

**IN THE DISTRICT COURT
AT ROTORUA**

CIV-2006-063-384

BETWEEN

SIMON AART OOSTERMAN
Plaintiff

AND

ATTORNEY-GENERAL OF NEW
ZEALAND FOR AND ON BEHALF OF
THE NEW ZEALAND POLICE
Defendant

Hearing: 21-23 April and 23 June 2008

Appearances: G Minchin for the Plaintiff
SE McKenzie and CJ Curran for the Defendant

Judgment: 1 July 2008

RESERVED JUDGMENT OF JUDGE C J McGUIRE

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[1] The plaintiff brings a civil action against the Attorney-General in respect of the New Zealand alleging breach of his rights under s 9 of the New Zealand Bill of Rights Act which enshrines the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment; breach of s 23(5) of the New Zealand Bill of Rights Act which enshrines the right for everyone deprived of liberty to be treated with humanity and with the respect for the inherent dignity of the person; and for assault.

[2] The plaintiff's action arises out of a protest against genetic engineering on the Forest Research Institute's land at Rotorua on Sunday, 30 January 2005.

Background

[3] Supporters of a GE free Aotearoa from Rotorua and elsewhere had gathered at a nearby marae for the weekend to talk about a GE free New Zealand and to raise awareness of the existence of GE pine trees in Rotorua. It was intended that on Sunday the 30th of January, there would be a protest at the site of the genetically

engineered pine trees. The Police plainly were informed well in advance of this weekend as to what was intended to happen. Senior Sergeant Anna Jackson, for practical purposes, the police officer in charge of the Police response, had issued a report headed “GE protest at FRI January 29-31” for internal distribution within the Police at Rotorua, and to “Northcomms”, the Police radio communication hub. This report is dated 26 January 2005:

**“O/C PATROL GROUP SECTIONS ONE, TWO, SIX
DOG SECTION
S.T.U CONSTABLES SMITH, BENNETT, CONDER
DETECTIVES HATTON, WEBBER, LANG
NORTHCOMMS**

For your information this weekend.

The People’s Moratorium Enforcement Agency (PMEA) are converging on Rotorua this coming weekend, 29-31 January 2005 (Auckland Anniversary weekend) to protest against Genetic Engineering. Specifically, they are targeting Forest Research and their GE field trials. There is a field trial of genetically modified pine and spruce trees. The trial is to take another 20 years and already thousands have been invested in it.

Their programme for the weekend includes a rally march to the GE field trial site at 12 noon on Sunday 30 January – the group are staying at the Apumoana marae, off Awatea Tce.

We don’t know what the likely number of protestors will be – it could be anywhere between 10 or 1000.

Twenty-four hour security (4 guards) from Independent Security will be present at the field trial site from 28 January-1 February (inclusive).

The trees involved in the trial (and this is not for public knowledge) are contained inside a 2.4m electric fence (8000 volts) in an area adjacent to the nursery (see attached map). The fence also sinks a metre into the ground.

FRI have additional concerns that the protestors may target the commercial nursery trials – they have a large commercial contract (in excess of \$1.0 million) to grow pinus radiata seedlings. There are also a number of greenhouses, marked on the site map, to be aware of as they have been put on the PMEA website. Even though they have no genetically modified material in them, the fact that they appear on the website may mean they attract attention.

Intelligence so far suggests that there are few concerns for the group called PMEA (People’s Moratorium Enforcement Agency). They are mainly interested in raising awareness, rather than ‘direct action’. However there are

at least two other groups coming, from Auckland and Wellington, which we don't know much about. These groups could be into 'direct action'. The hosting group (PMEA) have told the visitors that they will not be party to any direct action that involves wilful damage or disorderly behaviour.

The programme, attached, starts at 1330 on Saturday with 'banner making/creative stuff' followed by various speakers.

On Sunday after some more speakers, there is a 'public march and rally' to the FRI. The march is to be peaceful and orderly, the hosts intend. When they sought authority from the Council, they estimates there would be 100 but with the other group involved, this number could grow.

There is no intelligence to suggest there will be disorder or damage planned but with gatherings of this nature, there is always the potential for mayhem.

The purpose of this report is to advise you of the situation, in case the Security staff call for assistance over the weekend. I will be working day shifts on Saturday and Sunday and will be paying periodic visits to FRI and speaking with the protest organizers. S/Constable Ratapu will also be present and liaising with PMEA and other groups.

As far as the march on Sunday is concerned, those of you who are working on Sunday at 1200 are asked to make contact with me in the morning, when more information should be at hand. At this stage, I don't intend to have a large police presence. If things really do get out of hand, I have the authority to call the Area Commander to request AOS (as a Team Policing Unit rather than AOS duty!)"

[4] It is common ground also that Senior Constable Ratapu was designated to be the Police liaison person with the protest group. He attended at the marae and was included in discussions relating to the proposed protest.

The Geography of the Site of the Protest

[5] The Forest Research Institute property is located at the southern end of Rotorua city. Broadly speaking, its western boundary is the Puaringa Stream, its southern boundary is the Whakarewarewa Forest, and the access road known as 'long mile', Te Ngae Road is on its northern side, and to the east are private properties accessed from Tarawera Road, including Apumoana marae where the protest group was staying. The geography assumes some importance in this case. The core of the Forest Research Institute is surrounded by a tall fence to keep out intruders. Access cards are required to enter this core area. This core area includes essential Forest Research Institute buildings and an extensive plant nursery.

Immediately outside that enclosed area to the north east is a further large nursery area measuring in very approximate terms some 240m x 160m in more or less a regular rectangle shape. For the purposes of this judgment, we will call this area the 'open nursery area'. It is so described because it is directly accessible to the public from the north, the east and south. People are often to be seen walking dogs, jogging, mountain biking or strolling past this area. It continues to be used as a nursery for trees, planted, as one would expect, in straight rows.

[6] At the relevant time, in broad terms, the northern quarter of the open nursery area was planted with young seedlings. Moving further south, the next quarter of the open nursery area was bare. This area had plainly been used for plantings but had been tilled, possibly preparatory to autumn or winter planting. Moving further south, the third quarter, again in approximate terms, was planted in pine seedlings in straight rows. The southern quarter, being an area of approximately 160m x 60m and surrounded by a tall electrified fence, was the area containing the genetically engineered trees ("the GE trees enclosure"). Running along the whole of the eastern border of the open nursery area was a clay vehicle track. Again, this track assumes some importance in this judgment.

Summary Overview of Events of 30 January 2005

[7] On Sunday 30 January, the protestors, chanting and carrying banners and placards, moved from the Apumoana marae in a westerly direction towards the open nursery area. They eventually met the clay vehicle track bordering the eastern side of the open nursery area adjacent to the area that I have described as the first quarter of the open nursery area, that is to say an area of young plantings. At this point the demonstration wheeled left to advance towards the GE trees enclosure. What occurred subsequent to the protestors meeting the clay vehicle track, and shortly thereafter, the Police, forms the basis of the action brought by the plaintiff.

[8] After wheeling left, the protestors spread out into the open nursery area and advanced on a wide front towards the GE trees enclosure. A thin cordon of police and security guards blocked their axis of advance at the front row of pine seedlings at the beginning of the third quarter of the open nursery area described in para 6.

[9] In the minutes that followed the arrival of the demonstration at this point, four of its number, including the plaintiff, were arrested, taken back to the Rotorua Police Station, charged and then released. The plaintiff was charged with obstruction. This charge was later dismissed at a defended hearing. Save for the evidence of Mark Wickens, the police manager of physical training and defensive tactics at the Royal New Zealand Police College in Porirua, all the other witnesses were present on the day in question and were able to give eyewitness accounts of what they saw. The Court has been assisted also by two video clips, one tendered on behalf of the plaintiff and the other tendered on behalf of the defendant. By an almost unique coincidence, the video footage in each case misses the time immediately preceding the first of the arrests, namely that of Ms Perry, and there is a divergence of evidence as to what had occurred in the short time immediately prior to that. However, such footage, as there is, has been extremely helpful.

The Plaintiff's Evidence

[10] Felicity Perry gave evidence first. She told the Court that she was with a group of supporters of GE Free Aotearoa assembled at the marae in Rotorua that weekend to talk about New Zealand being GE free and to raise awareness of the existence of GE pine trees in Rotorua. She was the media spokesperson for the weekend. She said:

“Our main activity was a protest at the site of the GE pine trees.”

[11] She said:

“... we made it clear that we only wanted to march up to the fence and that while the protest would be loud it would be peaceful.”

[12] As they got near the GE trees enclosure, her attention to the demonstration was diverted by an interview with a journalist. She said that when the interview was over, she saw most of the group were right at the edge of the fence of the GE trees enclosure and she attempted to join them. She said she was stopped by a policeman before she could reach the fence and told that she could go no further. She says she was told she might damage seedlings planted between her and the fence. She says she turned back to walk towards the clay vehicle track at the side of the open nursery

area, and that at that point she was grabbed by a policeman. She said a second policeman began forcibly yanking her wrists, that she cried out in pain, and that the plaintiff asked the Police to stop hurting her, and when they would not, he put his arms around her. She says at that point other police dragged the plaintiff away. Whilst being taken to the police car, she said she looked behind her and, “saw that Simon was enacting a technique of passivity, whereby he made his whole body go limp and did not physically resist the police.” She said she turned around again when she heard someone shouting “they’ve used chemical spray” and she saw the plaintiff lying on the ground clearly in pain. When the plaintiff was himself placed in the police car, she said, “he could not see and he was having a lot of trouble breathing. Simon was wheezing frequently and shaking due to his shortness of breath.” She said that a policeman put some water from a drink bottle in Simon’s eyes to try and wash out the spray. He did this twice, but when Simon asked him to apply the water again, the policeman refused. The place of the arrests of the plaintiff and Ms Perry was about half way down the open nursery area where the ploughed and bare land met the area planted in seedlings, perhaps 50-60 metres in from the clay vehicle track bordering the eastern side of the open nursery area.

