IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2017-404-797
[2018] NZHC 2557

UNDER	the New Zealand Bill of Rights Act 1990 and the Declaratory Judgments Act 1908
IN THE MATTER	of unreasonable search and public law compensation in the manner of Baigent damages
BETWEEN	ARTHUR WILLIAM TAYLOR First Plaintiff
	PHILLIP JOHN SMITH Second Plaintiff
AND	THE ATTORNEY-GENERAL ON BEHALF OF THE CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Defendant

Hearing:	19 – 21 March 2018
Appearances:	First and Second Plaintiffs in person with Ms T Hartman as McKenzie Friend for First Plaintiff P J Gunn and K Laurenson for Defendant
Judgment:	28 September 2018

JUDGMENT OF PETERS J

This judgment was delivered by Justice Peters on 28 September 2018 at 4 pm
pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date: .....

Solicitors:	Crown Law Office, Wellington
Copy for:	First and Second Plaintiffs

Introduction

[1] On 21 October 2016, the plaintiffs, both serving prisoners then housed in East division at Auckland Prison ("division" and "prison"), were "strip searched". Their case is that the strip searches were unlawful; unreasonable and so in breach of s 21 New Zealand Bill of Rights Act 1990 ("NZBORA"); and inhumane or undignified, and so in breach of s 23(5) NZBORA. They seek declarations accordingly, and compensation of $10,000 each.

Background

[2] The prison is New Zealand's only "maximum security" facility and as such houses many, if not all, of the country's most violent and dangerous offenders.

[3] On 19 October 2016, four prisoners in C block of the division attacked prison officers ("assault"). An officer brought items requested by a prisoner to a grille that separated prisoners from officers. As the officer opened the grille, three other prisoners appeared and forced open the grille. The four prisoners began attacking the officers present, fighting and kicking them. Two prisoners had "home-made" weapons, referred to as "shanks", which they used to stab officers.

[4] Other officers ran to the scene and eventually brought the situation under control. In all, four officers were injured, one of whom required hospital treatment.[1]

[5] Staff recovered three weapons from the prisoners. An important point for present purposes is that one or more appeared to have been fashioned from a metal bracket within the "standard issue", and intended to be tamper proof, television available to prisoners.[2] The brackets are one of just a handful of metal items in the TVs which are cased in clear plastic.

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1 Evidence of R T Sherlock, Notes of Evidence ("NoE") at 64–65.
2 At 64.

[6] One officer thought two of the prisoners appeared drunk.[3] Officers later located a plastic bag containing fruit and liquid, and suspected that the prisoners had been drinking "homebrew". This suspicion was never confirmed, however, and the contents of the bag were not tested for alcohol.[4]

[7] After the assault, Mr Robert Sherlock, the then prison manager, ordered the division into "lockdown", meaning that each prisoner was confined to his cell. There was an immediate meeting of senior management to take stock of the situation, and a further meeting the following morning, on 20 October 2016.

[8] Mr Sherlock and senior staff of the prison, including Mr Solomon Nui, the "residential manager" of the four blocks (A, B, C and D) in the division, attended the meeting on 20 October 2016. Also present were representatives of the prison's local and regional intelligence groups, and Ms Jeanette Burns, the Northern Regional Commissioner of Corrections. Ms Burns had gone to the prison the previous afternoon when she learned of the assault.

[9] In the course of this meeting and having heard from those present, Mr Sherlock decided that every prisoner in the four blocks and in the Special Needs unit should be strip searched, and their cells and all common areas also searched. Mr Sherlock's evidence was that the search was to be "for weapons, homebrew and the items needed to make homebrew".[5] Mr Sherlock excluded prisoners in the Management and At Risk units on the grounds that the regime to which they were subject made it most unlikely they would have any unauthorised item in their possession.

[10] This decision made, the searches commenced. Searches of the prisoners in C block, where the assault took place, were completed that day.

[11] The remainder of the searches, including those of the plaintiffs, were completed the next day. There was a further meeting on 21 October 2016 before the searches recommenced.

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3 Brief of Evidence of M E Beukes dated 9 October 2017 at [3].
4 Evidence of S T A Nui, NoE at 187–188.
5 Brief of Evidence of R T Sherlock dated 9 October 2017, at [12].

Reasons for the strip searches

[12] Mr Sherlock gave evidence that his decision to order the strip searches reflected several matters.

[13] First, Mr Sherlock wished to ensure that any weapons held by prisoners were seized, whether those weapons had been made from TV brackets or anything else. From a "health and safety perspective", Mr Sherlock did not consider the search could or should be confined to C block.[6] The shanks used in the assault were not the first of their kind to be discovered and it was possible that other prisoners might have extracted a bracket from their TV for the same purposes.

