

**IN THE HIGH COURT OF NEW ZEALAND  
WELLINGTON REGISTRY**

**I TE KŌTI MATUA O AOTEAROA  
TE WHANGANUI-A-TARA ROHE**

**CIV-2019-485-1  
[2022] NZHC 1069**

BETWEEN IRIHEKE TE KANI MANU PERE  
Plaintiff  
AND ATTORNEY-GENERAL  
Defendant

Hearing: 21 March 2022  
Appearances: E M Forster and H A Neumegen for the Plaintiff  
A M Powell, H M Carrad and C N Tocher for the Defendant  
Judgment: 16 May 2022

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**JUDGMENT OF COOKE J**

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[1] On 16 August 2013 the plaintiff was accidentally shot by a member of the New Zealand Armed Offenders Squad while he was detained in their custody. He

brings these proceedings seeking compensation for a breach of his right under s 23(5) of the New Zealand Bill of Rights Act 1990 (the Bill of Rights). This provides:

Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the person.

[2] The key issues in this case are whether the facts which are agreed between the parties give rise to a breach of this right, and if so, what compensation should be awarded for that breach.

### **The facts**

[3] As indicated the relevant facts have been agreed between the parties in the form of an agreed statement of facts admitted under s 9 of the Evidence Act 2006. The parties and their counsel are to be commended for reaching this agreement, not only because it has allowed for an efficient hearing, but also because it has removed the further stress for the participants yet again giving evidence about these events.

[4] Mr Pere was aged 33 at the time of the accidental shooting. He was living with his mother in Hastings.

[5] He has a complex medical health history and has been diagnosed with depression and social bi-polar disorder. He had suffered previously from psychotic episodes. He was known to police having accrued 41 convictions between April 2000 and April 2003 including for violent offending. He was the subject of an Armed Offender Squad callout in 2009. From August 2011 he was a compulsory patient under the Mental Health (Compulsory Assessment and Treatment) Act 2002 and was subject to an indefinite community treatment order. The order was discharged in July 2013. From this time Mr Pere was a voluntary patient.

[6] The relevant events occurred on 16 August 2013. Mr Pere had ceased taking his medication regularly at this time. He was consuming recreational drugs and experiencing a deterioration in his mental health. Mr Pere's mother rang the Hawkes Bay District Health Board's mental health unit seeking assistance. She then attended the Napier Health Centre and spoke to Ms Joanne Wainwright, an employee of the Hawkes Bay District Health Board Mental Health Unit who was the case worker

assigned to Mr Pere. Mrs Pere informed Ms Wainwright that Mr Pere appeared to be having a psychotic episode. She said that two days earlier he had waived what she believed was a BB-gun around, including pointing it in her direction, and that Mr Pere had subsequently stowed the BB-gun in his bedroom. A BB-gun is a type of air gun designed to shoot metallic spherical projectiles called BBs. BB-guns are classified as airguns under the Arms Act 1993. Anyone over the age of 18 may use an airgun without a firearms licence, but it is an offence to possess an airgun other than for lawful, proper and sufficient purpose.

[7] At about 2.26 pm that day Ms Wainwright rang the New Zealand Police and informed them of the content of her conversation with Mrs Pere. Following that call police made an operational decision to activate the Hawkes Bay Armed Offenders Squad to apprehend Mr Pere. Police knew of Mr Pere's mental illness because of the information supplied by Ms Wainwright and from the police's prior dealings with Mr Pere.

[8] At 3.26 pm following a briefing at Hastings Police Station Armed Offenders Squad officers including Officer Z4, a dog unit, and a police negotiation team were despatched to set up an outer cordon around the address where Mr Pere lived with his mother. At 4.03 pm the officers, including the police dog unit, established a command vehicle base at a designated safe forward point. At 4.46 pm police established road blocks. The Armed Offenders Squad, including Officer Z4 then deployed forward to the address.

