IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

001502

CP 296/98

UNDER	**THE NEW ZEALAND BILL OF RIGHTS ACT 1990 AND THE COMMON LAW**
BETWEEN	**PAUL TE RANGI PO EVERITT**
	Plaintiff
AND	**ATTORNEY GENERAL**
	Defendant

Hearing: 2, 3, 21 March 2000

Counsel: T Ellis with A Shaw for Plaintiff
D J Boldt with C Geiringer for Defendant

Judgment: 18 April 2000

JUDGMENT OF GENDALL J

Solicitors:

N B Dunning, Wellington for Plaintiff
Crown Law office, Wellington for Defendant

[1] Paul Everitt was a messenger. The modern description is a courier. His task was to deliver letters and small packages or parcels around the business community of Wellington city. For that purpose he rode a bicycle. Of essence, his job was that he complete his tasks quickly. That is the purpose for which couriers are asked to make deliveries. Late on the afternoon of Tuesday 20 January 1998 he was delivering messages on his bicycle. He was in a hurry but was detained by a red traffic light in central Wellington City, at the Panama and Featherston Streets intersection. Nearby was a Police patrol car in which were two Police Constables. Mr Everitt did not see the patrol car, or perhaps he saw it but did not care. He proceeded through the intersection whilst the light remained red. Not surprisingly he was stopped by the Officers in the patrol car a short distance away.

[2] From such small beginnings, there escalated this civil claim against the Police for $100,000. Mr Everitt said that he did not exactly know how much he was claiming, but that $100,000 would be a fair amount. The claim relates to what happened, initially, on Featherston Street and later at the Wellington Central Police Station.

[3] I refer to Mr Everitt as "the plaintiff".

The First Cause of Action

[4] The plaintiff alleges that what occurred upon him being stopped by the two Police Officers led to his false imprisonment, malicious and/or arbitrary arrest and detention, and an unreasonable search of his bicycle. He says that the Constables' actions were high handed, being an abuse of their power and a deliberate invasion of his rights so as to require punishment on award of exemplary damages. For those events he claims $50,000 for Bill of Rights compensation, and alternatively general damages of $10,000 together with aggravated damages of $10,000 and exemplary damages of $30,000.

The Second Cause of Action

[5] This arises out of events, which I will later relate, that the plaintiff alleges occurred at the Wellington Central Police Station. He says that he was subjected to an unreasonable search which was a failure to treat him with dignity and respect, and that the search was in breach of ss 21 and 23(5) of the New Zealand Bill of Rights Act 1990 ("Bill of Rights"). In respect of that cause of action the plaintiff seeks a declaration that the search was unlawful and unreasonable, being illegal and invalid, and seeks Bill of Rights compensation of $50,000 by way of general, aggravated and punitive damages.

Events in Featherston Street relevant to the First Cause of Action

[6] After the plaintiff was stopped for proceeding through a red light, he was asked to supply his name, address and date of birth. He was in a hurry and was annoyed at being further delayed. He had previously, in the normal course of his messenger duties, been stopped, and had received traffic infringement notices or tickets on other occasions. He was familiar with such procedures. He wanted the procedures over with quickly. He told the Officer that it was "a waste of time". As do many motorists, he endeavoured to talk his way out of receiving a ticket. When this appeared unsuccessful he adopted a slightly different attitude. One Police Officer contacted the Police Communication Centre by radio, in the usual manner to confirm details and driver's licence number of the plaintiff, and there was some further short delay. During this time the plaintiff walked away from the Police car, but only some short distance. His bicycle was left behind. The female Police Officer (Constable Hayes) asked, or told, him to come back. She then asked the plaintiff to lift up his bicycle so she could check its serial number. He agreed to do so. Whilst doing this, according to the Constable, the plaintiff deliberately struck her in the chest with the front wheel of the bicycle. The male Police Constable (Constable Lander) observed this. He believed that the plaintiff's actions were deliberate. He told him that he was being arrested for assaulting a Police Officer. Both Officers were of the view that the plaintiff's actions were deliberate, but he

claims that, although there was contact made between his bicycle and the female Police Officer, such was accidental. Upon being informed that he was arrested, the plaintiff was told in the usual way of his rights under the Bill of Rights. Arrangements were made to transfer the current message tasks of the plaintiff to another courier and he and his bicycle were taken to Wellington Central Police Station.

[7] Arising out of those essentially simple facts the plaintiff seeks $50,000 on the basis that he was unlawfully or arbitrarily detained by the Police, that there was an unreasonable, unlawful search of his bicycle and that his arrest was both malicious and arbitrary.

[8] At the relevant times the Transport Act 1962 was in force. Section 66(1) contains the power to stop the courier's cycle. It provides that a Constable may demand the user of a vehicle to stop provided the Constable is in uniform, and give his or her name, address and other particulars including ownership of the vehicle.

[9] "Vehicle" is defined in s2 of the Act as including a push cycle, being a "contrivance equipped with wheels upon which it moves or is moved." There can be no doubt that, having observed the plaintiff proceed through a red light, the Officers were acting within their power for the purposes of the Transport Act as authorised by s66(1). Yet the plaintiff says that he was unlawfully detained at the Police car. He largely relies upon the evidence that Constable Hayes told him to return, from a few metres away, to the vicinity of the Police car. His bicycle was there. This was during the time when his particulars were being checked by Constable Lander. He says that Constable Hayes had no right or power to tell him to "come back here" and in doing so went beyond her powers, so as to amount to a detention and false imprisonment of the plaintiff. At that point a Traffic Infringement Notice had not been completed (although strictly speaking it was not necessary for it to be completed and handed to the plaintiff at that time). Yet the Police have the power to issue an infringement notice (rather than proceed under the Summary Proceedings Act 1957). To elevate that exchange as between the plaintiff and the Police Officer to be an unlawful detention or false imprisonment is in my view without foundation. His bicycle remained adjacent to the Police car. His particulars were being checked

so that an infringement notice could be issued. His wandering away, for whatever reason the evidence is silent, and the request that he return, is hardly unreasonable given that he was needing to return to mount his bicycle and go about his task, as such was his wish. The allegation and claim that there was a detention which was unlawful is an exaggeration.

[10] The plaintiff further says that there was a search of the bicycle that was unreasonable and unlawful. He says it is deserving of damages payable to him.

[11] After there has been a stopping for the purpose of enforcement or administration of the Transport Act under s66(1), a Constable in uniform may inspect any part of any vehicle on any road (s68B). That inspection of course must be for the purposes of enforcement of the Transport Act and would not authorise, of itself, a search of a vehicle. Nor would it authorise search for an improper purpose. An example of such a situation can be found in ***R v Bainbridge*** (CA258/99, 9 September 1999) where a search of the trunk of a car for purposes other than enforcement of the Transport Act, after a stopping under s66(1) was held to be unlawful because the interior search was not for the purpose of enforcing the provisions of the Transport Act or Regulations.

[12] What happened on Featherston Street was not a search of the bicycle. There was a request by the female Police Officer that a certain part of the bicycle be shown to her so that she may see it. The plaintiff agreed to do so. Indeed his actions illustrated his consent. He may not have needed to have done so but he agreed. The Police Officer's evidence was that if he had refused she would not have taken the matter further. I accept that evidence. What occurred was neither a search nor an inspection without the consent of the plaintiff. Whilst he pleads that the purpose or guise under which the Constable acted was to detain and harass the plaintiff, she having no reasonable suspicion that the bicycle was stolen, that submission is an exaggeration unsupported by the facts. The appellant's argument is an embellishment of what actually occurred. There was no search but a request for an inspection. A visual observation is not necessarily a search; ***R v Dodgson*** (1995) 2 HRNZ 300 (CA). Nor was there an inspection of the bicycle without the plaintiff's

consent. There was no unreasonable or unlawful search so as to amount to a breach of the plaintiff's rights under the Bill of Rights, or otherwise.

[13] The plaintiff contends what followed upon his striking (accidentally or otherwise) the female Police Officer with his cycle was that he was arbitrarily arrested and detained because the arresting Officer (Constable Lander) had no honest belief that he had committed any offence. That is a question of fact. Constable Lander observed what occurred and arrested the plaintiff. His evidence was clear, namely that he observed the contact between the vehicle and the female Police Constable's chest and he had no doubt that it was deliberate. Constable Hayes lent support for that belief in her evidence which was also that she regarded the act as deliberate. It is not for me to decide whether there was an assault or not. It was never decided whether the actions of the plaintiff were deliberate or accidental. The issue is whether the Officer had reasonable grounds for arresting him. The power of arrest is contained in s315 of the Crimes Act 1961. In its relevant parts it empowers arrest without warrant as follows.