[14] Mr Nui's evidence was that it would not be sufficient just to inspect TVs and search cells. That was because it was not always immediately obvious that a bracket from a TV had been removed, as the prisoner concerned might, for instance, have substituted coloured or tin foil covered cardboard.[7]

[15] Secondly, Mr Sherlock said that it was rare for staff to discover homebrew, if that is what it was. If it was homebrew, Mr Sherlock doubted that it would be confined to those particular prisoners and would be likely to be elsewhere.[8] Mr Sherlock's evidence was that these risks, being the presence of weapons and homebrew, or the ingredients to make homebrew, required as comprehensive a search as possible, that is of cells, common areas and prisoners by way of strip searches.[9]

[16] Homebrew can be made from fruit, sugar and a starter containing yeast. Although yeast and yeast based products, such as Marmite, are banned on the prison estate, a prisoner receives a daily allowance of sugar and is allowed up to nine pieces of fruit in his cell. Given this, Mr Taylor and Mr Smith submitted that it is most unlikely that a strip search would ever be necessary to detect the presence of fruit or sugar, as there would be little point in a prisoner concealing such items on their person – and rather obvious in the case of the quantity of fruit required for homebrew.

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6 Evidence of R T Sherlock, above n 1, at 76–77.
7 Evidence of S T A Nui, above n 4, at 188.
8 Evidence of R T Sherlock, above n 1, at 134.
9 At 134.

Regardless, Mr Sherlock, supported by Mr Nui, considered that the possibility of manufacture of homebrew was another reason pointing to the need for a strip search.

[17] Thirdly, Mr Sherlock stated that it was understood that the assault had a "gang aspect" as three of the prisoners involved were from one gang and the fourth from another.[10] Mr Nui confirmed that the possibility of gang involvement was a concern.

[18] However, this concern of gang involvement was not held by the prison's intelligence group. In fact, Mr Nui acknowledged that, at the meeting on 21 October 2016, an intelligence officer said that no information was available to support the possibility of gang involvement in the assault. Asked why the strip searches in A, B and D blocks continued despite this, Mr Nui replied "because the risks still existed that it was gang related", and that the intelligence officer's statement was made in the course of an oral briefing and was not contained in a written report.[11] This was not a convincing response, given it is the intelligence group's role to be informed of such matters.

[19] Mr Sherlock also gave evidence that time was of the essence if staff were to limit the potential for prisoners to dispose of contraband and the possibility of disposal also made it necessary to strip search the prisoners. Mr Sherlock was not satisfied that any of the other, less intrusive searches to which I refer below would be sufficient.[12] Mr Sherlock's evidence was "I wanted to do the best I could to lower risk and considered strip searches necessary to do that".[13]

Other evidence

[20] Ms Burns' and Mr Nui's evidence was not materially different from Mr Sherlock's. Ms Burns' evidence was that she agreed with Mr Sherlock's decision to conduct the various searches to which I have referred, although the decision was one for Mr Sherlock to make as manager of the prison.

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10 Brief of Evidence of R T Sherlock, above n 5, at [7].
11 Evidence of S T A Nui, above n 4, at 210.
12 Brief of Evidence of R T Sherlock, above n 5, at [15].
13 At [15].

[21] Mr Sherlock did not take legal advice as to whether he had power to order a mass strip search, and nor did he consult the Prison Officers Manual issued by the Chief Executive of Corrections.[14] Nor did Ms Burns or Mr Nui take any of these steps.

[22] In all, the gist of the evidence for the Department was that all of the searches – cells, common areas and of prisoners – were intended to eliminate or minimise risk, whether of the presence of weapons or homebrew or the ingredients to make the same.

Evidence regarding the plaintiffs

[23] Mr Taylor and Mr Smith were situated in A block. The assault took place in C block. There is no suggestion that either Mr Taylor or Mr Smith was involved in the assault.

[24] Each block is physically removed from the other and the prisoners from one block do not come into contact with prisoners from another. Although Mr Sherlock referred to the possibility of contraband moving around the prison, there was no evidence that this happened frequently or was a factor in the present case.

[25] To the extent generalisations can be made, C block houses maximum-security prisoners, being those considered to pose the greatest risk.[15] Prisoners in A block generally have lower security classifications and so are considered to pose less risk.

[26] At the time of the assault, Mr Taylor was a low-medium security prisoner and Mr Smith high security.[16] Neither has a history of violence. Neither has ever been found to be in possession of a weapon. Neither has ever been associated with a gang. Mr Smith has no recollection of ever being found with contraband on his person or in his cell.[17] Two or so years before the assault, Mr Taylor was found in possession of curry powder or pepper which had been taken from the kitchen.[18]

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14 Corrections Act 2004, s 196(1).
15 Brief of Evidence of R T Sherlock, above n 5, at [3].
16 Brief of Evidence of A W Taylor dated 22 August 2017 at 1; and Brief of Evidence of P J Smith dated 22 August 2017 at [6].
17 Brief of Evidence of P J Smith at [20].
18 Evidence of S T A Nui, above n 4, at 193.

