room to retreat as Mr Wallace moved to cut off his escape. The Constable's evidence was that he was facing a man in a rage and he was in fear of his life, believing his head would be smashed in. As Mr Gunn submitted, that account was corroborated by, notably, the contemporaneous statement of Constable Herbert (see [47] above) and the eyewitness evidence of Constable Dombroski and Keith Luxton.

[161] The Judge found that the Constable's belief in these circumstances was also reasonable.[174] We have held that an honest belief suffices, but we agree that his belief was reasonable.

Was it reasonable to use a firearm in self-defence?

[162] Ellis J accepted that it would be reasonable to use a firearm only if, in the circumstances as he understood them to be, Constable Abbott had no other reasonable way of protecting his life.[175] The Attorney did not challenge that conclusion before us. A firearm is a lethal weapon and the evidence establishes that officers are trained to aim for the body mass.

[163] On this issue the Judge did hear evidence, from Sergeant Dombroski. She accepted that he could not have tackled Mr Wallace from behind.[176] She invoked previous investigations which had examined the other options available to the officers,

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172 At [316]–[319].
173 At [324(j)].
174 At [326].
175 At [328].
176 At [329].

presumably referring principally to the Coroner's and IPCA investigations.[177] It will be seen that she took into account the conclusions reached in these investigations. She saw no basis for revisiting the issue. She concluded briefly that retreat was not a reasonable option, nor was the use of a baton or pepper spray.[178] She rejected the possibility of a cordon and contain strategy, noting that to the extent the possibility ever reasonably existed it was too late by the time of the shooting; at that time Mr Wallace was only around five metres away from Constable Abbott and was moving closer.[179]

[164] Like the Judge, we think it inappropriate to break down a dangerous and swiftly moving confrontation with benefit of hindsight.[180] Different decisions might have been made, but the question is whether those that were made were unreasonable in the very difficult circumstances facing the officers. The circumstances were that Mr Wallace advanced on Constable Abbott, uttering threats to kill and evidently intending to use the baseball bat to attack him. He had not responded to voice entreaties. The threat was real.

[165] Mr Minchin argued that there were alternatives available to the officers even at that stage. The argument finds some support in the record. There was evidence at depositions and at the criminal trial that the two officers ought to have been able to restrain Mr Wallace. A former Superintendent, Bryan Rowe, stated at depositions that given their physiques, training and fitness Constables Abbott and Dombroski ought to have been able to do so if armed with batons (it appears Constable Dombroski had either left his in the car or had not drawn one at the Station).

[166] However, Sergeant Dombroski deposed before Ellis J that to tackle Mr Wallace was too dangerous for himself as the tackler and it seems he did not entertain the idea. On his account Mr Wallace was walking straight at Constable Abbott and making clear that he meant to kill. We observe that had Constable Dombroski attempted to grapple with Mr Wallace he would have prevented Constable Abbott, who was facing attack, from using his firearm. There was evidence that pepper spray, which must be used at

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177 At [329].
178 At [330].
179 At [331].
180 See also the comments made in *Bubbins v United Kingdom*, above n 80, at [138].

close range (within 3.5 metres), might not have prevented the attack. Police training teaches that the spray is less effective against goal-driven offenders. There was evidence that a PR24 baton, which is 60 cm long, is not an effective defence against blows from a baseball bat, and to deploy it effectively would require higher levels of proficiency than officers acquire in training. For these reasons we are not persuaded that Ellis J was wrong to find Constable Abbott was justified in using a firearm in self-defence.

Was it reasonable to fire four shots in self-defence?

[167] We have explained that this issue was raised in the statement of claim, albeit as a particular of a pleading that Constable Abbott did not comply with good practice. And although Ellis J herself heard no evidence about it, the issue was explored at the criminal trial. The Judge gave close attention to the issue. She started from the premise that the reasonableness of firing a group of two shots was not challenged, nor was the recommended police practice of aiming for central body mass.[181] She expressed reservations about the distinction she was asked to draw between the first and second groups of shots, citing English authority to the effect that "minute dissections of fractions of a second with the benefit of hindsight" might discourage an appropriate response to threats experienced in real time and so increase danger to those involved.[182] She noted that Constable Abbott himself, understandably in the circumstances, was not aware at the time of how many shots he had fired, or whether he fired in groups of two.[183]

[168] The Judge framed the question as whether Constable Abbott continued firing after it had become clear that the immediate threat posed by Mr Wallace had been averted or materially diminished.[184] She was satisfied that Mr Wallace did not fall to the ground until after the third shot, accepting the evidence of Constable Abbott at the criminal trial that he continued to shoot until the threat was averted and Mr Wallace never stopped advancing on him until after the last shot was fired.[185] The Constable