> "(2) Any Constable, and all persons whom he calls to his assistance, may arrest and take into custody without a warrant -
>
> ...
>
> > (b) Any person whom he has good cause to suspect of having committed any offence punishable by imprisonment.
> >
> > ..."

[14] The plaintiff pleads that the arrest was done in order to punish him for reasons other than bringing him to justice, and that there were no reasonable grounds to arrest him.

[15] The issues that arise are: Did Constable Lander have good cause to suspect in terms of s315? If so, was there a valid exercise of his discretion to arrest; and was the arrest arbitrary in terms of s22 of the Bill of Rights. If the arrest is lawful and not arbitrary, then s31 of the Crimes Act 1961 protects the Police from civil liability.

[16] Whether an Officer has good cause to suspect is to be objectively assessed, irrespective of the Officer's own belief. This standard is that of a reasonable person

assumed to know the law and possessed of the information which the arresting Officer in fact possessed at the time: ***Police v Anderson*** [1972] NZLR 233. There need not be good cause to commit for trial or a prima facie case; ***Hussien v Chong Fook Kam*** [1970] AC 942, 947-948. Where, as here, the arresting Officer has observed an event which involved the striking of another Police Officer on the chest with a bicycle, and the other Officer confirms such event occurred and that the actions were deliberate, on any objective assessment the arresting Officer had good cause to suspect that an offence had been committed. Thereafter the plaintiff's explanations as to his application of force being accidental, of course, fall onto the scales but do not, in the circumstances, detract from the validity of the officer having good cause to suspect.

[17] Of course there remains a discretion whether or not to arrest. Such discretion is wide and is to be exercised reasonably in the particular circumstances of the case. If there was improper purpose or bad faith so as to provide some collateral motive for arrest that would be an important factor. So too are the rights of the alleged offender as well as the public interest in the prevention of crime and prosecution of offenders. The Court has to recognise the practical realities faced by Police Officers day by day and ought not place unreasonable strictures upon the exercise of their discretion. The leading authorities were discussed in ***Niao v Attorney General*** (unreported, High Court, Rotorua, CP22/96, 11 June 1998, Randerson J) and include ***Hussien v Chong Fook Kam*** (supra), and ***Holgate-Mohammed v Duke*** [1984] 1 AC 437. They need no detailed further analysis by me. I simply refer to the judgment of the full Court in ***Attorney-General v Hewitt*** [2000] NZAR 148 where it was said (at p160-161):

> "In ***Holgate-Mohammed v Duke*** at 443 Lord Diplock considered that the discretion to arrest could be challenged on the usual administrative law grounds established in ***Associated Provincial Picture Houses Limited v Wednesbury Corporation*** [1948] 1 KB 233. In ***Holgate-Mohammed*** it was accepted that the discretion could be attacked for taking into account irrelevant considerations but the challenge failed on the facts. The scope for successful challenge on the grounds of failure to take into account relevant considerations is very limited or even non-existent because there are no mandatory considerations in the exercise of the discretion: see the remarks of Keith J in ***Thomas v Attorney-General*** (CA139/96, 14 August 1997) at 9. Improper purpose or bad faith are available as bases of

> challenge but the existence of a collateral motive for an arrest does not necessarily make it unlawful: ***R v Chalkley*** [1998] 2 All ER 155 (CA). The authorities demonstrate that in the absence of bad faith or improper purpose, the prospects of a successful challenge to the exercise of the discretion to arrest are likely to be very limited."

[18] In the present case there is no evidence at all that points to bad faith or improper purpose or to some feature which impinged upon the proper exercise of the Police Constable's discretion, he having had good cause to suspect.

[19] The arrest was lawful and it was neither unreasonable nor arbitrary as provided in s22 of the Bill of Rights. None of the events which happened on Featherston Street, according to my assessment of the evidence, constituted false imprisonment, malicious or arbitrary arrest and detention, or unreasonable search so as to entitle the plaintiff to compensation or damages.

Events at Wellington Central Police Station relevant to the Second Cause of Action

[20] Upon being taken to Wellington Central Police Station the plaintiff was in the company of the male Police Officer, Constable Lander. He was advised of his right to consult and instruct a lawyer without delay and in private and that he was not obliged to make a statement, and a list of solicitors and phone numbers were made available. He took up this opportunity and spoke to a lawyer by telephone. He thereafter agreed to an interview which was recorded on video-tape. That was at 5.50pm and obviously events had moved quite quickly. The interview was short taking 12 minutes. The plaintiff agreed that the bicycle had struck the female Constable but said that it was accidental agreeing that he was "pretty hacked off at the time" but that he was "not into hurting people". He stated that:

> "When we stopped your partner was, I mean I don't know if you are willing to admit it, but she was fully aggro at me. I know I was just, I, I've got to admit it, yeah I was, I was standing up for myself, I wasn't you know being pushed around by a Police person cos I felt what you guys had done was wrong. I didn't lift my bike up to hit your partner .... I am innocent, this was really stupid ...."

[21] After the interview was finished Constable Lander charged the plaintiff with assault on a Police Officer and he was re-advised of his rights pursuant to the Bill of Rights. It is what followed thereafter which the plaintiff says entitles him to damages. He said that he was subject to a search which he submits was unlawful, unreasonable, and degrading.

[22] Having been formally charged, the plaintiff was taken to a separate area of the Police Station known as the "cellblock area", where procedures involving the taking of fingerprints, photographs, removal of belongings and possible search occurs. This is prior to an arrested person being granted Police bail, if such occurs. They may be placed in the cells to await such a decision or they may be detained in the cells to await being brought before the District Court. The Receiving Officer in the cells was Constable Kearns. He, together with Constable Lander, undertook a search of the plaintiff. Here the evidence diverges further.

[23] The plaintiff says that he was required to remove all of his clothes so as to be totally naked, having first objected to what he said was a "strip-search." He says he had his attention directed to a notice that said:

> "the Police have the right to use reasonable force, if necessary to search you. For your safety, and ours, you may be strip-searched."

[24] The plaintiff says he objected, saying the Police did not have to search him but that Constable Kearns said words to the effect they were "going to do it". The plaintiff says he asked to speak to a lawyer but this was declined. He said that he was required to squat totally naked and felt humiliated and distressed.

[25] On the other hand, both Police Officers say that the plaintiff did not then ask to speak to a lawyer; he was agitated and uncomfortable and because Constable Kearns was not confident that the plaintiff would be bailed immediately, he elected to undertake a search. He said that, as was his invariable practice, he obtained the authority of the Watchhouse Senior Sergeant. His evidence was that the plaintiff was asked to remove all belongings from his pockets and take the satchel that he was wearing off his back. Constable Kearns' evidence was that Constable Lander searched items in the plaintiff's satchel and pockets whilst he requested him to

remove his shirt. This was done and the shirt was checked for any items, and then was put back on by the plaintiff. He was asked to remove his shoes and socks which were also checked and put back on. He says the plaintiff was then asked to face the wall and lower the bicycle shorts he was wearing, because the padding in certain areas on the shorts made it difficult to see if anything had been concealed. When the plaintiff objected he was directed to the notice on the wall. Constable Kearns said that without further protest the plaintiff faced the wall, lowered the bicycle shorts and squatted momentarily so that if anything had been concealed in the folds of his body it would fall to the floor, and he was then told to pull up his shorts. That version of events is confirmed by Constable Lander.

[26] Thereafter the plaintiff was fingerprinted and paper work completed. Constable Kearns went and spoke again to the Watchhouse Senior Sergeant and the decision was made that the plaintiff should be bailed rather than retained in Police custody. This occurred. Constable Kearns was adamant that no request for a lawyer was made at the time of search.

[27] There was some conflict in the evidence of the Police Constables on the one hand and Mr Everitt on the other hand as to whether or not he was "agitated" whilst at the Police Station. His demeanour during the videotape interview does not disclose any undue agitation although he could be described as animated, assertive and a little argumentative in the sense of not being submissive. He admits to some degree of verbal conflict on the street with the woman Police Constable, and that he was "standing up" for himself. Constable Lander's evidence was that the plaintiff's state of agitation "rose somewhat after he had been formally charged at the completion of the video interview." Having observed the plaintiff give evidence and in his video interview, I think that he was probably argumentative, annoyed and objecting to his arrest, and assertive verbal exchanges occurred. Likewise it is probable that he was in that sort of state when formally charged and when inside the cellblock with the two Constables, but I would not have thought it reached a high level of agitation. That sort of assessment is very much subjective.

