

BETWEEN **KEVIN JACK NGAN**

Appellant

AND **THE QUEEN**

Respondent

Coram: Elias CJ  
Blanchard J  
Tipping J  
McGrath J  
Anderson J

Hearing: 14 August 2007

Counsel A Shaw and CWJ Stevenson for the Appellant  
JC Pike and MD Downs for the Respondent

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**CRIMINAL APPEAL**

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Shaw Good morning Your Honours, I appear with Mr Stevenson for the appellant.

Elias CJ Thank you Mr Shaw, Mr Stevenson.

Anderson J May it please the Court, I appear with Mr Downs for the Crown.

Elias CJ Thank you Mr Pike, Mr Downs. Yes Mr Shaw.

Shaw Your Honours I should like to begin by presenting in summary form the essential points of legal argument that will be advanced in support of this appeal. There are five points. The first point Your Honours is that the common law power to protect property in danger for the purpose of safe-keeping does not authorise a full search of the property on an item by item basis.

Elias CJ Is that indicating that there is some search that you acknowledge is appropriate but not an item by item one?

Shaw No there is no acknowledgement that any search

Elias CJ So it does not authorise a search, is that what your submission is?

Shaw Yes, and specifically does not authorise the opening of closed items where the owner's identity and location are known. The second point is if there is a common law power and it is expansive enough to authorise the roadside opening and search of the zipped closed pouch in this case, such common law power does not survive Bill of Rights and covenant scrutiny. Thirdly,

Elias CJ Does that mean that there is no longer a common law power because of the Bill of Rights

Shaw Yes.

Elias CJ Yes, okay.

Shaw That the common law power is affected by the Bill of Rights.

Elias CJ Well it will be affected but are you saying that

Shaw Does not survive.

Elias CJ It doesn't survive, yes thank you.

Shaw Thirdly, even if the roadside opening and search of the pouch in the particular circumstances of this case was lawful it is submitted that having regard to the totality of the circumstances the search of the pouch was s.21 Bill of Rights unreasonable. The fourth point is that it follows that the appellant's rights guaranteed by s.21 of the Bill of Rights have been breached in this case. After *Shaheed Balancing* the evidence of the discovery of the drugs in the pouch should be ruled inadmissible, and fifthly, alternatively, the fruits of the safe-keeping roadside search should be declared inadmissible on the ground that the pouch was collected and held solely for non-criminal purposes and should not be admitted as evidence in a criminal proceeding.

Elias CJ Sorry, on the basis that the pouch?

Shaw Was collected and held solely for non-criminal purposes

Elias CJ Non?

Shaw Non-criminal purposes.

Elias CJ Non-criminal investigation purposes

Shaw Correct.

Elias CJ Yes.

- McGrath J Is that ground quite distinct from the other four?
- Shaw It is distinct in the sense that so far as I'm aware that ground has never been advanced in the present context before, but the framework of the argument puts it as a distinct fallback position after *Shaheed Balancing*, if I could put it that way Your Honour, and just a signal as Your Honours will be aware that is the *Caslake* proposition that's referred to in the written submissions, and there are other cases that will be referred to in the course of the argument. Your Honours I shall be dealing with points 1 to 3. Mr Stevenson will address you on points 4 and 5. May I preface my submissions with the observation that constitutional guarantees inevitably protect some criminal activity in securing the rights of us all? The point that I draw from that judicial observation in a Vermont case in 1991 is that I invite Your Honours to approach this case not on the basis that Mr Ngan is obviously a drug dealer, but on the basis that if it had been you or I in the motorcar on this occasion and what rights you and I possess as a matter of law. I think that framework is of cardinal importance in adopting the correct starting point for the elaboration of the legal position. Now Your Honours with the consent of my friend Mr Pike, we thought it appropriate that we hand up exhibits that were presented at the trial but not included in the materials, just for Your Honours' curiosity and/or assistance. There are photographs of the pouch, which is photograph no. 2, and the photograph no.16 is the computer satchel.
- Tipping J Is the pouch what is sometimes called a glasses case?
- Shaw Yes, and I could I just clarify that. Nobody knows whether it is or it isn't a sunglasses case. I would prefer just to call it a pouch that
- Tipping J I just wanted for identification purposes.
- Shaw Yes, yes, that is the item. Your Honours before I embark on the legal argument I wish to emphasise some facts of primary significance. The first is that the appellant owned the motor vehicle. That fact doesn't actually appear in the written submissions, but could I draw Your Honours' attention to the case on appeal, page 32, at line 17 in support of that proposition. The evidence was given at trial that Mr Ngan owned the motor vehicle. A second fact of importance is that the Police, both Police Officers were aware of his identity, of his name. Thirdly the Police Officers were aware where he was, namely Palmerston North Hospital, after he was helicoptered from the scene.
- Tipping J Was this a one vehicle accident?
- Shaw Yes.
- Tipping J That's what I imagined.

Shaw Yes. The next factor, the appellant was not arrested, so the common law power of search incidental to arrest isn't engaged in this case. Next, the car was not abandoned. I take Your Honours to that point in more detail shortly, but there was a finding in the Court of Appeal pre-trial ruling at para.17 of the judgment case on appeal, page 40 XL. Next, prior to the search of the pouch by Officer Johnson, it had been secured inside the computer satchel. Your Honours will recall that had been done by Officer Burden, and the computer satchel and its contents had been placed inside the boot of Officer Johnson's police vehicle. It was presumptively safe and secure in that position. Next, no consent was ever sought for the search that took place in this case, and if I could just pause there to observe that at the time that Officer Burden removed the computer satchel and pouch from the vehicle, the appellant was still present at the scene two meters away from the motor vehicle.

Tipping J If consent had been sought and obtained he'd be arguing he wasn't in a fit state to give it.

Shaw Well no Your Honour because his injuries, as Your Honour might infer, were relatively minor. He was discharged the following morning and in fact, although not before Your Honours, the road traffic report filled out by Officer Johnson says that his injuries are minor bruising.

Blanchard J And yet they used a helicopter.

Shaw Yes, perhaps

Elias CJ Perhaps they were securing him.

Anderson J It must have seemed potentially worse at the time than it proved in the event.

Shaw It may have done so, but the evidence is that the appellant was conscious.

Elias CJ He says of course in his evidence, it said he couldn't remember

Shaw Yes but that's more amnesia I would infer rather than any other serious

Blanchard J So he had head injuries.

Shaw Well there's no evidence of that.

Blanchard J Well if he had amnesia he wouldn't have got it from a bang on the foot.

Shaw Well

Elias CJ Ingestion of drugs maybe.

Shaw Yes, we're all speculating, I'm speculating. It was just that Your Honour Justice Tipping suggested that there would be an alternative argument being run and

Tipping J I have set the hare running Mr Shaw.

Shaw Yes, and the hare has run too far and I think that we're all speculating way beyond the actual established facts.

Elias CJ Well he certainly did give evidence of some concussion I think didn't he, or some amnesia as you say?

Shaw Well I use that word very loosely. In fact his evidence was to the effect that he couldn't recollect what had happened.

Tipping J Your proposition that they didn't seek consent is unanswerable.

Shaw Thank you Your Honour, and the hares can be put to rest at that point. The next factor that I would draw to attention is that as a matter of fact no roadside inventory was ever made by Officer Johnson. The only inventorying that he did was back at the Police Station on police property record sheets. Another factor

Elias CJ But that's relevant because at that stage you say the property was secured?

Shaw Yes, and further the Officer was not conducting an item by item inventory search at the roadside.

Blanchard J Did he have property sheets with him?

Shaw No evidence that he did.

Elias CJ He picked up the scattered property and secured that.

Shaw The first Officer picked up only the property that was in the vehicle, which included the pouch and the computer satchel, and the majority of the money and the digital camera, and he put all those specific items in the computer satchel, closed it up and then about three quarters of an hour later when Officer Johnson arrived that computer satchel was handed to Officer Johnson who then put it immediately in the boot of his patrol vehicle, so there was no inventory done at that point by either Officers and the proposition is there was no evidence that there was any inventory done when much later Officer Johnson went back to the boot of his vehicle and did the search that uncovered the drugs in this case.

Blanchard J How long were the Police Officers at the scene?

Shaw The evidence Your Honour is that the first Officer arrived shortly after 9pm, and then there were two Officers there – one was Highway Patrol and one was a local, but Constable Johnson didn't arrive until much later – 10.34pm. And the evidence is that somewhere about 9.30pm Senior Constable Burden located, collected, and secured the pouch, and as I read the evidence it appears that he held on to the computer satchel throughout the ensuing hour until the third Constable which was Senior Constable Johnson, and

Blanchard J Sorry, what time did Johnson arrive?

Shaw Johnson arrived - sorry I'll just check the chronology

Elias CJ 10.31pm, oh no, contacted

Shaw that was the call-out. 10.43pm I believe.

Elias CJ Yes.

Blanchard J Thank you.

Shaw Your Honour if you wish further details I have prepared a chronology of the events as a separate item and the times are recorded in that chronology. The evidence is that

Blanchard J I'm sorry I overlooked it - they're actually supposed to be in the submissions.

Shaw It would have caused the submissions

Elias CJ It's quite convenient separately.

Shaw It would have caused the submissions to go significantly over the allotted case

Elias CJ That's probably the reason.

Shaw Which was the real reason why it was put in as a separate document. On page 9 of the document Your Honours you will see that

Blanchard J So it was a device to avoid the rules?

Shaw Yes.

Tipping J You can't win Mr Shaw, you may as well skip that.

Shaw And apparently the Officers didn't leave the scene till 11.41pm approximately.

Tipping J Yes, am I right in thinking without prejudice to this useful traverse of the more detailed facts that the crunch in this case is whether it was reasonable to open the pouch?

Shaw Lawful.

Tipping J Well lawful but ultimately reasonable?

Shaw Yes, yes.

Tipping J Reasonableness is the ultimate question isn't it?

Shaw Well for a breach of s.21 it is, but given that this is a warrantless search on *Maihi* principles, if it was unlawful that is a very significant

Tipping J Well it's a step

Shaw Yes.

Tipping J But the ultimate question is whether it was unreasonable to open the pouch, and I'm not trying to trap you or anything Mr Shaw, but surely that is the ultimate question.

Shaw It is the ultimate question because without that there is no breach of the Bill of Rights and we're back to a common law situation which I don't think any of us want to go there in this case.

Tipping J But the whole case is about the Bill of Rights

Shaw It is.

Tipping J And s.21, so you've got to show it was unreasonable to open the pouch.

Shaw Yes, and as Your Honour accepts, one can approach that in two stages. Was it lawful, was it unreasonable?

Anderson J Or was it an unreasonable search which is a different proposition. It might be reasonable in terms of Police instinct and Police practice, but it's also an unreasonable search.

Shaw Search, or was it conducted in an unreasonable manner. The Court has emphasised that that is another factor. Your Honours I now wish to revert to the specific points of legal argument that I adumbrated earlier. Your Honours will recall that my first point is that the common law power to protect property in danger for the purpose of safe-keeping does not authorise a search – I'll take Your Honour's amendment there – does not authorise a search of the property, and certainly does not authorise an item by item search of the property, particularly where the items of property that are searched are presumptively safe already, and

the search in this case involved opening a patrol vehicle boot; opening a closed computer satchel; opening a closed pouch; and opening closed film canisters, and I suppose that the point is that the arguments would be different of course if we were in plain view territory, but we're not in this case, we're a million miles away from Officer Johnson conducting a plain view search. He clearly wasn't. He was rummaging through the items that were already secured in the boot and the common law has never granted a license to rummage when the purpose of the common law rule is safekeeping.

Elias CJ I just wonder whether it can be quite as absolute as you say, because there is some property that couldn't be kept safe by simply storing, if you have perishable items or something like that. What would happen then? The paau here for example

Shaw If it was lawfully owned for example.

Elias CJ Well I was just thinking of the paau here. If they'd been contained in containers, mightn't the Police Officers have to open those containers to ascertain that they're perishable then put them in a fridge or something?

Shaw If the Officer knew that there was paau in there.

Elias CJ But if he didn't know he's not entitled to find out whether he needs

Shaw If I had a suitcase on the back seat of the vehicle and the Officer opened the suitcase on the basis that it might contain paau, or it might contain something fragile, and go right through the suitcase item by item, or right through a lady's handbag, or right through somebody's briefcase that happens to be in the front seat of the car, that's where I'm coming from Your Honour. I think Your Honour's example is only raised where there's an evidential foundation that would reasonably affect the Officer to the point where 'oh there's fragile property in there, we must do something extra to protect the property'.

Blanchard J I can see that that might go to reasonableness, but I'm not sure that it goes to lawfulness. It seems to me that the Police have really an obligation on them to make sure that they're looking after the property in an appropriate way, and in order to fulfill that they need to know what the property is, at least in a general sense, so it would seem to me that they really can lawfully look to see what there is there. How far they go would go to reasonableness. For example if they came across a diary there would be no excuse at all for starting to read it. You'd know it was a diary. You could just deal with it in terms of safety on that basis, but in the example of the containers that might contain powder or might contain all sorts of things, surely they have to know what they are. For one thing they might have to decide whether they need to put them into cold storage.



Shaw Well if Your Honour takes that view, isn't that basically saying, or endorsing the proposition, anything and everything can be opened?

Blanchard J To find out what it is.

Shaw Yes.

Blanchard J Well I wouldn't put it quite as absolutely as that because it might be quite obvious what some things are and you wouldn't need to open them.

Shaw Like a computer satchel, and remember this Officer Your Honour has already looked inside the computer satchel when it was first handed to him.

Blanchard J Yes but something's been put into the computer satchel as a temporary securing. If it was merely a computer satchel the Police might have to proceed on the basis that what was in there was a computer, but given that they had put something in there themselves, that situation was not what they were looking at.

Shaw Well I think that strengthens the appellant's case, because in this case all the items in the computer satchel had essentially been put in there by Constable Burden.

Blanchard J Without being examined to see what they were except perhaps in a cursory way.

Shaw No, he had removed, he'd removed the pouch, the digital camera, money, and decided that the best place to put those three items was in the computer satchel which was half zipped open at the time. He could see that there was already a computer in there, so Your Honour there is no doubt that Constable Burden knew exactly what was inside the computer satchel when he handed it over to Constable Johnson, and Your Honours will recall that the evidence is that at the time of the handing over, the satchel was opened up and they had a look inside and some comment was made about money, the large amount of money in the computer, so I think on these facts Your Honour there is no rational reason why you'd need to go back to that satchel and check to see whether or not something was in there that needed to be in cool storage or frozen. I accept Your Honour's facts if there is an evidential foundation for such facts may require that type of step, but not on the facts of this case.

Tipping J Is the answer perhaps that the searcher for it to be reasonable must have a bone fide safekeeping purpose in mind

Shaw Yes.

Tipping J And you can't use it as a surrogate for an evidentiary search, is that sort of coming close to the

Shaw It's coming closer to that although Your Honour will recall that although there was comments made about this must drug money etc, His Honour Justice Miller says that the reason why the pouch was opened by Officer Johnson was to check to see whether there was any money in the pouch. But when you look at his actual evidence, and he was tested in cross-examination on it, he basically says 'I had really no idea what I might find, possibly cash', so it was purely

Tipping J But the purpose was to find out what was inside the pouch, not for evidentiary purposes but for safekeeping purposes. That seems to me to come clearly through the Judge's finding.

Shaw Yes.

Tipping J Now isn't that a very very material factor in whether it was reasonable?

Shaw Well it has to be.

Tipping J Yes. If there's good faith and the purpose is safekeeping I would need a lot of persuasion that that was unreasonable.

Shaw Well I will come to that obviously.

Tipping J Well I just signal that.

Shaw Yes, yes.

Tipping J And I read the Judge who heard the evidence as saying they were in good faith and although they mightn't have been sure what they were going to find they were looking (a) because they thought it important to know, and (b) they wanted to protect themselves against allegations of property going missing. Now that seems to me to be good faith and entirely reasonable.

Shaw Well it will come down to whether or not those are valid factors on the facts of the case.

Tipping J But assuming they are, assuming the evidence, and we can't double-guess the Judge's findings, not at this level anyway, and no one's really put any doubt on the Judge's findings that there was good faith. They weren't trying to use it as a device to find the evidence, and that they were motivated by (a) wanting to know genuinely what they were seizing, or taking possession of, and (b) they wanted to protect themselves from allegations - that's why they had someone there to witness it when he opened it.

Shaw Well

Tipping J Now if that's not reasonable, we're putting a very heavy burden on people in these circumstances.

Shaw Could I just take Your Honour, since I want to confront this now

Tipping J Well I think you have to from my point of view Mr Shaw, never mind all these cases and all the facts and so on, that seems to me to be the bottom line.

Shaw Well if I could take Your Honour to page 8 of the chronology you will see the second notation Senior Constable Johnson gave evidence at the hearing before Justice Miller and accepted by Justice Miller that the main reason we opened the computer satchel – I emphasise computer satchel – was to clarify roughly how much cash was in there.

Tipping J Well the pouch was by this stage inside the computer satchel wasn't it? Are you seeking to draw some

Shaw A major distinction was there was no rational reason why the Officer would be expecting to find money in the pouch, and when Your Honour looks at the next notation, Senior Constable Johnson gave evidence at the hearing that his suspicions were aroused at the time he opened the computer satchel that it was just the usual property check we do, referring to property, and that he had no idea, no idea I emphasise what he would find when he opened the sunglasses pouch – possibly more cash. Now that was the evidence that Justice Miller heard on the reason why he opened the pouch.

Tipping J Well wait a moment, you're talking here about the computer section. I thought you were making a studied distinction between computer satchel and pouch. What evidence was there as to why he opened the pouch that was inside the computer satchel?

Shaw That section that I just read out to Your Honour. It's the third notation on the page. His reason for opening the satchel Your Honour was contained in the second notation, to clarify roughly how much cash was in there. That was his evidence.

Tipping J Yes.

Blanchard J And then

Shaw And his reason for opening the pouch was he had no idea what he would find – possibly more cash.

Blanchard J Well he also said, and you've got it at the top of your page 9, 'I did not believe there were sunglasses in the pouch due to the fact that there was money scattered in the vehicle in odd places, I thought there was the possibility that there was further cash in the sunglasses pouch'.

Shaw Yes.

Tipping J I just don't want the law to get so pedantic as this Mr Shaw. I mean they were trying to work out what they were taking possession of. They were in good faith; they weren't looking for evidence without a foundation; they were just taking steps to find out what they were taking possession of and I think the Judge found didn't he that they were entitled to do that to protect themselves against suggestions that property had been nicked.

Elias CJ Is there inference of that?

Tipping J No, perhaps the Judge didn't find that but there was some reference to it.

Shaw Let's be clear Your Honour, the Judge found that this search was unlawful. Justice Miller found

Tipping J Yes well maybe he did

Shaw That the search was unlawful.

