IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

CIV-2008-463-000701

BETWEEN	RAWIRI MAUI TE KEMIHI MARTIN FALWASSER Plaintiff
AND	ATTORNEY-GENERAL Defendant

Hearing: 15-17 February 2010

Counsel: R E Harrison QC and T Tuari for the plaintiff
A Powell and C Curran for the defendant

Judgment: 19 March 2010

JUDGMENT OF STEVENS J

This judgment was delivered by me on Friday, 19 March 2010 at 3pm pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors/Counsel:
R E Harrison QC, PO Box 1153, Shortland Street, Auckland 1140
Crown Law Office, PO Box 2858, Wellington 6140

Table of Contents

Introduction

[1] The plaintiff, Mr Falwasser, has brought an action for damages in tort and under the New Zealand Bill of Rights Act 1990 (BORA) arising out of an incident that occurred on 23 October 2006 when he was being held in Police custody at the Whakatane Police Station (the incident). There is no dispute that, during a period of some twenty minutes, Mr Falwasser was assaulted several times with Police batons and repeatedly pepper sprayed with Police issue Oleoresin Capsicum (OC) spray. He claims, correctly, that a number of serving police officers including the two most senior officers present at the station were involved and that their actions were unnecessary, unjustified and without lawful authority.

[2] Mr Falwasser further claims that his treatment at the hands of the Police during the incident was so extreme as to amount to cruel, degrading or

disproportionately severe treatment or punishment contrary to s 9 BORA, or in the alternative to a breach of the right in s 23(5) BORA as a person deprived of liberty to be treated with humanity and with respect for the inherent dignity of his person. Baigent compensation/damages were sought for the relevant BORA breach. Under four common law claims Mr Falwasser sought damages for compensatory and/or exemplary damages.

[3] Unusually in a case such as this, there is little dispute as to what occurred during the incident. This is because the entire episode was captured on Police closed circuit television (CCTV). The relevant CCTV footage was admitted into evidence by consent and was available to be viewed in two formats including standard DVD. I have taken the opportunity to review the CCTV footage since the hearing.

[4] Mr Falwasser and his family filed a complaint with the Police within a day of the incident. The Police conducted a thorough investigation including a detailed analysis of the CCTV footage, searches under warrant, forensic testing and interviews with witnesses. Conclusions reached from the investigation resulted in a decision to prosecute four officers, Sergeants Parsons and Busby, and Constables Laing and Mills for breaches of the criminal law. This led to a prosecution before a Judge and jury which ended with all four officers being acquitted on all counts. However, the parties accepted that the acquittal of the four officers is of no consequence with respect to the present civil proceeding. Importantly, Mr Falwasser does not need to prove the commission of criminal offences in order to establish a civil claim for damages.

[5] In the civil proceeding, the New Zealand Police admit that the baton blows and applications of pepper spray complained of constituted "an abuse of power by the police officers concerned". No defence alleging justified use of force against Mr Falwasser during the incident is advanced. Moreover, the New Zealand Police admit breach of the right guaranteed by s 23(5) BORA, but deny any breach of the s 9 BORA right.

[6] For the detailed reasons set out below, Mr Falwasser has succeeded in establishing a breach of s 23(5), but not a breach of the s 9 right. For the s 23(5)

breach, in addition to other remedial steps already taken by the New Zealand Police, Mr Falwasser is entitled to a formal declaration, as well as damages/compensation. He has also established a breach of his common law tort rights in respect of assault and battery. However, in relation to both the use of the batons and the use of the pepper spray, the defence has been successful in invoking the bar to compensatory and aggravated damages arising out of personal injury by accident under s 317 of the Injury Prevention Rehabilitation and Compensation Act 2001 (the 2001 Act). Finally, I have ruled that a claim for exemplary damages against the Attorney-General on the grounds of vicarious liability cannot succeed. But if I am wrong on that point, then exemplary damages at common law for breach of the tortious right ought to be compensated on the same basis as for the breach of BORA right.

Factual background

[7] On Labour Day 2006, Mr Falwasser was arrested by Senior Constable Laing on suspicion that he had stolen a car. He was driven in a Police car to Whakatane Police Station to be charged and processed. He arrived some time after midday and, after being searched, was placed in a holding cell. Mr Falwasser's behaviour, both when he was first spoken to by Senior Constable Laing and in the Police car on the way back to the station, was such that he was considered to be either affected by drugs or mentally disturbed.

[8] The Officer-in-Charge of the Whakatane Police Station was Senior Sergeant Jenkins. He was away on leave. His senior officer, the Area Controller, Inspector Tasker, who had an office at the station, was also away that day. That left Sergeant Parsons as the person in authority at the station at that time.

[9] It seems that Mr Falwasser was, from his own admission, not his normal self that day. Police accept that he had no previous convictions and that it was not in his nature to take a car that did not belong to him. Neither was it normal for him to be unco-operative with the Police. Although both seem to have happened that day, the focus of the proceeding is not on his conduct, but rather on the actions of the police officers who dealt with him at the station that afternoon.

[10] In the early stage, the police officers treatment of Mr Falwasser was passive and tolerant, despite a lack of co-operation by Mr Falwasser in refusing to move from the holding cell. In the normal course, routine processing would have involved Mr Falwasser being moved to another cell for fingerprinting as occurs with every other arrested person. Had co-operation been forthcoming, Mr Falwasser would shortly have been granted bail and been released.

[11] Given Senior Constable Laing's assessment of Mr Falwasser, arrangements were made for a Duly Authorised Officer (Mental Health) (DAO) to attend to assess Mr Falwasser. Mr Jamie Smith, a registered nurse and DAO, arrived at the station at 1.30pm to talk to Mr Falwasser. The DAO then made an assessment and concluded that "Rawiri appeared reasonably settled and relatively stable mentally … and appeared to have no other mental disorder". The DAO conveyed this assessment to Senior Constable Laing who recorded in his jobsheet that the DAO was "satisfied that [Mr Falwasser] was not 1M". The reference to "1M" is shorthand for "mentally ill". Sergeant Parsons was also informed by the DAO of this assessment.

[12] Sergeant Parsons instructed Senior Constable Laing to charge Mr Falwasser with an offence in respect of the stolen vehicle. Mr Falwasser was then charged and Senior Constable Laing attempted to process him but encountered difficulties in fingerprinting and photographing him. Constable Secker, who knew Mr Falwasser from school days, was brought in to endeavour to help Mr Falwasser understand the arrest procedure, it being assumed that a familiar face might help ease the situation.

[13] At about 2.20pm, Mr Falwasser's brother Tawera arrived at the Police Station. He was enlisted by Senior Constable Laing to try to have Mr Falwasser co-operate with processing. Up until 2.23pm, those police officers dealing with Mr Falwasser had been tolerant and patient in the face of passive but ongoing resistance to the process by Mr Falwasser.

[14] Constable Secker explained to Sergeant Parsons the difficulties that he and Senior Constable Laing had been having convincing Mr Falwasser to comply with the fingerprinting and photographing requirements. Sergeant Parsons himself went to speak with Mr Falwasser and can be seen on the CCTV opening the cell door at

2.29pm to have a conversation with Mr Falwasser. Sergeant Parsons instructed Mr Falwasser that he would have to go down to another cell until he allowed Police to take his fingerprints and photograph. Sergeant Parsons can be seen inviting Mr Falwasser to leave his cell, but he refused to move. At this point, Sergeant Parsons abandoned attempts to persuade Mr Falwasser to move and gave instructions several times for him to turn around to be handcuffed so that he could then be moved to another cell. Again, Mr Falwasser refused.

[15] In the face of such refusal, Sergeant Parsons then decided to embark on a strategy that counsel for the Attorney-General accepted was "flawed". Sergeant Parsons informed Mr Falwasser that, if he did not comply with the instructions given to him, he would be pepper sprayed. Shortly after 2.30pm, in the face of the persistent refusals by Mr Falwasser to comply with instructions, Sergeant Parsons used pepper spray on him. Shortly thereafter a second officer, Sergeant Busby, struck Mr Falwasser with a baton. At one point, Mr Falwasser sought to advance out of the cell and a baton was also used by Sergeant Parsons. One of the baton blows caused a wound on his scalp. He retreated inside the cell and Sergeant Parsons closed the cell door at around 2.32pm.

[16] There followed a discussion between various police officers to determine a possible different strategy to remove Mr Falwasser from the cell. A plan was formulated to enter the cell using plastic shields and then employ plastic handcuffs to restrain Mr Falwasser so that he could be moved. The plan was put into action shortly after 2.39pm. During this phase, another Constable used pepper spray, whereupon Mr Falwasser charged at the officers as he sought to exit the cell. It was not possible for the officers to enter the cell to implement the new strategy. The cell door was closed shortly thereafter. Again, counsel for the Attorney-General accepted that, once it was clear to the police officers that minimum force was ineffective to deal with Mr Falwasser, this new strategy was also flawed and inappropriate.

[17] After this second plan was abandoned, there was no further attempt by police officers to enter the cell. But the CCTV footage shows various attempts being made, particularly by Constable Mills, to deploy pepper spray through the vents of the cell.

On several occasions the spraying was carried out by two officers spraying at the same time, both from the top vents and through an aperture at the ground level. One officer poked a baton through the floor aperture to force Mr Falwasser to remove his foot that he was using to attempt to block the entry of pepper spray. Mr Falwasser received injuries to his foot from such baton use. This period of pepper spray use concluded shortly after 2.40pm.

[18] At this stage, all police officers left the cell area, no doubt because of the effects of the pepper spray in the enclosed space. One officer approached the cell holding a long baton and seemed to be trying to persuade Mr Falwasser to comply with instructions. During this period, Mr Falwasser can be seen bending down by the floor aperture, no doubt endeavouring to breathe air less affected by the pepper spray.