[9] All Armed Offenders Squad officers were armed with .223 Calibre M4 Bushmaster rifles. They wore standard issue uniforms that included a tactical vest and a sling for holding the rifles. Some of the rifles were mistakenly loaded with Remington .223 training rounds, including Officer Z4's rifle. This was because, contrary to protocol, the training rounds had not been replaced with standard rounds after the last training exercise. A training round is a live frangible bullet that is designed so that when it hits a solid surface it disintegrates into tiny pieces to minimise the bullet's penetration into the object it has hit. A standard hollow point round is designed to penetrate its target and disintegrate after impact.

[10] At 5.23 pm police requested Mr Pere to surrender to police for arrest upon suspicion of possession of a pistol without lawful or sufficient purpose contrary to s 45 of the Arms Act. Mr Pere duly surrendered himself and acquiesced in the arrest by police.

[11] As part of his arrest Mr Pere was lain prone face down on the ground outside the address. When Officer Z3 undertook the arrest he first gave his Bushmaster rifle to another police officer. Mr Pere was then handcuffed behind his back with plastic handcuffs by Officer Z3. Officer Z4 was then tasked with assisting with the detention of Mr Pere while other Armed Offenders Squad officers entered the address to search it. Officer Z4 checked that that the safety catch on his Bushmaster rifle was in the safe position before doing so. He also made sure that the rifle, which was held in a sling, had its muzzle pointing away from Mr Pere as he approached. He knelt beside Mr Pere with one knee on the ground and the other on Mr Pere's back. He informed Mr Pere of his arrest rights under the Bill of Rights. Mr Pere was cooperative throughout the arrest. After Mr Pere was arrested Officer Z4 stood up and moved his Bushmaster rifle to the front of his body and stepped back one or two metres.

[12] There was no other apparent danger to the public or police officers at the scene. Other uniformed police then arrived at the address to take Mr Pere to the police station for processing. A request was given to the attending officers to replace the plastic handcuffs with metal handcuffs to enable his transfer into custody of the uniformed officers.

[13] Officer Z4 had his Bushmaster rifle suspended in front of him from a sling. He then moved forward to assist other officers to change the handcuffs on Mr Pere. Before doing so Officer Z4 did not remove the round in the chamber of the Bushmaster rifle. He did not remove his Bushmaster rifle and put it in the custody of another officer or in another safe place. Nor did he check that the safety catch on the Bushmaster rifle was in the safe position so that it could not fire.

[14] While the handcuffs were being replaced Officer Z4 bent over to assist other officers to lift Mr Pere to his feet. When doing so he did not ensure that the muzzle of his Bushmaster rifle pointed away from anywhere that if it fired would cause harm.

The muzzle of the Bushmaster rifle was pointing directly at the central upper area of Mr Pere's back while Mr Pere was lying prone face down on the ground outside the address. The muzzle of the rifle was near Mr Pere's back.

[15] The way Officer Z4 had set up his vest on his uniform meant that when he shifted his Bushmaster rifle across to the right side of his body the safety catch of the Bushmaster rifle brushed against the stiff fabric holster for his Glock pistol. This contact is likely to have caused the safety catch on the Bushmaster to have shifted from the safe position to a position that enabled the Bushmaster rifle to fire without Officer Z4 knowing it.

[16] As Officer Z4 bent down to help lift Mr Pere to his feet with the Bushmaster rifle suspended in the sling, the lower buckle on his vest entered the trigger guard of the rifle and caught on the trigger. The weight of the rifle moving in the sling against the buckle was sufficient to pull the trigger. The rifle discharged a single frangible bullet at close range into the central/upper area of Mr Pere's back. Officer Z4 did not intend to fire his rifle and did not depress the trigger with his finger.

#### *Impacts on Mr Pere*

[17] Mr Pere was taken to hospital suffering from blood loss, a collapsed lung, injury to blood vessels and had shrapnel from the frangible bullet lodged in his upper back and spread through his chest area and neck areas. He required extensive medical treatment but not surgery. He was in hospital for a month.

[18] Mr Pere had experienced acute mental health events in the past but suffered further shock and distress and complications with his mental illness because of what happened during his arrest.

[19] Had Officer Z4's Bushmaster rifle been armed with standard life ammunition as intended for armed offenders squad deployment, Mr Pere's physical injuries would have been more serious and likely fatal.