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181 At [334].
182 At [356], quoting *E7 v Holland*, above n 83, at [54].
183 At [358]–[361].
184 At [362].
185 At [363]–[367].

did not know whether Mr Wallace had been hit until he fired the second group of shots. The evidence of Constable Dombroski was to similar effect; he said that after the fourth shot Mr Wallace stood still, dropped his bat, and went to the ground. All of this was confirmed by expert evidence, the witnesses agreeing that the fourth shot hit Mr Wallace while he was still semi-upright.[186] The eyewitness evidence, while limited, was to the effect that Mr Wallace did not drop his bat until the second group of shots was fired.[187] The Judge found accordingly that the Constable had an objective basis to assume Mr Wallace had not been incapacitated, and perhaps not hit at all, after the first two shots. It followed that it did not matter which of the four shots was fatal.[188]

[169] Mr Minchin's submissions on this issue invite us to draw a series of doubtful inferences about the sequence of events. He asked us to find that:

(a) the final location of the baseball bat justified an inference that it had been thrown by Mr Wallace, not dropped;

(b) Mr Wallace rotated his body between the second and third shots, consistent with a throwing motion; and

(c) the Constable knew these things when he fired the third and fourth shots and so used unreasonable force, or alternatively was no longer acting in self-defence.

The direct evidence contradicts these propositions and justifies the Judge's findings, with which we agree. The short point is that Constable Abbott reasonably did not think Mr Wallace had been incapacitated by the first two shots. (We record that we decline to rely on the animation which Mr Minchin tendered without leave after the hearing in the High Court; that would need to be validated by expert evidence from the person who created it before it could be relied upon.)

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186 At [366]. The witnesses included Dr Kenneth Thompson and Dr Martin Sage who gave evidence at both the depositions hearings and at the criminal trial.

187 At [370]–[371].

188 At [373].

[170] For these reasons, we need not consider which shot was fatal.[189] We agree with Ellis J that all four shots were fired in reasonable self-defence.

Did the planning and control of the operation contravene s 8?

[171] We turn to the allegations that planning and control of the operation were deficient in several respects: the decision to uplift firearms, the omission to implement a cordon and contain strategy, the omission to wait for the dog unit, and the provision of first aid. As noted at [74] above, Ellis J found that any omissions were not egregious and significant and did not breach s 8 on the facts.

The decision to uplift firearms from the police station

[172] Ellis J focused her attention on those decisions which posed a risk to Mr Wallace's life; they were the decisions to uplift firearms and the possible availability of alternatives, namely cordon and contain and waiting for the dog unit.[190]

[173] With respect to the first of these decisions, the Judge discounted technical failures of process, instancing the fact that Constables Abbott and Dombroski did not sign the firearms register, on the ground that they could not have increased the risk to life. She found that:

(a) the existence of policies regulating the uplift of firearms was a factor counting against a finding of unreasonableness in breach, and on the facts no defect in policies and no significant failure to comply with them was identified by either the coroner or IPCA;[191]

(b) the two constables independently decided to uplift firearms, tending to support the conclusion that it was reasonable to do so;[192] and

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189 As noted at [72] above, the Judge also addressed that argument, finding herself unpersuaded.

190 Judgment under appeal, above n 1, at [559]. She also dealt with and dismissed an unpleaded allegation that the officers should have waited for the Armed Offenders Squad.

191 At [562].

192 At [563].

(c) the officers knew Mr Wallace was extremely angry and had already shown his willingness to use his weapons against police.[193]

[174] She added that there was reason to think the life of any member of the public who happened to cross Mr Wallace's path might also be at risk. The Constables did not know he had already attacked civilians, but he had, and that fact supplied retrospective support for her conclusion about the immediacy and nature of the danger.[194]

[175] For these reasons the Judge was satisfied that there was a serious risk to safety and a need to address it urgently. She accepted that the officers did not intend to shoot Mr Wallace when they uplifted firearms; the objective was "logically" to persuade him to stop what he was doing and to surrender his weapons.[195] It was reasonable to think he might respond when faced with armed officers. It is only with hindsight that it can be seen that he was not amenable to reason.[196]

[176] On appeal, Mr Minchin contended generally that the Judge was wrong to find delay could not be countenanced. He accepted that Mr Wallace's actions constituted a threat to public safety which required that police returned promptly to the scene, but when they arrived he was not menacing anyone. The Judge's findings on self-defence dispose of this allegation. When the two Constables arrived and got out of their car Mr Wallace immediately behaved aggressively towards them.