[19] Shortly after 2.43pm, Constable Mills returned to the cell and resumed the use of pepper spray through the floor aperture. Again, Mr Falwasser attempted to block the aperture with his foot. The use of pepper spray by Constable Mills and others (including Senior Constable Laing) continued on an intermittent basis until just after 2.51pm. Various police officers were present during this time, some wearing masks, coming and going from the cell area to other parts of the building or outside. The use of such force by police officers concluded at 2.51pm. Mr Falwasser remained inside the cell in obvious discomfort from the pepper spray and the bleeding head wound received from one of the baton blows.

[20] Constable Secker was instructed to call a doctor to attend Mr Falwasser. Dr Waxman arrived at the station some time before 3pm. Shortly after 3pm, Mr Smith, the DAO, returned to be joined by his supervisor Dr Egyedi. Mr Falwasser was then attended to by the medical personnel. Thereafter, Mr Falwasser's brother returned to the station. Mr Falwasser calmed down and Constable Secker was able to process him.

[21] In summary, the use of pepper spray commenced just after 2.31pm and the final application of it occurred at around 2.51pm, a period of 20 minutes. The investigation by the New Zealand Police found that pepper spray was used by

Sergeant Parsons nine times, Constable Oswald four times, Constable Mills 41 times and Senior Constable Laing 11 times, a total of 65 times. All but the first deployment of pepper spray occurred after Mr Falwasser had received the six centimetre laceration midline to his scalp.

Injuries to Mr Falwasser

[22] Mr Falwasser was seen by Dr Waxman immediately following the incident. He had bloodshot eyes, appeared to be distressed and anxious and was pacing backwards and forwards. His mood was described as labile or fluctuating. Mr Falwasser refused to allow Dr Waxman to examine the head laceration unless he was allowed out of the cell. Dr Waxman formed the view that he was "psychotic". Arrangements were made for Dr Egyedi, a consultant psychiatrist, to examine Mr Falwasser later that afternoon. She had been called by the DAO at around 3.30pm to say that Mr Falwasser's mental state had changed from the earlier assessment. By now the DAO considered that he was "mentally ill".

[23] Dr Egyedi was informed that Mr Falwasser had been seen writing on the wall of the cell in his own blood and licking blood off the bench. He was shouting out religious words and seemed paranoid. Dr Egyedi concluded that Mr Falwasser was "probably suffering from a mental illness" and should be admitted to a psychiatric ward for assessment and, if necessary, treatment. Later, in conjunction with senior police officers, Dr Egyedi agreed that she should leave the situation for a few hours and come back to reassess Mr Falwasser. This would give time for Mr Falwasser's parents to arrive.

[24] Dr Egyedi returned to the Police Station at about 6.30pm and saw Mr Falwasser who was at this time sitting in the holding cell with his brother. He was calm and friendly and Dr Egyedi could not discern any symptoms of mental illness. The laceration had been sutured by Dr Waxman. Dr Egyedi asked Mr Falwasser about drug use. He told her that he had smoked cannabis that morning, although he was vague about the quantity and quality. That Mr Falwasser had in fact smoked cannabis that day was confirmed by other evidence.

[25] The overall conclusion reached by Dr Egyedi was that Mr Falwasser was psychotic prior to, and at the time of, the incident in the holding cell. Dr Egyedi opined that, if a drug-induced psychosis was involved, this could have arisen over a short period of time. She noted that sometimes a psychosis can be intensified by other experiences, especially if there is a lot of stress involved.

[26] Mr Falwasser's physical injuries were assessed the next day by his GP, Dr Insull. As well as the head laceration, Mr Falwasser suffered bruising to the outside part of his left forearm, bruising to the back and underside of hisleft arm, a large abrasion below his thumb and an abrasion over the middle finger joint, abrasions to the back of his left hand and outside of his hand and towards the wrist area.

[27] Following the incident, Mr Falwasser was referred by the New Zealand Police for assessment to a registered clinical psychologist, Dr Eggleston. His report dated 2 December 2006 concluded that:

> ...Mr Falwasser experienced a broad range of acute trauma responses during and following the assaults with batons and pepper spray by several police officers on 23 October. At the time of the experience he had strong emotions of fear, helplessness, horror and disgust. He thought that he may die and was disoriented and said he was not completely aware of what was going on around him. In the month following 23 October 2006, his most prominent symptoms were distressing intrusive memories, sleep disturbance, amotivation, poor concentration, hypervigilence, irritability, avoidance of discussing what happened, emotional numbness, feelings of detachment from others, and a sense of foreshortened future.
>
> Mr Falwasser met the criteria for Acute Stress Disorder (ASD) for a month. He has subsequently developed a Post Traumatic Stress Disorder (PTSD) – Acute. PTSD is defined as a set of characteristic symptoms which develop following exposure to an extreme traumatic stressor/s that involves a threat of serious injury, death, or threat to personal integrity. Mr Falwasser experienced an event that involved serious injury to self and his response involved intense fear, helplessness and horror. In respect to diagnosis, if the symptoms have not resolved within a month then the Acute Stress Disorder diagnosis is altered to PTSD. Untreated PTSD is a disabling condition that causes problems in most domains of the individual's life (self image, relationships, employment, substance abuse, and depression).
>
> His ASD and PTSD can be attributed to the trauma of his experiences while incarcerated on 23rd October (assault, inescapable exposure to pepper spray and his feeling of helplessness and fear) …

[28] Dr Eggleston conducted a follow-up psychological assessment, the results of which are set out in a report dated 2 August 2009. With respect to the long term impact of the incident, Dr Eggleston concluded:

> The evidence is that the symptoms present in the month after the event ... have largely continued to be present, albeit with less intensity and frequency over time. The symptoms that were most prominent at the time of the current assessment were sleep problems, avoidance of reminders and hyper-alertness. The symptoms that were becoming less frequent were intrusive thoughts or images, feeling frightened or upset by reminders, not being able to feel emotions and distressing nightmares. It must also be taken into account that Mr Falwasser has demonstrated a propensity for defensiveness and presenting himself favourably and therefore he probably understated some of the symptoms reported. The degree to which this has occurred would become clear in the context of psychological treatment. It is, however, reasonable to assume a degree of under-reporting. Even at face value, he continues to meet the diagnostic criteria for PTSD.
>
> In respect of everyday impairment, Mr Falwasser reported hyperalertness and anxiety as the most prominent ongoing impairments. It is further noted that Mr Falwasser has:
>
> a. Not settled into a job;
> b. Had difficulty with family relationships including needing respite in residence;
> c. Not yet lived independently since the assaults;
> d. Poor insight in respect of the impact of cannabis on his recovery;
> e. Made an error in judgment that led to losing his job;
> f. Become isolated from his friends.

[29] In terms of a prognosis, Dr Eggleston stated:

> Mr Falwasser's PTSD symptoms have diminished somewhat but he is not in the large group of patients that recover within one year of the event. It is most likely that he is in the category of patients (20% of PTSD group) who continue to have moderate PTSD symptoms over time. Risk factors for poor prognosis in Mr Falwasser's case are:
>
> a. Symptoms of psychosis prior to and after the event;
> b. Substance use prior to and after the event;
> c. The event included physical violence and injury (at least to his head).
> d. High degree of distress during the event;
> e. Lack of control of surroundings and report of feeling helpless during the event.

[30] At the time of the second report, Dr Eggleston had not provided any treatment to Mr Falwasser. By the date of the hearing, this had changed and two treatment sessions had taken place, the cost of which were met in whole by ACC. These treatments and the follow-up sessions planned are part of the ongoing intervention aimed at reducing over time the effects of Mr Falwasser's PTSD.

[31] The plaintiff's case under the common law tortious claim is that the effects on him of the pepper spray used during the incident did not amount to "physical injuries" as defined in the 2001 Act. Reference must therefore be made to the actual effects of the pepper spray on Mr Falwasser as emerged in the evidence.

[32] Mr Falwasser described these effects in several parts of his evidence. He said that his eyes were stinging and he wanted to scratch them. He started to gasp for air and found it difficult to breathe properly. Later, he elaborated that whilst in the cell he could hardly breathe and his vision became very blurred. His whole face was stinging and he was in terrible pain. He described the pain as feeling like really hot water being poured on your body but without any physical burn. Finally, Mr Falwasser said that the continued pepper spraying not only meant that he was in pain, but also that he could not breathe properly. He thought that he would suffocate from the effects of the spray. He confirmed in his evidence that the effects of finding it hard to breathe, blurred vision and stinging face lasted about 30 minutes.

Steps taken by the New Zealand Police

[33] Following the complaint by Mr Falwasser's family, details of the incident were referred to the District Commander for the Bay of Plenty. The Police Professional Standards body and the Police Complaints Authority were notified and criminal and disciplinary investigations were commenced on 1 November 2006.

[34] The investigation and resolution of these processes were vigorously pursued by independent police officers. There is no doubt that the investigations were thorough and that the prosecution of the four officers was pursued diligently by a Crown Solicitor from another area. All four officers were stood down from duty at the commencement of the investigations. In terms of the criminal charges brought against them, they elected trial by jury but were acquitted in the District Court at Tauranga in June 2008.

[35] The disciplinary charges were dealt with in accordance with legal requirements. There is no need to canvas the detailed processes followed. Sergeant Parsons resigned from the Police before the disciplinary tribunal convened. Sergeant

Busby and Constable Mills elected to be dealt with under a new disciplinary procedure that had been subsequently introduced. Both came to a mediated settlement with the Police that saw them transferred out of the Whakatane area, and in the case of Sergeant Busby reduced in rank. Senior Constable Laing went to a disciplinary tribunal hearing. He was found guilty of two breaches of Police regulations, but chose to retire from the Police before any penalty was imposed.