## *Firearms safety*

[20] The Interim Amended Firearms Instruction Manual was in use at the time of the shooting. In the chapter entitled *Rifle Operator* four cardinal rules of firearms safety are set out, namely:

1. All guns are loaded.
2. Point muzzle in a safe direction ('laser rule').
3. Keep your finger outside the trigger guard until you are on target and have decided to fire.
4. Be sure of your target and what is around it.

[21] The Bushmaster M4A3 manual provides a similar set of four rules. Rule 2 states:

Point the muzzle in a safe direction. (Remember the "Laser Rule": Treat any firearm as if it has a laser fitted through the axis of the barrel. Whatever the beam touches, it cuts through).

[22] In addition the manual comments:

Be conscious of where the muzzle of the firearm is pointing at all times. Never permit your muzzle to cross anything that you are unwilling to shoot.

[23] Expert evidence has also been provided from Tracy Short. He confirms that:

- (a) Allowing the loaded firearm to unintentionally point at a person was a careless omission.
- (b) Moving forward to physically assist Mr Pere to get up without checking the safety catch while holding a loaded firearm was a careless omission.
- (c) Moving forward to physically assist Mr Pere to get up without neutralising the danger from his firearm by removing the live round from the chamber or by putting the rifle in the custody of another officer or in a safe place was a substandard and dangerous use of a firearm.

[24] It is also accepted that the qualification process to become an Armed Offenders Squad member includes how the firearm safety rules apply including ensuring the safety catch is on and observing the laser rule, and if there is cover from another officer, provide the rifle to that officer.

*Officer Z4's training and qualifications*

[25] To be a member of the Armed Offenders Squad a candidate needs to be a serving police officer. That officer must first complete the Armed Offenders Squad selection course and then the national Armed Offenders Squad qualification course. Following that the officer can apply for a position in an Armed Offenders Squad following which they go through an induction and mentoring process.

[26] Officer Z4 graduated from police college in 2007 and completed probationary requirements in April 2009. He attended an Armed Offenders Squad selection course in March 2010. Due to concerns about his performance on the course he was given a conditional pass on the basis he subsequently receive one on one tutoring. The concerns related to decision-making in operational settings.

[27] On 31 July 2013 due to a shortage of qualified Armed Offenders Squad members a decision was made by the Police Commander of National Tactics Groups to deploy trainee members in Hawkes Bay provided that they would not be used for house clearing unless there was no alternative.

[28] As at the date of the accidental shooting on 16 August 2013, Officer Z4 was a trainee Armed Offenders Squad member and was designated part of the Hawkes Bay Armed Offenders Squad. He had not received any one on one training since the Armed Offenders Squad selection course. He had not been inducted and had not had any mentoring. At the time there was no formal induction or mentoring programme for Armed Offenders Squad officers. There was no training plan in place for him other than that he was due to attend the Armed Offenders Squad qualification course in September 2013. He was current with his general firearms training for pistol and rifle which is a qualification for police outside of the armed offenders squad.

### *Other prosecutions/investigations*

[29] In April 2015 Officer Z4 was charged with careless use of a firearm causing injury under s 53 of the Arms Act 1983. In February 2016 after trial before a Judge and jury in the District Court at Napier he was found not guilty and acquitted.

[30] On 31 May 2016 the Independent Police Conduct Authority (IPCA) issued a report finding on the balance of probabilities that Officer Z4's failure to know where his Bushmaster's rifle was pointing was careless in the circumstances.

### **Was s 23(5) of the Bill of Rights breached?**

#### *Arguments*

[31] For Mr Pere Mr Forster argued that liability for Bill of Rights compensation arose. No claim in tort could be advanced as a consequence of s 317 of the Accident Compensation Act 2001. A claim for exemplary damages was preserved by s 319 of that Act but it was accepted that no basis for exemplary damages existed here. Mr Forster focused on s 23(5) of the Bill of Rights. He emphasised that Officer Z4 was dealing with a cooperative and handcuffed man lying prone face down on the ground. Officer Z4's actions were not just a one off as he engaged in a series of errors that led to the shooting. This distinguished the case from that in *A v Attorney-General* in which the High Court had dismissed a claim under s 23(5) where a prison guard had made a mistake when directing that the plaintiff be mixed with prisoners from a rival gang who then assaulted him.<sup>1</sup> Mr Forster also argued that there were systemic shortcomings involved in this case and also relied on other rights in the Bill of Rights, including the right to life in s 8, although they were not pressed in oral argument.