Tipping J But he found it was reasonable?

Shaw Correct.

Tipping J But I'm not sure about unlawfulness, but he found it was reasonable and I thought he would give it as a reason that they were entitled to protect themselves against - where did that come from?

Shaw No, that came from the first Court of Appeal

Tipping J Oh the first Court of Appeal

Shaw And the second Court of Appeal.

Tipping J And the second Court of Appeal. I'm sorry I got my source wrong. But what's wrong with that.

Shaw A lot Your Honour.

Tipping J A lot

Shaw The

Elias CJ Well I suppose your argument would be that if the Police are always entitled to search to secure then you never have a protection against search where property is abandoned.

Shaw No, because you can always have a bone fide belief that there might possibly be money in any particular closed item.

Elias CJ Well indeed, the Police

Shaw And you don't know until you open it up.

Elias CJ Well indeed the Police said that this was just normal practice.

Tipping J That might be a bit worrying, but here there was cash all over the place. I mean one's got to be realistic.

Shaw But the cash that was collected up by Constable Burden had been placed inside the computer satchel. There was no rational reason why you'd expect to find more money in other items that Constable Burden had individually himself placed. Constable Burden hadn't opened up the pouch when he went to put the pouch into the satchel. He didn't think that there was possibly money in there, and

Tipping J Well he was just temporarily securing it wasn't he?

Blanchard J Was he ever asked what he thought might be in there?

Shaw I'm sorry.

Blanchard J Was he ever asked what he thought might be in there? The reference Roman 21.

Shaw Thank you Your Honour.

Anderson J 'With your suspicions aroused, were you keen to have a look inside the small sunglass pouch to see what you might find'. Answer, 'not particularly, just a usual property check'.

Tipping J Did you read out s.18? 'No'.

Shaw But he then

Tipping J He might have but he didn't.

Shaw Well he didn't have

Tipping J Well I'm saying he might have if he had been trying to stretch it in that direction, he may well not have had grounds, but he was quite candid, he wasn't doing that.

Shaw But he later gave evidence that he had seized it under s.18.

Blanchard J This is the wrong Constable?

Shaw Yes.

Blanchard J In fact my question was related to Burden.

Shaw I think the answer to your question Your Honour Justice Blanchard is it wasn't put to Burden because he didn't open it, so it was almost a pointless question to him.

Blanchard J Well my question arose out of your submission. You were attributing to Burden the suggestion that he didn't form the view that there was cash there. All I was demonstrating is that he wasn't asked what his view was, it's just as much open to the inference that being the first on the scene he simply gathered things up without troubling too much about exactly what was there for the moment.

Shaw Well he certainly gathered things up and then handed them on to the next Constable who then starts to feel property in the computer satchel and because there isn't sunglasses in the sunglass pouch gives evidence accepted by the Judge that he's possibly looking for money.

Tipping J What would be wrong with a common law power that had incidental to it a power of reasonable search, the control being in the concept of reasonableness of a search associated with the safekeeping part? I can understand an anxiety about indiscriminate search or unreasonable search, but what would be wrong with the common law power including. I know you might say it's anticipating and begging the s.21 question, but it will all come to the same thing in the end won't it?

Shaw Well Your Honour, *Entick v Carrington* says "if it's law it will be found in our books", if it is not to be found there it is not law.

Elias CJ I don't want you to assume that I accept there is a common law power to search. That seems to be contrary to the concession that was made by the Crown in the High Court. A matter that the first Court of Appeal judgment came to really off its own bat, I think, by reference to the responsibilities of Police Officers, and I would like to see, I mean I would like – it may be pedantic – but I would like to know what we're talking about here, what the legal authority is, and I think it's dangerous to jump from a duty to a power.

Shaw I'm grateful for Your Honour's indication. I was going to canvas those issues in any event, notwithstanding Justice Tipping's position.

Tipping J I'm just exploring it Mr Shaw, I have not got a position at the moment.

Shaw Well I'm grateful for that indication too Your Honour.

Tipping J I thought you would have known that by now.

- Shaw Can I take Your Honours firstly back to point no.1, because I've been sidetracked slightly? I had a look just in terms of the legal framework at the history of legislation pertaining to New Zealand Police in New Zealand, and there are six statutes beginning with the Constabulary Force Ordinance of 1846 down to the 58 Act that we presently have, and what is interesting, although ultimately it may not be decisive is that in none of the statutes is there an express retention of the powers and duties of common law Constables. And I say that there's no express formula that one finds in other statutes for example s.42 of the Ontario Police Services Act in ss.3 states a Police Officer has the powers and duties ascribed to a Constable at common law.
- Tipping J But do any of our Acts exclude common law powers?
- Shaw No I'm just drawing attention to the fact that legislation in other jurisdictions frequently refer expressly to this being preserved and similarly
- Blanchard J Without saying what it is that's being preserved?
- Shaw Yes, just the common law.
- Blanchard J Well where does that take you?
- Shaw I'm not seeking to draw any major legal distinction Your Honour. All I'm saying is that when one looks at other jurisdictions, some contain an express preservation of the common law powers of a Constable.
- McGrath J Mr Shaw I understood from when you opened that you accepted there was a common law power to protect property in danger.
- Shaw I do.
- McGrath J And you've really spent the first hour without getting to it and I really would be most assisted if we could come to something that's pointed to this power otherwise you're in danger of not getting through all of your points before you have to sit down.
- Shaw Well can we go to the fact that the Court of Appeal cites no relevant authority for the proposition that there is a duty and/or a power to open all items, even closed items, as powers of a lawful inventory search.
- McGrath J But if you accept that there is a power, what's the case or line of authority on which you base that acceptance?
- Shaw *Amos v Police*.
- McGrath J Well perhaps it would be helpful to look at that.

- Shaw But *Amos v Police* simply says that there's a common law, a general common law power to protect property in danger.
- Elias CJ Does it say it's a power or does it say it's a duty coupled with an immunity? It may not matter but perhaps we should look at *Amos*, because presumably it gets into the common law position.
- Shaw Your Honours the relevant pages are set out at p.44 of the submissions.
- Elias CJ Where is it in the report Mr Shaw?
- Shaw Pages 568 to 569 and also on page 571. This common law power derives from an English case *Haines v Harwood*.
- Elias CJ Do we have that?
- Shaw No you don't, and it's quite a well-known case. It was a case where a Police Officer was observing a street scene and he saw a horse take fright and go down the street and place some people and property in danger and the Police Officer intervened and caused damage during his intervention, and the question was whether or not he could be liable in tort. That's the genesis of this
- Elias CJ So that's a duty coupled with an immunity?
- Shaw Yes.
- Elias CJ Yes.
- Blanchard J Towards the bottom of that page there's a quotation from *Waterfield*, and I don't know what the context of that is but it talks about conduct within the general scope of a duty and whether it involved an unjustifiable use of powers associated with the duty. As I say I don't know what the context of *Waterfield* was.
- Shaw The extract from the Court of Appeal that affirmed Justice Findlay's judgment at first instance is referred to at page 568 at lines 38, Lord Justice Mounie refers to it as a discretionary duty. Lord Justice Roache said the Policeman was moved by both a duty, both legal and moral.
- Tipping J But if you have a duty you must have a power to fulfill your duty.
- Shaw Yes.
- Elias CJ I'm not sure that that's right.
- Tipping J Why is that being too simplistic? It seems odd that if you have a duty to do something and you've got no power to do it
- Blanchard J Yes, to give you the protection only of an immunity would be strange.



- Shaw But it goes on to say at page 569 at the top of the page that there is a common law duty on Policemen to take steps which would otherwise be unlawful if he has apprehension on reasonable grounds of danger to life or property, and also the word 'danger' is again used at page 571 when the Judge is summarising the basis upon which the intervention in that case was upheld again the word 'danger' is used in para.4 of the summary.
- Tipping J But that I think is in the context of when you are actually protected from say trespass if you act under necessity as it's sometimes called. That's the immunity side of it, but at the moment I'm wrestling with the idea that you can have a duty but no power.
- Anderson J If there are necessarily implied powers, the question is what's the limit on them? The limit on them is determined by the nature of the duty and if the duty is simply to protect from danger then protecting them from danger is as far as the power will go.
- Shaw Yes that's my argument Your Honour and I'm sorry I haven't elaborated that
- McGrath J No, I'm just concerned that we get through it all, but that's really what you're saying in para.45.
- Shaw Thank you Your Honour, that's the kernel of the position because the argument is whatever Constable Johnson was doing in this case he was not protecting property from danger at the time that he conducted the search.
- Anderson J The justification for taking an inventory was to protect the Police from allegations which is quite a different idea.
- Shaw Yes, and I'll come to the argument that in my respectful submission, that is not a legitimate governmental interest that bears upon the common law power of safekeeping. It's for if you like an entirely ulterior purpose, quite separate from keeping the property safe.
- Elias CJ May I ask in other common law jurisdictions, does the common law power, if it is a power, does it go further than a power to protect from danger?
- Shaw Not in the situation of a road accident. I've found no case that says, in fact the only case that bears directly on Your Honour's question is *Caslake*
- Elias CJ Yes
- Shaw And could I take Your Honours to tab 8, para.30 of the judgment of Justices Lamer, Cory, McLachlin and Major

Elias CJ Are the paragraphs numbered?

Shaw Yes they are.

McGrath J In the margin.

Elias CJ Oh I see, thank you.

Shaw Para.30. After referring to the *Opperman* decision, the Chief Justice in that case wrote ‘in order to meet the standard set out by the charter all searches must be authorised by law; warrantless searches are prima facie unreasonable and the burden shifts to the party who is seeking to uphold the search. This means inter alia the party must be able to point to a law, which authorises the search. The respondent was unable to find either statutory or common law authority for inventory searches’.

Tipping J But that seems to be saying that if it’s unlawful it’s per se unreasonable.

Shaw That’s the position in Canada, particularly with warrantless searches.

Tipping J But that’s not the position that you are arguing for in New Zealand.

Shaw Yes it is and I thought that that was the position reached in *Maihi* that warrantless searches are presumptively

Tipping J Oh presumptively, yes presumptively maybe, but here the reasoning seems to be that unless you can find some lawful underpinning it is necessary unreasonable, not presumptively but necessarily

Anderson J And they are prima facie. Warrantless searches are prima facie unreasonable then the burden shifts, halfway down the paragraph.

Tipping J This means inter alia that the party must be able to point to a law which authorises the search.

Blanchard J Why did the Supreme Court in this case say it wasn’t an appropriate case to decide the question? Was that because this was a case concerning arrest so it isn’t actually an inventory search case?

Elias CJ Well there is no law, isn’t that it, that they’re saying that there is no common law power?

Blanchard J Well the argument from the respondent and the intervenors was that even if the search was not properly authorised by search incident to arrest, there ought to be an inventory search exception for the protection of the accused’s belongings and having noted that in the United States there is such an exception under *Opperman* the judgment goes on to say this is not an appropriate case to decide this question

and then a little further down they make it clear that they're only making their finding for the purposes of this appeal.

Tipping J Yes, I think it's strange. I couldn't quite get my mind around that either Mr Shaw.

Blanchard J And then they do the usual Canadian trick of dodging the whole thing anyway by leafing to s.24(2) of the charter and making some very interesting observations, particularly the third one.

Shaw Well that was the only common law decision that I could find that said something about no common basis for inventory searches. If I could just take you

Blanchard J Is the exception in the United States then simply a matter of constitutional law rather than common law?

Shaw Yes, and secondly Your Honour the exception is predicated as we emphasise in the written submissions on two very essential preconditions. Firstly there has to be a lawful impoundment of the vehicle and that is as I understand that it must be under the umbrella of some statutory lawful empowerment basis, so if the situation here was that the car had been seized under the Land Transport Act, the first limb of the American jurisprudence would have been satisfied that there was no seizure, sorry, no impoundment of the vehicle in this case. All that one can say is that it was being held. It wasn't statutorily impounded, so none of the American cases would be triggered in our fact situation.

Elias CJ But are you saying that the US cases require there to be statutory authority for seizure before the exception applies?

Shaw The cases make it very clear that there has to be a statutory legal impoundment.

McGrath J Does that mean that the cases don't really apply to accident situations? They really apply rather to cars that are just being impounded and removed

Shaw Well unless there's a power to impound a car following an accident which is conceivable.

McGrath J But do the cases say that with respect?

Shaw No, no.

McGrath J No.

Anderson J Impoundment implies an authority to hold and keep for a certain purpose.

Shaw Yes.

Anderson J Whereas this type of situation is simply holding for preservation purposes until the owner asks for it back.

Shaw Yes, and remember, I take Your Honour's point, the purpose of this safe-keeping is to keep the property safe for the owner, nothing more, nothing less. If you go beyond that you're exceeding your common law power.

Anderson J Impoundment necessarily implied at best the desirability of taking an inventory so that you haven't impounded more than you're entitled to for example.

Shaw Yes, and also as Your Honour will be aware that impoundment statutes require notice to be given to the owner and the inventory to be provided to the owner usually.

Anderson J Yes, usually. But there's quite a difference between taking something on the basis that one has a legal entitlement actually to hold and retain, on the other hand voluntarily assuming a bailment for preservation purposes.

Shaw Yes, and also to search, to protect yourself from speculative possible future claims.

Anderson J That comes a bit further down the track on your argument I think.

Shaw Yes, yes it does. I need to take Your Honours to the only case that the Crown rely on, and the Court of Appeal cites in support of the supposed common law power duty to inventorise. It's a case that unfortunately isn't in your material, so if I could hand up the decision *Poole and the Police*. The key point about this case Your Honours is that (1) there was a motor vehicle accident, that (2) the vehicle had been abandoned. The owner had fled the scene and when the Officer arrived he examined parts of the vehicle, including opening the boot of the vehicle. And leaving aside the question of whether or not that constituted a search and His Honour thought that it didn't on these facts, but leaving that aside, the critical observation is at the top of page 513. After citing *Grayson* His Honour said 'it could not be said to be unreasonable for a Police Officer coming upon the scene of a crashed vehicle with no occupants present to examine all those parts of the vehicle' – I emphasise all those parts of the vehicle – to which he was able to gain ready access before arranging for the vehicle to be removed and taken back to the Police Station or to some other secure place. Indeed it could be said to be negligent of him if he did not follow such course. I wish to make a number of observations about this decision. It's clearly distinguishable from the present case. This is a case of an abandoned vehicle and the law in this country, as in other

jurisdictions, is that when property is abandoned there is no reasonable expectation of privacy in relation to that property – i.e., zero expectation of privacy in relation to abandoned property. You just cannot raise Fourth Amendment, s.21 arguments, because they don't have any legs once property is abandoned. Here we do not have an abandoned vehicle. Mr Ngan was present at the time that the items were collected and he never in any conceivable sense abandoned his vehicle or his property. The most that one can say is that he could have had an expectation that the Police would look after his property for safekeeping purposes.

McGrath J Well neither did Mr Horn really abandon his property in the sense that he was relinquishing, implicitly relinquishing any rights of ownership.

Shaw Yes and I have to say there's a decision of the Court of Appeal in *Reuben* that draws the distinction that abandon doesn't mean that you abandon a title, it means that you actually abandon your connection or propinquity with the property.

McGrath J The only distinction you're making is that Horn walked away whereas Ngan could not and

Shaw Fled.

McGrath J And was disabled.

Shaw No, what I'm saying is that in terms of reasonable expectation of privacy the law is clear that if you flee a motor accident scene you lose the protection of the guarantee.

Anderson J What case is that?

Shaw *Reuben*. It's referred to in *Bogue's* case so I'll just turn up that decision Your Honour. It's tab 37.

Anderson J There's no need on my account to go to it now. We can look at it later.

Shaw No, no, no, I don't actually have a copy for Your Honours but it's cited at tab 37, *Bogue versus the Police* and *Bainbridge*, a decision of Your Honours Chief Justice, Justices Blanchard and Anderson is also cited. That's the *Bainbridge* case that refers to *Reuben*. But the second point that I want to emphasise from Horn's case in terms of what it says about the common law, Justice **Doogue** never suggests that there's a power or a duty to inventorise, he simply says it would be negligent not to examine the contents of the vehicle, and that's the far step that the Court of Appeal has taken. It cites the Horn decision as authority for a power to inventorise and in my respectful submission it erred in taking that position.

Tipping J Hence the submission that it is not reasonably incidental to safe-keeping to inventorise, is that the, it's a step too far

Shaw It's a step too far, and could I just add, because it's the next point that I have on my list, on a policy level it must be a step too far because the common law historically and traditionally has not extended Police powers of search. It hasn't seen it as its historical or proper role. That's a matter for Parliament.

Tipping J This is the crunch isn't it? Is it reasonably incidental to safekeeping to have a list in querying how much detail of what you're keeping? I mean one suitcase doesn't tell you very much.

Shaw No but it still keeps the property safe. What keeps the property safe is the fact that it's collected up, held, secured, and put in a safe place. The list doesn't keep the property safe.

Tipping J There must be circumstances mustn't there, I just say this in the abstract, where the Police are entitled, they'd have reasonable cause to look inside the suitcase. I mean what if there was every reason to think it could have something dangerous in it. I'm hypothesising.

Shaw Yes.

Tipping J I mean we can't have an absolute.

Shaw I'm not arguing for an absolute, I'm arguing that on these facts

Tipping J Well what is the test in your submission? If we're going to lay something down in your favour, we've got to allow room for it to work the other way if

Shaw Right, it's where my s.5 argument of the Bill of Rights comes in I'm anticipating now, but what I'm going to suggest

Tipping J But you see none of your steps, which I think were very helpful – you've set them out at the beginning Mr Shaw – very helpful, I wish more counsel would do that, none of your steps seems to me to give any guidance as to where the line falls between something which is on the wrong side of the line for looking to see what you've got and something that's on the right side of the line. That's what I'm worried about, amongst other things.

Shaw I've made the point that for policy reasons the Court shouldn't be in an expansive mode in this area, and I take Your Honour's point that there might be, where there is evidential foundation, reasonable grounds to believe that there's a bomb ticking in a suitcase, then the law would be made not to allow the Officer to open up the suitcase in such a situation, but we're a million miles away from that situation here in my respectful submission because bearing in mind who bears the onus,

where is the evidential foundation in the record that hazardous material or life-threatening material to the Officer who's got a duty to transport it back to the station and keep it safe. There's nothing in the record that would give the Court comfort in this case.

Elias CJ But is this submission directed at the reasonableness of the search or at the power to search, because I'm still groping for what is the scope and what is the source of the power to search?

Shaw My friends in the court of Appeal say that there's a common law power to search in this detailed cataloguing way that enables Officers to open up without any further inquiry, to open up everything.

Elias CJ Well I'm still not sure of that point.

Shaw Well the appellant's position is that that point is not to be found in any previously decided common law case, let alone New Zealand.

