IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2013-404-004936
[2015] NZHC 3367

BETWEEN	NICHOLAS DAVID WRIGHT Plaintiff
AND	VIJAYRAJ BHOSALE First Defendant
	ATTORNEY-GENERAL Second Defendant

Hearing: 15 to 19 June and 21 July 2015

Counsel: N D Wright Plaintiff in person
T A Simmonds for First Defendant
N Whittington and B Thompson for Second Defendant

Judgment: 21 December 2015

JUDGMENT OF HINTON J

This judgment was delivered by me on 21 December 2015 at 7.30 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date: ……..

Counsel/Solicitors:
Todd A Simmonds, Barrister, Auckland
Meredith Connell, Auckland

And to:
N D Wright

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Introduction

[1] Mr Wright, who some years ago was a partner in an Auckland law firm but who has fallen on hard times, was a passenger in the back seat of a vehicle when he was asked by the police to provide identification. Knowing the police had no lawful right, Mr Wright refused. He did so in an odd and confrontational manner. He was handcuffed and subjected to a pat-down search on the footpath on Karangahape Road; taken to the Auckland Central Police Station; charged and locked in a cell for two and a half hours. Some four months later, the police conceded there was no lawful basis for the charge and it was dismissed.

[2] Mr Wright seeks declarations and damages against Constable Bhosale and the Crown, for breach of the New Zealand Bill of Rights Act 1990 ("BORA"), assault and battery, wrongful arrest and false imprisonment.

[3] The defendants have acted fairly throughout the proceeding. They readily accepted in their first statement of defence in December 2013 that Mr Wright was wrongfully arrested and imprisoned during the events that are the subject of this proceeding. The parties attempted to settle in early 2015 but could not reach an agreement.

[4] As there is no dispute that the defendants have committed the torts of battery, wrongful arrest and false imprisonment, the main issues for determination in this proceeding are whether BORA rights have been breached and the quantum of damages that should be awarded to Mr Wright, including in particular whether he should receive exemplary damages.

Background

[5] In the early morning of 3 May 2013, Constable Bhosale and Constable Bunce were patrolling in a police vehicle along Karangahape Road. Shortly after 1 am, Constable Bhosale observed a vehicle make a sudden and prohibited U-turn. The vehicle was stopped by police towards the intersection of Queen Street and Karangahape Road. There were four passengers and one driver in the vehicle. Mr Wright was a passenger in the back seat of the vehicle.

[6] The driver of the vehicle was spoken to by Constable Bunce. Constable Bhosale asked each of the passengers to provide some form of identification. This request was complied with by the passengers, apart from Mr Wright. Mr Wright advised Constable Bhosale that he did not consider he was legally required to provide identification in New Zealand and that Constable Bhosale had no power to require him to produce identification. Constable Bhosale said he was exercising his power under s 114 of the Land Transport Act 1998 ("LTA").

[7] At this point, Mr Wright stepped out of the vehicle and told Constable Bhosale that since he was no longer in a vehicle, the LTA did not apply to him. Constable Bhosale advised that under the Act, he was still required to provide his details. Mr Wright then announced that he was exercising his right to freedom of movement and turned to walk away. Mr Wright said something to the effect of "I am a free man", which he was to repeat a number of times during the overall incident. As he walked away, Constable Bhosale placed an arm out in front of Mr Wright. Mr Wright pushed past that arm and was arrested for refusing to provide his name and details under s 114 of the LTA. Constable Bhosale handcuffed Mr Wright, with the assistance of Constable Bunce, and subjected him to a pat down search. They then took Mr Wright to the Auckland Central Police Station.

[8] Mr Wright reached the station at approximately 1.26 am. He was taken to the receiving counter at the Custody Unit where his arrest was processed by the authorising officer Graham Lockhart. Mr Lockhart asked Mr Wright for his name, birth date and other details, which he provided and which were entered into the computer system. A "notice to person in custody" document is automatically created after the arrest details are entered into the computer system. Mr Wright was given the document which said he was being held in legal custody for "B109 – Failed to give name and address on demand". The document advised him of his rights. It did not specify a statutory provision and did not refer to s 114, which Constable Bhosale had cited.

[9] Mr Wright made a full statement about the circumstances of the arrest to Constable Bunce. He announced to the officers present that he was a former lawyer and that s 114 of the LTA did not apply. He asked Mr Lockhart to look up s 114 on

his computer. Mr Lockhart did not look up s 114 and advised Mr Wright that he had no jurisdiction or discretion over the charge laid.

[10] The relevant documents were prepared by Constable Bhosale, including a Traffic Offence Notice, a Custody Summary and a Custody Charge Sheet.

[11] The Traffic Offence Notice did not refer to a particular section of the Land Transport Act. It recorded the code "B109" and the description "Failed to provide name and address on demand".

[12] The Custody Summary stated:

> **CHARGE(S)**
>
> B109 – Failed to give name and address on demand
>
> …
>
> Being a person on a road and having had a lawful demand by an enforcement officer to [give your full name and full address] refused to give such information
>
> Land Transport Act 1998 section 52(1)(c)

[13] The Custody Charge Sheet included the following information:

CODE	TEXT OF CHARGE
B109	FAILED TO GIVE NAME AND ADDRESS ON DEMAND

[14] Constable Bhosale attempted to hand a copy of the Traffic Offence Notice to Mr Wright but he refused to accept or sign the document. Mr Wright said he did however read the document.

[15] Constable Bhosale then took the Custody Charge Sheet and the Custody Summary to the Custody Sergeant on duty at the time, Sergeant Field. The Custody Charge Sheet was signed and stamped as "bailable" by Sergeant Field. The Custody Sergeant has responsibility for the final decision as to what charges are laid, if any. In this case, Sergeant Field approved the charge as set out in the Custody Charge Sheet.

[16] Mr Wright was fingerprinted and locked in a cell before being released on bail at 4 am. The total time that Mr Wright was at the station was approximately two and a half hours. Mr Lockhart printed a police bail bond form and explained the bail conditions. The form stated:

> Charge(s):
>
> The DEFENDANT, having been arrested without warrant, is charged with:
>
> 1. B109 – Failed to give name and address on demand

[17] Mr Wright initially refused to sign the form because, in his view, the release form did not disclose the statutory basis for the charge laid against him. He eventually signed the form.

[18] The matter was first called before the Auckland District Court on 9 May 2013. Mr Wright says he was then advised that he was now being charged under ss 52 and 113 of the LTA. At this first appearance, Mr Wright was provided with initial disclosure containing the Information, the Caption Summary, the relevant sections of Constable Bhosale's notebook, Mr Wright's criminal history and the relevant sections of Constable Bunce's notebook. The disclosure sheet stated that ongoing disclosure enquiries must go to the Criminal Justice Support Unit.

[19] The caption summary included the following information:

> CHARGE failed to give name and address on demand
>
> LAND TRANSPORT ACT 1998 SECTION 52(1)(c)

[20] The Information described the charge as:

> Land Transport Act 1998 section 52(1)(c) being a person on a road and having had a lawful demand by an enforcement officer to give your full name and full address you failed or refused to give such information.

[21] On 9 May 2013, Mr Wright emailed Constable Bhosale seeking full disclosure of the police file and information as to which of the statutory provisions listed in s 113(1) the officer was seeking to enforce. On 25 May 2013 and 18 June 2013, Mr Wright again emailed Constable Bhosale with the same request. These emails went unanswered until 19 June 2013 when Constable Bhosale replied

attaching the disclosure that had previously been provided to Mr Wright and advising him to contact the Criminal Justice Support Unit for queries about disclosure.