[32] For the defendant Mr Powell argued that the relevant standard for assessing a breach of s 23(5) was that set out by the Supreme Court in *Taunoa v Attorney-General*.<sup>2</sup> A breach of s 23(5) could arise from a failure to keep a detainee safe, albeit as Ellis J held in *S v Attorney-General* the simple fact that a detainee has come to harm did not mean there was a breach of the right.<sup>3</sup> Some breach of standards by the

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<sup>1</sup> *A v Attorney-General* [2020] NZHC 3401.

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

<sup>3</sup> *S v Attorney-General* [2017] NZHC 2629 at [243].

detaining authorities was required. Mr Powell accepted that in the circumstances of this case it would be open for the Court to find that Officer Z4 had owed a duty to Mr Pere to take reasonable care to ensure that he did not injure him with the weapon he was carrying, and that this duty had been breached. It might then be open for the Court to conclude that this comprised a breach of s 23(5). He argued that there was no systemic element to any breach of the standard, however.

### *Analysis*

[33] The key question in this case is whether Mr Pere's right under s 23(5) was breached. This may depend on whether a breach of this right can arise as a consequence of harm caused to a detainee that is accidental rather than intentional. For the reasons I elaborate upon below I have decided that it can, and that such a breach arose in the present case.

[34] The right to be treated with humanity, and with respect for the inherent dignity of the person can be seen to be at the heart of all fundamental human rights. When the state assumes control over the personal autonomy of a person by detaining them such concepts assume particular significance, and this is reflected in the existence of the separate right in s 23(5) of the Bill of Rights. It is derived from Article 10(1) of the International Covenant on Civil and Political Rights. In other human rights instruments, such as the European Convention there is no express article to the same effect, but the existence of the right arises by implication given the centrality of the concepts of humanity and inherent dignity.<sup>4</sup>

[35] The leading New Zealand authority on the nature and extent of the right arising under s 23(5) is the decision of the Supreme Court in *Taunoa v Attorney-General*. The Court there referred to the decision of the European Court of Human Rights in *Kudla v Poland* which was said to have captured the flavour of s 23(5) in the following way:<sup>5</sup>

... The State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention in

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<sup>4</sup> Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 221 (opened for signature 4 November 1950, entered into force 3 September 1953).

<sup>5</sup> *Kudla v Poland* (2000) 10 BHRC 269 at [94]. See *Taunoa*, above n 2, at [156] per Blanchard J.

that, given the practical demands of imprisonment, his health and wellbeing are adequately secured ...

[36] In *Taunoa* the Supreme Court explained the difference between the right arising under s 23(5) and that arising under s 9 of the Bill of Rights not to be subjected to torture or cruel, degrading, or disproportionately severe treatment or punishment. There were degrees of infringing conduct evident in ss 23(5) and 9. Section 23(5) was concerned with conduct which was unacceptable but not rising to a level of outrageousness covered by s 9.<sup>6</sup> In describing the differences Tipping J said:<sup>7</sup>

... I consider different considerations apply to a case in which the State is said to have failed to observe the positive duty contained in New Zealand's s 23(5), which requires those deprived of their liberty to be treated with humanity and with respect for their inherent dignity as persons. A failure to observe that positive duty is different from a breach of s 9. **In the case of s 23(5), the person concerned can claim that the statutory standard has not been met. It does not matter for liability purposes why that is so. The State's duty is to achieve an objectively defined outcome.** It is, however, of moment to whether there has been a breach of s 9 to consider the state of mind of the party said to be in breach and the consequences for the victim of the impugned conduct.

(emphasis added).