[27] Mr Taylor questioned Mr Sherlock as to what precisely was known or believed as regards the plaintiffs on 20 and 21 October 2016:[19]

> Q. At the time you ordered the search of both Mr Smith and myself, the strip search, not the search of ourselves the strip search of our person, you had no information whatsoever that suggested we were in possession of any weapons or items that could be used to make weapons?
>
> A. No.
>
> Q. At the time you ordered the strip search of myself and Mr Smith did you have any information whatsoever that Mr Smith or myself were in possession of any unauthorised items?
>
> A. No.
>
> Q. Did you give any consideration, whatsoever ... as to myself and Mr Smith's individual circumstances before you ordered that strip search of us?
>
> A. As individuals, no.

[28] Mr Smith asked Mr Sherlock whether he, Mr Sherlock, knew whether the plaintiffs had the ingredients required to make homebrew. Mr Sherlock replied:[20]

> A. I didn't know whether you had or not. Likewise for all the other prisoners that we gave instruction to be searched. That was the crux of it, because we'd identified the, if you like, the insecure nature of these particular televisions and the ability to remove items that could be made into shanks. And the fact that homebrew had been used in this particular incident, we didn't know how far that extended across the East Division in terms of prisoner's abilities or their possession of.

Search

[29] In total 209 prisoners were strip searched. None of these strip searches yielded anything of consequence, although searches of some of the cells did. As a result of information supplied to me after the hearing, it appears two shanks were found in cells, although not in A block; a blade from a pair of scissors in a common area in A block; and a container of what was believed to be homebrew in a common area elsewhere.

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19 Evidence of R T Sherlock, above n 1, at 94–95.
20 At 93.

[30] The strip searches of the plaintiffs were conducted in accordance with the formal requirements of the Act, that is in private and by male officers.[21] Each search took no more than a couple of minutes. Thereafter there was a "scanner" search of each prisoner and a search of each cell. No complaint is made as to these latter two searches.

Were the searches lawful?

[31] The plaintiffs contend the searches were unlawful on the grounds that they were in breach of ss 6(1)(f)(ii) and (g), 98 and 102 of the Act. I shall start with s 98, which is the most significant provision in this case.

Section 98

[32] Section 98 of the Act provides for a scanner, rub-down, strip and x-ray search. Each of these searches has its limitations. A scanner search is conducted with a "wand", of the type commonly seen at airport security checks. A scanner search will detect metal but nothing else. A strip search requires the prisoner to remove his or her clothes, in this case top half followed by bottom half, and thereafter to follow instructions that will enable the officer to see all parts of the body. A strip search will not reveal anything concealed internally. An officer carrying out a rub down search may run or pat his or her hand over the body of the person being searched, or insert his or her hand inside any pocket or pouch in the clothing, other than underclothing.

[33] The material parts of s 98 are:

> **98 Search of prisoners and cells**
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> (1) An officer may, at any time, for the purpose of detecting any unauthorised item, conduct—
>
> (a) a scanner search of any prisoner:
>
> (b) a rub-down search of any prisoner:
>
> (c) a search of any cell in a prison.

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[21] Corrections Act 2004, s 94.

(2) Nothing in subsection (1)(c) limits or affects any power or authority to search or inspect any cell in any prison for any purpose relating to the security of the prison.

(3) An officer may conduct a strip search of a prisoner—

(a) if the officer—

(i) has reasonable grounds for believing that the prisoner has in his or her possession an unauthorised item; and

(ii) has obtained the manager's approval to the conduct of a strip search; or

(b) in the situations referred to in subsection (6).

(4) Despite subsection (3)(a)(ii), it is not necessary to obtain the approval of a prison manager for the conduct of a strip search under subsection (3) if the delay involved in obtaining that approval would endanger the health or safety of any person or prejudice the maintenance of security at the prison.

(5) The power to conduct a strip search of a prisoner under subsection (3) may only be exercised—

(a) for the purpose of detecting any unauthorised item; and

(b) if a strip search is necessary in the circumstances for the purpose of detecting an unauthorised item.

(6) The situations referred to in subsection (3)(b) are as follows:

…

(9) An officer may conduct an x-ray search of a prisoner …

Section 98(3)(a) and (5)

[34] It was common ground between the plaintiffs and Crown counsel, Mr Gunn, that the strip searches of the plaintiffs would be lawful only if the requirements of s 98(3)(a)(i) and (5) were met. The real issue between the parties was what s 98(3)(a)(i) does require. Before I address those provisions, I note that s 98(3)(b) refers to "situations referred to in subsection (6)". Those situations cover particular occurrences such as a prisoner's temporary release from custody, his or her return to prison, or the prisoner's transfer to another prison. Nothing of that nature arises in this case.