McGrath J Well the property that we're concerned about the safety of, in this case is cash, but you don't need to subscribe to a common law theory that would allow a general inventory of all property to reach the conclusion that to make cash safe which is in a car and some of it scattered around, it's necessary to record as soon as possible exactly how much was taken from the scene, because in keeping cash safe unfortunately, you have to guard yourself against subsequent incidents of possible pilfering and matters of that kind, so I wonder if you don't need to focus, not on the nature of a general inventory, but on recording cash that's present in this case.

Shaw I'd like to come back to that point rather than address it immediately because it is a significant point, but Your Honour yourself will recognise that the cash can be protected simply by being put in a property bag at the Police Station. They have bags where property is zipped up then there's a notation put on it and it's put in the police safe.

McGrath J Certainly, that may protect it from the Police Station but what Constable Johnson was saying was that he as I understood it, and this is as I understood what Justice Miller found, was that from the feel of the pouch he thought there might be cash inside it and he wanted to verify whether that was so or not and so we are now talking about the safety of the cash from the point of the accident and going to the Police Station, and not what's done at the Police Station.

Shaw Yes.

Anderson J Can we go back to the issue of the power or immunity, whatever it is, is defined by reference to the duty and if you define the duty then you will be able to say this goes beyond any power because it goes beyond the duty. So if the duty is to take reasonable steps to protect persons or

property in relation to property, which would allow a search for example of a potentially explosive device, then anything that goes beyond the reasonable steps test will be unauthorised.

Shaw The Court of Appeal said that there was a duty to inventorise subject to what was reasonably required in the circumstances.

Anderson J I understand, but that's a different issue in terms of your argument isn't it, because you say

Shaw It is and I would attack that as not being s.5 Bill of Rights compliant.

Anderson J I thought you would deal with that perhaps on the basis that taking an inventory is not a necessary part of protection.

Shaw That's the other point

Anderson J Of the property or persons in relation to it. It's if anything for the purpose of protecting the Police reputation.

Shaw There is a case that I should draw to Your Honour's attention, *Thomas v Sawkins*. This was a case about the right of the Police to attend a function at which the public had been invited albeit on private premises, and in the course of his judgment in that case, the Chief Justice, Lord Hewitt, says at page 254, and I'll hand the case in for Your Honours' assistance, 'I think that there is quite sufficient ground for the proposition that it is part of the preventive power and therefore part of the preventive duty of the Police in cases where there are such reasonable grounds of apprehension as the Justices have found here to enter and remain on private premises'. It goes without saying that the powers and duties of the Police are directed not to the interests of the Police but to the protection and welfare of the public, and that encapsulates, that's where I would invite Your Honours to draw the line that the safe-keeping common law function cannot be predicated or grounded in a proposition that we can extend the power on the basis that the Police need some protection. That is with great respect to those who might have the other view an unprincipled, not a right-centred approach, and that's what the Bill of Rights is trying to imbue in relation to its relationship with the common law.

McGrath J I'm proceeding Mr Shaw at the moment on the basis that cash may have needed some protection.

Tipping J I can understand your proposition that in p.35 of the Court of Appeal's judgment they went too far by saying that the power extends to cataloguing possessions of which they're taking control. That's really your point isn't it? They went too far.

Shaw Yes.



Tipping J      You wouldn't deny an ability to catalogue in some circumstances

Shaw            No

Tipping J      But you challenge the absoluteness.

Shaw            No, in the written submissions we contest a common law right to catalogue, if you want i.e. go through item by item. What we say it is sufficient that the guiding principle here is minimum interference, not expansive. That's the touchstone.

Anderson J    Item A, one black satchel, zipped, containing unknown objects.

Shaw            Yes, and if you read the property record sheet that they actually produced, it says black wallet, black satchel. It doesn't give any more detail than that and that's sufficient in my respectful submission. That would be a demonstrably justified limitation in a free and democratic society.

Tipping J      Am I right in thinking that the key conclusion to which you object in the Court of Appeal's judgment is contained in the third sentence of p.35, that is the relevant sentence is the duty of common law to protect this property, well that's fair enough, but the power which they've then invested in the Police goes beyond the scope of the duty that they've aspired to the Police.

Shaw            Yes.

Tipping J      I'm just trying to get this quite precise Mr Shaw if you'll forgive me.

Shaw            Yes.

Tipping J      As to where our real focus has to be.

Shaw            I would endorse that as my major concern that the Court of Appeal's lost focus by taking into account extraneous matters like a duty to protect themselves from tampering.

Tipping J      The power given is more extensive than the duty requires. That is to say that's what the Court of Appeal have done. They've vested a common law power more extensive than the duty.

Shaw            Correct, and the duty is a duty to protect property in danger, that's the scope

Anderson J    It's really to deal with property that might constitute a danger or be in danger.

Shaw            Yes.

Tipping J I don't think you can take this concept of danger too literally. I mean you would admit would you, or would own, that this property was in danger if it wasn't collected together and put into some form of safekeeping.

Shaw Yes.

Tipping J Yes.

Shaw Just whilst I'm thinking about Your Honour's concern

McGrath J Which you've promised to come back to.

Shaw Which I promised to come back to, I think that one of the points is that you're at an accident scene and the Officers will have done their best to collect up all the money that they saw, but human beings being what they are, they may have missed some money; some money may have blown away; it just may be under another item. The point about counting is reserved to cases where you know exactly how much money and Mr Ngan is not going to be able to contest, but you didn't collect up every last dollar that was on the scene, because that's not the Officer's duty. The Officer's duty is to collect up what's visible and readily obtainable, and so the counting of it doesn't actually protect the property in the situation that we're dealing with.

McGrath J You don't think that actually knowing what money you've got at the scene gives you some protection later in relation to the sum that's returned to you?

Shaw No, but Mr Ngan knows how much money was there one assumes, one assumes.

Tipping J Well.

Elias CJ Well I suppose an answer might be that if there were something about the nature of cash that required inventorisation for safeguarding, the same would apply to anything valuable and fungible? Loose diamonds?

Shaw Loose diamonds, yes, but it's the rummaging through closed receptacles that the appellant would respectfully submit is a key factor here.

Tipping J Well there's a link here with the plain view isn't there point? If it's not in plain view you're not allowed to go looking.

Shaw At one point one of the Officers, and I'll get the reference when I can, refers to the fact that their policy is to protect visible, valuable property.

Elias CJ            It may be convenient to take the adjournment now thank you.

11.31am            Court Adjourned  
11.50am            Court Resumed

Elias CJ            Thank you Mr Shaw.

Shaw                Thank you Your Honours. The proceeding submissions have been advanced on the basis that there is no common law power, that was my point no.1, and point no.2 assumes that there is a power as enunciated by the Court of Appeal, and Your Honours will appreciate that that immediately raises the relationship between that common law rule and the Bill of Rights requirements. In my respectful submission, if there were such a common law rule and the Court of Appeal was correct, that rule now needs to be re-evaluated and reconsidered in the light of the Bill of Rights requirements and the context, the relevant context sections 21 and 5, and I also want to canvas with you the relevant context of the covenant parallel provision, article 17 of the covenant. I would make this submission, the concept of unreasonableness in s.21 ought to be construed by reference to s.5 requirements, or an other way, it's improper for the Court not to have regard to s.5 when considering the meaning and scope of protection afforded by s.21.

Tipping J           Is there an equal route through s.6, or to the same effect?

Shaw                No, I don't believe it would be because s.5 has the three limbs that feed into the reasonableness requirement in s.21. It's my submission that they overlay the proper meaning to be accorded to the word 'unreasonable' in s.21. Could I take Your Honours immediately in support of that proposition to *Baigent's* case which is at tab 13, and I'm going to be referring to page 693 which is the first page of Justice Hardie Boys judgment. If I could just very briefly introduce this submission by saying that in this case one of the arguments that Mr McLindon and I advanced to the Court of Appeal was that the common law cause of action of malicious prosecution should be extended to include or to acknowledge a cause of action of negligent procurement of a search warrant, and it's in that context that Justice Hardie Boys makes his observations at line 32. I could take Your Honours to that. It's the entire paragraph. Now whilst that's the seed or a kernel for the argument that I'm advancing in this case, I'm suggesting that when the Court is looking at the big picture and the relationship between the common law and the Bill of Rights, s.5 is a key provision. I think if I might respectfully say for the reasons that Your Honour Justice Tipping refers to in *Hanson's case* that they encapsulate rule of law principles.

Tipping J           I appreciate the difference now between 6 and 5, yes.

- Shaw What I'm really saying is that to date the Courts haven't gone down this route but I believe it's time the Courts must grapple with the relationship between 21 and 5. My submission is 5 has a major impact upon the correct meaning and scope of the word 'unreasonable' in s.21, and that is reinforced by covenant jurisprudence, and I'll refer to one case in due course. Now Your Honours will all be familiar with the three limbs of s.5 prescribed by law. Now there's case law that says that that includes the common law
- Elias CJ I was just trying to remember, what's the most authoritative statement of that principle?
- Shaw The *Sunday Times* case is recognised and then in *Lange and Atkinson*, the *Sunday Times* case is referred to in the Court of Appeal's judgment. Your Honours judgment Justices Blanchard and Duff in *Communicado* also grappled with this issue and there's some support in your judgment that I'm advancing here as well, so those were the two leading cases that I'm aware of.
- Tipping Prescribed by law includes the common law.
- Shaw Includes the common but as the international jurisprudence very clearly emphasises, it just doesn't refer to the existence of something in the law, it also refers to the quality of the law.
- Tipping J But the common law must be consistent with the Bill of Rights. I mean there's this kind of a circular effect.
- Shaw There is, but could I just complete the notion prescribed by law as I want to put it to you? The jurisprudence from the *Sunday Times* case and then through a number of European cases, and I have the references here that I'll give you in a moment, says that there are three essential
- Elias CJ Sorry, are you talking about the Thalidomide case, the *Sunday Times* case?
- Shaw Yes, the *Sunday Times versus*
- Elias CJ Which is pre-Human Rights Act.
- Shaw No, no, the European Court Human Rights.
- Elias CJ Oh the European Court, yes, sorry, sorry, yes.
- Shaw I'm saying that the motion prescribed by law has an autonomous meaning. That autonomous meaning has been particularly elaborated at the international level by the European Court of Human Rights and they have identified three central planks. Firstly there has to be a domestic basis. Secondly, the law must be accessible, and thirdly it

must be foreseeable, so that a person can organise their conduct accordingly. Now those three principles are in the *Sunday Times versus UK case* and just so that Your Honours have the relevant references, I draw your attention to four recent cases that elaborate upon the notion prescribed by law or the companion phrase, in accordance with law. The first is a case *Valenzuela Contreras against Spain*. It's reported at 28 European Human Rights reports at 483, and the relevant paragraph are at 46, 49 to 51. The second case is *Andersson in Sweden*, 14 European Human Rights reports, 615, para.74 to 76, and then there are two decisions in June and July this year involving Bulgaria. The first is *Case of the Association for European Integration and Human Rights* and I'll spell the name because it's a difficult one *Ekimdzhiev versus Bulgaria*, decision of the European Court on the 28<sup>th</sup> June of this year, relevant paragraphs 71 to 77, and finally the case of *Peeve versus Bulgaria*, decision 26<sup>th</sup> July 2007, relevant paragraph 43. What those cases have progressively developed the *Sunday Times* principle to say that the notion of prescribe by law encapsulates rule of law requirements and is supposed to protect the individual from a lawful or arbitrary state interference. The same sentiment is to be found in covenant jurisprudence. I wish to hand up to Your Honours article 17 of the covenant, the decision of the Human Rights Committee in *Toonen versus Australia*, the relevant paragraph being 8.3 and the general comment of the Human Rights Committee on article 17, the relevant paragraphs being 1, 3, 4, 8 and 9.

- Elias CJ      Sorry, now these are all directed at what submission that the
- Shaw            That the proper interpretation of unreasonableness in s.21 takes it colour now. Part of the context is s.5 criteria.
- Elias CJ        Yes, but what are you directing as that? Is it the predictability and certainty of rules for search in order that they be prescribed by law?
- Shaw            That's one aspect. In other words the law should be clear.
- Elias CJ        Yes.
- Shaw            And not uncertain as I would argue the Court of Appeal's judgment makes the law. Moreover this jurisprudence from the covenant makes it clear that the issues of proportionality are really far more important than the Court of Appeal test discloses. In other words the Court of Appeal's reasonably required proposition in my submission does not survive covenant and BORA scrutiny and the case that I want to take you to, the *Toonen* case, is specifically on that point.
- Elias CJ        Yes, thank you.
- Shaw            If I could just hand them up there is three items.

Tipping J So you would be suggesting that instead of reasonably required, something like essential?

Shaw Demonstrably, just demonstrably required.

Tipping J Yes.

Shaw Necessary.

McGrath J Are we still on the first or have we moved into the second?

Shaw Second.

McGrath J Second, yes, thank you.

Shaw Madam Registrar I have inadvertently given you my copy as well. Just before I take you to the covenant material Your Honours I need to draw your attention also to first *Lange and Atkinson* in the Court of Appeal. It's reported at 1998, volume 3 at page 424, and the relevant passage is at 464 and if I just summarise what the Court of Appeal, sorry, what Justices Richardson, Henry, Keith and Blanchard say in their joint judgment, that covenant obligations are relevant to the proper articulation of s.5 requirements. So the covenant material that I'm about to explore with Your Honours is relevant not only because of the long title **..12.05.07 ??** which says that the Bill of Rights is inapt to affirm New Zealand's commitment to the covenant, but it's also relevant through the medium of a s.5 analysis. If I could take Your Honours firstly to article 17 itself, both paragraphs are relevant. Firstly the subject matter of the present case is engaged either because the appellant has been subjected to arbitrary or unlawful interference with his privacy, and p.2 is particularly germane because what it says is that everyone has the right to the protection of the law against such interference. In other words the common law should be moulded so as to protect individuals against arbitrary or unlawful interference. Now obviously Your Honours I've given you references to the general comment, which is general comment no.16. I won't take you through all of the paragraphs that I've given you but you will see in paras.3 and 4 the Committee deals separately with the term 'unlawful' and the term 'arbitrary'. Just as an aside Your Honours in covenant terms if there were a finding of unlawfulness that in itself would constitute of the covenant's guarantee. The notion of arbitrary interference is a separate disjunctive obligation that extends beyond something that's lawful to something as you will see should be in accordance with the provisions, aims and objectives of the covenant and should in any event be reasonable in the particular circumstances. And I can hear Your Honours saying 'but how does that advance the Bill of Rights argument'. Well it does when you go and read the *Toonen* decision which is the third item that I handed up to you and Your Honours, some of Your Honours will be familiar with this decision. This was a case where Tasmania had anti-homosexual statute law and it was

challenged on the grounds of incompatibility without article 17. If I can take Your Honours to para.8.3, which is if you could read it in its entirety is self-explanatory. So the argument that I'm inviting Your Honours to consider is that given the covenant requirement in relation to reasonableness, a covenant consistent interpretation of the Bill of Rights must read into s.21 a heavy onus of proportionality going to the point of being necessary. Perhaps I haven't explained that particularly succinctly. What that really means is the spirit of the covenant obligation fed into the Bill of Rights as part of its context means that the s.5 requirements of demonstrable justification would satisfy our covenant obligations. Any lesser threshold would not. The concept of reasonably required limitations as posited by the Court of Appeal are not covenant or Bill of Rights compliant.

Elias CJ           What about the fact that s.5 is directed at limitations on the rights as expressed, and the right here is to be free from arbitrary search or from unreasonable search in the domestic legislation?

Shaw               Well you

Elias CJ           Isn't it the limitation that needs to be proportional?

Shaw               Yes.

Elias CJ           On the argument that you're putting forward here?

Shaw               Yes, and what I'm saying is that because s.5 encapsulates the Bedrock rule of law principles any articulation of the contemporary New Zealand common law must have regard and factor in those criteria when articulating the meets and bounds of the common law rule. So to put it in concrete terms, is a search unreasonable, ah it has the gloss, the international in s.5 gloss that it has to be demonstrably justified before it's reasonable.

Elias CJ           But its limitations is the point that I'm making to you. Limitations have to be demonstrably justifiable and that's not the same as the scope of s.21.

Tipping J          An unreasonable search has to be demonstrably justified.

Elias CJ           Yes, yes, that's the proposition I'm putting to you. I'd like to hear what you have to say on it.

Shaw               I suppose there is what immediately springs to mind is an observation of Justice Richardson in *Jefferies case* where he emphasises that the right in s.21 is a negative right; it doesn't authorise reasonable searches. In other words s.21 is not the repository of any common law right of search. It cannot be. It's a Bill of Rights. The whole notion of this document is it restrains State power, so s.21 itself cannot confer a common law power, even by implication.

Elias CJ Well that's why I'm wondering why we're looking at section - I'm not disagreeing with you but I'm just trying to work out why it's necessary to go to s.5 to determine what the common law right is, particularly using s.5 via s.21.

Shaw Or on its own.

Elias CJ Or on its own.

Shaw Because an alternative formula would be the common law would apply the rule of law criteria that are found in s.5 in any event.

Elias CJ But I would have thought you have to apply those in any event. I mean as you say they're rule of law criteria, so if the common law is providing a power to search in an area where there are as you say Bedrock Human Rights, it should not be expansive and it must ensure that any right crafted by the common law is proportionate and is certain

Shaw And demonstrably justified.

Elias CJ Well I'm not sure about demonstrably justified, yes I suppose it is necessary.

Shaw I would go that far and I'm not trying to put words in Your Honour's mouth.

Elias CJ No.

Shaw A similar approach to that which I'm advocating in relation to the words 'reasonably required' used by the Court of Appeal is those words are criticised by Justice Binnie in the *Queen and Clayton* which is to be found in my friend's bundle of materials.

Tipping J Does he refer to this case or is he just criticising the words as such?

Shaw He's saying, and a whole section of his judgment deals with this, that those words don't pass charter scrutiny. The problem with the Canadian approach, if I can put it this way, is that they don't bring s.1 of their charter into play until after they've found a violation of s.8 of the charter

Elias CJ Wise, wise.

Shaw No but it's a nonsense because if you found with great respect

Tipping J Do we need to go here Mr Shaw?

Shaw No.



Blanchard J It's their escape clause?

Shaw Their escape clause is

Blanchard J Yes, they escape from their high sounding principles. We don't have similar sort of escape

Elias CJ We don't have high sounding principles.

Blanchard J Well that's right, they're too dangerous.

Anderson J Mr Shaw how can an unreasonable search be justified?

Shaw That's my point, and so any s.1 to 5 analysis has to be done prior to that as part of the normative character of what the guaranteed right is. That's what I'm submitting that the Canadians got it wrong

Anderson J When it goes past the point of justification it becomes unreasonable

Shaw Exactly.

Anderson J And that's it then, the screeching of what remedies or vindication is required.

Shaw Yes. For similar reasons that I've been

Elias CJ I would have thought you got there directly through s.21.