[22] Mr Wright then applied to the District Court on 1 July 2013 for orders requiring disclosure under s 30 of the Criminal Disclosure Act 2008.

[23] That application was considered by the District Court on 4 September 2013. At that point, the police prosecutor conceded that the police had no lawful jurisdiction to require Mr Wright to supply his name and details and that his arrest was unlawful. The charge was dismissed.

Disputed facts

[24] The facts, as I have recorded them above, are largely undisputed.

[25] There was an issue raised by the police as to whether Mr Wright was intoxicated at the time of the arrest on Karangahape Road. Mr Wright maintained that he consumed no intoxicants of any kind during the course of that night. He asked to be tested and the police declined to do so. Constable Bhosale gave evidence that Mr Wright appeared intoxicated, had bloodshot eyes and a flushed complexion. Mr Wright accepted that his eyes may have been bloodshot due to allergies and that his complexion may have been flushed due to being angry. In any event, Mr Simmonds, counsel for Mr Bhosale, accepted that nothing turns on the issue of whether Mr Wright was intoxicated and therefore no factual finding is required. I agree that nothing or very little turns on that issue. I proceed on the basis that Mr Wright was not intoxicated.

[26] The next issue was over Mr Wright's general demeanour. The Crown say that Mr Wright was confrontational, aggressive and unco-operative. Mr Wright says he was angry. In any event, the Crown accepts that Mr Wright was entitled to decline to provide his name in an assertive and forceful manner. They say that his general demeanour is of no real moment, other than with regard to exemplary damages.

[27] The third dispute is over some details of what happened at the police station including whether Constable Bhosale remained present while Mr Wright gave his statement to Constable Bunce. Mr Wright took the view that Constable Bhosale was present for the entire statement and therefore heard him explain that s 114 did not apply. Constable Bhosale, on the other hand, said that he wanted to give Mr Wright some space to calm down and was discussing the circumstances of his arrest with Sergeant Field at the time that Mr Wright gave his statement. Similarly, Mr Wright says Constable Bhosale did not discuss the circumstances of the arrest with Sergeant Field or withheld details, so that Sergeant Field could not pick up on the error. Mr Wright says these matters go to his exemplary damages claim against Constable Bhosale as they show bad faith. I will come back to these points later.

[28] Mr Wright also initially sought to adduce evidence relating to an alleged incident in 2009 when he was arrested at home. The parties agreed that the 2009 incident was not relevant to the current proceedings and that no factual or legal findings regarding the 2009 matter were needed. The Crown say that the relevance of the 2009 incident, if any, is that in 2009 Mr Wright was arrested and he asserts that it left him "deeply disillusioned" and with a very poor opinion of the police, to which statement Mr Wright did not object.

[29] There was a further incident between Mr Wright and the police in 2012. Mr Wright included in the common bundle, witness statements and a transcript of a hearing in the District Court, following which a charge of trespass brought against Mr Wright was dismissed. The second defendant submitted that this material was not relevant and Mr Wright agreed it should not be part of the common bundle.

Pleadings

[30] Mr Wright pleads five "causes of action" against Constable Bhosale and the Crown. These are briefly discussed below.

(a) Various declarations as to the unlawful and unreasonable exercise of statutory power. I have broken these up and considered them under different headings, as they relate to different causes of action. These

declarations are principally based on breaches of BORA but also overlap with the pleaded torts.

(b) Assault and battery.

(c) Wrongful arrest.

(d) False imprisonment.

(e) Failure to disclose information regarding basis of charge/breach of s 24(a) BORA.

(f) Breaches of various provisions of BORA. These overlap with the declarations sought under (a) and, again, I have divided them up under appropriate headings.

[31] In terms of relief, Mr Wright seeks declarations as to the lawfulness or unlawfulness of the police conduct; general damages and exemplary damages.

[32] The Crown's case is that declarations as to battery, wrongful arrest and false imprisonment can be made more or less on the terms sought by Mr Wright. They oppose the other declarations, being in respect of unreasonable search (s 21, BORA); the decision to charge Mr Wright (s 23(2), BORA and the right to information regarding the charge (s 24(a) BORA)).

[33] There is a substantial dispute over damages, both as to quantum of general damages and as to eligibility for exemplary damages.

Judgment structure

[34] I deal with the issues under the headings and in the order set out below. As noted, this is necessarily different to the order of Mr Wright's pleading. It is also not in chronological order in terms of the sequence of events as I address those matters that require little comment first and then turn to the disputed matters. The order is as follows:

(a) Assault and battery.

(b) Wrongful arrest.

(c) False imprisonment/breach of ss 18 and 22, BORA.

(d) Breach of s 21, BORA – unreasonable search.

(e) Breach of s 23(2), BORA – the decision to charge Mr Wright.

(f) Breach of s 24(a) BORA – failure to disclose information regarding basis of charge.

(g) General damages.

(h) Exemplary damages.

Assault and battery

[35] Mr Wright pleads that when Constable Bhosale seized his hand and handcuffed him, he was acting in excess of his statutory powers and this constituted an actionable assault and battery.

[36] A battery is the act of intentionally applying force to the body of another person without that person's consent or other lawful justification.[1] An assault can be committed independently of a battery and requires an intentional overt act that creates an apprehension of the imminent infliction of a battery. For an assault the person has to believe on reasonable grounds that he or she is in danger of a battery.[2]

[37] In this case, the defendants accept that there was a battery. Although Mr Wright pleads assault in addition, he does not make any submissions in that regard and nor is that a matter addressed by the Crown. While technically there

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1 Stephen Todd (ed) *The Law of Torts in New Zealand* (6th ed, Brookers, Wellington, 2013) at [4.4].

2 At [4.3].

probably was also an assault, the point is rather academic. In the absence of submissions, I limit the finding to one of battery.

[38] A declaration that Constable Bhosale's actions constituted a battery is therefore appropriate.

[39] I come back to the matter of damages.

Wrongful arrest

[40] Mr Wright pleads that Constable Bhosale had no lawful authority to arrest him and that the Crown gave Constable Bhosale a mistaken understanding of his powers by giving him defective training on the extent of his powers to demand identifying particulars under the LTA.

[41] Mr Wright seeks declarations as follows:

(a) Constable Bhosale had no reasonable, lawful and justifiable basis to *ask* that he provide identifying particulars. (The statement of claim refers to no basis "to demand", but this changed in submissions to no basis "to ask").

(b) Constable Bhosale had no reasonable, lawful and justifiable basis to exercise a statutory power of arrest against him.

[42] The Crown accept that there was a wrongful arrest and accept that declarations can be made as follows:

(a) Constable Bhosale had no legal authority to *direct* Mr Wright to produce identification or provide his name and address.

(b) Constable Bhosale was acting outside his statutory powers when he arrested Mr Wright for failing to provide his name and address on demand and as a result the arrest was unlawful.

[43] The only difference in this regard between the parties' positions is that Mr Wright wants the first declaration to be broader and to declare that the police have no legal authority even to ask for identification.

[44] Constable Bhosale arrested Mr Wright on the misapprehension that s 114 of the LTA enabled him to direct passengers in a vehicle to provide him with identification and that failure to do so was an offence. Section 114 only empowers an enforcement officer to stop vehicles and demand that the *driver* of the vehicle provide identifying particulars.

[45] The charge was later amended to an offence under ss 113 and 52. Section 113 confers power on an enforcement officer to direct *any person on a road* to give identifying particulars in the exercise of enforcing the LTA or another specified transport law. It is accepted that s 113 also did not apply. Therefore, there was no legal authority for Constable Bhosale to "direct"[3] or "demand"[4] identification particulars to be provided.