[177] Mr Minchin argued that, as the Coroner had found, the Constables breached police instructions F059(4) by uplifting firearms. The situation may have constituted an emergency, which permitted them to draw firearms without the approval of the superior officer where no such officer is available, but a superior was available over the radio to give authority. He added that there was a further breach in that body armour was available at the police station and it ought to have been worn when firearms were uplifted. Nor did the police obey an instruction requiring that they stop and think before taking action.

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193 At [564].
194 At [565].
195 At [567].
196 At [568].

[178] We agree with the Judge that none of these points comes close to the threshold needed to establish a breach of s 8. As Ellis J found, the relevant decisions are those which put the life of Mr Wallace at risk. We are dealing here with the decision to uplift firearms. At various points in his submissions Mr Minchin appeared to accept that it was reasonable to uplift firearms (but not to use them). It was not in dispute that, to use counsel's words, Mr Wallace was in a violent destructive rage and had smashed windows, charged at friends who tried to calm him down, hit a taxi with a weapon and smashed up a patrol car while officers were sitting in it. That was the position when the decision was made to uplift firearms. Indeed, Mr Minchin accepted that this behaviour led to a "reasonable presumption" that Mr Wallace would continue to behave in this way when the officers returned. It must follow that the decision to uplift firearms for self-defence was reasonable. In our view it is immaterial that Sergeant Prestidge did not give formal prior authorisation. The situation was urgent. We add that she was monitoring communications, and knew of and was comfortable with the decision to uplift firearms.

Cordon and contain

[179] The Judge found that the omission to consider or to implement a cordon and contain strategy could not be said to have been an egregious and significant failure to do something that the officers could, in the circumstances, reasonably be expected to do.[197]

[180] Mr Minchin submitted that this was an error. Constable Abbott's evidence at trial was that there was no discussion as to any plan of how to approach Mr Wallace. It was necessary for the officers to return to the scene, but it is not correct that they needed to act as urgently as they did. They ought to have stopped and considered whether it was possible to cordon and contain the offender, whether a dog unit was available and so on. He submitted that the officers "locked onto a course of action" and completely failed to consider alternatives. But he did not squarely address the Judge's finding that cordon and containment was not a viable option having regard to the absence of immediate backup the wide area of operations, Mr Wallace's mobility

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[197] At [573].

and the risk to the officers themselves and members of the public.[198] As the Judge noted, that was the IPCA finding, reached by reference to the Police Manual of Best Practice.[199] It was supported by the opinion of Inspector Dunstan given on 8 August 2000; in his view it was not feasible to cordon and contain and what the officers did amounted to a "semi cordon", retreating and giving Mr Wallace the option of surrendering.

[181] We find there is ample support in the record for the Judge's conclusion and nothing in the submissions to sustain the argument that she was wrong.

Waiting for reinforcements

[182] Having decided that cordon and contain was not a viable strategy, the Judge found that waiting for reinforcements also fell away as a reasonable operational possibility. It was predicated on the ability of the officers to contain Mr Wallace effectively until reinforcements arrived. The 10 minutes that it would have taken the dog unit to arrive was too long, as IPCA had found.[200] We agree. As noted, it is not in dispute that Mr Wallace was in a violent rage and a danger to others when the officers went to arm themselves. We have agreed with the Judge that he was mobile and containment was not a viable strategy. That being so, neither was waiting for the dog unit.

Provision of first aid

[183] Ellis J treated the allegation that the police failed to administer first aid as part of the "planning and control" claim. She observed that a tortious claim would likely be answered by the proposition that first aid would have made no difference to the outcome, but a rights-based approach meant that it was potentially legitimate to ask whether, on the basis of what was known by the officers at the time, the failure to render first aid took sufficient account of the obvious risk that Mr Wallace would die.[201]

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198 At [570]–[572].
199 At [572].
200 At [574].
201 At [578].