Anderson J Yes.

Shaw I just don't see in the New Zealand Courts jurisprudence to date a sufficiently powerful statement of what the true onus is in proportionality and rule of law terms and that's why I've sort of belabored this point, because I'd like to invite the Court to consider whether or not the threshold for compliance with s.21 is high enough.

Tipping J Are you really saying that unreasonableness for s.21 purposes must be judged against the criteria set out in s.5 for limitation purposes - you carry them across, that I think is what you're arguing?

Shaw It is, and

Tipping J And although they are designed for another purpose they can serve equally well as a touchstone, or at least a guide, as to what should be regarded as unreasonable or not unreasonable.

Shaw Yes, and you can take comfort in that by referring to the *Toonen* decision where obviously at the international level the notion of reasonableness goes to the point of necessity.

Elias CJ Yes but I would again, I don't know that it's necessary to be quite as, as

Shaw Dogmatic?

Elias CJ Well, yes you have to read the statute as a whole and there are themes that come through it, but I'm not that it's necessary to go via 5 to decide that unreasonable search is search that is not necessary and not proportional and not certain, because those, as you've said, are aspects of the rule of law.

Shaw That's a much cleaner route to go, although could I take Your Honour

Elias CJ I agree that the New Zealand cases don't give you an enormous amount of comfort.

Shaw There is Your Honour's judgment in *Shaheed* that I was intrigued about at para.20. That's tab 6 and notwithstanding that it was a dissenting judgment, para.20 seems on one reading of it to support the thrust of what I've been submitting.

Tipping J What, I'm sorry?

Shaw That's under tab 36.

Tipping J 36.

Shaw Paragraph 20 of the *Shaheed* judgment. I don't know whether Your Honour was attempting to assist my argument or not but there is a conjunction there of sections 5 and 21 which I found intriguing.

Elias CJ Yes.

Anderson J Is it a question of saying in determining whether the search is unreasonable one must bear in mind the constraints of s.5?

Shaw Yes, because it's part of the relevant context, because you interpret the Bill of Rights as a whole and the rule of law runs right through the Bill of Rights guarantees.

Tipping J All this as I've noted here is on the premise that there is a common law power as enunciated by the Court of Appeal, but all this seems to suggest that the common law power is enunciated by the Court of Appeal was unsound.

Shaw Correct, that's the burden

Tipping J So it's not based on an assumption that it exists. The premise is that if there is a power it has been wrongly articulated by the Court of Appeal

Shaw And wrongly applied by the Court of Appeal in this case, yes. Just before I conclude this point, my friend has referred in his written submissions to *Waterfield*.

Elias CJ Yes.

Shaw *Waterfield* doesn't pass muster under the principles that we've just been discussing.

Elias CJ When was it decided?

Shaw 1964, Divisional Court in England.

McGrath J But Justice Binnie had something to say about that didn't he?

Shaw Yes, he's not in favour of *Waterfield* at all.

McGrath J No, but the majority were more amenable to it?

Shaw Well they were, but remember this was a gun case and there exigent circumstances. As Your Honour says, the Canadians are very patchy in how they approach things. There could be all sorts of reasons why in that particular case a lesser level of scrutiny was applied, but what I'm inviting Your Honours to do is to jettison *Waterfield*; say it's parse; we now have the Bill of Rights; we now appreciate rule of law principles and how they're factored in to rights and the *Waterfield* test albeit applied in common law jurisdictions is no longer appropriate. Now I move on to my final point no.3, even if the roadside opening and search of the pouch was lawful, having regard to the totality of the circumstances, the search of the pouch in this case and specific film canisters that yielded the LSD flakes was s.21 BORA unreasonable, could I refer Your Honours to para.4.3 of the written submissions. Sorry, 4.13 of the written submissions.

Tipping J This proposition was a ruse, isn't that putting it a bit high on the findings of fact Mr Shaw? It implies bad faith.

Shaw Well my friend's going to address you on that issue.

Tipping J Oh you've given him the hospital pass have you?

Shaw No it's not a hospital pass in my respectful submission.

Tipping J Yes but let's get this quite clear, are you saying in effect that this was a ruse, that they were really looking for evidence and that they weren't honestly doing what they said they were doing? I think you have to have that flat on the table.

Shaw Right the flat proposition is, and my friend will develop it in his submissions to you, that there are elements of bad faith in this case

because Constable Johnson, although he conducted the roadside search, in his paperwork pretended that the search had gone back at the Station.

Anderson J That battle has to be won at first instance. So often we get cases to this Court raising interesting and important issues of principle and they all get knocked over by the facts, and if you are going to argue that you've got to nail it at first instance and get a finding to that fact. A lot of stuff comes our way which looks a bit suspicious, but it's just not rammed home at the factual level.

Tipping J Was there any challenge to the Constables?

Shaw Yes.

Tipping J There was?

Shaw Yes.

Tipping J There was, but the Judge didn't buy it by the sound of it.

Shaw No, the Judge didn't rule on it one way or the other.

Tipping J Alright.

Shaw My friend will develop that point but he's heard Your Honour's initial response. I invited Your Honours to read 4.13. I think the key points are this was a warrantless search

Tipping J But we're talking now on the premise as I understand it that it was a lawful warrantless search. Your heading is even if search lawful, not unreasonable.

Shaw Yes, yes.

Tipping J I mean you've got to stick with your premise haven't you.

Shaw Yes, but the point is it's still a factor that even though it's a lawful warrantless search, it's warrantless.

Anderson J Can you have an unreasonable lawful search except in relationship to the manner in which the search is conducted?

Shaw I'm sure you can.

Anderson J Well it's hard to think of one. I mean I can think of cases where it's lawful but it's carried out in an unreasonable way and I've forgotten the name of the case, but when I decided some years ago whether a search warrant was executed at 2 in the morning in a family home and

they'd been sitting on it for days, and obviously executed it for strategic reasons.

Shaw Yes.

Blanchard J It's referred to in the Law Commission's report that came out this week.

Anderson J And I knocked that evidence out on the grounds that although it had the basis of a warrant, it was unreasonable in its execution, but apart from that type of situation

Shaw But I suppose that's the importance of the covenant jurisprudence that the notions of unlawfulness and arbitrariness/unreasonableness are separate concepts and what the covenant jurisprudence establishes is that you can have something that's lawful but nevertheless unreasonable, i.e., arbitrary. It's just another

Anderson J Well in relation to the *Toonen* case you could see that, although it's a little bit elusive in other contexts.

Tipping J But you could have a situation where you had a lawful power to search but it's arbitrary or oppressive or something like that to exercise it in the particular circumstances, but frankly

Anderson J For the wrong reason.

Tipping J I think this gives me the flavour that your client is simply trying to have every possible argument. I mean he seems to be pressing very hard. If he doesn't succeed in showing it's unlawful, I would have thought he's well on the back foot Mr Shaw. What precisely, you've got a lot of pejorative stuff in 4.13, but what precisely makes it, assuming there was a power to do what they did, unreasonable to exercise it.

Shaw The pouch was already presumptively safe in the boot of the Patrol Officer's vehicle.

Tipping J But this is a power to inventorise isn't it?

Shaw Yes.

Tipping J If this is a power to inventorise, this aspect of the search was lawful, the inventorising. You can't say that it was already safe because we're already assuming that they had the power to inventorise. This is a sort of circular

Shaw I see what Your Honour is

Tipping J That's why I'm getting a little edgy because it just seems to me your client can't have it all ways. Through your skill he's having a jolly good try, but

Shaw No, but perhaps you've misread, I think you've misread my point which is even if the roadside opening and search of the pouch was lawful the issue still is was the inventorising?

Tipping J Oh, oh, well I thought we were assuming here that the search in the sense of inventorising was lawful.

Shaw No, I wasn't assuming that. Does that make it a little less aggressive?

Tipping J It makes it less problematic, but what is it you're assuming was lawful?

Shaw That there was a power to safe-keep which did not include.

Tipping J Well I've got even if the search was lawful, but it's not, even if the

Shaw Even if the, yes I see what Your Honour's suggesting there.

Tipping J Well you used the word 'search'.

Shaw Yes.

Tipping J I'm sorry to sound pedantic Mr Shaw but this is important stuff and we've got to be absolutely clear what your premise is. Would it be a good idea to go on to your learned junior and let you mull this one.

Shaw Yes, I just want to say that in this particular case the Officer wasn't inventorising at the roadside. Your Honours will recall, and that goes to Justice Anderson's observation, the manner of the execution. In this particular case the evidence was that Officer Johnson arrived at the scene and kept his notebook in his patrol vehicle, so when he was opening he wasn't inventorising.

Tipping J He wasn't inventorising.

Shaw Yes, and furthermore there is evidence from Senior Constable Burden that he was not actually a witness to what was happening on because he said he didn't look into the item.

Tipping J Well if he wasn't inventorising the search couldn't have been awful. I mean I fully understand the force of your first two points. I think they're good points, but I think your client's trying to have his cake and eat it here.

Anderson J And if you relied on this it's the king hit isn't it?

Shaw Well it shows

Anderson J What else do you need?

Tipping J You can't have it both lawful and not inventorising because he wouldn't be doing to the purpose for which you found it was lawful. Ex-hypothesi

Shaw Yes, so what Your Honour's suggesting is that if the facts that I've just told you are actually true, and they were in the case on appeal, then that would go to legality rather than unreasonableness?

Tipping J I would have thought so.

Blanchard J And I think the person who wrote para.4.13 thought that because it's all premised on an unlawful search.

Tipping J Yes.

Shaw Well I'm sorry that's caused a little jarring. Just finally before I sit down I wanted to go back to Justice McGrath's proposition.

McGrath J Thank you.

Shaw For me the answer is the touchstone principle is least intrusive conduct and counting the money does not protect the money.

Blanchard J Well arguably it does. It's more susceptible of having some of it pilfered than if the money has been counted.

Shaw If that is a valid common law concern, the pilfering, then I

Blanchard J Well it would be a concern for the victim. It's the victim who may well suffer from it. If the money has just been put in a bag without being counted indeed he may not even know that it is money in there because you haven't opened it, it's the victim who's like to suffer if there was in fact money there and somebody came and pilfered it.

Shaw Well in my respectful

Blanchard J So it protects the Police and the person whose property it is.

Shaw Well in my respectful submission the common law duty is satisfied by collecting and securing the pouch and counting is not a requirement or a power or a duty. I mean if pilfering is a problem, where's the evidence, where's the evidential foundation laid by the Crown in this case?

Blanchard J Well there can't be because the Police have a practice of counting.

- Shaw But my friend Mr Pike in his submissions is trying to support the Court of Appeal's reasoning on the basis that it's well-known that pilfering takes place from time-to-time and the Police need to be protected from that, but with great respect to my friend there's no evidential foundation for that in this case.
- Anderson J The whole idea of securing it is to secure it properly so it will be safe, and it's the securing, not the counting, that goes to safety.
- Shaw Thank you Your Honour, that with respect Justice McGrath would be my answer.
- McGrath J Thank you, that's what I was asking for.
- Shaw Thank you Your Honour.
- Elias CJ Thank you Mr Shaw. Mr Stevenson.
- Stevenson May it please Your Honours, as Mr Shaw has indicated, I propose to address the Court on two matters. I think I can be relatively brief which is not to say the appellant doesn't suggest the first point at least I'm going to raise is potentially determinative. The two points then are first the question of whether or not the fruits of this type of administrative search can later be tendered as evidence at a criminal trial and then a question of *Shaheed Balancing* which the appellant says will arise in this case. Turning first to the question of what arises here, namely a search which didn't require prior judicial authorisation, we've included in the materials a New Zealand case which in a round-about way touches on that general issue that *Queen and Salmond* and that's at tab 33 of the appellant's volume 2. I'm going to just very briefly summarise the factual background of that case and the essential agreed point reached by the members of the Court, and I'm then going to refer to a more recent Canadian case which I regret I had not cited prior to the filing of these authorities, but which I want to refer to, and I think is helpful and I have copies available. First of all in terms of *Queen and Salmond*, there was a question as to whether or not blood which had been taken legitimately could be used for a purpose that had not originally been apprehended - that is to identify the driver. Now all of the Judges on my reading of the case essentially agreed with the general principle that it's wrong to use evidence taken pursuant in that case to statute for a purpose not apprehended by the statute. Ultimately however in that case the evidence was admitted because the majority considered a purpose of the Land Transport Act, it was road safety, and identifying a driver fell within that purpose. So on the facts of that case there was no difficulty, but in my submission the Judges when they undertook the background context analysis, did come to the point for example starting with Justice Cooke at page 11 of the report
- Tipping J Was this the case where they took the blood for blood alcohol purposes but later used it to identify the driver.



Stevenson Correct.

Tipping J Yes.

Stevenson Yes. And the Judges as I say I think whilst admitting the evidence for that purpose to identify because they felt it fell within the general purpose of road safety, the Judges on my reading all agreed that in terms of principle it would be wrong to admit evidence for a purpose that wasn't apprehended at all. Of course in that case they didn't that that was a difficulty. Cooke at page 11 for example said effectively – that's at line 5 – 'to say that evidence obtained by in effect compulsion under statutory powers can be used for purposes not authorised by the statute is to go very far. It would be tantamount to amending the Act. It does not seem to me that this Court could sanction such an approach'. I want to refer also to

Tipping J So the dichotomy here is between safety and law enforcement?

Stevenson Yes.

Elias CJ Or was it that it had to be for the purposes of the Act and the Act included safety?

Tipping J When I said here I mean in our present case. The dichotomy is between safety and law enforcement

Stevenson That's right.

Tipping J Which is a much sharper contrast than the rather subtle distinctions that were being drawn in *Salmond*.

Stevenson Correct, and I'll come to *Colarusso* the Canadian Court which dealt with a situation perhaps that there's more analogy to our case, but I just wanted before leaving *Salmond* to alert Your Honours to what The Honourable Casey J said and this is at page 19 of the report. Now he wouldn't have admitted the evidence and said at line 40, this is at page 19, line 40, it's admission – he's talking about the blood for the purposes of identity – it's admission this case can only be seen as a backdoor method of getting in evidence which would be rejected out of hand if the blood specimen had been taken without consent for identification purposes.

Tipping J Yes I remember this case vividly when it was decided. There was quite a major debate all around the place as to which side of this argument had the legs.

Stevenson That's right, and I think that *Colarusso* recently described this concept of whether or not evidence obtained or seized for one purpose can be used for another and it is one of the more difficult concepts in search

and seizure. As I say it's been carefully considered by the Canadian Supreme Court in a case called *Colarusso*. I beg your pardon I'm not sure if Your Honours want to have that handed up now and I can draw Your Honours to the particular paragraphs.

Elias CJ Yes please.

Stevenson Now briefly I can summarise the facts. There in that case the Coroner attended the hospital. There had been an accident whereby the accused had careered into one car maiming two people, continued on and killed somebody else. Well that was the allegation. The Coroner attended hospital and pursuant to his statutory powers for non-prosecutorial purposes took blood. Ultimately the Supreme Court considered that the Police later taking that blood and effectively seizing it for criminal prosecution purposes couldn't be countenanced and I think I can draw Your Honours to the key paragraph in their judgment from *La Forest* for the majority. He said, and this is at para.63, I beg your pardon, page 63 of the judgment. 62 to 63, beginning 62, para.i beginning 'the State cannot'. He said 'the State cannot however have it both ways. It cannot be argued that the Coroner's seizure is reasonable because it is independent of the criminal law enforcement arm of the state while the state is at the same time attempting to introduce into criminal proceedings the very evidence seized by the Coroner. It follows logically in my opinion that a seizure by a Coroner will only be reasonable while the evidence is used for the purpose for which it was seized, namely for determining whether an inquest; into the death of the individual is warranted. Once the evidence has been appropriated by the criminal law enforcement arm of the state for use in criminal proceedings, there is no foundation on which to argue the Coroner's seizure continues to be reasonable'.

Tipping J So they've sort of retrospectively unreasonablised the original seizure by dint of what the purpose was. That's an interesting concept. It was reasonable initially but it becomes unreasonable when you seek to use it for an unrelated purpose.

Stevenson Yes, and I think also in the judgment it was approached a different way that at the time the Police took the blood from the Coroner and seized it for criminal prosecutions purposes, the seizure was unreasonable, so it wasn't a focus so much on the search, it was the seizure itself and I raised that case because of the analogy it bares, **in** my submission to this case. Whilst it might be thought for argument sake that what happened was not unlawful, and of course there was no prior judicial authority required for the Police acting in their role to safe-keep property, it's the appellant's submission that to then seize that property for criminal prosecution purposes, amounts to an unreasonable seizure, and of course the Court's not ever wanting to unnecessarily limit officials or administration in these types of searches that will happen across a broad spectrum of administrative function. They don't require prior judicial authorisation but it's a significantly different thing in my

submission to then seize and produce the fruits of those sorts of searches.

Elias CJ Isn't this contrary to *Jefferies* and quite a lot of New Zealand authority. I'm just thinking the Coroner example is interesting because it's a different actor and so there is a Police seizure at least in that case, but if you have the Police acting lawfully for one purpose and then discovering information of use for another purpose, is that

Stevenson Well at first flush of course it's problematic to break it down in that way when you have the same person acting throughout, but one must remember that the Police invoked s.18 to seize the property later at the Station. Now the underlying policy must be that it's inappropriate to suggest that the Police in safe-keeping would be unduly limited, in fact that's a separate argument, but it would apply all sorts of official action. The question is whether or not because there's no prior authorisation required, and taking that as an important context, it's then acceptable to allow the Crown to adduce whatever's uncovered, in those circumstances, against the accused at trial.

Anderson J Well suppose the Customs Officer is searching through a bag and finds clear evidence that the person's whose affects are being searched has just murdered someone. They must be able to seize that evidence and by the same token if a search is not unreasonable and discloses evidence of criminality then the seizure of the criminal evidence can't be unreasonable.

Stevenson Yes, it may be that this consideration is more property undertaken in the *Shaheed Balancing* test, and I acknowledge the examples.

Anderson J It might come in at that level, yes.

Stevenson I acknowledge the examples Your Honour gives, but certainly the Supreme Court and La Forest, and he went through it, had no difficulty whatsoever in saying in those circumstances that it would be inappropriate to allow effectively the Police, and he uses these words 'to piggy back on the authority that another person had in his particular situation to undertake the search. The Police would never in the circumstances of that case be entitled to have done what was done and similarly in this case, absent, acting to safe-keep property from which there may be some power in terms of the common law to protect property, absent that the Police wouldn't have been entitled to open the pouch.

Anderson J Well I for myself see that coming in more on the discretionary level than on the classification level.