[46] It is accepted by Constable Bhosale and the Crown in this case, that the Constable did "direct" Mr Wright to provide identification and that, or "demand", is the language used in the relevant sections. I consider it appropriate to limit the declaration to dealing with the officer having no authority to direct. The question of whether the broader proposition is correct, can wait on a ruling if and when it arises.

[47] I add that I would consider it unwise practice on the part of the police to "ask" a passenger in Mr Wright's circumstances for identification, as the public would tend to view a request from the police in such circumstances as stemming from an entitlement. I note, as a matter of general law, that "a law enforcement officer is entitled to *ask* questions relating to the citizen's identity and otherwise, but the citizen is perfectly entitled to refuse to give the information".[5] That was in the context of the right to silence. Whether that applies in the present context can await

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3 Land Transport Act, s 113(2)(a).

4 Section 114(3)(b).

5 *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 (CA) at 406 per McMullin J. See also *Rice v Connolly* [1966] 2 (QB) at 419. The Crown also refers to the Chief Justice's Practice Note on police questioning.

a case where it is relevant. In my view, declaratory relief should be limited to that reasonably necessary for the case at hand and not stray into broader propositions.

[48] I consider the declarations referred to by the Crown to be appropriate.

[49] Again, I return later to the matter of damages.

False imprisonment/Breach of ss 18 and 22 BORA

[50] Mr Wright pleads that the actions of the police from the time he was seized by Constable Bhosale to the time of his release on bail constituted false imprisonment.

[51] The tort of false imprisonment requires total restraint where the person restrained cannot escape from confinement. There must also be an intention to detain and a detention without lawful justification.[6]

[52] Mr Wright seeks a declaration that the actions of the defendants in detaining, arresting, charging and incarcerating him constituted a breach of his rights under ss 18, 22 and/or 23(2) of BORA.

[53] The Crown accepts that the tort was committed and also that a declaration should be made in the following terms: "The detention of Mr Wright at Auckland Central Police Station for two and a half hours was unlawful and a breach of s 22 of BORA."

[54] There is no doubt that the tort was committed here. Mr Wright was falsely imprisoned from when he was arrested and handcuffed until his release on bail – approximately two hours and 40 minutes.[7] The right not to be arbitrarily arrested or detained under s 22 of BORA was also breached, as was the right under s 18 BORA to freedom of movement. Section 23(2), Mr Wright's alternative pleading, is not applicable as it deals with the separate right to be charged promptly or released.

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6 *The Law of Torts in New Zealand,* above n 1, at [4.5].

7 In *Caie v Attorney-General* [2005] NZAR 703 (HC) at [150], Fisher J said that the period of wrongful imprisonment begins with arrest.

[55] I consider a declaration in the following form is appropriate: Mr Wright was falsely imprisoned from the time of his arrest until his release on bail. This was a breach of ss 18 and 22 of BORA.

Unreasonable search/Breach of s 21 BORA

[56] Mr Wright sought two declarations in this regard:

(a) First, he sought and still seeks a declaration that Constable Bhosale's request for particulars constituted a search and that it was unreasonable in terms of s 21 BORA.

(b) Secondly, he pleaded that, in any event, the pat down search performed on arrest was an unreasonable search, in breach of s 21 of BORA. With regard to this second declaration, Mr Wright accepted in his closing submissions that the pat-down search was reasonable and he was no longer seeking damages for it. I therefore do not consider that point. A breach of s 21 only arises if the search is unreasonable.

[57] Section 21 of BORA provides:

> **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.

[58] As to the first declaration, Mr Wright submits that a request for identification from a passenger of a vehicle, in the context of a traffic stop, is always a search. He says that the search represents interference with the reasonable expectation of privacy. He argues that it may be a reasonable search if it is conducted for a legitimate statutory purpose or if there is informed consent. However, if the search is unrelated to a specific law enforcement purpose or was conducted for a collateral purpose, it will be arbitrary and unreasonable.

[59] Mr Wright relies on a Canadian case, *R v Pinto*[8] which suggested that a request for identification was a search.

[60] I have considered *R v Pinto* and I agree with the Crown that Hill J's statement that "a request for information or identification documentation from a vehicle passenger amounts to a search or seizure within the meaning of s 8 of the Charter", is not supported by authorities. In any event, that decision is not binding or of highly persuasive value to this Court.

[61] I am persuaded by the Crown's submission that the request for particulars was not a search. Tipping J in *Hamed* referred to "search" in its ordinary sense as "consciously looking for something or somebody".[9] Blanchard J referred to the idea of an "examination or investigation or scrutiny in order to expose or uncover."[10] Clearly, some positive act of "searching" is required. I consider that merely requesting identification to be provided does not constitute a search for the purpose of s 21.

Section 23(2) BORA – the decision to charge Mr Wright

[62] Mr Wright seeks declarations:

(a) That he had the lawful right, prior to being charged with an offence, to have the circumstances and legality of his arrest reviewed and considered by an officer with delegated power to determine whether a reasonable prima facie basis existed to support the charge and that right was unlawfully and unreasonably denied to him.

(b) That the decision to charge him constituted a breach of s 23(2) of BORA.

[63] The relevant parts of s 23 of BORA provide:

> **23 Rights of persons arrested or detained**

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8 *R v Pinto* [2003] OJ No 5172 (ON Superior Court of Justice).
9 *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [220].
10 At [165].

> (1) Everyone who is arrested or who is detained under any enactment—
>
> (a) shall be informed at the time of the arrest or detention of the reason for it; and
>
> (b) shall have the right to consult and instruct a lawyer without delay and to be informed of that right; and
>
> (c) shall have the right to have the validity of the arrest or detention determined without delay by way of habeas corpus and to be released if the arrest or detention is not lawful.
>
> (2) Everyone who is arrested for an offence has the right to be charged promptly or to be released.

[64] Mr Wright says that s 23(2) BORA deals with the discretion held by police in the case of every arrest to either charge or release a person. He moves from that to argue that inherent in the wording of s 23(2), where there are obvious and immediately identifiable flaws associated with an arrest, it is incumbent upon the police to review the facts prior to charging an arrested person and to release the person if there is no prima facie case to proceed against them.

[65] Mr Wright says that in exercising the discretion to charge or release, the most relevant consideration is the lawfulness of the arrest. He submits that the discretion should be exercised by the custody supervisor, as opposed to the arresting officer, and that it was not exercised in his case. He says that Constable Bhosale, as the arresting officer, did not provide to Sergeant Field, as the custody supervisor, all the relevant information necessary for him to consider whether to exercise the discretion and release him. Had all the information been provided to Sergeant Field, Mr Wright submits that it would have resulted in his immediate release.

[66] The Crown says that s 23(2) is concerned with the right not to be detained for an unreasonable length of time without being charged and that the subsection does not specify any particular steps that must be undertaken by police in arriving at the decision to lay a charge. Further, the subsection does not require any process of review, let alone by a second person, before an arrested person is charged. The Crown says furthermore that the courts are reluctant to interfere with the process by which the police make charging decisions.

[67] However, the Crown says the police do recognise the good sense in having a review procedure in place for laying charges. The Crown says the Police Manual sets out a process whereby the decision to lay charges is first made by an officer, then checked by a supervisor and then reviewed by a member of the Police Prosecution Service. In this case, the Crown says that Mr Wright's arrest and the proposed charge were reviewed by Sergeant Field in accordance with the standard procedures. Whilst it denies that there is a legal right to a review, the Crown submits that if there were, there was no breach of such right.