[36] Counsel for the Attorney-General submitted that the institutional response to the incident from the New Zealand Police left nothing to chance. It was prompt, thorough and public. I am satisfied that, in terms of the investigation and both the criminal and disciplinary processes, everything was done to ensure that appropriate outcomes were achieved.

[37] Finally, in terms of the chronology, a senior police officer, Inspector Smith, made a visit to the Falwasser family and offered an apology on behalf of the New Zealand Police for the actions of the officers concerned. I accept that this apology was sincere, fulsome and timely.

The pleadings

Factual allegations

[38] The statement of claim pleads various preliminary allegations followed by five alternative claims. The claims distinguish between:

a) Liability and redress for the baton blows (accepted as being "physical injuries" in terms of the 2001 Act) for which no compensatory redress is claimed on account of the statutory bar; and

b) Other abuse treatment during the incident involving the use of pepper spray (that Mr Falwasser contends did not amount to "physical injuries" and is not subject to the statutory bar), for which compensation including for the PTSD as "nervous shock" is claimed.

[39] Paragraphs 3 and 4 of the statement of claim make factual allegations about the Police actions during the incident. Both paragraphs are admitted with the result that the New Zealand Police formally admit that the force applied to Mr Falwasser was "excessive and unnecessary". The pleading that Mr Falwasser suffered considerable humiliation, distress and inconvenience is also admitted. There is a specific pleading disclaiming any intent to recover compensatory damages in respect of the personal injury from the baton blows on the basis of the statutory bar. By contrast, in respect of the use of the pepper spray, Mr Falwasser alleges that he suffered "short-term noxious effects, including painful interference with his vision and breathing, stinging sensations and nausea", but not so as to amount to personal injury covered by the 2001 Act, and in particular, not constituting "physical injuries" suffered by him.

[40] The defence in response admits that Mr Falwasser "suffered short-term painful interference with his vision and breathing, stinging and nausea". But the defence pleading alleges that the "inflection of the noxious effects of the pepper spray was personal injury by accident" in terms of the 2001 Act. There is a similar affirmative defence pleaded in respect of the second, third, fourth and fifth causes of action.

[41] The final factual allegation pleads that, as an overall consequence of Police conduct, Mr Falwasser has suffered "significant and lasting emotional distress, including (as diagnosed) acute stress disorder followed by post-traumatic stress disorder". Such allegations were not admitted, although at the hearing the evidence of Dr Eggleston described above was not seriously challenged by the defence. There is no doubt that Mr Falwasser suffered PTSD and continues to suffer from that condition, fortunately to a gradually decreasing extent.

The five causes of action

[42] The first cause of action alleges that the conduct complained of breached s 9 or alternatively s 23(5) BORA. The defence denied the allegation of breach of s 9, but admitted that there had been a breach of the s 23(5) BORA right. Counsel were in agreement that the question whether the conduct exceeded the s 23(5) threshold

and amounted to cruel, degrading or disproportionately severe treatment or punishment, required the application of the law as laid down in the judgments of the Supreme Court in *Taunoa v Attorney-General* [2008] 1 NZLR 429 (SC).

[43] The second cause of action in the alternative alleges the tort of trespass to the person arising out of the use of pepper spray against Mr Falwasser. The defence conceded that each deployment of pepper spray "involved an application of force to the plaintiff's person [he] did not consent to"; conceded a causal relationship between the application of pepper spray and the pleaded distress and physical symptoms; and admitted that the application of pepper spray "constituted an abuse of power by the police officers concerned". There was no formal concession that the tort of trespass to the person, assault and battery, or assault had been committed but the point was not seriously challenged at trial.

[44] The main defence to the second cause of action turned on the affirmative defence relating to the application of the statutory bar in respect of the pepper spray, thus excluding the availability of compensatory damages. There is a further assertion by the defence that "as a matter of law vicarious liability does not lie for exemplary damages". Counsel were agreed that this raises the question of the effect of the decision of the Court of Appeal in *S v Attorney-General* [2003] 3 NZLR 450. Mr Falwasser's position on this point was that, assuming without conceding the correctness of that and related decisions, his case fell within the exception or qualification recognised in *S v Attorney-General*.

[45] The third cause of action alleges in the alternative that the tort of deliberate infliction of mental injury arose through the use of the pepper spray against Mr Falwasser, thus calling in aid the tort or rule in *Wilkinson v Downton* [1897] 2 QB 57. This claim was advanced as an alternative to the claim in negligence. The defence denied that the police officers intentionally or recklessly inflicted any harm pleaded. Similar lines of defence in respect of the second cause of action were also advanced.

[46] The fourth cause of action pleaded in the alternative the negligent infliction of nervous shock. Counsel for Mr Falwasser acknowledged that, if the individual

tortious acts and their consequences are made out and redressed as a whole, this cause of action really added nothing. He submitted that the negligence claim, like the third cause of action, focussed on the overall course of conduct engaged in by all of the police officers involved, not merely the individual tortfeasor. The allegations in this cause of action were denied and the lines of defence applicable to the other causes of action were repeated.

[47] The fifth cause of action is the only claim, made by Mr Falwasser in the alternative, in respect of the use of Police batons. The claim is pleaded as a claim in trespass to the person/assault and battery. Given the acknowledged application of the statutory bar to this claim, it is accepted that any award of damages is restricted to exemplary damages. The defence makes the same concessions concerning unjustified use of force and abuse of power by the officers concerned, but denies that an award of exemplary damages should be made. The inapplicability of an award based on vicarious liability is also maintained.

The issues for determination

[48] As the hearing developed, it became clear that the defence accepted that, in terms of tortious liability, the use of the batons and the use of the pepper spray by the police officers constituted the tort of trespass against Mr Falwasser. The actions of those involved amounted to at least a series of assaults and batteries and this was a trespass to the person of Mr Falwasser at common law. The defence did not challenge in the end that the PTSD suffered by Mr Falwasser was caused by the actions of the police officers during the incident. Thus, were it not for the 2001 Act, Mr Falwasser would be entitled to seek damages to compensate him for the cost of treatment, pain and suffering, loss of enjoyment of life and any foreseeable consequential losses such as loss of income.

[49] The statement of claim, however, accepted that Mr Falwasser could not recover damages for any losses (apart from exemplary damages) arising from the use of the Police batons because he suffered personal injury. Any claim for damages that he might have, putting aside the possibility of exemplary damages, is in law fully compensated through the accident compensation legislation under which

Mr Falwasser has lodged a claim. The statutory bar in s 317 of the 2001 Act applies to preclude compensation.

[50] As noted, the second cause of action in the statement of claim sought damages, both general and exemplary, in respect of the use of the pepper spray. A key issue will be whether a claim for compensatory damages is covered by the statutory bar in the 2001 Act.

[51] Accordingly, the issues for determination arising from the pleadings and development of the arguments at trial are:

a) In respect of the first cause of action, which BORA right was breached?

b) Is there cover under the 2001 Act arising from the battery constituted by the application of pepper spray?

c) Are aggravated damages available?

d) Are exemplary damages able to be awarded vicariously against the Crown?

e) What is an effective BORA remedy?

f) If applicable, what damages should be awarded at common law?

The first cause of action – which BORA breach?

[52] The parties agreed that the critical issue in relation to the first cause of action is whether the conduct complained of and the overall effects on Mr Falwasser amounted to cruel, degrading or disproportionately severe treatment or punishment contrary to s 9 BORA, or to breach of the s 23(5) right admitted by the New Zealand Police. Counsel accepted that the issue must be approached in terms of the judgments of the majority in *Taunoa*, it being accepted that the decision of the

Supreme Court is important in relation to both liability and also to remedies, particularly the quantum of compensation.

Applicable legal principles

[53] Counsel for the parties each provided helpful analyses of the *Taunoa* judgments, particularly those of the majority that bind this Court. Mr Harrison QC submitted that the majority saw ss 23(5) and 9 BORA as involving a continuum of inhuman treatment, although Elias CJ disagreed with that approach. He submitted that there was agreement that the overall treatment and its effect had to be assessed cumulatively to determine the seriousness and hence the level of BORA breach. He observed that the majority of Judges placed considerable emphasis on the collective departmental lack of intention to cause suffering to the plaintiff prisoners and on the absence of evidence (except in the case of one of the claimants) that significant suffering over and above that inherent in the prisoner's sentence was in fact caused.

[54] The rights in ss 9 and 23(5) BORA were said by Blanchard J at [170] to represent "degrees of reprehensibility". In other words, there is a statutory hierarchy of proscribed conduct: see also [277], [285], [288] and [297] (per Tipping J), [339] (per McGrath J), [383] (per Henry J); compare [5] and [80] (per Elias CJ).

[55] Conduct proscribed by s 9 BORA was described by Blanchard J at [170] as that which is "to be utterly condemned as outrageous and unacceptable in any circumstances". Later at [172], Blanchard J described it as conduct that "New Zealanders would … regard as so out of proportion to the particular circumstances as to cause shock and revulsion". Blanchard J added at [176] that:

> It is therefore apparent that "disproportionately severe", appearing in s 9 alongside torture, cruelty and conduct with degrading effect, is intended to capture treatment or punishment which is grossly disproportionate to the circumstances. Conduct so characterised can, in my view, when it occurs in New Zealand, be fairly called "inhuman" in the sense given to that term in the jurisprudence under art 7 of the ICCPR.

[56] McGrath J agreed with the approach of Blanchard J at [339] – [340]. Tipping J suggested at [297] that s 9 conduct should be "reserved for truly egregious cases which call for a level of denunciation of the same order as that appropriate for

torture". Earlier, at [289] he had referred to a test defining disproportionately severe conduct as being "conduct which is so severe as to shock the national conscience". Henry J at [383] expressed general agreement with the substance of the views expressed by Tipping J.