[13] In cross-examination, Ms Perry elaborated on her direction of travel after being stopped by the policeman. She said:

“My intention was to walk to the path and then towards the fence, but as I was heading towards the fence, I was taking a diagonal approach towards the path.”

[14] The “path” she refers to is the clay vehicle track. Her diagonal approach to it would have taken her across some of the rows of the pine seedlings. She also said that at no time did a police officer warn her about trespass. She does recall the police officer saying she was under arrest, “but I don’t recall if he said anything after that.” She acknowledged that there was a slight struggle after she was arrested. She said she knew the trespass law quite well, and that had she been warned she was trespassing, she would have left the scene. She said that she was media spokesperson and as such of no use if she were arrested.

[15] Arthur Price also gave evidence. He too was with the demonstration. He said:

“We had approached the area which we assumed housed GE pine trees and were stopped by 6 or 7 police officers and security guards along a line of pine seedlings approximately 10m¹ away from the fence where we had intended to protest.

It was apparent that the police did not want us to cross this plot of seedlings but as other protestors were up against the fence in front of us it was unclear to me why.”

[16] He confirmed that Ms Perry was grabbed by the Police and then many of the protestors, himself included, shouted at the Police to release her and that it was an unlawful arrest. He saw the plaintiff go to her assistance and said:

“I was very close to Simon at the time of his initial apprehension and at no time did I hear the police tell him he was under arrest or pay any respect to his right for peaceful protest.”

[17] He saw one of the Police pepper-spray the plaintiff’s face. He too says that the plaintiff was only passively resisting from the time where the Police first grabbed hold of him. He said:

“I felt that the police and security guards were acting very aggressively for the whole duration of the protest.”

[18] In cross-examination, he said he definitely did not hear that people would be arrested for trespass if they went onto the seedlings. He acknowledged that the plaintiff may have been trying to pull Ms Perry back to a safer space when he took hold of her after her arrest. Mr Price acknowledged that he too was arrested, that he saw one occasion of police applying water to the plaintiff’s eyes, but that several requests the plaintiff made for water were declined.

[19] Paul Blair was also present with the demonstration. He said that Senior Constable Ratapu was present on the Sunday morning as protestors filled water balloons, and that he had walked along with the protestors, numbering 30-50, towards where they intended to demonstrate. He said:

¹ Mr Price’s estimate is wrong. The distance is approximately 50 metres.

“I was with a group that went across a field, others went down a road that went off to the left.”

[20] He said that the security guards had formed a line in front of the trees (ie the seedlings) and that he saw them pushing people back. He said:

“Some people who had walked down the road had gone right up to the fence and had hung banners on it.”

[21] He said:

“The guards who formed a line against our group became aggressive to the protestors.”

[22] Of the arrest of Mr Oosterman, he said:

“Two police officers had hold of him, one on each arm and were dragging him away or so it seemed. They certainly had him totally restrained and he appeared powerless to resist.

The police continued to drag him in that state about 20 feet or so, when one of them sprayed something into Simon’s face and the next thing I saw him writhing and screaming on the ground in pain.”

[23] In cross-examination, it was put to Mr Blair that police officers and security guards were telling the protestors they would be arrested for trespass if they came into the seedling area. Mr Blair’s reply was, “I can’t confirm that, not that detail.” He also said there was commotion, yelling and some pushing.

[24] Robert Gilchrist gave evidence of attending the protest. He said he was the person who was to liase with the Police. He said that about 20² metres away from the fence, a security guard stepped forward and said something:

“I couldn’t hear due to the chanting. He was pointing to the ground.”

[25] He referred to pushing and shoving and then noticing the plaintiff writhing in pain on the ground in front of them. When the plaintiff was taken to the police car,

² Again, Mr Gilchrist’s estimate is wrong. The distance is approximately 50 metres.

this witness sought out the nearest police officer and told him that the plaintiff was asthmatic. He said he was told to “fuck off” and “we know what we’re doing.”

[26] In cross-examination, he acknowledged that some of the protestors were in white boiler suits, but he could not recall specifically whether some had their faces covered. He acknowledged that some water balloons had been filled, and that the intention was to water the trees saying:

“Correct, it was a symbolic thing, it was discussed the night before that it would be basically about the only thing we could do without climbing over the fence or anything like that.”

[27] It was put to Mr Gilchrist that the Police were calling out that anyone who came onto the seedlings would be arrested. He said, “I did not hear that.” Likewise when it was put to him that the Police were also calling out to people coming onto the seedlings that they would be arrested for trespass. He said, “I can’t recall that either.” When asked by the Court from which direction it was intended that the group approach the GE trees enclosure, Mr Gilchrist said:

“I don’t actually think we specifically discussed whether we would come from the east, west, south or north whatever, I know we discussed walking down the track [clay vehicle track] to the enclosure itself.”

[28] The plaintiff then gave evidence. He said he found Senior Constable Ratapu friendly and approachable, and that he was pleasant during discussions about the protest, including the use of water balloons. He said that they marched from near the marae along the side of the road and through a field and out onto an area where the Forest Research Institute was. There was a lot of chanting and even singing, and that it was a very orderly march and felt like a family protest. He then said:

“As we entered an open field [the open nursery area] I was with the group which went across the field, walking through some small pine trees, while others went down a road [the clay vehicle track] to the left of us. ...

My group was stopped approximately 10³ meters away from the 2 metre high fence by the security guards who stood in front of a line of small pine trees. I was not personally told, nor did I hear anyone else being told that we couldn’t cross the line. It was noisy so it is possible that I didn’t hear it. Once security

³ Again, Mr Oosterman’s estimate is wrong. The distance is approximately 50 metres.

guard was pushing people back. There was not any tape or a white line on the ground. We had already walked through a planting of small pine trees and it seemed like an arbitrary line as some of the people who had walked down the road (immediately to the left of us) had gone right up to the fence and had hung banners on the (sic) it.

After we were stopped in front of them the security guards were being aggressive to the protestors. One in particular was walking backwards and forwards yelling and pushing at people. The mood changed to one of tension and the police became agitated.

Sometime after we had been stopped I saw police grabbing Felicity Perry, our media spokesperson. I am also a media person and as her role was to be available to the media I thought it was unlikely she would put herself in jeopardy of getting arrested. I did not see her stepping over the line, it looked like she was being grabbed and pulled.

I told the police not to hurt her and to let her go.

The police were pulling her backwards and she was clearly in distress.

I walked up to Felicity and I put my arms around her to stop the straps from hurting her. I felt they had gone over the top and did not think their actions were warranted.

I was then grabbed by two police officers. Each officer had taken an arm and when one pulled me in one direction, the other would pull me back in another. I was not resisting. At one point one of the officers kicked me in the leg, it seemed like he was trying to trip me up.

The police officers pulled me about 5 meters away from the protest line and without warning then one of the police officers pepper sprayed me right into one of my eyes. I immediately fell to the ground in pain. It took me a little while to realise what had happened but I was face down on the ground in pain. At some stage I was handcuffed.

When the police started to drag me away I yelled out 'they're using chemical spray' to warn other people. I was surprised because I've never heard of pepper spray being used at a protest before.

I was then picked up and dragged to a police car where a police officer applied water to my eyes a number of times. It did not make much difference to the pain. I have mild asthma and I also had some difficulty breathing. ..."

[29] He went on to say that after he was released, he went to Rotorua Hospital but was told only to "keep washing". He said that the pain continued for perhaps an hour and afterwards he had a serious headache for over a week.

[30] He later elaborated on the matter of one group going across the field (the open nursery area) and others going down the clay vehicle track. He talked about the approach to where the Police and security guards were as being “an emu line”, and went onto say:

“The only reason I would distinguish them in two groups is to explain that we weren’t all in the field, it was just one line really. The purpose of the line was for the TV cameras to be honest I only recall seeing one, but there may have been more, but this on a sunny day this is a much better visual point than under the trees. If you were a cameraman filming a protest, it would be almost a waste of time to walk solely down the track because you can even see it on there, its dark. ... So the main focus of the protest was to get a good media shot which is a big line, looks bigger than people just going down a road.”

[31] He said that two security guards were being abusive and that the police were not abusive at all. He said the two security guards were pushing and shoving and yelling at people, “and I admit that they may have been saying get off the trees, but to be honest they were yelling, they were just being agro and I thought this was completely inappropriate ...”

[32] And further, on his involvement with Ms Perry:

“I didn’t see her stepping over the first time, all I saw was screaming and yelling ‘my bag, my bag.’ The strap was pulling on one of her – I’m assuming it was her left shoulder, ... she was clearly in distress so I walked ... straight towards her and I put my arms around her in what I would describe as a bear hug. The main purpose was to hold her arms because she was being pulled backwards although at some point I think she got twisted around, I’m not too sure. And I was also trying to stabilise her because she was being yanked backwards or forwards at that time ... I was trying to keep her so she wasn’t being hurt. I had asked the officers before and during to let her go or to take it easy but they must have felt that they needed to control the situation and I think one of the officers handcuffed me and one of them pryed off one of my arms. At no stage did they say I was under arrest ...”

[33] And then:

“I can accept that it looks as though I’m trying to move out of the way, but when you have a trained police officer using whatever it is with my wrist, you can imagine that it is relatively painful, and they were – one was doing it and the other was doing it and you can clearly see in the video trying to pull me down and they said get on the ground, I vividly recall them saying that. But at no stage did they say I was under arrest, although you could just assume by the fact that I had a handcuff on that that would be what they were intending.”

[34] And then on what happened after that:

“And just as an explanation as a pacifist and peaceful protestors, we don’t actively ever resist arrest, but on occasion, depending on the circumstances, there are various forms of passive resistance which is more not helping rather than doing something to someone. You are not trying to harm an officer or push them out of the way and the two most common forms are standing completely still, or being dragged both of which you can see.”

[35] And then as to the pepper-spraying:

“... you can see that I am in front of both officers, at no point did the officers warn me that I would be pepper-sprayed. Pause, and you can see that the pepper-spray has an immediate effect and it’s almost instantaneous. I didn’t see it. It went straight in my eyes and I went straight down and in this instance that’s not actually passive resistance, it was painful and I went down. He pepper-sprayed my left eye, and from memory it was straight and it was very close right into the one eye and it was instantaneous.”