Stevenson It may well be but the reason why I originally started with *Salmond* is because of the interesting comment from Casey when he talked about a backdoor method

- Anderson J Justice Casey.
- Stevenson Justice Casey I beg your pardon Sir, yes. The Honourable Justice Casey, his comment about the backdoor method of getting in evidence that would be otherwise rejected out of hand
- Tipping J Well putting it slightly less dramatically, it's really a suggestion that if you can't get it directly, you shouldn't be allowed to get it indirectly.
- Stevenson Yes.
- Tipping J If you couldn't get it at the scene or at the Police Station under the Misuse of Drugs Act for example, how can you get it through exercising another power lawfully? It's an interesting conceptual and the fact that there were two different stages in the Canadian case tends to mask that conceptually it could be said you've got the same situation. That's I think your point. I'm not saying whether I agree with it or not, but that is the point.
- Stevenson That's right and it undercuts the carefully crafted laws we have in statute as to search and seizure and allows as La Forest said, the Police to piggyback on what has happened or as
- Tipping J Here it was piggybacking on the Coroner. In our case it's piggybacking on themselves so to speak.
- Stevenson Whether or not that's necessarily possible, conceptually it is difficult, but one must first of all have regard to the fact that we have the high standard before which agents of the State are entitled to search and then consider equally that there will be occasions, whether or not this is one of them, in fulfilling their function there will be some type of search. Whether or not it's appropriate if evidence is uncovered in those situations to allow that evidence to be adduced and the appellant says the answer should be effectively that given by La Forest, Justice La Forest, in the case that I've referred to in *Colarusso*.
- Tipping J Maybe the answer is in the *Shaheed Balancing test*, that you can't have absolute rules in this area, you have to feel the weight of it so to speak.
- Stevenson Yes. I don't know if I can say terribly more about that point, in which case I propose to turn then to the *Shaheed Balancing test*, and in doing so of course I acknowledge that Your Honours have to undertake other considerations before arising at that but I touch briefly on the *Shaheed Balancing Test*. Ultimately of course it's a question of whether or not exclusion of evidence to indicate the breach of a right is proportionate having regard to the interest in prosecution, typically of serious crime. So that involves here two things and no doubt those are things that Your Honours will more elegantly summarise than I do but I simply say on behalf of the appellant that he had a significant expectation to

privacy or more generally when considering the value at stake and considering the New Zealand approach to such values, it's the appellant's submission that people who crash their car and have property collected for the purposes of safe-keeping have a considerable expectation of privacy and especially closed what appear to be personal receptacles. More obviously briefcases and handbags, but in this case a small pouch, zipped closed, which can be rightly categorised or referred to as a personal receptacle of some sort. It's the appellant's case that despite the fact that the Police were dealing first with a vehicle and the reduced expectations in relation to that, ultimately at the time the pouch was open they must have known they were dealing with an item of personal property and that it appeared to be some sort of personal receptacle. It's been said that few things are more inherently private than handbags and those sorts of things and I accept there's a distinction between that and the item we're dealing with here, but it is my submission it was some sort of personal receptacle and there was a high expectation, rightly so, of privacy to it.

Anderson J It's just slipped my mind Mr Stevenson where this pouch was when first noticed. Was it loose in the car or something?

Stevenson As I recall the car was upside down and there were items behind Mr Ngan which would have been on the ceiling effectively of his car and it was with some other items close to his person.

Anderson J Likely to have been on the seat beside him immediately before the crash, that sort of thing. It wasn't inside the satchel at the point was it?

Stevenson No, no. Against the assessment of his privacy; the general expectation of privacy in such circumstances, one has to consider the interest in the prosecution in this case. We're dealing with methamphetamine for supply but this was relatively smoking a very small amount of the drug over the presumption that 6.9 grams I stress relatively speaking.

Anderson J He pleaded guilty to the LSD didn't he?

Stevenson He did, yes.

Anderson J And this appeal against that as well?

Stevenson Well, that's also potentially problematic but his guilty plea of course was predicated upon the findings as to the legality and admissibility of the evidence, so

Anderson J I understand that argument but is this appeal against that as well?

Stevenson It is, yes, and in terms of the LSD, again a small amount, two flakes, and it's my submission that the interest in prosecution of that crime in those circumstances doesn't call for inclusion of the evidence that there

needs to be vindication by exclusion. I could go on and talk about things that were said in *Maihi* and *Shaheed*, in particular but

Blanchard J Are you correct in saying that the appeal relates to the LSD? The notice of application for leave doesn't mention it. It only talks about conviction for possession for methamphetamine for supply.

Stevenson I'd need to double-check that Sir. I seem to recall the ground

Blanchard J Well I'm looking at the notice.

Elias CJ Perhaps that's something you can check over lunch.

Blanchard J I don't know that the Court of Appeal was dealing with that either.

Stevenson I think in number B indexed case the actual judgment in this Court in granting leave said the approved ground is whether the evidence of methamphetamine and LSD should have been ruled inadmissible, so perhaps that was a correction of something

Elias CJ How was the position preserved, because there was a 344(a) application the appeal to the Court of Appeal? We don't have a direct appeal from that, and then there was a guilty plea entered on the LSD. Can you do that?

Stevenson I need to check that frankly.

Elias CJ Mr Pike is shaking his head. You have to preserve the position don't you? There would have to be a case stated or a directed verdict.

Anderson J No you have to establish on the evidence that you pleaded guilty only because of that ruling.

Tipping J And you've got to appeal, despite the plea, you've got to have appealed haven't you against the LSD conviction?

Stevenson Someone can in the course of an appeal seek leave to vacate a guilty plea on the usual grounds there's been some mistake as to fact of law and in this case I suppose it would be said there was a mistake as

Tipping J But there was an appeal to the Court of Appeal against the LSD conviction was there, despite the plea of guilty to preserve the position, or wasn't there? That I think is crucial.

Stevenson That's always what's been anticipated. I'll need to check the record.

Tipping J If there was then you've got leave in effect to bring both of them up here you may be alright.

Stevenson I understand.

- Anderson J In view of his raging drug habit, can you tell us what penalties were imposed for the respective offences?
- Stevenson He was ultimately – I wasn't trial counsel – he was ultimately sentenced to three and a half years imprisonment.
- Anderson J Concurrent was it?
- Stevenson Total, yes it must have been concurrent.
- Anderson J Perhaps you could find that out as it might have some bearing on this other issue which has been raised.
- Stevenson Yes.
- Elias CJ There is also the point in terms of inevitably discoverability which you will have I think to enlarge on that although you make reference to the newspaper clipping, as soon as they had done the checks on him this man had previous form didn't he?
- Stevenson Yes, and I was just about to turn to that as a factor in the *Shaheed Balancing Test*. I think it's more appropriately dealt with there. The question in terms of inevitability first of all was whether or not the wallet itself would have been opened. I understand Your Honour's point that that aside if checks were undertaken, and given his history, that would have provided the requisite grounds for a search pursuant to s.18 or 198 of the Summary Proceedings Act.
- Elias CJ Or they might have got a warrant.
- Stevenson Well the question is could they have or would they have? Did they truly have the requisite grounds for reasonable belief that he was offending or there was evidence of offending against the Misuse of Drugs Act, and in my submission it would go close but it was truly categorised or best categorised as reasonable grounds to suspect, and one sees that time and time again in warrant applications which are challenged through the Courts. The recitation by the Police that this person has a history really doesn't take one far at all.
- Anderson J Well the fact that there's all this money around of different denominations is itself highly likely to indicate some form of criminal behavior without being specific, but then if you do a check on him and find that he's a man with a raging drug habit and a long record then you get the link between the dealing and the money.
- Tipping J If he's taken the trouble to keep the newspaper clipping in his wallet,
- Anderson J As a CV.

Tipping J As a CV as my brother puts it

Elias CJ And gives the most extraordinary explanation of that in his evidence.

Tipping J I understand fully your point between suspicion and belief but I think there's a pretty powerful case that there would be enough for belief here.

Stevenson To believe meaning to free one's mind from any doubt.

Tipping J An affirmative belief. You're not necessarily going to be right but you have reasonable grounds to believe rather than suspect, because as you rightly say it's got to be belief hasn't it under 18(2)?

Stevenson That's right and it must also in terms of 18(2) as I recall pursuant to *Hill and Attorney-General* which is still good law, be reasonable grounds to believe that there will be evidence of a particular drug described in one the schedules to be found not just that, there's some sort of drug offending, and the Court of

Elias CJ Oh well they might have got a warrant. Anyway we'd better take the luncheon adjournment now. We'll resume at 2.15pm thank you.

1.04pm Court Adjourned  
2.16pm Court Resumed

Elias CJ Yes Mr Stevenson.

Stevenson Yes thank you. Your Honours continuing on the issue of inevitable discovery, I wanted to come back to a point that was raised, that is the suggestion that Police would have undertaken an inquiry in any event through their computer database into the history of Mr Ngan and that might have given them in conjunction with the cash the requisite grounds for belief to undertake a search thereby there would have been inevitable discovery

Elias CJ I'm not sure really that it's necessary to get into that is it. It's a bit speculative.

Stevenson I was simply going to say they may well have done that but it couldn't be in terms of the inevitability doctrine that they would have and so I'd simply suggest that it be put to side on the basis. Turning to the approach in the event it needs to be dealt with just briefly that Justice Miller took at first instance, that is place inevitably, would have opened the wallet, would have sighted the article, and on that basis in conjunction with the cash inevitably would have conducted a search. It's the appellant's case as I think will be obvious now that the opening of those sorts of things would have been unlawful. If there's power to



do so it comes from the duty to protect property, it's the appellant's case that protection of a wallet for example doesn't require opening of the wallet; that an item such as that for example might be placed in a tamper-proof sealed bag or at the very least noted that it's Mr Ngan's and that negates any concern that the property for example might be lost to him

Tipping J Well if your argument is correct, up to that point it's circular then to say that it would be inevitably discovered because they wouldn't have had any power to open the wallet, or pouch, whatever it is.

Stevenson Yes well what I'm submitting Sir is that it would be wrong to say inevitability arises on the basis of the wallet at the Police Station because there's no lawful basis and that's the end of the argument the appellant says on that point. I could go further in terms of the fact that the record disguises

Tipping J Inevitable discovery means inevitable legitimate discovery.

Stevenson That's right. Yes, as *Pratt* says lawful means that inevitably they would have by way of lawful proper means discovered the evidence and so if the appellant's argument is correct in terms of how far Police can go and the powers that flow to them from some duty to protect property, then it wouldn't include opening the wallet.

Anderson J How big was this article? Would you have to open it up for example to read it?

Stevenson I think we have a photocopy of it somewhere Sir and if that assists it could be handed up at a later stage. As I recall it's quite a small article but perhaps determinatively the Police Officer himself, Johnson, didn't actually read it and that's contained in his evidence at trial, so it would be hard to say that he filled the requisite grounds when he didn't read the article himself. Those are the matters I wanted to raise in respect of that point and unless Your Honours. Oh yes right, yes I should just say that we've had time obviously to consider the question about the LSD and I think we're of the view that the appellant is stuck with that in terms of his guilty plea. I'll further look over that but as of now that's the appellant's concession I think that I would make, yes.

Elias CJ Yes thank you Mr Stevenson. Yes Mr Pike.

Pike Yes may it please the Court, the principles in this case have migrated backwards from the position that it was possibly an unlawful search but perhaps unreasonably but *Shaheed* compliant to the fact that possibly it was an unlawful but not necessarily unreasonable search and now the focus has been taken back to a starting point which whether the examination of the contents of the car was itself lawful or not, and we certainly in the Crown case, we place some emphasis on the proposition, the starting point is that the search was lawful for two

reasons, one of which has not been gone into by the appellant and one which has, but has been narrowly confined

Elias CJ This is contrary of course to the position taken on the 344(a) application?

Pike Yes, yes.

Elias CJ That's fine, I just wanted to

Pike Yes, we don't agree with the position taken in the 344(a) application may it please the Court. It's exercising Her Majesty's prerogative to change her mind, but the starting point is that the Police were not acting unlawfully in doing what they did, they were doing what in our submission any citizen could reasonably do, so before we even get on to the Point of was there a common law power and getting into this question of if so what is its origin, what are its confinements, and what is its purpose and scope, the question is did they need a common law power at all? And I would submit there's a considerable question mark over that.

Tipping J Did you mean a common law power specific to the Police?

Pike Yes.

Tipping J Because if you say it was what any citizen could lawfully do, you're presumably saying a citizen had a common law power to do

Pike The citizen is free to do what is neither criminal nor tortious in that sense. Let us say that civilians had dealt with this crash, that somebody had come along – two people in two cars had come along. One decides to drive and has to get quickly to a hospital; away that person goes with the persons who has become the accused. The second driver then decides that here is a car, upside down, in a road with thousands of dollars spewing out of it. There's some need to take some steps to protect it and does so as a Good Samaritan.

Anderson J Where's the loss though? What would the cause of action be?

Pike Well there wouldn't be one.

Anderson J So it's not an allergist to the Police situation?

Pike Well the question is why? Why is it not an allergist? Why do the Police not have the same

Anderson J Because they are constrained by BORA from searching unreasonably and citizens aren't.

Pike Well the question are they constrained by BORA from searching unreasonably, because in the one sense the only issue is that this was not an investigative process, that's no.1. The Bill of Rights, s.21, certainly protects against state action and doesn't bind a person to an agent of the state, I quite agree, that's plainly so, but the starting point still has to be that the Police may not be at all unreasonably doing something that any person might do. It's not a sine qua none; in other words that merely because the Police are taking a step that any civilian could do they are immediately engaged by s.21.

Anderson J But if a civilian did that, technically they commit the tort of trespass which is actionable without proof of loss.

Pike Well I don't with respect to cover that, its not, it's justified the principles of trespass are subject to justification and they're subject to necessity and they're subject to of course whether in fact the book by Todd raises a very big question mark over whether trespass to chattels exist without any damage at all to the chattel by moving it. It's open for debate. Now what I wanted to really start off on is the point that certainly common law powers, and I don't think anyone's going to disagree with that, common law powers nowadays will be subject a Bill of Rights analysis. So if the Police are doing something that they have a power to do by dint of the doctrine of the Canadians called auxiliary powers, then of course either in what would be called a front end or a back end, whichever you prefer analysis, that power will have to be looked at at some point in terms of s.21, but the difficulty in this case is the starting point is that is it really the case that per se the Police acting beyond their power or exercising a power when they do something that any good Samaritan citizen would do and have done on terms innumerable in this country of getting people's possessions that are left in public places and so on, and gathering them up into a place of safety and possibly even noting, because they're cautious, what they've picked up and what they've done with it. This is all that the Police have done in this case and the emphasis on Police powers in some ways are in relation to the need for a specific common law power, comes across predominantly from North American jurisprudence. I've harped on about this in many instances before the Court, but the point is that the United States and all of the North American Courts on both sides of the border are very much fixated on the need for prior authorisation. That is a state of the law, which the Courts in New Zealand have no wholly endorsed. They have in part and they have at times, but there's not wholly endorsing of it. The vital starting point for the analysis of this case that flows through from the fact well do we need a common law power at all is it really a power case, is the case of *Waterfield*, and of course that is dismissed with a flick of the wrist by my friend who says well that's 1963, it's a divisional Court. It's long before human rights instruments took their place alongside common law edicts. It's a broken backed authority.

Elias CJ Do we have it by the way?

- Pike We've got sufficient of it in *Clayton*. I mean the nub of *Waterfield* is in *Clayton*, so you have the really operative parts of it and why I make the submission about *Waterfield* that I do was that the starting point in *Waterfield* is that if the Police are otherwise acting criminally or tortiously, then the question arises, but only then, of whether or not there is a common law power for them to do what they did. But you don't get there unless they're acting criminally or tortiously. I mean that is the point of the whole
- Tipping J Is that because the common law assumed or treated everyone as authorised to do anything unless it was expressly prohibited or was a civil wrong?
- Pike Yes, we've always found that. You're free to do, we're all free to do what we're not prohibited from doing. We don't look for prior authorisation for many of our actions. Many we do of course, but that principle, that important principle about Policing in the common law world is often overlooked, but *Waterfield* is important because
- Elias CJ Well if it is important it should be before us.
- Pike Well I'm sorry Your Honour, the reason it isn't is because I thought that rather than peppering the Court with authorities, yes the ratio of *Waterfield* is set out in *Clayton*. I can certainly take you to that forthwith. It's under tab 3 of the authorities
- Elias CJ Does anyone approve *Waterfield* in *Clayton*? I haven't read *Clayton*.
- Pike Sorry.
- Elias CJ Does anyone approve *Waterfield* in *Clayton*?
- Pike Oh yes, yes, yes, nine of them.
- Elias CJ Nine of them, and it's just Binnie is it who criticises it?
- Pike No he doesn't with respect. What he does is he said well *Waterfield's* fine but I would not wish to be going, what as I read anyway, a close analysis of *Clayton* is Justice Binnie wants to start with the charter which the argument that's been made here. We've started with the charter and looking whether is prior-authorisation, reasonable proportionate focus, those tests to the common law test in *Waterfield* and he finds it passes muster on that basis. That is a front-end analysis if you like. What the majority do in *Clayton* as I read is they say that *Waterfield* itself talks about that a power as long as it is rationally connected to the Policeman's objectives and is reasonably necessary, passes muster, but then they do go on to look at whether in fact having gone there they would get to a different result if they used a charter analysis.

Elias CJ Is *Waterfield* a case of implied powers from other duties, is that what it is?

Pike Yes, yes, it's like the old law of corporations that people who have got public powers have reasonable inherent

Elias CJ Or like Courts have. Well how does that sit with the statutory scheme we now have for Police search?

Pike I'm not entirely sure we have one yet Your Honour.

Elias CJ Don't worry we're about to get one.

Pike Well I mean I must say leaping ahead to that that I note with interest that the Law Commission has in its report which has just published, I think the reference is 9.75, it is reported it does endorse their idea of an inventory search. The only difficulty with it I'm sad to say is that it relies in two cases to do that. One of course is Ngan in this case in the Court of Appeal and the other one sadly is *Caslake* which of course doesn't do any such thing. It's only the minority in *Caslake* which look at whether an inventory search is a legitimate Police Officer tool and decide more or less that it is, but the majority doesn't go to that extent at all. It leaves inventory search aside, so unfortunately the authority of the Law Commission's propositions is a little bit undermined by that. Nevertheless its heart is in the right place one might say.

Tipping J But *Clayton* seems to be a case where what took place would without authorisation be a false imprisonment.

Pike Yes it was.

Tipping J So it clearly requires prior authorisation if you like to call it that.

Pike Well it was an implied power. Well the Canadian Courts have decided that it didn't need a prior authorisation. They've decided based on *Mann*, the earlier decision we also have.

Tipping J But it rested on the implied power. It didn't rest on the ability to do it, because it's not prohibited.

Pike No, no, look absolutely.

Tipping J That's the point isn't it?