[68] In terms of the procedure surrounding arrest envisaged by BORA, the first phase is encapsulated by s 23(1) whereby the arrested or detained person has to be informed of his or her rights. Section 23(2) represents the second phase that requires the law enforcement authorities to make a prompt decision to charge the person arrested; to in fact charge that person or to release the person.[11]

[69] The purpose of s 23(2) is to ensure that an arrested person "cannot … be held in custody at the convenience of the detaining authorities".[12] The s 23(2) obligation is part of a broader course of conduct which the Court of Appeal has made clear, is "to ensure that an arrested person is not held in custody at the will of the police, but is entitled either to be released or to be brought before a Court; for it is the Court that is the proper authority to decide whether there is to be continuing custody".[13]

[70] The word "promptly" carries a sense of urgency[14] but it does not however convey "immediacy".[15] Some time is allowed to lapse before a decision to charge can be made. In determining whether or not a prompt charging has occurred, a realistic assessment of the facts and circumstances of each individual case is required.[16]

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11 The terminology "first phase", "second phase" is used by Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: a commentary* (2nd ed, 2015, LexisNexis, Wellington) at [20.9.1].
12 White Paper on the Bill of Rights, cited in Butler and Butler at [20.9.8].
13 *R v Rogers* (1993) 1 HRNZ 282 (CA) at 284.
14 *R v Te Kira* [1993] 3 NZLR 257 (CA) at 270.
15 *R v Rogers* at 284.
16 At 284.

[71] In my view, s 23(2) provides a temporal right. It does not provide for processes that the police must carry out in deciding whether or not to lay any charge. The subsection does not give Mr Wright a lawful right to have the circumstances and legality of his arrest reviewed or considered in a particular way, to determine whether the facts support a charge.

[72] Mr Wright has not suggested that s 23(2) was breached because he was not charged promptly, the right which it clearly does give. I consider that s 23(2) is not engaged in this case.

[73] This is not to say that the review process is not important. The police have an established procedure to ensure "good charging decisions are made".[17] A decision to charge can be checked by a supervisor. Finally, the decision to prosecute will be independently reviewed by police prosecutors who have the discretion to amend, withdraw and to file additional charges.[18] In this case, Mr Wright's arrest and the question of whether to lay a charge were reviewed by Sergeant Field. The fact that the error in the arrest/charge was not picked up (despite the review procedure being followed and regardless of who was at fault) does not constitute a breach of s 23(2).

[74] I therefore conclude:

(a) Mr Wright did not have a lawful right, prior to being charged with an offence, to have the circumstances and legality of his arrest reviewed and considered by an officer with delegated power to determine whether a reasonable prima facie basis existed to support the charge.

(b) In deciding to charge Mr Wright, the police did not breach his rights under s 23(2) of BORA.

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17 Police Intranet chapter on charging decisions.

18 This process is provided in the relevant police manual.

Failure to disclose information regarding basis of charge/breach of s 24(a) BORA

[75] Mr Wright seeks a declaration that the information provided to him regarding the lawful basis of the charge against him at the time he was bailed, was insufficient to fulfil his rights under s 24(a) of BORA. He also pleads (without reference to any particular point of time) that the defendants' refusal to disclose the basis for asserting that the first defendant's demand was a "lawful" one, represented a breach of s 24(a) BORA.

[76] The relevant section provides:

> **24 Rights of persons charged**
>
> Everyone who is charged with an offence—
>
> (a) shall be informed promptly and in detail of the nature and cause of the charge;
>
> …

[77] Mr Wright submits that the police failed to disclose to him, as required by s 24(a), the detailed nature and cause of the charge. He says that he left the police station in complete ignorance of the lawful basis of the charge against him. He submits that the statutory intention of s 24(a) is that no person should be charged without both them and the police understanding what law the person is said to have broken.

[78] The Crown submits that the reason for Mr Wright's arrest, albeit a reason based on a misunderstanding of the law, was made very clear to him. At the time of his arrest, Mr Wright was in no doubt as to what he was being arrested for, namely breach of s 114 LTA. Further, when he was being processed at the police station, he was handed documents that revealed the nature and cause of the charge in that the Custody Summary says, "Failed to give name and address on demand". The Crown submits that an accused may be informed of the nature and cause of a charge at several points during the prosecutorial process and that the information provided at the first appearance on 9 May 2013 in combination with that provided at the police station was sufficient to satisfy s 24(a).

[79] The Crown submits that Mr Wright's request for disclosure under the Criminal Disclosure Act 2008 (relevant to the issues around the reasons to be informed promptly) would have been unsuccessful because he was not seeking "disclosure" but "further particulars of the charge". It says that Mr Wright was aware from the outset that the information he was seeking to have disclosed did not exist. Further, Mr Wright was fully aware of the nature and cause of the charge against him as he knew that the charge could not be sustained.

[80] Leading commentators on the Bill of Rights state that the purpose of s 24(a) is to ensure that a person charged with an offence is informed in a timely manner of what he or she is charged with and why.[19] Section 24(a) mirrors the now repealed s 17 of the Summary Proceedings Act 1957 and s 329 of the Crimes Act 1961. Under those two provisions, the law required the charging document to contain "particulars sufficient to alert a defendant as to the exact offence charged and the transaction upon which it is based".[20]

[81] Section 24(a) has been said to protect several interests through the swift and specific notice of a criminal charge:[21]

> It: (1) permits an accused at the outset to challenge the authority of state officials to subject him or her to the criminal process; (2) aids in the preparation of a defence; (3) allows the defendant to know his or her accuser; and (4) defines the scale of criminal proceedings.

[82] Fisher J in *Caie v Attorney-General* took the view that the obligation in s 24(a) arises at an intermediate point between arrest and appearance in court, namely when the prosecution formally commits itself to the bringing of a particular charge.[22] The Judge said:[23]

> By one means or another the suspect needs to know both the act or omission alleged and the category of offence which it is said to constitute.

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19 Butler and Butler, above n 11, at [22.3.3].
20 Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, 2003) at 600.
21 At 600.
22 *Caie v Attorney-General* [2005] NZAR 703 (HC) at [114].
23 At [115].

The Judge held there was a breach of s 24(a) as at the time Mr Caie was charged, he was not informed as to the factual basis for the charge. That conclusion was reached despite the fact that Mr Caie found out the factual basis from a solicitor in court the day after he was charged.

[83] In *R v Gibbons,* Goddard J concluded that a person is "charged" with an offence "when the prosecuting authority formally advises an arrested person that he is to be prosecuted and gives him particulars of the charges he will face".[24] The Judge considered that:[25]

> An accused may be informed of the nature and cause of a charge at several points during the prosecutorial process. An accused may be told of the nature and cause of a charge soon after he is informed that he is to be prosecuted. The same accused may be informed in more detail when an information is sworn and read to him in open Court.

[84] The level of detail required will vary with the circumstances of the case and the stage of the prosecutorial process. Citing this case, Butler and Butler comment that the s 24(a) right is therefore "ambulatory", meaning that the right to be informed of the charge continues up to, and during, the trial.[26] Mr Gibbons was told in some detail of the nature of the charges at the time he was charged. Therefore, there was no breach of s 24(a).