[28] Some emphasis was placed by the plaintiff's counsel on the phrase "strip-search" in a somewhat emotive way as describing a search of a suspect through

"stripping" completely naked. I think that is a misnomer. A search of a suspect may include search of their clothing and belongings and also of their body. A search which involves the removal of any part of the clothing of a suspect can be said to be a strip-search because it is a search of the body for items or articles that may be concealed or attached to it. In this case the plaintiff says the search involved him being required to stand and squat completely naked whereas both Police Officers depose that the standard procedure for such a search was followed, namely removal of shirt for search of upper body, with it then being replaced, and the lowering of trousers to the knee level and a squatting facing the wall. As I will return to later, I prefer the evidence of the Police Officers as to what actually occurred and how the search was conducted.

[29] The real issue is whether such a search was unreasonable so as to constitute a breach of s21 and s23(5) of the Bill of Rights. So it is necessary to look to the lawful authority for the search, as well as to have regard to the manner of the search, its degree and extent. That is because the search must be reasonable, even if lawful.

Power to search at the Police Station

[30] There is a limited common law power of search of an arrested person, but search of an arrested person for no reason other than his arrest is unlawful; ***Craig v Attorney General*** (1986) 2 CRNZ 551. Once a person is in lawful custody of the Police and is to be "locked up" the common law power of search is modified or expanded. Section 57A of the Police Act 1958 is the source of power to conduct a lawful search of such persons in custody. As I have said lawfulness is not necessarily determinative of reasonableness. Section 57A provides:

> "General Search of Person in Custody -
>
> (1) Subject to subsection (4) of this section, where any person (in this section referred to as the detainee) is taken into lawful custody and is to be locked up in Police custody, a member of the Police or any searcher employed for the purpose under section 57B, may conduct a search of that person and take from him all money and all or any property found on him or in his possession, and may use or cause to be used such reasonable force as may be necessary to conduct that search or take any money or property.

(2) Subject to subsection (3) of this section, and to any order of the Court made under section 58 of this Act or section 404 of the Crimes Act 1961, all money and every item of property taken from the detainee under subsection (1) of this section shall, on request, be returned to him when he is released from custody, except--

(a) Any money or property that may be required to be given in evidence in any proceeding arising out of any charge brought against the detainee:

(b) Any money or property the possession of which by the detainee constitutes an offence.

(3) Where the detainee is released from police custody and taken into custody in any penal institution, all money and every item of property taken from him under subsection (1) of this section (other than money or property referred to in paragraph (a) or paragraph (b) of subsection (2) of this section) shall, where practicable, be delivered to the Superintendent or other officer in charge of that penal institution.

(4) No search shall be conducted under this section unless the detainee is at a police station, or in any other premises, or in any vehicle, being used for the time being for Police purposes.

(5) Nothing in this section shall limit or affect the right at common law of a constable to search any person upon that person's arrest."

[31] Section 57A was enacted, following the decision in ***Rudling v Police*** (High Court Auckland, M1498/78, 18 December 1978) where Holland J held that the Police had no general right to search a person in custody at a Police Station, and the right was limited to cases where there was reason to believe that the person had on him evidence of the offence with which he is charged, or weapons.

[32] Separately there is the Penal Institutions Act 1954 (the "PI Act"). Section 21K(5) provides:

"(5) Subject to section 21G of this Act, every inmate shall, -

(a) On first being admitted to an institution in respect of a particular offence or matter; and

(b) Immediately before being transferred to another institution; and

(c) On being received in an institution on transfer from another institution,-

be required to undergo a strip search conducted by an officer."

[33] Section 21G restricts the conduct of such searches to officers of the same sex as the person being searched and requires the presence of another officer, and proper privacy.

[34] "Inmate" is defined in s2:

> ""Inmate" means any person for the time being in the legal custody of the Superintendent of any penal institution."

[35] "Penal Institution" means any prison, corrective training institution or police jail, established under the Act.

[36] The Penal Institution (Police Jail) Notice 1992 (SR1992/242) designates the Wellington Central Police Station as a "Police jail", pursuant to s4 of the Act.

[37] The Superintendent of an institution which is a police jail is governed by s6(5) which provides:

> "The Commissioner of Police may from time to time appoint any member of the Police to be the Superintendent or any other officer of any police jail."

[38] The Act defines, for its purposes, a strip search. Section 21E provides:

> "... a strip-search means a search where the person conducting the search may require the person being searched to remove, raise, lower, or open all or any part of that latter person's clothing.
>
> (2) For the purpose of facilitating a strip-search, the person conducting the search may require the person being searched to do all or any of the following:
>
> (a) Open his or her mouth;
>
> (b) Display the palms of his or her hands;
>
> (c) Lift or rub his or her hair;
>
> (d) Display the soles of his or her feet;
>
> (e) Raise his or her arms so as to expose his or her armpits;

(f) With his or her legs spread apart, bend his or her knees."

[39] The defendant says that the provisions of the Police Act 1958 authorised the search undertaken in the present case, and despite that Act, such a search was mandatory under s21K(5) of the Penal Institutions Act 1954.

[40] That section describes the <u>duty</u> of the officers and obligation on an inmate, whereas s57A gives power to the officer to search. To reconcile the two statutory provisions may not be easy. But I think it may be able to be done because the duty on an officer to require an "inmate" to undergo a "strip search" must still, when the power is exercised, be undertaken reasonably. A strip search under the PI Act may be only a removing of a shirt, or of a hat, or opening a vest. The extent to which a search goes, by officers in the exercise of their duty, is still to be governed by the test of "reasonableness". So, too, the exercise of the power given to an officer under s57A, has as a constraining factor, the touchstone of "reasonableness".

[41] Further, it is quite clear that the s57A power can be lawfully exercised only when an accused "is to be locked up". Such is an obvious prerequisite to the requirement of a search of an inmate under s21K(5) of the PI Act. There is a distinction however. The s57A power can be exercised anywhere in premises or a vehicle being used for Police purposes. However, s21K(5) of the PI Act only imposes a duty on the officer, and a corresponding obligation on the inmate, upon being admitted to an institution. (Inmates on returning from leave or work parties fall into a different category).

[42] I do not, in this case have to decide which Act applies because:

[a] The prerequisite of "about to be locked up" is the same and is crucial.

[b] The requirement of reasonableness of the extent of the search applies whether the officers act under either provision.

[c] The Police here said that they were acting under their s57A powers and the lawfulness of their actions, and whether or not such were reasonable, in my view falls to be judged in that context.

[43] For those reasons I propose to determine this case on whether s57A and the factual basis, in the circumstances existing on that day at Wellington Central Police Station, provided justification for the Constable to require and undertake the particular search, in its manner and extent, and that such was a genuine and reasonable exercise of the officer's discretion as governed by s21 of the Bill of Rights.

Purpose of the Legislation

[44] It is obvious that the power given under s57A enables the Police to search those about to be locked up, and the separate statutory duty imposed upon officers under s21K(5) of the PI Act, has the same purpose, namely to protect all persons in custody in such institutions, to protect Police and official property, and to protect the person detained in custody. Dangers to all persons in custody, the inmate and Police property, are well known and it is necessary that all reasonable steps be undertaken to eliminate or guard against them. Small items such as razor blades, pens, matches, lighters, elastic bands and so on can all be used in ways which may harm property, or others, and in particular be used for self-harm. The dilemma that Police Officers face is in identifying those who might be at risk of self-harm or pose a risk to others or property. But they have a duty to protect all who are in their custody. As was said by Lord Hoffman in a lecture to the Chancery Bar Association on 15 June 1999:

> "Unfortunately people do quite often try to commit suicide in police cells and the police have instructions to take care not to give them the opportunity."

[45] Lord Hoffman was referring to the decision in ***Reeves v Commissioner of Police of the Metropolis*** [1999] 3 All ER 897 which affirmed the duty imposed upon the Police to take reasonable care to prevent persons in their custody or detained by them from self-harm. As Lord Hope of Craighead said at p911:

> "My Lords, the problem with which this case is concerned is, sadly, all too familiar both to the police and to prison authorities. It is well known that people are more likely to commit suicide when they are in prison or in a prison cell than when they are at liberty. Research has shown that some prisoners are more at risk than others would be when detained in the custody. Those who are mentally disordered, young persons on remand and those who are serving very long sentences are thought to be particularly vulnerable... The act of suicide may be both unforeseen and unforeseeable."

[46] It is the unforeseeability of the act of self-harm/suicide or otherwise, that makes the Police task so difficult. The Police have a duty to protect, but also a Bill of Rights duty to not subject accused persons or prisoners to unreasonable search. How can they achieve the proper balance?

[47] It is for the reasons of risk of harm that a statutory duty is imposed in terms of s21K(5) PI Act, and that a discretionary power, quite apart from that duty, is given where s57A applies. In the present case the Police acted on the basis of their statutory discretion in terms of s57A and did not purport to act under s21K(5). But in any event, as I have said, such searches, under whatever Act they are said to be performed, must be reasonable, not only in the manner in which they are undertaken, but also in terms of the initial decision to perform them. Application of the test of reasonableness to the decision to undertake the search may be a very much more difficult exercise than deciding whether the manner in which the search is performed is reasonable. Section 21 of the New Zealand Bill of Rights Act 1990 provides:

> "Everyone has a right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise".