Pike It is the point but the importance to the respondent at least of *Clayton* and its predecessor *Mann*, is that in both of those cases the Canadian Supreme Court approves specifically of the *Waterfield* approach. I mean my friend is right, in one sense *Waterfield* is water under the

bridge in the UK, the time of its origin because of the extensive codifications of Police powers and practices under the Criminal Evidence Act and the innumerable sets of rulings from the Home Office and elsewhere, so of course their strictly prescribed by massive documents as to search, seizure and the like, but the Canadians aren't, so the Canadians have picked up *Waterfield* and run with it on the basis that it is a necessary extension to Police powers and is charter compliant so long as it passes two strictest tests; that is it's rationally connected to what the Police Officer is doing and is reasonably necessary, so that is what they have done.

Elias CJ But do you then rely on the first Court of Appeal decision in this case to identify the source of the authority to which the power to make an inventory search is ancillary?

Pike Yes I do

Elias CJ That very general

Pike It's a very generalised statement but we don't rely on it, I mean we say it is validated by reference to overseas jurisprudence which it does in itself go into and of course the Court will see that there's some reliance on the United States Supreme Court holdings that simply come out as one of their very many exclusionary doctrines as to the reach of the Fourth Amendment and hold an inventory search to be entirely legitimate and not subject to Fourth Amendment challenge if it is done on the basis of a prescribed or prescriptive series of steps that are common to that Police Force, i.e., all that they want to be assured of is that this is not a dodge to say that we're pretty damn sure there's drugs in here but we haven't got articulable cause and so we'll do a search and call it an inventory search, so they've got to make a showing, as the American's call it, that there was a prescriptive practice in the particular Police Force of inventorising the contents of vehicles, or indeed handbags or anything else that comes into Police custody, that showing there is no longer a Fourth Amendment challenge, that my friend says that these cases apply if and only if there is some sort of lawful impoundment, but that is not a close reading and those cases do not support that analysis at all.

Elias CJ They don't require statutory coat-hangers?

Pike No, nor an impoundment. One of them *Berting* I think which we can come to, is a search of a woman's handbag that got into Police custody and was to be stored and the Police went through it and inventorised it, so

Tipping J What was the name of that case?

Blanchard J *Berting*.

- Pike Yes, I think we have it, but I just
- Tipping J Mr Pike just before you move on, you said there were two bases which you were putting it forward on for lawfulness – one addressed, one not addressed. Now there’s the Good Samaritan basis or the Police simply acting as citizen’s basis, and the other one is what the implied power basis is it?
- Pike Yes, the *Waterfield* one. If you say no, the Police for some reason under New Zealand law cannot do things that ordinary citizens can do because of the Bill of Rights Act, and I’d say there’s difficulties with that argument because they tend to be engaged in North America only on the basis that the North American jurisprudence is very strong on prior authorisation – we are no so strong on it. If you don’t go to have a powerful constitutional presumption of prior authorisation, then there’s no particular basis for saying that because of s.21 what the Police did as Police even a citizen could do it as a citizen, is unlawful. You’ve got to find
- Tipping J Well if a Policeman is doing no more than what an ordinary citizen could do it does seem difficult to say that somehow or other that becomes unlawful or unreasonable because they happened to be a Policeman. I mean that’s the point I take it?
- Pike That is the point although I immediately accept that if it’s a search, if what the Police Officer is doing does in fact amount to something that is intrusive, and it could engage s.21, but it doesn’t do it by dint only of the fact that a Police Officer does it by dint of the fact that in doing it they have acted as an agent of the state in all the circumstances unreasonably, therefore we’re in the area of lawful but unreasonable, and that’s an area where of course there’s discussion with the Court this morning is usually confined to a use of a lawful power but for a completely and proper purpose or the use of a lawful power but improperly, and both two or three at least of this Court have held in times past that Police raids at 2 in the morning, Police
- Elias CJ What’s the point of having warrants then?
- Pike Well the point of having a warrant is that if you are exercising a law enforcement power.
- Blanchard J So if they stopped the car for some reason then putting aside s.18 and the Misuse of Drugs Act or any comparable power they’d have to have a warrant?
- Pike That’s right
- Blanchard J But if they merely come upon a car wreck they are entitled to do what the local farmer could do, namely say gee we can’t leave this stuff

lying around here, the farmer would say I'll take it back to my farmhouse.

Pike Indeed yes, indeed, and then I'll make a list of it, I'll photograph it, I'll make a list of it, there's a

Blanchard J In case I get burgled.

Pike Yes, there's a diamond tiara here by the look of it. There's no way I'm going to have this hanging around without taking steps to identify it and protect it. I mean any of those things could be done but that is the point that is so critical in this case and with respect is often at times overlooked by the immediate leap that is made into jurisdictions that have prior authorisation or

Elias CJ What's the problem with prior authorisation? What's the policy reason against prior authorisation where it can reasonably be obtained?

Pike Well it's a policy decision I would submit to be worked out between the Courts and Parliament in that sense and

Elias CJ Well Parliament's provided for prior authorisation. Why shouldn't it be required?

Pike Well it's required for both with respect. I mean it also allows warrantless searches in many ways and

Elias CJ Yes but under controlled conditions.

Pike Yes

Elias CJ Well why shouldn't the common law take that regime into account?

Pike Well I would submit as to prior authorisation that what happened in the United States of America was of course the Fourth Amendment is clear – it has a warrant requirement. I mean we all know that. No warrant shall issue except on

Elias CJ But that might have emerged out of the constitutional framework

Pike Yes.

Elias CJ But why shouldn't it emerge out of the statutory framework that once Parliament sets up a system for prior authorisation, why shouldn't that be a significant for the Courts in deciding what powers Police Officers have?

Pike Well I submit that's more a function for legislatures than the Courts in one sense because the Canadian – I haven't got the words with me and we might have to get them if we're drilling rather deeper into this – but



the Canadian charter, the preparatory debate was heavily focused on whether they should have a warrant requirement. In the end their equivalent of white papers indicated they would not have a warrant requirement. They would go along with what would put s.8 in the terms it is now. They specifically in the working papers decided against a Fourth Amendment warrant requirement rule. Now controversially the Supreme Court of Canada in a very early case, the well-known *Hunter and Southern* inserted a warrant requirement into s.8 of the charter. It was very controversial but there was no override and the Canadians lived with it. They are in some ways now slowly peeling it back. *Mann and Clayton* are very important in that regard in as much as these are quite intrusive powers in both cases that require no warrant and no prior authorisation and indeed only an implied common law power. They relate to the stopping of motorcars and the searching of the occupants of those motorcars without probable cause. So that's something we probably wouldn't do here, but there's a perceived shift in Canada and can only be explained on possibly the way the Courts perceive the social situation in Canada at the moment and I really don't know. But with respect here the argument for the Crown is that at the moment, at the moment at least the Courts in New Zealand have not gone, except perhaps touching on it in cases like *Laugalis* where they indicated they did use a warrant and saying if you can get a warrant to search a vehicle reasonably, you can't rely on *Laugalis* to a warrantless power, which was an assertion of obviously a prior authorisation bias. But the Courts with respect since *Laugalis* have really rather undulated little on that topic. It's come and gone I think as a proposition and it's ultimately for the Courts and for Parliament to work it through but my submission with respect here and now is that the New Zealand Bill of Rights Act does not require, does not have a Fourth Amendment warrant bias in it. It protects against all unreasonable searches. We've certainly got an issue in New Zealand that a lawful search is a sine qua none of reasonableness. There's no question about that and it can hardly be challenged. So in this circumstance we go back

Blanchard J Sorry, what does it mean by that statement?

Pike Sir I meant that there is a strong juridical trend in this country to equiperate lawfulness or unlawfulness with potential unreasonableness. We've got a lot of decisions saying that, that if it is unlawful then it likely unreasonable. Now that's *Maihi* and of course the Court of Appeal recently in a very long judgment in *Williams* of course has gone beyond that and overruled *Grayson and Taylor* and declared that an unlawful search will be unreasonable, so that's where we've got to in the Court of Appeal.

Tipping J But not inevitably?

Pike Well that's a very strong statement and I have to say it wasn't something that was argued in the Court of Appeal, distressing to say.

This was judgment issued without argument on that and several other incredibly important points, but it is decided in *Williams* which purports to overrule *Grayson and Taylor* which of course puts

- Tipping J But it also departs from *Maihi*.
- Pike Yes It does, well yes, it goes much, yes it departs from *Maihi*. And it has overruled *Grayson and Taylor*, which of course says that unlawfulness is a factor but it is an important factor, of course it is, and whether it was unreasonable, but it is not inevitable as a pre-condition. But what we say in this case with respect is that as we are now with a mix of constitute or quasi constitution or Human Rights law and common law, we're still at the point where if a Constable can do something that any citizen can do then it is not per se unlawful for that Constable to do it. It doesn't need a prior power sorry.
- Elias CJ Sorry. These two arguments you're putting to us are inconsistent aren't they, because you say there is an implied power that Constables have, but you say they don't need it, in which case why would you imply it?
- Pike Well as an implied power with respect if the act, which is in focus, is tortious or criminal, but here there's a strong argument that it was neither. That when the Constables came upon the scene and decided to pick up the money and do what they did with it and make their inventories and take it back for safe-keeping, all of which is findings of fact, they did not need any power to do that, but
- McGrath J What Mr Shaw was saying was yes they needed power to open the pouch.
- Pike Well
- McGrath J And look inside it.
- Pike Well with respect
- McGrath J I don't think he's concerned with anything prior to then.
- Pike No indeed, well I understand that Sir but I would submit that once you have something in your possession which they are going to take, comes back to whether it's a tortious, does it make it a tort. It's not a tort to take the case and to store it somewhere or to look after, but it is a tort to check first what it is, or as I said not criminal, so it has to be tortious, to check into it, to have a look. Does it contain something of real value? For instance in the reality of this case we're going back to the Hunterville Police Station. Now if, to get a sensible example, if there had been sunglasses and they had been designer Gucci or some designer ones of \$2,000 or \$3,000 worth, the Police Officer might have if he or she had realised what it was, would be inclined to look after a

little bit more carefully than putting it in what goes for a property room in Hunterville, i.e., you've got to protect it from light-fingered people who might pass through the Police Station. So that would be a reasonable step to take.

Tipping J If I had appeared on the scene and I had taken possession of this pouch and I had opened it and taken it back to my farmhouse as my brother said, I'm not at all sure that I would have committed a tort.

Pike No well I would submit you hadn't because what you're doing is no further trespass than taking it. To look at it is no greater trespass than to take the article. It's not a trespass to take possession of the article and to put it in your farmhouse safe, it certainly can't be a trespass to then decide well before I do that I'd better see what's in it, just in case, whatever. I would say that no one would be able to get home on saying it wasn't tortious if you'd just kept it, but it was tortious to examine what was in it for no purpose other than simply to satisfy the fact that you had something valuable or not. Do I leave it on the kitchen table or do I actually put it somewhere very much more secure.

Blanchard J Do I ring my insurance company.

Pike Exactly, yes.

Tipping J It wouldn't be conversion. It wouldn't be detinue. It would hardly be invasion of privacy

Pike No it would have to be a trespass to a chattel or nothing I suspect.

Tipping J It would have to be trespass to goods.

Pike Trespass to goods or nothing I would submit. And without damage it's as I said *Todd* strongly argues that trespass to goods doesn't lie without some form of interference in the form of damage, although he admits that's controversial.

Tipping J Cross tort run the doctrines of necessity.

Pike Yes and justification

Tipping J And justification which even if it were a tort, were otherwise a tort, might not actually be a tort if it was subject to the

Pike It's a defence.

Tipping J To the defences.

Pike Yes.

- Elias CJ Well that's why I raised at the outset whether it was a question of immunity rather than power.
- Pike Well our approach to the case is on a more fundamental level that we only get to start talking about powers if you need them. Now if we accept that a Police Officer can do what any citizen can do with one important rider, which I accept wholeheartedly, then that Policeman can do that. However the Policeman's doing that will be subject to s.21 analysis. So even if the citizen can do it, if the Police in doing so are unreasonably invading a privacy expectation, even though the citizen mightn't be subject to sanction or suit, I accept a Policeman would, i.e., you can't simply say look just because the Policeman does anything, can do anything a citizen can do, that means that you could never get it as lawful, it was lawful but wholly unreasonable case on foot then get a remedy, and I accept that.
- Elias CJ Does your argument entail going as far as saying that no one needs authority to search property that's unattended at all?
- Pike Yes, well it depends. If they
- Elias CJ But it's not in the possession of somebody.
- Pike That's right, I do, well it's not overly wide it's really that if in the case of rescuing property or something of that nature, if they are engaged in a process which the point of which is to rescue property and secure it, if it's abandoned in a public place, no they don't commit any tort in doing that, nor indeed in say making a list if they're particularly people or whatever, or nervous, of making a list of what they've taken and checking it through with the neighbours saying look here's my list, do you agree that's what I've got, so that there's no comeback from somebody who's aggrieved later by the action.
- Elias CJ What's the pattern of warrants though? I'm still thinking about this statutory scheme. Is it only if somebody is in control that you have to get a warrant?
- Pike Well the only warrant required, well if we're just taking the general warrant requirement s.198 of the Summary Proceedings Act, the requirement to get a warrant is to go into places where you cannot go lawfully as a citizen or otherwise and search for the purposes of finding evidence of a crime. In this case there's no suggestion the Police were undertaking any form of law enforcement power. That's settled by the findings of fact, so they're doing what's called administrative searches, or inventory searches. There is of course no warrant for that so we're back to where we were in *Fraser*, the video-camera case, where the strong argument made was on a prior authorisation argument the Police were peering into, well using a video camera to peer into *Fraser's*, well it wasn't actually *Fraser's* back garden, a point that we completely missed as the Crown. It was someone else's back garden, and they had

a video camera set up in a place nearby. The question was, was that an unreasonable search. The argument was, yes it was because you needed a warrant to do it because it needed prior authorisation. The Court was satisfied that you couldn't possibly get a warrant to put a video camera into a surveiled property, because it didn't fall within 198 of the Summary Proceedings Act, so accordingly that was a case, well a clear instance that in the case of *Gardener, Mr Fraser's* daughter, it was similarly potted by video camera use. That was a very clear case where the Court had noticed that like it or not a citizen at that stage, the next door neighbour could put a video camera up and film happily away in the back garden without committing any crime or tort, so the Police could. So at *Fraser* we turned on the fact that you couldn't get a warrant to do what was done, they didn't exist. Anybody could have held the video camera up and spied over the fence, ergo the Police could do it.

Tipping J It's crucial then that the purpose of the exercise is security rather than law enforcement, because if it was law enforcement you both could and should get a warrant shall we say, but if it's security, you can't get a warrant so you

Pike No, well this was law enforcement of course

Tipping J I'm talking about this present case Mr Pike.

Pike I'm sorry, yes.

Tipping J The case in front of us.

Pike Yes.

Tipping J You put very much weight as I understand the argument on the premise that this has been found below not to have been a law enforcement purpose?

Pike Yes.

Tipping J It was simply a preservation purpose?

Pike Yes.

Tipping J Therefore they couldn't have got a warrant for that purpose

Pike No they couldn't.

Tipping J Nor could they have invoked s.18(2) for that purpose.

Pike No, of course not, no, they couldn't have done that.

Tipping J That's the nub of it.

Pike That's the nub of it, yes. They couldn't do that so there was no existing authorisation that they could have got prior anyway, so that's an important feature in this case.

Tipping J So if a piece of evidence just pops out in the course of exercising a non-law enforcement purpose, you still have to face the argument that it can't be used for that secondary purpose if you like, but you're saying it doesn't damnify the acquisition?

Pike No it doesn't. No the secondary argument we can hold, although there is no authority for the 'no use' argument. The case has relied on *Salmond and Colarusso* that are both cases where intrusive powers are exercised under statutory regimes. Certainly *Salmond* was blood alcohol and was the blood procedures and the Canadians would have immediately have said that is conscriptive evidence under a strict statutory regime. Of course Parliament has said you use it and you can get into people's blood-streams, for this purpose of course the Court are going to say well once you've done that you can't then rush off and match them to murder scenes or anything else. Absent **trying** to see if you can get a warrant to do it. But another case that indicates a rather alternative tack is one called *Templer* which came twice before the Court of Appeal. *Templer* was a man who was accused of having unlawful sexual intercourse with a severely mentally disabled girl

Blanchard J Oh this is the *Queen against T*.

Pike Oh sorry, I shouldn't have said *Templer*. Sorry *T*, yes it's suppressed. Oh no it's *Templer*. No suppression anymore, he was convicted so sorry. There DNA was taken as a suspect request. Everything was seen by the Court to have gone belly-up on the way the process occurred. The DNA samples were excluded from evidence. The Police then decided right and they rushed off to a District Court Judge with a search warrant with the Court of Appeal judgment stapled to it, saying that we've lost this evidence; we did this; we did all this wrong; here is what the Court of Appeal's done; here's our grounds for suspecting that if we go and seize his toothbrush, we're going to get some DNA and the warrant was issued by a District Court Judge. *Mr Templer* came back to the Court of Appeal and the Court of Appeal said well sorry, we're not going to interfere and that evidence was not excluded. But it indicates that a slightly different run of jurisprudence from *Salmond*, which is perfectly legitimate and perfectly right, but *Templer* is a case where a process that has misfired can be the foundation board for another bite at the cherry as it were.

Anderson J Not in *Shaheed*.

Pike Sorry?

Anderson J Not in *Shaheed*.

Pike No in *Shaheed* it didn't, indeed.

McGrath J Has *Salmond* got a self-incriminating element to it?

Pike Well *Salmond* had a huge self-incrimination, yes it was

McGrath J That's another basis for distinguishing

Pike Well both *Colarusso* and *Salmond* did. Yes they were conscripted as the North Americans call it. They were conscriptive evidence which is that term that covers physical evidence which is taken

Elias CJ It was for the purposes of evidence too, which is a bit different than

Pike This one.

Elias CJ Yes.

Pike Oh it's a long way distant, but the point is about those cases is that they do not found any general principle that if you exercise a power for one purpose, or you're doing something for one purpose, you can never jump tracks and have another purpose. I mean the point is sometimes you can, sometimes you can't depending on statutory settings. The statutory setting of EBA Law, in both Canada and New Zealand, is you cannot and of course we'd say that's unarguable. If Parliament wants it to be generally used it's going to have to say so with taking blood compulsorily from people; it's a very different thing. But here with respect to come back to our case, our case is simply that the Police (a) didn't need a power; (b) that that said we do not want to be heard for a second to suggest that in that circumstance they're still not subject to s.21 scrutiny if they act lawfully but unreasonably, and that distinguishes them. That's the difference now from the ordinary citizen. The ordinary citizen obviously isn't subject to s.21. No matter how unreasonable they may commit torts now of privacy invasion as it develops, but the Police are. So we are in agreement I think in a sense with the appellant's case that by even if we are right to say the Police don't need a power, everybody's got it to do it, the person aggrieved can still come to a Court and say well be that as it may s.21 was breached because it might be all very well to say its lawful, but what was done in the circumstances was wholly unreasonable and I'll accept that.

