Dunlea v Attorney-General

Court of Appeal Wellington
15 March; 14 June 2000
Richardson P, Gault, Thomas, Keith and Blanchard JJ

Human rights – New Zealand Bill of Rights Act 1990 – Unreasonable search of persons and property – Arbitrary detention – Torts of assault, unlawful imprisonment and trespass to the person and property – Award of damages – Whether exemplary damages should be awarded – Whether different approach for New Zealand Bill of Rights Act 1990 and torts appropriate – Defence of acting under authority – Arms Act 1983, ss 60, 61 and 71 – New Zealand Bill of Rights Act 1990, ss 21 and 22.

The actions of police resulted in claims by the six appellants under the New Zealand Bill of Rights Act 1990 for the unreasonable search of themselves and of the premises occupied by three of them and arbitrary detention, and for the torts of assault, unlawful imprisonment and trespass to the person and property. Police had received information that a suspect in two armed robberies, thought to be in possession of a firearm, was at a flat (flat 2) which was one of two in a house. The six appellants were in the other flat (flat 1). Three were residents and the other three, two of whom were 14 years old, were visitors. Police had obtained a search warrant to search the whole house. The Armed Offenders Squad (AOS) under the authority of s 61 of the Arms Act 1983 was also involved in the operation, the plan of which was to evacuate those in flat 1 and then use a loudhailer to get the suspect present in flat 2 with another person to give himself up. The police set up a cordon around the house. Soon after, two of the appellants, Mr Buxton and Mr Graham, left flat 1 and were ordered by an AOS member, who mistakenly thought they were the suspect and the other occupant from flat 2, to lie face down on the ground, where they were handcuffed and searched for weapons. No weapons were found and, still handcuffed, the two were delivered into the charge of Criminal Investigation Branch (CIB) officers who held them without arresting them for approximately 15 minutes. After their handcuffs were removed Mr Buxton was subjected to a further search. Once it became clear that there had been a mistake in relation to Mr Buxton, the four other plaintiffs were evacuated from flat 1 to the street, and as each emerged were ordered to place their hands on their heads. During the evacuation AOS officers trained their rifles briefly on the four. On reaching the edge of the property the four were subjected to pat searches and three had pocket searches. All searches were negative. After some time the occupants of flat 2 emerged and the suspect was arrested. Subsequently the appellants' flat was searched for people and eventually the appellants were allowed to return to their flat. In the High Court, the Judge found in respect of Mr Buxton and Mr Graham that, though the initial assault by the AOS officers was protected by s 71 of the Arms Act 1983, the

unreasonable search which shaded into arbitrary detention and false imprisonment first by AOS officers and then by CIB officers was in breach of s 21 of the Bill of Rights Act and was not protected by s 71. Awards of $12,000 for the Bill of Rights breach along with $6000 exemplary damages were made in favour of Mr Buxton and $11,000 and $5000 for Mr Graham. In respect of the other four appellants the High Court held that: the claims associated with the evacuation of the flat were protected by s 71 of the Arms Act 1983; the pat-down searches were not unreasonable; but the pocket searches and the search of the flat were unreasonable and s 71 did not protect the officers. All the appellants contended that the awards should have been larger. The four appellants evacuated from the flat also appealed against the Judge's findings that they could not recover damages or compensation both for assault from the pointing of the rifle and arbitrary detention and the pat-down searches. The Crown cross-appealed against the High Court findings that the AOS actions relating to Mr Buxton and Mr Graham amounted to an unreasonable search, and against both the amount of the awards and the inclusion of exemplary damages.

Held: (Thomas J doubting) 1 The actions of the Armed Offenders Squad in relation to Mr Buxton and Mr Graham had been lawful and had not been in breach of the New Zealand Bill of Rights Act 1990. The need to remove them from the danger area in the execution or intended execution of the Arms Act search warrant justified their removal out to the road. However, that did not affect the awards made in respect of the arbitrary detention and false imprisonment by CIB officers of these two men once they reached the road and it was clear they were not the men being sought (see paras [13], [25], [81]).

2 Section 71 of the Arms Act 1983 covered the steps taken in the operation by the Armed Offenders Squad to evacuate the area so that attention could be focused on the suspect without endangering others. This included the claimed detention by the second group of four plaintiffs while they made their way from the house to the road as part of the controlled evacuation. While s 60 of the Arms Act did not protect the pat-down searches they were part of the controlled evacuation and did not have any aggravating features (see paras [29], [30]).

3 The Crown's cross-appeal in respect of the pocket searches should succeed and the three awards of $2000 should be set aside. No allegations had been made about the searches and no award had been sought. The appellants did not give proper evidence in respect of the searches and the defendant was entitled to be put on proper notice of such a claim and possible award (see para [31]).

4 This was not an occasion for the award of exemplary damages as such awards should be reserved for truly outrageous conduct which could not be punished in any other way. (Thomas J dissenting) The total awards of $18,000 for Mr Buxton and $16,000 for Mr Graham were however appropriate given the nature and extent of the wrongs done to them once they had been taken out to the road (see paras [34], [36], [78], [80]).

Ellison v L [1998] 1 NZLR 416 (CA) applied.

Appeal dismissed: cross-appeal allowed in part.

Observation: (Thomas J dissenting) This is not the occasion to resolve the question whether a different approach should be adopted to the fixing of compensation for a breach of the Bill of Rights compared with the fixing of damages for a tort arising out of essentially the same facts. But, where a claim

in tort is established and is not defeated by statutory immunities, and the same facts lie behind the findings of breach of rights protected by tortious remedies and by the Bill of Rights Act, there are strong reasons for not adopting a different approach (see paras [37], [38], [66], [72]).

Other cases mentioned in judgments

Attorney-General v Upton (1998) 5 HRNZ 54 (CA).
Basu v State of West Bengal [1997] 2 LRC 1.
Duffy v Attorney-General (High Court, Wellington, A 352/82, 3 February 1986, Eichelbaum J).
Entick v Carrington (1765) 19 State Tr 1030.
Hanrahan v Merck Sharp & Dohme (Ireland) Ltd (1988) ILRM 629.
Kennedy v Ireland [1987] IR 587.
Manga v Attorney-General [2000] 2 NZLR 65.
Martin v Tauranga District Court [1995] 2 NZLR 419 (CA).
Home Affairs (Minister of) v Fisher [1980] AC 319; [1979] 3 All ER 21 (PC).
Nilabati Behera v State of Orissa [1994] 2 LRC 99.
R v Goodwin [1993] 2 NZLR 153 (CA).
R v Grayson and Taylor [1997] 1 NZLR 399 (CA).
RJR-Macdonald Inc v Attorney-General of Canada (1994) 111 DLR (4th) 385; 54 CPR (3d) 114.
Simpson v Attorney-General [Baigent's Case] [1994] 3 NZLR 667 (CA).
Transport (Ministry of) v Noort [1992] 3 NZLR 260 (CA).

Appeal

This was an appeal by Ms Angela Dunlea, Mr Hardie, Ms Melissa Dunlea, Mr Te Whake, Mr Buxton and Mr Graham from the judgment of Panckhurst J (High Court, Christchurch, CP 48/96, 21 November 1998) upholding some claims against the Attorney-General for the torts of assault, unlawful imprisonment, trespass to the person and property and for breach of rights under the New Zealand Bill of Rights Act 1990, and dismissing others, and against the amount of damages awarded; and a cross-appeal by the Attorney-General from the award by Panckhurst J of exemplary damages and other findings.

James O'Neill and *Desmond Boyle* for the appellants.
David Boldt and *Andrew Butler* for the respondent.

Cur adv vult

The judgment of Richardson P, Gault, Keith and Blanchard JJ was delivered by

KEITH J.

A police operation

[1] This appeal concerns actions of members of the Armed Offenders Squad (AOS) and the Criminal Investigation Branch (CIB) of the police on the evening of 7 September 1995 at a house in Christchurch. Their actions gave rise to claims by the six appellants under the New Zealand Bill of Rights Act 1990 for unreasonable search of the appellants and of the premises occupied by three of them and arbitrary detention, and for the torts of assault, unlawful imprisonment and trespass to the person and to property. Panckhurst J (High Court, Christchurch, CP 48/96, 21 November 1998) upheld some of the claims and dismissed others. His awards totalled $44,500. The appellants appeal and the Crown cross-appeals.

[2] The Christchurch police had information that Shane Christopher Reedy, suspected of committing two armed robberies, was in a flat (flat 2) at 114 Woodham Road. That flat was occupied by another man, Steven Watson, who had a criminal record, and Mr Watson's son. The flat was one of two in the house. The six appellants were in the other flat (flat 1). Three were residents of flat 1 and the other three were visiting it at the time of the police action.