[184] Against that standard, she found that the officers could not be faulted for their provision of first aid. The evidence was that Mr Wallace was not bleeding heavily and his wounds could not be attended to, which the Judge accepted would be the case when the fatal wound was internal. There was evidence from a specialist in emergency medicine (Professor Michael Ardagh, who gave evidence before the Coroner) that there was nothing else the officers could properly have done.[202]

[185] Mr Minchin submitted that the officers did not act in a timely or appropriate way to lend first aid. Mr Wallace was crying for help. Constable Dombroski told Mr Wallace that an ambulance was coming, but prevented a witness with some first aid experience from going to Mr Wallace's aid and refused to take a blanket that she offered. Some 10 to 12 minutes after she arrived Sergeant Prestidge placed a sling under Mr Wallace's shoulder and also took the blanket that had been offered. Mr Wallace effectively bled to death, lying alone on the street with almost no attempt being made to staunch the bleeding. Mr Minchin pointed out that eyewitnesses were concerned that Mr Wallace was left alone. The ambulance took 20 minutes to arrive. He observed that a snap Parliamentary debate was held in regard to the shooting and asserted that police lied by saying that officers remained with Mr Wallace until the ambulance arrived.

[186] It is clear that nothing could have been done at the scene to save Mr Wallace. Professor Ardagh stated that it was better Mr Wallace not be moved before ambulance staff arrived; that might have made his condition worse. He stated that Mr Wallace's condition did deteriorate when ambulance staff rolled him fully onto his back to examine his injuries. Any prospect of survival depended on immediate surgical intervention. Even then, death was "very likely", according to Dr Peter Johnston, a specialist liver surgeon, who had been briefed by Mr Rowan and gave evidence before the Coroner. Dr Martin Sage, who was briefed by the police to review the autopsy, explained that the bullet passed through one of the major blood vessels servicing the liver. Under what he described as "internationally agreed criteria for assessing the severity of liver injury", wounds of this severity carry a 75–100 per cent risk of mortality. We are satisfied that the Coroner was correct to find Mr Wallace's injuries

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202 At [579].

were unsurvivable and nothing the police could have done at the scene would have made a difference.

[187] So the question is whether more should have been done to comfort Mr Wallace. Professor Ardagh thought that more attention should have been paid to Mr Wallace before ambulance staff arrived; it would not have made any difference to survivability but it would have demonstrated compassion. The police themselves acknowledged, when announcing that Constable Abbott would not be prosecuted, that comfort could have been provided sooner.

[188] The perception of eyewitnesses was that Mr Wallace was left alone for some time before the ambulance arrived (it did so a little less than 20 minutes after the shooting). That is not entirely correct. Constable Dombroski approached him, placed a hand on him, asked him to stay still, and told him an ambulance was on its way. It appears the attention of the officers was then focused on guarding the scene and keeping members of the public out of it. They knew an ambulance would arrive soon. Barbara George, an eyewitness, approached them and offered a blanket but was told it was too dangerous. Mr Wallace was still moving. After about 10 or 15 minutes the ambulance had not come and she repeated her offer. An officer, who must have been Constable Dombroski, took the blanket and placed it over Mr Wallace's lower body. Sergeant Prestidge, who had arrived some minutes previously, approached Mr Wallace and placed a bandage under him. She checked his wounds. Because he did not appear to be bleeding externally, she did not attempt to compress the bandage.

[189] We accept that a failure to render first aid when safe to do so might breach s 8. But as will be apparent, we agree with the Judge that nothing could have been done to save Mr Wallace's life. Any attempt to render first aid might well have made his condition worse. We do accept that he could have been approached sooner and more effort made to comfort him, but that would not have reduced the risk to life. And we do not accept that any omission to offer comfort was substantial or egregious. He was initially thought still to pose a risk and the officers needed to preserve and manage the scene. Members of the public were approaching and needed to be kept away. The officers themselves were under considerable stress.

The decision not to assume control of the private prosecution

[190] We have mentioned the pleading of this claim and summarised the Judge's findings at [11] and [41] above. As noted there, she rejected the claim that following the decision of Elias CJ the Crown was obliged to assume conduct of the prosecution. That did not follow from the Chief Justice's finding that there was sufficient evidence to go to a jury.[203] The Solicitor-General's 1992 Prosecution Guidelines (which are quoted in the judgment below at [592]) made it clear that a prima facie case is only the first part of the required analysis; it is also necessary to consider whether the prosecution would be in the public interest. The Guidelines state that the public interest does not normally require that a prosecution proceed unless a conviction is more likely than not to result.

[191] Mr Minchin did not challenge these conclusions before us. The question is whether, as the Attorney contends in his cross-appeal, the Judge was wrong to find an actionable failure to give reasons.