Tipping J You do accept that do you?

Pike I do. I can't see how you can legitimately argue against

Tipping J But it's a question of their purpose. If their purpose isn't engaging s.21 at all, I'm not quite sure why you say so readily. They're subject to 21 control.

Pike I'm rather thinking of cases where they act lawfully but do it in a way that's overbearing or do something which the Courts see as regular abuse of a position they hold as Police Officers.

Tipping J Well maybe

Pike I think that's where the difference is, a difficult meld.

Tipping J Yes that sounds more

Elias CJ Or if they act beyond the purpose of securing property. I mean that's the care issue isn't it, if that's the

Pike Oh sure.

Elias CJ Yes.

Tipping J Well they can't do more than what a citizen could do but what I didn't like was the general view that they ask if they're acting as a citizen they're subject to some general doctrine of reasonableness, when a citizen is not ex hypothesi.

Elias CJ That's what s.21 says.

Tipping J Well I'm not sure that it does. This is the point I'm, but I don't think we are going to have to get to that.

Pike No, I'm just

Elias CJ I think we may have to.

Tipping J You think we may, well in that case we had better pursue it then.

McGrath J I think we do on Mr Pike's concession.

Elias CJ Well, yes I think so.

McGrath J I think the concession sounds an appropriate concession.

Pike Yes I think because 21 envisages it's just neutral as to legality. What we're saying is look the Police acted lawfully because they weren't acting unlawfully.

Tipping J Because s.21 binds everybody.

Pike It binds

Tipping J No one shall be subjected



McGrath J By public officials.

Tipping J Well it doesn't bind citizens.

Pike No, no it binds

Tipping J But you can't shave your skin as a public official for this purpose?

Pike No.

Blanchard J The farmer who took the things from the car back to his place wouldn't be bound by s.21?

Pike No.

Blanchard J But it would seem to me that there might be things that the farmer would do with them which would not actually cause damage which might nevertheless be tortious. For example if one of the things taken back was a book, technically if the farmer starts reading the book using someone else's property, there might then be a tort been committed.

Tipping J I think if there's a tort the whole ball game changes because you then have to justify it.

Pike Have to go to *Waterfield*.

Tipping J Yes, but I'm presupposed

Elias CJ It doesn't make it unlawful though does it in a sense that's critical here?

Pike Tort does yes.

Elias CJ Does it?

Pike Yes, pretty much, yes. If the Police can do something that is tortious that is unlawful and that's that. Trespass per se is going into someone's property without a warrant is a trespass that's all, but it's unlawful.

Tipping J But it might be reasonable in extreme circumstances for example.

Pike Yes but it's unlawful.

Tipping J Yes.

Pike So we accept that and what the proposition is that the Police may do something that any citizen can do and this is an example, this case is an example, but I was attempting to subject to accept *in limine* that that is subject to BORA scrutiny in terms of it's being lawful but in all the

circumstances was state action that was unreasonable for something to do with the manner in which they did it, which mightn't amount to a tort on the hypothetical civilian, may or may not, but it does in the state actor for instance if they got a diary or some psychiatric notes from the person who was undergoing sex change therapy or some incredibly private thing, and they got it and they read it and then it got out that they'd read it. I rather suspect that that would be serious. It may be a tort, I'm not sure about it, perhaps not. But the point is it would be such an invasion of an expected realm of privacy that the Courts would say well look you know, yes you could have taken all this and put the book in it; you can't read it; you can't do this and there would be damages or most likely a damages action, and I accept that Your Honour. I don't have any difficulty with that.

Tipping J Well it was I who queried the concession. If you're wanting to make the concession you've obviously thought about it very carefully and I'm perfectly happy to move on.

Pike Yes.

McGrath J Can I just ask one point Mr Pike? I think you've probably covered it, but I just want to get it clear in my mind, the ordinary citizen who, put the present situation aside, sees a house that's been damaged by a tornado or something, but sees property around it which he goes and collects and picks up, then goes into the house and finds a sealed purse or something of that kind, now is that citizen committing a tort if he opens what he finds inside the house, damaged house? We are just really wanting to make sure that by analogy to see what our own situation is, but what point does the citizen start committing a tort of trespass?

Pike Well I would suggest that the citizen does that once the implied licence runs out, because presumably if you see your neighbour's house on fire, we all give each other implied licence to rush in and put it out; to save the cat; and do things.

Blanchard J And grab all the goods and get them outside.

Pike But if they then sit down and examining property or doing something beyond that it's a question of whether in fact that's actionable, whether it would be a trespass. There would be for instance, it's possibly unnecessary to get into it in a way, if the Police did it we'd start to get into those examples where everything was very lawful up to that point and at that point s.21 is going to have to start to come into play because you're now in there doing something quite unnecessary, unrelated, and I think the critical words the Canadians or the cases used is 'not rationally connected to what you were and therefore'

McGrath J That's the house, but if the purse is in the wrecked car you say you're still within the implied licence because it's completely open and

unsecured and you can therefore pick up the purse and you can look inside it because

Pike To see if it's got something particularly valuable for instance that you need to take special care of.

McGrath J If it needs to have special care. Thank you.

Anderson J Suppose an ordinary citizen saw Mr Ngan crash the car and then sees him taken off in the helicopter and thinks I'll just go and have a shifty through all his gear; I've always been a bit nosey about Mr Ngan; I won't damage anything, would that be unlawful? I think I'll go and have a squiz at his computer. I'll have a poke through the glovebox and anything else I find just because I'm a curious person, would that be unlawful or would it be trespass to goods?

Tipping J Trespass.

Pike I don't know there would be a trespass to goods. It would have to be developed by developing to privacy tort.

Tipping J Your purpose would damnify you I suspect.

Elias CJ I think so.

Pike But we hopefully were not in that position in this case.

Anderson J But if the purpose would render it tortious then the Police are in no better position than that, so any justification they have must be related to other lawful objective.

Pike Assuming it was a trespass to do what they did, to look into it, but where we get into a fine line straddling exercise because the Police are also public officials, and so they may be seen as having duties as such of accountability in relation to goods taken than necessarily wouldn't apply to the farmer. For instance if there was a quarter of a million diamond bracelet in the case and the Police just threw it into one case and put it into the Hunterville property area of the Hunterville Police Station and it disappears, imagine the tort case. Did you look in the case; do you simply mean you left without examining an article? Did you leave it in the area

Anderson J No I put it in a sealed bag and marked it 'pouch retrieved from Mr Ngan's car'

Tipping J And contents unknown.

Anderson J And put in here unopened and put it in the Police safe.

Elias CJ Put a seal on it.

Pike The trouble is what happens before you put the seal on. Mr Ngan says no, no, no, my quarter of a million-dollar tiara disappeared before you put it in the sealed bag thank you very much.

Anderson J I would say well you prove it, you prove it because we've got two Police Officers here who are saying he put it in a sealed bag.

Pike Yes, well my friend would say you can't believe them.

Anderson J Can't one really just approach it by saying well suppose it's lawful to start with for some reason, mustn't there be a point where it becomes an unreasonable search, or has the point been reached when whatever they did becomes an unreasonable search by someone bound by BORA?

Pike In this case no, because what

Anderson J No but as an approach?

Pike As an approach yes there could be some point at whether lawfulness becomes, yes I'll accept that.

Anderson J And then cases turn on their own facts don't they?

Pike They do. And here what we do we come before this Court and say well overseas jurisdictions by and large support the proposition because they've had to engage on it because of the prior authorisation rule and hence we have *Opperman*, whichever it is, the United States Supreme Court coming in quite heavily - I think it's *Layfayette* and the other cases relied on of course in Canada, to say that an inventory search per se passes constitutional muster

Anderson J Right down to the last chattel of any kind.

Pike Well it seems so. They don't make distinctions. They simply what we want to clear away is pretext searches.

Anderson J I'll look in this coin purse in case there's something in there and I'll have a look at his diary just in case there's some bank notes interleaved between the pages, anything at all.

Pike Well yes, the fact is that they do that because there's not an articulable search going on. The Courts are satisfied the Police aren't trying to search without articulable basis for searching. They then say that it's rationally connected to their duties of taking property in is a matter of accountability both that they protect the citizen's property and protect themselves from allegations of wrongdoing and all one can say is that the Courts in the USA are quite unflinchingly of that view that the only issue you look at is whether this was a pretext search. Absent that

issue and the hallmark of that is that can we be satisfied that this is what the Police in this precinct have been doing since the year dot of writing down every last pinhead that they get and putting it in a property sheet and if that is so that's what happened here then there's no Fourth Amendment comeback.

Anderson J It's pretty easy to set up pretext searches. You just have a protocol in that case.

Pike Well

Anderson J You never know what you might find in a crashed car. Machine guns, drugs

Pike Well that may be so, but then again I would come back with great respect to the point which I made in the far flung horizons of the argument to say that in privacy contexts there's a certain risk element. If you want to get and deal drugs don't consume your own product when you're driving from Wellington to Auckland because you know that if you wreck yourself.

Anderson J If you don't want to be searched take your ...

Pike Well that's right, I mean it may sound facetious but

Elias CJ But if we have to be concerned about the application of whatever conclusion we come to in much less obvious circumstances Mr Pike, I mean just listening to what you're saying it occurs to me that private property even in a public place cannot be interfered with by anyone, private people or the Police, except for the purposes of securing it. Do you accept that? I don't know whether you do.

Pike Well certainly the only example we are dealing with is the protection of property and I hadn't gone wider than that, so yes I would say in those limited circumstances, no tort is committed by the citizen who goes and who finds property which is abandoned

Elias CJ Yes.

Pike Which this was. I mean my friends say it wasn't, but in a sense it was involuntary. Mr Ngan didn't want to abandon, he's not a *Mr Reuben*, who throws the objects and takes to his heels, but he's somebody who's taken off the scene, so the goods are in a sense left abandoned, they are literally abandoned in a public place unless the somebody, who happens to be the Police, become the bailees of it, which is what they did. Involuntary bailees one might say.

Anderson J At which point it was no longer abandoned.

Pike Well once they had got it, no.

Anderson J It's almost to an implied bailment isn't it? I mean Mr Ngan must have known that they were going to sort of take charge if he had an ounce of sense and

Pike Well we all do, I think isn't that what we assent to?

Anderson J Yes.

Pike We assent to the Police saying if they come across our car wrecked on the public road; we're carted off to hospital; we've got valuable property in it; none of us have got any concerns with them opening wallets and checking and saying \$500 cash, whatever, whatever, noted, put it in the bag; container opened, \$3,000 pair of Gucci or whatever glasses, noted, secured. So no reasonable citizen I would submit would have any difficulty with the Police doing that. They'd have an awful lot of difficulty if the Police found your private medical notes than anything, but certainly sensitive medical notes and it decided to have a good read and then pass that information around or do something which made their actions then inherently unreasonable, and that's where I come back to, of course I'd accept that there would be a remedy for that. We are talking generally. There'd be BORA, *Baigent* damages would get on foot for that sort of misconduct and I don't have difficulty with that but the essential point here with respect is that the evidence in this case, and we can't go much beyond it, and I take the Chief Justice's point, but the more one reads search and seizure cases, the more you come to the gloomy realisation that in fact it's very difficult to make general propositions that don't come back in the next case for modification. And I mean that is the history of search and seizure. Their social attitudes and incompleteness shifts with the times or with perception. But here with respect what we do say is that the Police were found to have an honesty of purpose. They took it in to the property room and they opened containers because they thought it might have more money in it, and so the object was to count it.

Elias CJ Well that's their motive isn't it?

Pike Yes.

Elias CJ But I suppose the critical issue it seems to me listening to this is whether it was necessary for them to do that or whether the property having been secured, they should have sought the approval of Mr Ngan or obtained a warrant.

Pike Well they couldn't of course obtain a warrant unless they were engaged in criminal investigation and there is nothing to suggest they were or could have been so that's their difficulty. The point is too in terms of the common, sorry, the ability to do that the steps that would be taken in terms of *Waterfield* are rationally connected with the objective, that is taking the property into custody. Is it rationally connected that we'll

have to make a listing and an accounting of it, yes; was it reasonably necessary to do that

Elias CJ I wonder whether rationally connected given the wording of s.21 is worthwhile, whether it just at that stage has to be whether it's reasonable to search it.

Pike These words are chosen because the action is lawful, that's the difficulty. Even in the face of a prior authorisation standard in Canada, the majority of the Supreme Court in *Clayton* describes the proposition that the tests are rationally connected and reasonably necessary. They don't agree with Justice Binnie, who come at it from a different way, although

Elias CJ By rationally connected and reasonably necessary is a much higher standard than simply rationally connected.

Pike Yes, oh yes, no I accept that, but here the point is that we then relied on authority of the United States Supreme Court which has engaged on the issues in a good number of cases now, but the three we cite *Layfayette, Bertine and Opperman*

Elias CJ Can I ask you those inventory cases, because I haven't read them yet. Those inventory cases, are they cases where the person in control of the property was around or are they cases of abandoned property?

Pike I think they were both. One was a tow-away case I think. Notices had been left and they had worked out the registered owner of the car and they then ended up impounding it because it had been a parking violation and somebody just went through the car and listed everything down and found the drugs. *Bertine* was actually a woman's handbag, so yes she wasn't there, so they were

Tipping J How did they come into possession of a handbag?

Blanchard J I think *Bertine* is actually an impoundment art case.

Pike Well I've got the wrong case I'm sorry.

Tipping J But the handbag case I was interested in as to how

Pike Yes I'm sorry I've got the wrong case, yes you're right.

Elias CJ Which is the handbag case?

Pike That was *Layfayette* I think.

Elias CJ Ah yes it's *Layfayette*. It's a man's shoulder bag.

Tipping J A man's handbag.

Pike Yes it was following arrest it was searched for a routine administrative procedure. It was not a search incidental to arrest but it was there simply seems to be a standard Police search of property taken into custody on arrest of the person owning it.

Elias CJ Is there a difference there?

Pike No, well I think the difference is

Elias CJ Because that's the person in custody isn't it, so they do have to do detailed inventories in those circumstances.

Pike They do but also it's open to the likelihood that it's more likely to bear fruit than not in terms of criminal investigation because they've been arrested. Well it depends if whether they are arrested for jay walking, obviously not.

Elias CJ This was disturbing the peace?

Pike Yes, but this is the handbag one, the other one's were simply cars taken and one was wrecked in a car accident and the other was parking violations, successive parking violations and was ultimately towed away, so there's a range of situations, but the proposition that it's consistent with the Fourth Amendment is reasonable for the Police to search personal effects under lawful arrest, and

Elias CJ Sorry, *Burtine* was another arrest case?

Pike Yes.

Elias CJ Are there any cases quite like this where the person hasn't been taken into custody

Blanchard J *Mozzetti* has very similar facts to this.

Elias CJ Who?

Blanchard J *Mozzetti and the Superior Court of Sacramento County*, and in *Opperman* it's pretty clear that they don't really approve of *Mozzetti*.

Elias CJ Where do I find *Mozzetti*?

Blanchard J *Mozzetti* is 18.

Elias CJ Thanks.

Blanchard J And in that case what was found was held to be inadmissible.

Tipping J And what was *Opperman*?



Blanchard J *Opperman* deals with *Mozzetti* in passing at page 1006.

Tipping J And that's tab?

Blanchard J 20.

Tipping J Oh yes.

Pike Yes *Opperman* was a parking violation case that's right.

Tipping J So in *Opperman* they found this evidence was admissible after the car had been impounded for a parking offence and they went through it with a tooth-comb and found the drugs.

Pike Yes, including the glove box.

Tipping J And that was admissible?

Pike Yes.

Blanchard J In *Mozzetti* of course the search was really unnecessary because they had already figured out, I hope I've got the right, no I'm sorry I'm thinking of a different case.

Tipping J So this is where, well at least it's affirmed or where this pretext idea comes in?

Pike Yes it is, the *Burtine* has quite a good statement of it in the

Tipping J That's where your noted, or your purpose is extremely important presumably, because you're acquitted of having a duplicitous motive if you like, you're well on the way.

Pike Yes, the syllabus in that case is 'the policies behind the warrant requirement and the related concept of probable cause are not implicated in an inventory search which serves the strong governmental interest in protecting an owner's property whilst it is in Police custody, ensuring against claims of lost, stolen or vandalised property and guarding the Police from danger. There was no showing here that the Police who are following standardised care-taking procedures acted in bad faith all for the sole purposes of investigation'.

Tipping J Where are you reading from Mr Pike?

Pike I'm sorry that's the syllabus of a case called *Burtine*. That's in our thin little volume under tab 4 and it's in the second column.

McGrath J First page.

Pike First page. ‘The Police, before inventorying a container, are not required to weigh the strength of the individual’s privacy interest in the container against the possibility that the container might serve as a repository for dangerous or valuable items. There is no merit to the contention that the search of respondent’s van was unconstitutional because departmental regulations gave the Police discretion to choose between impounding and disabling and locking the car in a public place’. The discretion was available therefore the search was legitimate, or the inventory inventorising was legitimate. Now whether one sees those cases as taking the matter to a distance that if Court is uncomfortable or not, the point of them is made in as much as the United States as well as Canada recognises this common law if you like, extension. There’s no prior authorisation in relation to inventories in the States and so the common law of the United States is used to make to recognise constitution exception to the Fourth Amendment, saying that the Fourth Amendment is not engaged unless the Police are in a law enforcement mode, but if they act reasonably in a property protection of the owner of themselves mode, the Fourth Amendment is not engaged. The Canadians are less rigid about it; it has to be said. They require the activity to be, as I say they go on the *Waterfield* test, which is that it must be rationally connected and it must be reasonably necessary. And so that’s where our case sits really. It sits on the proposition first that (a) the Police did not have a need to invoke any power to do what was done in this case in the first instance. New Zealand law does not require that sort of prior authorisation analysis approach and secondly it is subject to s.21, but having regard to the fact that the power is law, that’s a lawful exercise of a function if you like which is simply lawful, a breach s.21 will require something egregious which indicates an abuse of the exercise of the particular liberty, if we can call it that, to do what any citizen can do, so it has to be BORA compliant in the sense it’s not a plain and stark example of a misuse of the powers of the State, albeit in the context where what they’re doing doesn’t require a warrant or indeed a common law power. That’s no.1. No.2, there was no such departure in this case as to invoke s.21. What they did was entirely reasonable. It was simply to note what the property was and to open a container to see if it contained even more cash and those are the facts in the case, in which case they would have counted it and added it to the total. No.3 proposition for the Crown is that if this is wrong

Elias CJ Quite a strong dissent from Justice Marshall with Justice Brennan, sorry

Pike Yes well I mean obviously most of the United States cases on search and seizure would have Marshall and Brennan.

Elias CJ Yes I know, sorry.