[3] The police information about the configuration of the two flats in the house was not accurate. They understood, from a visit which a police officer had made about three months before and from information obtained just a day before the operation from a female friend of Mr Reedy, that Mr Watson lived in the "back flat". That female informant also said that Mr Reedy was using a converted Mitsubishi Mirage and was in possession of a cut-down firearm. He was also said to be desperate for drugs and capable of taking stupid risks. Those involved in the operation on the evening of 7 September were briefed in those terms. In fact the house was divided, as seen from the road, into two sides with the left-hand side, flat 1, occupied by three of the appellants, Angela Dunlea, Travis Hardie and Ronald Graham. Their visitors were Melissa Dunlea (the 14-year-old sister of Ms Dunlea), Billie Te Whake (the 14-year-old brother of Mr Hardie) and Graeme Buxton (a friend of Mr Graham). Also present in the flat was another friend of Mr Graham, Stephen Skinner (who was not a plaintiff). Flat 1 had doors at the front and back. At the back right of the section as seen from the road, that is, closer to flat 2, on the evening in question were the converted Mitsubishi (which the police had identified earlier in the day) and Mr Graham's car.

[4] The police obtained a search warrant under the Summary Proceedings Act 1957 to search the whole address, without any distinction being drawn between the two flats, for items from the second robbery. As the operation began, Inspector Cairns, the officer in charge of the AOS in Christchurch, was in a command vehicle some distance away but in radio contact with most of the AOS members. He also had in his possession a written authority which he, as a commissioned officer of the police, had signed under s 61 of the Arms Act 1983 (set out in para [14] below). That warrant also referred generally to the address and did not distinguish between the two flats. The plan was to evacuate those in flat 1 (which had a telephone) and then to use a loudhailer to get

Mr Reedy to give himself up. As appears from the summary in the next paragraph misfortune intervened.

[5] The sequence of major events unfolded in the following way:

9.25 pm	The police cordon around the address was in place.
9.42	Mr Buxton, Mr Graham and Mr Skinner had planned to go into town. The first two left flat 1 through its back door and were heading towards Mr Graham's car when they were ordered by an AOS member to lie face down on the ground, were handcuffed with their hands behind their back and were searched for weapons (with negative results). The AOS officers, confused about the layout of the house, believed that the two men were Mr Reedy and Mr Watson and that they were heading to the converted car. Mr Skinner, who had reached the back door, was terrified by what he had seen, immediately slammed the door shut, retreated back into the middle of the flat and told the other four occupants what he had seen. The five occupants of the flat were understandably very worried, with the two 14-year-olds saying they didn't want to die. Mr Buxton and Mr Graham, still handcuffed, were quickly taken through the back of a neighbouring property on the flat 1 side of the property and along the far boundary out on to the street and delivered into the charge of the CIB. They were not ever arrested in the course of the operation. By 9.56 the transcript of the radio messages records an acknowledgment that the police did not have those the CIB was looking for.
9.53	Detective Jenkins, who was in the command vehicle with Inspector Cairns, made phone contact with Angela Dunlea in flat 1. She was told that the police were involved. She gave her name and advised the police there were three adults and two teenage children in the house. She was not told what was going on but she said that there were two flats in the building and suggested that the police must have the wrong one. Detective Jenkins indicated that the group was required to leave the property by the front door out onto the road, and that this was to be done in a controlled fashion. After some discussion in respect of which Panckhurst J was satisfied that Ms Dunlea was entirely cooperative and was as helpful as she could be, the sequential evacuation of the group was organised. The phone call lasted until the evacuation was complete.
9.56 – 10.02	Mr Skinner, Mr Te Whake, Ms Melissa Dunlea, and finally Ms Angela Dunlea and Mr Hardie (together because Mr Hardie had very poor vision) came through the front door of flat 1 and moved to their right to the corner of the property furthest away from flat 2. As each emerged, Detective Parker instructed them to place their hands on their heads so that they remained in view, to proceed across the lawn to a gap in the hedge at that corner where he was positioned and to remain cooperative. They were told that if they complied they would have nothing to fear. During that evacuation Detective Parker trained his rifle briefly on each of the five and it is probable that at least one other AOS officer, and perhaps more, trained their rifles in that general direction at least

	momentarily. As the appellants and Mr Skinner passed through the hedge at the front corner of the property they were pat searched by Inspector Paula Stevens for weapons. She told them of her intention to do this but did not ask for consent and once again the searches were negative. They were then passed over to CIB personnel who were further along the road. Three of the appellants had their pockets searched by a CIB officer, additional to the search by Inspector Stevens. That was said to be done to endeavour to recover items of clothing or pills which could have been used or taken in the pharmacy robbery the previous day.
9.58 (approx)	Mr Graham's handcuffs and then Mr Buxton's were removed. Mr Buxton's had caused bleeding. Mr Graham then provided a rough sketch of the house to indicate the relationship of the two flats. Mr Buxton was searched again.
10.17	Mr Watson and his son left their flat after the use of a loudhailer.
10.21	*Mr Reedy emerged. He was charged with the two offences of* aggravated robbery and on 19 October sentenced to a lengthy term of imprisonment.
10.30 (approx)	Flat 1 was cleared; that is, it was searched for people. Clearance involves a voice warning and the release of a dog into the premises and after that AOS members enter and check cupboards, under beds and elsewhere where a person might be concealed.
10.45 (approx)	The appellants were allowed to return to the flat.

The High Court judgment

[6] The findings of Panckhurst J can be summarised under four headings.

[7] Mr Buxton and Mr Graham: The initial assault by the AOS officers was protected by s 71 of the Arms Act (para [14] below). But the unreasonable search which shaded into arbitrary detention and false imprisonment first by AOS officers and then by CIB officers was in breach of s 21 of the Bill of Rights Act and was not protected by s 71. The action in tort for trespass added nothing to the unreasonable search cause of action and would in any event be barred by s 14(5) of the Accident Rehabilitation and Compensation Insurance Act 1992. In Mr Buxton's case there was the additional element of the later search, also held to be unreasonable. Panckhurst J made awards in favour of Mr Buxton of $12,000 for the Bill of Rights breach along with $6000 exemplary damages (with parallel awards for trespass and false imprisonment). The figures for Mr Graham were $11,000 and $5000, the differences in the amounts being explained by the additional unreasonable search of Mr Buxton.

[8] Ms Angela Dunlea, Mr Hardie, Ms Melissa Dunlea and Mr Te Whake: Any liability for assault arising from the pointing of the rifles at these four appellants as they left the house and made their way to the street was denied by s 71. The pat search was minimally intrusive and had none of the aggravating features involved in the searches of Mr Graham and Mr Buxton. It was not unreasonable. Any arbitrary detention and false imprisonment during the evacuation was justified since the basis for the exercise of Arms Act powers in respect of flat 2 existed at the relevant time. The controlled evacuation of flat 1 was a step in that process. Further, the actions were protected by s 71. Any later detention was not established on the evidence.

[9] Ms Angela Dunlea, Mr Hardie and Mr Te Whake: The pocket searches by the CIB without consent were unreasonable and unlawful searches and s 71 was not available. In respect of those breaches the three were each awarded $2000.

[10] Ms Angela Dunlea, Mr Hardie and Mr Graham: The search of the flat in which the three resided was an unreasonable search and a trespass to property. Section 71 did not protect the police. The three residents were each awarded $1500.

[11] The first four appellants appeal against the Judge's findings summarised under the second heading (para [8] above). All appellants appeal against the amounts of the awards. The Attorney-General cross-appeals in respect of the findings about AOS actions in relation to Mr Graham and Mr Buxton (para [7]) and the pocket searches (para [9]) and against the decision to award exemplary damages and the amounts awarded.

Our conclusion

[12] We conclude that the judgment should stand except:

1. The Crown's cross-appeal in respect of the pocket searches should succeed, with the consequence that the three awards of $2000 should be set aside.
2. The awards in favour of Mr Graham and Mr Buxton should become general awards to the total amount fixed (that is $15,000 and $18,000) with no distinct element of exemplary judgments.

[13] As well, we have concluded that the AOS actions in relation to Mr Buxton and Mr Graham were lawful and not in breach of the Bill of Rights. That conclusion does not however affect the awards in respect of the arbitrary detention and false imprisonment by CIB officers of those two men once they reached the street, claims which are undoubtedly established, as the Crown concedes.