[35] The plaintiffs submitted that the effect of s 98(3)(a)(i) is that a strip search will be lawful only if the officer conducting the strip search believes that the particular prisoner to be searched has an unauthorised item in his or her possession, and has reasonable grounds for that belief.[22]

[36] The plaintiffs contend the search was unlawful because there was no belief that either had an unauthorised item in their possession, let alone a belief held on reasonable grounds. Each of Mr Sherlock, Ms Burns and Mr Nui accepted in evidence that they did not turn their minds to Mr Taylor or Mr Smith individually. Mr Beukes, who searched Mr Smith, gave evidence that at the time the searches were conducted he did not have any "specific intelligence or other information that there was homebrew, homebrew ingredients or weapons on any of the prisoners" in A block, or B or D blocks or the Special Needs unit for that matter.[23]

[37] The plaintiffs also addressed the alternative methods of search that might have been employed to detect a weapon or homebrew or its ingredients and submitted that a strip search was not "necessary" in the sense of s 98(5). I do not propose to address this submission, because it is unnecessary to do so.

[38] Mr Gunn acknowledged that the decision to strip search was made without considering either Mr Taylor's or Mr Smith's individual circumstances and whether either might have a weapon or homebrew in their possession. Mr Gunn did not accept, however, that rendered the searches of them unlawful. Mr Gunn's submission was that the assault and the use of weapons, and the prospect that prisoners were making homebrew, gave rise to a health and safety issue for prisoners and staff alike. In addition, the weapons used in the assault had derived from the TV that virtually every prisoner, including the plaintiffs, had in his cell. Mr Gunn submitted that the combination of these circumstances gave rise to reasonable grounds to believe all prisoners who were searched, including Mr Taylor and Mr Smith, had an unauthorised item in their possession.

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22 Given that all searches followed the order or direction given by Mr Sherlock, no issue arises as to "approval" under s 98(3)(a)(ii) or (4).

23 Evidence of M E Beukes, NoE at 246.

[39] However, this submission does not confront the words of s 98(3)(a)(i) and, in particular, the reference to "the prisoner" (being the prisoner to be searched) and "has" in his or her possession. I consider s 98(3)(a)(i) permits an officer to strip search Mr Taylor or Mr Smith if the officer has reasonable grounds to believe Mr Taylor or Mr Smith has in his possession an unauthorised item and not otherwise.

[40] The fact that two or three other prisoners had converted an authorised item (fruit or a TV with a bracket in it) to an unauthorised item (homebrew or a bracket outside of a TV and able to be used as a weapon) and that the plaintiffs might do likewise, did not permit of a strip search of the plaintiffs.

[41] Given that, it is unnecessary for me to address the other arguments the plaintiffs made as to the proper construction of s 98(3), being whether anything is to be drawn from the order of the two limbs of s 98(3)(a), that is reasonable grounds first, approval second, and the significance of s 98(5) to s 98(3)(a)(i). In any event, the Court of Appeal addressed this latter point in *Forrest v Attorney General*, to which I refer below.[24]

Authorities

[42] This is not the first case in which the Court has considered s 98 or for that matter possible consequential breaches of ss 21 and 23(5) NZBORA. Other relevant authorities on s 98 are as follows.

[43] *Mitchell v Attorney-General*, which was argued after the strip searches in the present case had taken place, is a similar case as it required consideration of s 98(3)(a)(i).[25] Prisoner A told prisoner B that there was cannabis in a wing of Arohata Prison. Prisoner B relayed this information to the prison manager who ordered an immediate strip search of the 16 prisoners in the wing. The search took place within 20 minutes or so thereafter. Fifteen of the prisoners in the wing complied, Ms Mitchell refused.

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[24] *Forrest v Attorney-General* [2012] NZCA 125, [2012] NZAR 798.
[25] *Mitchell v Attorney-General* [2017] NZHC 2089, [2017] NZAR 1538.

[44] Ms Mitchell sought, and Thomas J granted, a declaration that the strip search of the 15 was unlawful. Thomas J said:

> [15] It is clear that, contrary to s 98(3), the Corrections officers conducting the searches did not have reasonable grounds to believe Ms Mitchell or any other individual prisoner was in possession of an unauthorised item. The Prison Manager should not have approved (or decided to approve) the strip search in those circumstances. The information received did not identify any individual as being in possession of cannabis or any other illegal drug. …

[45] It is clear from this passage that Thomas J considered that s 98(3)(a)(i) permitted a strip search of Ms Mitchell only if there were reasonable grounds to believe that she was in possession of an unauthorised item.

[46] Mr Gunn sought to distinguish this case on the following factual matters. Thomas J described the information as to the presence of cannabis in the wing as "vague" and sourced from a prisoner, and the decision to search in the *Mitchell* case, and the search itself, took place very quickly. Mr Gunn submitted that there was no "vagueness" in the present case, it was a known fact that weapons had been used in the assault and that similar weapons could be made from any television. Mr Gunn also referred to Mr Sherlock's evidence that the meeting on 20 October 2016 lasted some 45 minutes, so the decision to search was not rushed or hasty.

[47] However, these matters of fact do not detract from the point Thomas J was making, namely that the search was unlawful because the information conveyed to the authorities did not identify a particular prisoner and there is no power to conduct a mass search.