Pike That’s why I rather like to go back to the more moderate Canadian approach where there is no dissents in *Clayton*, there’s only a

difference of approach. But if it's all wrong as to the first proposition then the *Waterfield* test certainly is alive and well. The *Waterfield* authorisation common law is alive and well then we can take from that the Police in the duty to protect as involuntary bailees of wrecked and bits of pieces of property in public places when they come across it would be expected to take it into custody and would be expected, it is reasonable to assume that as state servants that they in terms of being accountable for what they do, they would make very sure that they know exactly what it is they've got in custody and take proper steps to guard it if it's particularly valuable. A proper step would not be leaving it in a general property room. It will be putting it in a safe somewhere. So they are entitled to look into the container as long as they were not dealing with collateral purposes, that's the proposition to it based on *Waterfield* and we submit that the Canadian cases of *Mann* and its successor *Clayton*, both indicate that the Canadian Courts at Supreme Court level, recognised the place, and a very strong place for the *Waterfield* implied powers regime, subject to suitable controls which they say are based on that rational connection and reasonably necessary, so we get into an argument in this case as to whether it was reasonable for the Police to take an inventory of what they had found. Now that does not in our analysis require intense scrutiny as to the reasonableness of it because we're not dealing here with the exercise of a power in circumstances of an inherently intrusive nature. We submit that most people in this country would assent to the fact I say that the Police would in dealing with our wrecked, our abandoned, and property strewn around the countryside, would take a note of what they've got and make proper steps to safeguard it according to its inherent qualities and high value would be one of them, and i.e. it goes in a safe and not say a relatively unsecured property room or a pigeon hole or a filing cabinet, and that is something that we would expect and I don't shrink away from the proposition that if we expect that as we drive our cars, and hopefully don't end up upside down and being in a ditch and helicoptered off, that the Police will come along and do just that. If we expect that, we can't raise a legitimate expectation of privacy if one of the things they check out is they protect our property happens to be full of drugs, and that's where it comes back to the relevance of risk-taking and on privacy expectations.

Anderson J      Could it possibly be the case but in a hypothetical search position might be reached but obviously there are privacy issues which curtail the search at that point or that aspect of the search.

Pike              I do, I've always accepted that, I most certainly do. I agree with my friend. The Bill of Rights must be engaged in the analysis of a common law power or indeed any exercise of power or authority or functioned by a State actor. I accept all that. Where we differ markedly is that he wants a very hard look at what must be confined by the minimalist approach to what is just barely strenuously has to be seen as necessary, whereas we say well why in relation to the exercise of this function of protecting property and making sure what you've

got is what it is and where it is and how it's protected. We don't accept that it needs a very hard look, but we accept that it needs a careful look but not the intensity of analysis.

Anderson J The US jurisprudence rationalises or explains the authority for inventory examination shall we say on the basis that it's a care-taking exercise for the benefit of the owner or the person entitled to possession.

Pike Yes.

Anderson J And one might then see how a conflict would arise between that benefit to the owner and some obviously private information or privacy expectation of the ordinary owner.

Pike I do, and

Anderson J And that goes past minimalism, that goes actually up to a point of danger to privacy in fact doesn't it?

Pike Well it goes to the point where there's no rational objective, there's no defensible rational objective in looking at something which would be say the private psychiatric records of something about that person. But looking into the glasses case doesn't fall into that. There is nothing inherently private about a pouch. It doesn't indicate that any person who owned it would have a strong expectation of privacy and its contents.

Anderson J It's interesting that in the *Burtine* case there's a recital I think of criticisms of the Police Officer – it might have been the previous, oh yes here '*Burtine* criticised a Police Officer because he didn't look into a sealed envelop marked "rent" whilst he was carrying out his inventory obligations and sufficiently astutely failed to list \$150 in cash found in the respondent's wallet of the contents of the sealed envelop marked "rent"'.

Pike Yes I saw that, yes, which is making a point.

Anderson J This is in the dissenting opinion. I'm not disapproving that, I'm just distinguishing that the *Burtine* case on the basis that where you had a truck or van or something else, you didn't need to go that far.

Pike No, but that's really, well I'm not sure If I can say an awful lot more in respect of this case because we were very strong on the anterior propositions in this case as to lawfulness either on the basis that it's the good Samaritan rule, or if it's not the good Samaritan rule for some reason that fails to pass muster, it's plainly within the *Waterfield* understanding of what is a reasonable adjunct to Police powers. The Police powers are certainly to protect property and it's not at all unreasonable for the Police to do the twin function of ensuring that

property, one would hope, is securely stored if it's particularly valuable and if we have to know what it is, and also it's not at all unreasonable to protect Police Officers from allegations of theft which are easily made, or of civil liability, which as the Court will know there have been many cases where Police Officers have been held negligent in the protection of property and they've been successfully sued, and so those circumstances fit in with the State sector circumstances that public servants have to be accountable for what they do and it would not be seen as good practice for a person, albeit a Constable, is also a State servant, to take into possession something without making proper inquiries as to what it is and what they are going to do with it and why.

Blanchard J I'm not actually familiar with any of the cases in which Police Officers have been said to have been negligent in that respect.

Pike They're mostly English Your Honour. They mostly get settled. We've had ones with motorbikes stolen.

Blanchard J It is still the law isn't it that a voluntary bailee is only liable for gross negligence?

Pike Yes, unfortunately it was a bit gross. Well we've certainly had cases where we've had to settle but there has been the thefts of motorbikes and motor vehicles and quite a raft of cases

Tipping J There's been some doubt cast on the desirability of making that distinction between a gratuitous bailee and a bailee for award.

Pike Yes, I know Sir, it's a very ancient law, yes that's right, but I mean the point is that what the United States cases are at least relied on for one reason if nothing else is that they see it as a proper legitimate State purpose to protect both the actors of the State and the citizen from loss

Tipping J Is it wholly unreasonable to take a rather utilitarian approach that the greater good will be served by allowing this than preventing it?

Pike Well certainly

Tipping J It won't go down well in

Pike Utilitarianism would win hands down, but I'm not sure if you can do that under 21.

Blanchard J Is this Act utilitarianism or rule utilitarianism.

Elias CJ We don't want that answered.

Pike No your quite safe, I can't. But I rather suspect may it please the Court that we've really traversed all the issues that we see as important on the

case. The reasonable analysis and the *Shaheed* analysis I think is sufficiently

Tipping J What happens if we are against you on both points Mr Pike? That it's neither the Good Samaritan nor the implied power or ancillary power, whatever adjunct power, where do you stand then?

Pike Well I'd certainly submit that given all the circumstances of this search it would be clearly disproportionate to give a remedy of exclusion in this serious drug-dealing case. Here's a man who probably had 17 grams it can be assumed of methamphetamine given there's seven in the kitty and still to be sold \$10,000 of what he's already sold, but this is not minor crime by any manner of means and given that the Police Officers undoubtedly were exercising what all of them would have understand to be a legitimate Police function in securing and inventorising property, it would require something of an order of bad faith or collateral purpose before the Court would say that it was proportionate to give a remedy of such a nature that the drugs evidence is excluded. But that's just the simple answer.

Tipping J Yes, thank you.

Pike And that's the Crown's case.

Elias CJ Yes thank you Mr Pike.

Pike Thank you.

Elias CJ Yes Mr Shaw.

Shaw My friend has submitted that the Police did not need a power to conduct the search of opening the pouch. In my submission that should be rejected and that in opening of the pouch the Police Officer committed a tort of trespassed goods. In my respectful submission

Tipping J The authority **for** that?

Shaw There's an interference with the goods by opening without consent.

Tipping J Interference without consent.

Anderson J And without justification.

Shaw Yes.

Anderson J But you'd accept justification up to that point would you?

Shaw I think we have in our written submissions.

Anderson J Yes.

- Shaw Your Honours the Good Samaritan principle can run too far on the facts of this case. We do have to recall that it was a Police Officer who was exercising Police powers and it would be entirely different if the Police Officer was just acting as an individual, off duty, but this Officer was on duty. He was called out by the Police communications and so it's quite clear that in terms of s.3 of the Bill of Rights this was an act done by a member of the executive branch of the Government, so I invite the Court to bear that matter in mind. Also in my respectful submission it's wrong in principle to adopt the approach that you've been invited to adopted, because the correct rule of law principle that was applicable to this Police Officer at the relevant time was that he was prohibited from opening the pouch unless he had authority to do so, and once a Bill of Rights right is implicated in the conduct of the Officer and prima facie, the conduct of the Officer is interfering with a guaranteed right in s.21, then the framework shifts and the onus shifts on the Crown to point to lawful authority, and that approach is consistent with the covenant approach that as soon as there is interference by the State with the right to privacy under article 17, the State must justify in law, and that's the importance of the phrase "prescribed by law" in s.5. Otherwise we'd have Knight Errants running around trying to protect property in all sorts of ways and in my respectful submission the Knight Errant or Good Samaritan analogy simply is inappropriate in the circumstances of this case. I wish to add also that the issue of abandonment has been referred to on six occasions in friend's written submissions, but the Court of Appeal, the first Court of Appeal make a finding at para.17, it's at page 40 of the case, sorry 40, that's XL, and it's paragraph, I beg your pardon, para.20 of the Court of Appeal's judgment 'here there had been no abandonment of the vehicle'.
- Tipping J Well it was an unwilling abandonment, but it was an abandonment de facto wasn't it. No one's suggesting he was abandoning title, but he was abandoning it in the sense that he was relying on someone else to do what he would have done presumable if he'd been able.
- Shaw In my respectful submission he wasn't abandoning any reasonable expectation of privacy in the item that was being searched, that's the critical point in my
- Blanchard J Is that what the Court of Appeal was addressing at that paragraph which I don't have before me?
- Shaw Yes, Your Honour at the immediately prior paragraph there is a discussion of *Horn* and the Police.
- McGrath J What number paragraph are we at?
- Shaw Nineteen. This is the judgment of His Honour Justice Baragwanath.

Tipping J Is that what His Honour said for the Court that he can't be deemed to have abandoned such expectation of privacy as he had?

Shaw No he didn't say that, he said here there had been no abandonment of the vehicle.

Blanchard J In reality he was submitting his chattels to bailment of the Police.

Shaw But not with the consequential

Anderson J Not in a qualified way, I understand your position.

Shaw Yes, that's my position.

Anderson J I'm just trying to work out how you would rationalise his view in relation to the Police.

Shaw Yes well you would test it this way Your Honours. It had been Constable Burden who as soon as he had collected up the property, started to open up the pouch. Mr Ngan, two meters away on the ground saw that. You'd expect him to call out no I don't want you to open up any of my property thank you.

Anderson J What an incentive.

Shaw Yes he is removed from the scene but that doesn't extinguish his expectations of privacy in relation to the property. In relation to *Opperman*

Tipping J But this is where I find this argument sort of just an assertion that there was a trespass to goods by a bailee, that's why I ask what authority. I mean it's all very well just to assert it but here we have a bailee

Shaw Well we cite some cases in the written submissions on this issue and it relates to the duty of a bailee is a slight duty, so because the bailee

Tipping J Are you back to the sort of gross negligence point that my brother was talking to Mr Pike about?

Shaw Yes.

Tipping J I'm not at all sure this is modern law Mr Shaw that if you are a voluntary bailee you can just be as callous as you like as long as you're not grossly callous.

Shaw Well I remember reading *Helson and McKenzie* which is one case

Tipping J That's a long time ago.

Shaw Yes.



Tipping J There's a case in the Privy Council called *Port Swettenham Authority v T W Wu & Co*

Shaw I don't know that.

Tipping J No, no, I can't but there's quite a lot of relatively recent law on this and I thought we'd moved to test together

Shaw Well

Tipping J But anyway

Shaw Yes anyway isn't the point that it's a question of how far the Police Officer could go and has he gone too far in opening the pouch and thereby committed a tort. That would be the tort analysis. The other analysis would be a Bill of Rights one, as soon as the s.21 right is engaged, i.e., on the facts there's an interference prima facie with the right the Crown has an obligation to justify and point to authority. In relation to *Opperman*

Blanchard J Can a bailee commit the tort of trespass to goods? I've no idea whether the answer is yes or not on that. I'm seeking help.

Tipping J I think excessive user, but it's a very unusual Mr Shaw and just this sort of tossing off on both sides that will be trespass to goods I didn't find very helpful.

Anderson J Or dealing with them outside the scope of the bailment arrangement for example.

Shaw But I think there's some discussion in *Mozzetti* on the bailment issue, that's my recollection.

Tipping J Well we'll have to have a closer look at that.

Shaw Yes I'm sorry I can't help you any further. In relation to *Opperman*, yes Justices Brennan and Marshall joined in a very vigorous dissent, but critical in the *Opperman* case is the concurring opinion of Justice Powel, who concurs to enable the majority

McGrath J Justice White I think.

Tipping J No, Justice White concurred with Justices Brennan and Marshall. Justice Powel concurred in the majority judgment but in his concurring judgment he waters down some of the propositions that the majority would otherwise have. Could I invite you to pay particular attention to Justice Powel's judgment in *Opperman* as well as the dissent? In relation to *Clayton* my friend says well look what great things the Canadian Supreme Court are doing in the ancillary powers area now,

but of course *Clayton* could never be decided that way in New Zealand because we have legislation. We have s.317(b) which specifically authorises roadblocks of the kind that the Supreme Court of Canada was forced they said to uphold in that case because of the refusal of the Canadian Federal Parliament to act in this area, and that brings me back to that policy, that crunch policy issue that I attempted to raise earlier which is should this Court be rushing in and giving impromata to a search of the invasive kind in this case or rather should it be a matter that's left for Parliament. Two final matters in conclusion Your Honours.

Tipping J You mean we should hold it unreasonable but if Parliament wants just to authorise it they're welcome to, is that the point?

Shaw Yes that's the philosophy and isn't that the traditional approach of common law Courts as guardians of constitutional rights and fundamental liberties? There's a real jarring effect if I might put it that way in the Courts actually extending Police powers of search as Your Honours have been invited to do, when at the same time the Courts under the Bill of Rights are guardians of the fundamental liberties

Blanchard J You would make that criticism presumably of what the Supreme Court of Canada did in *Clayton*?

Shaw Yes I don't agree with that approach.

Blanchard J And similarly *Fraser and Gardener*?

Shaw *Fraser and Gardener* I have real problems with on rule of law principles.

Blanchard J I thought you might.

Shaw Yes.

McGrath J It's also *Jefferies* isn't it, the majority in *Jefferies*

Shaw No *Jefferies* is more consistent with the appellant's proposition than

McGrath J In *Jefferies* didn't the Court of Appeal decline to find the search lawful? It wasn't prepared to find an implicit power of search but it certainly found it reasonable.

Shaw Yes but that was under the umbrella of the Arms Act and in paras.49 and 50 of my submissions I have set out the relevant passages from the Court of Appeal judgments that simply say that the implied powers modeled that was being advocated by Justices Cooke and Thomas in that case were disagreed with.

McGrath J Yes, but I'm suggesting that the way the principle has emerged that the Courts are hesitant to extend implied powers of search

Shaw Yes.

McGrath J But that they will assess on the merits of the particular case whether or not the search was reasonable. So that seems certainly to be the way the majority ended up in *Jefferies*.

Shaw Yes, I agree with that but it doesn't hurt the appellant's case in this case because what the appellant says is that the conduct of the Officer in this case amounted to quite a serious search, opening up closed personal items. The Court should not embrace that. The proper approach is minimal impairment and strict circumscription of any common law power.

Tipping J Minimal impairment of what?

Shaw Of the privacy rights of the

Tipping J Of the privacy rights.

Shaw Of the individual.

Tipping J That presumably invites a consideration of how strong those privacy rights were in the circumstances.

Shaw Yes, we've cited *Bogue*'s case in the materials and there are authorities cited within that. There's another one called *McFall*, where the Courts have said that although it's a motor vehicle there are still moderately high expectations of privacy in relation to vehicles.

Tipping J Is it relevant in this context as to the level of expectation of privacy that this man has crashed his car and become unable if you like for the moment, to look after his own property?

Shaw It may be.

Tipping J It may be.

Shaw It may be relevant but it doesn't equate with the abandonment of the property.

Anderson J Yes well you're not complaining about the search of the car are you?

Shaw No. I think it's important to recall also Your Honours when you are making your assessments that the evidence was that there was no written policy that the Officers were following and that's at page Roman numeral 17, lines 21 to 22 of the case, and could I also draw Your Honours attention to the passage in *Colorado and Burton*, that's

tab 4 at page 381. If I could take Your Honours to that citation. Just before I invite Your Honours to read the relevant passage

Shaw It's tab, my friend's bundle, tab 4, *Colorado and Burton*, at page 381. Just before you delve into that I thought I heard my friend Mr Pike say that because this was an investigatory-type or administrative-type search, s.21 of the Bill of Rights wouldn't be engaged because it was long criminal. In my respectful submission

Elias CJ No, he didn't make that submission.

Shaw He didn't go that far?

Elias CJ No.

Shaw Right, okay, well then I simply invite you to read the final paragraph on the right-hand column at page 381. And finally Your Honours I have located the reference to, I had it, now I'll have to relocate it, the reference to Senior Constable Burden giving evidence at the 344(a) concerning visible, valuable property, and it's at page roman numeral 16 of the case on appeal, beginning at line 15, if I could just take Your Honours to that now. Lines 15 to 24. And for completeness I should add that that is obviously Constable Burden's interpretation of the non-written policy. Constable Johnson had a differing interpretation and at para.22 of Justice Miller's judgment the Judge specifically draws attention to their differences. Because of the absence of a written policy there isn't a standardised policy for inventorising the items that were found in this case would be the

Tipping J Are you implying that if there was a written policy, a standardised policy that said you should open, that would make it better or worse from the point of view

Shaw No I'm glad Your Honour raised that point because at the end of the day policy is not law and the argument clearly is open that that policy is nevertheless unlawful.

Tipping J But I'm just wanting to understand what you're seeking as to take out of this final point of yours that there's no written policy and that these two Constables couldn't agree on what they were supposed to be doing anyway.

Shaw Well I suppose there may not be very much that you can take out except that one of the Constables clearly thought that the policy only referred to visible, valuable property, and of course in opening the pouch he's breaching that policy.

Anderson J There's an irony in the approach taken in 13 by the concurring and dissenting Judges that if it's only occasional it's unlawful, but if it happens all the time it's okay. I find that rather odd.

Tipping J Well that was rather what was behind *Maihi*.

Elias CJ Well it's perhaps tied up with the concern under the constitution about arbitrariness and equal protection and so on.

Anderson Well the explanation given is in that way you avoid the risk of improper searches.

Shaw Your Honours this has been a challenging appeal to work on and I thank you for your contributions and exchanges.

Elias CJ Well we're very grateful to counsel. It's very difficult and it's been very well argued thank you.

Shaw Thank you.

Elias CJ We'll take time to consider our decision.

4.08pm Court Adjourned