[57] By contrast, a breach of the s 23(5) right occurs when there is conduct by the State that is less reprehensible but still unacceptable: see per Blanchard J at [170]. Blanchard J also added at [177]:

> That leaves to s 23(5) the task, couched as a positive instruction to the New Zealand government, of protecting a person deprived of liberty and therefore particularly vulnerable (including a sentenced prisoner) from conduct which lacks humanity, but falls short of being cruel; which demeans the person, but not to an extent which is degrading; or which is clearly excessive in the circumstances, but not grossly so.

[58] The views of Blanchard J were supported by McGrath J at [339] – [340]. Tipping J stated at [288] that it seems "clear that the threshold for breach of s 23(5) was designed to be lower than the corresponding threshold for disproportionately severe treatment in s 9".

[59] Counsel for the Attorney-General submitted that conduct breaching s 9 BORA will usually, but not necessarily, involve an intention to harm or consciously reckless indifference to the causing of harm, as well as significant physical or mental suffering. The judgment of Blanchard J at [211], Tipping J at [295], McGrath J at [359] and Henry J at [383] were advanced in support. It seems that the Supreme Court recognised that the prohibition on torture in s 9 of the BORA involved adoption of the concept defined in the widely ratified United Nations Convention against Torture and targeted the worst form of ill-treatment by the State: see, for example, [81] (per Elias CJ), [171] (per Blanchard J, "[t]he worst is torture"), [280] (per Tipping J, describing treatment or punishment that is cruel or degrading or disproportionately severe as "broadly on the same general level of seriousness" as torture), [339] – [340] (per McGrath J), [383] (per Henry J).

[60] Alongside torture, the remaining limbs of s 9 involve cruel, degrading and disproportionately severe treatment or punishment, these being considered to set out three concepts of equivalent and grave seriousness, albeit reflecting different

emphases or orientation: see [82] – [83] (per Elias CJ), [171] – [172] (per Blanchard J), [280], [286] (per Tipping J), [339] – [340] (per McGrath J), [383] (per Henry J). At [82] – [83], Elias CJ inclined to the view, not shared by any other members of the Court, that "cruel, degrading or disproportionately severe treatment or punishment" should be applied as a "compendious expression of a norm", rather than three distinct inquiries. Adopting a submission from Counsel for the Attorney-General, relying on the majority judgments in *Taunoa*, the different limbs of s 9 of the BORA are:

> Torture involves the deliberate infliction of severe physical or mental suffering for a proscribed purpose, such as the obtaining of information.
>
> Cruel treatment is treatment which deliberately inflicts suffering, or results in severe or substantial suffering or distress.
>
> Degrading treatment is treatment which gravely humiliates and debases the person subjected to it.
>
> Disproportionately severe treatment is conduct which is so severe as to shock the national conscience, or so grossly disproportionate as to cause shock and revulsion. It is a standard well beyond even manifestly excessive treatment.

[61] In terms of assessing alleged breaches of s 9 BORA, the Supreme Court referred to potentially relevant factors as including the nature of the conduct being examined, the state of mind of the party responsible for the conduct, and the effects of the conduct on the victims: see [291], [294] and [295] (per Tipping J), [353] and [360] (per McGrath J), [383] (per Henry J). Moreover, the length of time a person is exposed to the impugned conduct can also bear on the severity of the conduct and thus whether a breach of s 9 of the BORA has occurred: see [8] (per Elias CJ), [218] (per Blanchard J), [355[, [358] and [362] (per McGrath J).

[62] Finally, counsel for the Attorney-General referred to the relevance of the legal breaches that occurred in assessing which BORA breach was involved. A majority in the Supreme Court suggested that the focus should be on the nature and harshness of the treatment and not its lawfulness in assessing the seriousness of the breach: see [181], [211] (per Blanchard J); [343], [353] (per McGrath J and [386] (per Henry J); aliter [31] (per Elias CJ) and [296] (per Tipping J); and compare *Vaihu v Attorney-General* [2007] NZCA 574 at [35].

Competing factual submissions

[63] The plaintiff submitted that a breach of s 9 BORA rights could be established on the evidence on the basis that the conduct of the police officers involved intentionally or recklessly harming Mr Falwasser. Mr Harrison relied upon a number of factual aspects to support such submission. First, he noted that Mr Falwasser, unlike the plaintiffs in *Taunoa*, was not a sentenced prisoner, far less a hardened criminal whose earlier behaviour which had resulted in the departmental actions warranted significant disciplinary response. Mr Falwasser was a hitherto blameless citizen taken into custody and was known to be experiencing some kind of mental crisis, whether drug induced or otherwise.

[64] Second, the conduct of the four officers directly involved must be characterised as deliberate and knowing. Mr Harrison submitted that the weapons involved comprising batons, shields and pepper spray were used contrary to Police General Instructions and that this was an aggravating factor demonstrating the deliberate nature and seriousness of the conduct, including the fact that such conduct was led by two of the most senior police officers present at the Police Station that day.

[65] Mr Harrison noted that none of the four officers directly involved were called to give evidence to deny that their conduct was not intentional, reckless or deliberately aimed at harming Mr Falwasser. He submitted that the intention of those involved was patently to cause such immediate harm and distress as the force or measures repeatedly used would foreseeably cause. Thus, the actions were at the very least reckless as to the likely longer term consequences of their actions. The training of the officers concerned would have made them well aware of the likely immediate effects. But beyond that, the effects of what they were doing unfolded over the course of the 20 minute period from 2.30pm until just after 2.50pm. Mr Harrison submitted that the officers directly involved could see the suffering that Mr Falwasser was enduring from the ongoing mistreatment of him, especially from the repeated use of pepper spray. He submitted that the length of the incident was indicative of the degree of ongoing humiliation and debasement of Mr Falwasser.

[66] Mr Harrison also referred to the medical evidence and submitted that Mr Falwasser had no prior history of mental illness, yet he ended up initially with acute stress disorder and ultimately PTSD. He accepted that the PTSD is now abating and is likely to abate further with the ongoing treatment available to Mr Falwasser through Dr Eggleston. Mr Harrison referred to the fact that Mr Falwasser had been unable to work. He noted that the overall effect on him from the incident, both in terms of its physical and mental effects, was "profound". He submitted that the conduct involved serious and significant abuse from a human rights perspective.

[67] Mr Harrison submitted that the most excessive and shocking aspect of the entire incident was the repeated use of pepper spray against Mr Falwasser, particularly after he had received his head injury. He referred to the number of times that the pepper spray was used totalling 65. He submitted that the use of the pepper spray occurred while Mr Falwasser was contained in the perspex cell posing no immediate threat to himself or anyone else. Accordingly, he submitted that the Police conduct over the full 20 minute period, and viewed as a whole, amounted to cruel or degrading or disproportionately severe treatment or punishment.

[68] For the defendant, Mr Curran submitted that there was no intention to torment, punish or degrade Mr Falwasser. Rather, the intention of the officers concerned throughout the incident was to move Mr Falwasser from the holding cell after he had persistently refused to agree to routine processing involving the provision of fingerprints and photographs. The evidence in support of that submission included the fact that, prior to any force being used, non-violent means seeking to persuade Mr Falwasser to submit had been tried and failed. For example, Constable Secker attempted to assist Senior Constable Laing and police officers sought to enlist the support of Mr Falwasser's brother to persuade him to comply with the requested processing. The evidence of Mr Falwasser himself confirmed that multiple instructions had been given by police officers to agree to the routine processing of fingerprinting and photographing.

[69] Mr Curran referred to the actions of Sergeant Parsons who, shortly after 2.30pm, could be seen inviting Mr Falwasser out of his cell in an open handed

manner. Counsel further noted that the police officers were ultimately able to achieve their intention by completing fingerprints and photographs, consistent with their earlier and continuing intention.

[70] Counsel for the Attorney-General accepted that the strategies chosen to endeavour to move Mr Falwasser were flawed and inappropriate. This was because the plan began with the use of pepper spray when there was only passive resistance by Mr Falwasser to instructions lawfully given. While it was true that the level of force increased, this arose from the misguided actions of the officers to enter the cell and seek to restrain and remove Mr Falwasser. Counsel accepted that the plan of removing Mr Falwasser to another cell should have been abandoned when it became clear that more than minimal force was going to be required. However, counsel submitted that, even if there is patently unreasonable adherence to a flawed plan or strategy, this does not equate to an intention to torment, punish or degrade Mr Falwasser.

[71] Factors relevant to there being no more sinister intention included the fact that there was no attempt by police officers to conceal what had occurred. Further, an intention on the part of the police officers to mistreat Mr Falwasser is inconsistent with the prompt recourse to obtaining the assistance of health professionals at the conclusion of the incident. Moreover, the officers must have been aware that there would be a running record of what had transpired since Mr Falwasser was in the receiving area which was under video surveillance. Counsel submitted that it was unlikely that an officer whose intention was to mistreat a prisoner, would do so when their actions could be captured on CCTV and reviewed thereafter.

[72] Counsel further submitted that there was no evidence that the officers involved with the incident with Mr Falwasser knew or suspected that the plaintiff was mentally ill during the period of the incident. Reference was made to the jobsheet of Constable Laing recording the earlier suspicion that Mr Falwasser had mental health issues. However, any such suspicions were conclusively displaced following the mental health assessment by the DAO. Mr Smith recorded his assessment that Mr Falwasser "appeared reasonably settled and reasonably stable mentally … and appeared to have no other disorder". Further, shortly before the

commencement of the incident Mr Falwasser was seen to be inside the holding cell reading a piece of paper but appearing to be calm. This situation is to be contrasted with the position after the incident (when the Police use of force had ceased) when Mr Falwasser, according to Doctors Waxman and Egyedi showed clear signs of abnormal mental health. Counsel for the Attorney-General accepted that the conclusions of the health professionals as to the effect on Mr Falwasser involved a possible psychotic episode or some form of mental illness.