[48] The protection is against "unreasonable search", not search. That distinction must be relevant where a search is authorised, or lawful, yet the manner or extent of it is challenged as unreasonable. That is, in truth, what the plaintiff alleges here.

[49] A critical prerequisite to the exercise of the power under s57A is that a person is "about to be locked up". Obviously it is also an essential prerequisite to the performance of the Officer's duty under s21K(5). As the inmate must be "admitted to an institution" obviously searches are not authorised under either

provision unless the person is in the lawful custody of the Superintendent and is being admitted to the institution, whether a Police jail or otherwise. Visitors cannot be searched under those provisions nor could a person detained by the Police and not about to be locked up be searched - apart from pursuant to the Police common law powers. Thus, in the present case, the plaintiff, although arrested, but whilst undergoing the Police interview and before formal charge and a decision was made that he be locked up, would not have been in a position where Constable Lander could have exercised s57A powers. However once there is a decision reasonably made - that is without improper purpose or malice - that the person in Police custody is to be transferred to the Watchhouse Keeper and confined in the cellblock or secure part of the Police jail, in that sense that is a decision "that the person is about to be locked up".

[50] It does not follow from s57A that the person must in fact be in a "locked up" state when such search is conducted. Section 57A(4) provides that no search shall be conducted unless the detaining is at a Police Station or in any other premises or in any vehicle being used for the time being for Police purposes. The subsection envisages that the general power to search can be exercised, in proper circumstances, when a person is in a vehicle and in lawful custody provided that the intent is that he "is to be locked up in Police custody". I think the decision of the Court of Appeal in ***R v Creser*** (CA250/98, 17 December 1998) reinforces this view. In that case Mr Cresser arrived at a Police Station voluntarily and was arrested as a result of a warrant that had been issued. He was required to go to what is known as the "holding room". He was told to leave the room so that he could be searched before he was transported to the Wellington Central Police Station. Some altercation took place but he was then searched and some marijuana seeds were located in his pocket. The Court of Appeal referred to s57A as giving the right of general search of persons in custody and concluded that the section gave:

> "the clear authority to the Police to undertake the search that was undertaken in this case."

[51] There will obviously be situations where persons arrested and taken to a Police Station are not going to be locked up. They may be the subject of interview or not. They may be simply charged and released. However if it is intended that

they are to be detained and subsequently locked up for any period of time then the power of search under s57A arises. It must be a question of fact as to whether a person is "to be locked up" and this must depend upon an individual decision made in his particular case, but such decision must have been made reasonably, and not for an improper purpose. The difficulty is the degree to which the Courts will sit in judgment of the reasoning process of the officer who determines the detention path down which a person may go.

General Police Policy

[52] The evidence was that the Police in Wellington have general policy instructions or guidelines drawn together from previous experience and research, based upon the requirement that cellblock areas be safe to those who are detained and work in them. The instructions recognise that cellblocks are inherently dangerous places and that frequently property on persons detained in them have been used to either harm themselves or others and other property such as drugs, medication, cigarettes, lighters and matches are retained. Even small apparently harmless objects such as plastic combs, coins, hairpins or cords have been used to cause damage or self-harm. The evidence was that research and experience had highlighted the need that a thorough searching policy was the vital component of a successful anti self-harm strategy, and that it was notoriously difficult to identify reliable predictors of those who might engage in self-harm. The evidence was that of 12 prisoners who attempted self-harm, five had not been assessed as potentially suicidal in advance, and age was not a reliable predictor, nor was gender or the type of offence for which a person was in custody. It was said in evidence that first time prisoners fell into the category of those more likely to attempt self-harm.

[53] Police general instructions are designed to ensure that reasonable steps are taken to safeguard all persons in custody as well as Police staff and it is a difficult task to achieve a proper balance between the duty on the Police to take such steps to eliminate risks, and the right of the individual to be secure from unreasonable search. The general policy instructions issued by the Commissioner and other guidelines in the Wellington Central Police Station Watchhouse Cellblock Manual, (being

guidelines for Watchhouse staff who control the cellblock area) include the following:

> "Any complete (strip) search of any prisoner may only be carried out on the authority of a supervisor and is to be conducted in as seemingly a manner as is consistent with the necessity of discovering any concealed article. Two Police members of the same sex as the prisoner must be present and the search must not be viewed by other persons."

[54] Further the policy states:

> "The circumstances dictate, a full strip-search may be undertaken, on the authority of an NCO [Sergeant or Senior Sergeant]. Two Police members of the same sex as the prisoner must be present and the search must not be viewed by any other person."

[55] Separately there are directions in relation to suicidal prisoners which state:

> "All potentially suicidal prisoners are to be strip-searched.
>
> - Where any member considers a prisoner to be potentially suicidal that prisoner to have all property and clothing removed from them and replaced with a set of white plastic/paper composition overalls for the duration of their stay ...."

[56] Given that the plaintiff did not, on my finding, have all his property and clothing removed and replaced by white or plastic clothing it is clear that the Police Officers were not acting pursuant to this direction. It does not follow that a search by removal of some items of clothing of a person in custody is only reasonable or permissible when the prisoner is "potentially suicidal".

[57] What is required is that there be a conscious exercise of the Police Officer's discretion to search or not according to the circumstances then existing. The principle is well established that where a public official or body having a discretionary power, such as exists under s57A, it may adopt a policy as to how this power is to be exercised but:

> "It must not disable itself from exercising a genuine discretion in a particular case directly involving individual interests; hence it must be prepared to consider making an exception to the general rule if the

circumstances of the case warrant special treatment." 1 Halsbury's Laws of England (4th ed) para 32.

[58] The principle is discussed in ***Practical Shooting Institute (NZ) Inc v Commissioner of Police*** (1992) 1 NZLR 709, ***Whithair v Attorney General*** [1996] 2 NZLR 45 and ***Attorney General v Hewitt*** (supra). If Parliament vests in the Police a discretion and power to search, as it does pursuant to s57A, such discretion may not be fettered through reliance by an officer of a statement of policy issued by a superior officer. Clearly the Police officials are entitled to provide some policy considerations as to how the discretionary statutory power may be exercised. As Eichelbaum CJ observed in ***Whithair v Attorney General*** (supra) the question poses mixed issues of fact and law with the potential for factual dispute being two-fold (at p51):

> "(a) I am unaware of the sense in which "policy" would be interpreted in Police practice. Does it mean rules to be followed without exception, or does the statement establish a general approach by way of rule of thumb guidance but on the understanding that the individual circumstances have to be considered, with room for differentiation in individual results? If the former be the case [then] .... it would follow that if this was the true basis on which the Constable made his decision, there was no true exercise of the discretion at all.
>
> (b) If on the other hand the latter was the case the question would remain whether the Constable in fact exercised a discretion in the sense that he was at least conscious that [non search] was an option for consideration."

[59] If Police Officers never turn their mind to the issue of whether in the individual case searches should occur or not, then in truth they would be simply following policy slavishly and not undertaking a true exercise of their discretion.

[60] In the present case the plaintiff attacks, first, the policy, and second, what he says is an unquestioning following of it by the Police Officer. I have no difficulty in concluding that the Police are justified in laying down their policy of general guidelines. So much, at least, is required from their duty to protect all persons in their custody. But the law is clear that there must be an individual assessment and proper exercise of the searching officer's discretion in each particular case. The evidence from the Police was that this in fact is what happened. Defence evidence

was that whilst there is a search in all cases of persons in custody who are to be locked up not all persons are "strip searched" in the sense of having to remove items of clothing. That decision is not made by one officer alone and the authority of the Watchhouse Senior Sergeant is sought. The evidence was that not all persons are searched through removal of clothing and the search process does not commence, if at all, until after the prisoner has been charged and brought into the secure Watchhouse or cellblock area.

[61] By way of contrast, the case of ***Attorney General v Hewitt*** (supra) involved the application by Police Officers of a particular Police policy in the Kapiti district of arrested suspects in domestic violence situations which was designed to always occur, so that decisions were made so as to follow policy, without the exercise of a discretion, which was unlawful. That accords with ***Withair v Attorney General*** which related to what was said to be Police policy to refuse to grant Police bail in cases of domestic violence.

The issue in the present case

[62] The issue must come down to two-fold considerations, both of which are largely matters of fact.