[37] So whilst the state of mind of the party said to be in breach is relevant to s 9, it is not necessary to establish a breach of s 23(5). Section 23(5) gives rise to a positive duty. The Court's enquiry is directed to identifying whether standards arising from the positive obligation to treat detainees with humanity and inherent dignity have been observed. As Ellis J said in *S v Attorney-General*:<sup>8</sup>

Many cases invoking s 23(5) concern actions by a detaining authority that are self-evidently inconsistent with the dignity or humanity of the detainee, such as unnecessary use of force or assault. For example, the intentional infliction of injuries by a police officer and inappropriate use of pepper spray against a person in custody have been found to breach s 23(5).<sup>9</sup>

But inaction, neglect or failure to take the necessary steps to ensure the humane treatment of a detainee have also been discussed by the courts, and positive duties recognised under s 23(5). There is no doubt (and the respondents accept) that s 23(5) requires the State not simply to refrain from inhumane conduct, but also to act to maintain minimum conditions of detention, as defined in the statute authorising the detention, subordinate legislation and/or any relevant standards. ...

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<sup>6</sup> *Taunoa v Attorney-General*, above n 2, at [170].

<sup>7</sup> At [294].

<sup>8</sup> *S v Attorney-General*, above n 3, at [216]–[217].

<sup>9</sup> *Falwasser v Attorney-General* [2010] NZAR 445 (HC).

[38] An illustration of a breach of such standards arising through non-deliberate behaviour is to be found in *Attorney-General v Udompun*.<sup>10</sup> Here Mrs Udompun had been detained at the airport and then transferred to a police station. In that process she had been denied the opportunity for a change of clothes and also deprived of sanitary pads which she needed. A full Court of the Court of Appeal upheld the finding that this involved a breach of s 23(5). They held:

We accept Heath J's formulation of the issue as whether the standards of administration applied to Mrs Udompun during her detention were satisfactory in light of the guarantees provided in s 23(5). Looked at in this light, the failure to provide sanitary products to Mrs Udompun, after having been informed of her need for such products, was treatment that fell below an acceptable standard. We accept Mrs Woodroffe's submission that there are hygiene issues arising out of the lack of sanitary products, as well as discomfort and personal embarrassment. The fact that the failure to provide the products was through inadvertence does not alter the fact that there was a breach. The request for the products, together with the essentiality of the item, means that a breach occurred.

[39] Again, therefore, the cause of the breach of standards, and whether they arose by deliberate or inadvertent action is not determinative of a breach. Maintenance of the standards arising as a consequence of s 23(5) is an absolute obligation. The relevant inquiry is directed to how the detainee has been treated by the authorities. So the issue turns on how the person has been detained, and what has happened to them during that detention. That approach is consistent with a rights centred focus.

[40] Section 23(5) accordingly mandates what can be thought of as minimum standards that must be maintained by the authorities when a person is detained. Compliance with those standards is an absolute obligation. If the minimum standards are not maintained by the authorities then a breach arises. Maintenance of minimum standards is not limited to, or the same as, an obligation to take reasonable care. The fact that such a breach arises as a consequence of accidental rather than deliberate conduct may be relevant to the extent of the state's culpability, but it does not mean that there is no breach. Whether there is a breach depends on an objective assessment on whether what has happened to a detainee is consistent with the minimum standards arising from the obligation to treat detainees with humanity, and with inherent dignity for the person.

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<sup>10</sup> *Attorney-General v Udompun* [2005] 3 NZLR 204 (CA) at [141].

[41] On that basis the relevant question here is whether the conditions of Mr Pere's detention, and what happened to him in detention, were consistent with minimum standards the officers were required to maintain. In assessing that it is important that there was no issue of public safety arising from the circumstances. Indeed the operation involved a less significant issue of public safety given it involved a report by a family member that Mr Pere was having a mental health episode, and had misused an air gun two days earlier, rather than a more serious incident. Mr Pere was then fully cooperative on his arrest. The officers also assumed complete control of Mr Pere. He was lying face down handcuffed behind his back in the process of being assisted to his feet. He was in a vulnerable position. He was then shot in the back by one of the officers. This caused him to be seriously harmed. The question is whether the harm caused to Mr Pere was consistent with the maintenance of minimum standards.