[85] The right to be informed "in detail" of the "nature and cause of the charge" requires elaboration. The "nature" of the charge refers to the offence it is alleged the person has committed. The "cause" of the charge relates to the facts alleged to give rise to the offence.[27]

[86] In the circumstances of this case, I consider s 24(a) to have been breached. As Goddard J noted in *R v Gibbons,* the level of detail needed to satisfy s 24(a) varies from case to case. For some types of offending, a person charged may be adequately informed in detail of the nature and cause of the charge without reference to a specific legislative provision. However, in Mr Wright's case, the Custody Charge Sheet and the Police Bail Bond form that disclosed "B109 failed to give name and

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24 *R v Gibbons* [1997] 2 NZLR 585 at 595.
25 At 596.
26 Butler and Butler, above n 11, at [22.3.6].
27 Butler and Butler, above n 11, at [22.3.9].

address on demand" were insufficient to inform Mr Wright in detail of the nature and cause of the charge. The "cause" of the charge is clear but Mr Wright is left in the dark regarding why the failure to give his name and address was an offence. The information disclosed did not inform him *why* he was charged. It is my understanding that Mr Wright was not told of s 52(1)(c) or any other section at the police station. I do not consider the police can rely on the oral reference to s 114 made by Constable Bhosale during the arrest.

[87] It is no defence that Mr Wright (by virtue of being a lawyer) knew or said he knew the charge was baseless. Another person in Mr Wright's position may not have been able to prepare a defence and make relevant decisions (such as whether to retain a lawyer or regarding the need for further disclosure) based on the information disclosed.

[88] The right under s 24(a) did not cease to apply when Mr Wright left the police station. On 9 May 2013, an information sheet and summary of facts were provided to Mr Wright. Both documents referred only to s 52(1)(c) LTA and not ss 113 or 114. Section 52(1)(c) is not sufficient on its own to disclose the nature of the charge. However, it seems that Mr Wright was informed by the police prosecutor that the charge relied on s 113. I consider that was then sufficient to inform Mr Wright in detail of the nature and cause of the charge. The fact that the details of the charge were wrong is not relevant to s 24(a). At least Mr Wright then knew what he was facing. I therefore consider that s 24(a) was breached up until 9 May 2013.

[89] I consider it is appropriate to make a declaration that the information provided to Mr Wright regarding the basis of the charge against him at the time he was bailed, and up until 9 May 2013, was a breach of s 24(a) of BORA.

General damages

Submissions

[90] Mr Wright claims general damages in separate sums for each cause of action on the basis that he suffered discomfort, fear for his well-being and humiliation as a consequence of the various acts, with specific reference to the fact that the wrongful

arrest took place in public and in front of his friends. He says also that Constable Bhosale acted in bad faith and the failure of the Crown to have standardised processes in place for training and to review mistakes constitutes oppressive, arbitrary and unconstitutional action on behalf of the Crown, for both of which exemplary damages ought to be payable. I return separately to exemplary damages.

[91] Mr Wright seeks general damages of $141,000 from both defendants in his statement of claim, but in closing submissions refers to total general damages of $40,000 being sought from the Crown (only) as follows:

(a) Wrongful arrest: $10,000;

(b) Unreasonable search (for the request to produce identifying particulars): $5,000 general damages.

(c) False imprisonment: $5,000 (without taking into account aggravating factors which he says go to exemplary damages).

(d) Failure to properly exercise discretion to release without charge: $5,000.

(e) Plainly bad prosecution process (no initial review of the charge, the prosecutor ignored two memoranda highlighting the flaws in the charge, ignored a formal request for details of the charge to be provided under the Criminal Disclosure Act and failed to respond to formal application for orders under that Act): $15,000.

[92] Mr Wright raises a number of aggravating factors, particularly systemic failure on the part of the Crown and the four month period before the charge was dropped, but seems to reserve these for his exemplary damages claim.

[93] Mr Wright submits that the range of damages that have been awarded in cases like this is a significant economic disincentive to civil rights litigation. He argues that the law is overdue for a reappraisal of damages in these cases so that the amount awarded can incentivise the Crown to put more resources into police training and

better charging processes in order to avoid future claims. He says also that the quantum of damages disincentives lawyers from representing claimants such as himself.

[94] The Crown submits that damages of around $5,000 is sufficient in this case.

[95] The Crown cites a number of cases and submits that where a plaintiff brings several causes of action, the remedy is usually an award of damages encompassing all causes of action. It says that the tortious wrongful arrest and false imprisonment causes of action also constitute breaches of BORA. It submits that where interests protected by tort and BORA coincide, there is to be no duplication in the damages awarded.

[96] The Crown submits that if this Court finds breaches of the rights in ss 23(2) and 24(a), then a nominal amount is sufficient to vindicate those rights.

[97] The Crown accepted that general damages would not be reduced because of any alleged contributory conduct on Mr Wright's part. The Crown says that Mr Wright's confrontational and aggressive approach towards Constable Bhosale contributed to the escalation of the situation which culminated in his arrest which they say is relevant to whether exemplary damages should be awarded.

[98] Regarding whether the fact that the police persevered with charges against a wrongfully arrested person is an aggravating factor, the Crown refers to comments that Fisher J made in *Caie v Attorney General* that in the absence of male fides, merely persevering in a charge is insufficient to aggravate damages.[28]

Relevant law as to damages in tort and under BORA

[99] Assault and battery, wrongful arrest and false imprisonment are actionable torts. False imprisonment and wrongful arrest are also breaches of BORA. In general, a court will award damages in tort to compensate a plaintiff for loss suffered as a result of the wrongful conduct of a defendant.[29] The plaintiff in an action for

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[28] *Caie v Attorney General* [2005] NZAR 703 (HC).
[29] *Couch v Attorney-General* [2010] NZSC 27, [2010] 3 NZLR 149 at [194].

false imprisonment is entitled to recover compensatory damages for distress, humiliation or fear. Consequential loss can also be recovered if it is not too remote.

[100] Compensation is also available as a public law remedy for an unjustified infringement of the guaranteed rights and freedoms of BORA.[30] The Court of Appeal affirmed that:[31]

> 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.

[101] However, there can be no expectation of compensation as of right for breaches of BORA.[32] What is an appropriate remedy to best vindicate the right infringed is a matter left to a judge on a case by case basis.[33] Whether or not compensation is appropriate depends "on the nature of the right and of the particular infringement, and the consequences of the infringement".[34]

[102] In regard to the quantum of compensation as a public law remedy, the emphasis must be on the compensatory and not the punitive element. The objective is to "affirm the right, not punish the transgressor".[35]

[103] In *Manga v Attorney-General,* Hammond J suggested that where there is concurrent liability in private and public law, the burden is on the plaintiff to establish that the application of tort principles would yield inadequate compensation before *Baigent* compensation is awarded.[36] Where breaches of BORA rights and tort claims arise out of essentially the same facts, the same approach to the fixing of compensation applies whether the pleading is based upon BORA or torts. The majority of the Court of Appeal in *Dunlea v Attorney-General* referred to other

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30 *Simpson v Attorney-General (Baigent's Case)* [1994] 3 NZLR 667 (CA).
31 At 702.
32 At 703: "A rights-centred approach does not necessarily require a remedy in the form of damages or other compensation".
33 At 692.
34 At 718.
35 At 703 per Hardie Boys J.
36 *Manga v Attorney-General* [2000] 2 NZLR 65 (HC); cited in Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, 2003) at 826.

jurisdictions where tort principles were considered in calculating damages in breach of rights claims.[37]

[104] The approach in *Manga* was endorsed in *Attorney-General v Hewitt* where Randerson and Neazor JJ observed:[38]

> [69] Where a statement of claim pleads causes of action based on breach of the NZBORA as well as other causes of action, we do not read the comments of Cooke P (as he then was) in *Baigent's Case*, at p 678; p 59 as authority for the proposition contended for by Mr Ellis. *As we see it, Cooke P considered that one could first approach either the public or private law remedies provided there was no element of double recovery.* This is evident from the following passage:
>
> > 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. A legitimate alternative approach, having the advantage of simplicity, would be to make a global award under the Bill of Rights and nominal or concurrent awards on any other successful causes of action.
>
> [70] In our view, accepting the views of the majority in *Baigent's Case*, we consider that either of the two approaches identified by Cooke P is appropriate, depending on the facts of the case and the way the claim is pleaded. We consider the Courts ought to take a flexible approach to do justice and to meet the circumstances of the particular case, especially in the early stages of exploring and developing the ways in which the rights afforded by the Act should be vindicated or made effective.
>
> (emphasis added)

[105] In *Attorney-General v Hewitt*, compensation was awarded for unlawful arrest and false imprisonment in tort. The judges did not see a need for additional or concurrent compensation to mark the violation of s 22 of BORA.[39]

[106] The authors of *The New Zealand Bill of Rights* also endorsed the approach in *Manga.*[40]

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37 *Dunlea v Attorney-General* [2000] 3 NZLR 136 (CA) at [38]-[39].
38 *Attorney-General v Hewitt* [2000] 2 NZLR 110 (HC) at [69]-[70].
39 At [73].
40 *The New Zealand Bill of Rights*, above n 36, at 826.