The Arms Act 1983, ss 60, 61 and 71

[14] According to the Crown, some of the actions in question were taken in exercise of powers conferred by the Arms Act or were protected by a provision in that Act. The relevant sections are ss 60, 61 and 71:

> **60. Search of suspected persons and seizure of firearms, airguns, pistols, imitation firearms, restricted weapons, ammunition, or explosives** – (1) If a member of the Police has reasonable grounds to suspect that any person being *in a public place* is carrying or is in possession of any firearm, airgun, pistol, imitation firearm, restricted weapon, ammunition, or explosive in breach of this Act, the member of the Police may, without warrant, –
>
> (a) Search that person, or any vehicle, package, or other thing there in his possession or under his control; and
>
> . . .
>
> (b) Detain that person for the purpose of any search under paragraph (a) of this subsection; and
>
> (c) Seize any such firearm, airgun, pistol, imitation firearm, restricted weapon, ammunition, or explosive, and detain the same.
>
> . . .
>
> (2) If any member of the Police has reasonable grounds to suspect that any person has in his possession or under his control *in any place* any firearm, airgun, pistol, restricted weapon, ammunition, or explosive and

that the person . . . may kill or do bodily injury to himself or any other person, the member of the Police may, without warrant, –

(a) Enter that place and search that person and that place; and

(b) Detain that person for the purpose of any search under paragraph (a) of this subsection; and

(c) Seize any such firearm, airgun, pistol, restricted weapon, ammunition, or explosive, and detain the same.

(3) It is the duty of everyone exercising any power conferred by subsection (1) or subsection (2) of this section –

(a) To identify himself to the person searched and to the occupant of any premises searched; and

(b) To tell the person searched and the occupant of any premises searched the section and subsection of this Act under which the power is being exercised; and

(c) If he is not in uniform, to produce on initial entry, and, if requested, at any subsequent time, evidence that he is a member of the Police.

(4) Where any member of the Police exercises any power conferred by subsection (1) or subsection (2) of this section, he shall, within 3 days after the day on which he exercises the power, furnish to the Commissioner a written report on the exercise of the power and the circumstances in which it came to be exercised. (Emphasis added.)

61. Search of land or buildings for firearms, airguns, pistols, imitation firearms, restricted weapons, ammunition, or explosives – (1) If any commissioned officer of Police has reason to suspect that there is in any building, aircraft, vessel, hovercraft, carriage, vehicle, premises, or place any firearm, airgun, pistol, imitation firearm, restricted weapon, ammunition, or explosive in respect of which any offence against this Act or any indictable offence has been or is about to be committed or which may be evidence of any such offence, the commissioned officer, or any member or members of the Police authorised by him in writing, may –

(a) Enter any such building, aircraft, vessel, hovercraft, carriage, vehicle, premises, or place, by force if necessary, and either by day or night, and search the same or any part thereof; and

(b) Seize any firearm, airgun, pistol, imitation firearm, restricted weapon, ammunition, or explosive found therein and detain the same.

[Subsections (2) and (3) are to the same effect as s 60(3) and (4).]

71. Protection of persons acting under authority of this Act – No action, claim, or demand whatsoever shall lie or be made or allowed by or in favour of any person against the Crown, or any Minister of the Crown, or any person acting in good faith in the execution or intended execution of this Act, save only in respect of any compensation that is payable in accordance with the express provisions of this Act.

[15] The Arms Act, according to its long title, is an Act to promote both the safe use and the control of firearms and other weapons. It establishes various licensing systems and creates certain offences in support of those aims. It also confers important and unusual powers on the police and supplements those powers with a broad protection against legal proceedings. Those powers, exercisable in public places and in other places under s 60 and inside buildings under s 61, have two notable features. The first is that the powers are not

subject to the check in advance provided by the requirement to seek from, and have a search warrant granted by, a judicial officer. In the category of case falling within s 61 it is a commissioned officer who gives the written authority. The second is that the powers conferred are preventive – to search, to detain (not arrest) the person for the purposes of the search, and to seize and detain the firearm.

[16] Parliament has not simply conferred important powers exercisable on an urgent basis to help prevent the dangerous or illegal use of firearms. It has also, in s 71, provided a broad protection to those operating in this area. The protection:

- extends to a wide range of proceedings (on its face it does not appear to be limited, for instance, to actions in tort);
- extends to a wide range of potential defendants including the person who took the action and those most likely to be vicariously liable;
- extends to the *intended* execution of the Act and not simply to its actual execution; and
- makes provision for a sole exception, perhaps implying that there are no others.

(The provision can be seen in context in the Law Commission's report on *Crown Liability and Judicial Immunity: A response to* Baigent's *case and* Harvey v Derrick ((1997) NZLC R37) app C.)

[17] It is convenient to consider the various grounds of appeal and cross-appeal chronologically.

The AOS search and detention of Mr Buxton and Mr Graham

[18] The Crown cross-appeals against the High Court finding that the AOS actions relating to Mr Buxton and Mr Graham amounted to unreasonable search and arbitrary detention or false imprisonment. In very large measure, Panckhurst J accepted the account of what happened given by the AOS members, not being satisfied of the two men's claims of more extreme conduct in the form, for instance, of threats of being shot in the event of non-compliance. But he did not accept that the search as described by the officer who handcuffed and searched them was authorised by s 60:

> "The act of searching, patting down the bodies of the two men, was unremarkable. But one cannot divorce the search itself from the other circumstances: that the two were required to lie face down, that without ceremony they were cuffed, that no words of arrest were used and, most importantly, that when the search was completed with negative result detention of the two continued. In short, treatment of them as 'suspects' continued. At this point the issue of unreasonable search shades into that of arbitrary detention or false imprisonment. Against this background it is my essential conclusion that the AOS member did not seek or purport to act in terms of s 60 in conducting the search. I doubt that members on the night were consciously aware of the extent of their powers under that provision. For them the issue was one of operational process. Initially there probably were grounds to found suspicion and justify a search, but the methods employed and what followed cannot in my view be justified pursuant to s 60, albeit that the section does authorise detention of the suspect for the purpose of a search. Accordingly I view the searches as illegal.
>
> The further question is whether they were unreasonable in terms of s 21 [of the Bill of Rights]. I conclude that they were. Of course I accept that the officers were entitled to detain and to search Mr Buxton and

Mr Graham. Further that the search itself was proper in the sense that it was not intrusive, lasted only a few seconds and was entirely appropriate to check for the presence of weapons. I accept also that a measure of force could be used in that process. Indeed that the use of firearms was justified. But what was unreasonable to my mind was the automatic use of flexi cuffs when the two were totally cooperative. Moreover, their continued use when the search was negative and when all the signs suggested that the two were not the persons sought by the police" (p 21).

[19] The Judge then went on to hold that s 71 does not provide protection. The officers had not acted "in the execution or intended execution of [the Arms] Act". Their approach was simply dictated by AOS procedure.

[20] The reasoning relating to the reasonableness or lawfulness of the AOS actions emphasises two elements – the qualitative and the temporal. The first includes requiring the suspects (for that is how the AOS officers rightly saw them at the outset) to lie face down, to cuff them and not to arrest them. The searches themselves and related detentions were not by contrast questioned in the judgment in any way. The evidence seems to us to provide no basis for questioning the particular methods used in this operation. Those methods are among those regularly employed by the AOS. According to Inspector Cairns:

> ". . . *in order to maintain the greatest degree of safety and control over the* suspect, he or she is usually instructed to lie on the ground, face down with arms outstretched and hands open to show nothing is concealed in them. The suspect is normally handcuffed and then given a quick 'pat-down' search for weapons before being handed over to CIB or other police officers."

[21] Inspector Cairns was not cross-examined on this matter. He said in answer to a question from the Judge that the police had an opinion that the handcuffing procedure could be justified as self-defence under s 48 of the Crimes Act 1961.

[22] He had earlier in his evidence emphasised certain basic principles of AOS operations – including the "wait and appeal" role, and taking as long as necessary to talk a person into giving up; it is better to take matters too seriously rather than too lightly; and all suspects who are believed to be armed are to be treated as dangerous and hostile until the contrary is definitely established. The apparent good sense of the principles and their application is supported by their almost completely successful use throughout New Zealand (including no member of the Christchurch AOS having to fire a shot in 23 years) and the very limited number of complaints to the Police Complaints Authority. Inspector Cairns could recall only one (which was unsuccessful) in seven years. No complaint has been made in this case.

[23] A critical point in this case was that the AOS officers had reasonable grounds to suspect that the two men apparently coming from "the back flat" and heading in the direction of the converted car were the two they were seeking and that they might be armed and dangerous (in terms of s 60(2)). But once they were found to be unarmed, and in addition showed their cooperation and gave their own names, the temporal element becomes significant. At that point, as the Judge indicated, the matter may shade into arbitrary detention or false imprisonment. But any illegality of the subsequent detention cannot affect the legality and reasonableness of the earlier search.

[24] But what about the AOS actions taken after "all the signs suggested that the two were not the persons sought by the police", to quote Panckhurst J?

A critical part of AOS processes will often be to get others out of danger, to enable them to exercise their powers to search for and to detain suspects. The position of those evacuated through the front door makes that point plain. When the Judge came to consider their claim that they should recover for assault in respect of their being sighted momentarily through the telescopic sight of the rifle as they emerged from the house and made their way to the road, he held that at that time the AOS members were acting in execution of the Arms Act, not in relation to the appellants, but in relation to the suspect and his companion in flat 2.