Conclusion on BORA breach

[73] Having reviewed the CCTV footage and considered all the evidence, I am satisfied that the plaintiff has failed to establish a breach of Mr Falwasser's s 9 BORA right. What he has established at the hearing is that there was a serious breach of his s 23(5) BORA right. With respect to the s 9 claim, I am unable to find that what occurred involved torture or cruel, degrading or disproportionately severe treatment or punishment. In making this assessment, I have borne in mind the observations of the majority Judges in *Taunoa* that breaches of s 9 are reserved for truly egregious cases, involve conduct "which is to be utterly condemned as outrageous and unacceptable in any circumstances" and conduct that "New Zealanders would … regard as so out of proportion to the particular circumstances as to cause shock and revulsion". The conduct of the police officers during the incident, while serious and wholly unacceptable, does not in my opinion reach that standard.

[74] Mr Harrison accepted that, had the incident stopped after the first application of pepper spray and the causing of the head laceration by the use of a Police baton, there would not have been a breach of s 9. However, he submitted that it was the extended period of use of pepper spray at various intervals during a 20 minute period that took this case beyond a breach of the s 23(5) BORA right. I disagree. I am satisfied that the police officers concerned did not intend to torment, punish or degrade Mr Falwasser. In this regard, I accept the submissions advanced by counsel for the Attorney-General summarised above. Further, I find that the police officers did not set about intentionally or recklessly harming a mentally ill person. The advice that had been received from the DAO by Senior Constable Laing as to

Mr Falwasser's mental health (namely, that he was not mentally ill) was passed on to Sergeant Parsons, the Officer-in-Charge. Accordingly, as from the time of that assessment until after Dr Egyedi made her assessment much later in the afternoon, the police officers involved were entitled to accept the opinion of the DAO that Mr Falwasser "appeared reasonably settled and relatively stable mentally".

[75] In summary, whether viewed either separately in its component parts or cumulatively throughout the whole of the incident, I am satisfied that what occurred to Mr Falwasser did not amount to torture, or treatment or punishment that was cruel, degrading or disproportionately severe. The police officers concerned in the incident were not motivated by a desire to inflict physical or mental distress on Mr Falwasser. I am satisfied that Mr Falwasser has not established that there was an intention or recklessness on the part of the officers concerned to cause damage or distress. Rather, the police officers embarked on a flawed strategy or plan that was designed to have Mr Falwasser comply with lawful instructions and undertake routine processing by the provision of fingerprints and photographs. The flawed strategy was continued by some individual officers, particularly in the use of pepper spray, for far too long. But this did not in my judgment take the overall conduct throughout the incident into the category of torture or other conduct circumscribed by s 9 BORA. I accept the submission of counsel for the Attorney-General on this point.

[76] On the other hand, I am satisfied that the concession by the defence as to a breach of the s 23(5) BORA right was properly made. Mr Falwasser was, despite his lack of compliance and intransigence, entitled to be treated during that 20 minute period of the incident with humanity and with respect for the inherent dignity of the person. He was not. The breach of the s 23(5) BORA right in this case was, in my opinion, such that it lacked humanity, but fell short of being cruel. The Police conduct during the incident did demean Mr Falwasser, but was not to such an extent that it was degrading. The application of force in all the circumstances was clearly excessive, but not grossly so. Therefore, I have concluded that, in terms of the degrees of reprehensibility, the conduct in question during the incident ought properly to be characterised as a serious breach of the s 23(5) BORA right of Mr Falwasser.

Is there cover under the 2001 Act for the application of pepper spray?

[77] There was no dispute between the parties that, if Mr Falwasser did not have cover under the 2001 Act for the tortious claim in respect of the use of pepper spray (the second cause of action), the statutory bar in s 317 of the 2001 Act would not preclude a claim for compensatory damages: see *Queenstown Lakes District Council v Palmer* [1999] 1 NZLR 549 (CA). The issue for determination is whether, in respect of the mental injury arising from the use of the pepper spray during the incident, Mr Falwasser has cover under the 2001 Act.

[78] The case advanced by Mr Falwasser is that the effects on him of the use of pepper spray during the incident did not amount to "physical injuries" as defined by the 2001 Act. Therefore, he did not qualify for cover in respect of his mental injury on the basis of s 26 of the 2001 Act and the definition of "personal injury", which under s 26(1)(c) includes within that term "mental injury suffered by a person because of physical injuries suffered by that person". This raises an essentially factual inquiry as to whether the effects of the pepper spray on Mr Falwasser in the circumstances of this particular case came within the term "physical injuries". The defence position is that Mr Falwasser is covered by the 2001 Act because during the incident he suffered physical injuries resulting from the use of the pepper spray.

The statutory framework

[79] The starting point is s 20 of the 2001 Act which relevantly provides:

> **20 Cover for personal injury suffered in New Zealand (except mental injury caused by certain criminal acts [or work-related mental injury])**
>
> (1) A person has cover for a personal injury if—
>
> (a) he or she suffers the personal injury in New Zealand on or after 1 April 2002; and
>
> (b) the personal injury is any of the kinds of injuries described in section 26(1)(a) or (b) or (c) or (e); and
>
> (c) the personal injury is described in any of the paragraphs in subsection (2).
>
> (2) Subsection (1)(c) applies to—

(a) personal injury caused by an accident to the person:

…

[80] The term "personal injury" is relevantly defined in s 26 of the Act as follows:

> **26 Personal injury**
>
> (1) Personal injury means—
>
> (a) the death of a person; or
>
> (b) physical injuries suffered by a person, including, for example, a strain or a sprain; or
>
> (c) mental injury suffered by a person because of physical injuries suffered by the person; or
>
> …

[81] The term "mental injury" is defined in s 27 of the 2001 Act to mean "a clinically significant behavioural, cognitive, or psychological dysfunction". Counsel for the Attorney-General accepted that the acute stress disorder suffered by Mr Falwasser matured into PTSD as diagnosed by Dr Eggleston and fell within the definition of mental injury. It is further not disputed that, subject to an exception that is not applicable to the present case, there is cover for mental injuries under the 2001 Act only if they are suffered because of physical injuries: see s 26(1)(c).

[82] Counsel noted that the term "physical injury" is not defined in the 2001 Act other than by reference to two examples of a strain or a sprain included in s 26(1)(b). Counsel for the Attorney-General submitted that the natural meaning of "physical injury" is that it is hurt or harm that affects the body rather than the mind or any incorporeal aspects of human existence. In the absence of a detailed statutory definition, counsel for the defence cited a decision of the District Court on appeal under the 2001 Act dealing with the ordinary meaning of physical injury: see *Teen v Accident Compensation Corporation* DC Wellington 244/2002, 3 September 2002. Judge Beattie stated at [13]:

> It is clear from that definition that physical injury is clearly distinguished as a separate category of injury from mental injury. Physical in this context I find to be in accordance with the dictionary meaning "of or relating to the body as distinguished from the *mind or spirit"*. Using the definition of

> physical injury in line with the natural and ordinary meaning it must therefore involve physical damage or hurt, that is bodily harm or damage.

[83] The approach to the interpretation of "physical injury" is also informed by two decisions of the Court of Appeal. The first is *Accident Compensation Corporation v Mitchell* [1992] 2 NZLR 436 (CA). The issue for the Court was whether cover under the Accident Compensation Act 1982 applied where brain damage was caused to an infant by an involuntary cessation of breathing when no external cause of that condition could be identified. At 438, Richardson J stated:

> …a generous unniggardly interpretation of personal injury by accident is in keeping with the policy underlying the Accident Compensation Act of providing comprehensive cover for all those suffering personal injury by accident in New Zealand wherever, whenever and however occurring, and to do so in place of common law remedies.

[84] The second case is *Harrild v Director of Proceedings* [2003] 3 NZLR 289 (CA). There the Court of Appeal was considering whether the death of a foetus due to medical misadventure constituted an injury to the mother under the 2001 Act and would therefore be covered, precluding an action for damages against the medical practitioner under the Health and Disability Commissioner Act 1994. On the interpretation point, Keith J gave a separate judgment as part of the majority and stated:

> [39] I return to the terms of the 2001 Act, the latest version of a major piece of social legislation, and to the philosophy underlying it. I agree with Richardson J in *ACC v Mitchell* [1992] 2 NZLR 436, 438-439, that a generous unniggardly interpretation of the legislation is in keeping with its policy of providing comprehensive cover for all those suffering personal injury in New Zealand, wherever, whenever, and however occurring. It is true that, since he said that, the coverage of the legislation has been more precisely defined and in some respects narrowed (for instance with the introduction of the medical misadventure and mishap limits) but with one possible exception I do not see those changes as affecting this case.
>
> [40] That possible exception is the exclusion from the coverage of the compensation legislation of mental injury in the 1992 amendments, reversing the effect of the decision of this Court in *ACC v E* [1992] 2 NZLR 426, a decision given by the same Judges as *Mitchell* and on the same day. Since the argument here is based on physical injury, not mental injury, I do not see that limit as significant in this case. Accordingly, the generous non-niggardly approach remains applicable.

[85] Relying on the approach in these Court of Appeal cases, Counsel for the Attorney-General submitted that the question of whether cover will apply in a

particular case is to be approached in a generous and non-niggardly manner in order to satisfy the aims and purpose of the 2001 Act. To achieve this, there must be some hurt or harm to the body of the claimant, although a *de minimis* threshold will apply. Whether the claimant has suffered a physical injury will be a question of fact, measured against the definition of s 26(1)(b) thus interpreted.