[48] *Forrest v Attorney General* is also very relevant. Officers strip searched Mr Forrest twice in one day as they moved him between blocks. In the High Court, Chisholm J determined that the first search was unlawful and the second lawful.[26] Mr Forrest appealed the finding on the second search.[27]

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[26] *Forrest v Attorney-General of New Zealand* HC Christchurch CIV-2009-409-2373, 1 November 2010.

[27] *Forrest v Attorney-General*, above n 24.

[49] The issues on appeal were whether s 98(3)(b)/(6) applied and, if so, whether the search was "necessary" in the sense of s 98(5). The Court of Appeal expressed reservations as to the first issue but in any event determined that the search was not necessary. In passing, the Court also responded to evidence that there was a blanket policy of strip searching every prisoner on admission to a particular block of the prison, saying that any such policy would be unlawful if it existed. The Court said:

> [13] … the second strip search was not carried out for the specified statutory purpose set out in subs (5) …
>
> [14] Whether "a strip search [was] necessary in the circumstances" will be a very fact-specific inquiry. For example, if a scanner search or a rub-down search was likely to detect the particular unauthorised item the prisoner was suspected of carrying, then a strip search would be less likely to be found to be "necessary in the circumstances". Where the prisoner had recently been (for instance, a prison kitchen) might be relevant in an assessment of necessity. The history of the particular prisoner would generally be a very relevant circumstance: a strip search may well be considered "necessary" if the prisoner has a history of secreting unauthorised items in body orifices.
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> …
>
> [16] The officers in the present case did not undertake the sort of analysis implicit in s 98(5). … [T]wo justifications for the strip search emerged [from the evidence]. One of the officers involved said it was conducted because not long before there had been "a control and restraint incident involving threats to staff". That was a reference to what had happened in the interview room. A second explanation was proffered by the same officer in cross-examination. He said it was always the practice to strip search inmates on entry to J Block. Another officer who gave evidence confirmed this was the practice.
>
> [17] Neither explanation justified the strip search. None of the three officers said he thought Mr Forrest was carrying an unauthorised item or could point to evidence justifying an inference he might be. Some of the evidence would suggest that the prison was running an informal blanket policy of strip searching every prisoner on his admission to J Block. We make no finding on that, as it is unnecessary to do so. Were there such an informal policy, of course, it would have been unlawful …

[50] What appears from these passages is, first, that there must be a suspicion (or a belief on reasonable grounds) that the prisoner is carrying an unauthorised item; secondly, a determination of whether a strip search, as opposed to some other search, is necessary to retrieve it, with that determination to be made having regard to the item and the particular prisoner; and, thirdly, that any policy of routine strip searching is unlawful.

[51] In *Reekie v Attorney-General*, Wylie J determined several complaints by Mr Reekie in respect of events between late 2002 and early to mid-2003.[28] One of Mr Reekie's complaints was that he had been "routinely strip searched, between two and six times per day, even when he was constantly with staff, or in a pre-searched area", and that the same was not permitted by s 21K of the Penal Institutions Act 1954, the predecessor provision to s 98(3) of the Act.[29]

[52] The Judge accepted this evidence and held the searches were unlawful, saying:

> [265] Having considered all of the evidence which was presented to me, I accept the evidence that Mr Reekie was routinely strip searched. … Inmates, including Mr Reekie, were strip searched to ensure that they had not obtained and hidden on their person any item that they could use to self-harm when they were placed in their cell. … *However, the necessity for a strip search should have been considered on an inmate by inmate basis and on each occasion. There is no evidence that staff considered the necessity of the searches or what alternatives might have been available.*
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> (Emphasis added)

[53] I have not referred to the litigation in *Taunoa v Attorney-General* because the facts of that case are far removed from the present.[30] It is fair to say, however, that at each instance – High Court, Court of Appeal and Supreme Court – the Court was highly critical of the manner in which prisoners were subjected to routine, gratuitous and frequent strip searches.

[54] To conclude, s 98(3)(a)(i) permits a strip search of a prisoner only if it is believed, on reasonable grounds, that prisoner has an unauthorised item in his or her possession. The search in this case was unlawful because no such belief was held.

Section 102

[55] The plaintiffs also contend that the strip searches were unlawful for breach of s 102. It is common ground that the defendant did not comply with s 102 which, to the extent relevant, provides:

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28 *Reekie v Attorney-General* [2012] NZHC 1867.
29 At [259].
30 *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429; *Attorney-General v Taunoa* [2006] 2 NZLR 457 (CA); and *Taunoa v Attorney-General* (2004) 7 HRNZ 379 (HC).

> **102 Reporting of unauthorised items discovered, certain searches, and placement in dry cells**
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> (2) Every officer who conducts a strip search of any person in the circumstances described in section 98(3)(a) (whether or not the approval of a prison manager is required to undertake that search) … must, promptly after the search [report the details of the search to the prison manager or the supervisor as the case may be].
>
> …
>
> (4) Every report under subsection (2) must contain—
>
> (a) the reasons for the search; and
>
> (b) the details of any unauthorised item discovered as a result of the search.
>
> (5) Every person to whom a report is made under … subsection (2) … must ensure that a record of that report is made and kept.