[25] At some point, the steps properly taken to remove the two men from the danger area would achieve their purpose and, given that they were no longer suspects, their detention (being handcuffed and accompanied by one or more police officers) could become arbitrary. It would however be artificial to hold that at some point in their removal from the back of the house and through the neighbouring property to the road before they were delivered there to the CIB officers the detention became unlawful or arbitrary. The operational situation did not, for instance, easily enable let alone require the AOS officer with them to cut their flexicuffs. The need to remove them from the danger area in the execution or intended execution of the Act justified their removal out to the road. It follows that in so far as the High Court held that the AOS actions against Mr Graham or Mr Buxton gave rise to liability, the Crown's cross-appeal succeeds.

The evacuation of Ms Angela Dunlea, Mr Hardie, Ms Melissa Dunlea and Mr Te Whake

[26] These four appellants challenge the Judge's holding that they could not recover damages or compensation in respect of their evacuation from their front door to the corner of the section. They claimed both assault (from the pointing of the rifles) and arbitrary detention. On the assault claim the Judge made the following findings at p 27:

> "[The four appellants] knew at all relevant times that the armed persons were police officers. The phone contact established that. On the other hand, I accept their evidence that they were well aware that firearms were pointed towards them as they left 114 Woodham Road. Detective Parker, who impressed me considerably in giving evidence, was fair in accepting that as each person neared the hedge they passed within centimetres of the barrel end of his rifle. Moreover, he gave careful evidence that as each emerged from the house he momentarily sighted each through his telescopic sight. I do not accept the evidence of some appellants that as they were on the verandah, or the steps of the house, an AOS member held a rifle to their head. That I regard as so contrary to the practice of the squad, as was emphasised time and again by various members, as to be unthinkable. It is only necessary to consider the nature of the cordon and the layout of the particular site to understand that it would be both unnecessary and dangerous for an AOS member to venture to that forward and exposed position."

[27] Panckhurst J did not make a definitive ruling on whether the actions amounted to assault. Rather:

> "To the extent that such action could afford the basis for an assault finding, I consider it protected pursuant to s 71, albeit that I entirely accept that the appellants entertained reasonable and genuine apprehension for their safety. It seems to me that this is the very type of situation the section is designed to cover" (p 29).

[28] Mr O'Neill contended that s 71 should be read down, referring to *Simpson v Attorney-General [Baigent's Case]* [1994] 3 NZLR 667. In particular he contended that the provisions should not protect defendants against the consequences of illegal acts for which they are responsible. But that is of course the very purpose of such provisions. His proposed reading would deprive it of that essence. And as noted earlier, the protection is stated in broad terms, broader than that conferred in the statutory provisions in issue in *Baigent*. We accept that such provisions should be read in the context of the right of the individual to challenge in Court the legality of the actions of the state. But no possible reading of s 71 appears to be available that would help with this particular cause of action.

[29] We agree that s 71 is designed to cover steps such as those taken in this operation by the AOS to evacuate the area so that when that has been achieved all attention can be focused on the suspect without endangering others. The reasoning applies equally to the claimed detention while the appellants were making their way from the house to the road as part of the controlled evacuation. Because of the protective effect of s 71 we do not address the question whether the appellants had otherwise made out their claims that they had been assaulted. Once the four were in the hands of the CIB on the footpath there was, in the opinion of Panckhurst J, insufficient evidence to find a detention or imprisonment. Again, there is no basis for upsetting that ruling.

The "pat-down" searches

[30] The same four appellants challenge the Judge's finding that the searches to which they were subjected as they went through the hedge at the front of the property, although unlawful, were not unreasonable. They were momentary in terms of duration, minimally intrusive and involved no more than was necessary to ensure that none of the persons were carrying anything. In the Judge's opinion they were part of a controlled evacuation and not attended by any of the aggravating features which characterised the earlier searches of Mr Graham and Mr Buxton. They were also undertaken in a situation of some urgency. The Crown does not challenge the finding that the searches could not be justified under s 60. The Judge had earlier referred to the proposition stated by this Court in *R v Grayson and Taylor* [1997] 1 NZLR 399 at p 407 that whether a search is unreasonable under s 21 of the Bill of Rights is a matter of fact and degree, to be determined by a consideration of all the relevant factors in the light of the guiding principles and values set out in the judgment. Lawfulness or unlawfulness is highly relevant but not determinative. We agree with the Crown that the Judge has carefully considered the relevant factors. We see no basis for disagreeing with the conclusion he reached.

The pocket searches

[31] No allegations about the searches of the pockets of Ms Angela Dunlea, Mr Hardie and Mr Te Whake were included in the statement of claim. No award was sought in respect of them. None of the appellants gave evidence in respect of them. And counsel agreed that they were not the subject of final submissions to the Judge. The defendant was of course entitled, in justice, to be put on proper notice of such a claim and possible award. It may also be that the only evidence on the matter – given by the police officer who undertook the searches – does not support the finding that the searches were without consent. Whether that is so or not, the procedural problems mean that the part of the judgment cannot stand. It follows that the three related awards of $2000 must be set aside.

The amount of the awards

[32] The appellants contend that the awards should have been larger. The respondent cross-appeals both against the amounts (including those for the search of the flat) and the inclusion of exemplary damages in the awards.

[33] The award for the unreasonable search of the flat was $1500 for each of the three tenants. Panckhurst J would have made the same award for trespass to the land. The Crown contends that the justification for the search (to ensure that no potentially dangerous person had gained access to the flat), the extremely brief duration of two to three minutes, and the absence of damage together make it difficult to discern any basis for awards totalling $4500. But the assessment is to be made on the basis of an illegal and unreasonable search of a private residence. (The officer in charge of the AOS did not claim the search fell within the scope of the authority he had signed under s 61 and we accordingly need not consider that issue.) For the Judge, the suggestion that the search was required because there might be another fugitive in flat 1 bordered on the fanciful and he rejected the argument that the action fell within s 60(2). He saw the clearance as being something done as a matter of course at the end stage of a call out. Nor, he said, did s 71 avail the defendant: the clearance did not occur in the execution or intended execution of a power given by the Arms Act. The duration of the breach and the lack of damage are relevant of course to the measure of the award, but the very facts of the unlawful and unreasonable entry and search involving the invasion of the privacy of a residence are themselves the core of the claim. Further, there was no obstacle in the way of seeking consent to the search. We can see no reason to depart from the assessment which the trial Judge made following a two-week trial in which he could observe the appellants and the police officers and the impact of the actions on the appellants. As Mr Boldt, for the Crown, rightly accepted, the whole occurrence must have been a frightening experience for all the appellants.

[34] The advantage of the trial Judge is elevant as well to the appeal and cross-appeal in respect of the awards made in favour of Mr Buxton and Mr Graham. We consider there is force in the Crown submission that this is not an occasion for the award of exemplary damages (and accordingly the question whether they can be awarded along with compensation under the Bill of Rights does not arise). As Panckhurst J recalled, this Court has recently emphasised that a conservative approach to the award of exemplary damages is required. Awards should be reserved for truly outrageous conduct which cannot be adequately punished in any other way (*Ellison v L* [1998] 1 NZLR 416 at p 419). The conduct of AOS members was not deserving of the labels outrageous or high-handed. No one could question that. But he did consider that:

> ". . . the indifferent manner in which Messrs Buxton and Graham were treated by CIB staff on Woodham Road was high-handed. Such officers were somewhat removed from the situation which confronted persons in the AOS cordon. They had the opportunity to confront and deal with the situation presented by the arrival of two handcuffed men on the footpath. Yet, for an appreciable time, nothing effective was done. The two were treated with seeming indifference when they were nothing more than the innocent victims of an earlier mistake. In particular flexi cuffs were not removed until it became convenient to do so in order that Mr Graham could assist by the drawing of a plan of the flat layout. When Mr Buxton's handcuffs were released shortly later he was, to add insult to injury,

subjected to an unlawful search. In these circumstances I consider that an award of exemplary damages must be made, albeit at a modest level" (pp 36 – 37).

[35] The search was of course unlawful but there does not appear anything additional which matches the high level of the test repeated in *Ellison*. The other actions, while worthy of condemnation, consist essentially of a delay over a relatively brief period and of a failure to act, without any truly outrageous or high-handed conduct.