[36] Then on what happened after the pepper-spray:

“You can see one of the officers to the right had gone off, what had happened, was the two officers picked me up, I think I told them to leave me for a while, I do not really recall, but the reason I’m standing is because they have picked me up and I didn’t – that wasn’t a trip that was me going down, the pepper-spray was incredibly painful, however looking back it would have been better if I had gone as fast as possible because they would have put more water in my eyes but at the time it was just painful. ... so I was taken back to the police car that was on the clay track and placed in the front of the car and at first I was put in the front with the doors shut and the windows shut. At some point the red head officer came and applied water, I couldn’t tell you how much, I think I recall him saying he had been pepper-sprayed before and he understood that it was painful and that it required water, but that wasn’t straight away, I’m assuming he was busy with something else. But he was a very nice officer, very pleasant, at some point I think he ran out of water and I remember asking him for more water and he said no, but I think that may have been because we were going to the police station. ... I may have been left outside of the car before I went but to be honest I don’t recall. I have mild asthma and I had some difficulty breathing but an officer actually asked me, ...”

[37] And then as to the headache:

“... I’m not ever sure that I could feel it straight away but later that night or the next day a headache started which lasted for a very long time. I wouldn’t want to give an exact date of how long, but it was for easily over a week and I never get headaches which is why I remember it so vividly.”

[38] In cross-examination, he acknowledged that he was one of the protestors wearing a white boiler suit. He explained:

“... it was part of the media gimmick – those suits are kind of like used internationally at GE marches, its like a bio hazard thing, RAD suit I think they are called.”

[39] He also acknowledged that some protestors were wearing “gas masky type things which go with those suits.” He acknowledged:

“... people had made water balloons filled with water which had been agreed to the night before as a part of the whole street theatre thing. Previous evidence was given it was watering the plants, my understanding was that it was as a part of the media story, that it was symbolic for the need for people to do something about GE in NZ ... to be honest we actually didn't know where the trees were, it was agreed that the fencing area would be a good media spot even if it wasn't in the actual trees, but the idea was certain to throw them ...”

[40] When pressed about security guards warning them not to come into the seedlings, he said:

“I definitely recall the security guards yelling or actually it was more screaming actually, I certainly never heard anyone saying you will be trespassed or anything of the sort, ...”

[41] It was put to him that the security guards were indicating the front line of the seedlings with their arms. The plaintiff said:

“That may have been so but that it is not what I saw, I was focussing on one particular security guard and that's all I really saw ...”

[42] When it was put to him that he could have gone down the clay vehicle track like other protestors, he said:

“Certainly I could have gone for a walk at the Hamilton Gardens also.”

[43] It was put to him that Constable Yockney instructed him to let Ms Perry go, he said:

“It's possible, I don't recall that. I would assume they would say something like that whether I heard that to be honest I was focussing on her being in distress ... Well there was a police officer involved and I made a decision to

go and put my arms around her and I certainly wasn't going to let go if she was in pain so I wouldn't say I ignored him but in all intents and purposes, that is what happened."

[44] He acknowledged that it was possible that he had been told to let Ms Perry go or he would be arrested for obstruction, but he said:

"... people were yelling pretty loud at this point you know, doing the chants, I wouldn't say they were aggravated but they were just chanting louder you know."

[45] The plaintiff denied straining towards the protest line when the two police were attempting to handcuff him. As to his overall treatment at the hands of the Police, the plaintiff said:

"Yes, apart from being pepper-sprayed, I thought they were very courteous, as I said before, I thought it was the security guards who were aggressive not the officers ..."

The Defence Evidence

[46] Senior Sergeant Anna Jackson gave evidence that being rostered as duty Senior Sergeant for the weekend of 29-30 January 2005, she was in charge of co-ordinating the Police response to the protest at the Forest Research Institute on Sunday 30 January. She said it was initially thought that only a low level police response was required, and that Senior Constable Ratapu was the only officer tasked to attend the protest. However, she also made contingency plans and sent out the low level report of 26 January giving a "heads-up" about the protest to police staff. She met with the officer in charge of security at the Forest Research Institute. Security had been arranged both day and night for the protest weekend as the institute had invested a considerable sum of money in some genetically modified trees.

[47] She says that about 11.30 am on Sunday the 30th of January, she received a call from Kevin Rowell of the security firm reporting protestors and a police officer walking close to the perimeter fence around the trees. His understanding had been that no protestors would come near the fence during the protest. Senior Sergeant Jackson said that this was when she first thought a low level police presence might

not be the appropriate response to the protest. She got in touch with Senior Constable Ratapu and heard about the possibility of liquid filled balloons being thrown. She said that on advice from Mr Rowell, she decided that the first row of seedlings (in the open nursery area) in front of (but some distance from) the perimeter fence (of the GE trees enclosure) was the natural line to use to stop the protestors. She briefed her staff to maintain a physical barrier along the line of seedlings. She said she heard the chanting of the protestors before she saw them. She estimated they numbered 80 to 100, including children. She said that protestors wearing camouflage or overalls were in the front of the protest and making the loudest noise. She said:

“The protestors stopped in front of us. I kept shouting out to the protestors in front of me that they should not cross the line of seedlings as they would be arrested for trespass. At the same time as I gave my warnings, I was demonstrating with my arms the line the protestors were not to cross. I had instructed my staff to do the same and could hear and see that they were also telling protestors not to cross the line. I was confident that the protestors understood what we were warning them about because they had stopped in front of us, and a bit of a stand-off followed.”

[48] Her attention was on keeping the Police line intact and she did not observe Ms Perry or Mr Oosterman’s arrests, although she was aware from a glance now and then that arrests were being made and that staff were having difficulties escorting those arrested to the police cars. She said:

“After the first two arrests had been made, some staff asked me about some protestors who had begun hanging banners up on the perimeter fence [of the GE trees enclosure]. They had come around to the fence from the road [the clay vehicle track] going through to Long Mile Road, which is the road we wanted them to be on, rather than through the Police line.

Even though they were behind the Police line, I told my staff to let these protestors do that.”

[49] In cross-examination, Senior Sergeant Jackson said that until the Sunday, her understanding was that the protest march would be on Long Mile Road, that is to say, well away from the area where the GE trees were planted. She also said that the reason she felt the need to increase the Police presence was the indication that the protestors intended to go very close to the perimeter fence (of the GE trees enclosure), and that they had “these balloons, whatever they contained, that they

could throw over the fence.” It was put to her that leaving aside what happened in the paddock and the fact that one water balloon was thrown, the rest of the march was peaceful, her response was:

“Putting aside all of the arrests and the noise the yelling right in our faces, the chanting, then yes, the rest of the demonstrators were peaceful.”

[50] She was asked about police general instruction A275(3) that says OC spray is not to be carried by members rostered for duty at demonstrations unless specifically authorised by the District Commander. She said:

“We were not deployed on demonstration duty, as I have said, all of the indications until 11.30 on Sunday were that there was to be a peaceful demonstration.”

[51] She did, however, acknowledge that Constable Yockney, the officer who used the pepper-spray, was one who had received her report of 26 January 2005.

[52] In re-examination, she acknowledged that Senior Constable Ratapu was rostered for duty at the demonstration. She said:

“I feel the need to point out that the intent of this general instruction no doubt is to prevent unintentional victims, that is, that if there is a demonstration situation, that people are not sprayed as a group, by the OC spray, however, in this situation, from what I saw, of Mr Oosterman’s arrest, there was some distance from the rest of the demonstrators and where the spray was deployed and I believe the staff used common-sense by not deploying it earlier when he was nearer to the group ...”

[53] To her knowledge, this was the general understanding that police officers had of the instruction. When she was pressed further on the point by Mr Minchin that there was no reference to the issue of spraying groups of people, she said:

“No, however my point is that we were not deployed on demonstration duty as such, I was given an hour’s notice of this development on a Sunday, so when it was time to brief the staff, I briefed them on the purpose of the demonstration, briefly who was involved, the possible tactics to be used by the demonstrators, our plan of action, including if arrests had to be made, and the powers that were available to us. It was an oversight on my part that I did not advise the staff to remove their spray, however, there would have been a concern about where to put the spray, we could have put it in the cars, the police cars, however we were going to use these cars possibly to transport the arrested persons ...”

[54] It was put to her, that this understanding that she had of general instruction A275 was the reason why she did not mention it in her briefing that day. She said:

“No, it was more because I just didn’t think of it as the time ...”

[55] She was asked a number of questions about the fact that protestors had gone up to the fence (of the GE trees enclosure) and attached banners at the time when those in the open nursery area were stopped at the line of seedlings. She acknowledged that this had occurred whilst those in the open nursery area were being held up by the security guards.

[56] Kevin Rowell, who was the security guards’ supervisor at the relevant time, told the Court of the security arrangements in force for that weekend and of his understanding that the protest march was not expected to come closer than 400 metres from the GE trial trees, ie it would not get closer to the GE trial trees than Long Mile Road. However, prior to the demonstration, he saw Senior Constable Ratapu and one of the protestors go up to the perimeter fence of the GE trees enclosure and have a discussion about the route of the march. He said he immediately became concerned and contacted Senior Sergeant Jackson to say that it looked like the protestors were changing their route to come right into the GE trial tree area. He acknowledged a later discussion about positioning themselves in front of the seedlings. He said:

“I also took into account the fact that the seedlings were far enough from the trial trees to avoid any weedkiller or other agents, such as I had heard about earlier, being thrown into the trial trees.”

[57] He then said that four or five minutes after the Police and security guards had formed their line, he could hear chanting:

“A crowd of protestors emerged from the tree line and turned left. There would have been about 60 protestors.

The bulk of the protestors remained on the tree line but a smaller group broke away from that and came up towards us on the Police line.”

[58] He then said:

“I was yelling to the protestors to stand back, and saying that if they came through the line they were liable to be arrested.”