[a] Whether the decision to search the plaintiff was unreasonable in the circumstances so as to involve a breach of his rights against unreasonable search as provided by the Bill of Rights. The answer to that question, if a search be lawful, depends to a large extent upon whether the type of search decided upon was reasonable. So that leads onto, or merges in the second question, namely:

[b] Whether the manner, type and extent of search was unreasonable.

As to application of the Bill of Rights

[63] Where an enactment can be given a meaning that is consistent with the rights and freedoms contained in the Act then that meaning shall be preferred to any other (s6). If there are two tenable meanings, the one which is most in harmony with the Bill of Rights must be adopted. An enactment which limits rights and freedoms contained in the Act should be given such tenable meaning and application as constitutes the least possible limitation. ***Moonen v Film & Literature Board of Review*** (CA42/99, 17 December 1999).

[64] It must follow that in applying s57A of the Police Act 1958, and interpreting it in line with its purpose, the right or power of search of a person detained, and who it is contemplated will be locked up in custody, is a power that must be exercised reasonably. The reasonableness of the decision to search cannot be viewed separately from the manner or type of search undertaken. The power to search exists. It is a power that must be exercised lawfully. And the way in which it is used is subject to the restraint of reasonableness.

[65] Whether the power to search is derived from statute or from common law, the exercise of the power must always be subject to the "reasonable" requirement of the Bill of Rights.

[66] An example of the required approach, where the power is statutory, can be seen in ***R v Beare and Higgins*** (1988) 55 DLR (4th) 481. There the Supreme Court of Canada was concerned with the application of the Canadian Charter of Rights and Freedoms to the process of fingerprinting as permitted by the Identification of Criminals Act, RSC 1970. The issue was how the Charter Rights affected the statutory power to take fingerprints. The Court said the legislation was not arbitrary in scope, having not created an arbitrary or irrational statutory scheme. La Forest J in delivering the judgment of the Court said (at p499):

> "The existence of the discretion conferred by the statutory provisions does not, in my view, offend principles of fundamental justice. Discretion is an essential feature of the criminal justice system. A

system that attempted to eliminate discretion would be unworkably complex and rigid. Police necessarily exercise discretion in deciding when to lay charges, to arrest and to conduct incidental searches, as prosecutors do in deciding whether or not to withdraw a charge, enter a stay, consent to an adjournment, proceed by way of indictment or summary conviction, launch an appeal and so on.

> *The Criminal Code* provides no guidelines for the exercise of discretion in any of these areas. The day-to-day operation of law enforcement and the criminal justice system nonetheless depends upon the exercise of that discretion.
>
> This Court has already recognised that the existence of prosecutorial discretion does not offend the principles of fundamental justice ... The Court did add that if, in a particular case, it was established that a discretion was exercised for improper or arbitrary motives, the remedy under s24 of the Charter would lie, but no allegations of this kind has been made in the present case."

And further the Court said, when discussing the issue of "privacy" (at p501):

> "It seems to me that a person who is arrested on reasonable and probable grounds that he has committed a serious crime, or a person against whom a case for issuing a summons or warrant, or confirming an appearance notice has been made out, must expect a significant loss of personal privacy. He must expect that incidental to his being taken into custody he will be subject to observation, to physical measurement and the like. Fingerprinting is of that nature. While some may find it distasteful, it is insubstantial, of very short duration, and leaves no lasting impression. There is no penetration into the body and no substance is removed from it."

Canadian authorities relating to common law searches

[67] Whilst the s57A power is statutory, nevertheless the common law power is preserved and the distinction relates only to the lawfulness of the search, but not necessarily its reasonableness, because a lawful power - whether arising by common law or statute - can still be exercised in some circumstances unreasonably so as to be a breach of s21 of the Bill of Rights. So, some examination of dicta in cases where the search was based upon common law powers is not irrelevant, and may assist.

[68] In ***Langlois and Bédard v Cloutier*** [1990] 1 S.C.R. 158, the Supreme Court of Canada was concerned with a frisk search of an appellant who had been stopped for a driving offence and was arrested because a warrant for committal for unpaid

traffic fines existed. The Supreme Court reviewed the common law and held that (per headnote):

> "The exercise of the power of search is not however unlimited. First, this power does not impose a duty. The police have some discretion and, if satisfied that the law can be effectively and safely applied, they may see fit not to conduct a search. They must also be in a position to assess the circumstances of each case so as to determine whether a search meets the underlying objectives forming the basis of the right to search. Second, as regards these objectives, the search must be for a valid objective in pursuit of the ends of criminal justice - such as the discovery of an object that may be a threat to the safety of the police, the accused or the public, or that may facilitate escape or acts as evidence against the accused - and the purpose of the search must not be unrelated to the objectives of the proper administration of justice. Third, the search must not be conducted in an abusive fashion, and in particular, the use of physical or psychological constraint should be proportionate to the objectives sought and the other circumstances of the situation. A search which does not meet these objectives could be characterised as unreasonable and unjustified at common law."

[69] In delivering the judgment of the Court L'Heureux-Dube J, in describing the three propositions set out above, observed that the existence of reasonable and probable grounds was not a pre-requisite to the existence of a Police power of search, but of course the power was not unlimited.

[70] The Court referred to the well known dicta of Donaldson LJ in ***Lindley v Rutter*** [1981] QB 128 at 134-135 when he said:

> "It is the duty of the Courts to be ever zealous to protect the personal freedom, privacy and dignity of all who live in these Islands. Any claims to be entitled to take action which infringes these rights are to be examined with great care. But such rights are not absolute. They have to be weighed against the rights and duties of police officers, acting on behalf of society as a whole. It is the duty of any constable who lawfully has a prisoner in his charge to take all reasonable measures to ensure that the prisoner does not escape or assist others to do so, does not injure himself or others, does not destroy or dispose of evidence and does not commit further crimes such as, for example, malicious damage to property. This list is not exhaustive, but it is sufficient for present purposes. What measures are reasonable in the discharge of this duty will depend upon the likelihood that the particular prisoner will do any of these things unless prevented. That in turn will involve the constable in considering the known or apparent disposition and sobriety of the prisoner. What can never be

> justified is the adoption of any particular measures without regard to all the circumstances of the particular case."
>
> That is not to say there can be no standing instructions. Although there may always be special features in any individual case, the circumstances in which people are taken into custody are capable of being categorised and experience may show that certain measures, including searches, are prima facie reasonable and necessary in a particular category of case. The fruits of this experience may be passed on to officers in the form of standing instructions. But the officer having custody of the prisoner must always consider, and be allowed and encouraged to consider, whether the special circumstances of the particular case justify or demand a departure from the standard procedure either by omitting what would otherwise be done or by taking additional measures. So far as searches are concerned, he should appreciate that they involve an affront to the dignity and privacy of the individual. Furthermore, there are degrees of affront involved in such a search. Clearly going through someone's pockets or handbag is less an affront than a body search. In every case a police officer ordering a search or depriving a prisoner of property should have a very good reason for doing so."

[71] It is sufficient if the circumstances are such as to justify a search as a reasonable precaution (see ***R v Brezack*** [1950] 2 DLR 265. The authority to search is not dependent upon what the Court may later decide was the probability in a particular situation that, for example, weapons or evidence or dangerous objects would in fact be found upon the offender's person.

[72] In the present case, it is the fact of the lawful arrest, and an impending locking up in custody which establishes the authority to search, provided that such search is "reasonable". The Officer need not have reasonable grounds to believe that the offender had upon him a weapon or item that may cause harm to himself or others or government property for the search to be lawful. It is the fact that the search of the person is empowered after a lawful arrest and in terms of s57A which gives the officer the authority to search but the search must still be reasonable having a purpose based upon a genuine belief of reasonable grounds:

> "The interference with liberty must be necessary for the carrying out of the particular police duty and it must be reasonable, having regard to the nature of the liberty interfered with and the importance of the public purpose served by the interference." ***Dedman v The Queen*** [1985] 2 SCR 2 per Le Dain J at 35; also 20 DLR (4th) 321 at 346.

[73] There can be little dispute that a search will not be wrongful if it is authorised by law provided the law is itself reasonable and the search is conducted in a reasonable manner.