[56] The evidence before me was that the prevailing practice was to keep a record of a strip search if an unauthorised item were found, but not otherwise. All concerned accepted that the provisions of s 102 apply to every strip search to which it refers, and Ms Burns' evidence was that additional training has since been given to ensure future compliance. Nothing turns on the non-compliance in this case. Nor do I consider that non-compliance could render unlawful an otherwise lawful strip search. The breach of s 102 is not material in this case.

Section 6

[57] Lastly, the plaintiffs also contend that the strip searches were unlawful for breach of s 6. Section 6 is concerned with principles governing the operation of the corrections system, such as the need to treat those under control fairly and reasonably and to avoid administering an order more restrictively than necessary. These principles are to be taken into account if applicable and to the extent practicable. In *Forrest*, the Court of Appeal referred expressly to the principles of s 6 as guiding any decisions made under s 98. However, it is unnecessary for me to consider the isolated issue of whether there was a breach of s 6, as it adds nothing to the plaintiffs' case. In those circumstances, it is best to put that matter to one side for present purposes.

Conclusion on Corrections Act 2004

[58] The strip searches of Mr Taylor and Mr Smith were not authorised by s 98 and were unlawful.

New Zealand Bill of Rights Act 1990

[59] The plaintiffs also submit that the strip searches breached their rights under ss 21 and 23(5) NZBORA, which provide:

> **21 Unreasonable search and seizure**
>
> Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise.
>
> **23 Rights of persons arrested or detained**
>
> …
>
> (5) Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the person.

Section 21

[60] Mr Gunn accepted that the strip search in this case would be unreasonable within the meaning of s 21 if the search was unlawful for want of compliance with s 98(3)(a)(i). This was a proper concession.[31]

Section 23(5)

[61] Mr Taylor and Mr Smith made four submissions as regards their contention that the effect of the strip search was to breach s 23(5) NZBORA.

[62] The first was that the search was undertaken without reasonable grounds and without considering whether it was necessary.

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31 *Forrest v Attorney*-General, above n 24, at [18].

[63] Secondly, the 209 prisoners searched included a teenager, a transgender prisoner and some who were elderly. The plaintiffs were embarrassed and humiliated, and Mr David Obiaga, another prisoner in A Block and who gave evidence, likewise.[32]

[64] The third submission was based on *Taunoa*, to the effect that an unlawful and unreasonable strip search diminishes dignity and engenders feelings of anguish and inferiority. However, that statement in *Taunoa* was made in the context of routine strip searches, not *apropos* of a single instance, as in this case.

[65] Fourthly, the plaintiffs submitted they had a reasonable expectation of personal freedom and dignity and to be free of arbitrary state intrusion.

[66] The gist of Mr Gunn's submission on this was that this was a single instance of strip searching (unlawfully as it turned out) and did not constitute conduct encompassed by s 23(5). I accept that submission for the reasons given below.

Discussion

[67] The issue of whether the plaintiffs were treated with humanity and with respect for their inherent dignity is an evaluative exercise.

[68] The matters relevant to this case are as follows.

[69] First, a breach of the Corrections Act, even one that causes embarrassment or distress, such as a strip search, will not inevitably constitute a breach of s 23(5). The Supreme Court said as much in *Taunoa*.[33] In *Forrest*, Chisholm J in the High Court held that the single unlawful strip search he had identified did not constitute a breach of s 23(5).[34] Mr Forrest did not appeal that finding to the Court of Appeal. And in *Reekie*, Wylie J said:[35]

> The Courts in *Taunoa* appear to have accepted that a breach of the minimum legislative requirements applicable to prisoners does not automatically lead to

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32 Brief of Evidence of D I Obiaga dated 23 August 2017 at [7].
33 *Taunoa v Attorney-General*, above n 30, at [31] per Elias CJ, at [181] per Blanchard J, at [296] per Tipping J, at [386] per Henry J.
34 *Forrest v Attorney-General of New Zealand*, above n 26, at [66].
35 *Reekie v Attorney-General*, above n 28, at [94] (citations omitted).

> a breach of s 9 or s 23(5). A Judge considering s 23(5) must undertake an evaluative exercise ...

[70] Secondly, the conduct complained of was short lived. The Court has previously held that s 23(5) has not been breached by instances of short lived conduct.

[71] For instance, in *Toia v Prison Manager, Auckland Prison*, this Court held that the de-facto segregation of a prisoner was unlawful but not a breach of s 23(5).[36] Officers believed the prisoner was at risk of suicide and placed him in an at-risk unit for two periods of up to 11 days in total. Pans were provided as a substitute for a toilet. Amongst other things, Brewer J found that segregation was brief, caused no harm to the prisoner and that the prisoner had been the creator of his own (unsanitary) conditions. The Court of Appeal agreed.[37]

[72] Thirdly, and in contrast, it was held in *Taunoa* and *Reekie* that the right in s 23(5) was breached because of the numerous and ongoing deficiencies in the prisoner's or prisoners' treatment over significant periods of time.