Relevant case law

[107] In *Caie v Attorney-General,* Fisher J found that Mr Caie was falsely imprisoned for about 20 hours and awarded $10,000 in compensation.[41] In that case, reasons for the arrest were not given at the time of arrest which made the arrest and subsequent imprisonment unlawful. Further, there was a breach of s 24(1)(a) BORA as Mr Caie was left in a state of ignorance as to the factual basis for his arrest and charge. However, as this right was only breached during the period of false imprisonment, it did not create any prejudice in addition to the ongoing false imprisonment. Therefore, no additional compensation was awarded for the breach of this right.[42] On appeal, the Court of Appeal stated, without hearing full arguments on the matter, that "an award of $10,000 was, in the circumstances, perfectly fair, given that the period of unlawful detention was less than a day and given that there were in fact grounds for the arrest."[43]

[108] In *Neilsen v Attorney-General,*[44] Mr Neilsen was unlawfully arrested and detained for approximately 1.5 hours. The Court of Appeal held that there were no aggravating features accompanying his treatment while in custody and $5,000 was awarded in compensation.

[109] In *Slater v Attorney- General (No 2),* Mr Slater was assaulted, restrained, handcuffed and detained for 7.5 hours by the police.[45] He was then released without charge. Keane J held that the arrest, subsequent restraint and the use of force (handcuffing, wrist and ankle strapping) was unlawful and a breach of s 22 BORA. In setting compensation at $5,000**,** the Judge considered that the police acted in good faith and that their want of authority was "momentary". Furthermore, Mr Slater, by overreacting aggressively, in contrast to his associate, contributed to his own arrest and detention.[46] Keane J observed that in determining the quantum of an award of damages for unlawful arrest and false imprisonment, the assessment:[47]

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41 *Caie v Attorney-General* [2005] NZAR 703 (HC) at [150].
42 At [142].
43 *Caie v Attorney-General* [2006] NZAR 379 (CA) at [20].
44 *Neilsen v Attorney-General* [2001] 3 NZLR 433 (CA).
45 *Slater v Attorney- General (No 2)* HC Auckland CIV-2005-404-3728, 30 August 2006.
46 At [14].
47 At [6].

> … embraces the extent to which the one whose rights were infringed contributed. If he or she acted unreasonably, provocatively or aggressively and the police, on the instant, made an error of judgment, that can result in any award of damages being reduced even to a nominal award.

[110] The Judge concluded that Mr Slater was only entitled to damages in tort but that if public law damages were also awarded, $5,000 was also sufficient to vindicate the s 22 right.[48]

[111] In *Attorney-General v Hewitt,* Mr Hewitt was charged with male assaults female and was in custody for 7.5 hours.[49] Compensation of $5,000 for an unlawful and arbitrary arrest pursuant to s 22 BORA and false imprisonment was awarded. The High Court noted that there was no evidence that the police acted in bad faith or with improper motives and that the process did not cause Mr Hewitt any unusual distress or suffering.[50]

[112] In *Craig v Attorney-General,* damages of $5,000 were awarded for wrongful arrest and false imprisonment for a period of about two hours.[51] Tompkins J envisaged the $5,000 to "embrace both compensatory aggravated and exemplary damages". The Judge took into account the unlawful search upon arrest and the conduct of the police in not acknowledging that the charge was unjustified for 2.5 months after the charge was laid.[52]

[113] In *Attorney-General v Niania,* damages of $5,000 were awarded for false imprisonment for a period of 5.5 hours.[53] Tipping J reduced the damages from $10,000, saying that amount was substantially greater than warranted in the circumstances.[54]

[114] In *Howley v Attorney-General*,[55] $4,000 was awarded in damages for about an hour of false imprisonment and unlawful arrest. The plaintiff was a barrister. The Judge considered this amount to give adequate recognition to the heightened sense of

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48 At [15].
49 *Attorney-General v Hewitt* [2000] 2 NZLR 110 (HC).
50 At [65].
51 *Craig v Attorney-General* (1986) 2 CRNZ 551 (HC).
52 At 566.
53 *Attorney-General v Niania* [1994] 3 NZLR 106 (HC).
54 At 114.
55 *Howley v Attorney-General* HC Auckland A586/85, 16 January 1989.

humiliation and outrage felt by the plaintiff because of his occupation and knowledge of the law.

[115] The Crown has also referred to *Thompson v Attorney-General*, a District Court decision involving similar facts.[56] The plaintiff there was unlawfully arrested, assaulted and then detained at the police station for two to three hours. The charge proceeded to a hearing over two months after arrest at which time the charge was dismissed. Judge Lawson awarded $5,000 in compensatory damages which took into account the fact that the plaintiff was wrongly subject to the criminal justice process. However in setting that amount, the Judge also considered the fact that the plaintiff brought the incident to some extent upon himself. No exemplary damages were awarded.

Assessment of general damages in this case

[116] The approach I consider best fits with the authorities and is clearest to follow is to first consider the appropriate level of general damages in tort for false imprisonment, unlawful arrest and assault and battery. I need to do that in keeping with standard practice, by reference to analogous cases. Secondly, I consider whether those BORA breaches which are not duplicated in tort, require further compensation.

[117] I accept, as does the Crown that Mr Wright suffered damage as a consequence of the torts committed, including discomfort, fear for his well-being and humiliation.

[118] Assessing the level of general damages to be awarded in this case is made difficult by the lack of recent case law in this area and the lack of any guidance as to the effect of inflation on the level of damages.

[119] *Thompson* and *Craig* are the two cases that, in broad terms, are similar in resonance to this one. In both cases, $5,000 was awarded. This case is slightly more

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[56] *Thompson v A-G* [1994] DCR 448 (DC).

serious than *Thompson* in that Mr Wright was subject to a charge for a longer period of time. *Howley* is also helpful, though again less serious than this case.

[120] *Craig* involved two hours of false imprisonment. Similarly, there was a false arrest and a body search. The police in *Craig* did not acknowledge that the charge laid was unjustified, for about two and a half months. In this case, Mr Wright was suspended in the criminal justice system for four months. That additional period of time is balanced against the actions of the police in *Craig* in attempting to "buy off" any possible claim arising out of the unlawful arrest. That behaviour seriously aggravated the damages awarded. The amount of damages in *Craig* also took into account the plaintiff's conduct which in part provoked the arrest. In this case, the Crown does not suggest that Mr Wright "brought this on himself".

[121] I note that the full Court of Appeal in *Neilsen* stated:[57]

> We are satisfied that in accordance with the general pattern of awards in a case such as this, involving a brief period of detention where there are no other aggravating features, the appropriate award of general damages is $5000.