The factual question

[86] The factual question for determination is: does the reaction of Mr Falwasser to pepper spray (OC spray) constitute physical injury? Counsel for Mr Falwasser relied on information provided by the New Zealand Police including the Material Safety Data Sheet for OC spray and the Staff Safety Tactical Training Materials for OC spray. In the latter document, the effects are described as follows:

> The reaction to OC Spray can be divided into two categories: psychological and physical. The effects are considered to be 60% psychological and 40% physical. …
>
> The second category is physical. The physical effects of OC Spray may include:
>
> - a burning sensation on exposed skin
> - breathing made more difficult by constricted bronchial passages
> - eyes burning and involuntarily closing tightly
> - reducing muscle co-ordination
> - freely secreting mucous membranes
> - rapidly dilating blood vessels
> - gagging or gasping for breath
> - no response
>
> Reaction times vary from person to person. Responses can be immediate but on average take about 3 to 6 seconds. The effects of OC Spray can last from 10 to 45 minutes.

[87] Counsel for the Attorney-General referred to a paper by Marita Broadstock entitled *What is the safety of "pepper spray" use by law enforcement or mental health service staff?* There, the effects of OC spray were described at page 1 as follows:

> Inhalation of, and skin and eye contact with, pepper spray causes an almost instantaneous onset of responses. Effects on the eyes include severe burning pain, involuntary closure, lacrimation (tearing), conjunctival inflammation, redness, swelling and blepharospasm (eyelid twitching). Skin contamination causes tingling, burning pain, edema, erythema and occasional blistering. Respiratory symptoms include nasal irritation, bronchoconstriction, a burning sensation in the throat, severe coughing and sneezing, and shortness of breath (Olajos and Salem, 2001). More systemic effects include disorientation, panic and loss of body motor control (Smith, 2002). Most symptoms resolve within 30 to 45 minutes.

[88] Counsel for Mr Falwasser relied upon the evidence given as to the effects of the pepper spray and submitted that they involved no more than "short term painful interference with his vision and breathing, stinging and nausea". Counsel accepted that these effects would no doubt qualify as physiological consequences of the inhalation of, and contact with pepper spray, but submitted that there was no evidence that they amounted to, or caused "physical injuries" to Mr Falwasser's person. Essentially, this was on the basis that the effects of the pepper spray were transitory or within any *de minimis* threshold applied to that term.

[89] Counsel for the Attorney-General also relied on Mr Falwasser's evidence, particularly that dealing with the immediate consequences. Thus, the effect of the pepper spray is described by reference to the effect that it had on Mr Falwasser's body, particularly his eyes and respiratory system. Counsel submitted that, whilst the physical effects were not permanent and are intended to dissipate, the undoubted purpose and effect of pepper spray is to physically disable the subject by means of the intense irritation caused to the eyes, mouth and nose. Counsel developed the submission by contending that there was no reason to restrict cover under the 2001 Act to those persons who have abrasions, bone fractures or other lasting manifestations of their injury. Thus, if the effects of the injury have passed, the person may not require treatment. But Mr Falwasser's case is different because, as a result of the effects of the pepper spray he suffered mental injury, in which case cover under the 2001 Act should apply.

Determination on issue of cover

[90] The approach to the question of interpretation of "physical injury" discussed in *Teen* is helpful and I propose to adopt it. Further, I accept that the natural

meaning of "physical injury" involves hurt or harm that affects the body rather than the mind or any incorporeal aspects of human existence. I also agree with the discussion in Stephen Todd (ed) *The Law of Torts in New Zealand* (5 ed, Brookers, Wellington, 2009) where Professor Todd suggested at 2.4.01 that physical injuries:

> …should be understood to mean any condition involving harm to the human body, including harm by sickness or disease, that is more than merely trifling or fleeting.

[91] Applying such an approach to the interpretation of "physical injury", I am satisfied that Mr Falwasser suffered physical injuries from the effects of his exposure to pepper spray during the incident. I find that the effects anticipated from the use of pepper spray in the Police materials referred to at [86] above are consistent with physical injury under the 2001 Act. Further, the actual effects that Mr Falwasser experienced in this case (as summarised at [32] above) also fall within the term physical injury. I agree with the submission on behalf of the defendant that the effects and consequences suffered by Mr Falwasser were more than trifling or fleeting. They also went well beyond any *de minimis* qualification applicable to the term "physical injury". Approaching the issue in this way is also consistent with the injunction of the Court of Appeal that questions of cover ought to be approached in a generous and non-niggardly manner.

[92] In conclusion on this point, I find as a fact that Mr Falwasser did suffer physical injury as a result of the use of pepper spray during the incident. He also suffered mental injury as conceded on behalf of the Attorney-General. He therefore comes within the definition of "personal injury" provided for in s 26(1)(c) of the 2001 Act. It follows that he would have cover for the personal injury concerned by virtue of s 20 of the 2001 Act. This finding is also consistent with the fact that the Accident Compensation Commission appear to have accepted that Mr Falwasser has cover and so will be entitled to cover for treatment for his acknowledged mental injury. Finally, these findings mean that any action by Mr Falwasser for compensatory damages is barred by s 317 of the 2001 Act. Accordingly, he would not be entitled to any claim for compensatory damages under the second, third or fourth causes of action.

Availability of aggravated damages

[93] This point may be shortly dealt with. It arises because, on the pleadings, Mr Falwasser claimed "aggravated damages" as part of the relief sought in the second, third and fourth causes of action. In fairness, this claim was not strongly pressed by counsel for Mr Falwasser in closing.

[94] The law provides that aggravated damages may be available where an award of damages on a restorative or restitutionary basis is insufficient to properly allow for the plaintiff's legitimate sense of indignation as to the manner in which the tort was committed. Such an award may be compared with an award of general damages that may be available if there is additional harm such as anxiety, distress and so on that is not susceptible to proof. It has been suggested that aggravated damages are conceptually distinct from exemplary or punitive damages: see S M Waddams *The Law of Damages* (looseleaf) at 11-1.

[95] Counsel for the Attorney-General submitted that it might be preferable to use the expression "aggravation of damage" referring to compensatory damage, rather than "aggravated damages" to describe what the law is seeking to achieve in this area. Counsel drew a comparison with the way in which the law refers to mitigation of damage when the opposite phenomenon has occurred: see per Tipping J in *Attorney-General v Niania* [1994] 3 NZLR 106 at 111. But however expressed, counsel submitted that aggravated damages are compensatory in nature.

[96] Citing *Donselaar v Donselaar* [1982] 1 NZLR 97 (CA), Counsel for the Attorney-General submitted that all actions for compensatory damage must yield to s 317 of the 2001 Act. Once there is cover for the loss, the action for damages cannot proceed for any amount whether the loss has been mitigated or aggravated by the defendant's conduct. Accordingly, the aggravated damages claimed under the second, third and fourth causes of action are blocked by the statutory bar.

[97] I agree with the defendant's submissions on this point. I appreciate that a different view has been argued by Professor Todd in "A New Zealand Perspective on Exemplary Damages" (2004) 33 Common Law World Review 255-282).

However, Professor Todd acknowledged that the law as expressed in *Donselaar* would need to be reconsidered before such a view were treated as the law of New Zealand. Finally, I am satisfied that any claim for aggravated damages advanced by Mr Falwasser under the second, third and fourth causes of action must fail.

Availability of exemplary damages

[98] This issue falls to be determined on the basis that exemplary damages are claimed under the second, third and fourth causes of action, as well as the fifth cause of action relying on the use of the Police baton. Counsel for the parties accepted that the statutory bar did not apply to claims for exemplary damages. But Mr Falwasser's claims under this head were met by an assertion that any exemplary damages claimed do not lie against the Crown because, as a matter of law, vicarious liability does not lie for exemplary damages. Counsel agreed that this issue raises the effect of the decision of the Court of Appeal in *S v Attorney-General* [2003] 3 NZLR 450 and associated cases.

[99] The leading case on the issue of vicarious liability is *S v Attorney-General*. Counsel for Mr Falwasser accepted that this Court must accept as binding the principle that generally a plaintiff ought not to be entitled to recover exemplary damages from a principal, for example the Crown, on the basis of vicarious liability. The reasons for such a principle were carefully examined in the majority judgment of Blanchard J at [85] – [92]. But, the same judgment went on at [93] to propose a tentative exception in the following terms:

> The balance may possibly be different in a case in which an official of the state, for example a police constable, has deliberately, recklessly or (in the rare case contemplated by the Privy Council in *Bottrill v A* [2003] 2 NZLR 721 in a grossly negligent manner directly inflicted personal injury on the plaintiff, particularly if, as in *Monroe v Attorney-General*, that official has not been able to be identified and so the wrongdoer has not been punished or disciplined. We therefore leave open the possibility that in such a case the Crown may be held vicariously liable.

[100] Counsel for the plaintiff also referred to the discussion on the point in *W v Attorney-General* CA227/02, 15 July 2003 at [50] and [53]. Counsel noted further discussion of the issue in later Court of Appeal decisions in *Wilding v*

Attorney-General [2003] 3 NZLR 787 (CA) at [17] and *Hobson v Attorney-General* [2007] 1 NZLR 374 (CA) at 153. Counsel indicated that there was a possibility that the point might receive some consideration in the Supreme Court in a further round of the case of *Couch v Attorney-General* [2008] 3 NZLR 725 (SC). But he accepted that there was no certainty as to whether such decision would shed any light on the correctness of the principles discussed in *S v Attorney-General.*

[101] Counsel for the Attorney-General submitted that the exception mentioned in *S v Attorney-General* was in the "possible" category. Further, the Crown maintained that there ought to be no distinction drawn in respect of Police Constables where, as in this case, the State has not only identified the actual tortfeasors, but also prosecuted them and disciplined them according to law. Counsel accepted that authority in the High Court is currently against the Crown's submission: see *Monroe v Attorney-General* HC Auckland A617/82, 27 March 1985 and *Archbold v Attorney-General* [2003] NZAR 563. Counsel accepted that the Court of Appeal in *Wilding* had left the point "open".