[59] The a little later:

“Felicity Perry walked in front of me from side to side about three times. She looked to me as if she was trying to decide whether to go through the police line. She then stuck her head up and tried to walk through the line between me and the person next to me, I think to my right. I pushed Felicity back and said she was going to get arrested if she did that. The protestor with the megaphone yelled at me, ‘you can’t do that, I’ll have you for assault, what’s your security number’ and words to that effect. Other protestors were videoing this and telling me that I was going to be on their website and that they were going to record Police brutality.

I was largely focusing on the protestor with the megaphone but I did see later that Felicity had crossed the line and had been caught by a constable behind me and to my right in the seedlings area. I vaguely remember seeing that the constable had her by the wrist. He appeared to me to be moving Felicity out of the seedlings and back to the protest line so I did not think that she was under arrest.”

[60] He later said:

“Although I did not see them go up, some banners had been placed on the fence by the trial trees. The banners remained there because we were still dealing with other issues.”

[61] Sergeant Ratapu, formerly Senior Constable Ratapu, gave evidence that on the weekend he was rostered to work at the liaison officer to the marae and to the protest group. He said:

“I knew the protestors were concerned about some trees that the FRI were growing. The trees were in a fenced off area on nearby FRI land.”

[62] He went on:

“On the Sunday, before the march, I saw some of the protestors put on white overalls. I also saw some protestors filling up water balloons, though I couldn’t be sure what was in them. This activity caused me some concern, and indicated to me that the protest may not be entirely peaceful.

I believe it was after that that I spoke to Senior Sergeant Anna Jackson, the Duty Senior Sergeant, on the phone.”

[63] He accompanied the protestors and in a very general way confirmed what then occurred, but did not go into specifics.

[64] In cross-examination, he acknowledged that it was always envisaged that a part of the protest was to march to the GE trees growing in the FRI enclosure and that he had communicated this to Senior Sergeant Jackson.

[65] In the course of questions from the Court of this witness, Sergeant Ratapu said “there was a prescribed route” and:

“... whatever that route was sir, if they had have stuck to the plan along that prescribed route, there wouldn't have been a problem not at all.”

[66] From the Court:

“So in summary Sergeant – if the march had proceeded in an orderly fashion along the dirt road [the clay vehicle track] and banners put on that end fence [of the GE trees enclosure] there for example – you wouldn't have seen a problem? ... No.”

[67] Tony Bennett gave evidence of being assigned to attend the protest at the Forest Research Institute from his usual job in the strategic traffic unit. After instructions from Senior Sergeant Jackson, he formed part of the Police line at the first row of seedlings. He spoke of the protestors approaching and forming a line opposite the Police line about three meters away. He estimated about 60 or 70 protestors. He told the protestors to stop where they were and not to cross the first line of seedlings. He said Ms Perry walked straight into the seedlings and made as if to carry past his left shoulder. He says:

“I was able to grab Ms Perry and march her straight back into the protestors. I did this quickly and without any significant force – I just spun her around by the arm and guided her back to the protest line.”

[68] He says he told Ms Perry that if she came back into the seedlings, she would be arrested for trespass, but that she came straight back again. He says:

“I was conscious that arresting someone at a protest is not always the most sensible thing to do. We had limited resources at the protest and things could

have turned ugly, especially as arresting Ms Perry would leave the Police line a man down.

But I was also conscious that if I didn't act, it would send the message that the Police were unwilling to enforce the law. The Police line was already too thin to properly protect the seedlings and we only had control of the protest through the protestors' goodwill."

[69] He said he then told Ms Perry that she was under arrest for trespassing and tried to restrain her. He was able to take hold of one of Ms Perry's arms in order to handcuff her. She tried to get back to the protestors. He said people were trying to pull Ms Perry back into the crowd, but that as she was under arrest, he wasn't going to let go. He said eventually the strap on Ms Perry's bag broke. He was then able to walk Ms Perry to the patrol car.

[70] He described Mr Oosterman arriving at the patrol car. He said he moved Mr Oosterman to the front passenger seat and opened the door so that he could sit on the seat with his feet outside of the car to reduce the effect of the spray. He confirmed that it was his voice on video two that said, "I know that spray hurts, I've had it myself", and that he applied water to Mr Oosterman from his own personal water bottles. He said:

"I offered Mr Oosterman the water, and he was quite happy to receive it. Mr Oosterman was polite throughout. He seemed in a bit of pain but didn't cry or moan at all."

[71] He said he heard someone say that Mr Oosterman was asthmatic and that he offered Mr Oosterman the ventolin inhaler which was in the OC spray kit, but that he didn't want it. He says that at no point was Mr Oosterman ever refused a request for water.

[72] Constable Blair Yockney was rostered to the watch house at Rotorua on Sunday, 30 January 2005. Around lunchtime he was told to go with Senior Constable Atkin to the Forest Research Institute as Senior Sergeant Jackson had requested further police numbers. He heard Senior Sergeant Jackson's briefing and took up his place in the Police line. He says that when the protestors, by his estimate about 100, approached, it was apparent to him there were two types of protestor present – those wearing white overalls, including some wearing white

disposable dust masks, and he saw these as different from the mums and dads present. He said the protestors arrived together and spread out in front of the Police line. He said he kept repeating to the people in front of him not to come onto the seedlings or they would be arrested for trespass, and that he was yelling quite loud to make himself heard. Shortly afterwards, he noticed Constable Bennett struggling with a female protestor, Ms Perry. He went to help Constable Bennett who was having difficulty making the arrest. He said a couple of people tried to pull Ms Perry back into the crowd when one of the men in a white boiler suit began forcefully trying to pull Ms Perry back. This was Mr Oosterman. He said he yelled at him to let Ms Perry go or he would be arrested for obstruction. He said Mr Oosterman ignored him, so he grabbed him by the shoulder and told him he was under arrest for obstructing Constable Bennett. He said:

“I took hold of Mr Oosterman by the lower part of his arm and pulled him into the seedlings. I told him again that he was under arrest and to put his arms behind his back. He had been uncooperative from the outset and I believed if I didn’t restrain him he would attempt to escape back into the crowd.

Mr Oosterman didn’t comply with my request to put his arms behind his back but I managed to get one handcuff on him.

However, I then found it difficult to get the other handcuff on Mr Oosterman. Every time I tried to get his other hand he evaded me by moving away. He was twisting and turning and followed my own movements. I kept telling him to put his hands behind his back but he refused to comply.”

[73] He said that Constable Conder then came to his assistance, taking Mr Oosterman’s other arm. He confirmed that it was he that said the words heard on video one, “get to the ground now.” He said that at one point he tried the “bottle top” technique, which puts pressure on the handcuffed wrist and is designed to get the offender to the ground to allow the second handcuff to be applied. He acknowledged that Constable Conder also tried a foot sweep to bring Mr Oosterman to the ground. That too was unsuccessful. He says:

“By this stage I was getting concerned that we still didn’t have control of Mr Oosterman. I didn’t want things to escalate with the protest and I was concerned that if the protestors saw us struggling with Mr Oosterman, this might happen.

I was also aware of a risk that the free handcuff could open and cut either Mr Oosterman, Constable Conder or myself. I had seen that happen before to another officer, who had required stitches.

I was conscious that Constable Bennett was dealing with Ms Perry and that Constable Bennett was dealing with Ms Perry and that Constable Conder and I were now missing from the line. It seemed to me the reduction in the number of officers on the line increased the risk of the protest getting out of control and the crowd entering the seedlings. I was concerned to finish the arrest tidily and professionally and to return to the line.

At no point of my dealings with him had Mr Oosterman shown any sign of complying with police instructions.

For all these reasons I decided to use my OC spray to effect the arrest. I knew the effect would be instant because I have suffered the effects of the spray myself. ...

I thought it was appropriate to use OC spray in this case. We had already tried several techniques to get Mr Oosterman under control: he had been given repeated clear instructions which he had ignored, Constable Conder and I had tried using physical force to bring his arms together for cuffing, the foot sweep technique and the bottle top technique. OC spraying was the next logical step. The alternative was to use a baton, which could have caused some injuries, or to continue to struggle with him. Struggling had not worked and posed a risk to both Mr Oosterman's safety and the safety of Constable Conder and myself.

I recall withdrawing my OC spray from my belt with my left hand and I held it up in such a way that both Mr Oosterman and Constable Conder could see it. I paused for a moment to let Constable Conder take evasive action. I then gave Mr Oosterman one short burst of OC spray in the face area. We are trained that OC spray works best in the eyes or forehead since it forces an offender to close his eyes.

The effect of the OC spray was immediate. Mr Oosterman went straight onto his knees, and hunched forward."

[74] Shortly afterwards Constable Yockney said to Mr Oosterman that he would get something for his eyes. He still had Mr Oosterman by his left arm but he just became a dead weight. That prompted Constable's comment, "I didn't spray your legs, eh?" Eventually Constable Leonie Smith assisted and they carried Mr Oosterman, supporting him under each armpit, to the patrol car. In cross-examination he was closely questioned about Mr Oosterman actions with Ms Perry. He disagreed that Mr Oosterman was passively resisting arrest, and that by pulling away he was actively resisting. It was put to Constable Yockney that he had changed his view of Mr Oosterman's conduct after he discovered that general

instruction A272 forbids the use of OC spray to those offering passive resistance.

Constable Yockney's answer was:

“His conduct on the day was his conduct on the day and it has not changed. ...

[Mr Minchin continued] I put it to you that the potential from the physical harm from the handcuffs was an after thought as without a concern for physical injury you had not permissible grounds that general instruction 270 to use pepper-spray? I think in the moment of making an arrest and trying all the steps starting at the lower end of force that you can, ie starting with verbal communication and working your way up to whatever it may take to cause the arrest, happens very quickly and I cannot recall ever in my police career running general instructions through my head as I'm effecting an arrest. But I always act reasonably.”

[75] Counsel put to Constable Yockney that he didn't fear physical injury for himself or others on that occasion. His reply was “yes, that was always a possibility.” Constable Yockney said he couldn't recall giving a verbal warning that he was about to use OC spray and he acknowledged that there was nothing exceptional in the circumstances that would have prevented him giving a verbal warning as general instruction A272 requires. The constable did however say:

“As I said earlier, he certainly wasn't passively resisting and I did um, unholster the spray can and made my intentions clear.”