[122] Given that there are aggravating features in this case and the period of detention was longer than in *Neilsen,* the damages awarded ought to be higher than $5,000.

[123] In terms of the Crown's submission that merely persevering in a charge is insufficient to aggravate damages, citing *Caie,* I prefer the contrary view expressed in *Thompson.* Pursuing a baseless charge can aggravate general damages, even in the absence of mala fides (which would be relevant to exemplary damages). In this case, after being discharged on bail, Mr Wright was subject to a criminal charge that had no legal basis for four months before the charge was dismissed. During that period, Mr Wright attempted to draw the error to the attention of the police without success. His memorandum to the District Court dated 7 May 2015 set out the illegal basis of the charge based on s 114. His memorandum dated 9 May 2015 set out the reasons why s 113 cannot form the basis of his charge. The fact that it took four months for the charge to be dismissed is relevant in setting damages.

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[57] *Neilsen v Attorney-General* [2001] 3 NZLR 433 (CA) at [51].

[124] In *Craig v Attorney-General,* $5,000 was considered appropriate for two hours of false imprisonment in 1986. Almost 20 years later in *Slater,* $5,000 was awarded for 7.5 hours of false imprisonment. The judgment did not refer to inflation. It is now a further nine years since *Slater* was decided. In my view, it is inappropriate not to make some allowance for inflation.

[125] Mr Wright submits that the Crown has "misinformed and mis-trained" Constable Bhosale on the extent of his powers and that this failure represents a significant aggravating factor. The Crown relies on statements from *Hill v Chief Constable of West Yorkshire,* and submits that the deployment of resources in the police is not something that the courts will readily interfere with.[58] That case was decided in a completely different context to the present. It was a claim against the police for negligence in failing to apprehend the offender who killed the plaintiff's daughter. In my view inadequate training cannot uplift general damages. It could be relevant to exemplary damages.

[126] I take into account that because of Mr Wright's knowledge of the law, he would have felt greater humiliation and outrage than a person who did not have a legal background. This factor was taken into account in *Howley* in assessing the level of damages to be awarded.

[127] Regarding Mr Wright's attitude at the time he was arrested, he may well have been aggressive and confrontational. However, the Crown does not suggest reducing the amount of general damages based on Mr Wright's contributory conduct.[59] Further, it was not unreasonable for Mr Wright to be indignant in the circumstances. He was being arrested, imprisoned and charged over nothing. I do not consider the fact that Mr Wright had a particular negative mind set towards the police based on past experiences was relevant one way or the other.

[128] Taking into account these factors and giving some recognition to inflation, I fix $12,000 in general damages in tort for the false imprisonment, arrest, assault and battery.

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58 *Hill v Chief Constable of West Yorkshire* [1989] 1 AC 53 (HL) at 65.
59 Closing submissions at [11.24].

[129] In this case, apart from breaches of tort, I have found there was also a breach of s 24(a) in failing to disclose the nature and cause of the charge against Mr Wright.

[130] Following *Manga,* the burden is on Mr Wright to establish that compensation in tort would yield inadequate compensation before *Baigent* compensation is considered. In most cases, breaches of BORA and tort claims arise out of the same facts. Where this is the case, double recovery would not be appropriate.[60] The case at hand is different. The BORA breach of s 24(a) extends beyond the tortious breaches.

[131] It is important to recognise the distinction between an award of damages in tort and compensation for breach of BORA. The former is a private law remedy to compensate for Mr Wright's loss. *Baigent's* compensation is a public law claim against the State which is to give effect to, or vindicate, the fundamental rights preserved by BORA.[61] If BORA is to be more than an empty statement, the courts must be able to grant appropriate and effective remedies where rights have been infringed.[62]

[132] It seems irrelevant that Mr Wright knew or considered he knew that there was no legal basis for the charge. He was entitled to be informed of the details. Further, had full particulars of the charge been disclosed at the time of charge or at the first court appearance, the police might have realised the error earlier. The matter did not need to drag on for four months.

[133] To adequately affirm the s 24(a) right, public law compensation is required in the sum of $2,000.

Exemplary damages

Submissions

[134] With regard to exemplary damages, Mr Wright highlights the following factors which he says deserve condemnation:

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60 As recognised by Cooke P in *Baigent's Case* and in *Attorney-General v Hewitt.*
61 *Attorney-General v Hewitt,* above n 49, at [68].
62 *Baigent's case,* above n 30, at 702.

(a) Bad faith: Mr Wright accepts that Constable Bhosale might have been acting in good faith at the time of arrest but says that his repeated refusal to check the wording of s 114 refutes any possible suggestion of honesty and good faith. Mr Wright went beyond this, at points, to allege for example that Constable Bhosale deliberately tricked Sergeant Field and was "bloody minded". He relies on the fact that Constable Bhosale had asked hundreds of people for identification until the error came to his attention in this case.

(b) A deliberate breach of s 24(a): Mr Wright says that Constable Bhosale consciously and deliberately contravened this right over a five month period. Mr Wright submits that it was not up to the disclosure department to disclose the basis of the police case, it was Constable Bhosale's responsibility as "he was the only one that knew the exact facts and his own motivation for demanding identification".

(c) The defective training and procedure manuals that encouraged Constable Bhosale to develop his unlawful routine.

(d) The absence of adequate pre-charge procedures to ensure that the charge had a legal basis.

(e) The Crown's incompetence and extraordinary conduct in failing to check the legal basis of the charge that kept Mr Wright suspended in the criminal justice system for four months.

[135] He seeks a total award of $85,000 in exemplary damages.

[136] Mr Simmonds, for Constable Bhosale, submits that the facts of this case are not unique and do not call for a reappraisal of damages awards. He submits that there is no evidential basis to suggest that Constable Bhosale was acting other than in good faith at the time of arrest and at all times subsequent. He says that the decision to charge Mr Wright cannot be sheeted home to Constable Bhosale as he

was not the ultimate decision maker. Mr Simmonds invites the court to find that Constable Bhosale is not the bully that Mr Wright alleges him to be.

[137] The Crown is firmly against the granting of exemplary damages in this case. It submits that the threshold of "subjective recklessness" set by the Supreme Court in *Couch v Attorney-General*[63] cannot be met as there has been no deliberate and outrageous pursuit of a charge with actual knowledge of the legal error.

[138] The Crown objects to Mr Wright's pleading that the Crown has "misinformed and mis-trained" Constable Bhosale on the extent of his powers and that this failure represents a significant aggravating factor. The Crown subjects that this allegation of mis-training is essentially a negligence argument and that it is inappropriate to avoid the rigour of a proper duty of care analysis by pleading the alleged negligence as an aggravating factor going to the level of damages. It submits that there is no basis to uplift any award of damages for training issues as there is evidence that the training manuals are continually improved and updated. Further, the deployment of resources in the police is not something that the courts will readily interfere with, citing *Hill v Chief Constable of West Yorkshire*.[64]

[139] The Crown submits that Constable Bhosale was not misinformed and mis-trained and that the training documentation provided sound advice. It says that there were no errors in processing the arrest into a charge and that whilst the error in this case was not picked up, it does not mean that the process itself is defective. The Crown does not consider that there are circumstances in this case that warrant exemplary damages being awarded.

[140] The Crown says that Mr Wright's confrontational and aggressive approach towards Constable Bhosale contributed to the escalation of the situation which culminated in his arrest. They accepted this was not relevant to general damages but they say it is relevant to whether exemplary damages should be awarded.

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63 *Couch v Attorney-General* [2010] NZSC 27, [2010] 3 NZLR 149.
64 *Hill v Chief Constable of West Yorkshire* [1989] 1 AC 53 (HL) at 65.