[36] We do however consider that the overall awards of $18,000 for Mr Buxton and $16,000 for Mr Graham are appropriate given the nature and extent of the wrongs done to them once the perception by the AOS members of the immediate threat that they appeared to present had gone and they had also been removed, by being taken out to the road, from any danger from the real suspect or suspects. As indicated earlier in this judgment, once they had been taken out to the road Mr Graham and Mr Buxton should have had their handcuffs removed and should have been released. Mr Buxton should not have been subjected to the further search at the end of his detention. That conclusion is not affected by the success of the Crown's cross-appeal in respect of the AOS's actions. We cannot however see any possible basis for an award, as Mr O'Neill suggested, of $40,000 for each of them. He mentioned, as had Panckhurst J, *Duffy v Attorney-General* (High Court, Wellington, A 352/82, 3 February 1986, Eichelbaum J) where an award of about $20,000 was suggested as appropriate as a total verdict. (Changes in the Consumer Price Index would almost double that figure now.) But in that case the plaintiff, having been wrongly arrested for drunkenness, was deprived of her liberty for two and a half hours, she was humiliated, she was subject to the indignity of being confined with two drunken males, one of whom was violent and abusive, she was processed at the police station and she was subject to a "Kojak" jibe (she was bald from medical treatment). Accordingly, we leave the two awards undisturbed.

[37] We do not see this as an occasion to resolve the question whether a different approach should be adopted to the fixing of compensation for a breach of the Bill of Rights compared with the fixing of damages for a tort arising out of essentially the same facts. One reason for not resolving it is procedural. While the Crown had prepared argument on the question of the correct approach, it had not given notice of that to the appellants, for instance by way of cross-appeal, counsel for the appellants accordingly had not prepared so as to enable them to argue the matter, and the Court did not pursue the issues with counsel in any depth.

[38] Were we to take the matter further, we consider that there are strong reasons for not adopting a different approach. The first reason is that in the great range of cases where a claim of a breach of the Bill of Rights is made there will also be a claim in tort. So, the present case is not one in which torts were not also established (as in *Attorney-General v Upton* (1998) 5 HRNZ 54) or a tortious remedy was defeated by statutory immunities (as in *Baigent's Case*) with the consequence that, if monetary relief were to be awarded, only the Bill of Rights breach could be invoked. On the contrary, essentially the same facts lie behind the twin rulings (which are significant in themselves) that the state through its officers has acted in breach of the rights of the plaintiffs, rights long protected by tortious remedies and now affirmed, along with other human rights and fundamental freedoms, in the Bill of Rights.

[39] A second reason is that an examination of the law and practice of other jurisdictions would, it appears, cast doubt on a different approach. An extensive survey carried out for the Law Commission by Paul Rishworth and Grant Huscroft in 1995 – 1996 of damages for breach of individual rights in the United States of America, Canada, Ireland, the Caribbean, India, Sri Lanka, the European Union and under the European Convention for the Protection of Human Rights and Fundamental Freedoms led to these conclusions:

> "B1 . . . This survey tends to indicate that:
>
> - the number of cases in which damages are awarded is not high, and
> - the courts draw on tort principles when considering whether there has been a breach of the right and when calculating damages.
>
> . . .
>
> B10 This international experience suggests that damages for breach of constitutional rights is not a remedy central to judicial enforcement of individual rights. The existing law of tort would seem to have continued to meet the need to compensate persons adversely affected by the wrongful actions of others including those exercising public powers. That result is not at all surprising. That law has been developed carefully and incrementally over several centuries to give remedies to those whose basic rights – now recognised and affirmed in New Zealand in the Bill of Rights Act – have been infringed. It would be surprising if those developments had left large gaps in the remedies available. But, as the occasional case shows, instances do occur when a supplementary remedy is considered appropriate." (Law Commission, *Crown Liability and Judicial Immunity* at pp 70 and 72.)

[40] The United States, Canadian and Irish positions were summarised as follows:

> "B2 In the United States claims may be brought against state officials under the Civil Rights Act 1871, 42 USC s 1983, and federal officials – so called '*Bivens* actions' – for breach of the Constitution. . . . [The reference is to *Bivens v Six Unknown Named Agents of Federal Bureau of Narcotics* (1971) 403 US 388.]
>
> B3 The survey concludes [on the US material]:
>
> - For the most part, this tension (between vindicating constitutional rights and protecting state officials from undue liability and harassment) has been resolved by the courts in favour of protecting state officials (s 1983 cases).
> - The *Bivens* action is so rarely available that it cannot be considered constitutionally significant. According to one survey, of 12000 *Bivens* actions reported to have been filed as at 1985, only 30 resulted in judgments for the plaintiffs. Most of these were reversed on appeal, and only four judgments were actually paid by the federal defendants.
>
> . . .
>
> B4 . . .
>
> In the thirteen years following the passage of the [Canadian] Charter, the damages remedy has not been significant, and there is no clear appellate authority about the approach to the remedy. There is uncertainty about whether liability is direct or vicarious, the relevance

of statutory immunities, the extent of misconduct or intent necessary before damages will be awarded, and the relevance of tort principles. Where damages are awarded, the cases surveyed indicate that the amounts are usually under $10000 and often much less.

B5 Damages are available for breach of constitutional rights in Ireland. It seems to have been more significant there but the situation differs from New Zealand's in two important respects:

- Fundamental rights can be enforced against private individuals (against whom many of the non-monetary penalties regularly issued against public bodies are not likely to be available or appropriate); and
- The range of rights protected by the Constitution is broader, and includes rights for the breach of which monetary relief is more appropriate: the right to privacy, the right not to be interfered with in earning a living, and the right to an education.

Despite these differences it is interesting to note, first, that some cases have read in immunities even though the constitutional rights are entrenched, and second, that tort principles are applied in the calculation of damages."

[41] The third reason for doubting that a different approach should be adopted reinforces the point made in para B10 of the Law Commission summary. The common law Courts have long affirmed that breaches of important rights by officers of the state are to be marked by appropriate awards of damages. A classic instance is the £300 awarded in 1765 by a jury and upheld by Lord Camden CJ in *Entick v Carrington* (1765) 19 State Tr 1030 against King's Messengers for breaking and entering the plaintiff's house and seizing his papers:

> "Papers are the owner's . . . dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection; . . . where private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect" (p 1066).

[42] That statement indicates the importance of the assessment of the particular circumstances of the unlawful act including the value of the right infringed, both generally and to the individual. A central feature of that great case – the taking away by the King's Messengers of John Entick's private papers in search of evidence of a seditious libel – is of course not present here in this case, but three of the appellants do properly assert the significant matter, mentioned earlier, of the invasion of the privacy of their residence.

Result

[43] It follows that the appeal is dismissed; and the cross-appeal is allowed to the extent of: (a) setting aside the finding in respect of the AOS actions in relation to Mr Buxton and Mr Graham; (b) setting aside the finding in respect of the pat-down searches and the related awards; and (c) incorporating the exemplary damages elements in the awards in favour of Mr Buxton and Mr Graham into the general awards made in their favour. As a consequence the awards are:

Mr Buxton	$18,000
Mr Graham	$16,000
Ms Angela Dunlea, Mr Hardie and Mr Graham	$1500 each

Costs

[44] Given that the appeal has failed and the cross-appeal succeeded only in part, we make no order concerning costs in this Court.

THOMAS J. [45] One can understand and accept that the Armed Offenders Squad must act decisively in an operation involving a risk that a firearm will be used. At the same time, the powers which the squad exercises are far-reaching and care must be taken to ensure that innocent citizens who may be inadvertently involved are not denied their fundamental rights and freedoms under the New Zealand Bill of Rights Act 1990. In this case, the Armed Offenders Squad, supported by the Criminal Investigation Branch, took positive steps to meet the perceived danger that the person who was the target of the operation would be armed. But in the course of the operation innocent persons were subjected to violations of the fundamental rights conferred on all citizens under the Bill of Rights.

[46] I am of the view that the damages which are awarded in such cases must be sufficient to vindicate those rights. None of the awards which have been upheld by the Court in this case are adequate to achieve that objective. I would therefore allow the appellants' appeal against the quantum of damages awarded in the Court below.

The Crown's submission

[47] In a considered and extensive submission, the Crown saw this case as the "first opportunity for this Court to provide guidance as to the appropriate approach where public law compensation of the kind mandated in *Simpson v Attorney-General [Baigent's Case]* [1994] 3 NZLR 667 is claimed". Under the heading "Public Law Compensation", the Crown commenced with a short summary of its comprehensive submission to follow. It submitted:

> "96.1 There is no presumption that compensation should be awarded for breaches of the Bill of Rights Act. In many cases, where significant actual loss cannot be proven, Bill of Rights Act violations will best be remedied by way of a stand alone declaration.
>
> 96.2 Where Bill of Rights compensation is an issue, it is submitted that the appropriate level of compensation should be fixed in the first instance by reference to the analogous tort, unless:
>
> 96.2.1 There is no such tort, in which case compensation should be calculated by reference to first principle; or
>
> 96.2.2 The remedy in tort would fail to provide adequate vindication of the Bill of Rights Act right involved.
>
> 96.3 That exemplary damages are not available for Breaches of the Bill of Rights Act."

[48] With respect to the present case the Crown submitted that the "very minor violations", if established, should be remedied by way of a declaration only. If compensation is to be awarded, it contended, the quantum should not be assessed in a significantly different way from the way it is assessed at common law. Nothing had been advanced which might indicate that violations of the Bill of Rights required any extra compensation over and above what might traditionally be awarded in tort.