[42] In my view it is clear that it was not. The harm caused to Mr Pere by those responsible for his detention was clearly inconsistent with minimum standards. The fact that the harm happened by accident mitigates against the state's culpability, but it does not mean there was no breach. A deliberate infliction of harm, such as by a deliberate shooting, potentially involves a breach of s 9. A breach of the s 23(5) right does not depend on deliberate conduct, however. Shooting somebody in custody in the absence of a justification is inconsistent with the minimum standards of detention arising from the duty to treat detainees with humanity, and with respect for their inherent dignity.

[43] The position will be different if the harm occasioned to a detainee is caused by third parties rather than the detaining authorities. The question will then be whether the harm caused by third parties can be said to have been the consequence of a failure by the authorities to maintain minimum standards. In *A v Attorney-General*, for example, the High Court found that the error by a prison officer in placing the plaintiff in an area with rival gang members leading to his assault did not involve a breach of those standards.<sup>11</sup> But when the harm is caused by the authorities themselves the analysis is more simply whether the way the detainee has been treated is consistent

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<sup>11</sup> *A v Attorney-General*, above n 1. See also *S v Attorney-General*, above n 3, at [244].

with the minimum standards contemplated by the right that the state is obliged to maintain.

*Nature and circumstances of the breach*

[44] The reasons for the failure to observe minimum standards remain relevant to assessing the degree of culpability of the breach, however. They are accordingly appropriately assessed.

[45] First, it is accepted that Officer Z4 failed to observe minimum standards of firearms safety. This is so in at least two respects. First, before approaching Mr Pere to assist the other officers he should have disabled his weapon. I accept that this would not have required him to unload the weapon in the context of an Armed Offenders Squad operation. Rather he should have followed the process followed by Officer Z3 and handed off his firearm to another officer before so assisting. Secondly, he failed to adhere to the cardinal rule — the laser rule — requiring that a loaded weapon should always remain pointed away from anybody else. This is a fundamental requirement of firearms safety. It is to be remembered that this was no longer an active operation requiring firearms use by the squad, and had moved to a standard arrest procedure without any threat to the public. To those two key breaches it can also be said approaching Mr Pere Officer Z4 did not have a full appreciation of the state of his firearm given that his apparel both apparently dislodged the safety catch, and then caught on the trigger causing a discharge of the firearm. It may be noted that these breaches of standards involved an inherent danger to the other attending officers as much as it did to Mr Pere.

[46] I also accept Mr Forster's argument that there were systemic elements to these failures. Whilst it cannot be shown that the concerns expressed during Officer Z4's training had any direct implication for this incident, it is significant that Officer Z4 received no one on one tutoring as had been a condition of his approval from the armed offenders course. Neither had he received any induction or mentoring, and no such formal induction or mentoring was in existence. This lack of comprehensive training may have caused Officer Z4 to do things that a well-trained officer would not have done. Neither is there any evidence that any concern arose amongst the other attending officers when he approached to assist with Mr Pere's movement, or when he earlier

assisted Officer Z3 in providing Mr Pere of his Bill of Rights warning which he did without handing off his weapon to another officer. This might also suggest a lack of clear protocols that are carefully followed by squad members to ensure safety. Further evidence of a general lack of standards is demonstrated by the fact that it was not just Officer Z4 who had the incorrect training rounds in his weapon. That was so of other officers. It is not difficult to imagine that this failure could have led to very serious adverse events in other situations requiring deployment of the Armed Offenders Squad. This further suggests that necessary high standards of professionalism for a squad such as this were not being maintained. As it happened this particular failure may have saved Mr Pere's life. But it is further indicative of systemic shortcomings in circumstances where well drilled and highly professional standards can be expected.

[47] Both the systemic failures, and the failures in Officer Z4's personal conduct, can be described as failures to take reasonable care. The state's culpability is accordingly less serious than it would have been had the breach arose from any deliberate conduct. But in any event the breach of s 23(5) arises as a consequence of a more straightforward analysis. Causing serious harm to a detainee by one of those responsible for the detention shooting him involves a breach of the minimum standards of detention arising from in the right under s 23(5).

### **Level of compensation**

[48] The next question is to assess the compensation that should be awarded for this breach.