[76] It was put to the constable that the video showed really one fluid movement of him taking the canister out of his holster and putting it directly in Mr Oosterman's face. The constable's response was, “yeah my mind um, recalls it different I must say.”

[77] Constable Yockney agreed that in training the Police do not spray closer than one metre from a person's face because eyes might be damaged and the distance of a metre is required to give the propellant in the canister time to separate and disperse from the active ingredient to make it more effective.

[78] Constable Zane Conder was the constable who went to Constable Yockney's assistance to help him make the arrest of Mr Oosterman. At the time he was working in the strategic traffic unit at Rotorua. He said:

“Constable Yockney appeared to be having trouble handcuffing Mr Oosterman so I went to help him. I wanted to make sure Mr Oosterman was handcuffed so he couldn’t get away.

I grabbed Mr Oosterman’s right arm. Constable Yockney was on Mr Oosterman’s left arm. I was trying to get Mr Oosterman’s right arm behind his back to get the handcuffs on. Mr Oosterman was resisting this. I can’t remember whether he had locked his hands together or just pulled them towards himself but we couldn’t get his arms behind his back.

I knew from experience that it was easier to apply handcuffs to a person on the ground. Mr Oosterman was walking stiff-legged and taking big, quite unusual, steps which was preventing us from taking him to the ground. He was ignoring instructions from both myself and Constable Yockney to get on the ground so I tried to trip him. Mr Oosterman had some momentum up and I was trying to take the momentum away by tripping him. I nearly fell over myself instead, and Mr Oosterman kept walking. ...

We continued to struggle with him.

I remember seeing a hand with a can of OC spray come round and I looked away.”

[79] Constable Conder had nothing more to do with Mr Oosterman after the handcuffs were applied to him. In cross-examination, Constable Conder denied that Mr Oosterman’s actions were passive. He acknowledges attempting a foot sweep.

[80] Constable Leonie Smith, who was at the time also employed with the strategic traffic unit, also attended the protest that day. It was she that assisted Constable Yockney to take Mr Oosterman to the police car after he had been pepper-spray. She acknowledges her voice on the video two saying something like “don’t make a performance of it, okay.”

[81] The defence also called an expert witness, Mark Wickens, the manager of physical training and defensive tactics at the Royal New Zealand Police College in Porirua. He has spent a total of 14 years providing physical training and teaching defensive tactics within the Police. He explained the “tactical options framework” which was introduced in 2004 following brainstorming and consultation done by the Defence Tactics ‘Best Practice’ Group which he chaired. He told the Court the Police tactical options framework includes the following definitions:

“‘Passive resistance’ is defined as being when a subject refuses, with little or no physical action, to co-operate with an officer’s lawful direction either by verbally refusing to co-operate or by consciously contrived physical inactivity.

‘Active resistance’ occurs where there is resistance beyond simple verbal defiance. It includes non-assaultive physical actions such as pulling away, pushing away or running away in an attempt to prevent control by police.”

[82] He told the Court that the officer should decide how best to deal with this situation based on an assessment by the subject’s behaviour and the situational factors. He said it is accepted that two officers faced with the same situation may reasonably reach different conclusions on how best to react. He said that in cases of passive resistance, empty-handed tactics are likely to be appropriate. Intermediate options, which may include wrist locks, pain compliance techniques, distraction techniques, redirection, arm/takedowns, bottle tops and OC spray, may be appropriate where there is active resistance or assaultive behaviour. Mr Wickens went on to give his views on what the two videos showed as having occurred here.

The Videos

[83] Video one is the video produced by the plaintiff. The first nine or ten seconds of it is a wide view of the protestors moving towards the camera in a grassy open area, plainly prior to their reaching the clay vehicle track. It is a bright sunny day. The protestors have large cloth banners. The protestors are walking forward in a wide formation. There are in view two large orange cloth banners carried by the front row of people. Some are wearing boiler suits, some ordinary clothes. The chanting is loud and repetitive. The video then cuts to the moment when Constables Yockney and Conder each have hold of Mr Oosterman. Constable Yockney had hold of the chain link of his handcuffs, one cuff being attached to Mr Oosterman’s left wrist. Constable Conder had both hands holding Mr Oosterman’s right wrist. Mr Oosterman’s direction of movement is parallel to the line of protestors along a lane of seedlings. He is taking big and deliberate steps and plainly is not minded to “get on the ground now”, which he is being ordered to do. He then veers off to his left towards the GE trees enclosure, which is in the background. It appears from this shot that the protestors who were on the clay vehicle track have not yet reached the GE trees enclosure. Constable Conder plainly is intent on completing the

handcuffing of Mr Oosterman. Constable Yockney is temporarily obscured, Constable Conder and the plaintiff being between him and the camera. As soon as Constable Yockney comes back in view, he is shown still holding in his right hand the chain of the handcuff on Mr Oosterman's left wrist and with his left hand, he is reaching for his pepper-spray. Constable Yockney's body language is quite different from that of Constable Conder. The latter is working hard at hanging onto Mr Oosterman's right wrist in an effort to complete the handcuffing. Whereas Constable Yockney's body language is relaxed. Whilst he is holding onto Mr Oosterman's left wrist via the handcuff chain, he plainly has decided on the use of pepper-spray rather than to continue to try to physically restrain Mr Oosterman. In the space of three seconds, Constable Yockney reaches for his pepper-spray, draws it and sprays Mr Oosterman. Freezing frame at the moment Mr Oosterman is sprayed, Constable Yockney has his left arm extended and the spray can appears to be immediately above Mr Oosterman's left shoulder. So Mr Oosterman is sprayed side on from his left side at a range of between 15 and 20 centimetres to 6 to 8 inches. Mr Oosterman is facing away from the camera, but it appears that the top of the spray can is approximately level with the middle of his face. The effect on Mr Oosterman is immediate and he drops to the ground. The camera pans around to the left towards the clay vehicle track. We can see Ms Perry being escorted towards the police vehicles. We can also see protestors on the clay vehicle track behind the Police line, that is to say closer to the GE trees enclosure than the line of protestors facing the Police before the front row of the seedlings.

Video Two

[84] This is the Police video. It commences three seconds earlier than Video One, in its coverage of the confrontation between the protestors and the Police at the line of the seedling pines. The initial sequence shows the protestors' line along the front of the seedling pines with people chanting and holding banners. In the centre of the shot, Constable Bennett is grappling with Ms Perry and Constables Yockney and Conder are grappling with Mr Oosterman. These altercations are taking place about four rows into the seedling pines. Ms Perry is straining to get back towards the line of protestors, as is Mr Oosterman. Constables Yockney and Conder pull Mr Oosterman further into the rows of pine seedlings. He is plainly unwilling to be

pulled, and again leans forward towards the line of protestors. As Mr Oosterman leans towards the picket line, Constable Yockney unsuccessfully tries the bottle top technique on Mr Oosterman's handcuffed left wrist. While they are grappling with Mr Oosterman, Constable Yockney shouts "get on the ground, get on the ground now, get on the ground now." Almost simultaneously, Constable Conder unsuccessfully attempts a "scoop kick", a sideways sweep of his right leg against Mr Oosterman's left leg, again in an attempt to take him to the ground. When this happens, the direction of travel of the three participants is parallel with the front of the protestors. Immediately after the unsuccessful scoop kick, Constable Conder stumbles off balance but maintains his hold on the plaintiff's right wrist. The cameraman then pans back onto Ms Perry who is still struggling to try and get back into the protest line. The Police cameraman is focussed on Ms Perry's apprehension and does not turn back to Mr Oosterman until after he has been sprayed and is being escorted by Constable Yockney towards the police vehicle.

[85] So the initial sequence in this video showing the first recorded stages of Mr Oosterman's apprehension lasted nine seconds. Given that the Police cameraman commenced three seconds before the plaintiff's cameraman, the entire combined video coverage of Mr Oosterman's apprehension up to the pepper-spraying was 14 seconds. I think it reasonable to infer that both plaintiff's and defence's cameraman commenced recording as soon as they were able after becoming aware that "the action" had started. So I think it reasonable to infer that the incident that drew the Police's attention to Mr Oosterman, his giving Ms Perry a bear hug, occurred only a few seconds prior to the first of the cameras commencing to record. I therefore conclude that from the time the Police told Mr Oosterman to let Ms Perry go until the time he was pepper-sprayed would have been no more than about 20 seconds.

[86] When the Police cameraman next focuses on Mr Oosterman, Constable Yockney is escorting him towards the police vehicle. Both are walking without difficulty. Mr Oosterman then suddenly lifts both feet off the ground at the same time and sits down. Mr Oosterman doesn't respond to the urgings of Constable Yockney to stand up, nor to Constable Yockney's statement to him that "we'll get something for those eyes." Likewise, Constable Yockney's attempts to

pull Mr Oosterman both along the ground and up off the ground come to nothing. Twenty-five seconds after Mr Oosterman's deliberate going to ground, Constable Leonie Smith arrives. Taking a shoulder each, they attempt to move Mr Oosterman towards the Police vehicle. They continue their attempts, unsuccessfully, for the next 15 seconds until the cameraman again focuses on the protest line. The protest line is still in front of the first row of pine seedlings, as it was at the commencement of the video clip. Protestors continue to chant loudly. Accepted that at this stage some police personnel are involved in the arrests of the plaintiff, Ms Perry, and the other two who were arrested that day, those few police left at the demonstration line are standing still and security guards are walking back and forth in front of the protest line.

[87] The cameraman pans right along the protest line towards the clay vehicle track and down the clay track towards the GE trees enclosure. Two minutes and 51 seconds into the video, we can see that already one of the protestor's banners has been affixed to the fence of this enclosure. It has plainly been there for some time as those who affixed the banner are not in evidence. Protestors and press are dotted along the clay vehicle track between the GE trees enclosure and the protest line. The Police vehicles to which those arrested were taken, are parked on this same clay vehicle track between the edge of the protest line and the GE trees enclosure. Protestors and press are very close to the Police vehicles, but from the video footage, it is apparent that the protestors and press in this vicinity are not impeding the Police activities.