[73] The prisoners in *Taunoa* were subjected to the unlawful regime for periods of between six and a half weeks in the case of Mr Gunbie, to more than two years in the case of Mr Taunoa.[38] Amongst other things, they were unlawfully and routinely strip searched; unlawfully segregated for lengthy periods in conditions of poor cell hygiene; and they were given inadequate opportunities for exercise.[39]

[74] In *Reekie*, the High Court held that officers had breached the prisoner's right under s 23(5) by routinely and frequently strip searching him without considering on each occasion whether it was necessary.[40]

[75] Likewise in *Vogel v Attorney-General*.[41] The Court of Appeal found there was a breach of 23(5) because the prisoner, known to be vulnerable and addicted to drugs,

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36 *Toia v Prison Manager, Auckland Prison* [2014] NZHC 867 at [72], [83].
37 *Toia v Prison Manager, Auckland Prison* [2015] NZCA 624 at [29].
38 *Taunoa v Attorney-General*, above n 30, at [130], [269] per Blanchard J
39 *Taunoa v Attorney-General* (2004) 7 HRNZ 379 (HC) at [276]; *Attorney-General v Taunoa* [2006] 2 NZLR 457 (CA) at [147]; and *Taunoa v Attorney-General*, above n 30, at [6] per Elias CJ; at [215] per Blanchard J; at [276] per Tipping J; at [353], [362] per McGrath J.
40 *Reekie v Attorney-General* [2012] NZHC 1867 at [265].
41 *Vogel v Attorney-General* [2013] NZCA 545, [2014] NZAR 67.

was placed in solitary confinement for 21 days, a period exceeding the maximum allowed by statute.

[76] As Mr Gunn submitted, however, this case comprised a single strip search. It was conducted in the manner the Act requires, that is male officers and in private. The searches were brief and resulted in no significant or ongoing harm to the plaintiffs. In my view, what occurred falls short of a breach of s 23(5).

[77] Lastly on this point, I record that Mr Taylor referred me to two Canadian decisions, *R v Golden* and *Vancouver (City) v Ward*.[42] I accept Mr Gunn's submission that it is unnecessary to refer to those cases given the significant body of authority in New Zealand.

Conclusion on NZBORA

[78] The strip searches of the plaintiffs were unreasonable, in breach of s 21 NZBORA, but were not in breach of s 23(5) NZBORA.

Relief

[79] As prisoners, the plaintiffs' claim for compensation (of $10,000 each) is a "specified claim" within the meaning of the Prisoners' and Victims' Claims Act 2005 ("PVC"). The PVC is legislation intended "to restrict and guide the awarding of compensation ... to help to ensure ... compensation is reserved for exceptional cases and used only if, and only to the extent that, it is necessary to provide effective redress".[43]

[80] I may not award compensation to the plaintiffs unless the requirements of s 13(1)(a) and (b) PVC are met. Section 13 provides:

> **13 Restriction on awarding of compensation**
>
> (1) No court ... may ... award any compensation ... unless satisfied that—

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42 *R v Golden* 2001 SCC 83, [2001] 3 SCR 679; *Vancouver (City) v Ward* 2010 SCC 27, [2010] 2 SCR 28.

43 Prisoners' and Victims' Claims Act 2005, s 3(1).

(a) the plaintiff has made reasonable use of all of the specified internal and external complaints mechanisms reasonably available to him or her to complain about the act or omission on which the claim is based, but has not obtained ... redress that the court ... considers effective; and

(b) another remedy, or a combination of other remedies, cannot provide ... redress that the court ... considers effective.

(2) ... reasonable use of a complaints mechanism means the use that the court ... considers it reasonable for the plaintiff to have made in the circumstances.

[81] As to s 13(1)(a), there was no dispute at trial that the plaintiffs had made reasonable use of the internal complaints mechanisms available to them, and obtained no redress.[44] I am also satisfied that they made reasonable use of external mechanisms reasonably available to them. They, and others, complained to the Ombudsman, as was appropriate. The Ombudsman's response was that he did not propose to investigate the matter as it was before the Court. Given this response, I am satisfied that the plaintiffs have satisfied s 13(1)(a).

[82] Section 13(1)(b) requires me to consider whether a remedy or combination of remedies, other than compensation, could provide effective redress, a matter which is to be considered having regard to the matters specified in s 14(2).[45]

[83] Section 14 provides:

14 Guiding considerations for awarding of compensation

(1) A court or tribunal must take into account the matters specified in subsection (2) in determining, in proceedings to which this subpart applies,—

(a) whether compensation is required to provide effective redress; and (if it is)

(b) the quantum of an award of compensation required to provide effective redress.