[102] The early authorities on this point, including *Monroe*, have been reviewed and criticised in articles by Professor Smillie "Exemplary Damages for Personal Injury" [1997] NZ Law Review 140 and Professor Todd "Exemplary Damages" (1998) 18 NZULR 145. In the latter article, Professor Todd at 181-184 considered the arguments in favour of awarding exemplary damages on the basis of vicarious liability and (at 182) concluded:

> There are good reasons for refusing to allow vicarious liability to extend to exemplary awards. The most telling objection is simple unfairness. An innocent party is required to pay the damages, whereas the guilty goes unpunished, and the amount of the damages awarded necessarily do not reflect the particular defendant's degree of culpability. Furthermore, the reasons for making an award of exemplary damages – primarily to punish the wrongdoer and to deter similar conduct in future – are largely ignored if legal responsibility for the wrongdoing is transferred to another. The English Law Commission has recognised the force of the objections …

[103] Counsel for the Attorney-General also submitted that, of the policy considerations that have been put forward to support the imposition of exemplary damages vicariously, only one survived the judgment of the Court of Appeal in *S v Attorney-General*. Importantly, the majority noted at [91] that:

> The single argument of cogency which can be put forward for awarding exemplary damages on a vicarious basis is that the punishment and denunciation of outrageous conduct within an enterprise controlled or supervised by the defendant may provide additional deterrence for the defendant and others, including its employees and agents, from behaving in such a grossly improper manner. It can be said that, particularly in a jurisdiction where ordinary damages for personal injury cannot be awarded save in an exceptional case, it is desirable, even necessary, to make an example of the principal or employer whose agent or employee has behaved disgracefully and thereby encourage people in their position to take even greater precautions to avoid such behaviour or to detect and stop it at an early stage. But it is debatable, in our view, whether in very many cases a principal whose own conduct has not been found to be negligent, or other principals who are already observing their legal duties, will be thereby provided with an additional incentive to take, on an economically sensible basis, further and effective precautions going beyond those required by an ordinary duty of care.

[104] Counsel for the Attorney-General also submitted that alternative means of redress provided a better basis than imposing exemplary damages vicariously on the Crown. For example, declarations in public law compensation recognised in Baigent's case (the same type of relief as is relied upon in this case) will enable a plaintiff to obtain relief where a parallel breach of civil rights has occurred. Counsel cited inquiries and investigations under the State Sector Act 1988, the Ombudsman, Parliamentary Select Committee inquiries and Independent Police Conduct Authority Act 1988 as providing alternative means for effective normative controls on State behaviour than an award of exemplary damages.

[105] Counsel for Mr Falwasser submitted that the case came within the "exception" in *S v Attorney-General*. He submitted that this was a case where not merely one, but a number of police officers acting in concert have "deliberately, recklessly or … in a grossly negligent manner directly inflicted personal injury on the plaintiff". Counsel accepted that, unlike the *Monroe* case, the officers concerned had been identified. But he submitted that proceeding in tort against all four officers as individual defendants would have been inappropriate and unfairly onerous, given the need to sue the Crown in respect of the breach of BORA right in any event. He added that what matters in terms of assessing the incident for both BORA and exemplary damages purposes is the overall conduct and its cumulative effect. Finally, he submitted that the law should not put substantial obstacles in the way of a wronged plaintiff, if the conduct in question otherwise merits an award of exemplary

damages. This would be especially so if it transpired that exemplary damages were the only available remedy.

[106] With respect to the application of *S v Attorney-General* to recovery of exemplary damages by means of vicarious liability, I prefer the submissions made on behalf of the Attorney-General. I consider that the powerful arguments advanced by Professor Todd in the article discussed above support the proposition that in principle, exemplary damages ought not to be recovered against the Crown in the present case. This is not a situation where the police officers involved have not been able to be identified. Far less is it a case where the actual wrongdoers have not been punished (given that they were prosecuted under the criminal law) or disciplined (by virtue of proceedings under the Police disciplinary regulations).

[107] As to the availability of the possible exception discussed in *S v Attorney-General*, I am satisfied that the exception (if it in fact exists) has no application in the circumstances of this case. First, I have already made findings at [74] – [75] holding that the actions of the officers during the incident were not deliberate or reckless. Those findings are sufficient to demonstrate that the first part of the possible exception has no application. The only other basis for an application of the so called exception would be grossly negligent conduct or, as the Court of Appeal suggested in *Wilding*, "very grossly neglectful". Although I have held that the conduct of the police officers involved was serious in the context of a breach of the s 23(5) BORA right, this does not necessarily mean that the conduct was necessarily very grossly neglectful for the purposes of a vicarious liability analysis. Such a level of conduct must in terms of a scale of behaviour come close to recklessness. Had it been necessary to make a finding on this remaining aspect of the possible exception, I am satisfied that Mr Falwasser has not established that the conduct of the officers during the incident was "very grossly neglectful".

[108] In all the circumstances of this case, I consider that the arguments against imposing liability for exemplary damages on the basis of vicarious liability outweigh those in favour of doing so. An award on such a basis is contrary to the principle, particularly where a plaintiff is able to obtain redress under the BORA and will have the benefit of a declaration of breach of his civil rights in his favour. In case I am

wrong in the views I have outlined, I propose in the final section of this judgment to consider the separate question of what would be an appropriate award of exemplary damages in the circumstances of this case.

What is the appropriate BORA remedy?

Declaratory relief

[109] The parties agreed that BORA remedies and common law damages must be considered separately, but are to be determined in terms of their overall effect. Counsel for Mr Falwasser suggested that alternative awards on matters of quantum and relief generally be made.

Remedies for BORA breach

[110] The parties also agreed that, following *Taunoa*, the first question is whether a declaration of breach of right, of the type found arising from the incident, should be made by the Court. Counsel for Mr Falwasser submitted that, where a breach is established, a declaration must be regarded as the inevitable starting point for any "effective remedy". I agree. Counsel for the parties were able to settle a draft form of declaration that I consider is suitable for granting as the first step in fashioning an effective remedy in this case.

[111] In terms of the financial component of the remedy, counsel for Mr Falwasser accepted that the Court must fix a sum that has regard to, but does not slavishly follow, previous awards as a matter of value judgment and on an ultimately impressionistic basis. Counsel also accepted that the assessment would be influenced by whether the statutory bar applies, as I have held it does. Counsel referred to the award of $30,000 in *Harris v Attorney-General* HC Masterton CP7/96, 23 July 1999 and submitted that the case should be seen as a starting point for a significantly higher award to Mr Falwasser. Counsel acknowledged that the Supreme Court decision in *Taunoa* needed to be taken into account, but submitted that the level of award (premised on the applicability of the statutory bar) might be $80,000 for a s 9 BORA breach, or alternatively $45,000 for a s 23(5) BORA breach.

[112] Counsel for the Attorney-General referred to the steps already taken by the Crown relevant to an effective remedy. Counsel submitted that the remedial steps already taken by the Crown have to a large degree met the objectives of an appropriate remedy as that concept was defined in *Taunoa*. Counsel cited the observation of Tipping J at [300]:

> …Any conduct by the party in breach undertaken to repair or remedy the breach will obviously be relevant to what [remedial] action the Court should take.

[113] Counsel submitted that the following remedial steps taken by the Crown should be seen as a "robust" response following the incident. In particular:

a) Superintendent Smith immediately recognized that the incident was serious and commissioned an out of district team to investigate it. Further, he personally visited Mr Falwasser's family to explain the Police response to the incident. He also apologised to the Falwasser family for the unnecessary use of force against Mr Falwasser.

b) The Police ensured that the incident was referred to the Police Complaints Authority, although this process was overtaken by subsequent criminal and disciplinary investigations.

c) The Police conducted a vigorous criminal investigation. The plaintiff's evidence was accepted. His complaint taken very seriously and four of the police officers were investigated and charged with criminal offences, the case being prosecuted by an independent Crown Solicitor. That the criminal trial resulted in acquittals was part of the criminal process and not something for which the Crown could ultimately be responsible.

d) The Police took a series of steps in the employment/disciplinary field to ensure that those responsible for the incident were held accountable. The various steps taken and the outcomes were referred to at [32] – [37] above.

e) Superintendent Smith carefully considered whether any systemic or institutional failures could be identified as contributing to the incident, such as might require further remedial action. He concluded that the existing guidelines, resources and staff training were adequate but that the Police had been let down on this occasion by poor judgment of the individual officers involved.

[114] On this latter point, counsel referred to the observations of Blanchard J in *Taunoa* at [263]:

> Cases of breach which exemplify systemic failure, rather than individual misconduct by an official on a certain occasion or during a certain period, obviously require a greater response by the state of its own volition or as prescribed by court declaration.

[115] Accordingly, counsel for the Attorney-General submitted that the New Zealand Police had done everything within its power to investigate, acknowledge, condemn and ensure accountability for those officers involved in the use of excessive force against Mr Falwasser.

[116] Next, counsel referred to the three goals of an effective BORA remedy as discussed in *Taunoa*, namely, vindication, deterrence and denunciation. In terms of vindication, counsel submitted that the importance and value of Mr Falwasser's rights had already been demonstrated in a very public way. He submitted that the present case did not call for an additional judicial remedy to deter authorities from future BORA rights breaches. He submitted that there was little need for a remedy designed to mark society's denunciation or disapproval of the conduct in this case. A remedy for breach of the s 23(5) BORA right would augment the remedial steps already taken and would appropriately mark society's disapproval of the actions of the officers concerned.

[117] Finally, counsel submitted that the declaration of breach would complete an effective remedy. He noted that a majority of the Supreme Court in *Taunoa* assigned the remedy of BORA damages a residual role to be awarded as the final component of an effective BORA remedy and where that was necessary: see [258] (per Blanchard J), [372] (per McGrath J), [300], [305], [327] (per Tipping J) noting that

the remedial question will often be whether BORA damages must be added to a declaration to provide an effective remedy.