[88] Over the next couple of minutes, more banners are affixed to the GE trees enclosure fence without interference by the Police or security guards. Eventually, after about four minutes and 50 seconds, the Police start to usher protestors away from the northern side of the GE trees enclosure where a number of banners had been affixed. Ironically, where the banners are affixed to the GE trees enclosure on its northern side was directly in front of the protest line. In other words, had the protest line advanced through the pine seedlings, it would have met the GE trees enclosure exactly where the banners were in fact affixed, no doubt by protestors moving up the clay vehicle track bordering the open nursery area.

[89] After this, the protestors slowly make their way south along the clay track which runs alongside the eastern end of the GE trees enclosure. The protestors are still chanting loudly and they attach more banners to that eastern end of the GE trees enclosure. The protestors continue to follow the clay vehicle track which then branches right, near but not immediately alongside the southern side of the GE trees enclosure and they head in the general direction of Long Mile Road. Individual protestors can be seen talking to security guards and members of the Police.

[90] Aside from what the videos show of the apprehensions/arrests, the whole affair is relatively low key. One protestor has a large but docile dog. Some children are in evidence. A couple of protestors have toddlers in backpacks.

Conclusions on the Evidence

[91] The Police had reasonable advance notice of the intended protest this weekend. Senior Sergeant Jackson's report, dated 26 January, contained a great deal of information about what was intended to happen. She noted, amongst other things, that the protestors were targeting the Forest Research and their GE field trial, and that the programme for the weekend included a rally march to the GE field trial site. The report refers to the protestors could number between 10 and 1,000, however it noted that the group had sought authority from the Council and it was estimated that there would be 100, but that that could grow. The report also noted that the march was to be peaceful and orderly, but it also noted:

“There is no intelligence to suggest that there will be disorder or damage planned, but with gatherings of this nature, there was always the potential for mayhem.”

[92] Senior Sergeant Jackson also noted:

“At this stage I don't intend to have a large police present.”

[93] However, the Patrol Group Staff were directed to periodic visits to the FRI campus as duties allowed, during the weekend. It seems clear enough, from Senior Sergeant Jackson's report, that assuming the protestors could figure out where the genetically modified trees were, that particular site would be the objective of the

protest march. So it remains unclear just where Senior Sergeant Jackson derived her information that the route of the march was along Long Mile Road. It may have been that the protestors' application to Council mentioned Long Mile.

[94] For whatever reason, Senior Sergeant Jackson was somewhat "caught out" by what she took to be a late change of protest march route. As the protestors were going to make for the GE tree enclosure, she suddenly needed more staff than was originally intended. There was no particular panic about this. Some police staff who were otherwise on patrol duties turned up at the appointed hour of the protest march anyway, and a couple of other police persons were diverted to the protest site and the eleventh hour.

[95] At any rate, I consider Senior Sergeant Jackson's report a sensible one. She wisely did not want to overplay the role of the Police in what was intended to be a peaceful protest.

[96] Reference was made by witnesses on both sides to local people and those from out of town. Based on all the evidence that I have heard, I think there is a broad distinction to be made between the two sets of people. Many of the protestors were simply dressed for a summer's day out. Others though were dressed in white overalls with a mixture of items covering parts of people's faces from dust masks to scarves and dark glasses.

[97] I have concluded from all of the evidence and the video clips that some of the protestors were well practised in the art of protest, the plaintiff himself being one. First, there is the fact of many wearing a uniform of a white boiler suit with a hood. The group was "media savvy", knowing that media impact will be maximised by a long protest line loudly confronting the Police, out in the middle of the open nursery area rather than bunched up on the clay vehicle track where shade would spoil photographic and television opportunities. When Mr Oosterman was apprehended, witnesses remarked on his leaning one way and then the other, and straining against the Police one way and then the other. All of this had the effect of making his handcuffing difficult and it was successful in thwarting an attempted bottle top remover and a scoop kick, all the while giving the impression that he was doing little

or nothing to resist being handcuffed. I find that Mr Oosterman did not manoeuvre himself as he did by accident, or that he was just being passive.

[98] Protests of this kind, indeed of all kinds by their very nature, tend to have elements that were not planned for or predicted. Senior Sergeant Jackson makes that point in her report and it would seem that the protest group also made the same point when they sought Council permission for the march. Reference was made by Constable Ratapu to a lack of leadership of the protestors. He said:

“There didn’t appear to be any set leadership so to speak. Compared to others I have been involved with.”

[99] So Senior Sergeant Jackson was faced on the day with what she perceived to be a change of plan so far as the route of the march was concerned, and Senior Constable Ratapu quite rightly, in my view, reported to Senior Sergeant Jackson that balloons were being filled with liquid.

[100] Had the protestors thought about this aspect of things, they could not help but have concluded that this particular activity was bound to raise concern on the part of the Police. After all, this was a protest directed at GE trees growing in an enclosure. The starting premise of the protestors were that these trees should not be grown. It is not much of a leap from that premise to think that there might be a risk that people of that view may be tempted to place substances in addition to, or in substitution for, water in those balloons, particularly when the objective of those balloons was that they be thrown into the GE tree enclosure. So, in my view, on the day and at the time, Senior Sergeant Jackson responded appropriately and proportionately to the scenario that had evolved. It needs to be said also that had this been a determined protest to get to the GE trees, then with a total number of protestors of 80-100, it would have taken at least an equivalent number of police/security guards to thwart that endeavour. The fact is that the GE tree enclosure is accessible from three points of the compass along well used public tracks.

[101] Where Senior Sergeant Jackson chose to deploy her resources in front of the first row of the seedling pines some 30-50 metres out from the northern perimeter fence of the GE trees enclosure, turned out on balance to be as good a place as any,

given the scant human resources she had. Luckily for her, the protestors decided that the media value to be gained from spreading out in a long line in front of the Police cordon in the middle of that sunny paddock, was always going to be far greater than proceeding along the clay vehicle track, in the shade, unimpeded by police.

[102] The evidence is that Ms Perry was the first to “break the line” as it were. She tried to move past police and security officers on at least two occasions, culminating in her arrest, which in turn triggered the involvement of Mr Oosterman that resulted in his arrest, spraying and this case being before the Court today. It is plain that no doubt, at least in part, for maximum media effect, there was some quite loud chanting going on and some of what was said or shouted between protestors, police and security guards was not precisely heard. Thus there are differences of opinion about just what was said or heard by way of warnings. However, it was reasonably clear from the first video frames of this part of the protest that the protestors knew that the Police and security guards did not want any of them to advance into the rows of pine seedlings on their way to the GE trees enclosure. And in fact all but four of their number advanced no further. The first video images show Ms Perry in the pine seedlings area in the throes of being arrested and detained. Mr Oosterman is very close to her, being arrested by Constables Yockney and Conder. He too is in the pine seedlings area. It may well have been that neither Ms Perry nor Mr Oosterman heard all of what the Police said. However, both videos show that the noise level at the time of the arrest was not great and words uttered by those involved can be heard. So I find they did both know that the Police would not allow them in the pine seedlings area, and that the plaintiff knew that the Police were attempting to arrest Ms Perry. And that he knew this prior to his own arrest and in sufficient time for him to make a decision to not let go of Ms Perry when directed (thereby triggering his own arrest).

[103] Then the video shows Mr Oosterman with a handcuff on his left wrist held by the chain of that handcuff by Constable Yockney, and Constable Conder with both hands holding Mr Oosterman’s right wrist. In terms of relative sizes of personnel, there is nothing much to differentiate between Constable Yockney, Constable Conder and Mr Oosterman. They presented both on the video and in Court as slim, fit young men of similar size and build. The two constables then

attempt to complete the handcuffing of Mr Oosterman. As Constable Yockney attempts to use the bottle top technique, Mr Oosterman sways in his direction and thus negates the attempt. When Constable Conder tries to move Mr Oosterman's right wrist around his back, Mr Oosterman once again sways in that direction. The three then move sideways along the rows of seedling pines, Mr Oosterman doing what I would describe as a deliberate wide-gaited stagger. This lowers Mr Oosterman's centre of gravity and the wide gait gives him added stability. This rendered Constable Conder's foot sweep nugatory.

[104] Mr Oosterman is repeatedly ordered to get on the ground. He does not do so. While Mr Wickens told the Court that completing handcuffing is much easier and safer if the subject is on the ground or taken to the ground, it is not at all clear to me that Mr Oosterman was under any legal duty to comply. The wide gaited stagger continues with Mr Oosterman and the two officers veering left across the rows of seedlings towards the GE trees enclosure. It is plain that as soon as the bottle top and the foot sweep have failed, Constable Yockney immediately decides to apply pepper-spray. I find that it is only when Constable Yockney draws the pepper-spray that Constable Conder first becomes aware that spray is intended to be used. Constable Yockney sprays the left side of Mr Oosterman's face from a range of 15-20 centimetres or 6-8 inches. The effect is instantaneous. Mr Oosterman drops to the ground in a heap. Handcuffing is completed and Constable Conder departs. Constable Yockney persuades Mr Oosterman to get to his feet to walk in the direction of the Police vehicles. Very shortly after they commence walking in this direction, Mr Oosterman decides to go to the ground again. He plainly decided at this moment not to continue to comply with the request that he move to the vehicle. Constable Smith eventually comes over and assists Constable Yockney to move Mr Oosterman to the Police vehicle. They half drag, half carry him the rest of the way. At the Police vehicle he is initially placed in the back of the vehicle and the door shut, but shortly thereafter he is placed in the front passenger seat with the door open and seated sideways facing out of the car. Constable Bennett applies what water he has available to help ease the pain and discomfort of the pepper-spray that Mr Oosterman is feeling.