[141] In supplementary submissions, the Crown said that if exemplary damages are awarded against Constable Bhosale, the Crown will not undertake to pay exemplary damages on a vicarious basis.

Relevant law

[142] The common law has long recognised that in appropriate circumstances a court may award exemplary damages, not to compensate the plaintiff for the harm suffered, but to punish the defendant for the wrongful conduct.[65] Exemplary damages for false imprisonment may be appropriate where the defendant's conduct is so serious as to be deserving of punishment and where compensatory damages are not sufficient for this purpose.[66]

[143] The Privy Council in *Bottrill v A* held that the conduct must satisfy a criterion of outrageousness so that exemplary damages are necessary to punish, to deter and to serve as an emphatic vindication of the plaintiff's rights.[67]

[144] In *Couch v Attorney-General,* the Supreme Court by majority overruled that decision and reinstated the view of the Court of Appeal in *Bottrill.* Tipping J summarised the majority judges' position:[68]

> [178] Exemplary damages are anomalous. Civil remedies are not generally designed to punish. The reach of exemplary damages should therefore be confined rather than expanded. Outrageousness is not a satisfactory sole criterion. The concept lacks objective content and does not contain sufficient certainty or predictability. Exemplary damages should be confined to *torts which are committed intentionally or with subjective recklessness, which is the close moral equivalent of intention.*
>
> (emphasis added)

Discussion

[145] *Couch v Attorney-General* makes it clear that exemplary damages are anomalous and should be confined to torts committed intentionally or with subjective recklessness. That high standard is not met here.

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65 *Couch v Attorney-General,* above n 63, at [194].
66 *The Law of Torts in New Zealand,* above n 1, at [4.5.03].
67 *A v Bottrill* [2002] UKPC 44, [2003] 2 NZLR 721 at [22], [29].
68 *Couch v Attorney-General,* above n 63.

[146] The torts were not committed intentionally. I am satisfied that Constable Bhosale was operating under a mistake. I formed the view of all of the police witnesses that they were genuinely trying to do their job as well as possible. In particular, Constable Bhosale came across as an earnest, conscientious young officer who was under a grave misapprehension in this instance. I do not consider there was any bad faith whatsoever on his part. I accept his account of what happened at the police station and I accept that he remained unaware of his error. Past the point of what happened at the police station, matters were out of Constable Bhosale's hands. I consider it unreasonable of Mr Wright to communicate by email with Constable Bhosale beyond that. Mr Wright should have known perfectly well to liaise with the prosecution team and was specifically asked to do so in the initial disclosure provided to him on 9 May 2013. There was a series of completely unacceptable errors on the part of the police but I draw the line at any finding of intentional committing of a tort or subjective recklessness.

[147] It is a bit extraordinary that Constable Bhosale had been following the same practice for the four years he had been in the police force, without anyone picking up on the error, but I am satisfied he was acting in good faith.

[148] I reject Mr Wright's argument that *Couch* is limited to negligence or only applies to unintentional torts. There is nothing in *Couch* that says so. It is not the way in which *Couch* has been interpreted. I consider the position is to the contrary on a straight-forward reading of the judgment and statements such as that of Tipping J cited above.

[149] The test in *Couch* applies to exemplary damages in tort generally.

[150] For the sake of completeness, as some of Mr Wright's submissions hinted at this, it does not follow because the torts of assault, battery and false imprisonment are intentional torts, that these were "torts committed intentionally and therefore subject to exemplary damages" per Tipping J. Intentional torts are only so classified because one of the elements of them is an intention to do something, as compared to an unintentional tort, such as negligence, which is essentially one of inadvertence.[69]

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[69] *Couch*, at [172].

The Supreme Court was referring to any tort and saying it had to be committed intentionally, or with subjective recklessness, to be considered for exemplary damages.

[151] I also do not accept that *Rookes v Barnard* still applies, as Mr Wright argued.[70] That case, like *Bottrill* in the Privy Council, has been superseded it seems to me and I must follow the binding authority of *Couch*.

[152] Mr Wright argued (not in written submissions but in oral reply submissions) that there is a distinction to be made between errors of law and errors of fact on the part of the police and that exemplary damages are more readily available for errors of law. He submitted that the police are assumed to know the law and therefore an error of law attracts a higher penalty. Mr Wright says there was an error of law in this case (which I accept) and he submits that *Caie* is the only other case where that has been so. He relies for his interpretation on a passage of the judgment of Tipping J in *Couch* at [146]. In my view that passage had no relevance to the point he was making. I do not agree that Mr Wright's interpretation of that passage is a fair one. He confirmed that there was no specific authority to support his point, other than the passage he took me to. I consider there is no basis for writing into the test in *Couch*, a distinction based on whether the police erred in law or in fact.

[153] I refer to the various aggravating factors that Mr Wright contended should lead to an award of exemplary damages or should expand that award.

[154] First, the fact that he was left facing the charge for four months is something I have taken into account in my assessment of general damages. It makes no difference to my view that exemplary damages are not applicable here. That delay and the process that followed was quite unacceptable but it was not intentional or reckless.

[155] Secondly, I agree with Mr Wright that the training manual on which Constable Bhosale was taught and relied was somewhat ambiguous as to s 113. The first page gave the impression that any officer could, under s 113(1), direct any

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[70] *Rookes v Barnard* [1964] AC 1129 (HL).

person on any road whether or not in charge of any vehicle to give identification details. That was misleading. However, the second page then said that an officer could use s 113 "**only** if you believe an offence under the Transport laws, or an offence involving the use of the vehicle you've stopped, has been committed". Sergeant Bradley, the Practice Leader at the Royal New Zealand Police College, gave evidence that the manual was just a lesson note and only one part of the training programme that all officers received. The other officers who gave evidence in this case were quite clear that there was no right to require identification of Mr Wright. Further, the police have, albeit belatedly, clarified the manual. I do not consider that any deficiency in the manual or in Constable Bhosale's training would meet the *Couch* test.

[156] Mr Wright made a number of points in closing submissions as to other deficiencies in the training manual, including there being no reference to s 24 BORA. As the Crown pointed out, there was no pleading to that effect, nor was it raised until closing submissions, so there was no opportunity for the Crown to call relevant evidence. I take no account of this or similar points.

[157] Exemplary damages are not payable in this case.

Conclusion

[158] I make the following declarations:

(a) When Constable Bhosale seized Mr Wright's hand, handcuffed him and searched him, that constituted a battery.

(b) Constable Bhosale had no legal authority to direct Mr Wright to produce identification or provide his name and address.

(c) Constable Bhosale was acting outside his statutory powers when he arrested Mr Wright for failing to provide his name and address on demand and as a result the arrest was unlawful.

(d) Mr Wright was falsely imprisoned from when he was arrested and handcuffed until he was released on bail. This was a breach of ss 18 and 22 of BORA.

(e) The information provided to Mr Wright regarding the basis of the charge against him at the time he was bailed, and up until 9 May 2013, was a breach of s 24(a) of BORA.

[159] I have also come to the following conclusions:

(a) Constable Bhosale's request for particulars did not constitute an unlawful search pursuant to s 21 of BORA.

(b) Mr Wright did not have a lawful right, prior to being charged with an offence, to have the circumstances and legality of his arrest reviewed and considered by an officer with delegated power to determine whether a reasonable prima facie basis existed to support the charge.

(c) In deciding to charge Mr Wright, the police did not breach his rights under s 23(2) of BORA.

[160] The defendants are to pay general damages in the sum of $14,000. No award is made of exemplary damages.

Hinton J