[49] The proper approach to civil remedies for violations of the Bill of Rights, the Crown's submission continued, remains uncertain and it invited the Court "to provide some guidance as to the way Judges faced with claims for public law compensation should set about their task".

[50] Addressing the question as to when Bill of Rights compensation should be awarded, the Crown reiterated that resort to such compensation should only be had where either:

(1) there is no equivalent common law cause of action; or

(2) the related common law cause of action provides inadequate protection and vindication of the guaranteed rights.

While it recognised that the Bill of Rights requires effective remedies for breaches of protected rights, the Crown argued the corollary must be that, where effective remedies already exist, no duplication is required. In any event, the Crown submitted, even if parallel Bill of Rights and common law causes of action are pleaded the quantum of Bill of Rights compensation should follow the common law lead, unless it can be shown that the calculation of quantum at common law does not adequately safeguard the interest protected by the Bill of Rights right. Reviewing the overseas jurisprudence the Crown emphasised that the Bill of Rights remedy should be seen as supplementary to pre-existing remedies provided by the law and should only be relied upon where in all the circumstances the remedies available through existing law are inadequate for the vindication of protected rights.

[51] The Crown's submission deserves a considered response. I would not want it thought, however, that in reaching a different conclusion from the Crown I am unappreciative of the considerable thought and work which has gone into its submission.

[52] In the first place, I reject out of hand the submission that a declaration alone would provide adequate vindication of the breaches of the Bill of Rights. A declaration of itself would not, in the circumstances of this case, recognise the significance of the Bill of Rights and the importance of ensuring that when the rights which are enshrined in the Bill are violated, the remedy must serve to vindicate those rights.

[53] In the second place, I cannot accept and, indeed, reject with vigour, the Crown's submission that compensation under the Bill of Rights should only be awarded where there is no equivalent common law cause of action. In my view, this submission would, if accepted, represent a major and retrograde inroad into the principle established in *Baigent's Case*. The majority in that case (Cooke P, Casey, Hardie Boys and McKay JJ, with Gault J dissenting) did not restrict the cause of action spelt out in that case to situations where there is no common law cause of action. Indeed, in holding that if malice or lack of good faith could be shown a claim in common law would lie in addition to the Bill of Rights cause of action, the majority clearly assumed that the causes of action at common law and under the Bill of Rights can be concurrent.

[54] This assumption is confirmed by what was said. Cooke P's perception that the cause of action under the Bill of Rights would lie irrespective of an equivalent cause of action at common law is apparent from his express statement at p 678: "If damages are awarded on causes of action not based on the Bill of Rights, they must be allowed for in any award of compensation under the Bill of Rights so that there will be no double recovery." Casey J averred at p 692 that there should be an adequate public law remedy for an infringement of the Bill of Rights. What is "adequate", he considered, is for the Courts to determine in the circumstances of each case. He allowed that in some

cases the remedy may already be obtainable under legislation or at common law while in other cases remedies will be "unavailable or inadequate". Clearly, the unavailability of a remedy was not the learned Judge's only concern. The inadequacy of an existing remedy was also critical. Finally, McKay J explicitly accepted at p 718 the possibility of "twin track" remedies, to use the Crown's phrase, under the Bill of Rights and the common law, although he added that the same damages "may" be recoverable by either route. Casey and Hardie Boys JJ also adopt Cooke P's concept of a global award with nominal or concurrent awards on any other successful cause of action at pp 692 and 703 respectively.

[55] *Baigent's Case* established a new cause of action and remedy in compensation for a breach of the Bill of Rights. It applies, not only where there is no existing cause of action, but also where the existing cause of action and consequential remedy is inadequate. The focus is on the inadequacy as well as the availability of the cause of action. Consequently, to seek to restrict the remedy provided by *Baigent's Case* to situations where there is no existing common law cause of action is not in accord with the ratio of the majority decision in that case. Furthermore, such claimed exclusivity runs counter to the fact that a number of causes of action deriving from statute or common law can and do exist concurrently and frequently overlap.

[56] Nor is the attempted exclusion particularly logical in that the cause of action under the Bill of Rights does not duplicate the common law cause of action. As I emphasise below, the common law cause of action is a private remedy to redress a private wrong. The cause of action under the Bill of Rights is a public law remedy based on a right in the nature of a public right. The Crown's liability is not vicarious as it would be in tort. Its liability arises directly from the fact that in affirming fundamental rights in the Bill of Rights, the state has undertaken a constitutional obligation to respect, protect and vindicate those rights. Why, then, when the state has failed in that obligation should that essentially different public law remedy lie dormant if there is an equivalent common law, private law civil action, and only arise from its torpor if and when there is no such cause of action? What is there in this public law remedy which would restrict it to such a back-up role? How can it be said that the elements of this public law remedy will only exist when the plaintiff has no common law remedy but not when he or she has such a remedy? Are we to pretend that the public law factors in respect of a breach of the Bill of Rights only arise where by fortuitous happenstance there is no equivalent private law remedy? Is there some policy consideration which is yet to be disclosed?

[57] I prefer to accept that *Baigent's Case* established a new remedy for a violation of the Bill of Rights and that the key question which arises is not whether a remedy is available for that violation, but whether the existing private law remedies are adequate to provide an effective remedy for such a violation. Contrary to the Crown's submission, I take the view that existing private law remedies are inadequate to vindicate those rights, and I turn to the critical need for such vindication.

The vindication of rights

[58] In enacting the New Zealand Bill of Rights Act 1990, Parliament deliberately affirmed the fundamental rights and freedoms of New Zealand citizens. Those rights, for the most part, had already existed at common law, but they were now given a constitutional significance. A generous interpretation was required sufficient to give individuals the full measure of the fundamental rights and freedoms referred to. (See Cooke P in *Ministry of Transport v Noort*

[1992] 3 NZLR 260 at p 268, quoting Lord Wilberforce's famous dictum in *Minister of Home Affairs v Fisher* [1980] AC 319 at p 328; see also the dictum of Richardson J at p 277 to the same effect.) Hardie Boys J has observed that in contemporary New Zealand society the importance of human rights can go unappreciated. They may be taken for granted. They may be seen as irrelevant and other considerations, such as expediency or alarm or outrage may suggest they should be overridden. The learned Judge thought that, perhaps, it is only when the rights are abrogated that their crucial role in ameliorating the human condition is truly appreciated. (See *Ministry of Transport v Noort* at p 286.)

[59] The same Judge eloquently summed up this Court's attitude in *Baigent's Case* at p 702:

> "The New Zealand Bill of Rights Act, unless it is to be no more than an empty statement, is a commitment by the Crown that those who in the three branches of the government exercise its functions, powers and duties will observe the rights that the Bill affirms. It is I consider implicit in that commitment, indeed essential to its worth, that the Courts are not only to observe the Bill in the discharge of their own duties but are able to grant appropriate and effective remedies where rights have been infringed. . . . Enjoyment of the basic human rights are the entitlement of every citizen, and their protection the obligation of every civilised state. They are inherent in and essential to the structure of society."

[60] Not unexpectedly, therefore, the Bill of Rights has been vested with a potency which goes beyond its mere words. As Paul Rishworth states in Huscroft and Rishworth (eds), *Rights and Freedoms: the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (1995) at p 75, the Bill of Rights has been "taken as a launching pad for the judicial development of remedies which in other countries are retained for *constitutional* violations".

[61] It is because of its constitutional significance that this Court has directed that the rights in the Bill of Rights must be vindicated. Richardson J first pointed out the need for a "rights-centred approach" in *R v Goodwin* [1993] 2 NZLR 153 at pp 193 – 194. The learned Judge held that such an approach to the Bill of Rights necessarily requires that "primacy be given to the vindication of human rights". (For a discussion on the rights-centred approach and the relationship of such an approach to remedies, see *R v Grayson and Taylor* [1997] 1 NZLR 399 at pp 411 – 412; and see also *Baigent's Case* at pp 702 – 703.)

[62] Rights will not be vindicated, however, unless a violation of them is met with a real and effective remedy, and this Court has accepted that it would be failing in its duty if it did not provide an effective remedy to a person whose legislatively affirmed rights have been infringed. (See *Baigent's Case* at pp 676 and 677.) This requirement reflects international treaties on human rights. The Universal Declaration of Human Rights (art 8); the International Covenant on Civil and Political Rights 1966 (art 2(3)(a)); and the European Convention for the Protection of Human Rights and Fundamental Freedoms (art 13) all contain express clauses requiring an "effective remedy" for breaches of human rights. The Canadian Charter of Rights and Freedoms contains in s 24(1) a requirement that there be an "appropriate remedy".