These principles were affirmed in ***Caslake v The Queen*** (1998) 121 CCC (3d) 97. In dealing with the common law powers relating to the scope of search incidental to arrest, Lamer CJC said (at 108-109):

> "As L'Heureux-Dube J stated in ***Cloutier,*** the three main purposes of search incident to arrest are ensuring the safety of the police and public, the protection of evidence from destruction at the hands of the arrestee or others, and the discovery of evidence which can be used at the arrestee's trial. The restriction that the search must be "truly incidental" to the arrest means that the police must be attempting to achieve some valid purpose connected to the arrest. Whether such an objective exists will depend on what the police were looking for and why. There are both subjective and objective aspects to this issue. In my view, the police must have one of the purposes for a valid search incident to arrest in mind when the search is conducted. Further, the officer's belief that this purpose will be served by the search must be a reasonable one.
>
> *To be clear, this is not a standard of reasonable and probable grounds,* the normal threshold that must be surpassed before a search can be conducted. Here, the only requirement is that there be some reasonable basis for doing what the police officer did. To give an example, a reasonable and probable grounds standard would require a police officer to demonstrate a reasonable belief that an arrested person was armed with a particular weapon before searching the person. By contrast, under the standard that applies here, the police would be entitled to search an arrested person for a weapon if under the circumstances it seemed reasonable to check whether the person might be armed. Obviously, there is a significant difference in the two standards. The police have considerable leeway in the circumstances of an arrest which they do not have in other situations. At the same time, in keeping with the criteria in ***Cloutier***, there must be a "valid objective" served by the search. An objective cannot be valid if it is not reasonable to pursue it in the circumstances of the arrest.
>
> In my view, it would be contrary to the spirit of the ***Charter's*** s8 guarantee of security against unreasonable searches or seizures to allow searches incident to arrest which do not meet both the subjective and objective criteria. This Court cannot characertize a search as being incidental to an arrest when the officer is actually acting for purposes unrelated to the arrest. That is the reason for the subjective element of the test. The objective element ensures that the

police officer's belief that he or she has a legitimate reason to search is reasonable in the circumstances."

And further (at p110):

> "In summary, searches must be authorized by law. If the law on which the Crown is relying for authorization is the common law doctrine of search incident to arrest, then the limits of this doctrine must be respected. The most important of these limits is that the search must be truly incidental to the arrest. This means that the police must be able to explain, within the purposes articulated in *Cloutier, supra* (protecting the police, protecting the evidence, discovering evidence), or by reference to some other valid purpose, why they searched. They do not need reasonable and probable grounds. However, they must have had some reason related to the arrest for conducting the search at the time the search was carried out, and that reason must be objectively reasonable. Delay and distance do not automatically preclude a search from being incidental to arrest, but they may cause the Court to draw a negative inference. However, that inference may be rebutted by a proper explanation."

[74] So, in the present case, the question is whether the purpose for which, or reason why, a search under s57A is to be conducted, including as it must the extent and manner of such search, is genuinely the basis for the decision to search and in that way.

[75] The plaintiff's counsel relies in part on the decision of ***R v Flintoff*** (1998) 126 CCC (3d) 321 to support his argument that the search of the plaintiff was unreasonable. There a strip search of an accused at a Police Station occurred after the suspect was charged with a blood alcohol offence. It held to violate his rights under the Canadian Charter to be secure against unreasonable search. However that was a case in which the Crown accepted that the appellant's rights had been violated because the search was not incidental to arrest, in terms of the common law principles and that despite Police reliance upon general policy regarding placing prisoners in the cellblock, in the circumstances of that case there was no suggestion that the appellant was to be held in custody regardless of the outcome of the demand for a breath test sample. Under our s57A, which enlarges the common law power requiring the search be undertaken incidental upon arrest, a search can lawfully be made provided of course that the pre-requisite of the accused being about "to be locked up" exists.

[76] The New Zealand Court of Appeal, in ***R v Grayson and Taylor*** [1997] 1 NZLR 399 (CA) has laid down some guiding principles. These include:

(a) that s21 does not validate an otherwise unlawful search;

(b) whether a Police search is unreasonable depends on both the subject matter and the particular, time, place and circumstance;

(c) a prime purpose of s21 is to ensure that governmental power is not exercised unreasonably. A s21 inquiry is an exercise in balancing legitimate state interests against any intrusions on individual interests;

(d) assessment of the seriousness of a particular intrusion into the value of privacy and security of personal privacy against unwanted intrusion involves considerations of fact and degree;

(e) in terms of s21 what is unlawful is not necessarily unreasonable. The lawfulness or unlawfulness of the search will always be highly relevant but will not be determinative either way.

[77] The Court of Appeal, in its judgment said (at p407):

> "A search is unreasonable if the circumstances giving rise to it make the search itself unreasonable or if a search which would otherwise be reasonable is carried out in an unreasonable manner. So too seizure. Whether a police search or seizure is unreasonable depends on both the subject-matter and the particular time, place and circumstance.
>
> A prime purpose of s21 is to ensure that governmental power is not exercised unreasonably. A s21 inquiry is an exercise in balancing legitimate state interests against any intrusions on individual interests. It requires weighing relevant values and public interests.
>
> The guarantee under s21 to be free from unreasonable search and seizure reflects an amalgam of values. A search of premises is an invasion of property rights and an intrusion on privacy. It may also involve a restraint on individual liberty and an affront to dignity. Any search is a significant invasion of individual freedom. How significant it is will depend on the circumstances. There may be other values and interests, including law enforcement considerations, which weigh in the particular case.

> Contemporary society attaches a high value to privacy and to the security of personal privacy against arbitrary intrusions by those in authority. Privacy values underlying the s21 guarantee are those held by the community at large. They are not merely the subjective expectations of privacy which a particular owner or occupier may have and may demonstrate by signs or barricades.
>
> Reasonable expectations of privacy are lower in public places than on private property. They are higher for the home than for the surrounding land, for farm land and for land not used for residential purposes. And the nature of the activities carried on, particularly if involving public engagement or governmental oversight, may affect reasonable expectations of privacy. An assessment of the seriousness of the particular intrusion involves considerations of fact and degree, not taking absolutist stances. In that regard, and unlike the thrust of the American Fourth Amendment jurisprudence, the object of s21 is vindication of individual rights rather than deterrence and disciplining of police misconduct.
>
> Illegality is not the touchstone of unreasonableness. In terms of s21 what is unlawful is not necessarily unreasonable. The lawfulness or unlawfulness of a search will always be highly relevant but will not be determinative either way."

[78] So too, in my view, the lawfulness of the search may not necessarily be the touchstone of reasonableness. The search may be authorised under s57A but if an officer acting under that section does so in such a manner and in such a way that the search is unreasonable so as to impinge upon a suspect's rights, then it is a breach of s21. Although unlawfulness may not equate with unreasonableness, in the circumstances of the present case it is hard to see that if the search was not authorised by s57A as being a prerequisite to being "locked up" it could still be categorised as reasonable (whether at common law or otherwise). If the plaintiff did not qualify for searching under the section, a search in the present circumstances would surely be unreasonable.

[79] I now apply the foregoing considerations and principles to the circumstances of this case, observing as I must that, in the end, findings on the facts and basis for a genuineness of the exercise of discretion by Constable Kearns will determine the outcome.

Factual findings as to events at Wellington Central Police Station

[80] I have carefully assessed the evidence of Constables Lander and Kearns, and that of the plaintiff, in coming to conclusions as to the facts of what occurred at the Wellington Central Police Station. As I have already mentioned the evidence diverges as between the Police Officers and the plaintiff concerning the manner in which the search was carried out and whether, prior to its taking place, the plaintiff requested to see or speak with a lawyer. The evidence of the Police Officers had an inherent probability and ring of truth about it. I accept the evidence of the Police Officers that the manner of the search was as they have described, namely that the plaintiff was required to remove his shirt which was then examined and put on again, and was then required to face the wall and asked to lower his trousers and underpants to his knees, squat momentarily and then stand up. I do not accept that he was required to remove all his clothes so as to stand and squat completely naked. He himself confirmed in evidence the Police Officers treated him in a friendly and dignified way and that up until the time of the request for a search he had been getting on well with both officers. His complaint was that they were "just off-hand" about the search process and "were friendly but there was no real guidance". He confirmed that he knew he had to be checked for anything that might be dangerous and knew that such check was not designed to harass or humiliate. He went on to say that he knew the Officers had a discretion to search him. He expressed the conclusion that they did not have to do it, and because they did it, he said, it was to make a fool of him. I think that that is more a perception or judgment made in hindsight as I am satisfied that the Officers acted professionally and sensitively in advising of the search and in undertaking it. I accept their evidence as to how the search was carried out.

Regarding the decision to search in this way

[81] Constable Kearns impressed me as a young but conscientious and responsible Police Officer and an honest witness. He had not met the plaintiff before and knew nothing of him until he was brought into his custody as Watchhouse Keeper. That

would not be uncommon in his position. He said that his concern was that he did not know, having never dealt with the plaintiff, whether he may have been a drug, alcohol or solvent user, and that he appeared agitated. He said his agitation was part of the reason why he elected to search him and "I searched him for his safety, my safety, Constable Lander's safety" and that he explained those reasons to the plaintiff. There was no reason for the Officer to undertake a search of the plaintiff fully naked. If that in fact had occurred because the plaintiff was obviously suicidal he would have been placed in a white plastic suit thereafter but that did not happen. This may lend support for the conclusion that both Constables' version of the type of search undertaken is to be preferred, unless of course they, together are manufacturing evidence. I do not find that to be the case.