[192] The relevant facts are few. The police and the Deputy Solicitor-General had publicly justified the decision not to prosecute by expressing the opinion that Constable Abbott's actions were justified. The Deputy Solicitor-General had announced in August 2000 that on the evidence the shooting was done in self-defence and the police (whose decision it was) had stated that Constable Abbott had acted in self-defence and hence lawfully. The Chief Justice delivered her decision authorising an indictment on 14 June 2002. On 19 June Mr Rowan wrote to the Solicitor-General, expressing the opinion that in light of that decision it might be appropriate for the Crown to consider taking over the prosecution, or funding it. He drew attention to specific findings that the Chief Justice had made. Those findings concerned evidence that the third shot was fatal and the possibility that the threat had passed when that shot was fired. The Chief Justice had noted that Constable Abbott accepted self-defence could not succeed if a threat had been averted.[204]

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203 At [597].

204 *Wallace v Abbott*, above n 20, at [95].

[193] The Deputy Solicitor-General responded on 16 July on behalf of the Solicitor-General, stating that:

> …
>
> In his view this is a classic private prosecution. The Police have investigated and after taking legal advice, including a review of that advice by the Crown Law Office, decided not to prosecute Mr Abbott.
>
> Your client has exercised his right to have the Courts look at the matter.
>
> It is accepted that in New Zealand the right to take a private prosecution is a constitutional safe guard for the citizen. However, that does not mean any particular prosecution is of constitutional importance.
>
> The Solicitor-General is of the view that the public interest factors here should operate to leave the prosecution of Mr Abbott at trial as a private prosecution. It follows that costs of such prosecution should not be borne by the Crown.
>
> On the Solicitor-General's behalf I have reviewed the ruling of the Chief Justice in the light of the specific provisions you have referred to in your letter. It is considered that they are all matters that the Chief Justice thought should be left to the tribunal of fact; the jury. None of them operate to elevate the matter to such a degree that the Crown should intervene to take over the trial.

[194] Mr Rowan renewed his request on 3 October 2002, emphasising that Constable Abbott was being supported by the Police Association and that the Wallace family had committed all that they possibly could to the prosecution. He asked that reasons be given if the Solicitor-General remained of the same view, as the decision might be judicially reviewed. It appears he received no substantive reply.

[195] As the Judge noted, the argument that reasons ought to have been given was developed before her. It was not pleaded. The Attorney took the point before her, saying that if it the case had been pleaded as a judicial review he likely would have responded differently.

[196] In our view the Attorney's complaint was well-founded. The pleading did not require that he address the duty to give reasons or the adequacy of reasons. Had the issue been pleaded, one would expect that, in accordance with usual practice in judicial review, the Attorney would have adduced evidence about both the original decision not to prosecute and the decision not to take over the private prosecution. That evidence would have explained the processes that had been followed, the

decisions themselves, and perhaps why the Deputy Solicitor-General expressed herself as circumspectly as she did in her letter of 16 July.

[197] As Ellis J was prepared to recognise, the correspondence does permit the inference that the Solicitor-General believed a prosecution would fail to exclude self-defence.[205] To that extent, reasons were given. This was an exchange of correspondence between experienced counsel. Mr Rowan knew that self-defence was the issue. That was why he gave the pinpoint references to the Chief Justice's decision. A belief that a prosecution would fail was a sufficient reason to decline to prosecute under the Guidelines. The Deputy Solicitor-General might have responded to the subsequent plea that public controversy and inequality of arms justified intervention, but in the absence of evidence we cannot know why she did not.

[198] We conclude that on the pleadings the issue of failure to give reasons was not properly before the High Court. It was not open to the Judge to find that a duty to give reasons had not been met in relation to control or funding of the prosecution following the High Court decision allowing that prosecution to proceed. For these reasons the Attorney's cross-appeal on the third cause of action must succeed. No purpose would be served in the circumstances by examining the authorities on reviewability of a decision to prosecute and adequacy of reasons.

Limitation

[199] Mr Gunn addressed this topic very briefly, citing this Court's decision in *Attorney-General v P F Sugrue Ltd* for the proposition that, while the Limitation Act 1950 does not apply directly to BORA claims, a Court may employ the equitable principle of limitation by analogy and may invoke delay as reason to deny a remedy in the exercise of discretion.[206] We accept that delay may justify a court in refusing a remedy. In this case, however, it was reasonable to await the official investigations and the parties relied on the record of those investigations. The Attorney does not point to prejudice from the passage of time. For these reasons we would not deny relief on this ground.

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[205] Judgment under appeal, above n 1, at [609].
[206] *P F Sugrue Ltd v Attorney-General* [2004] 1 NZLR 207 (CA) at [69]–[70].

Result

[200] The appeal is dismissed.

[201] The cross-appeal is allowed.

[202] No order as to costs.

Solicitors:
Thomas & Co, Auckland for Appellant
Crown Law Office, Wellington for Respondents