[63] As recognised in *Baigent's Case*, in cases such as the present the only effective remedy is compensation. Cooke P ventured at p 678 a comment as to the level of compensation, which was endorsed by Casey and Hardie Boys JJ. The President suggested that, in addition to any physical damage, intangible harm such as distress and injured feelings may be compensated, recognising in

doing so the gravity of the breach and the need to emphasise the importance of the affirmed rights and deter breaches of those rights.

The extra dimension

[64] Compensation will not be effective to vindicate and affirm the right which has been violated, however, unless the quantum of the award recognises that a fundamental right possessed by the plaintiff has been denied. It follows that the award cannot be simply equated with damages for "equivalent" breaches of common law torts such as wrongful arrest, false imprisonment, or the like. The focus of the Court is wider and must embrace the impact of the state's violation of the citizen's fundamental rights.

[65] The question of a claim for damages under the Bill of Rights was dealt with in a comprehensive judgment (to which I pause to pay tribute) by Hammond J in *Manga v Attorney-General* [2000] 2 NZLR 65. In that case the learned Judge recognised that the remedy articulated in *Baigent's Case* is not a private law remedy, but a public law remedy. There are substantial differences between private law and public law remedies (at pp 79 – 81). Hammond J reached the conclusion that, on the facts of that case, there was nothing outside the compensatory damages in tort which he had identified for which an award of damages would be appropriate under the Bill of Rights (at p 84). He supported the plaintiffs' claim under the Bill, however, by making a declaration. I am not required to question the learned Judge's conclusion, but I do wish to generally endorse certain of his observations (paras [119] – [126] at pp 80 – 82), and can do no better than repeat them in extenso:

> "**[119]** The touchstone for a public law remedy must be that there should be effective and appropriate relief. That means that:
>
> - a distinct violation must be identified and publicly articulated – there must be a 'public acknowledgement' that a violation has occurred;
> - the remedy should be such that the violation is ended;
> - the remedy should, so far as is practicable, compensate the victim(s) for the violation; and
> - the remedy should ensure that no further violations occur.
>
> . . .
>
> **[123]** . . . the sort of factors influencing remedial choice in a private law suit (which include plaintiff autonomy; economic efficiency; the relative severity of the remedy; the nature of the right to be supported; difficulties of calculation; the effect of a remedy on third parties; the practicability of enforcement; and the conduct of the parties) are not wide enough for a case involving a violation of a constitutional character.
>
> **[124]** Furthermore, the *character* of a public law claim differs substantially from that of a strictly private law claim.
>
> **[125]** The private law proceeding is bipolar (between two parties); it is retrospective (it looks to events which have already occurred); right and remedy have historically been seen as intertwined; the dispute is very much self-contained; and the whole case is still essentially party-initiated and controlled.
>
> **[126]** Cases based upon violations of the Bill of Rights are about the vindication of statutory policies which are not 'just' private: they have overarching, public dimensions. The context of such a proceeding necessarily changes, in at least three ways. First, the case is not a winner-takes-all kind of case. Damages are an economic concept. Bill of

> Rights cases routinely involve a rearrangement of the social relations between the parties, and sometimes with third parties. The object is to promote mutual justice, and to protect the weak from the strong. Secondly, the future consequences of such a case are every bit as important as the past, and the particular transgression. Thirdly, there is a distinct interface with public administration, and indeed, the governance of a given jurisdiction."

[66] Damages for a private wrong do not ordinarily extend to the vindication of the right which has been violated. In a tortious claim the plaintiff claims damages for the breach of a duty owed to the plaintiff. It is in the nature of a private right to remedy a private wrong. In a claim under the Bill of Rights the plaintiff seeks compensation for the breach of a right of a different character. It is a public right in the sense that it is a right against the state possessed by all citizens, but the breach occurs to the plaintiff and it is the intrinsic value of that right to the plaintiff which then falls to be compensated. The plaintiff is compensated, not just as the victim as in the private law proceeding, but as a citizen possessing a thing of value in itself. (For a discussion of the economic inappropriateness of applying the instrumental analysis of private law damages to compensation for constitutional torts, see Daryl J Levinson, "Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs" (2000) 67 UCLR 345.)

[67] Compensation for a breach of the Bill of Rights therefore embraces the extra dimension of vindicating the plaintiff's right, a right which has been vested with an intrinsic value, and it is that intrinsic value to the plaintiff for which he or she must be compensated over and above the damages which the common law torts have traditionally attracted. Thus, the right has a real value to the recidivist offender as well as to the model citizen. As stated by the Law Commission in *Crown Liability and Judicial Immunity: A response to* Baigent's *case and* Harvey v Derrick ((1997) NZLC R37) at para 70, the availability of rights does not depend on the identity or the character of the plaintiff. But the damages may then vary. Not only may they vary because the loss, such as the extent of the distress, will vary as between plaintiffs but because the amount necessary to compensate the plaintiff for the violation of his or her right may differ depending on the nature of the right which is breached, the gravity of the breach, and such other matters as may be germane to the vindication of the right in the particular case.

[68] Understandably, in ascertaining damages for the equivalent tortious actions over the years the Courts, adopting a loss-centred approach to damages, focused on the compensatory function of the law. Having determined an amount to compensate the plaintiff for his or her physical damage and mental distress, it could be said, if the question arose at all, that the breach of the right had been "vindicated". But as the Bill of Rights has necessitated a rights-centred approach based on an understanding of the importance of vindicating the right now vested in the plaintiff as a citizen, it may be appropriate in many cases to focus on the violation of the right, and even to begin with that violation, in order to ensure that the public law element is not submerged in the task of compensating the plaintiff for his or her physical damage and mental distress. No such approach has been adopted in this case.

[69] The point I seek to make is aptly put by William Binchy, "Constitutional Remedies and the Law of Torts" in O'Reilly (ed), *Human Rights and Constitutional Law* (Dublin, Round Hall Press, 1992) who, writing of the approach of the Courts in Ireland, stated at p 205:

> "No doubt, the judges who shaped tort law over the centuries devised a system containing useful protections of the individual's life, bodily integrity, property and good name, *but the fruits of their efforts surely have no necessary, or even presumptive, identity with the implementation of the rights guaranteed under our Constitution.*
>
> . . . Contrary to the ready assumption in *Hanrahan* [infra] that the law of torts effectuates in a substantial way the legal vindication of several constitutional rights, it seems that the relationship between the two torts is a good deal more complex. *Tort law deals with wrongs: the Constitution with rights.*" (Emphasis added.)

[70] Drawing a distinction between common law damages and compensation for a breach of the Bill of Rights does not mean that the latter ceases to be compensation for the plaintiff's loss. It remains compensatory but includes the value of the right (or the non-violation of that right) to the plaintiff. John Miller might be thought to have suggested a different perception in his article "Seeking Compensation for Bill of Rights Breaches" (1996) *Human Rights Law and Practice* 211. He states at p 212:

> "The award is public law compensation not common law damages. The focus of the claim is on the breach of the rights not on the personal injury, and is similar to the approach adopted for exemplary damages claims. Such damages also focus on punishing the conduct of the wrong-doer rather than compensating the victim for the personal injury."

This passage is referred to with apparent approval in Radich and Best, "*Baigent*: An Update" (1997) NZLJ 207 at p 209.

[71] For myself, I would stop short of drawing an analogy with exemplary damages. I do not consider that any punitive element should enter into the calculation of the compensation. (See to this effect *Baigent's Case* per Hardie Boys J at p 703.) Nor do I think that the plaintiff should benefit from what might be described as a "windfall" resulting from the public interest in ensuring that fundamental rights are not violated. To my mind, the better analysis is to regard the damages as being essentially compensation to the plaintiff for the value to him or her of the right in issue. Certainly, in general terms it is the constitutional significance of the Bill of Rights and the community's interest in ensuring that those rights are heedfully respected by the state that provides the need to vindicate rights affirmed in the Bill. Once the right is breached, however, the right being vindicated is the plaintiff's right and the fact that the right is shared with all other citizens does not detract from this point. The right can only be vindicated by compensating the plaintiff for the value which has been vested in it. All the general considerations which make up the public dimension of the right are particularised in the person of the plaintiff. The focus of the Court's inquiry is not thereby narrowed. The gravity of the breach and the need to emphasise the importance of the affirmed rights and deter breaches are inherent in the plaintiff's right notwithstanding that it is shared with all other citizens. In other words, the community's interest in vindicating the Bill of Rights is the plaintiff's right writ large.

[72] As recommended in *Baigent's Case* the question of compensation under the Bill of Rights can be approached globally. Where the breach is both a tort and a breach of the Bill of Rights, however, compensation for the latter must include compensation for the intrinsic value to the plaintiff of a right having constitutional significance. There is no other effective method of vindicating and affirming that right.