[105] I find that for the protestors, the “main event” that morning was not the affixing of banners to the GE trees enclosure, but the confrontation of the Police line in the middle of the open nursery area. The media value of the confrontation in that open field was huge and the protestors on arrival at that part of the march immediately saw the media potential of such a confrontation. So in fact the protestors did deviate from their earlier intended route of march which was to be have been along the clay vehicle track. Quite a number of the protestors did not go out and the join protest line in front of the Police line on the open nursery area, but stayed on the clay vehicle track. For a while it would seem these latter people simply watched what was going on in the open nursery area, and then slowly continued forward along the clay vehicle track. For these latter people to get to the eastern end of the GE trees enclosure, they had to go past the assembled police vehicles. This they did without incident and in their own time they made their way unimpeded to the GE trees enclosure where they hung banners. So they were able to achieve, without any confrontation whatsoever, what those in the line across the open nursery area would have said was their ultimate goal, namely to get to the GE trees enclosure.

[106] So the incidents of the four arrests aside, it seems to me, as far as protests go, what occurred was low key and almost prosaic. By and large, all involved acted in a reasonably good-natured and non-aggressive fashion. As the protest marchers then drifted on towards the Long Mile, individual police officers, protestors and security guards could be seen in non-animated discussion with each other.

[107] A tactical critique of what both the Police and the protestors did on 30 January 2005 would show up deficiencies on each side.

[108] On the protestors’ side, for example, there were the decisions to take liquid filled balloons and for some, to force the police line.

[109] On the Police side, for example, having an open “right flank” that allowed the protestors to get to the GE trees enclosure unmolested, even more or less to that part of the enclosure which appeared to be the goal of those who tried to force the police line.

[110] Overall however, there was not much that either side could be heavily criticised for doing or not doing that day.

[111] The Police conveyed Mr Oosterman and the other arrested persons back to the police station. Mr Oosterman was treated humanely at the station and given access to more water to ease the pain and discomfort. Ms Perry was seen by a police doctor regarding one of her wrists that was badly swollen as a result of her arrest and the tight application of a handcuff. Mr Oosterman gave evidence of a headache lasting a week or so. There is no reason to disbelieve him.

Police General Instructions

[112] Police instruction 269 notes that OC spray is categorised as a restricted weapon under paragraph 8 of the Arms (Restricted Weapons and Specially Dangerous Airguns) Order 1984. Paragraph 3 of that instruction notes:

“The use of OC spray by a member is a use of force and such use must be reasonable in the circumstances.”

[113] Police instruction A270 states the following:

- “(1) Police members may only use OC spray to:
- defend themselves or others if they fear physical injury to themselves or others, and they cannot reasonably protect themselves, or others less forcefully, or
 - arrest an offender if they believe on reasonable grounds that the offender poses a threat of physical injury and the arrest cannot be effected less forcefully, or
 - resolve an incident where a person is acting in a manner likely to seriously injure themselves and the incident cannot reasonably be resolved less forcefully,
 - deter attacking animals,
 - prevent the escape of an offender if they believe on reasonable grounds that the offender poses a threat of physical injury to any person (whether an identifiable individual or members of the public at large) and the escape cannot be prevented less forcefully.

- (2) OC spray must not be used against people offering passive resistance. While it can be used against more than one person, OC spray should not normally be used in crowd situations and is not to be carried by members rostered for duty at demonstrations unless specifically authorised by a District Commander.
- (3) OC spray is to be used in accordance with the approved training given.”

[114] Police instruction A272 provides as follows:

“(1) Unless it is impracticable to do so, a verbal warning is to be given prior to discharging the spray at another person to encourage peaceful compliance and to warn any people nearby.”

[115] Police instruction A275 states as follows:

“(1) Except as outlined below, qualified members will carry OC spray while undertaking duty that may involve personal contact with the public. An exemption may be granted by a District Commander.

- (2) OC spray is not to be carried on a commercial aircraft (see A282)
- (3) OC spray is not to be carried by members rostered for duty at demonstrations unless specifically authorised by a District Commander.
- (4) The improper discharge by a member of OC spray will be considered to be a serious disciplinary matter. A supervisor will carry out an immediate investigation should such an incident occur and will report the circumstances to the District Commander within 24 hours of the incident. A copy of the completed file is to be forwarded to the District OC Spray Coordinator.”

[116] The plaintiff alleges breach of those regulations in the following respects:

- a) Its use on Mr Oosterman was not reasonable in the circumstances.
- b) Its use in the circumstances was not to prevent the escape of an offender whom they believed, on reasonable grounds, posed a threat of physical injury to any person.
- c) That when it was used, the Police did not fear physical injury to themselves or others, and that they could not reasonably protect themselves or others less forcefully.

- d) That it was used against a person offering passive resistance.
- e) That it was used other than in accordance with approved training given.
- f) That it was used without a verbal warning given prior to its discharge.
- g) That it was carried by members rostered for duty at a demonstration without the specific authority of a District Commander.

[117] As to a), test for reasonableness is an objective one. I find on balance that the use was not reasonable in the circumstances. It was used in circumstances where two officers of equivalent physical stature, youth and fitness were endeavouring to arrest Mr Oosterman. They already had the advantage of having a handcuff attached to his left hand and the chain of that handcuff being firmly held by Constable Yockney and Constable Conder with a two-handed grip on Mr Oosterman's right wrist. Mr Wickens agreed that the arrest of a person in such a manner prior to the addition of OC spray to the Police's armoury would have been unremarkable. In judging reasonableness, I am endeavouring not to apply "hindsight bias". There is force in the proposition that the Police were dealing with the situation that could have become volatile quite rapidly and that they themselves were very few in number. Against that however, as the three veered across the lines of seedlings in the general direction of the GE trees enclosure, they became quite separated and detached from anyone else. There was no immediate danger of interference by third parties. Indeed, as I have noted, during those last few seconds before pepper-spray was applied, Constable Yockney's body language is, if anything, quite relaxed. I am mindful too of the fact that with two constables preoccupied with Mr Oosterman, the Police line as two members down. Indeed, that was made worse by the fact that they were aware that at least one other of their number was very much involved in trying to arrest Ms Perry. However, the incident with Mr Oosterman was quite short. From the time Mr Oosterman first put himself in jeopardy of arrest and his being pepper-sprayed, no more than about 20 seconds elapsed. So I find the fact that Mr Oosterman was given no opportunity to allow himself to be handcuffed following warning that he would be pepper-sprayed helps

tip the balance into unreasonableness. Finally, in assessing reasonableness, I take account of the fact that this was an arrest in the context of a planned demonstration. The right of citizens to protest provides important context. Indeed it is reflected in the Police general instructions that prohibits the carrying of OC spray by members rostered for duty at demonstrations unless specifically authorised by a District Commander.

[118] As to b), although Mr Oosterman was doing what I have described as a wide-gaited stagger, I find that he was not attempting to escape and assuredly, even if he were, there were no reasonable grounds for belief that he posed a threat of physical injury to any person.

[119] As to c), Constable Yockney raised the spectre of the single cuff on Mr Oosterman's left wrist becoming free and injury occurring to either himself or Constable Conder or others. I do not find this argument persuasive. The method of securing one handcuff initially is stock in trade for police. It does not follow, in my view, that having chosen to commence the handcuffing of a person in that fashion, they are thereby, as a matter of course, then allowed to use OC spray on the basis they fear physical injury to themselves or others, and they cannot reasonably protect themselves or others less forcefully.

[120] As to d), this is decided in favour of the Police. The plaintiff was actively resisting. He was veering from side to side, he was pulling away from the Police, he adopted the wide-gaited stagger all to make his handcuffing more difficult.

[121] As to e), the OC spray was not used in accordance with the approved training that is designed to ensure safety, and the effectiveness of the spray. The spray requires deployment at a range of a metre or so. Mr Oosterman was sprayed from a range of 15-20 centimetres (6-8 inches). From that range, there was a risk of eye injury.

[122] As to f), no warning was given to Mr Oosterman that he was going to be sprayed. It was not impracticable for such a warning to be given. It could easily have been given.

[123] As to g), the defendant argues that Senior Constable Ratapu was the only police member that day rostered for duty at the demonstration. Technically that is right. I judge, however, that the spirit and intent of the regulation includes acknowledgement of the rights of citizens in a democracy to hold demonstrations. The starting premise in this regard is that police work at a demonstration is different from normal police work. Plainly if police intelligence suggests that a demonstration is likely to turn violent, then a District Commander may authorise that OC spray be carried. Given all of what was known about this particular demonstration; given the up to date briefing that Senior Sergeant Jackson received on the day; there was nothing that would have given the District Commander good reason to allow pepper-spray to be carried by members rostered to be there. I am sure that those who drafted Police General Instruction A270 did not intend that it be subverted in the way it was on this occasion by the simplistic and expedient argument that those members who actually attended the demonstration were not technically rostered for that duty.

The plaintiff's causes of action

Breach of s 9 New Zealand Bill of Rights Act

[124] Section 9:

“9 Right not to be subjected to torture or cruel treatment

Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.”

[125] The allegations in the statement of claim on which it appears the plaintiff bases this cause of action include the following:

- The pulling of the plaintiff's in opposite directions by the two arresting officers.
- The attempt by one of the officers to trip the plaintiff up.
- The pepper-spraying of the plaintiff in the face and directly into his left eye.

- The extreme irritation and pain caused to the plaintiff by the pepper-spray.
- The degree of difficulty that the plaintiff had with breathing after being pepper-sprayed.
- The inflammation and irritation to his skin for several days.
- The severe headache which lasted more than week.