(2) The matters referred to in subsection (1) are—

(a) the extent (if any) to which the plaintiff, the defendant, or both took, within a reasonable time, all reasonably practicable

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44 Defendant's closing written submissions at [91].

45 *Forrest v Attorney-General*, above n 24, at [32].

steps to mitigate loss or damage arising from the act or omission on which the claim is based; and

(b) whether the defendant's breach of, or interference with, the right concerned was deliberate or in bad faith; and

(c) the relevant conduct of the plaintiff; and

(d) the consequences for the plaintiff of the breach of, or interference with, the right concerned; and

(e) the freedoms, interests, liberties, principles, or values recognised and protected by the right concerned; and

(f) any need to emphasise the importance of, or deter other breaches of or other interferences with, the right concerned; and

(g) the extent (if any) to which effective redress in relation to that act or omission has been, or could be, provided otherwise than by compensation; and

(h) any other matters the court or Tribunal considers relevant.

(3) ...

[84] As to (2)(a), the Crown has not suggested that there was anything the plaintiffs could do to mitigate the consequences of the search.

[85] As to (b) and (f), Mr Gunn submitted that the searches were motivated by a genuine desire to ensure the health and safety of prisoners and staff. The plaintiffs submitted this was implausible and, in any event, did not excuse the failure to heed the *Taunoa*, *Forrest* and *Reekie* decisions.

[86] I accept Mr Gunn's submission that the searches in this case were carried out for reasons of health and safety but at the very least the decision to search was made carelessly, given the failure to consult the Department's manual or its legal staff even though there was time to do so and particularly before the searches on 21 October 2016.

[87] I also accept the plaintiffs' submission as to the failure to heed the prior Court decisions to which I have referred.

[88] Neither Mr Sherlock, Ms Burns nor Mr Nui seem to have understood what s 98(3) required, whether in October 2016 or when they appeared before me, by which time *Mitchell* had been decided. The gist of their evidence was that there were "reasonable grounds to search".

[89] Turning now to s 14(2)(c), nothing in the plaintiffs' conduct warranted the search. As to (d), the indignity the plaintiffs suffered was short lived and as to (e), as was said in *Forrest*, the liberties protected by the right against an unreasonable search are very important.[46]

[90] As to (g) and s 13(1)(b), Mr Gunn submitted that a declaration would provide effective redress. I am not able to accept that submission given the matters to which I have referred to in [86] to [88] above. I do not consider a remedy other than compensation will provide effective redress.

Section 14(2) PVC

[91] The matters listed in s 14(2) are also to be considered in determining the quantum of any award, the purpose of which is to provide "effective redress".

[92] The plaintiffs seek $10,000 each. That is vastly more than is required to provide effective redress in the circumstances of this case. Mr Gunn submitted that any award should be less than the $600 awarded in *Forrest*, on the ground that Mr Forrest was subjected to two strip searches in one day.

[93] I do not consider that it matters particularly whether there was one or two unlawful strip searches in the day and I would award each plaintiff the same $600 awarded to Mr Forrest if all the circumstances of the case were the same. However, "effective" redress requires an increase in the sum awarded, to bring home to the Department the importance of compliance with the legislation and of heeding what the Courts have now said regarding s 98 on several occasions. To this end, I propose to increase the amount, and award $1,000 to each of the plaintiffs.

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[46] *Forrest v Attorney-General*, above n 24, at [37].

[94] I mention two more points for the sake of completeness.

[95] First, Mr Taylor and Mr Smith emphasised that 209 prisoners were searched. I do not consider this affects the outcome. It was open to those prisoners to join this proceeding if they wished. Given they did not, the plaintiffs' case stands or falls on the strip searches of them.

[96] Secondly, and as in *Forrest*, I do not know whether the plaintiffs will receive any of the $1,000. In the first instance, the compensation is paid to the Secretary for Justice, who disburses the funds in accordance with the provisions and procedures in the PVC. In accordance with that regime, the plaintiffs' victims may well lodge a claim for the money.[47] The plaintiffs benefit if any sum remains thereafter.[48]

Result

[97] I make a declaration that the strip searches of Mr Taylor and Mr Smith on 21 October 2016 were unlawful and unreasonable, in breach of s 21 of the New Zealand Bill of Rights Act 1990.

[98] Pursuant to the Prisoners' and Victims' Claims Act 2005, I order the Attorney-General to pay to Mr Taylor and Mr Smith compensation in the sum of $1,000 each.

Costs and disbursements

[99] The plaintiffs seek costs and disbursements. As litigants in person, the plaintiffs are only entitled to recover costs in exceptional circumstances. This case is not exceptional. However, I do award reasonable disbursements. I expect these will be agreed but any dispute is to be determined by the Registrar.

Peters J

[47] Prisoners' and Victims' Claims Act 2005, pt 2, sub-pt 2.
[48] Sections 32, 49, 52.