[73] In developing this argument, I have used the phrase "intrinsic value" to describe the value of a fundamental right to a citizen who suffers a violation of that right. I would not want it thought that in using this phrase I am postulating a higher order law or permitting undertones of natural law theory to creep into my reasoning. Such theory is best left to legal historians and reflective philosophers. The genesis of fundamental human rights is not to be found in the heavens. Notwithstanding the enthusiasm of some, rights are not "trumps" (see Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Harvard University Press, 1977). Human rights obtain command by virtue of their widespread acceptance in the abstract. This widespread acceptance in abstract form is given the appearance of universality by virtue of the proclamation of basic rights in international charters. Human rights are better perceived as prerequisites to the rule of law and, as such, part of the constitutional fabric which underpins the working of democracy. It is in this fashion that they have found their way into this country's Bill of Rights. The affirmed rights thus obtain an intrinsic value because the community has chosen to vest them with that value. It is a value which is realised in the individual case when a person is deprived of that right.

[74] The final point which I would make is that the vindication of rights is at present most clearly evident in the practice of criminal law. Evidence is excluded where there is a breach of the criminal procedures prescribed in the Bill of Rights. Previously, the evidence may have been excluded if the trial Judge in the exercise of his or her discretion determined that the accused would be prejudiced or otherwise deprived of a fair trial. But the need to vindicate the rights has resulted in a different approach on the part of the judiciary. The prima facie exclusion rule was adopted. The value of the vindication of his or her rights to an accused who has had evidence excluded because of an infringement of the Bill of Rights and whose prosecution is thereby discontinued or who, if the prosecution proceeds, obtains an acquittal, is plain to see. Such an outcome can only be countenanced if it is recognised that the rights breached by the state possess an inherent value requiring vindication.

[75] The Court in *Baigent's Case* acknowledged that the exclusion of evidence obtained unlawfully had been developed to provide an adequate remedy for breaches of the Bill of Rights. (See Cooke P at p 676 and Casey J at p 692.) Hardie Boys J observed at p 703 that the exclusion of evidence will often be amply sufficient vindication and added "Obviously there must be a different, and equally effective, remedy where there has been an infringement of the rights of an innocent person." I agree. If rights are to be taken seriously it does not bode well for the vindication of those rights if the Court is seen to be expansive in vindicating the rights of persons charged with crime and yet comparatively miserly when vindicating the rights of other citizens.

[76] The question whether the Court's preoccupation with a "rights-based" approach achieves an adequate balance between individual rights and community rights need not concern us here. See Sir Ivor Richardson, "Rights Jurisprudence – Justice for All?" in Joseph (ed), *Essays on the Constitution* (1995) at p 61; and The Hon Justice E W Thomas, "Criminal Procedure and the Bill of Rights: A View from the Bench" in *The New Zealand Bill of Rights Act 1990* Legal Research Foundation (1992) at p 33. As already intimated, the present case is concerned, not with the vindication of the rights of a person arrested or charged with a crime when the interest of the community in securing the conviction of the guilty is a pertinent consideration, but with the vindication of the rights of persons innocently caught up in police action. In neither of the

above articles is it suggested that the Bill of Rights is not rights-based or that the vindication of rights is anything other than critically important. Rather, discussion focuses on the means of achieving that vindication.

The position overseas

[77] Reference to the approach adopted by the Courts to breaches of constitutional rights in various overseas jurisdictions is important, but not conclusive. It should not deter this Court from guaranteeing an effective remedy for the violation of guaranteed rights. In Canada, for example, the correct approach is yet to be settled. Surprisingly, the Canadian Courts have not yet developed rules relating to damages for breaches of the Charter, and the law is characterised by uncertainty. Many cases are contradictory. See the report to the Law Commission of Grant Huscroft and Paul Rishworth (unpublished, Jan 1996) at pp 3 – 4 and 39 – 40. Nevertheless, damages may certainly be awarded for a breach of the Charter. See *RJR-Macdonald Inc v Attorney-General of Canada* (1994) 111 DLR (4th) 385 esp at p 406. The position in the United States is complicated by the fact that no actions are allowed against the state or federal governments. Action is taken against the individual perpetrator of the violation and there is an understandable fear that jury awards may prove extravagant. While in Ireland the Courts regard the common law torts as sufficient to vindicate constitutional rights (*Hanrahan v Merck Sharp & Dohme (Ireland) Ltd* (1988) ILRM 629) and Judges use the theory and language of tort law, substantial damages are nevertheless awarded. The Courts' attitude is reflected in the dicta of Hamilton P in *Kennedy v Ireland* [1987] IR 587 at p 594:

> ". . . the injury done to the plaintiffs has been aggravated by the fact that it has been done by an organ of the state which is under a constitutional obligation to respect, vindicate and defend their rights. The plaintiffs are in my opinion entitled to substantial damages and it is, in the circumstances of the case, irrelevant whether they be described as 'aggravated' or 'exemplary' damages."

Indian Courts have consistently held that the Indian Constitution provides a direct cause of action (*Nilabati Behera v State of Orissa* [1994] 2 LRC 99) and that this is to be treated distinctly from tort claims. They have awarded damages using novel principles applicable to a breach of constitutional rights rather than the formula for damages in tort. Relief to redress the wrong for the established invasion of the fundamental rights of the citizen under the public law jurisdiction is in addition to the traditional remedies and not in derogation of them. See *Basu v State of West Bengal* [1997] 2 LRC 1 at p 26.

[78] In all these jurisdictions the Courts can and do award exemplary damages for breaches of constitutional rights. As I have indicated above (para [71]), however, I would not wish to draw an analogy with exemplary damages or inject a punitive element into the determination of compensation for a breach of the Bill of Rights. Speaking of the Bill of Rights, Richardson J made this point succinctly in *Martin v Tauranga District Court* [1995] 2 NZLR 419 at p 428. He said:

> ". . . the objective is to vindicate human rights, not to punish or discipline those responsible for the breach. The choice of remedies should be directed to the values underlying the particular right. The remedy or remedies granted should be proportional to the particular breach and should have regard to other aspects of the public interest."

Consequently, the vindication of rights can be achieved without recourse to the concept of punitive damages – although such damages may at times be called for over and above the damages necessary to vindicate the right. What is basic is that the plaintiff be compensated for what he or she has lost, the protection of a fundamental right.

[79] The present case illustrates the need to focus on compensating the plaintiffs rather than punishing the wrongdoer – or the state for the wrongdoing of its agents. The Court has not found the conduct of the police so reprehensible as to warrant punitive damages. Yet, a breach of the plaintiffs' rights took place and those rights remain to be vindicated by compensation.

The quantum of damages

[80] In my view, the damages awarded in the Court below, and which have been upheld in this Court, are inadequate to vindicate the rights which have been infringed. Such damages may or may not be sufficient to compensate the appellants for the breaches of the private wrong done to them at common law, but they are certainly too low to compensate them at public law for the violation of their fundamental rights under the Bill of Rights.

[81] I do not find it necessary to attribute responsibility for the established breaches of the Bill of Rights in this case as between the Armed Offenders Squad and the Criminal Investigation Branch. As an action for damages under the Bill of Rights is not a private law action in the nature of a tort claim for which the state is vicariously liable but a public law action directly against the state for which the state is primarily liable, it does not matter from the plaintiffs' point of view which arm of the police force – or the state – may be responsible. The critical point is that the state is liable to compensate the plaintiffs for the breaches of the Bill of Rights which occurred.

[82] In this case, the plaintiffs were innocent third parties. They were involved in what must have been a terrifying experience. While much of the conduct on the part of the police may have to be excused for the reasons given in the judgment of the majority, the fact remains that this Court has concluded that the plaintiffs' fundamental rights under the Bill of Rights were infringed in certain respects. Mr Buxton and Mr Graham were arbitrarily detained contrary to s 22 of the Bill of Rights, Mr Buxton was subjected to an unreasonable search of his person contrary to s 21 and three plaintiffs endured an unreasonable search of their premises contrary to the same section. Not only must the plaintiffs be compensated for their loss, including the distress and humiliation which they suffered, but the plaintiffs' rights must be vindicated by recognising their worth to them. To that end the compensation needs to be greater than that awarded by the trial Judge and upheld in this Court. The Court should accept that higher awards will not "open the floodgates" or lead to excessive damages as at times reported in the United States. Compensation for breaches of the Bill of Rights can be restrained and yet still be realistic.

[83] Unless awards are realistic, as I have urged, the value which the community has chosen to place on the observance of those rights must be depreciated. What value is the right to be free of an unreasonable search or not to be unlawfully detained if the Court's remedies for breaches of those rights are seen to be miserly? Parliament's will is not then implemented and the community's expectations are not then met.

[84] For these reasons, I would allow the appellants' appeal against the quantum of the damages awarded in the Court below and substantially increase the sums awarded. As the appeal is being dismissed, I do not need to be precise,

but I would be inclined to double the compensation due to Mr Buxton and Mr Graham and to increase the compensation due to the tenants fivefold.

Appeal dismissed: cross-appeal allowed in part.

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Reported by: Glen Houghton, *Barrister*