[49] In doing so it is important to be clear that Mr Pere is not being compensated for the personal injuries he sustained. They are to be seen as having been compensated for under the Accident Compensation scheme. Damages for the injury cannot be recovered as a consequence of s 317 of the Accident Compensation Act, and whilst exemplary damages can be awarded under s 319 such damages do not arise here. As a full Court of the Court of Appeal explained in *Wilding v Attorney-General* these limitations preclude the award of Bill of Rights damages compensating for the physical injury.<sup>12</sup> The compensation awarded for a breach of the right in the Bill of

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<sup>12</sup> *Wilding v Attorney-General* [2003] 3 NZLR 787 at [14]–[16].

Rights is awarded to provide an effective remedy for the infringement of the fundamental right in itself. This involves the goals of vindication of the right, deterrence and denunciation.<sup>13</sup>

[50] There is no dispute between the parties that a declaration should be made by the Court that Mr Pere's rights under s 23(5) of the Bill of Rights were infringed. That declaration is duly made. That declaration in itself provides a measure of vindication, but it is also apparent that some financial compensation is appropriate for this purpose was well.

[51] Mr Forster argued that there was an analogy with workplace accidents, relying on the decision of a full Court of the High Court in *Department of Labour v Hanham*, and to the level of penalties awarded under the Health and Safety in Employment Act 1992 where penalties range from \$50,000 for low culpability up to \$175,000 for high culpability.<sup>14</sup> He also relied on levels of fine imposed in Worksafe prosecutions and argued an award of damages of \$250,000 was justified in the present case.

[52] Ms Tocher argued that the fines or penalties awarded under other legislative regimes were irrelevant, and that it was appropriate to look at comparable cases of Bill of Rights awards. He contended that the most helpful comparison was with the case of *Falwasser v Attorney-General*.<sup>15</sup> Here Mr Falwasser was assaulted several times with police batons and repeatedly sprayed with pepper spray over a period of some 20 minutes whilst in detention. A breach of s 23(5) arose. The Court held that an award of \$30,000 was appropriate to denounce the infringement of the right. It is notable that Stevens J indicated that "each case turns on its own facts" and he settled on the award as a matter of impression and judgment.<sup>16</sup>

[53] I accept Ms Tocher's submission that the comparison with the penalties awarded under other legislative regimes has no relevance. The penalties under the Health and Safety in Employment Act are the consequences of the application of those legislative provisions. They do not apply here, and they have different legislative

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<sup>13</sup> See *Taunoa v Attorney-General*, above n 2, including at [258], [300], [327] and [372].

<sup>14</sup> *Department of Labour v Hanham* HC Christchurch CRI-2008409-00002, 28 August 2008..

<sup>15</sup> *Falwasser v Attorney-General*, above n 9.

<sup>16</sup> At [124].

purposes. It may be that the legislation could have been applied to the present case, but as it happened other pathways were followed, including through the pursuit of a prosecution against Officer Z4. Those other pathways, and the potential consequences arising under them are not material. The focus is on the award that is necessary to provide an effective remedy for the infringement of the fundamental right beyond the grant of a declaration.

[54] A comparison with other cases where compensation has been awarded for breach of s 23(5) demonstrates that the amounts contended for by Mr Forster fall well outside the available range.

[55] I have outlined the factors relevant to the significance of the breach at [45]–[47] above. Mr Pere’s fundamental right was infringed as a result of inadvertent failures to maintain minimum standards rather than any deliberate conduct. It is accordingly less serious than *Falwasser* and other cases involving deliberate infringement. Questions of denunciation and deterrence are less significant. But it was nevertheless a serious departure, involving an infringement of the right leading to significant harm being occasioned to Mr Pere. These were also systemic failures. The award should be more than a notional one in those circumstances.

[56] Bearing in mind comparable cases, and the nature of the breach in the present case, in all the circumstances it seems to me that an award of \$20,000 is appropriate.

### **Conclusion and result**

[57] For the above reasons the plaintiff’s claim for breach of his right under s 23(5) of the Bill of Rights Act is upheld. I grant the declaration sought, and award \$20,000 as compensation. If there is any issue as to costs I will receive memoranda.

**Cooke J**