The Request for Legal Advice

[82] The plaintiff was advised of his right to consult and instruct a lawyer by Constable Lander and this he did prior to the video tape interview commencing. Presumably he was given advice as to his legal rights, position and options. At the conclusion of the interview he was again advised of those rights by the Constable. The plaintiff's evidence was that, in the cellblock, after being told that he was to be searched he told Constable Kearns to "piss off". He was then referred to the notice which explained the Police had the right to search and for "your safety, and ours you may be strip searched". The plaintiff said that he told Constable Kearns that he wished to speak to a lawyer before he was searched but this request was refused. Both Constable Kearns and Constable Lander's evidence was that no such request was made. I accept their evidence as being accurate. The plaintiff had previously sought the advice of a lawyer and this had been afforded to him and advice had been given. Whilst he protested at being required to lower his pants, I do not accept that at that stage he demanded to see and speak with a lawyer.

[83] Counsel for the plaintiff submitted the decision to search could and should only have been taken after a conscious decision was made to refuse bail. That is, a bail decision must first be made. He says that until that time it could not have been said that the plaintiff was going to be "locked up". I do not agree. A person may be

intended to be locked up until such time as a decision to bail or not can be made. There may be many reasons why such a decision cannot be immediately made. To circumscribe Police procedures so as to require bail decisions to always be made prior to, for example, fingerprinting (which may be relevant to identity) and to in some situations create an unreasonable backlog of persons awaiting processing, would place impractical and intolerable demands upon Police procedures. If any decision to "lock up" is made for genuine honest and reasonable reasons, and not for an improper purpose, a postponement of the decision to bail will not of itself invalidate the Police actions if they exercise the power to search in a reasonable manner.

[84] Of course in this case this plaintiff was granted bail sometime after his search and admission into the cellblock. The evidence is silent as to exactly how much time passed, but it was probably within 30 minutes, and no longer. Yet, that was not to be known to the searching officer, in advance.

[85] It is clear that the plaintiff was in fact "locked up" in the secure cellblock environment. Yet I do not think it is open for the defendant to contend that simply because all searching takes place within the cellblock therefore it inevitably follows that those being searched are "locked up". The prerequisite test for a search under s57A is that a person is to be locked up. Once that decision is made, even if it be that such incarceration might be for a shorter rather than longer period - depending on developing circumstances - then a search may be undertaken provided it is reasonable in terms of the manner in which it is carried out and with proper respect for the dignity and feelings of the accused. Where it occurs does not necessarily determine its lawfulness (eg ***R v Creser*** (supra)) provided that it is within s57A. If it is contemplated in the mind of the Police Officer to whose custody the accused is entrusted, that the person is to be granted bail immediately then it cannot be said that he "is to be locked up in Police custody" because such is not going to happen. He may be detained as an arrested person but he may not necessarily be locked up.

[86] The difficulty is that it is very often the case that the Police, in whose custody an alleged offender is, do not know in fact whether or not at a later stage Police bail will be granted. No conscious decision has been made to grant Police bail at that

stage, nor has there been a conscious decision that Police bail will later be refused. Circumstances will vary widely according to the offender, his/her physical and emotional state, the nature of the charge, practicalities of processing or dealing with Police bail decisions (particularly if there are a number of persons being detained and awaiting bail), the necessity to make other inquiries and the like. It would be unwise for rigid rules to be laid down and in matters of discretion rigidity has no place. If the searching officer has a genuine honest belief that a prisoner in his custody is to be locked up in Police custody, then he or she may conduct a search provided the manner of search is reasonable. Bad faith or improper motive would invalidate the decision to search. So too would a search that, in all the circumstances was performed in an unreasonable manner. But a detailed and fine analysis of the reasoning process is not appropriate. Provided the officer has a genuine belief founded upon some reasonably based grounds that the person is to be locked up and should be searched; then a later revisiting of whether in fact the actual reasons were valid on probable - or through subsequent events or knowledge proved to be inaccurate - is not really the point. In matters such as these requiring the exercise of the discretion where individual judgment has to be exercised expeditiously at the time, it is not in my view appropriate for there to be a later microscopic examination of the decision, provided it is honestly and reasonably based.

[87] In the present case Constable Kearns was of the view that the plaintiff might not be immediately granted bail. It was not a case where he felt able to immediately take the plaintiff to the Senior Sergeant who determined matters of bail, or for himself to immediately grant Police bail. He was receiving the plaintiff from Constable Lander for the purpose of him being locked up, pending any question of bail being considered and determined. The fact that it was, apparently, quite quickly decided upon can understandably be seen as a reason for the plaintiff's annoyance or umbrage at having been searched, but I accept the evidence of Constable Kearns that he was not to know, in advance, when such decision would be made or if it would be favourable to the plaintiff.

[88] It must be said, however, that the Police cannot in the exercise of their power under s57A, adopt a procedural policy which enables individual officers to search in all cases, simply on the basis that all accused persons are to be held in custody

pending such a decision being made. Many occasions will arise where it is obvious that a person is not going to be, and should not be, locked up. There will be instances, I imagine, where it is perfectly obvious that a person in Police custody will be immediately bailed and never, in truth, have to be locked up. It is impossible, and would be wrong, to lay down in advance such cases, or of the circumstances in which they arise, but there will surely be some. By way of an extreme example, an elderly woman may have been arrested for shoplifting and returned to the Police Station. The receiving officer well knows and genuinely believes that she is not going to be locked up, but rather will be charged and released. Section 57A would not justify search of her - although of course common law might well justify search of her bags and belongings if such was incidental to her arrest. The point however is obvious. Where there is a belief that a person is <u>not</u> going to be locked up, a Police Officer cannot justify use of s57A powers claiming to believe otherwise, namely that locking up is to occur. Of course the common law power remains. Each person in custody must be treated on a case by case basis according to all the circumstances existing at the time and their detention path determined by genuine honest decisions or expectation that locking up is to follow and thereafter a genuine decision that a search, its nature and degree is necessary but is reasonable.

[89] I was impressed with Constable Kearns' evidence, and what I regarded was his sincerity when he said in cross-examination:

> "I would never ever strip search a prisoner completely naked. The only time that would happen is if he had to go into a white suit .... I would think that if I ever got arrested which I hope never happens that I would be treated in the same way that I would treat people and that is not to completely strip search or attempt to humiliate them, I don't have any gain from humiliating someone being searched. I don't see the point in it."

[90] In answer to questions from the Court he said that the decision he made that the plaintiff should be subject to a search was made by him after obtaining the blessing, or approval, of the Senior Sergeant and that:

> "Q. Is that decision made because that's the policy or because you had a discretion?

A. With everything Police do there is a discretion.

Q. What factors did you have in mind in the exercise of your discretion?

A. His agitation, first time offender and that's pretty much why.

Q. Did you specifically turn your mind to the question of discretion?

A. Always."

[91] Whilst counsel for the plaintiff submitted that being a first time offender was an invalid reason for a search decision to be made I think that may well be isolating the actual thought process of the deciding officer. This involved a combination of factors, referred to in Constable Kearns' evidence, including advice to him from Police Officers to be wary of first time offenders because they are often more likely to do something to themselves or others, and general awareness or concern over well known issues of safety for prisoners and others. In cross-examination, when it was put to him that because the plaintiff was a first offender and it was the only significant factor in the decision to search him Constable Kearns said:

> "Not necessarily I didn't know whether Mr Everitt was under the influence of cannabis. I cannot tell. I don't know if you can, I don't know if he was under the influence of LSD. I'm not saying he was but I don't know. I didn't know his history or anything about him. We get first time offenders who are in the receiving area for the first time who as a result of the fingerprints being taken perhaps 50 more offences may have been cleared [sic] due to the fingerprints."

[92] Counsel for the plaintiff challenges the factual basis upon which the Constable exercised his discretion to search also related to whether the plaintiff was in fact agitated so as to in fact be regarded as a risk. In situations such as this where there are no mandatory considerations laid down prior to the exercise of a discretion, intricate analysis of facts confronting an officer, so as to challenge the merits of his discretionary decision, can only go so far unless it can be said that the ***Wednesbury*** type of unreasonableness occurred. Whilst counsel suggests that that is the case here, I am satisfied that the evidence falls completely short of establishing that proposition.

[93] As I have said I do not think this decision making process is something that the Courts should pass judgment upon through applying matters of fine distinction or detailed analysis. As was said in ***Attorney General v Hewitt*** (supra) (at p15):

> "... in the absence of bad faith or improper purpose the prospects of a successful challenge to the exercise of the discretion [to arrest] are likely to be very limited."