[126] In *Taunoa v Attorney-General* [2008] 1 NZLR 429, the Supreme Court had occasion to consider both ss 9 and 23(5) of the New Zealand Bill of Rights Act in relation to control measures introduced by the Department of Corrections to manage very difficult and dangerous prisoners. At first instance, the High Court had found that, amongst other things, there had been an unlawful practice of routine strip searches; that cell conditions fell short of proper standards of hygiene; that there was inadequate regular and ongoing assessment of the prisoner's mental health; and there were instances where prisoners had been left naked or with just a towel in a cell after control and restraint techniques had been used to defuse dangerous situations. In considering both ss 9 and 23(5), Tipping J at para 297 said this:

“[297] Although s 9 is not worded in this way, it can be seen as prohibiting inhuman treatment, that is, treating a person as less than human. Section 23(5) requires prisoners to be treated with humanity. There is a danger of these concepts being conflated in a way which reduces the degree of seriousness required for a s 9 breach. The possible area of overlap between the sections is thereby substantially enlarged. Indeed, if one equates lack of humanity with inhuman treatment, there would be a total overlap between s 9 and s 23(5). A breach of the latter would per se be a breach of the former. In view of the presence of s 23(5), it is appropriate and was probably intended that s 9 be reserved for truly egregious cases which call for a level of denunciation of the same order as that appropriate for torture. While Mr Taunoa was not treated with humanity, I find myself unable to conclude that he was treated as less than human.”

[127] Suffice it to say, that the behaviour described was not regarded by the majority of the Supreme Court as amounting to a breach of s 9.

[128] Despite Mr Minchin's valiant endeavours to persuade me otherwise, I likewise find there has been no breach of s 9 here.

[129] What Mr Oosterman suffered in our case was less in gravity and duration. Whilst mindful that it occurred while he was exercising his democratic right to protest, even in that context, this was plainly not truly egregious conduct. His claim for breach of s 9 of the New Zealand Bill of Rights Act therefore fails.

Breach of s 23(5) New Zealand Bill of Rights Act

“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.”

[130] The plaintiff relies on the same factual allegations in support of this cause of action, as he does for the alleged breach of s 9. Again, *Taunoa* provides assistance:

“Section 23(5), which is confined in application to persons deprived of their liberty, proscribes conduct which is unacceptable in our society but of a lesser order, not rising to a level deserving to be called outrageous.” (Para 170, per Blanchard J)

[131] Mr Minchin submits that because the Bill of Rights breach here occurred in the context of the democratic right to protest, the breach is thereby particularly serious. He contrasts this breach with those which occurred in *Taunoa's* case, dangerous prisoners there contrasting with an ordinary citizen here.

[132] I take the view that any attempt to categorise severity of breach in any formulaic type way will ultimately be unhelpful. Better, I think, simply to have regard to all the circumstances, including, in this case, breach in the context of democratic protest.

[133] Mr Curran, on behalf of the defendant, submits that looked at in its entirety, the conduct here does not amount to a breach of s 23(5). He reminds me of the Court of Appeal's caution in *Attorney-General v Udompun* [2005] 3 NZLR 204 at para 148, where Glazebrook J for the Court said:

“... In reaching this conclusion we are very aware of the need to avoid trivialising the s 23(5) guarantee.”

[134] He contrasts our case with the altogether more serious and damaging force used after arrest in *Archbold v Attorney-General* [2003] NZAR 563 (HC) and *Warne v Attorney-General* (DC Wellington, CIV 2004-085-1247, 22 February 2008). In *Archbold's* case, it said this about the obvious injuries to the plaintiff that were recorded back at the police station after his arrest:

“[39] ... There are three distinct sets of facial injuries; first on his forehead: secondly around his right eye; and thirdly around his left eye and on his left cheek. There was no expert medical evidence as to how they could have been inflicted but I think that I am entitled to draw some common-sense inferences from where these injuries were and their appearance. The most likely explanation for them is that there were three separate applications of force. In their totality, the injuries do not look to me as if they were all suffered accidentally. So if it was just a case in which there was the plaintiff's evidence and that of the police officers, I would be troubled, to say the least, by the injuries.

...

[42] For all the reasons which I have given, I am driven to the conclusion that some at least of the plaintiff's injuries were inflicted by Constable Carolan using inappropriate force in the driveway. In this category are the injuries to the plaintiff's forehead (which I believe were caused as the plaintiff alleges) and some of the injuries around his eyes. I also conclude that the Constable did use a mastoid hold on the plaintiff in the car on the way to the police station. If this was a result of the way the plaintiff had been behaving in the car (and I accept that this may well have been so), then this behaviour would have been contributed to by what had happened in the driveway.”

[135] The Judge had earlier described the plaintiff's injuries as follows:

“[15] The injuries which are apparent in the photographs are as follows:-

1. A lump and some abrasions in the vicinity of his hairline on his forehead;
2. Abrasions around his right eye;
3. More obvious abrasions, cuts and bruising around his left eye and on his left cheek in the general vicinity of the left side of his mouth.
4. What would appear to be a bruise or a pressure mark on the left side of his neck.

[161] The prison nurse who examined the plaintiff on his arrival at Christchurch Prison also recorded injuries or complaints of soreness additional to those which have just mentioned:-

1. Soreness on the chest.
2. Soreness in the back.
3. Reddening around the wrists associated presumably with the use of handcuffs.
4. Broken skin on the calf on the left leg.

[136] His Honour went on to award exemplary damages of \$15,000. He added at para 70:

“[70] If I had concluded that exemplary damages were not available, I would have awarded public law compensation in the sum of \$15,000 for breach of s23(5). Such an award would mark the occasion and affirm that behaviour which I have found against Constable Carolan is not acceptable. I fear that the making of a declaration (which was put up to me as an alternative by Mr Powell) would not have the same resonance as even a moderate award of compensation.”

[137] In *Warne's* case, Judge Thomas was satisfied that the plaintiff had received two separate beatings by police officers – first, when alighting from the police van at the station and later in the police cells after the Police had photographed him. He suffered injuries including bruising to the forehead and eye, ribs, thigh and thumb as well as tenderness in the hip and neck shoulder regions. The Judge further found that the Police conduct amounted to the deliberate infliction of personal injury on the plaintiff.

[138] Mr Curran referred to ss 39 and 40 of the Crimes Act. Section 39 provides:

“39 Force used in executing process or in arrest

Where any person is justified ... in making or assisting to make any arrest, that justification ... shall extend and apply to the use by him of such force as may be necessary to overcome any force used in resisting such ... arrest, unless ... the arrest made by reasonable means in a less violent manner:”

[139] By virtue of s 2, justified means, in this context, “not liable to any civil proceeding”. The focus therefore is whether or not the arrest in this case could be

made by reasonable means in a less violent manner. The evaluation of the arresting person's conduct is an objective one (see *Hill v Police*, (1994) 12 CRNZ 89, 93) and the warning in *Archbold* that the Court should be careful not to undermine the ability of officers performing their duties by effectively substituting its own view with the benefit of hindsight, is a proper one. His Honour Justice William Young said at para 46:

“[46] ... I am, however, very reluctant to second guess decisions made by police officers in situation such as this and am prepared to accord a fair margin of appreciation to the police officers as to what was reasonably required.”

[140] Mr Curran developed this point further by submitting that because the plaintiff was warned to let Ms Perry go or he would be arrested for obstruction, his arrest was a justified arrest.

[141] Defence counsel also raises the issue of s 40 of the Crimes Act, it is plainly not relevant. I find as a fact that the defendant was not attempting to escape. He was simply and deliberately making the task of the officers more difficult.

[142] Defence counsel also submit that while s 30(1) of the Police Act 1958 requires police to obey and be guided by police general instruction, a breach of Police General Instruction is not necessarily a breach of the New Zealand Bill of Rights Act. That proposition is undoubtedly correct.

[143] But as I have earlier found, the use of pepper-spray on this occasion not only breached Police General Instructions but was unreasonable. In all probability, in any other context of policing, what the Police did to arrest Mr Oosterman by using pepper-spray would have been unremarkable, or at least not have founded a cause of action for breach of s 23(5) of the New Zealand Bill of Rights Act. But here, Police General Instructions themselves draw a distinction between demonstrations and other contexts of policing. That distinction is deliberately drawn in my view. Demonstrations in this democracy are to be policed a little differently.

Remedy

[144] *Taunoa's* case reminds us that in the event of breach of a right declared under the New Zealand Bill of Rights Act, the Court's task is to provide a remedy which is effective to vindicate the right at issue rather than to punish the State for its wrongdoing. The remedy selected must be proportionate to the breach. Defence counsel, in this instance, submit that I recognise the plaintiff's own contribution to the breach of s 23(5) and they are right to do so. He did, to some extent, obstruct arrest and resist arrest.

[145] In some instances, a declaration that the plaintiff's rights have been breached will suffice. (See eg *Manga v Attorney-General* [2000] 2 NZLR 65 at para 133). In Mr Oosterman's case, I do not consider a declaration of breach will suffice. To use Justice William Young's words from *Archbold's* case:

“A declaration ... would not have the same resonance as even a moderate award of compensation.”

[146] Although the incident itself of pepper-spraying was momentary and immediately followed up by ameliorative measures, it caused real pain and discomfort, and the final effects of which stayed with Mr Oosterman for over a week. The breach of rights was significantly less egregious than in both *Warne* and *Archbold*. There will therefore be a public law award of compensation of \$5,000 for the breach.

Third cause of action – assault

[147] Mr Minchin, in final submissions, clarified this as being a claim for exemplary damages for assault and battery. The plaintiff in this regard alleges the pulling of the plaintiff's arms in different directions by the police officers; the attempt to trip him up; and the pepper-spraying. However, the focus is in essence on the latter.

[148] Put simply, does the use of pepper-spray by Constable Yockney on Mr Oosterman at the demonstration on 30 January 2005 amount to conduct that is within the purview of an exemplary damages award?

[149] Was it conduct that came within the meaning of the descriptive epithets used in the cases in this area like highhanded and oppressive; consciously reckless; deserving of condemnation; grossly negligent?

[150] I find that Constable Yockney's conduct did not quite meet this high threshold of blameworthiness. His conduct is saved from such a finding only by the continued active resistance by Mr Oosterman and, to a lesser extent, by the operational need to complete the arrest without undue delay.

[151] The Police should not draw comfort from this conclusion nor be complacent. Any continuum of breaches of General Instructions in this way is likely to result in Courts concluding that such breaches are deserving of condemnation and award exemplary damages.

Costs

[152] The successful plaintiff is entitled to costs. I understand the emerging trend is towards indemnity costs. If the parties cannot reach agreement about this, they are to file memoranda within 21 days.

C J McGuire
District Court Judge