[118] Of these passages relied upon, particular reference was made to the observations of Blanchard J at [258] as follows:

> When, therefore, a Court concludes that the plaintiff's right as guaranteed by the Bill of Rights Act has been infringed and turns to the question of remedy, it must begin by considering the non-monetary relief which should be given, and having done so it should ask whether that is enough to redress the breach and the consequent injury to the rights of the plaintiff in the particular circumstances, taking into account any non-Bill of Rights Act damages which are concurrently being awarded to the plaintiff. It is only if the Court concludes that just satisfaction is not thereby being achieved that it should consider an award of Bill of Rights Act damages. When it does address them, it should not proceed on the basis of any equivalence with the quantum of awards in tort. In this respect I would adopt the approach in *Greenfield* and *Fose*. The sum chosen must, however, be enough to provide an incentive to the defendant and other state agencies not to repeat the infringing conduct and also to ensure that the plaintiff does not reasonably feel that the award is trivialising of the breach.

[119] In terms of the purposes of a damages award in a human rights context, the Privy Council in *Attorney-General of Trinidad and Tobago v Ramonoop* [2006] 1 AC 328 (PC) held that the function of an award is to vindicate the infringement of the relevant constitutional right: see Lord Nichols at [19]. Elias CJ made a similar point in *Taunoa* at [109], as did McGrath J at [366] ("The Court's principal objective must be to vindicate the right …"). Blanchard J at [259] put vindication ahead of a compensation function:

> …an award of Bill of Rights Act damages does not perform the same economic or legal function as common law damages or equitable compensation; nor should it be allowed to perform the function of filling perceived gaps in the coverage of the general law, notably in this country in the area of personal injury. In public law, making amends to a victim is generally a secondary or subsidiary function. It is usually less important than bringing the infringing conduct to an end and ensuring future compliance with the law by governmental agencies and officials, which is the primary function of public law. Thus the award of public law damages is normally more to mark society's disapproval of official conduct than it is to compensate for hurt to personal feelings.

[120] The importance of considering what the defendant should pay in terms of a BORA breach was noted by Tipping J at [318]:

> …In private law cases the focus tends to be on what the plaintiff should receive. In the present public law environment the court should consider not only what the plaintiff ought to receive but also what the defendant should pay. The defendant must pay what, if anything, is necessary to vindicate the breach or denounce the conduct concerned or deter future breaches. The plaintiff should receive whatever is necessary to compensate effectively for the breach.

[121] Finally, counsel acknowledged that there was no set scale of damages that the Court could apply. In this context, Blanchard J spoke at [260] of fixing a figure "with which responsible members of New Zealand society will feel comfortable", an approach endorsed by McGrath J at [373]. Tipping J at [318] emphasised that relief is "discretionary rather than as of right".

[122] Counsel for the Attorney-General submitted that, if the Court concluded that an award of damages were necessary then it should be "moderate". In addition to the award of $30,000 in *Harris,* various cases were cited by way of example, including *Archbold* (where the plaintiff was awarded $15,000 exemplary damages), *Warn v Attorney-General* DC Wellington CIV 2004-085-1247 22 February 2008 (where an award of $10,000 exemplary damages was awarded), *Slater v Attorney-General (No 2)* [2007] NZAR 447 (where $5,000 damages was awarded) and *Greenwood v Attorney-General* [2006] DCR 586 (where $8,000 damages was awarded for trespass and breach of s 22 BORA).

An appropriate damages award

[123] I consider that, in view of the serious nature of the s 23(5) BORA breach in this case and its effects on Mr Falwasser, an award of damages is required to meet the goals of vindication and denunciation mentioned in *Taunoa*. With regard to deterrence, I am satisfied that an incident such as this is unlikely to occur in the future, absent aberrant conduct by individual police officers. There is no doubt on the evidence that the Police will have learned salutary lessons from the flawed strategy employed by the police officers concerned during the incident. But a declaration, together with the other remedial steps taken by the Police, is not in my judgment sufficient. There must be an award to cement the Court's and society's denunciation of the conduct in this case. Mr Falwasser is also entitled to have the breach of his civil right vindicated.

[124] As to the amount of the award, I have taken into account the other cases cited by counsel, but accept that each case turns on its own facts. As a matter of impression and judgment, and bearing in mind the application of the statutory bar, I fix a figure of $30,000 for the s 23(5) BORA breach. This figure takes into account the serious nature of the particular right breached. But for the fact that the Police have already taken the remedial steps noted above, the award would have been higher. Those steps were a good start; the declaration of rights is also important. However, I conclude that a financial component is required in this case to complete an effective remedy for Mr Falwasser, in the light of the principles laid out by the majority in *Taunoa.*

[125] For completeness, had I been dealing with a s 9 BORA breach, I would have assessed the financial component of the overall effective remedy at $40,000. This is well below the figure submitted by counsel for Mr Falwasser. But I consider that the conduct under scrutiny does not change, only its characterisation in terms of the level of BORA breach. Thus, while any award for breach of s 9 should be higher because the right that would have been breached was of a higher and more serious order than a breach of s 23(5) right, any such breach would have been at the lower end of the s 9 scale. It ought therefore attract an award that reflects the true nature of the particular breach. The figure suggested also takes account of the application of the statutory bar.

An award of exemplary damages (if applicable)

[126] Although I have held that an award of exemplary damages in this case is contrary to principle and would not fit within the exception in *S v Attorney-General*, a figure will be assessed at the invitation of counsel for Mr Falwasser.

[127] Counsel for Mr Falwasser acknowledged that a curious feature of the case law on exemplary damages was that the level of exemplary damages awarded in BORA breach cases tended to coincide with the figure assessed for the BORA breach. Counsel submitted that there are different purposes and legal contexts in which the two forms of damages are assessed and awarded and therefore there was no principled basis for treating the two assessment exercises as the same, or even

equivalent. He submitted that, should the statutory bar be held to apply to the use of pepper spray, it would be consistent with a principled approach to award separate cumulative awards under both BORA and the common law.

[128] Counsel cited the case of *McDermott v Wallace* [2005] 3 NZLR 661 (CA) and, in particular, the list of relevant factors at [92] – [103]. The Court of Appeal noted that any award of exemplary damages should be moderate. Counsel also submitted that any award of exemplary damages should take into account the absence of any Court ordered reparation and the fact that no criminal penalties were imposed on the police officers: at [87] – [88]. It follows of course from such submission that the Court is entitled, in assessing any award of exemplary damages, to take into account any remedial steps taken by the Crown.

[129] In terms of assessment, the first point is that I am not satisfied that an award of exemplary damages ought to have been made additional to the financial component for the BORA breach. There is no warrant for a cumulative award in the circumstances of this case. Therefore I propose to focus on the assessment of the amount of an award, had I been called upon to make one as a separate exercise. As a matter of impression and judgment, I conclude that an appropriate figure would have been $30,000. In fixing this figure, I have had regard to the factors mentioned by the Court of Appeal in *McDermott*. Of course, because of the findings made and legal principles applied, Mr Falwasser is not entitled to an award of compensatory damages. Further, I have held at [123] above that there is no need for an award here to deter future Police conduct. That leaves the punishment function, as well as the other *McDermott* factors required to be taken into account. It is a moderate award.

[130] I appreciate that the figure assessed is the same as the BORA award. It is hardly surprising that there would be an element of similarity; that is because some of the applicable principles and relevant factors are to a degree overlapping. Nevertheless, the fixing of an award of exemplary damages has been carried out as a separate exercise. The figure of $30,000 for exemplary damages would take into account the declaration, the nature of the Police conduct in question, the effects on Mr Falwasser, and the remedial steps taken by the Police after the incident, including the prosecution of the police officers and the disciplinary action taken against them.

However, if such an award were to be made, it should be reduced to zero to take into account the award of damages for breach of the s 23(5) BORA right. This is because of the finding at [129] above that a cumulative award is not warranted – that would amount to double recovery.

Result and declaration

[131] The plaintiff has succeeded in establishing a breach of s 23(5) BORA. Such breach ought properly be characterised as serious. The plaintiff has failed to prove a breach of s 9 BORA.

[132] For breach of s 23(5), in addition to the other remedial steps taken by the Crown to date, the plaintiff is entitled to a declaration from the Court in the following terms:

> The treatment of the plaintiff by Police at the Whakatane Police Station on 23 October 2006, which included the use against him of Police batons and pepper spray, was excessive and unnecessary and an abuse of power on part of the police officers involved. As a consequence it amounted to a failure to treat the plaintiff with humanity and with respect for the inherent dignity of his person and accordingly breached his rights under s 23(5) of the New Zealand Bill of Rights Act 1990.

[133] Additionally, the plaintiff is entitled to an award of $30,000 for breach of his s 23(5) BORA right on the basis that such an award is appropriate in all the circumstances of this case, because of the seriousness of the breach and to meet the *Taunoa* goals of vindication and denunciation.

[134] The defendant is entitled to judgment on the second, third and fourth causes of action based on the application of the statutory bar discussed above. Further, the plaintiff has no entitlement to an award of exemplary damages for the reasons outlined. The plaintiff cannot succeed on any claim for exemplary damages under the fifth cause of action for the same reasons.

[135] If I am wrong on the exemplary damages point, then I would have fixed an award of $30,000 under this head of damage for the reasons set out at [126] – [130] above. As noted, such an award would be completely offset by the award for the BORA breach to avoid double recovery.

[136] There will be a declaration and judgment accordingly.

Costs

[137] The plaintiff is entitled to costs. I am aware that the plaintiff is legally aided. It will be important that any resolution of the costs question should not put at risk the full effect of the financial award made in this case.

[138] No doubt the parties will confer on the issue of costs. To assist, my inclination is that an award of indemnity costs would be appropriate.

[139] If the parties cannot agree then memoranda may be filed. Leave to apply is reserved for this purpose.

_____

Stevens J