[94] Provided the discretion is properly exercised in the individual case, and some reasoned basis exists for that decision, which must inevitably involve the manner and degree of such search, and the search is reasonable then the Court ought not to second guess that judgment call. Naturally the manner of search and the way it is carried out must be undertaken reasonably and fairly with proper regard for privacy and dignity of the person being searched.

[95] On the facts of this case I do not find that Constable Kearns exercised his discretion to search otherwise than honestly and for what he saw as a proper purpose. He formed a genuine view, in light of the plaintiff's demeanour as he observed it, and other factors including the Police duty to eliminate risks, within the cellblock and in subsequent processing, that a search was necessary. These were relevant factors for him to have in mind in the exercise of his discretion.

[96] The practical realities faced by officers day-by-day who are admitting persons to a cellblock - provided of course the intention is that they be locked up, together with their duty to ensure the safety of all persons in the cellblock and balance the rights of individuals in the public interests - has to be recognised. The period of search was brief and the plaintiff was never completely unclothed. The lowering of undergarments was for a very brief period and the search took place in the privacy and security of a receiving room in the presence of two male officers, with no real possibility of observation by others. It did not involve force or any humiliating or abusive process. I am satisfied on the facts of this case that such search was reasonable given the clear purpose of s57A, the absence of any improper motive or purpose, and the generally considerate treatment of the plaintiff by the Constable. There has to be an appropriate balance struck between the public interest of searches being undertaken in respect of prisoners to be admitted to cellblocks,

balanced against the human values of privacy, dignity and liberty and the protection afforded to individuals from unreasonable search by s21 of the Bill of Rights.

[97] It follows from those factual conclusions that I find the exercise by Constable Kearns of his power of general search under s57A to have been lawful and reasonable. No question of bad faith or improper motive arose. The fact that others or this Court, in hindsight, may have made a different decision does not make unlawful the decision of Constable Kearnes, nor does it make his actions unreasonable.

[98] It is trite to say that matters such as these are questions of "fact and degree". Yet that has to be the case where there are difficult areas such as this requiring the exercise of discretion whether by the Police or others in authority. The balancing of considerations of public interest, individual protection, Police duties to all prisoners, issues of safety, Police powers to effectively maintain safe institutions, the rights and liberties of persons under the Bill of Rights Act 1990, related to the factual circumstances of each case, can be a profoundly difficult task. The Courts will review and curb searches that are unlawful and unreasonable. But the Bill of Rights requires a practical, realistic and common sense application, respecting and upholding the rights of the citizen and yet is determined in the context of the factual and practical framework of the power being exercised for its purpose. As a matter of fact and degree, on the circumstances of this case, the decision to search, and the manner of search, was not unlawful nor unreasonable.

Right to Counsel

[99] On behalf of the plaintiff it was submitted that he was denied the right to consult a lawyer before being searched, and thus his rights under s23(1)(a) of the New Zealand Bill of Rights Act 1990 were breached. I have found (para [82]) that no such request was made. But, in any event, in my view, where a person is detained at the Police Station and has been informed of and exercised his right to consult and instruct a lawyer, no Bill of Rights breach arises simply because that person is later required to undergo a search authorised by s57A of the Police Act 1958 without again being afforded access to counsel prior to search. That situation is quite

different from the position that may arise where a person subject to questioning faces a changed and markedly different Police inquiry so that the jeopardy that he might face has in a real sense altered and further advice as to his rights to counsel will be necessary; (see ***R v Tawhiti*** [1993] 3 NZLR 594; ***R v Schriek*** [1997] 2 NZLR 139 (CA) 152). In the case of lawful search to which an accused, prisoner or inmate is obliged to submit - and when he has already exercised his right to consult a lawyer - a mandatory requirement that he be given a further opportunity to so consult, in my view cannot be justified. It is essentially a question of balancing the need for the Bill of Rights to work in an effective practical way against the risk of unduly hindering proper Police procedures and it would be inconsistent with operational requirements of the Police in undertaking a search authorised by s57A for it to be delayed while a suspect consulted a lawyer. (See for example ***R v Smith*** (1993) 11 CRNZ 72 and the approach of Thomas J in ***R v Waddell*** (High Court, Auckland Registry, T119/91, 25 October 1991).

[100] I think this is especially the case where a search authorised by law is to be undertaken and it is hard to imagine any legitimate advice that could be given that would prevent the carrying out of such search. As was said in ***R v Guberman*** (1985) 23 CCC (3d) 406, relating to an accused person being able to obtain advice as to his rights in relation to search:

> "This cannot extend to matters such as a physical search... for which the accused is obliged to submit and which no amount of advice or legal assistance would deter."

If it were to be otherwise the case then every search undertaken pursuant to s57A could be delayed for a considerable period of time whilst the person in custody, yet again, consults and instructs a lawyer and receives advice. That advice, in circumstances of a valid search being undertaken could be of little benefit to him. Of course, if the manner of search thereafter undertaken falls into the category of being "unreasonable", breach of the Bill of Rights would arise.

[101] Though plaintiff's counsel placed particular reliance upon the decision of the Supreme Court of Canada in ***R v Simmons*** (1988) 45 CCC (3d) 296, that was a case where the Court held that a person, arriving at a custom's border, who had a

statutory right before search to be taken before a Magistrate, Justice of the Peace or Chief Officer of the Port, and was to be detained for the purpose of a strip search, was entitled to be informed and given the right to consult counsel. That was because counsel could have informed her of her statutory rights requiring higher authorisation for the search and it could not be said that counsel would perform no useful function, in advising her of her rights, in such a situation. That factual situation is quite different to those which will arise where a person in custody and who is about to be locked up is required by the Police Act to submit to a search pursuant to s57A.

[102] Finally I make it clear that, despite the assertion of counsel for the plaintiff that this case should be a "test case" so that I should rule on the lawfulness or otherwise of the search policy at Wellington Central Police Station this case is a claim for civil damages or compensation dependent on its own facts. It is not a "test case" based on agreed facts. There is no bar to Authorities providing general policy or practical guidelines or considerations so as to assist Police in the exercise of their power to search pursuant to s57A. What is required however is that there be an individual discretionary decision made in every case relating to every person in custody depending on the particular facts relevant to that person and the circumstances then existing. The degree, nature, extent and manner of search is a matter to be determined on a case by case basis bearing in mind the requirement that any search be reasonable in terms of s21 of the Bill of Rights Act. It is natural that personal feelings of a prisoner may point to a less intrusive search than one where clothing is removed but that alone is not the determinative factor. Less intrusive searches cannot be the only or invariable practice nor, correspondingly, can searches which involve removal of clothing be the only or invariable practice. It will all depend on circumstances existing at the time of search balancing the rights of a person to not be subject to unreasonable search, with the important policy and public interest considerations of ensuring safety of all persons in cellblocks, which encompass the Police duty to take all reasonable and sufficient precautions to protect those in their custody.

Conclusions

[103] I summarise my findings essential to dispose of this case.

[a] There was no false imprisonment of the plaintiff, nor unlawful or unreasonable search of his bicycle on Featherston Street.

[b] The arrest of the plaintiff by Constable Lander was lawful, and not arbitrary, given that he exercised his discretion fairly and had good cause to suspect that an assault upon Constable Hayes had occurred.

[c] The Police had the authority to search the plaintiff, pursuant to s57A of the Police Act 1958 once he was in their custody and about to be locked up, given that that was the honest and reasonable belief of Constable Kearns.

[d] The decision made to search the plaintiff was not an unlawful or improper exercise of Constable Kearns' discretion.

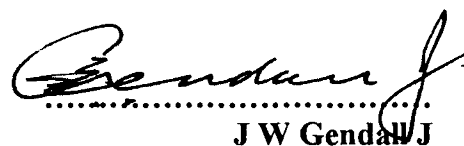
[e] The exercise by an officer of the power of search under s57A (or pursuant to his duty under s21K(5) PI Act 1954) must be undertaken reasonably so as to ensure that the right of a citizen to be secure against unreasonable search, as provided in s21 of the Bill of Rights, is upheld.

[f] The manner and type of search that occurred, in the circumstances of this case, was not unreasonable, so as to infringe the protection given to the plaintiff by s21 of the New Zealand Bill of Rights Act 1990.

[g] The providing of guidelines or policies for the assistance of Police Officers in the exercise of their discretion is under s57A not unlawful. But the discretion is to be exercised in each case so as not to be

fettered by such policies, which cannot override individual discretionary decisions being made.

[104] The plaintiff's claims have not been established and there will be judgment for the defendant. The defendant is entitled to costs. Failing agreement as to those, counsel are invited to submit memoranda.



J W Gendall J